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Limiting 'course of conduct' testimony needed in criminal cases

CRIMINAL LAW

HUGH MUNDY and MOHENA KAUR

HUGH MUNDY *is a professor at UIC Law. His teaching and scholarship focus on criminal justice reform.* MOHENA KAUR *is a 2021 graduate of UIC Law and an inaugural recipient of a research assistance grant from the Law School's Antiracism and Social Justice Fund.*

In 1988, federal prosecutors in Chicago charged Rodrigo Mejia with cocaine trafficking. At trial, a drug enforcement agent testified that surveillance of Mejia's home began with an informant's tip to police that a "shipment" was expected to arrive at the house. The trial court admitted the agent's testimony about the tip over a hearsay objection.

After Mejia's conviction, the 7th U.S. Circuit Court of Appeals upheld the lower court's ruling, reasoning that the informant's out-of-court statements were relevant "to show something other than the truth." Namely, the tip explained why agents initiated the surveillance — "a fact that in no way depended on the tip's truth."

Of course, the Federal and Illinois Rules of Evidence bar the admission of hearsay, i.e., a declarant's out-of-court statement offered for the "truth of the matter asserted" unless an exception applies. The ban is rooted in concerns about the reliability of such statements. After all, without the declarant under oath and in the witness box, opposing counsel is hard-pressed to challenge the out-of-court statement's veracity or attack the declarant's credibility.

Still, federal and Illinois courts routinely allow law enforcement witnesses to testify to out-of-court statements that fall outside any hearsay exception to provide "background" for their subsequent actions. These statements are often referred to as "course of conduct" or "course of investigation" non-hearsay. That is, the statements are not admitted for their "truth" but only to demonstrate that a law enforcement officer heard the declarant's words and acted upon them in furtherance of a criminal investigation.

The origins of "course of conduct" as a route of admissibility are nebulous. A 1976 Illinois appellate opinion, *People v. Estes*, mischaracterized "course of conduct" testimony as an "exception to the hearsay rule" — and noted the defendant's unsuccessful protestations that the exception "be, once and for all, removed."

Throughout the 1980s, the practice gained traction in Illinois courts. By 1991, in *People v. Simms*, the Illinois Supreme Court endorsed the use and admissibility of "course of conduct" testimony "even if it suggests that a non-testifying witness implicated the defendant." Further, by ruling that the testimony was not hearsay, the court sidestepped any Confrontation Clause challenges.

Despite the widespread acceptance of "course of conduct" testimony by courts, the custom sows juror confusion and unfairly prejudices criminal defendants. Though the distinction between "non-hearsay" and statements admissible for their "truth" is vital from an evidentiary perspective, it is often lost on jurors. More problematically, neither federal nor Illinois courts require the use of a limiting instruction to explain the difference. Indeed, in Mejia's case, the 7th Circuit ruled that the trial court was not required to give an instruction. Without additional guidance, the jury likely credited the informant's tip as "true" from the outset of the officer's testimony.

Further, "course of conduct" applies only to the testimony of law enforcement officers in criminal prosecutions. Its use and acceptance flourished during the 1980s during the so-called War on Drugs and the emergence of mass incarceration policies and practices. In 1993, a federal appeals court in the 3rd Circuit acknowledged that "course of conduct" testimony had become as "an area of widespread abuse" in criminal prosecutions as a gateway for otherwise-prohibited hearsay evidence. The practice persists largely unabated today, even in the midst of reforms to the criminal justice system.

Moving forward, two essential measures will safeguard against the unchecked admissibility of "course of conduct" testimony. First, courts must establish a clear and cogent pattern instruction to inform jurors as to the limited purpose of "course of conduct" testimony.

Additionally, under Rule 403, courts must routinely scrutinize the marginal relevance of "course of conduct" testimony as mere "background" information against the substantial likelihood that the evidence will mislead the jury and unfairly prejudice the defendant.

While neither step will eliminate "course of conduct" testimony, both will serve to reduce its exploitative use by prosecutors and promote more just jury verdicts.