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PERSPECTIVE

EVIDENCE FOR IDIOTS

Logos, dumbbells, and hearsay

By Gary A. Watt

Welcome to *Evidence for Idiots*. Some of you are thinking this column's not for you because you're no idiot when it comes to evidence. Others are thinking you're not going to read this because you don't take insults lightly. But the title was inspired by the author's typical reaction to evidence: headscratching and headaches. So read on. The goal is to grapple with evidence and perhaps, in the end, experience some form of enlightenment. And what better way to start *Evidence for Idiots* than a discussion about dumbbells!

The Hearsay Rule

Before turning to a recent case, *People v. Portillo*, review of the beloved hearsay rule would be in order. According to Wigmore, the rule has its roots in the rise of witness testimony during the 1600s. Fortunately, for our purposes we can fast forward to this century.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid. Code § 1200(a). We tend to think of the familiar shorthand: an out-of-court statement offered for the truth of its content. *Hart v. Keenan Properties, Inc.*, 9 Cal. 5th 442, 447 (2020). "Except as provided by law, hearsay evidence is inadmissible." Evid. Code § 1200(b).

However, out-of-court statements offered for a "purpose *other than* to prove the truth of the matter stated … [are] not hearsay." *People v. Wilson*, 11 Cal. 5th 259, 305 (2021) (emphasis added). Such statements are "nonhearsay" so long as offered for "some purpose independent of the truth of the matter it asserts." *People v. Hopson*, 3 Cal. 5th 424, 432 (2017). "For example, suppose A hit B after B said, 'You're stupid.' B's out-of-court statement asserts that A is stupid. If those words are offered to prove that A is, indeed, stupid, they constitute hearsay and would be inadmissible unless they fell under a hearsay exception. However, those same words might be admissible for a *nonhearsay purpose*: to prove that A had a motive to assault B. The distinction turns not on the words themselves, but what they are offered to prove." *Hart*, 9 Cal. 5th at 447-48.

Black and white examples of non-hearsay purposes only go so far. In *Hart*, the ultimate question was whether Keenan pipes caused the plaintiff's illness. A former worker at the construction site recalled some delivery invoices (the events were 44 years earlier) having a distinct "K" on the label (which generally described Keenan's logo). Were recollections of the invoice with a "K" at the job site offered to prove anything at all about the content of the logo?

A Court of Appeal majority said yes, the "wording on these invoices … were out-of-court statements offered to prove the truth of the matter asserted: namely, that Keenan supplied the pipes." *Hart v. Keenan Properties, Inc.*, 29 Cal. App. 5th 203, 211 (Ct. App. 2018). The "testimony regarding the content of the invoices was used to prove Keenan was the vendor. Therefore, the content of the invoices was being offered for the truth of the matter asserted in them." *Id.* at 213. The Court of Appeal found no hearsay exception applied, making the testimony inadmissible.

The California Supreme Court reversed. The out-of-court statement – the logo recalled by the witness – was not offered to prove the truth of anything in or on the invoices. It was circumstantial evidence that Keenan supplied pipe to the jobsite. The testimony was offered for a *nonhearsay* purpose – indications of Keenan pipe at that location during the relevant time – thereby making it admissible.

As the Supreme Court further explained, "the link between Keenan and the pipes does not depend on the word 'Keenan' [on an invoice] being a true statement that Keenan supplied the pipes. Instead, the link relies on several circumstances demonstrated by the evidence," including testimony that when some of the pipes were delivered, the witness "was given an invoice bearing Keenan's name and logo." *Hart*, 9 Cal. 5th at 449-50. Such evidence would be subject to a jury's ultimate decision about links in the evidentiary chain. The logo recollection may have been thin and subject to skepticism (going to weight, not admissibility), but it was not inadmissible under the hearsay rule. So, words and images observed can be relevant without seeking to prove the words or images are "true."

From Logos to Price Listings

What does all this have to do with dumbbells? That brings us to *People v. Portillo*, 91 Cal. App. 5th 577 (Ct. App. 2d Dist., May 15, 2023). In *Portillo*, defendants were convicted of one count of grand theft. The issue was whether the collective value of 15 boxes of stolen dumbbells exceeded $950, a threshold for grand theft.

At trial, the only valuation evidence was testimony from the warehouse manager where the theft occurred. Armed with the manufacturing number (from surveillance video), the manager searched Amazon, Walmart, and "Gym and Fitness" online for retail pricing. Based on the lowest price observed of $357 per box and 15 stolen boxes, total value easily exceeded the minimum necessary to support a grand theft conviction.

The jury found defendants guilty of grand theft. The defendants appealed, asserting the warehouse manager's pricing testimony was inadmissible hearsay offered for

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the truth of the dumbbells' value. Was it? The Court of Appeal said "no," unanimously finding the pricing testimony admissible. But not all justices agreed as to why it was admissible.

Price But Not Actual Price, So Not Hearsay

According to the majority, "an out-of-court statement by a Walmart employee that Walmart was offering to sell adjustable dumbbells for $357 (or a price listing or price tag to that effect) is hearsay if it is offered for the truth that Walmart was willing to sell the dumbbells for $357 . . . ."

However, the advertised price could be "evidence of a retailer's offer to sell . . . for the purpose of inviting a marketplace transaction." "If evidence of the . . . price listing for $357 is presented to show Walmart was advertising the dumbbells for sale at $357, but not for the truth of whether Walmart would consummate a transaction at the advertised price . . . this would be a nonhearsay purpose because it is 'relevant regardless of [its] truth.'" 91 Cal. App. 5th at 511 (quoting *Hart*, 9 Cal. 5th at 449). The majority's lengthy and scholarly discussion, among other things, analogized to car prices and common knowledge that actual transactions frequently occur at other than the advertised price.

"[W]e consider the advertised prices for dumbbells in the retail market for the nonhearsay purpose of showing there were offers to sell the dumbbells in a specified price range." The court distinguished "evidence of the existence of a retailer's advertised price (the nonhearsay purpose) from whether the individual retailer is willing to sell at that price or believes its price reflects the value of the item (the hearsay purposes)." *Id.* at 511. "The advertised prices may be considered by the jury as circumstantial evidence of the price at which willing sellers and willing buyers would consummate a transaction in the marketplace." *Id.* at 512.

Thus, for hearsay purposes, the majority appears to view testimony about price as distinguishable between advertised prices and prices actually paid. Since the price of an actual purchase was not the purpose for the testimony, the nonhearsay purpose – advertised prices reflecting a market for dumbbells – enabled the testimony to evade the clutches of the hearsay rule.

Price As Actual Price, But Not Hearsay

Portillo's concurrence also found the pricing testimony admissible but disagreed with the majority's reasoning. "If an online retailer is not willing to sell the item at the advertised price or does not believe the advertised price reflects the item's value, then the advertised price does not tend to prove or disprove anything about the fair market value of the item." *Id.* at 521. "[T]o be relevant, the evidence of the price listings must tend to prove what the majority understands to be the 'truth' they assert: the retailers' willingness to sell the dumbbells at the stated prices and, ultimately, the dumbbells' value. That is, the price listing evidence is only relevant if it serves what the majority has identified as its hearsay purpose."

The concurrence concluded the observed prices were nonhearsay "verbal acts" or "operative facts." "The price listings *were* offers to sell the dumbbells at the stated prices." (Emphasis original.) However, the price listings were admissible as "circumstantial evidence of a hypothetical agreement – between a willing buyer and a willing seller . . . ." Such an offer is not a statement "whose evidentiary value depends on its 'truth,' but a nonhearsay 'verbal act' or 'operative fact' whose evidentiary value derives from whether it occurred."

Examining cases involving offers to contract, the concurrence found no reason why "these principles should not apply equally to evidence introduced to establish the hypothetical agreement that serves as the basis for determining an item's fair market value. As offers to sell the dumbbells at stated prices, the online retailers' price listings were verbal acts (or operative facts) elemental to the formation of such an agreement," and thus, admissible.

The Price is Right?

Did the majority and the concurrence strive too hard to put a fine point on this? Was it necessary to define the listed prices as offers to engage in transactions but not prices that might actually result in a sale? This is a case about whether the total value of the stolen merchandise exceeded $950 thereby satisfying an element of grand theft. When the manager testified to the prices he personally viewed online (just like any shopper might), was he providing the jury with any truth about the listed prices he had seen? Or was he simply describing a marketplace he had observed? Were his observations of prices on vendor websites qualitatively different than the former employee's observation of invoices in *Hart*?

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"Fair market value may be established by opinion or *circumstantial evidence*." *People v. Grant*, 57 Cal. App. 5th 323, 329 (2020) (emphasis added). Assuming sufficient foundation, weren't the prices observed by the warehouse manager just circumstantial evidence of marketplace data points (subject to the rigors of cross-examination) in the jury's search for a value determination? If so, did the majority in *Portillo* need to describe the price listings as "offer[s] … for the purpose of inviting a marketplace transaction?" Is there an air of legal fiction about that construction?

The concurrence concludes that the listed prices are in fact, purchase prices. Nonetheless, such pricing testimony is exempt from the hearsay bar because the advertising of prices constitutes a "verbal act" or "operative fact" in the form of an offer to contract. Was it necessary to try to fit price listings within the law of words imbued with legal consequences irrespective of the ultimate truth of the words? And if so, as the majority notes, what about the requirement that "verbal acts" and "operative facts" be direct elements of the offense or claim? The element of the offense here was stolen merchandise with a total value exceeding $950, not the price per box of dumbbells observed by the warehouse manager. And did the concurrence come down too hard on the majority in describing the majority's construction – invitations for transactions – as completely irrelevant if no sale would result at the advertised price?

There's a song with a lyric, "he had many questions, like children often do." Why does evidence make me wish there was a dandy book, *Evidence for Idiots*, with a really cool chapter on hearsay? Are these mind-numbing hearsay knots unamenable to consensus? Is the correct doctrinal justification for what seems like something uncontroversial – testimony as to marketplace prices *personally observed* in stores or online – "analytically elusive." *Hart*, 9 Cal. 5th at 448. Does the hearsay rule require the retailer of the dumbbells to testify? Picture the author's head spinning round and round.

In all this hearsay haze, one thing does not appear analytically elusive. Trial judges make evidence rulings on the fly, and if *Hart* and *Portillo* are any indication, quite often correctly. As *Hart* and *Portillo* also reveal, appellate justices, with the luxury of time, quite often disagree with trial judges and each other about the rules of evidence. But maybe that's the point – grappling with evidence is as good as it gets – a sign that judges and lawyers want to get it right. Evidence, it seems, is difficult. And certainly no place for dumbbells.

***Evidence for Idiots* is a quarterly column presented by Hanson Bridgett's Appellate Group.**