STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2013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

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

PER CURIAM.

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

I. BASIC FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. EXPERT TESTIMONY

A. STANDARDS OF REVIEW

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

B. EXPERT TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. SUTHERLAND'S TESTIMONY

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

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

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

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

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

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

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

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

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

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

D. PREJUDICE

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

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

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

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

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

III. CONCLUSION

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

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

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