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BY ECF & E-MAIL

Hon. Dennis M. Cavanaugh, U.S.D.J.
U.S. District Court, District of New Jersey
Post Office Building & Federal Courthouse, Room 451
Newark, New Jersey 07101-0999

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Judge Cavanaugh:

In an effort to avoid disrupting the trial to resolve evidentiary objections, we write to address an issue that is likely to arise during the trial testimony of FBI Special Agent Shawn Brokos, the lead agent on the Bergrin matter. As set forth below, information learned from others, when offered to explain what investigative steps Agent Brokos took, would not violate the hearsay prohibition. But even if it would, Bergrin's frontal assault on the integrity of Agent Brokos' investigation has rendered numerous out-of-court statements specially relevant for a non-hearsay purpose.

I. Rule 802 Does Not Exclude Out Of Court Statements Offered To Explain Why The Witness Took Specific Actions.

Federal Rule of Evidence 802 provides that "[h]earsay is not admissible unless any of the following provides otherwise." Fed. R. Evid. 802. If a statement does not qualify as hearsay, Rule 802 cannot bar its admission. Rule 801 defines hearsay as statement that "(1) the declarant does not make at while testifying at the current trial, and (2) a party offers in evidence *to prove the truth of the matter asserted in the statement*." Fed. R. Evid. 801(c) (emphasis added).

As the emphasized language shows, "[n]ot every extrajudicial statement constitutes hearsay." United States v. Saad, 212 F.3d 210, 218 (3d Cir. 2000). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather

a restriction on the proof of fact through extrajudicial statements." Dutton v. Evans, 400 U.S. 74, 87 (1970). Accordingly, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed. R. Evid. 801(c), Advisory Committee Note.

Courts have routinely allowed a party to elicit a statement by an out-of-court declarant where the statement was being offered to show its effect on the testifying witness. See United States v. Bailey, 270 F.3d 83, 87 (1st Cir. 2001) (noting a statement "offered to show the effect of the words spoken on the listener (*e.g.*, to supply a motive for the listener's action)" is not hearsay) (citation omitted); Robinzine, 80 F.3d at 252 ("the significance of the words was that they were said (i.e., that a 'verbal act' occurred) and how they affected McCoy, not the truth-value of what was said."); United States v. Castro-Lara, 970 F.2d 976, 981 (1st Cir. 1992); see also 4 Stephen A. Saltzburg *et als.*, Federal Rules of Evidence Manual § 801.02[1][f] (9th ed. 2006) ("If a statement is offered for its effect on the listener, in order to explain the listener's conduct, it does not matter whether the declarant is telling the truth.").

The Third Circuit has endorsed this construction of Rule 801(c). See United States v. Price, 458 F.3d 202, 205 (3d Cir. 2006) (holding that police officers are permitted "to explain the background context for their arrival at a scene" and that such background statements are admissible nonhearsay "[w]hen the explanation cannot be effected without relating some contents of the information received"); accord United States v. LaBoy, No. 11-4506, 2012 WL 5937448, at *2 (3d Cir. Nov. 28, 2012) (not precedential) (where "LaBoy objected at trial to testimony given by Detective Fey on direct examination as to what he heard transmitted through a listening device placed on a confidential informant regarding a suspected drug transaction," the "District Court correctly ruled that the testimony was admissible as background testimony showing Detective Fey's motivation for his subsequent course of conduct").

Here, Agent Brokos took a number of investigative steps based on information she learned from various sources. The Government respectfully submits that Agent Brokos should be permitted to disclose what she learned to explain why she took certain actions.

II. Bergrin Opened the Door To Testimony By Agent Brokos Regarding The Information Available To Her.

Even putting to one side the decisional law described in Part I above, Bergrin's trial conduct has made various out-of-court statements specially relevant for a non-hearsay purpose. To explain why, we briefly recite some relevant procedural history.

Prior to trial, we asked this Court preclude Bergrin from testifying in his opening statement and to warn him that doing so could open the door to otherwise inadmissible

testimony. See Dkt. No. 381 at pp. 43-51 (referring to page numbers in the legend at the top of the filed pleading). This Court ruled (albeit in the context of references to Bergrin's military service) that "if Bergrin chooses to open on such information, it would be done knowing that there may be evidential issues later," and that "I'll allow it, but with the warning that he could open up doors for other problems." 9/12/2012 Tr. at 49. Thus, this Court recognized that Bergrin's opening statement could qualify as a door-opening event.

During his opening statement, Bergrin directly attacked the integrity of the Government's investigation. He argued that "[t]his case started with a very aggressive FBI agent" who needed to make someone pay for the FBI's negligence in failing to protect informant Kemo McCray. 1/22/13 Tr. at 168 ("And Kemo was [killed] -- they failed to protect him. And now somebody has to pay the costs for their negligence.").[1] Bergrin also claimed that Anthony Young, who walked in off the street and eventually confessed to having murdered McCray, allegedly read an article about Bergrin's supposed efforts to subpoena President Bush, Vice-President Cheney, Secretary of Defense Donald Rumsfeld, and used Bergrin's name to get in the door of the FBI. 1/22/13 Tr. at 112-13. Bergrin thus argued that Young falsely confessed to the Kemo Murder and that the Government nonetheless allowed him to cooperate in its zeal to convict Bergrin.

With Bergrin having clearly attacked the motives of the FBI and the Government in investigating and prosecuting him, the Government now has a right to rebut that attack by (among other things) eliciting the information Agent Brokos acquired as her investigation progressed. That information will be elicited *not* for its truth, but merely for the fact that the information existed. Several cases support the Government's position.

First, opening statement assertions can open the door to otherwise inadmissible evidence. See United States v. Milan, 304 F.3d 273, 290 & n.22 (3d Cir. 2002) ("The defense opened the door by intimating during opening statements that the government was willing to engage in improprieties-had made 'a pact with devils,' in order to convict Milan."); see also United States v. Green, 617 F.3d 233, 250 (3d Cir. 2010) (defendant's opening-statement attack on cooperating witness's motive for testifying opened door to otherwise inadmissible "other acts" testimony). See generally United States v. Chavez, 229 F.3d 946, 952 (10th Cir. 2000) ("a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party").

Second, out-of-court assertions admitted to rebut the suggestion that the lead agent intentionally or negligently conducted a flawed investigation do not fall within Rule 801(c)'s definition of hearsay. See United States v. Christie, 624 F.3d 558, 568 (3d Cir.

[1] Accord 11/15/11 Tr. at 89 (Bergrin summation) ("Because she lost her informant and she's responsible for handling him. And somebody has got to be made the scapegoat and somebody has to pay for this.").

2010) ("MacFarlane's testimony is not hearsay because it was offered for the purpose of rebutting Christie's charge of misguided law enforcement efforts and not offered for the truth of whatever the other investigative targets may have said. . . . Having put both MacFarlane's and Lochmiller's credibility at issue, the defense invited MacFarlane to say why he viewed the investigation as resting on reliable information.") (citing Milan, 304 F.3d at 290 & n. 22); id. at 569 ("the testimony can be seen as relevant to a proper, non-hearsay purpose because it illustrated the reliability of the investigation, a fact of considerable consequence since challenging the nature of the investigation was at the crux of Christie's defense."); accord United States v. Malik, 345 F.3d 999, 1001 (8th Cir. 2003) (statement not hearsay where used to show propriety of investigation); United States v. Khalil, 279 F.3d 358, 363-64 (6th Cir. 2002) (defendant opened door to testimony about why Government "proceeded with the investigation in the manner that it did"); United States v. Hunt, 749 F.2d 1078, 1084 (4th Cir. 1984) (when faced with criticism about the propriety and conduct of its investigation, the Government may "introduce rebuttal evidence, even though it would amount to hearsay if it were intended to prove the truth of matters asserted, for the limited purpose of demonstrating that the investigation was reasonable and free of improper motive").

Here, Bergrin claims that the Government in general (and Agent Brokos in particular) conducted a flawed investigation. As the foregoing cases show, the Government may rebut that assertion by eliciting the information that was made known to Agent Brokos. As Judge Jordan explained in Christie, such out-of-court statements "can be seen as relevant to a proper, non-hearsay purpose because [they] illustrate[] the reliability of the investigation, a fact of considerable consequence since challenging the nature of the investigation [is] at the crux of [Bergrin's] defense." Christie, 624 F.3d at 569. In other words, the Government may offer out-of-court statements made known to Agent Brokos "for the limited purpose of demonstrating that the investigation was reasonable and free of improper motive." Hunt, 749 F.2d at 1084.

We thank Your Honor for his continued indulgence.

Respectfully submitted,

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