

16. SPONTANEOUS UTTERANCES -- RULES 803(1)-(4)

A. Overview

At the start of Rule 803 are four exceptions for "spontaneous" utterances of the type typically made by witnesses and parties involved in a crime or accident. The best explanation for why we created these exceptions is the basic principle of relevancy that the jury is entitled as much as possible to be put in a time machine and taken back to view scene of crime or event. Everything that a fly on the wall would have observed is relevant. Part of what happens during important events is that people talk. The defendant says "Give me your money." The victim says, "It's in my purse." A bystander says, "Look out, he's got a gun." Another bystander says, "My god, that's the Deckard kid." Someone says "I'm hurt, get me an ambulance." If the jurors were actually present, they would have heard these things as well as seeing the action. If we excluded these statements as hearsay, it would frustrate the broader principle that the jury is supposed to reconstruct what happened at the time of the event.

History aside, nothing in the language of the modern hearsay rule limits spontaneous statements to those made at the scene of the crime or event. Spontaneous statements that relate to any relevant fact will qualify. However, statements relating to events other than the main ones, or made at time remote from the main events, will rarely be relevant.

There are actually five separate exceptions in this category.

- a) Present sense impression -- 803(1)
- b) Excited utterance -- 803(2)
- c) Statements of then-existing mental condition -- 803(3)
- d) Statements of then-existing physical condition -- 803(3).
- e) Statements for medical purposes -- 803(4)

Although statements of both mental and physical condition are grouped together in Rule 803(3), the specificity rule cautions that you must tell judge which of the two you are relying on as an exception.

The foundations are similar for 803(1)-803(3). All require spontaneity -- utterances made without much thought -- and that the declarant have personal knowledge of the event being described. Differences among them fall into three categories:

- What kind of event triggers the exception, e.g., a physical sensation for a statement of physical condition; a stressful event for an excited utterance.
- How closely must the statement relate to the trigger event; e.g., a statement of physical condition is limited to a description of the condition; excited utterances either describe or "relate to" the event in other ways.
- How close to the event must the statement have been made, e.g., a present sense impression must be made while the event is happening or "immediately after" it; but excited utterances can be made at any time after the event as long as the declarant is still "under the stress of excitement."

B. Rule 801(1): Present Sense Impression

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving it or immediately thereafter. The foundation is:

- 1) The declarant must have personal knowledge of the event described, usually by being a participant in or witness to it. If the declarant is not in court, a reasonable likelihood of personal knowledge may be shown by circumstantial evidence.
- 2) The statement must describe or explain the event, condition or transaction. It cannot include references to past events.
- 3) The statement must have been made spontaneously, with little chance for reflection, thought or fabrication.
- 4) The statement must have been made while the event was happening or immediately thereafter. A statement more than a few minutes after the event will not qualify, so most statements to police are not present sense impressions.

For example:

- The statement of a crime victim who had put her sister on hold while she took a second call, and when she resumed the call said "That was Amos. He said he was going to come over in a few minutes."
- Notes written by a police officer describing his negotiations with the defendant made while negotiations were underway.

C. Rule 803(2): EXCITED UTTERANCES

An excited utterance is a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. Statements by victims, participants and bystanders may all fall within this exception. The foundation is:

- 1) A startling or unusual event happened.
- 2) The declarant had personal knowledge of the event by being a participant in or witness to it.
- 3) The statement is spontaneous, not carefully thought out. Answers to questions and written statements are unlikely to meet this requirement.
- 4) At the time of the statement, the declarant was in a state of extreme excitement caused by the event, sufficient to overcome his or her normal reflective faculties. It is not enough that the declarant merely be upset or excited. To establish this element of the foundation, a witness will usually be required who can describe the declarant's appearance and the circumstances
 - A police officer who testifies he saw wrecked cars and the declarant was upset, hurt, angry, bleeding profusely, and had not picked up her broken glasses.
 - An officer who testifies that children were running toward him shouting "they're shooting at those boys in that car over there."
 - A tape of a 9-1-1- call in which you can hear the victim's voice and she says people are breaking into her house.

It is also relevant how long after the event the statement was made, because excitement

wears off. Statements made more than 30 minutes after an event are rarely admitted.

5) The statement relates to the startling event, describing, explaining or elucidating it. The content of an excited utterance is not limited to a description of the exciting event, but may link the exciting event to an earlier one. *See Noojin v. State*, 730 N.E.2d 672 (Ind. 2000) (witness saw corpses of two dead men, stated he had seen defendant in company of the two men earlier in the day). However, the statement must primarily concern the exciting event, not the past events.

6) The opinion rule applies. If an excited utterance contains opinions, they must be rationally based on perception and helpful to the jury. The declarant cannot say "Someone shot at the house; I'll bet it was those gang kids."

The most common kind of excited utterance is a statement to police by a crime victim. If the police arrive at a crime scene within minutes, find the victim injured, crying or upset, and ask a simple non-leading question such as "What happened," the victim's spontaneous statements usually will qualify as excited utterances. However, statements by crime victims who have not been seriously injured, are made more than a few minutes after the crime, are made in response to detailed police questioning, or are made after the victim has calmed down usually are not excited utterances. The key issue is whether the victim is under such stress that rational thought is difficult.

D. Rule 803(3): STATEMENTS OF THEN-EXISTING STATE OF MIND

Statements of then-existing mental and emotional conditions describe the declarant's own current state of mind, including emotional feelings, intentions, plans, and motives. They do not include the declarant's "belief" concerning how events took place -- that is a statement of fact, not state of mind. The foundation is:

- 1) The declarant's state of mind must be a material issue.
- 2) The statement describes the declarant's mental condition or emotional state.
- 3) The statement is in the present tense and describes a feeling or emotion that the declarant is then experiencing..

The declarant's state of mind must be a material issue in order to use this exception. All statements expressing a feeling tell us something about the declarant state of mind, so the exception would swallow the rule if the materiality requirement were ignored.

The state of mind of a criminal defendant is often in issue. General criminal intent is required for all crimes, and specific intent is required for many crimes, e.g., intent to kill. Remember that incriminating statements of intent (saying "I hate you" when pulling the trigger) are already excluded from hearsay as statements of the opposing party, Rule 801(d)(2), so this rule applies to exculpatory statements by the defendant negating criminal intent (saying "Oh no, I didn't mean to" when pulling the trigger).

The state of mind of the victim is almost never an issue, so statements by a crime victim expressing fear of the defendant are not admissible because whether the victim was in fear is not a material issue.

In civil cases, states of mind are less commonly at issue, but arise in intentional tort cases,

will contests over the testator's state of mind, cases with punitive damage claims, and a variety of family law issues.

E. State of Mind as Circumstantial Evidence of an Act

A common law hearsay exception allowed into evidence statements of intent to do an act, to prove that the declarant later did the act, if the statement and the act occur reasonably close together and the declarant had the capacity to carry out the act. For example, in *Pelley v. State*, 901 N.E.2d 494, 504 (Ind. 2009), statements by the father that he intended to restrict his son's prom activities as punishment were admissible to show that he in fact punished his son, which was relevant to the son's motive for killing his father. However, such statements are not admissible to prove that another person acted accordingly. *See Camm v. State*, 908 N.E.2d 215, 226-27 (Ind. 2009) (murdered wife told a friend she expected her husband to come home between 7:00 and 7:30, not admissible to show husband in fact came home at that time).

F. Rule 803(3): Statements of then-existing physical condition.

The exception for statements of then-existing physical condition is similar to the one for mental condition. The statement must describe a person's own condition or sensation while the declarant is experiencing it. Statements about past conditions are not admissible under this exception, but may be admissible under Rule 803(4) as statements for medical diagnosis or treatment. The foundation is:

- 1) Some aspect of the declarant's physical condition must be an issue.
- 2) The statement expresses or describes then-existing pain, malady, or other physical condition. The statement may not refer to past events such as who was the cause of the pain.
- 3) The statement may be made to anyone. It need not have been made to a doctor.

G. Rule 803(4): STATEMENTS MADE FOR MEDICAL DIAGNOSIS OR TREATMENT

Rule 803(4) creates a hearsay exception for statements made by a patient for medical diagnosis or treatment. Statements about current and past medical conditions and symptoms are fully admissible for substantive purposes if reasonably pertinent to diagnosis and not motivated by a desire to build a case for trial. The foundation is:

- 1) The statement must be made by the person seeking medical diagnosis or treatment for themselves.
- 2) The statement must have been made to medical personnel, such as a physician, nurse, or emergency medical technician. Statements to non-medical personnel may occasionally qualify if the declarant reasonably believes making the statement will lead to treatment or be conveyed to medical personnel, e.g., statements by children to parents.
- 3) The statement was made by the patient for the purpose of obtaining medical diagnosis or treatment. This part of the foundation depends on the subjective intent of the declarant -- whether he or she is motivated to provide truthful information in order to promote diagnosis and treatment. There is no requirement that seeking medical care be the declarant's only purpose. Hence, a victim's description of a rape made to a nurse in course of a sexual assault

examination requested by the police for purpose of gathering evidence fall within this exception because it describes the cause of the injury and medical care was provided.

4) The statement must be reasonably pertinent to diagnosis or treatment. This includes statements describing medical history, past or present symptoms, pain or sensations, or the cause or inception of the problem. This is an objective test to be evaluated from the perspective of the physician, not the patient. For example:

- A victim's description of how he was injured is pertinent, but naming the person who caused the injury is not, because the identity of the person responsible for injuries is not needed to provide medical care.
- The victim's statement to a nurse that she wanted to prosecute the defendant was not medically relevant.
- Statements about a family history of cancer were not pertinent when the declarant was seeking treatment for sinusitis.
- The statement is made under circumstances such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.

Courts differ on whether statements by a personal injury plaintiff to a "consulting" physician hired by the plaintiff's attorney, made in the course of preparing for trial, would seem inadmissible under this exception. The statements are made under circumstances in which the patient may not be motivated to provide truthful information.