OPENING THE DOOR TO OTHERWISE INADMISSIBLE EVIDENCE

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One of the scariest scenes in any Halloween horror movie involves an unwitting victim-in- waiting cautiously approaching a closed door at the end of a darkened hallway. As the audience members squirm in their seats behind curled-up knees, (possibly screaming, “DON’T DO IT”), and the knob is slowly turned by a trembling hand, who (or what) lies-in-wait on the other side could well be a nightmare of fatal dimension.

Such can sometimes be the case on cross examination when counsel wanders into subject areas not covered on direct examination only to OPEN THE DOOR to otherwise inadmissible evidence (e.g. hearsay implicating the defendant in the commission of the crime), that drives a stake into the heart of the defense.

The New York Rules of Evidence (NYRE 4.08), state that a party may open the door to the introduction (by the opposing party) of evidence that would otherwise be forbidden when such party, either on cross examination or in other presentation of evidence, creates an incomplete and misleading impression with respect to a matter in issue in the case.

In People v Reid 19 NY3d 382 (2012), the Court of Appeals held that the defendant opened the door to hearsay evidence that would otherwise have violated the Confrontation Clause (Crawford v Washington 541 US 36 [2004]), by introducing hearsay evidence (via testimony from a detective and an FBI agent called as witnesses by the defense), indicating that someone other than the defendant (one McFarlin), was involved in the 2001 shooting death of the victim (a marijuana dealer), in the doorway to his apartment.

At the time of the shooting, neighbors observed two young men running from the scene (where rifle casings from AK-47’s were left behind). Three years later, in 2004, the victim’s friend (who was watching tv with him just before the shooting), identified the co-defendant, one Joseph (whose case was severed for trial purposes), as having purchased marijuana at the apartment right before the shooting. After being arrested, Joseph admitted that he and the defendant went there to commit a robbery and then fired at the victim through the door.

The jury learned of Joseph’s pre-robbery visit to buy marijuana and that the defendant told a third party/acquaintance that he went there to do a robbery, met with some resistance and shot through the door. He reportedly said that he was with Joseph and McFarlin. On cross examination of the acquaintance, counsel established that McFarlin was present for the conversation but (unlike the defendant and Joseph) was never arrested.

On direct examination of the federal agent, defense counsel brought out that he (the agent) had heard from multiple sources that McFarlin was involved in the shooting. On cross examination, the prosecutor asked, “isn’t it true that the information you received about McFarlin’s alleged involvement came from a person (an acquaintance of the defendant), who only reported what he had heard rather than seen, and you had information from an eyewitness (the co-defendant Joseph who did not testify at defendant’s trial), who told you that McFarlin had not been there.” The agent replied, “yes.”

Defense counsel objected, arguing that no witness testified to seeing the men who did the shooting, and that the jury would deduce that the agent was referring to Joseph when he referenced the eyewitness. The trial court overruled the objection on the grounds that defense counsel had opened the door to this evidence with his line of inquiry which was aimed at showing that the police investigation was incomplete and incompetent.

The Appellate Division (AD) (82 AD3d 1495), reversed the defendant’s conviction on the grounds that the defendant’s right of confrontation had been violated because Joseph was unavailable (on 5th Amendment grounds) with no prior opportunity for cross examination, and his pre-trial statement to police (implicating himself and the defendant), was testimonial in nature (i.e. intended primarily as an out-of-court substitute for trial testimony).

The Court of Appeals reversed the AD, holding that by eliciting hearsay information (attributed to multiple sources), that McFarlin was involved (and by pressing the “incomplete investigation” argument), the defendant opened the door to testimonial hearsay (from the non-testifying co-defendant Joseph as told to law enforcement), that McFarlin was not actually present. In the court’s view, such evidence which was based on Joseph’s first-hand knowledge, was “reasonably necessary” to correct a misleading impression created by defense counsel. In this sense, two wrongs (testimonial hearsay from the prosecution to combat misleading hearsay elicited by the defense), were deemed to have made a right.

The Court, (citing, inter alia, US v Holmes 620 F3d 836 [8th Circ. 2010]), reasoned that if evidence barred by the Confrontation Clause were summarily excluded, a defendant could choose to reveal only those details of a testimonial statement that help him/her and conceal other details that might explain them or put them in proper context. (citing People Ko 15 AD3d 173 [1st dep't 2005]). So, to avoid unfairness, and preserve the truth-seeking objectives of the trial process, the admission of testimony that violates the right of confrontation (not unlike admitting statements obtained in violation of a defendant's Miranda rights to impeach inconsistent trial testimony), is allowed if the door has been opened. (see also People v Paul 2019 NY Slip Op. 03166 [4th dep't 4/26/19]).

The "Open Door" rule requires a trial court to exercise its discretion to decide whether a party has, in fact, opened the door to otherwise inadmissible evidence. In doing so, the court must determine whether and to what extent the evidence/argument that is claimed to have opened the door is INCOMPLETE OR MISLEADING. The court must then decide what, if any, otherwise inadmissible evidence is REASONABLY NECESSARY to EXPLAIN, CLARIFY OR OTHERWISE CORRECT AN INCOMPLETE OR MISLEADING INTERPRETATION.

In People v Melendez 55 NY2d 445 (1982), the Court of Appeals held that the trial court abused its discretion in allowing the People, on redirect examination, to elicit from a detective, hearsay information (from a "concerned citizen") which implicated the defendant as the shooter when all defense counsel asked on cross examination was whether another person (the People's main witness) was a suspect when he was brought to the police station for questioning.

That witness testified that he overheard the defendant and co-defendant arguing over which one was more responsible for the shooting. (The defendant said, "if you had held him right, I would not have had to shoot him." The co-defendant replied, "It's your fault for not searching him right"). Another witness provided some corroboration to this exchange.

After the direct examination of the police detective, defense counsel got him to admit that he considered the witness to be a suspect in the crime. Counsel also referenced his police report wherein he referenced three people being involved.

On re-direct exam, the prosecutor asked the detective to explain why he considered the witness to be a suspect. Defense counsel objected on hearsay grounds to which the court replied, "you opened the door by asking whether the witness was a suspect." The detective then went on to say that a "concerned citizen" had told him that the men responsible were the defendant and the witness (who may have been confused with the codefendant). The court also allowed the detective to read from his notes describing the defendant and the other offender.

The Appellate Division (74 AD2d 1006) affirmed the conviction, finding that since defense counsel sought to impugn the witness' credibility by inquiring about his status as a suspect, the People were properly allowed to explain the reasons upon which the detective's suspicions were based, and to show that there was no collaboration with the witness to try and convict and innocent person.

The Court of Appeals reversed, holding that there was no need or basis to elicit hearsay testimony implicating the defendant to explain why the detective considered another person to be a suspect. The cross examination was limited to establishing that the witness was a suspect and as such, did not open the flood gates to hearsay directly implicating the defendant.

The Court noted that a party, by exploring a new area on cross examination, does NOT invite all manner of evidence, no matter how remote or tangential to the subject matter that was introduced. Rather, the trial court must LIMIT THE INQUIRY on redirect exam to the subject matter which bears on the question in issue. (citing People v Buchanan 145 NY1 [1895]). Moreover, the trial court should only allow ONLY SO MUCH EVIDENCE AS IS NECESSARY TO MEET WHAT HAS BEEN BROUGHT OUT ON CROSS EXAMINATION. (citing People v Shlessel 196 NY 476 [1909]).

Defining the limits of the "Open Door" rule, the Court observed that it does not provide an independent basis for introducing new evidence on re-direct examination, nor does it provide an opportunity to put forth evidence that should have been brought out on direct examination. The purpose of the rule is to allow a party to EXPLAIN OR CLARIFY matters that have been put in issue for the first time on cross examination. Such explaining or clarifying evidence must also be NECESSARY to meet the evidence elicited on cross.

In Melendez, the Court held that while it was proper for the prosecutor, on redirect exam, to have the detective amplify the basis for his suspicions (with respect to the witness), that line of questioning on cross exam did not clear the way for the prosecutor to explore "the entire ambit of the officer's investigation, including any/all information connecting the defendant with the homicide." In other words, the "passageway" thus created was not so wide as to warrant the admission of hearsay directly implicating the defendant in the crime charged.

In People v Massie 2 NY3d 79 (2004), the "Open Door" rule was deemed to have been properly applied to preclude evidence of a suggestive photographic identification of the defendant by two witnesses without also admitting evidence of a subsequent non-suggestive corporeal identification of the defendant at a line-up.

In this McDonald's robbery case, two witnesses (cashier and manager) looked together without police oversight at a book of computerized photos six days after the robbery. The cashier was 50% sure of the defendant's identification but then became 100% certain after comparing notes with the manager. The subsequent line up (at which a customer who did not view any photographs and one of the employees picked out the defendant), was conducted in the absence of counsel for the defendant.

The People conceded the inadmissibility of both identification procedures and consented to an independent source hearing after which the trial court ruled in the People's favor. Just before trial, defense counsel moved for leave to inquire about the suggestive photographic identification only but the court ruled that the line-up evidence would also be admissible lest the jury be misled into believing that the in-court identification (which defense counsel argued at trial was obviously suggestive), was preceded only by a suggestive procedure.

The Appellate Division affirmed the defendant's conviction and the Court of Appeals held that the trial court acted within its discretion to permit evidence of both identification procedures because the line-up would have directly contradicted the (erroneous) impression that the witness (cashier) could not identify the defendant without help (from the manager) when, in fact, she also identified him on her own at the line-up.

The court in Massie also cited People v Rojas 97 NY2d 32 (2001) where the door had been opened to evidence of a prior alleged crime by the defendant, a prison inmate, who claimed that his placement in segregation from other inmates was "harsh and unjustifiable."

Some other examples of proper "open door" inquiries include: to explain inconsistencies brought out on cross examination, to rebut a claim of recent fabrication, (Nelson v Beth Rivka School for Girls 2014 NY Slip Op. 04908 [2d dep't 7/2/14]); to complete a statement elicited only in part on cross examination (People Goodson 57 NY2d 828[19886]: After defense counsel got out that the defendant denied his involvement in the crime, the prosecutor elicited on redirect his full statement that "I was there but did not rob the old lady"); to impeach a witness with a prior conviction that had been precluded in a Sandoval ruling where a defense psychologist testified that the defendant had been "non-violent his whole life." People v Fardan 82 NY2d 638 (1993); to explore the defendant's real motives for pleading guilty in prior cases where he claimed that he pled guilty and paid his debt because he was guilty in those cases but pled not guilty now because he is innocent (People v Cooper 92 NY2d 965 [1998]).

Whenever counsel believes, based on the evidence presented, that the door has been opened to a particular line of inquiry that would otherwise be foreclosed, counsel should first make application to the court, OUTSIDE THE PRESENCE OF THE JURY, for leave to inquire, and be prepared to explain how and why particular questioning should now be permitted. The rule requires that the judge make sure that the door has in fact been opened (and if so, how wide), and to limit the scope of the inquiry to that which is reasonably necessary to explain, clarify or correct an incomplete or misleading impression of the case created by opposing counsel's questioning of a witness or introduction of other evidence.

Trial judges generally don't like being surprised into making on-the-spot rulings on sensitive matters, (especially when they have already ruled that such evidence would not be allowed). Proceeding with forewarning outside the jury's presence gives the court the opportunity to consider the arguments of counsel, make a reasoned judgment and, hopefully, exercise discretion properly.

Whether counsel is pursuing a line of questioning that may open the door to otherwise inadmissible evidence or is seeking to pursue an avenue of inquiry on the belief that the door has been opened by his/her adversary, counsel is well advised to tread carefully and (at least in the latter case), seek judicial approval before proceeding headlong lest the demon on the other side of the door be the one wearing the black robe.

(See NYCOURTS.GOV for the New York Rules of Evidence).