8.41 State of Mind[1]

(1) An out-of-court statement of a declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design, feeling or mental condition as it may bear on whether a person is of sound mind, but not including a statement of memory or belief to prove the truth of a fact remembered or believed, is admissible, even though the declarant is available as a witness.

(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.

Note

Subdivision (1) is derived from several Court of Appeals decisions that recognize this exception (*see e.g. People v Reynoso*, 73 NY2d 816, 819 [1988] ["While . . . declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them," such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam*, 257 NY 140, 145 [1931] ["The declarations of a testator which are commonly received in proceedings for the probate of wills are expressions that tend to show his mental conditions and feelings, as bearing upon the probability that the instrument in question was the product of a sound mind"]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] ["It is always competent to show that a witness . . . is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party"]; *see also People v Arnold*, 147 AD3d 1327, 1327-1328 [4th Dept 2017] ["(A) recording of phone calls defendant made from jail arranging for a relative to pick him up from jail . . . were nonhearsay evidence of his state of mind, that they were relevant to his claim that the police coerced his confession by promising him that he would be released if he confessed"]; *People v Cromwell*, 71 AD3d 414, 415 [1st Dept 2010] [" 'The mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant' "]).

The prohibition on the proof of a statement to prove the truth of a past fact or belief initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]) has been consistently applied in New York (*see People v Vasquez*, 88 NY2d 561, 580 [1996] [the defendant's "911 statement was not admissible as proof of his state of mind at the time of the shooting, since it was made after that event occurred and its relevance to defendant's prior mental state depended entirely on

the truth of its contents"]; *Reynoso*, 73 NY2d at 818-819; *People v Goodluck*, 117 AD3d 653, 653-654 [1st Dept 2014] ["The court properly precluded defendant from eliciting evidence of a statement by a codefendant, who was a fugitive, that purportedly exculpated defendant. Although defendant offered this statement as evidence of the codefendant's state of mind, it was essentially a factual assertion that was irrelevant unless offered to prove the truth of the matter asserted. Accordingly, the statement was hearsay"]; *People v Villanueva*, 35 AD3d 229, 230 [1st Dept 2006] ["The court properly precluded defendant from eliciting testimony that at the end of the incident, he made a self-exculpatory comment to his companion. Although . . . defendant offered this statement as evidence of his state of mind, it was essentially a factual assertion of his innocence constituting hearsay"]; *People v Oguendo*, 305 AD2d 140, 141 [1st Dept 2003] [in a prosecution for the sale of a controlled substance, the defendant's "postarrest statement that he was in the area only to purchase marijuana" was "clearly being offered for its truth and not as evidence of his state of mind"]).

Statements regarding the declarant's present pain, illness, or physical condition are not included within the exception set forth in this subdivision (*see* Guide to NY Evid rule 8.42, Statement of Pain, Illness, or Physical Condition by an Unavailable Declarant).

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.13.

Subdivision (2) sets forth "a well-settled rule that where a witness' state of mind is relevant, the witness may testify to out-of-court statements made by others which would indicate circumstantially what the witness believed at that time" (*Matter of Bergstein v Board of Educ., Union Free School Dist. No. 1 of Towns of Ossining, New Castle & Yorktown*, 34 NY2d 318, 324 [1974]; *Provenzo v Sam*, 23 NY2d 256, 261-262 [1968] ["While the plaintiff was observing the respondent's vehicle meandering about the highway, he remarked to his wife, 'This person must be sick, must have had a heart attack'. . . . The statement was not being introduced to prove that the defendant had had a heart attack or that she was sick but rather to shed light on the plaintiff's state of mind as to why he crossed the highway"]; *Ferrara v Galluchio*, 5 NY2d 16, 19-20 [1958] [since the "plaintiff's statement that the dermatologist told her she should have the shoulder checked every six months because there was a possibility that cancer might develop . . . was introduced not for the purpose of proving that plaintiff would develop cancer but merely for the purpose of establishing that there was a basis for her mental anxiety, such testimony was not objectionable hearsay"]).

[1] In May 2023, subdivision (2) was removed from this rule and incorporated in rule 8.42; a new subdivision (2) was added; and the Note was amplified.