“TOUGHT IT, SAID IT, DID IT” : THE STATE OF MIND AND STATEMENT OF FUTURE INTENT EXCEPTIONS

 TO THE RULE AGAINST HEARSAY

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INTRODUCTION:

While the New York (Advisory) Rules of Evidence state that out-of-court statements offered to prove the truth of their contents are generally inadmissible as evidence, there are plenty of exceptions to that prohibition based primarily on indicia of reliability (i.e., a reasonable likelihood of truth) and necessity (i.e., no other or better evidence available) (see Article 8 of the New York Rules of Evidence at nycourts.gov).

As noted in Rule 8.2 (1)(a), “hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by decisional law or statute, (e.g., CPL Article 60) and is admissible under the federal and state constitutions (e.g., when the declarant is unavailable and the hearsay is material, exculpatory and has sufficient indicia of reliability” (sub. [1][b]).

If a statement is NOT offered for its truth but, rather, for some other relevant purpose (e.g., to show its effect on the conduct of the listener), it is NOT barred by the hearsay rule (see, for example, *People v Ricco*, 56 NY2d 320 [1982]). So, whether a statement amounts to hearsay is determined not by its contents, but by the purpose for which it is offered.

STATE OF MIND

Sometimes, where a declarant’s expression of his/her state of mind (e.g., anger, desire for revenge, feelings for another person) is relevant, the statement may be admitted, not for its truth but to show circumstantially his/her motive, intent or to explain his/her conduct.

For example, in *People v Harris* (209 NY 70 [1913]), where the defendant asserted the affirmative defense of extreme emotional disturbance (EED), it was proper for the trial court to permit the defendant to testify to his wife’s telling him that she was made pregnant by another man to explain why he flew off the handle and shot her to death. Whether or not the wife’s revelation was true was immaterial since it was the defendant’s belief that his wife had cheated that allegedly sent him into a state of EED (Penal Law § 125.25[1][a][i]).

And, in *Loetsch v NYC Omnibus Corp* (291 NY 308 [1943]), the Court of Appeals held that it was error to exclude the will of the decedent/wife who, four months before her demise, bequeathed her husband $1.00. In it she stated that her husband had reciprocated her tender affections with acts of cruelty and indifference and failed to support her as he did himself. The contents were deemed admissible, not to prove that the husband was a cold, mean and stingy lout, but to show the state of their relationship from the deceased’s point of view. As the Court observed, “it is always proper to make proof of the relations between the decedent to the person for whose benefit the action is maintained, because such proof has a bearing upon the pecuniary loss suffered by the person entitled to the recovery, …whether the beneficiary is the surviving husband or wife or one or more of the next of kin” (citing, inter alia, *Murphy v Erie RR Co*., 202 NY 242 [1911]).

PRESENT STATE OF MIND NOT PAST FACTS

While a defendant’s statement may be admitted to prove his/her state of mind when the statement was made, they may not be let in to establish the truth of the facts contained within them. For example, in *People v Reynoso* (73 NY2d 816 [1988]), the defendant’s claim made to his sister two hours after the killing that he’d thought the victim was armed was deemed to be inadmissible hearsay.

NY ADVISORY RULE 8.41

1. An out-of-court statement by a declarant describing his/her state of mind AT THE TIME SUCH STATEMENT WAS MADE, such as intent, motive or mental condition and feeling (but not including a statement of memory or belief to prove the fact remembered or believed) is ADMISSIBLE even though the declarant is available as a witness (see *People v Vasquez*, 88 NY2d 561 [1996]).
2. An out-of-court statement of a declarant which is heard by another may be admissible to establish the hearer’s state of mind on hearing the declaration (i.e., a non-hearsay purpose).

CONFRONTATION CLAUSE

When considering whether a particular statement falls into a hearsay exception, counsel should also be mindful of the Confrontation Clause of the Sixth Amendment which preludes the admission of testimonial hearsay from a witness who does not qualify as unavailable (e.g., dead, gone or who “pleads the fifth”), and against who there was no prior opportunity for cross examination. Such statements, if offered for their truth, are INADMISSBLE (whether or not they meet some exception) because the defendant is deprived of the opportunity to cross examine the declarant (see *Crawford v Washington*, 541 US 36 [2004]).

As stated in Advisory Rule 8.41 (1), “in a criminal prosecution, a TESTIMONIAL statement of a person who does not testify at trial is NOT ADMISSIBLE against a defendant for its truth unless the witness is UNAVAILABLE to testify and the defendant had a PRIOR OPPORTUNITY FOR CROSS EXAMINATION, or the defendant ENGAGED OR ACQUIESCED IN WRONGDOING that was intended to and did procure the unavailability of the witness.

1. A TESTIMONIAL STATEMENT consists of:
2. PRIOR TESTIMONY at a FELONY HEARING, before a GRAND JURY or at a FORMER TRIAL; or
3. An out-of-court statement in which:
4. STATE ACTORS are involved IN A FORMAL, OUT-OF-COURT INTERROGATION of a witness to OBTAIN EVIDENCE FOR TRIAL; or
5. Absent a formal interrogation, the circumstances demonstrate that the PRIMARY PURPOSE of an exchange was to PROCURE an out-of-court statement to PROVE CRIMINAL CONDUCT or PAST EVENTS potentially relevant to a later criminal prosecution or otherwise substitute for trial testimony.

Pursuant to subdivision 3, a statement will not be considered testimonial if it is made in connection with a police investigation under circumstances OBJECTIVELY INDICATING that the PRIMARY PURPOSE of the interrogation is to ENABLE POLICE ASSISTANCE TO MEET AN ONGOING EMERGENCY (see *Davis v Washington*, 547 US 815 [2006], *People v Nieves-Andino*, 9 NY3d 12 [2007], *People v Bradley*, 8 NY3d 124 [2006]).

STATEMENT OF INTENT TO PROVE SUBSEQUENT CONDUCT

In the oft-cited case of *Mutual Life Insurance Co v Hillmon* (145 US 285 [1892]), the Supreme Court expanded the state of mind exception to include statements declaring one’s intent to engage in future conduct with another person to prove not only that the declarant carried out such conduct but that he/she did so with the other person mentioned.

This is so even though there is no direct evidence of the third party’s state of mind. Consequently, the proponent of such testimony is granted a double benefit where the former’s statement of intent is, for all intents and purposes, imputed to the latter (provided there are strong indicia of trustworthiness and a high probability of the joint conduct’s occurrence).

The issue in *Hillmon* was whether the trial court erred (in this case arising from the denial of the widow/benficiary’s claim for life insurance benefits under a recently purchased life insurance policy) in excluding two letters offered by the insurance company from one Fred Walters to his sister and fiancée informing them of his plan to travel with Hillmon to Wichita Kansas to work on a sheep farm that Hillmon was establishing.

The widow’s claim was that her husband had travelled to Wichita with a friend (one Mr. Brown) in search of land to start a cattle ranch but was killed a couple weeks later at Crooked Creek by an accidental discharge from Brown’s gun after which his body was buried in a nearby town.

The insurance company argued that the body (which was exhumed and identified by family as Brown’s) was part of Hillmon’s plan to fake his own death and enable his wife to collect under the policy. It was offered to show circumstantially that Hillmon induced Brown to accompany him to a remote location to procure his death and provide a convenient corpse upon which the claim for benefits could be made.

As noted above, the trial court refused to admit the letters on the grounds of hearsay. The Court ultimately reversed, holding that, upon a retrial, the letters would be admissible under the STATE OF MIND exception because such statements of intention (to go with Hillmon) was a distinct and material fact of the CHAIN OF CIRCUMSTANCES (145 US at 295). In so ruling, the Court found that there were sufficient indicia of reliability (including Hillmon’s concurrent plans and Brown’s body being found where Hollman’s was supposed to be) and of necessity (owing to Brown’s unavailability as a witness).

As the Court observed, “Walter’s [letters] to his family were the natural if not only attainable evidence of his intention” (Id., at 295). The Court also noted that the letters were written at the very time and under circumstances precluding suspicion of misrepresentation. Consequently, since there was sufficient evidence of reliability (and necessity), the letters were admissible to prove that Walters travelled with Hillmon.

The *Hillmon* court relied principally on *Hunter v State* (40 NJL 495 [1878]) in which the court upheld the admission of the victim’s pre-death statement of his plans to travel with the defendant from Philadelphia PA to Camden NJ (where the killing occurred) on business. Focusing on indicia of trustworthiness, the *Hunter* court held that statements of a declarant’s intent to engage in conduct with another may be admitted to prove both that the conduct took place and that the other person participated in it as well.

Most courts seem to take the view that statements mentioning the participation of another in the usual course of every day affairs should be considered no less reliable than statements describing the declarant’s own intentions including details pertaining to the intended destination and/or expected duration of his/her impending travel.

And to the extent that reference to the conduct of a joint or cooperative participant suggests a prior agreement or understanding between them, admissibility is not foreclosed as long as there is other reliable evidence that: such agreement/understanding was recently made, the information was within the declarant’s personal knowledge, and the statement to engage in such conduct (that appeared likely to occur) was clear and unambiguous. The declarant, it should also be noted, must be UNAVALABLE to testify (see *People v Thomas*, 68 NY2d 194 [1986]).

NY ADVISORY RULE 8.42: DECLARATIONOF FUTURE INTENT

1. When a declarant’s out-of-court statement describes his/her then-existing intent and is offered to prove such conduct, it is admissible as follows:
2. A declarant’s statement of an intention to engage in particular conduct IS ADMISSIBLE to prove that the declarant ENGAGED IN SUCH CONDUCT provided there is INDEPENDENT EVIDENCE OF THE STATEMENT’S RELIABILITY, (i.e., a showing of circumstances which ALL BUT RULE OUT A MOTIVE TO FALSIFY) and INDEPENDENT EVIDENCE THAT THE DECLARANT WA AT LEAST LIKELY TO HAVE ENGAGED IN THAT CONDUCT.
3. Where such statement also indicates an intention to engage in particular conduct with another person, such statement is ADMISSIBLE to prove that SUCH OTHER PERSON ENGAGED IN THE CONDUCT: i. IF THE DECLARANT IS UNAVAILABLE; ii. IF the declarant’s statement of intent UNAMBIGUOSLY CONTEMPLATED SOME FUTURE ACTION BY THE DECLARANT (either JOINTLY with the non-declarant or which required the non-declarant’s COOPERATION for its accomplishment; iii. To the extent that the declaration expressly or impliedly refers to a PRIOR UNDERSTANDING OR ARRANGEMENT with the non-declarant, it must be inferable under the circumstances that the understanding or arrangement OCCURRED IN THE RECENT PAST and that the declarant was a PARTY to it (or had COMPETENT KNOWLEDGE OF IT); iv. If there is INDEPENDENT EVIDENCE OF RELIABILITY (i.e., a showing of circumstances that all but rule out a motive to falsify and evidence that the future acts were at least likely to have taken place).

SOME CASES

In *People v Malizia* (62 NY2d 755 [1984]), the Court of Appeals in this drive-by shooting homicide following a drug deal, held that the defendant failed to preserve his claim that the trial court improperly allowed the victim’s brother (who remained in the car while the victim transacted business with the defendant down the street in another vehicle) to testify to the victim’s statement that he was meeting up with the defendant to pay off an existing drug debt and buy more product.

The Court first rejected the defendant’s claim that the trial judge’s evidentiary ruling in the first trial denying admission of the statement was binding as law-of-the case in a second trial before a new judge. The Court also noted that while the defendant objected in the second trial to statements of the victim made weeks before the killing, he did not object to statements made as the brothers approached the location of the intended transaction with the defendant (*Citing Mutual Life Ins. Co. v Hillmon*, supra).

In *People v James* (93 NY2d 620 [1999]), a perjury prosecution stemming from the defendant’s denial before the grand jury that he attended a meeting of several police officers who obtained the questions to an upcoming police promotional exam, the Court held that it was proper to admit phone statements of an unavailable police lieutenant made to another officer (Lebron) who “accidentally” taped the conversation.

Officer LeBron testified that on 10/19/90, the lieutenant informed her that the meeting to discuss the questions with her and several officers would take place the following night at the lieutenant’s home. In a follow-up (taped) conversation on 10/20, Lebron inquired about the time of the impending meeting which had not previously been mentioned. The lieutenant said, “I’ve got Sam (the defendant) and Dave (another officer) who are coming over at 11:00 or 12:00 o’clock tonight for what I told you yesterday.” LeBron replied, “so you’re just going to tell me (what) to study, and I’ll study it” to which the lieutenant said, “yes.”

Over objection, the trial court admitted the 10/19 conversation under the state-of-mind exception, ultimately to show that the lieutenant’s expressed intent (to hold the meeting which included the defendant) contradicted the defendant’s grand jury testimony that there was no such meeting.

The defendant argued on appeal that the statement should not have been admitted (at least not insofar as it implicated the defendant’s alleged intent to attend the meeting), but the Court rejected what it described as the defendant’s limited interpretation of *Hillmon*.

 In the Court’s view, since the defendant was charged with lying to the grand jury about his alleged joint action with the lieutenant, Lebron (and other officers) at Gordon’s home, the lieutenant’s statement of future intent and subsequent actions at the meeting (i.e., disclosing the questions), in essence, “put the lie” on the defendant’s sworn denial. Without the statements setting up the meeting and its intended purpose, the defendant’s statement would have no meaning.

The Court was also not deterred by the fact that the lieutenant statements to LeBron implied a similar intent on the defendant’s part or that the 10/20 phone conversation referenced a previous conversation (from the day before). Just as Walter’s letters in *Hillmon* were ultimately deemed admissible to prove the subsequent conduct of BOTH Walters and Hillmon, so too were the lieutenant’s statements admitted to prove not only his but also the defendant’s participation (to establish the falsehood of his denial).

As the Court observed, “once the declaration of intent is admitted to prove the declarant’s act, there is no good reason to automatically exclude a declaration of joint actions with a named defendant just because it expressly or impliedly refers to a prior arrangement with the defendant” (citing, inter alia, *Bourjaily v United States*, 483 US 171 [1987]: statement of a co-conspirator declaring his intent to meet the defendant to do a drug deal at a particular location deemed admissible).

The Court was satisfied that the prior conversation was sufficiently recent and based on personal knowledge (e.g., “I’ve got Sam and Dave who will be over at 11:00-12:00 o’clock”), and there was independent evidence of reliability (e.g., LeBron was also there), to provide a sufficient foundation for admissibility of the statements from this unavailable witness.

The Court also deemed admissible (as a declaration against penal interest) taped phone statements made by the lieutenant to Lebron the next day wherein he told her to turn over her meeting notes to the defendant or another officer. This occurred after the lieutenant was confronted by LeBron’s boyfriend who accused him (following a claim by LeBron) that he had come on to her at the meeting. After the lieutenant “inadvertently” revealed the fact of the cheating session to the boyfriend, he called LeBron in a panic and instructed her to hand off her notes (see Advisory Rule 8.11).

In contrast, see *People v Chambers* (125 AD2d 88 [1st Dept 1987]) where the court held that it was error in this homicide case to admit testimony from the victim’s friend that an hour or so before being stabbed to death in her apartment, the victim told him that she had received a phone call from her boyfriend (the defendant) who reportedly had said that he planned to visit her that day.

The victim who worked as a multi-disciplinary entrepreneur (bookkeeper, leg waxer and part-time drug dealer), asked her friend to help remove any pills and bags with drug residue from her apartment because she feared that the defendant would frame her.

Another friend called the victim’s phone several times that day but repeatedly got a busy signal. The next day, with the help of the building super’s wife, he got into the apartment and found the victim’s dead body on the living room floor. Police were summoned and found a pillow and paper bag over the victim’s head, and her wrists were bloodied, (slit while she was still alive). The cause of death was determined to be a head wound and asphyxiation.

The apartment door was locked and there was no sign of forced entry. There was blood (from the victim) on the refrigerator door, on cabinet drawers, and on the kitchen counter. A palm print was found by some blood spatter on the door below some smudged fingerprints.

In the bedroom, the drawers of the victim’s jewelry case had been rifled and left open. A month later, the defendant’s vehicle was located at an impound garage in Connecticut where the victim’s gold pocket watch was found ensconced in the floor carpet when the brake was released.

The court began its analysis by acknowledging the state of mind exception (citing, inter alia, *United States v Pheaster*, 544 F2d 353 [9th Cir. 1976], *Hillmon*, *Hunter,* supra and *People v Malizia*, supra).

The court noted that trustworthiness and necessity were keys to admissibility in those cases but only because the strict foundational requirements had been satisfied. While contingencies other than the declarant’s conduct were involved (i.e., the defendant’s participation as foreshadowed by the declarant), such contingencies were deemed to affect only the weight but not the admissibility of the evidence. In *Hunter*, a critical element was the absence of any indication of any motive to fabricate or intentionally implicate the non-declarant in any wrongdoing. There were also other indicia of the statement’s reliability.

In *Chambers*, however, the court found virtually no indicia of reliability to meet the foundational test set forth in *Malizia*, supra. For starters, the victim’s statement spoke not of her own intentions (e.g., “I’m going to meet my boyfriend at the lunch hour”), but only of the defendant’s plan, as allegedly expressed by him, to come over to her apartment. Hence, she was no more than a passive recipient of information from another.

The Court noted that there was no way to know the circumstances under which the message was conveyed, if it was serious, or whether the victim heard and reported it correctly. Moreover, its sole purpose, in the court’s estimation, was to prove the defendant’s intentions and motivations which were otherwise unknown and unverifiable.

While such statement may have been admissible for the non-hearsay purpose of explaining its effect on the listener (i.e., the victim’s asking her friend to help her remove any traces of drugs from her apartment), they were deemed to be inadmissible double hearsay.

The dissenting justice (Sandler, J.P.), noted, first, that there was sufficient circumstantial evidence of guilt including the victim’s watch recovered from the defendant’s vehicle and the defendant’s palm print on the victim’s refrigerator (a fact not refenced by the majority).

The dissenter also indicated the victim’s report of her boyfriend’s simple and straightforward statement -- that he planned to come over around 12:30 -- which prompted her to take steps (i.e., enlist her friend’s help to remove drugs from the apartment) was, from a common-sense point of view, unlikely to have been made up, misstated, or misunderstood.

FINAL THOUGHT

When faced with out-of-court statements of a victim or witness that implicate a client in criminal conduct, defense counsel must make sure that all of the foundational requirements for admissibility have been satisfied. If there are insufficient signs of the statement’s reliability (or there is other non-hearsay evidence in the case obviating the “necessity” argument), an objection should promptly be made, preferably in limine, to preclude any out-of-court statements pointing to the defendant.

Once the hearsay kraken has been released, it may well be that no amount cautionary instruction can return it to its undersea lair, entirely forgotten.