

How Rules Of Evidence Lead To Convictions Of The Innocent

By **John Lauro**

By now, most everyone has seen the video of an unfortunate confrontation between Amy Cooper and Christian Cooper (no relation) that took place in a wooded area of Central Park known as the Ramble. Amy Cooper was walking her dog without a leash, which was prohibited by park rules. When Christian Cooper asked her to leash the dog and obey the rules, she refused the request, and he began videotaping Amy Cooper.



John Lauro

The encounter then quickly escalated. Amy Cooper began walking toward Christian Cooper in a futile effort to get him to stop recording. He asked her to keep her distance (after all we are in the age of COVID-19). She responded by threatening to call the police and making good on her threat, falsely stating that she is being threatened by "an African American man" in the Ramble, which is a rather isolated area in the park.[1]

Listening to the call alone, Amy Cooper sounds incredibly convincing and in total panic mode. In a word, she sounds believable. Fortunately for Christian Cooper, however, the entire incident is being taped, which puts the lie to Amy Cooper's call.

Placing aside the racial overtones of the confrontation, which have been widely discussed in the news and social media, this fact pattern presents an important illustration of how the rules of evidence often lead to the convictions of the factually innocent.

As every trial lawyer knows, Amy Cooper's compelling 911 call, although hearsay, could be played to a jury at trial as a "present sense impression" or an "excited utterance" in order to bolster witness trial testimony. Under the Federal Rules of Evidence, and those for nearly every state, a trial court would have little problem admitting the call into evidence.[2]

The historical justification for admitting such hearsay statements is their inherent trustworthiness. After all, the theory goes, a witness would be unlikely to fabricate a statement made while perceiving an occurrence in real time or in reaction to a startling event.

So, all things being equal, without the video, it is very likely that Amy Cooper's impassioned (albeit false) statements to the police could be used to convict Christian. And how wrong the jury would be in the case of the verbal rumble between Amy and Christian.

Despite spending endless hours in law school and after trying to figure out the riddles of evidence law, as practitioners, we understand that the "rules" are pretty much what any particular judge says they are in any given trial. Because appellate courts review trial-level evidentiary decisions under the rubric of "abuse of discretion," these calls are rarely overturned. It is almost unheard of for a conviction to be reversed based on the admission of evidence where it is a close call, and the prosecution can come up with an articulable basis under the rules for admitting it.

Indeed, the Federal Rules of Evidence (and state evidence codes) contain numerous pathways for a prosecutor to introduce all types of evidence that would otherwise be excludable for any number of reasons, including:

- A defendant's purported confession as reported by a jailhouse snitch;[3]
- Testimony by an alleged co-conspirator seeking a reduction in sentence and recounting a defendant's statements made during and in furtherance of an alleged conspiracy;[4]
- Prior acts of a defendant unrelated to the present case, but offered to show intent, knowledge, lack of mistake, etc.;[5]
- Opinions by lay persons about the circumstances of a defendant's purported misconduct;[6] and
- Stream of consciousness emails that are routinely admitted as "business records." [7]

The list goes on and on.

Law professor Jeffrey Bellin has written a brilliant article, "The Evidence Rules that Convict the Innocent," linking the evidence rules to the wrongful convictions of the factually innocent, which will soon be published in the Cornell Law Review.[8]

Bellin makes the case that our accepted understanding of the rules of evidence, based upon long-forgotten policy choices and flawed assumptions, actually increase the chances that innocent defendants will be convicted and go to jail. His article provides a pivot point in the discussion of innocence in our legal system and how the application of the evidence rules in fact do not lead to "ascertaining the truth and securing a just determination." [9]

In fact, he shows how the rules of evidence are used to skew the playing field and allow the use of untrustworthy "evidence" to convict the factually innocent. Any criminal defense lawyer who tries cases can easily point to trial decisions where the admissibility of dubious testimony or problematic documents has led to a client's conviction — whether at trial or as a result of a plea agreement.

Despite apparent silence from the influential Advisory Committee to the Federal Rules of Evidence, Bellin's article should be the beginning of a discussion of how the evidence rules have created an unfair and unbalanced playing field where the goal seems to be obtaining a quick conviction rather than a jury determination that takes into account the presumption of innocence.

One obvious fix would be to empower judges in criminal cases to use their plenary power under Federal Rule of Evidence 104 to restrict the admissibility of unreliable evidence, whether or not it would be otherwise admissible under the rules of evidence. In other words, Rule 104 should be amended to give judges the role of a gatekeeper — similar to that provided by the Daubert case and Federal Rule of Evidence 702 to weed out and exclude untrustworthy evidence.[10]

The touchstone would be reliability and the courts should be encouraged to aggressively review proffered evidence, rather than throwing everything to a jury to figure out the "weight" of the evidence after its admissibility. This approach would also protect and preserve the constitutional rights provided to those charged with a crime. Not everyone has the foresight to bring along their cell phone when bird watching.

John F. Lauro is principal at the Lauro Law Firm and a former federal prosecutor.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Video of the incident in question can be found by clicking here: <https://www.youtube.com/watch?v=gnrF-s7ZvTs&feature=youtu.be>.

[2] Fed.R.Evid. 803 (1) & (2).

[3] Fed.R.Evid. 801(d)(2).

[4] Fed.R.Evid. 801 (d)(2)(E).

[5] Fed.R.Evid. 404(b).

[6] Fed.R.Evid. 701.

[7] Fed.R.Evid. 803(6).

[8] The Evidence Rules that Convict the Innocent, 106 Cornell L. Rev. __ (forthcoming 2020) (electronic copy available at <https://ssrn.com/abstract=3547421>).

[9] Fed.R.Evid. 102.

[10] **Daubert v. Merrell Dow Pharmaceuticals Inc.**, 509 U.S. 579 (1993).