

## 8.47. Verbal Act

**When an act or transaction is itself admissible, statements or declarations made at that time that constitute the act or transaction, or are calculated to explain and elucidate its character and quality, and are so connected with it as to constitute one act or transaction are admissible as a “verbal act.” A statement admitted as a “verbal act” is not hearsay because it is not admitted for the truth of its assertions, but rather to give significance, legal effect, or an explanation to the accompanying conduct.**

### Note

This rule is derived from a series of Court of Appeals cases, beginning with *Hine v New York El. R.R. Co.* (149 NY 154, 162 [1896]):

“[W]hen an act or transaction is itself admissible, statements or declarations of the party at the time, calculated to explain and elucidate the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible as part of the *res gestæ*.”

“Res gestae,” as used in *Hine*, in modern times, refers specifically to “verbal acts” that “form[ ] part of the transaction itself” (*People v Marks*, 6 NY2d 67, 71 [1959]; *People v Seymour*, 183 AD2d 35, 38 [1st Dept 1992] [“res gestae, i.e., verbal acts forming part of the transaction itself”]; *Schner v Simpson*, 286 App Div 716, 718 [1st Dept 1955] [“the ‘verbal act’ doctrine where the utterance is admitted as a verbal part of an act, that is, of the *res gestae*”]).

“Verbal acts” are not hearsay because they are not offered “for the truth of their assertions, but, rather, to attach legal effect to the conduct which they accompany” (*People v Salko*, 47 NY2d 230, 239 [1979]; *People v Caban*, 5 NY3d 143, 149 [2005]); “to assist in giving legal significance to some ‘otherwise ambiguous conduct’ ” (*People v Guy*, 93 AD3d 877, 880 [3d Dept 2012]); to explain “otherwise ambiguous conduct” that accompanies it and lend “significance to it” (*People v Acomb*, 87 AD2d 1, 6 [4th Dept 1982]).

Examples of a “verbal act” include:

- *People v Caban* (5 NY3d at 149 [A statement accepting another’s solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible

without prima facie proof of the conspiracy]; *see* Guide to NY Evid rule 8.09 [2], Coconspirator Statement).

- *People v Merante* (59 AD3d 207, 208 [1st Dept 2009] [In a larceny prosecution, the “court properly admitted evidence that defendant’s accomplice demanded that the owner’s sister pay him money to obtain the return of the (stolen) car. This was not offered for its truth, but as a verbal act that was part of the criminal transaction”]).
- *Matter of Corey v Corey* (40 AD3d 1253, 1254, 1255 [3d Dept 2007] [“The wife testified that the husband refused to leave her home . . . , threatened to break down the doors of her home if she attempted to bar his entry, and repeatedly became enraged and directed obscenities at her . . . (W)e find that the verbal acts (i.e., spoken obscenities and threats) made in the context described by the wife were not constitutionally protected” by the First Amendment]).
- *People v DeJesus* (272 AD2d 61, 61-62 [1st Dept 2000] [The undercover detective testified “that, after defendant’s co-defendant Felix Rivera determined how many glassines the (undercover) detective wanted, he told him to ‘wait on the corner while he went to get it.’ . . . Rivera’s statement was a simple instruction given to the detective and was a necessary part of the detective’s narrative to explain why he remained where he was while Rivera crossed the street to defendant. Thus, this remark was ‘a verbal act and part of the criminal res gestae establishing the theory of “acting in concert” ’ and did not constitute inadmissible hearsay”]).
- *People v Thompson* (186 AD2d 768, 768 [2d Dept 1992] [“The challenged testimony established that as the officer approached an abandoned building utilized as a ‘peephole location’ from which drug transactions were effected, he observed the codefendant motioning with his hands and directing prospective purchasers to the peephole by stating ‘the hole is working’. We find that the codefendant’s statements accompanied equivocal conduct which could be interpreted by reference to the content of the statements . . . . Therefore, the statements constituted a verbal act and part of the criminal res gestae establishing the theory of ‘acting in concert’ as charged in the indictment (and accordingly did) not constitute hearsay”]).