
JOGE JANDERSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 14-16-00999.

United States Court of Appeals
for the Fourteenth Circuit.

Argued July 19, 2015.

Decided August 28, 2016.

Before Chief Judge Michael Lewis, Judges Renee Nguyen and Jeremy Dunbar.

Judge Nguyen delivered the opinion of the court.

Defendant Joge Janderson appeals from a judgment of conviction entered in the United States District Court for the District of San Jacinto, following a jury trial convicting him of murdering and conspiring to murder a federal official in violation of 18 U.S.C. § 1114, and sentencing him to life in prison without the possibility of parole.

On appeal, Janderson contends that the trial court improperly admitted into evidence the victim's out-of-court statement that the victim intended to meet with Janderson. Specifically, Janderson contends that (1) the statement was inadmissible hearsay, and (2) admitting the statement in the present case violated his right to confront the witnesses against him under the Sixth Amendment to the United States Constitution. Finding no merit to these contentions, we affirm.

Background

This case involves a tragic love triangle. What began as digital infidelity escalated into fraud and ultimately murder.

Joge Janderson worked as an insurance salesman for San Jacinto Insurance Co. from about the middle of January to the middle of May 2013, Janderson visited the McGinnis/Bender household a number of times. It is undisputed that Janderson sold Patty McGinnis a number of insurance policies, one of which was a policy on his life, which included a double indemnity clause. McGinnis's common-law wife, Erin Bender, was listed as the primary beneficiary.

A double indemnity clause is a provision in a life insurance policy where the insurance provider agrees to pay out double the face amount in the contract in cases of death caused by certain accidental means. Such clauses typically exclude suicide, murder in collusion with the beneficiary of the insurance policy, and natural causes. The double indemnity in the present case was

triggered in the event that the policy holder's death "occurred on or was proximately caused by" a train.

Sure enough, the policy holder, McGinnis, was found dead on June 1, 2013, on the train tracks just outside of San Jacinto City Central Station. Before any claim on the policy could be filed, investigators received a parcel from Analisa del Pozo, McGinnis's lawyer, which contained a cassette tape with the words "Play Me" written across the front. The tape recording was of McGinnis's voice, expressing his fears that his common-law wife might be trying to kill him, and also expressing his intent to meet with Joge Janderson (coincidentally, on a night train leaving May 31, 2013) about removing his wife from his life insurance policy.[1]

Acting on the information revealed in the tape, police arrested McGinnis's wife. After being confronted with the tape recording, Bender confessed to conspiring with Janderson to murder McGinnis and to collect the proceeds of the insurance claim. Bender admitted, in her signed confession, that she "seduced" Janderson during one of his visits to the McGinnis/Bender household,[2] that the two began a torrid affair, and that, after expressing to Janderson her desire to kill her husband and make it look like an accident, Janderson came up with the idea of doing the deed on a train. She also alleged that it was Janderson's idea to add the double indemnity clause, which he buried in fine print and tricked McGinnis into signing during one of his visits.

Based on this information, police arrested Janderson and he was indicted on June 15, 2013. Unfortunately for the prosecution's case, however, on July 2, the eve of Janderson's trial, Bender committed suicide in her jail cell. With its star witness gone, and the signed confession now inadmissible as testimonial hearsay, the prosecution decided to seek to admit McGinnis's tape recorded statement to refute Janderson's alibi and place him on the train the night of McGinnis's death.[3]

The cassette tape evidence was introduced over Janderson's objection as Exhibit A. The prosecution also introduced circumstantial evidence which included eyewitness testimony that a man fitting Janderson's profile was seen dragging what looked like a lifeless body out of McGinnis's train compartment. After seventy-two hours of deliberation, the jury returned a verdict of guilty. As indicated above, the district court imposed a life sentence without the possibility of parole. This appeal followed.

Discussion

On appeal, Janderson contends that the trial court improperly admitted the cassette tape evidence. He contends that (1) the hearsay exception codified in Federal Rule of Evidence 803(3) does not apply in the present case, and (2) admitting the statement in the present case violated his rights under the Sixth Amendment's Confrontation Clause.

[1] The transcript of the cassette tape provided: "If you are listening to this, then I am already dead. I've instructed my lawyer to deliver this cassette tape to the police in the event of my untimely death. I suspect my common-law wife is trying to kill me. She has been acting strange lately. I came home from work early one day and saw her throwing darts at a picture of my face that she had taped to the wall. Another time, I overheard her on the phone talking about her plans to travel the world after she gets rid of my husband. If I meet an untimely end under suspicious circumstances, I want it known that I do not trust my wife, and that I suspect that she wants to get rid of me. I am taking the train on May 31 to attend a medical convention. Jorg Janderson will be on the same train, and I plan to speak to him about removing my wife as a beneficiary under my life insurance policy."

[2] After a visit to the McGinnis/Bender home, Janderson discovered Bender's profile on Tinder. Testimony suggested that Janderson and Bender spent hours on the social dating app each day. Though Janderson's profile indicated he preferred large, full-figured women and Bender was not, testimony indicated that Janderson recognized Bender and was curious. The relationship blossomed from mere digital infidelity into a full-fledged homicidal conspiracy within a few days.

[3] At trial, Janderson's current girlfriend testified that on the evening in question the couple had been clothes shopping at Dress Barn and then dining at Golden Corral. According to the testimony, Janderson could not have been on the train because he was two hours away with her. Apparently, the jury did not credit this testimony.

Finding no merit in these contentions, we affirm the judgment.

Rule 803(3)

In general, hearsay—an out-of-court statement offered to prove the truth of the matter asserted—is inadmissible. *See* Fed. R. Evid. 802. But Federal Rule of Evidence 803(3) provides an exception for a statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. Fed. R. Evid. 803(3).

Rule 803(3) is premised on the idea that no one has better knowledge of the declarant's state of mind than the declarant himself. Such statements simply do not create the problems of memory and second-hand knowledge that the general rule against hearsay is designed to prevent. As a result, a declarant's out-of-court statement as to his intent to perform a certain act in the future is not excludable on hearsay grounds. If relevant, such a statement may be introduced to prove that the declarant subsequently acted in accordance with his stated intent. *See, e.g.*, *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295–96 (1892); *see also* Fed. R. Evid. 803 Advisory Committee Note to Paragraph (3) (1972) (stating that the rule of *Mutual Life Ins. Co. v. Hillmon* is meant to be left undisturbed).

Janderson maintains that McGinnis's statement should not be admitted against Janderson, arguing that:

> Rule 803(3) may never be used against a nondeclarant to prove that nondeclarant's subsequent actions. The guarantees of reliability underlying the state-of-mind hearsay exception are only present when one speaks about one's own intent. If the declarant's statement of intent is offered to prove the subsequent conduct of a third party, it must not be admitted. In short, the cassette tape recording of McGinnis's statement expressing his intent to meet with Janderson cannot be admitted to prove that McGinnis actually met with Janderson. And no one can seriously suggest that the prosecution sought to admit the cassette tape evidence for any other purpose.

(Brief for Appellant at 2). Janderson argues, in effect, that Rule 803(3) operates to categorically exclude a declarant's statement of intent whenever such statement implicates a third party. We disagree.

Statements of intent, such as McGinnis's intent to meet with Janderson, are often valuable and relevant evidence. Moreover, there is a distinction between a mere second-hand assertion of a third party's intent, and the declarant's statement of his own intent to do something which happens to implicate a third party. Such a statement is not as unreliable as Janderson would have us believe. The statement in the present case has nothing to do with Janderson's state of

mind. The fact that the cooperation of a third party might have been required to support the inference that declarant's stated intent in fact came to fruition is simply another factor to be considered by the trier of fact in determining how probative the evidence is. Any hypothetical unreliability of that inference goes merely to the weight of the evidence, not to its admissibility. *See, e.g.*, *United States v. Pheaster*, 544 F.2d 353, 375–80 (9th Cir. 1976) ("The possible unreliability of the inference to be drawn from the present intention is a matter going to the weight of the evidence which might be argued to the trier of fact, but it should not be grounds for completely excluding the admittedly relevant evidence.")

Indeed, the government argues that the statement was admissible against Janderson, not to show conduct by Janderson, but rather to show that McGinnis proceeded to meet with Janderson on the train on March 31 as he said he would do. Moreover, the government produced independent evidence of Janderson's own conduct that corroborated the proposition that McGinnis had indeed followed through on his intent to meet Janderson on the train that night. However, we do not find this factor dispositive or even necessary. We join the Ninth Circuit Court of Appeals in holding that a declarant's statement of intent or state of mind is admissible to prove that declarant's future conduct, even if it implicates the conduct of a third party. We find no error in the district court's admission of the cassette tape implicating Janderson under Federal Rule of Evidence 803(3).

Confrontation Clause

Janderson further argues that, regardless of whether the cassette tape was properly admitted under the federal evidence rules, its admission violated his constitutional rights under the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause only bars statements that are "testimonial" in nature. 541 U.S. 36, 51 (2004) ("An accuser who makes a formal statement to government officers bears testimony in the sense that a person who makes a casual remark to an acquaintance does not."). Statements are only barred if testimonial, unless the witness is available for cross-examination.

Janderson urges us to hold that, because the cassette tape in the present case was delivered to police, the statement contained on it is testimonial. We decline to do so.

Testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," *id.* at 68, as well as statements made during law enforcement "interrogations solely directed at establishing the facts of a past crime . . . ." *Davis v. Washington*, 547 U.S. 813, 826 (2006) (emphasis added). The statement at issue in the present case was neither prior formal testimony nor the result of an interrogation, and therefore is not testimonial.

Janderson mistakenly relies on *Davis* for the proposition that any statement to police is per se testimonial so long as there is no ongoing emergency. Janderson argues that, because there was no ongoing emergency and the only purpose of the cassette tape was to provide evidence for future prosecution, the statements were therefore testimonial.

Testimoniality, however, does not turn simply on whether there is an ongoing emergency. As the Supreme Court stated in *Michigan v. Bryant*, 562 U.S. 344, 346 (2011), "whether an ongoing emergency exists is simply one factor" for determining "an

interrogation's primary purpose." (emphasis added). The statement made in the present case was not made during a police interrogation. In any case, we do not believe the Sixth Amendment was ever intended to allow criminals to go free so long as they manage to kill anyone who might testify against them.[4]

Conclusion

The judgment of the District Court is affirmed.

Chief Judge Lewis, dissenting.

I dissent because I believe the cassette tape implicating Janderson is inadmissible hearsay evidence.[5]

The state-of-mind hearsay exception is premised on the idea that the hearsay dangers of second-hand knowledge and memory are not present. This is because nobody is in a better position to know the declarant's own state of mind than the declarant himself. However, when a declarant's statement of intent is offered to prove the subsequent conduct of a third party, memory and second-hand knowledge problems arise.

A declarant's statement of intent that requires the cooperation of a third party necessarily implicates that third party's intent. This is precisely the type of second-hand evidence the rule against hearsay was meant to exclude. The majority attempts to draw a distinction "between a mere second-hand assertion of a third party's intent, and the declarant's statement of his own intent to do something which happens to implicate a third party." It seems to me such a distinction is unsustainable, but then again, this kind of casuistry is what you tend to get from people who have had too much legal training.

In any case, I do not believe that *Hillmon* should control our interpretation of Rule 803(3), because that case was decided in 1892, long before the Federal Rules of Evidence were adopted. Additionally, the evidentiary question in *Hillmon* was uncontested, neither briefed nor argued, and the case was decided on other grounds. Therefore, any commentary on the state-of-mind exception in that case was mere dicta. Furthermore, a House Committee of the Judiciary Report from 1973 explicitly states that "[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. Rep. No. 93-650, at 12 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7087.

I would hold that statements of intent offered to prove the conduct of a third party are per se inadmissible. For this reason, I respectfully dissent.

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[4] Both parties cited *Williams v. Illinois*, 132 S. Ct. 2221 (2012), in their briefs. We find this perplexing. *Williams* dealt with forensic evidence. The evidence in the present case is not forensic evidence, so *Williams* is inapposite.

[5] Because I find that the statements admitted in the present case do not fall under the Rule 803(3) hearsay exception, I do not reach the constitutional question.