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When is a question not a question?

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At an evidence CLE at the South Carolina Bar Convention in Greenville this year, a judges' panel discussed a hearsay issue, raising the issue of whether a witness's out-of-court utterance—which was in the form of a question—constituted hearsay. For example, assume that a police officer asked a defendant at the time of arrest, "Can you explain why a bag of weed was sitting on your lap when I came in the room?" The officer who asked the question did not attend the trial, and the solicitor wants a witness to testify that he overheard the officer asking the question.

Is the police officer's question inadmissible hearsay? Is a question even a "statement" for hearsay purposes? Under grammatical rules, a statement is a declarative sentence, and a question is an interrogative sentence, and never the twain shall meet. Courts have come to three different conclusions.

First, what is hearsay?

> "Hearsay" means a statement that:
>
> (1) the declarant does not make while testifying at the current trial or hearing; and
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801(c).

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

S.C. R. Evid. 801(c).

What is a "statement" under the hearsay rule?

> "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

Fed. R. Evid. 801(a).

> A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

S.C. R. Evid. 801(a).

What is an "assertion"?

Unfortunately, the evidence rules do not define "assertion," but *McCormick on Evidence*, which is frequently cited for evidence purposes, states that "the word simply means *to say that something is so*, *e.g.,* that an event happened or that a condition existed." Kenneth S. Broun, et al., 2 *McCormick on Evidence*, § 246 (7th ed. 2013). Legal writing scholar Bryan Garner defines the term as being "a declaration or allegation" or "person's speaking, writing, acting, or failing to act *with the intent of expressing a fact or opinion*." *Black's Law Dictionary* 143 (11th ed. 2019) (emphasis added). *Black's* also states that questions generally "contain no assertion; they simply seek answers." *Id.*

What do the courts say?

As the Kentucky Supreme Court has noted, many other courts have addressed this issue, with varying results:

> Whether a question can be an assertion and, thereby, hearsay has been extensively discussed by numerous courts and commentators, though no consensus has been reached. The courts that have considered the issue have reached one of three conclusions: (1) a question can be hearsay if it contains an assertion; (2) a question can be hearsay if the declarant intended to make an assertion; or (3) questions can never be hearsay because they are inherently non-assertive.

Harris v. Kentucky, 384 S.W.3d 117, 126 (Ky. 2012).

1. A question can be hearsay only if it contains an assertion.

Probably shocking English teachers throughout Kentucky, the *Harris* state court stated that there was "no logical reason why the grammatical form of an utterance—whether a declarative sentence, a command[,] or a question—should conclusively determine whether the utterance is an assertion." *Id.* at 127. Further, "[o]ne cannot avoid the hearsay rule by tacking a question mark at the end of an essentially factual statement." *Id.*

> The federal district court in Kentucky followed this same line of reasoning:
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> [W]hether or not the testimony constitutes hearsay is not determined solely on the grammatical form it takes. Although it is true that questions generally are not hearsay, this is true because a question merely seeks answers and usually has no factual content. But a question[ ] might contain an

> assertion within it, and when it does, it is properly excluded as hearsay.

Martin v. Patterson, 2014 WL 769173, at *8 (E.D. Ky. Feb. 25, 2014) (internal punctuation and citation omitted). In other words, the court examined the *content* of the question and the circumstances surrounding the question.

In *State v. Heath*, 838 N.W.2d 4, 12 (Neb. Ct. App. 2013), a police officer answered a disturbance call at the defendant's residence. In response to an officer's knock at the door, the defendant's mother asked the officer, "Are you alone?" The *pro se* defendant objected to the question as inadmissible hearsay. The court of appeals found "that Heath's mother's utterance was not a 'statement' because it was not an assertion or declaration; it was an interrogatory seeking information and not asserting any particular fact." Therefore, the question was not hearsay and was properly admitted.

Other courts agree. *See Ex parte Hunt*, 744 So. 2d 851, 857 (Ala. 1999); *Alaska v. McDonald*, 872 P.2d 627, 645 (Alaska Ct. App. 1994); *Powell v. Indiana*, 714 N.E.2d 624, 627–628 (Ind. 1999) ("[V]erbal conduct intended to assert a fact but phrased as a question is equally capable of being a 'statement.' "); *Iowa v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987) ("In the present case, the utterance ["Dennis, what are you doing?"] was couched as a question but it was phrased in such a manner as to make it an implicit assertion of the fact [that Dennis was present]."); *Carlton v. Maryland*, 111 Md. App. 436, 681 A.2d 1181 (Md. Ct. Spec. App. 1996) (basing the decision on a committee note to Maryland's Rule 801 stating that the fact that evidence "is in the form of a question or something other than a narrative statement . . . does not necessarily preclude its being an assertion"); *Brown v. Virginia*, 487 S.E.2d 248, 251 (Va. Ct. App. 1997) (en banc); *Kolb v. Wyoming*, 930 P.2d 1238, 1246 (Wyo. 1996) ("Mr. Haler's testimony that Ms. Sallani asked him, "Are you John?" does not qualify as hearsay because her question is not an assertion.").

2. A question can be hearsay if the declarant *intended* to make an assertion.

Some courts focus not on the content of the question, but on the declarant's *intent*. For example, in *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005), a police officer stopped a car that in which two bank robbery suspects were riding (in a Ford Escape!). One of the suspects asked the officer, "How did you guys find us so fast?" At the trial of the second robbery suspect, the defendant objected that the question was inadmissible hearsay, violating his right to cross-examine his co-suspect who had uttered the question but was not in court. In response, the government argued that the question could not qualify as a statement or assertion, and thus was not hearsay. The Tenth Circuit found that the question was not designed to elicit information and a response, but was asserting the defendant's involvement with criminal activity. Thus, "[the questioner's] *intent* to make an assertion was apparent and that his question directed to police officers on the scene constituted hearsay." *Id.* at 1300 (emphasis added).

Other courts agree. *See, e.g.*, *United States v. Sinclair,* 301 Fed. App'x 251, 253 (4th Cir. 2008) (holding that if a question is merely a request for information or an inquiry, it cannot be construed as an "assertion" and, therefore, is not hearsay); *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990) (holding that questions—"Did you get the stuff?" and "Where is Dog?"— "like most questions and inquiries, are not hearsay because they do not, and were not intended to, assert anything"); *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990) (holding caller's questions, "Can I speak with Keith? Does he still have any stuff? Does he have a fifty?" was not hearsay because caller was seeking information and did not intend to make an assertion); *Maples v. Vollmer*, No. CIV 12-0294 JB/RHS, 2013 WL 1681234, at *17 n.3 (D.N.M. Mar. 31, 2013) ("The 911 Operator's statements ["Where's your emergency?" and "Can you give me a description of [plaintiff]?"] were intended to gather information, were not intended as assertions, and did not contain any assertions of fact, whether implied or expressed. . . . The 911 Operator's questions are thus admissible non-hearsay statements."); *State v. Palmer*, 229 Ariz. 64, 66, 270 P.3d 891, 893 (Ct. App. 2012) ("The statement the women made to the defendant concerning a backpack that contained illegal drugs ["Where's my backpack?"] was not intended as an assertion and thus was not inadmissible hearsay. . . . '[W]ords or conduct not intended as assertions are not hearsay even when offered as evidence of the declarant's implicit belief of a fact.' ").

3. Questions can never be hearsay because they are inherently non-assertive.

Ah, finally, there are some courts that follow the grammar books. In *United States v. Oguns,* 921 F.2d 442, 449 (2d Cir. 1990), federal agents answered a telephone in the defendant's apartment. During the conversation, the unidentified caller asked the agent (who had identified himself as a friend of the defendant),"Have the apples [drug trafficker's code word for heroin] arrived there?" The trial court defendant rejected the defendant's argument that the unidentified caller's question constituted inadmissible hearsay. The Second Circuit affirmed the trial court, holding that "[a]n inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement."

> The Seventh Circuit also followed this line of reasoning:
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> We held in *United States v. Thomas* that questions are not "statements" and therefore are not hearsay. 453 F.3d 838, 845 (7th Cir. 2006). Our sister circuits agree. . . . Given this overwhelming precedent, we think that Love's question was not hearsay.

United States v. Love, 706 F.3d 832, 840 (7th Cir. 2013) (citations omitted); *see also Inc. Publishing Corp. v. Manhattan Magazine, Inc.,* 616 F. Supp. 370, 388 (S.D.N.Y. 1985) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement."); *State v. Carter,* 651 N.E.2d 965, 971 (Ohio 1995) ("Because a true question or inquiry is by its nature incapable of being proved either true or false and cannot be offered 'to prove the truth of the matter asserted,' it does not constitute hearsay.").

Which avenue do South Carolina courts follow in deciding whether a question is hearsay?

The South Carolina Supreme Court has considered whether a witness's question was hearsay when the State's witness Ronald Myers described what had occurred during a verbal altercation between the defendant in a murder trial and a witness to a school fight:

> And then [the victim] said, "**well, you got a gun?**" and [defendant] was like, "yeah, and I ain't scared to shoot," and [defendant] pulled out the gun and started shooting.

State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (emphasis added). The *Johnson* trial court overruled the defendant's objection on hearsay grounds, and the supreme court affirmed, finding that "[h]ere, the statement 'you got a gun?' was not hearsay as it was not offered to prove the truth of the matter asserted. **Indeed, the statement was not even an assertion, but was a question asked to appellant.**" *Id.* at 40, 476 S.E.2d at 683 (emphasis added).The court then found that even if the testimony were hearsay and admitted in error, the error was harmless because the defendant admitted at trial that he possessed and fired a gun. *Id.* Although this finding arguably was dictum and was made without discussion, the court seemed to follow the line of cases finding that questions are, by definition, not hearsay.

Although I did not locate any cases in which the South Carolina federal district court had addressed this issue, the Fourth Circuit found that a son's request that his father, the plaintiff, buy him a gun was not hearsay, stating that "[a] question or inquiry is not a statement, and therefore is not hearsay unless it can be construed as an *intended assertion*." *McMichael v. James Island Charter Sch.*, 840 F. App'x 723, 731 n.5 (4th Cir. 2020) (emphasis added); *see also United States v. Sinclair,* 301 Fed. App'x 251, 253 (4th Cir. 2008).

Conclusion

My brother Warren, who writes the evidence column for the *SC Lawyer*, politely noted that this is a rather esoteric subject. I had to laugh and agree, but think about the criminal defendant whose case is torpedoed by a police officer's question concerning what he saw at the scene of the crime, with no chance to cross-examine the absent officer. To that defendant, the court's decision on that "question" may change his life.