

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

DWIGHT-STERLING DAVID JAMBOR,

Defendant-Appellee/Cross-  
Appellant.

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FOR PUBLICATION

May 2, 2006

9:00 a.m.

No. 259014

Oakland Circuit Court

LC No. 2004-194043-FH

Official Reported Version

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

COOPER, P.J. (*concurring*).

I join with the majority in result and analysis and write separately only because I find it necessary to address the hearsay issue presented by these facts. The majority begins the authentication analysis by positing "even if an exception to the hearsay rule would allow admission of the evidence . . . ," *ante* at \_\_\_\_; I find that the fingerprint cards at issue here are hearsay not within any exception.

In *People v McDaniel*, 469 Mich 409, 410; 670 NW2d 659 (2003), our Supreme Court considered "whether a police laboratory report is admissible, notwithstanding that it is hearsay . . . ." In that case, a police officer who was a chemist analyzed a substance seized at a crime scene and found it to be heroin. *Id.* That officer did not testify at trial, but the report he had prepared was admitted over defense counsel's objection. *Id.* at 411. A divided Court of Appeals affirmed, and the Supreme Court reversed.

The Court considered MRE 803(6), the business records exception exempting records "kept in the course of a regularly conducted business activity" from exclusion even though they are hearsay. The Court found MRE 803(6) inapplicable, noting that "[t]he hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records. That trustworthiness is undermined when the records are prepared in anticipation of litigation." *Id.* at 414. The report in question was prepared in anticipation of litigation because its sole purpose was to establish an element of the crime charged, specifically that the substance at issue was indeed heroin. Similarly, here the fingerprint cards at issue are records prepared in anticipation of litigation, because their purpose was to document the presence of particular individuals at the scene of the crime. Plainly, to charge defendant with breaking and entering with intent to commit larceny, the prosecution must establish that defendant was present at the scene, and the fingerprint cards

at issue here are out of court statements intended to prove the truth of that matter. The cards are therefore hearsay not within the exception allowed by MRE 803(6).

The Court also considered MRE 803(8), the public records exception exempting from exclusion public records and reports, but specifically excluding "in criminal cases matters observed by police officers and other law enforcement personnel . . . ." The Court referred to this Court's opinion in *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992), noting that decision's holding "that the exclusion of hearsay observations by police officers was intended to apply only to observations made at the scene of the crime or while investigating a crime." *McDaniel*, *supra* at 413. The Court reasoned from that decision that "MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant." *Id.* The Court found that the report at issue was adversarial because it established an element of the crime charged, and that MRE 803(8) was therefore not applicable. Here we have what is arguably a routine police report, although made in anticipation of litigation, since it plainly serves the purpose of establishing a record of the presence of a particular individual at a crime scene. And we also have the observations of an officer made at the scene of the crime while investigating that crime. Under either the *Stacy* or the *McDaniel* analysis, MRE 803(8) precludes admission of the fingerprint cards.

At the crime scene, evidence technician Robert Brien allegedly lifted fingerprints, applied each print to one side of a card, and handwrote information on the other side of each card including the location of the lift, the complaint number, the date, and his signature. The prosecution sought to offer seven cards into evidence, three black and four white, but Brien, now deceased, was unavailable to testify as to the authenticity of the proffered cards or to the subject matter there contained. The prosecution was unable to produce a witness who could confirm that Brien had used white cards at this crime scene. These cards, offered to prove the truth of the matter that Brien lifted these prints from that location on that date, and by extension that defendant was present in that location on that date, are hearsay not within any exception.

Affirmed.

/s/ Jessica R. Cooper