

## EXAMINERS' ANALYSIS OF QUESTION NO. 6

### Police Report:

In this case, Montana is the declarant, and the prosecution wishes to offer his statement for its truth. The statement is therefore hearsay. MRE 801.

Montana's statement is not admissible under MRE 803(8) because it involves a criminal matter and is a statement to a police officer. MRE 803(8) provides:

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

*People v Tanner*, 222 Mich App 626, 629 (1997) (statement provided by witness to police officer not within scope of public records exception).

In addition, Montana's statement lacks the elements of trustworthiness that generally accompany reliance on a public report. *Solomon v Shuell*, 435 Mich 104, 131 (1990). While sworn, Montana lied - at a minimum - about his name and address, suggesting a motive to misrepresent.

The other hearsay exception argued by the prosecutor is MRE 803(6), record of regularly conducted activity. See *Latits v Phillips*, 298 Mich App 109, 114 (2012) ("police reports are 'plausibly admissible' under MRE 803(6), though any secondary hearsay within the- documents would not be"). The exception therefore presents a "hearsay-within-hearsay" problem with a separate hearsay exception needed for the statement itself. The statement also would not be admissible as a business record because "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

MRE 803(6). Again, not only did Montana lie about his identity, he also had ample time to reflect on what to tell Officer Witherspoon since he did not provide the statement until noon the following day. If his role was anything other than that of innocent bystander, he would have a motive to misrepresent, after time for deliberation, what he actually witnessed in order to portray himself in a more favorable light. *Solomon*, 435 Mich at 127-128. Finally, although the facts do not identify the witness through whom the statement will be offered, there may be additional problems with whether the witness is the custodian or other qualified witness or whether there is appropriate certification.

Finally, the prosecution argues that the statement should be admitted under MRE 804(b), since Montana is now "unavailable." None of these exceptions apply, however. The statement is not former testimony or deposition testimony - even though sworn - since Barkey never had an opportunity to develop the testimony. There also is no evidence that Barkey caused Montana's unavailability or that what Montana said in his statement was against his interest. Nor can the statement come in under MRE 804(b)(7), for "other exceptions," because the statement could only be admitted under this provision if the prosecution provided Barkey with Montana's proper name and address, which it cannot do. Barkey's objection to entry of the police report should be sustained.

### **Conviction:**

Barkey's objection to the use of his criminal conviction should be overruled. Determining whether Barkey's prior conviction can be used to impeach him is governed by MRE 609. This rule allows the use of some but not all prior convictions. Under MRE 609(a)(1), a prior conviction containing an element of dishonesty or false statement can be used to impeach a criminal defendant without regard to the length of punishment. False statement convictions, such as identify theft, also are not subject to the balancing required for convictions for regular theft under MRE 609(a)(2)(B). And, because plaintiff's conviction is only three years old, it does not exceed the 10-year time limit set forth in MRE 609(c). The court should overrule Barkey's objection to the use of his prior conviction for impeachment purposes.

It is possible some examinees will interpret identity theft as a "crime contain[ing] an element of theft," pursuant to MRE 609(a)(2). Identity theft formerly fell under the "frauds and cheats" sections of the Michigan criminal code and so is properly qualified as a false statement offense. See MCL 767.24(5) and former MCL 750.285. Some credit will be given, however, for a sound discussion of the conviction under MRE 609(a)(2), that includes discussing the length of the sentence and the balancing required by MRE 609(a)(2)(B).