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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION September 10, 2020 9:05 a.m.
v	No. 350391 Oakland Circuit Court
ALTON FONTENOT, JR., Defendant-Appellee.	LC No. 2019-175232-AR

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

TUKEL, J.

The prosecution appeals by leave granted[1] the circuit court's order denying the prosecution's interlocutory application for leave to appeal, which seeks a declaration that DataMaster logs, which are generated through breath tests administered by police officers conducting alcohol-related investigations, are both nontestimonial under the Confrontation Clause of the Sixth Amendment and admissible as business records under MRE 803(6). This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We vacate.

I. FACTS

On October 3, 2017, Michigan State Police Trooper Jon Gjurashaj conducted a traffic stop of a car driven by defendant in Royal Oak, Michigan because the front passenger was not wearing a seatbelt. Upon approaching the car, Trooper Gjurashaj saw that defendant had bloodshot and glassy eyes and droopy eyelids; Trooper Gjurashaj smelled an odor of alcohol coming from the car and defendant's mouth. After defendant failed to pass field sobriety tests, Trooper Gjurashaj arrested defendant for operating under the influence of alcohol. Defendant was then taken to a Michigan State Police post and given two DataMaster breath tests; both tests revealed a 0.09 BAC. In September 2017 and December 2017, Marvin Gier, the Class IV operator who conducted the 120-day tests on the DataMaster, inspected the particular machine used on defendant, verified its

[1] *People v Fontenot*, unpublished order of the Court of Appeals, entered September 25, 2019 (Docket No. 350391).

accuracy, and certified that it was in proper working order, which is reflected in the DataMaster logs.

The prosecution filed a pretrial motion in limine in the district court to declare that the DataMaster logs are nontestimonial under the Confrontation Clause and admissible as business records under MRE 803(6); those declarations would have made it unnecessary for the prosecution to call Gier as a witness at trial. The district court denied the prosecution's motion in limine and stayed the trial pending the prosecution's appeal to the circuit court. On appeal, the circuit court concluded that it was proper for the district court to deny the prosecution's motion in limine because

> even assuming without deciding that the statements made by Marvin Gier were nontestimonial, the Court fails to see how it could reverse the trial court's June 25, 2019 Order when the People failed to present evidence before the trial court to support that the records in question amounted to business records. . . . Rather, the People appear to have merely promised to present such evidence at trial.

This appeal followed.

II. ANALYSIS

The prosecution argues that the DataMaster logs are nontestimonial and admissible as business records under MRE 803(6). We agree with both propositions.

A. STANDARD OF REVIEW

"The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). Furthermore, "[a] trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566-567; 876 NW2d 826 (2015). "To the extent that the trial court's ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Tanner*, 496 Mich 199, 205; 853 NW2d 653 (2014) (quotation marks and citation omitted).

B. CONFRONTATION CLAUSE

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am. VI. In *Crawford v Washington*, 541 US 36, 50-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, out-of-court testimonial statements are inadmissible against a criminal defendant unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant. In *Crawford*, the Court left

> for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior

> testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." [*Id*. at 68 (footnote omitted).]

Pretrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if they were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id*. at 51-52 (citation and quotation marks omitted).

The United States Supreme Court later narrowed the scope of what constitutes a testimonial statement in a plurality opinion in *Williams v Illinois*, 567 US 50; 132 S Ct 2221; 183 L Ed 2d 89 (2012).[2] In *Williams*, Justice ALITO, writing for a four-justice plurality, held that testimonial statements have two characteristics: "(a) they involve[] out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involve[] formalized statements such as affidavits, depositions, prior testimony, or confessions." *Id*. at 82. Our Supreme Court adopted the *Williams* primary purpose confrontation clause analysis in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), when it held that a certificate of mailing was not a testimonial statement because the certificate of mailing's primary purpose was to establish that notice was given—not to be used at a later trial. See also *id*. at 706 ("Instead, we believe that the circumstances under which the certificate was generated show that it is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason.").

In *Nunley*, our Supreme Court additionally held that the circumstances under which a statement is given should be considered to determine whether a statement is testimonial. *Nunley*, 491 Mich at 706 ("[U]nder *Crawford* and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial."). For example, the certificate of mailing in *Nunley* was nontestimonial because it was "a routine, objective cataloging of an unambiguous factual matter, documenting that the [Department of State] has undertaken its statutorily authorized bureaucratic responsibilities." *Id*. at 707. Consequently, the certificate of mailing was "created for an administrative business reason and kept in the regular course of the [Department of State]'s operations in a way that is properly within the bureaucratic purview of a governmental agency" and, therefore, was not a testimonial statement.

Here, the DataMaster logs are nontestimonial. The DataMaster logs here were created before defendant's breathalyzer test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant specifically; thus, they did not "accus[e] a targeted individual of engaging in criminal conduct, *Williams*, 567 US at 82.

Furthermore, the DataMaster logs were also created as part of the Michigan State Police's normal administrative function of assuring that the DataMaster machine produces accurate results.

[2] "A plurality opinion of the United States Supreme Court, however, is not binding precedent." *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

The DataMaster would have been checked for proper functioning even if defendant had not been tested with it. Thus, the primary purpose of Gier testing the DataMaster's accuracy was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), and to ensure its reliability for future tests—not to prosecute defendant specifically. As such, the DataMaster logs were nontestimonial and the trial court erred by holding that they were testimonial. See *Nunley*, 491 Mich at 706. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 311 n 1; 129 S Ct 2527; 174 L Ed 2d 314 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.").

C. MRE 803(6)

Business records are admissible under MRE 803(6), which provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor*, 273 Mich App 477, 482; 729 NW2d 569 (2007).

Here, the DataMaster logs are business records under MRE 803(6). The Michigan State Police keep the DataMaster logs "in the course of a regularly conducted business activity" and it is "the regular practice of that business activity to make the . . . record" as required by the administrative DataMaster regulations. MRE 803(6). Mich Admin Code R 325.2653(3) states:

> Approved evidential breath alcohol test instruments shall be inspected, verified for accuracy, and certified as to their proper working order within 120 days of the previous inspection by either an appropriate class operator who has been certified in accordance with R 325.2658 or a manufacturer-trained representative approved by the department.

Although the DataMaster logs are occasionally presented at trials, they are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such a log. Thus, the logs are admissible under MRE 803(6).[3]

Our dissenting colleague believes that the circumstances surrounding the creation of the DataMaster logs in this case establish that they are untrustworthy and, therefore, that they cannot be admissible as business records. We disagree. MRE 803(6) addresses the trustworthiness of the type of document in question, not the specific document at issue in a given case. Whether the DataMaster logs at issue in this case were accurate has no effect on whether they are an actual business record. Indeed, a business record can certainly be inaccurate such as when a business intentionally creates inaccurate accounting statements for tax evasion purposes. Those records are certainly not trustworthy, but they certainly would be considered business records because they were created during the normal course of business. Whether those records are believed by the fact-finder is a question of the weight and credibility of the evidence for the fact-finder to decide. Such is the case here. Whether the DataMaster logs in this case are accurate and trustworthy is a question of the weight that the fact-finder should give to the DataMaster logs. See, e.g., *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."). That is a separate question from whether they are admissible as business records. Thus, the DataMaster logs were admissible as business records. Defendant, however, may still challenge the reliability and credibility of the DataMaster logs. But that question is for the fact-finder to decide, not for the courts to decide in our gate keeping function when determining whether evidence is admissible.

III. CONCLUSION

We vacate the district court's order denying the prosecution's motion in limine and remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Christopher M. Murray

[3] While the DataMaster logs are admissible as business records, this ruling does not prevent defendant from challenging the accuracy of DataMaster testing machine itself in the future. We express no opinion on that question, or on whether such a challenge would go to weight rather than admissibility of the evidence.

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COURT OF APPEALS

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September 10, 2020

No. 350391
Oakland Circuit Court
LC No. 2019-175232-AR

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent. The evidence in this case demonstrates that the specific records at issue are unreliable, and therefore not admissible under MRE 803(6), irrespective of whether the records are considered "testimonial." Furthermore, the nature of the records at issue here is fundamentally different from the nature of the records at issue in the case law upon which the majority relies for the conclusion that they are not "testimonial." I would therefore affirm the lower courts.

As the majority explains, MRE 803(6) provides an exception to the hearsay evidence rule for "records of regularly conducted activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, *unless the source of information or the*

> *method or circumstances of preparation indicate lack of trustworthiness*.[1] The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [(Emphasis added.)]

"The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007). Importantly, however, nowhere in MRE 803(6) is there any limitation on or specification of how or why a record might lack trustworthiness.

Under the circumstances, "the source of information or the method or circumstances of preparation" clearly *does* "indicate a lack of trustworthiness." Defendant has provided evidence that Marvin Gier, the Class IV operator who conducted the 120-day tests on the DataMaster, testified in another proceeding that he had used an expired test sample kit on one occasion, and he had no ability to prove the test kits he used relevant to that proceeding were not also expired. By necessary implication, Gier apparently only learned he made the mistake in the prior case because it was brought out on cross-examination.[2] Thus, the testing procedure is clearly fallible and is not self-correcting. This is critical, because the testing logs are not merely a bureaucratic record that a routine was followed. Rather, the logs are substantive evidence establishing the reliability of any particular alcohol-level test performed by a DataMaster machine in specific cases. In turn, those individual alcohol-level tests carry enormous probative weight. Indeed, in many cases, including felonies, the tests are outright conclusive and effectively unchallengeable—even if, as here, there is a danger that they might be wrong due to an improperly calibrated piece of equipment that is not itself capable of being examined. The evidence shows that the 120-day test logs may not, in fact, be trustworthy *for the purpose for which they are introduced into evidence*: to show that the DataMaster machines were properly tested therefore provide reliable evidence of a defendant's blood alcohol level.

Importantly, the testing logs are not *merely* kept pursuant to a stray piece of bureaucratic red tape, to be filed away somewhere and usually forgotten. It begs the question simply to say that they are kept because a rule requires them to be kept. The purpose of the administrative rules pertaining to blood alcohol level breath tests is to ensure that the tests are accurate, and failure to comply with the rules therefore renders the accuracy of those tests questionable. *People v Boughner*, 209 Mich App 397, 338-339; 531 NW2d 746 (1995). Our Supreme Court has overruled older case law holding that noncompliance with breath test administrative rules or statutes *per se* precludes the admissibility of those tests. See *People v Anstey*, 467 Mich 436, 446-449, 447 n 9; 719 NW2d 579 (2006). However, noncompliance with the administrative rules or statute does

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[1] As a consequence of this qualifying clause, I respectfully disagree with the majority that the analysis under MRE 803(6) considers only the general kind of document at issue and disregards trustworthiness concerns pertaining to the specific document at issue.

[2] Although the implications of Gier's testimony are easily deduced on this occasion, the better practice would have been to also provide Gier's testimony from the prior case.

undermine the probative value of those tests. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Importantly, "the reliability of the testing device" remains a prerequisite to the admissibility of breath test results. *People v Kozar*, 54 Mich App 503, 509 n 2; 221 NW2d 170 (1974), overruled in part on other grounds by *Wager*, 460 Mich at 122-124.[3] In other words, although the testing logs are technically kept pursuant to a regulatory rule, the reason for the regulatory rule is *for the purpose of using the tests in prosecutions*. It cannot be overemphasized that the 120-day test logs do not simply show that a test was administered, but rather that a test was *properly* administered, which in turn is of direct relevance to the reliability and thus admissibility of the test.[4]

In contrast, the certificates of mailing at issue in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), were mechanistically generated purely for the purpose of showing the bare fact that a mailing had occurred. *Id*. at 690, 695-696. In other words, the certificates in *Nunley* contrast drastically with the logs here, which exist to certify that a potentially-fallible human properly performed a complex operation calling for training and expertise. At the other end of the spectrum, the certificates at issue in *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009), were actually literal affidavits prepared by persons who conducted sophisticated analyses for the sole and direct purpose of criminal proceedings against particular individuals. *Id*. at 307, 310-311. Those certificates again contrast with the logs in this case, but in the opposite direction, because they were prepared to directly establish facts at issue in a specific prosecution. Thus, the 120-day testing logs here seem to occupy an intermediate position not directly addressed in any binding case law. However, because the logs are clearly kept for the *substantive* purpose of litigation, and because they offer one of the very limited avenues by which a defendant might be able to test the forensic evidence against him, I would find that the logs should be considered testimonial in nature. See *Nunley*, 491 Mich at 706-707.

Nevertheless, I recognize that, as the majority observes, because the logs "are necessarily created *before* the commission of any crime that they may later be used to help prove," our Supreme Court has held that they therefore *per se* cannot be "*made under circumstances* that would

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[3] *Wager* specifically only overruled *Kozar* to the extent *Kozar* held that there was a "reasonable time" requirement for the administration of blood alcohol level breath tests.

[4] Of course, noncompliance that has no actual bearing on the accuracy or reliability of testing equipment may be harmless. *People v Rexford*, 228 Mich App 371, 378; 579 NW2d 111 (1998). However, as noted, it appears that Gier himself only learned that he had used an expired test kit because he was subpoenaed and called to testify. Thus, there is simply no way a defendant, facing potentially devastating and lifelong consequences, could test the reliability of the equipment used to dictate his or her fate unless that reliability is itself testimonial. It is impossible to determine whether noncompliance is harmless without first learning that it occurred. It has long been recognized that cross examination is the " 'greatest legal engine ever invented for the discovery of truth.' " *People v Fackelman*, 489 Mich 515, __ n 5; 802 NW2d 552 (2011), quoting *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970). This case shows that cross-examination serves more purposes than merely permitting the trier of fact to assess credibility. Justice requires defendants to be able to explore the reliability and potential for human error of forensic tests that will likely otherwise be regarded as infallible.

lead an objective witness reasonably to believe that [they] would be available for use at a later trial." *Nunley*, 491 Mich at 707, 709 (emphases in original). Thus, because the logs were not prepared for the benefit of a specific prosecution or targeted at a specific individual, even though they are clearly prepared for litigation, they are definitionally not testimonial.

To reiterate, I find this reasoning concerning because notwithstanding the applicable administrative rule, the DataMaster testing logs clearly are expected to be used in litigation, commonly are used in litigation, and are critical to establishing the reliability of evidence that is frequently conclusive *per se* and otherwise difficult to challenge. The United States Supreme Court has indicated that the business record exception is inapplicable "if the regularly conducted business activity is the production of evidence for use at trial" or "calculated for use essentially in the court, not in the business." *Melendez-Diaz*, 557 US at 321-322 (quotation omitted). Because the entire purpose for keeping the logs is to establish the reliability of individual test results for prosecutions, they are clearly not just ordinary and routine administrative check-boxes, and I am unconvinced they are not, in substance, testimonial. At a minimum, they should not be admitted as business records without establishing their trustworthiness.

Therefore, I would hold that under the circumstances of this case, the lower courts correctly determined that the 120-day testing logs were not admissible under MRE 803(6), irrespective of whether the logs are testimonial, and I would affirm. I am constrained by *Nunley* to agree that the logs are definitionally not "testimonial," but I believe the situation at bar differs significantly from the situation in *Nunley*. Therefore, I respectfully urge our Supreme Court to provide the bench and bar with additional guidance.

/s/ Amy Ronayne Krause