The "Explains Conduct" Non-Hearsay Purpose

October 13, 2009 Jeff Welty

Most readers of this blog know that hearsay evidence, meaning an out-of-court statement "offered in evidence to prove the truth of the matter asserted," N.C. R. Evid. 801(c), is presumptively inadmissible. Sometimes the proponent of hearsay evidence can introduce the evidence under one of the exceptions in Rules 803 and 804. But equally often, the proponent of what appears to be hearsay evidence will attempt to introduce it for a non-hearsay purpose, i.e., for a purpose other than to establish the truth of the matter asserted.

Here's an example. Dan Defendant is charged with PWISD cocaine. Ollie Officer is on the stand, and Pat Prosecutor asks, "how did Dan first come to your attention?" Ollie begins to say that Winnie Witness, who lived near Dan, contacted Ollie and told him that Dan was selling drugs. Dan's lawyer objects on hearsay grounds, and Pat responds that he's not trying to introduce Winnie's testimony to prove that Dan sold drugs, but rather, to explain why Ollie began to investigate Dan. In other words, Pat argues, Winnie's statements are admissible for the non-hearsay purpose of explaining Ollie's conduct.

Jane Judge should probably admit the evidence. An array of North Carolina cases support this conclusion, including *State v. Coffey*, 326 N.C. 268 (1990), *State v. Irick*, 291 N.C. 480 (1977), and *In re Mashburn*, 162 N.C. App. 386 (2004) (testimony of DSS employee regarding child's claims of sexual abuse did "not constitute inadmissible hearsay because it explained why . . . DSS commenced an investigation"). *See generally* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* 102 n. 47 (6th ed. 2004) (collecting cases). Nor is there a Confrontation Clause problem, because statements not offered for the truth of the matter asserted fall outside the scope of the Clause. *State v. Leyva*, 181 N.C. App. 491 (2007).

The "explains conduct" non-hearsay purpose is subject to abuse, however. Almost any statement can be said to explain some sort of conduct. Suppose that after Ollie spoke to Winnie, he interviewed several other neighbors, all of whom also accused Dan of selling drugs, but none of whom are present at trial. Can Ollie testify about those interviews, too, because they explain his conduct in obtaining a search warrant for Dan's house?

Although *State v. Holden*, 321 N.C. 125 (1987), suggests that the answer to the foregoing question may be yes, that would be a troubling response because it would allow parties easily to circumvent the hearsay rule. One leading commentator has argued that officers "should be entitled to provide some explanation for their presence and conduct" in investigating a crime, but "should not . . . be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient." 2 Kenneth S. Broun, et al., *McCormick on Evidence* 103 (5th ed.1999). Although the quoted material concerns testimony by officers, testimony by defense witnesses, including defense investigators, may raise similar issues.

The federal courts that have considered the reach of the "explains conduct" non-hearsay purpose have likewise expressed concern about the potential for abuse. *See, e.g., United States v. Maher*, 454 F.3d 13 (1st Cir. 2006) (rejecting the government's argument that informants' statements to officers were admissible to explain the officers' conduct as "impossibly overbroad" and "warning prosecutors [about] backdoor attempts to get statements by non-testifying [witnesses] before a jury"); *United States v. Silva*, 380 F.3d 1018 (7th Cir.2004) (rejecting a similar argument as "eviscerat[ing] the constitutional right to confront and cross-examine one's accusers").

North Carolina's appellate courts have yet to establish a clear outer limit to the use of the "explains conduct" rationale. However, it is settled that the proponent of evidence admitted for that purpose may not later argue the truth of the statement to the jury. *State v. Canady*, 355 N.C. 242 (2002). And presumably a limiting instruction is appropriate when evidence is admitted for a non-hearsay purpose. But judges and lawyers on both sides should also remain alert to attempts to circumvent the hearsay rules by introducing critical evidence under the guise of explaining conduct.