STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2012
v	No. 306624 Calhoun Circuit Court
BRANDON KIJUAN FIELDS, Defendant-Appellant.	LC No. 2011-001704-FC

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's convictions arise out of a shooting that occurred in the parking lot of a Battle Creek party store. Defendant and several others were standing outside of the store shortly before 11:00 p.m. on the night of the shooting when a vehicle, driven by Brandon Davis, pulled into the parking lot. Davis, Joshua Mitchell, Darese Smith, and Larry Carter exited the vehicle, and a verbal altercation immediately ensued. At one point, defendant and two others fired several gunshots in the direction of Davis, Mitchell, Smith, and Carter. Davis was struck twice, and Mitchell was struck once. Carter was struck three times and died as a result of his injuries.

I. INEFFECTIVE ASSISTANCE OF COUNSEL—EXPERT TESTIMONY

Defendant first argues that he was denied effective assistance of counsel because his trial counsel did not object to certain expert testimony provided by a police officer who was qualified to testify as an expert in gang activity and gang intelligence. The officer's expert testimony encompassed a number of broad topics, but also focused specifically on the origin, culture, symbols, territory, and rivals of the Boardman Boys, a gang to which defendant was alleged to

belong. Defendant argues that the officer's testimony was predicated on hearsay, and thus counsel was ineffective for failing to object on Confrontation Clause[1] grounds.

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). Because of the lack of an evidentiary hearing on the claim of ineffective assistance, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009).

"The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The 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, 244 (CA 4, 2012), quoting *Michigan v Bryant*, ___ US ___; 131 S Ct 1143, 1155; 179 L Ed 2d 93 (2011). Put another way, "the right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a defendant." *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011).

An expert may rely on hearsay in formulating an opinion. MRE 703; *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992). However, defendant argues that Officer Sutherland repeated testimonial statements from non-testifying declarants without a showing of unavailability, therefore violating defendant's right of confrontation.

As an initial matter, we note that most of Sutherland's testimony was unobjectionable expert testimony. Sutherland testified about gang behavior and gang culture in general. He also testified about the history and behavior of the "Boardman Boys" gang, describing it as a "hybrid scavenger gang." 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). As 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 alleged motive for the killing. We therefore find no error in the trial court's admission of the portions of Sutherland's testimony concerning gang behavior and gang activity in general and in the context of the Boardman Boys gang.

However, Sutherland also testified concerning Levon Bynum's role in the Boardman Boys, and testified that Bynum was "known as the gunman within the Boardman Boys gang." Sutherland testified that this characterization of Bynum was "not just [the Gang Unit's] own opinion. We've had people within the gang, the Boardman Boys Gang tell us that. We've also

[1] US Const, Am VI.

had people in the neighborhood that know the Boardman Boys tell us that he's the gun man." On cross examination, Sutherland testified that he had received information from various unnamed neighbors and citizens, as well as witnesses, victims, and suspects to gang violence. Statements by informants to the authorities generally constitute testimonial statements. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *US v Cromer*, 389 F3d 662, 675 (CA 6, 2004). Thus, it appears that Sutherland's testimony regarding Bynum was, in part, a paraphrase, at least, of others' testimonial statements.

However, even assuming that Sutherland's testimony included such testimonial statements, that fact alone does not violate the Confrontation Clause. "[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. Although Michigan has not squarely addressed the issue of an expert's reliance on *Crawford*-barred testimony, it has been addressed by Federal Circuit Courts of Appeal.[2]

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*.

In the instant case, the basis for the officer's expertise was his extensive training and experience, the latter of which included interviews with members of the Boardman Boys, as well as with victims and witnesses of the gang's violence. Although the Sutherland's testimony may have included some testimonial hearsay, he nonetheless did not act merely as a conduit or

[2] Although the decisions of lower federal courts may be persuasive, they are not binding on state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NM2d 325 (2004). However, decisions of lower federal courts can be "highly persuasive" when interpreting a federal constitutional right. See *Abdur-Ra'oof v MDOC*, 221 Mich App 585, 589; 562 NW2d 251 (1997).

"transmitter" for testimonial hearsay, nor was his testimony concerning the source of certain information underlying his opinion offered for the truth of the matter asserted. Rather, the officer offered his own independent and informed judgment regarding the Boardman Boys, including Bynum's role in the gang. Defense counsel was given the opportunity to cross-examine the officer, of which opportunity counsel took full advantage on behalf of defendant. The rule of *Crawford* was not violated. See *Palacios*, 677 F3d at 244. Defense counsel was therefore not ineffective for failing to raise a meritless objection to Sutherland's testimony. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Further, assuming *arguendo* that defendant's right to confrontation was violated by Sutherland's testimony, defendant has not demonstrated that he was prejudiced by his counsel's failure to object. Defendant was acquitted of first-degree murder, and convicted of second-degree murder. A defendant is guilty of second-degree murder when he causes the death of another person and either (1) intends to kill, (2) intends to commit great bodily harm, or (3) intends to create a very high risk of death or bodily harm with knowledge that death or great bodily harm was the probable result, and further the killing was not justified or excused. *People v Reese*, 491 Mich 127, 152; 815 NW2d 85 (2012). Video evidence was admitted that showed defendant pulling out a revolver and firing it at the victim's head, and that the victim did not appear to be armed. Defendant also testified that he was carrying a .38 caliber revolver, and that he shot at the victim, although he claimed that he did not intend to kill him. We conclude that defendant has not demonstrated that the exclusion of Sutherland's testimony would have altered the course of the proceedings against him. *Swain*, 288 Mich App at 643. Even if the admission was an error (which we conclude it was not) and even if counsel had objected and preserved the error for appeal, the prosecution could have demonstrated that the error was harmless beyond a reasonable doubt, and thus did not require reversal. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant's counsel was therefore not ineffective in this regard.

II. INEFFECTIVE ASSISTANCE OF COUNSEL—LAY OFFICER TESTIMONY

Defendant next argues that counsel was ineffective for failing to object to another officer's testimony regarding statements made by Bynum during a police interrogation, specifically that Bynum, who was in the party store parking lot when the victims pulled into the lot, and who engaged there in a physical altercation with the murder victim, had fired a gun in the direction of the victim. We agree that Bynum's statements were testimonial hearsay. See *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). However, we believe that counsel could have had a valid strategic reason for not objecting. "A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel's tactics constituted sound trial strategy." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Here, the officer's testimony that Bynum had indicated that he (Bynum) had fired in the direction of the murder victim served to corroborate defendant's assertion that, although he was involved in the shooting, it was Bynum who was responsible for the killing. This Court will not substitute its judgment for that of defense counsel in matters of trial strategy, even if that strategy proves unsuccessful. *Id.* That is particularly true where, as here, the trial resulted in defendant's acquittal of the most serious charge of first-degree murder.

Further, even if counsel was ineffective for failing to object, defendant cannot show that "but for counsel's error, there is a reasonable probability that the result of the proceedings would

have been different." *Swain*, 288 Mich App at 643. Bynum's statements were merely cumulative of defendant's own statements. Improperly admitted hearsay evidence is harmless error when it is merely cumulative of other properly admitted evidence. *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992).

Next defendant argues that counsel was ineffective for failing to object to references regarding defendant's prior criminal history. A police officer testified that he coordinated with other officers to start checking addresses of the suspects involved in the shooting. When asked how he came up with the addresses, this officer testified that he came about them "[t]hrough . . . contact with . . . the suspects in the [party store surveillance] video, through the information intelligence we had from members of the department that have made arrests in the past that, from computer information from the dispatch center, from our AS400 system."

Contrary to defendant's argument, this officer's testimony does not implicate MRE 404(b). Nowhere does the officer disclose that defendant committed a prior crime or bad act. The officer references contacts police had with suspects in the video and information obtained through past arrests, but he does not reference any particular suspect in the video or who had been arrested in the past. Nor does he indicate the nature of or reasons for prior police contact with any suspect in the video. Therefore, the testimony was admissible and did not implicate MRE 404(b), and counsel was not ineffective for failing to object. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next complains of the testimony of an officer who aided in the execution of a search warrant to locate defendant. The following exchange occurred between this officer and the prosecutor:

> *Q.* Okay. Were you successful in relation to the search warrant and finding [defendant] and having certain tattoos that he had photographed?
>
> *A.* Yes.
>
> *Q.* Okay. You remember when that was accomplished?
>
> *A.* I don't have a specific date on that, no.
>
> *Q.* Okay.
>
> *A.* It was when [defendant] was in custody in Ionia.

The officer's reference to defendant being in custody in Ionia was improper. However, the lack of objection was likely a matter of trial strategy. As our Supreme Court has observed, "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287; 531 NW2d 659 (1995). Here, the officer's comment was brief and did not disclose the reason defendant was in custody. Thus, it is reasonable to assume that counsel chose not to object so as to not draw further attention to the singular reference. In any event, in light of the totality of the evidence presented, defendant has not demonstrated that this remark was outcome determinative. *Swain*, 288 Mich App at 643.

III. PROSECUTORIAL MISCONDUCT

Defendant's final argument is that he was denied his right to a fair trial because the prosecution drew an allegedly offensive and demeaning caricature of defense counsel in the presence of the jury. "It is the duty of the prosecutor to ensure that a defendant has a fair and impartial trial, as the interest of the people lies in protecting the innocent as well as convicting the guilty." *People v Wallace*, 160 Mich App 1, 10; 408 NW2d 87 (1987). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). The law therefore requires a prosecutor to refrain from denigrating defense counsel, because such conduct may infringe upon the presumption of innocence. See *Bahoda*, 448 Mich at 283; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Trial counsel brought the matter to the trial court's attention outside the presence of the jury. Trial counsel informed the court that the prosecutor was drawing pictures of her during her cross-examination of one of the testifying police officers, and stated that members of the jury saw the pictures and were shocked. When questioned, the prosecutor conceded that he drew a picture and that it may have had a likeness to defense counsel. However, he stated that the picture was not demeaning and did not portray counsel in a negative light.

Defendant argues that the prosecutor's act of drawing an allegedly demeaning caricature denigrated defense counsel by suggesting that counsel's cross-examination of the witness was a waste of time. While it is undisputed that the prosecutor drew a picture, we conclude that defendant has failed to establish that he suffered any prejudice. Although defense counsel objected and stated that some members of jury saw the caricature, counsel did not request an evidentiary hearing to determine whether jurors actually saw the caricature, and, if they did, what their response had been. In the absence of such an evidentiary record, defendant cannot show that he was denied his right to a fair and impartial trial. Cf. *People v Herndon*, 98 Mich App 668, 672; 296 NW2d 333 (1980) (concluding, in a case where the question was whether the jury had seen the defendant in handcuffs, that the lack of an evidentiary record precluded a holding that the defendant was denied his right to a fair and impartial jury). Therefore, defendant is not entitled to any relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark T. Boonstra