

Table of Contents

INTRODUCTION	Pg.1
THE RULES OF EVIDENCE ARE RULES OF ADMISSIBILITY	Pg.1
RELEVANCE DOES NOT ALWAYS GUARANTEE ADMISSIBILITY	Pg.2
BALANCING PROBATIVE VALUE AND POTENTIAL FOR PREJUDICE	Pg.3
DEFENDANTS NOT ALLOWED TO SPEAK FOR JURY WHERE I.D. WAS BASED ON SIGHT NOT SOUND	Pg.3
AN OBSERVATION ABOUT VOCAL EVIDENCE	Pg.5
ANTHONY CAPPOZZI	Pg.5
PRIOR BAD ACTS	Pg.6
IMPEACHMENT	Pg.7
CIRCUMSTANTIAL EVIDENCE CASES	Pg.7
AN ENTIRELY CIRCUMSTANTIAL EVIDENCE CASE: MURDER WITHOUT A BODY	Pg.8
CONDITIONAL RELEVANCE	Pg.9
FINAL THOUGHT	Pg.9

BACK TO BASICS: THE RULES OF RELEVANCE

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INTRODUCTION

One of the most fundamental rules of evidence is the RULE OF RELEVANCE which requires that evidence must be relevant to a material issue in the case to be admitted and, therefore, available to the jury during deliberations.

No evidence, whether testimonial, tangible or documentary is relevant except insofar as it tends to prove or disprove a disputed issue and enables a jury, in its collective assessment of all the facts, to decide the case one way or another.

As stated in New York Advisory Evidence Rule 4.01 (1), relevant evidence is evidence having ANY TENDENCY to make the existence of any fact that is of consequence to the determination of a proceeding (i.e., a material fact) more probable or less probable than it would be without such evidence. (See *People v Stevens*, 76 NY2d 833 [1980], *People v Scarola*, 71 NY2d 769 [1988]).

In a criminal case, the relevance of evidence is determined by assessing its relationship to one or more elements of the crime(s) charged, any defense(s) raised, thematic issues such as motive (which while not an element of the crime, may explain the defendant's conduct or impugn a witness' testimony), or, in appropriate cases, to uncharged conduct which may shed light on matters like intent, knowledge, common scheme or plan, absence of mistake or the nature of the relationship between the defendant and the victim. (*People v Molineux*, 168 NY 164 [1901]).

Advisory Rule 4.01 (2) plainly states that ALL RELEVANT EVIDENCE IS ADMISSIBLE except as otherwise provided or required by the U.S Constitution, the New York State Constitution, or the statutes (e.g., CPL Article 60-Rules of Evidence and Related Matters) or common law of this state.

THE RULES OF EVIDENCE ARE RULES OF ADMISSIBILITY

It is worth noting that, as a general proposition, the Rules of Evidence are designed to encourage admissibility over exclusion of evidence that is RELEVANT, RELIABLE (i.e., likely to be true), and NOT UNDULY PREJUDICIAL to the defendant or to the People.

As stated by the Court of Appeals in *People v Robinson*, 17 NY3d 868 (2011), "the purpose of all rules of evidence is to ENSURE THAT THE JURY WILL HEAR ALL PERTINENT, RELIABLE AND PROBATIVE EVIDENCE THAT BEARS ON DISPOSITIVE ISSUES IN THE CASE."

In Robinson, the defendant was pulled over by a police officer shortly after pulling away from the curb without signaling and the officer reportedly observed excessive smoke emitting from the tail pipe. When the defendant (the sole occupant) got out from the driver's door, he kept walking, ditched the keys, and refused to follow the officer's commands to cooperate under threat of being arrested for obstructing and resisting.

The officer decided to impound the vehicle and searched it pending arrival of the tow truck, whereupon he found a loaded revolver under the driver seat. He testified at trial that after he informed the defendant that he would be charged with criminal possession of a weapon, the defendant replied, "it wasn't armed, but that's ok because possession is 9/10ths of the law."

The defendant testified that he told the officer, "I wasn't armed with anything. I don't know what kind of games you're playing. Who's going to be my attorney because I know for a fact that 9/10ths of the law is possession."

Defense counsel then asked the defendant to explain why he said that "possession is 9/10ths of the law" but the prosecutor objected, and the court disallowed the answer.

After summations, the trial court instructed the jury on the automobile presumption under PL 265.15 (3) and the defendant was convicted of Criminal Possession of a Loaded Weapon. The Third Department affirmed (69 AD3d 973 [3d Dep't 2010]), finding that while it was ERROR to deny the defendant the opportunity to explain his statement, the error was harmless in view of what it deemed to be overwhelming evidence of guilt. (People v Crimmins, 36 NY2d 230 [1975]).

The Court of Appeals agreed that it was error but disagreed that it was harmless. The Court noted that the defendant did not own the vehicle, he had driven it (to drop another person off at the train station) for only a short time before being pulled over, and several of his family members had access to it before he used it.

In the court's view, the only evidence of the defendant's KNOWLEDGE of the gun was his statement to the officer, and since he was not allowed to explain himself, the jury was left to reconcile the automobile presumption with the officer's account of the defendant's ambiguous statement. His explanation could have rebutted the presumption sufficient to create a reasonable doubt and thus, the exclusion of this relevant evidence constituted reversible error.

RELEVANCE DOES NOT ALWAYS GUARANTEE ADMISSIBILITY

As stated in Advisory Evidence Rule 4.07, A court MAY EXCLUDE RELEVANT EVIDENCE if its PROBATIVE VALUE IS OUTWEIGHED BY THE DANGER THAT ITS ADMISSIBILITY WOULD:

1. Create UNDUE PREJUDICE to a party
2. CONFUSE the issues or MISLEAD the jury
3. PROLONG the proceedings to an UNREASONABLE EXTENT with no corresponding advantage to the offering party or
4. UNFAIRLY SURPRISE a party and NO REMEDY OTHER THAN EXCLUSION could cure the prejudice caused by such surprise. (See People v Harris, 209 NY 70 [1913]).

BALANCING PROBATIVE VALUE AND POTENTIAL FOR PREJUDICE

Once a court decides that evidence is relevant to a material issue in the case, the court must then (if an objection has been made) balance its probative value (i.e., tendency to prove a material fact) against the risk that it may unfairly prejudice the defendant, for example, by making the jury aware of his unsavory past (i.e., prior criminal acts) and thereby pave the way for a conviction based on predisposition rather than actual proof of guilt of the crime charged. (See, for example, *People v Vargas*, 88 NY2d 856 [1996]: In this “she said-he said” case of forcible rape vs consensual sex which turned entirely on credibility, it was deemed unduly prejudicial to admit evidence in the People’s case-in-chief of the defendant’s acts of sexual misconduct against others, ostensibly to prove intent. See also *People v Hudy*, 73 NY2d 40 [1988]).

In contrast, see *People v Hayes*, 97 NY2d 203 (2002) where the Court of Appeals, in this spousal rape case, held that the trial court did not abuse its discretion in its Sandoval ruling that the prosecutor would be allowed to cross examine the defendant about several similar prior convictions including sexual abuse and aggravated sexual assault. In light of the ruling, the defendant declined to testify. In the Court’s analysis, despite the similarity of the prior crimes and risk of prejudice, it would have been permissible to permit cross examination (beyond eliciting unspecified convictions) because the crimes demonstrated that the defendant placed his own interests over those of society.

Trial courts are expected to balance probative value with prejudice whether the evidence is offered by the People or by the defense. In *People v Davis*, 43 NY2d 17 (1977), the Court of Appeals held that the trial court did not abuse its discretion in denying the defendant’s attempt to have a witness (parolee) testify in surrebuttal that he had signed the signed a statement (tending to rebut the defendant’s alibi claim) under duress from the police.

The Court noted that while a party’s attempt to procure false testimony has some relevance to show that the party’s case is weak, here, there was no evidence of misconduct or falsification by the police, nor was the witness’ statement offered into evidence. As such, the proffered testimony was collateral and the potential for prejudice was deemed to outweigh its probative value.

The Court observed that relevant evidence may be denied admission if its probative value is outweighed by the danger that its introduction would prolong the trial to an unreasonable extent without any corresponding advantage or would confuse the main issue (in this case whether the defendant was the person who shot and killed a police officer during an A&P robbery), mislead the jury, unfairly surprise a party or create a create a substantial danger of undue prejudice to a party. (Citing *People v Harris*, supra).

DEFENDANTS NOT ALLOWED TO SPEAK FOR JURY WHERE I.D. WAS BASED ON SIGHT NOT SOUND

In *People v Scarola*, supra (and the companion case of *People v Merchant*), 71 NY2d 769 (1988), the Court of Appeals held that the trial court in each case did not abuse its discretion in denying the defendant’s attempt to speak for the jury to demonstrate an alleged speech impediment (which neither victim mentioned but presumably should have noticed).

The defendant in Scarola followed the victim home from work and accosted her in her apartment vestibule by putting his hand over her mouth and telling her to be quiet. When she screamed, he punched her in the mouth and said, "I have a knife. Don't make me cut your heart out." He then stole \$13.00 from her purse, punched her again and tried to usher her into the lobby where the victim cried out to a neighbor, whereupon the defendant took off. He was arrested shortly thereafter and corporeally identified by the victim.

At trial, the defendant sought to speak for the jury to illustrate his alleged speech impediment, but the court said that he could testify only if were subjected to cross examination not only about his voice but about the incident and prior convictions bearing on his credibility. The defendant declined to testify and was convicted of Robbery 2d degree. The Appellate Division affirmed the conviction.

In Merchant, the defendant presented a knife to the victim and said, "give me your wallet and I won't hurt you." He then asked her how much money she had and said, "I'll give you some time to find your money in your purse but if you don't, I'll do some work on you." He took her money and radio with headphones and warned, "don't make me have to come back and do some work on you." The defendant was arrested the next morning and the victim subsequently identified him at a corporeal line-up.

At trial, the defendant called some friends to testify in support of his claimed alibi that he was at a movie when the robbery took place. His father also testified that the defendant spoke in a very nasal tone, and a speech therapist who had recently treated the defendant testified that he spoke in a stutter and mispronounced some multisyllabic words. This witness, conceded, however, that the words used by the robber were mostly single-syllable utterances that might not reveal an impediment.

The trial court declined to permit the defendant to speak for the jury because there was too big a risk that he could mislead the jury by faking a speech problem. The defendant was convicted of Robbery 1st degree and the Appellate Division affirmed.

On appeal, the defendants argued that if the People can compel a defendant to provide non-testimonial evidence, then they should also be allowed to present such evidence as a demonstrative for the jury. The Court of Appeals held, however, that just because the in-court exhibition of a physical characteristic (e.g., a scar, birthmark, or tattoo present on the crime date) is non-testimonial in nature, does not mean that it is admissible without a showing of RELEVANCE and RELIABILITY.

The Court held that while the proffered evidence was broadly relevant, it was of dubious reliability because a speech impediment (unlike a scar), can too easily be feigned by the speaker. (Citing, *inter alia*, *People v Alvino*, 71 NY2d 233 [1987] and *US v Esdaille* 769 F.2d 104 [2d Cir. 1985]). The Court also noted that neither defendant was identified based on his voice but rather upon his physical appearance, thus rendering the voice exemplar less probative than it might have been had the victims not gotten a good look at their attackers.

AN OBSERVATION ABOUT VOCAL EVIDENCE

It could be argued, however, that the victims' failure to say anything about their attackers' manner of speech (an identifying characteristic) would surely be probative of innocence if the defendants truly spoke with a noticeable peculiarity. Perhaps a videotape or audio recording of unrehearsed speaking, preferably without the defendant's knowledge, would have been admitted since the opportunity for fakery would be eliminated and reliability enhanced.

ANTHONY CAPPOZZI

In the 1987, Anthony Capozzi, a 27-year-old west-side man was convicted by a jury and sentenced to up to 35 years in prison for the rape of three women who described their attacker as weighing about 160 pounds (Capozzi was 220 lbs.), and none of whom mentioned the prominent three-inch scar that Capozzi had on his face. The victims reportedly expressed confidence in their identifications which the jury found to be credible.

In 2007, Capozzi was cleared by DNA evidence and released from prison. The actual perpetrator turned out to be Altemio Sanchez, the so-called bike-path rapist. In 2010, Capozzi was awarded \$4.25 from the State of New York for his wrongful conviction and imprisonment. (See the National Registry of Exonerations at law.umich.edu).

Scientific research on eyewitness identification has called its reliability into question and it is common in cases where identity is in issue for experts to testify about the factors that can influence an identification, especially where the perpetrator and the victim are of different races. (See *People v Boone*, 30 NY3d 521 [2017]). In fact, trial courts are required, upon request, to give a jury instruction on cross racial identification in appropriate cases whether or not an expert has been called.

The instruction states: "You may consider whether there is a difference in race between the defendant and the witness who identified (him/her) and if so, whether that difference affected the accuracy of the witness' identification. Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race (as compared to) members of their own race... You may consider the nature and extent of the witness's contacts with members of the defendant's race and whether such contacts, or lack thereof, affected the accuracy of the witness's identification."

While Capozzi was not a cross-racial identification case, his physical features, in particular his weight and the prominent facial scar not mentioned by the victims, were clearly RELEVANT to issue of identification, and, unlike *Scarola/Merchant supra*, it would have been appropriate to permit him to display those features to the jury.

In *People v Shields*, 81 AD2d 870 (2d Dep't 1981), the Second Department deemed it error not to allow the defendant to display 14-16-inch lower abdominal scar not mentioned by the rape victim who testified that her attacker was naked from the waist down. The defendant was required to stand up in court for the victim to point out his body shape and skin color but not allowed to show his scar [which pre-dated the crime] without being cross examined about several prior convictions.

PRIOR BAD ACTS

Questions of relevance and probative value versus potential prejudice arise whenever the People seek to introduce evidence of prior uncharged crimes in their case-in-chief (*People v Molineux*, supra), or to impeach the defendant should he/she choose to testify in his/her own behalf (*People v Sandoval*, 34 NY2d 371 [1974]).

Advisory Evidence Rule 4.21 states that evidence of crimes, wrongs or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in wrongful acts. Such evidence MAY be admissible, when more probative than prejudicial, to prove: 1. MOTIVE, OPPORTUNITY, INTENT, IDENTITY, PREPARATION, COMMON SCHEME OR PLAN, ABSENCE OF MISTAKE OR ACCIDENT, OR WHEN THE CONDUCT IS INEXTRICABLY INTERWOVEN WITH THE CHARGED ACTS OR PROVIDES NECESSARY BACKGROUND INFORMATION/EXPLANATION OR TO COMPLETE THE NARRATIVE OF THE SUBJECT EVENT OR MATTER.

Where the defendant interposes a defense, the People may, on rebuttal prove the defendant's commission of other crimes that are RELEVANT and PROBATIVE to DISPROVE the defense.

In this context, prior bad act evidence may be admitted NOT to show that the defendant is more likely to have committed the charged crime (*People v Morris*, 21 NY3d 588 [2013]) but rather to establish either an element of the crime (e.g., intent) or some substantive fact that either identifies him/her as the perpetrator or demonstrates that he/she had the opportunity to commit or planned to commit (or did not accidentally) commit the act in question.

Courts are generally accommodating to the People's requests to admit such evidence (assuming there is some relevance and other evidence on the point may be wanting), but particularly so in cases of DOMESTIC VIOLENCE and SEXUAL ASSAULT where prior threats or acts of violence (or the existence of an order of protection) are admitted to explain the nature of the relationship between the parties, to complete the narrative and to establish the defendant's alleged motive and intent to exert dominance over the victim. (See, for example, *People v Case*, 2021 NY Slip Op 04868 [4th Dep't 8/26/21], *People v Workman*, 56 AD3d 1155 [4th Dep't 2008], *People v Griffin*, 111 AD3d 1413 [4th Dep't 2013]).

As noted in *People v Westerling*, 48 AD3d 965 (3d Dep't 2008), domestic violence cases are different from stranger cases because they usually involve a pattern of abuse directed at the same person (e.g., girlfriend, spouse, significant other), and courts, therefore, tend to be more receptive to such evidence.

See also *People v Bierenbaum*, 301 AD2d 119 [1st Dep't 2002]: In a DV homicide case, it is especially relevant that the marriage between the victim and the defendant was strife-ridden, thus, their history of angry words, deeds and threats was admissible to show the nature of the relationship and to demonstrate the defendant's motive to kill his wife (to prevent her from disclosing damaging information about him to his medical colleagues if he didn't meet her divorce demands) and to establish his identity as the killer (who allegedly stuffed her chopped-up remains into a suit case which was then dropped from an airplane into the ocean).

In *Bierenbaum*, the court admitted plenty of hearsay statements attributed to the victim (e.g., his alleged threats and her expressions of fear) even though they did not appear to meet any recognized exception (other than that they were made spontaneously rather than in response to questions). While courts seem to be more generous in their evidentiary rulings in abominable cases involving vulnerable

(and unavailable) victims, counsel should not hesitate to preserve the record with appropriate objections that underscore the point that evidence, however relevant, must still be presented IN ADMISSIBLE FORM to be properly received.

See *People v Meadow*, 140 AD3d 1596 [4th Dep't 2016]: In this DV homicide case, the Fourth Department held that it was ERROR to admit the victim's statements made to others that the defendant had beaten her in the past and threatened to kill her. The court rejected the People's invitation (in reliance upon *People v Bierenbaum*, supra), to carve out what amounted to a "background exception" to the rule against hearsay. Rather, in the court's view, out-of-court statements offered for their truth may be received in evidence ONLY IF THEY FALL WITHIN ONE OF THE RECOGNIZED EXCEPTIONS TO THE HEARSAY RULE AND THE PROPONENT DEMONSTRATES THEIR RELIABILITY. (Citing *Nucci v Proper*, 95 NY2d 597 [2001]).

IMPEACHMENT

In this context, the People seek the court's permission (at a Sandoval hearing) to cross examine the defendant about prior specific criminal, vicious or immoral acts which, in their view, tend to impugn the defendant's CREDIBILITY as a witness either because they reveal an untruthful bent or because they demonstrate his/her willingness to place his/her own self interest over the interests of society. (*People v Smith*, 27 NY3d 652 [2016], *People v Walker*, 83 NY2d 455 [1994]).

As with Molineaux evidence, the trial court must balance the probative value of the evidence (i.e., what it says about DEFENDANT'S CREDIBILITY) against the risk that the jury, upon hearing about his/her prior history of misconduct, will conclude that he/she is a bad person who probably committed this crime because of a predisposition toward criminal behavior. Courts generally enjoy wide latitude in making such rulings and, as with most evidentiary determinations, reversal requires a showing of a clear abuse of discretion in a case where the proof of guilt is otherwise underwhelming. (*People v Coleman*, 56 NY2d 269 [1982]).

Unlike federal court, a defendant charged in state court need not testify and suffer the slings and arrows of cross examination to preserve the argument on appeal that the court abused its discretion in its ruling on the permissible scope of the inquiry. It is enough that the ruling dissuaded the defendant from testifying. (See *People v Hayes*, supra).

CIRCUMSTANTIAL EVIDENCE CASES

The rules of relevance and reliability are the same whether the case is based on direct evidence (i.e., based on a witness's observation/perception of an event/occurrence and/or perpetrator), circumstantial evidence (of surrounding circumstances from which the jury is asked to draw certain inferences about the existence or non-existence of a fact) or both. (See *People v Bretagna*, 298 NY 325 [1949]).

Advisory Evidence Rule 4.02 (3) states that the law draws NO DISTINCTION between circumstantial evidence and direct evidence in terms of its weight or importance. Each type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the fact finder.

As noted in *People v Benzinger*, 36 NY2d 29 (1974), circumstantial evidence may, depending on the facts of the case, be weaker or stronger than direct evidence but since it only establishes ancillary facts, the jury must determine whether those facts allow it to draw a reasonable inference of guilt to the exclusion of all reasonable, innocent explanations beyond a reasonable doubt.

Subdivision 4 of this rule states that in a criminal proceeding, a defendant's CONFESSION of guilt constitutes DIRECT evidence while an ADMISSION (i.e., an inculpatory statement short of an outright acknowledgment of guilt) constitutes CIRCUMSTANTIAL evidence of guilt. In the latter case, the jury must determine whether the defendant's statement, in conjunction with other evidence in the case, gives rise to a REASONABLE INFERENCE OF GUILT beyond a reasonable doubt.

For its part, direct evidence need not be dispositive of guilt to be admissible but need only establish a relevant fact that is in dispute. (See *People v Hardy*, 26 NY3d 245 [2015]: surveillance video of defendant leaving a bar with the victim's purse was direct evidence of "taking" for larceny purposes, and the defendant's innocent explanation did not change the nature of the evidence).

AN ENTIRELY CIRCUMSTANTIAL EVIDENCE CASE: MURDER WITHOUT A BODY

In *People v Seifert*, 152 AD2d 433 (4th Dep't 1989), the Fourth Department affirmed the defendant's murder conviction despite the absence of a body (and any direct evidence that the defendant murdered his brother) because the relevant evidence established a CONTINUOUS CHAIN OF COMPELLING CIRCUMSTANTIAL FACTS (before and after the victim disappeared and his burned-out car was found on a remote country road with human blood and skull fragments nearby).

The relevant evidence included: the defendant's expressed animus toward his brother, using an unwitting party (a friendly waitress) to lure the victim to the remote site upon the false pretense of meeting an out-of-state contractor to set up a big construction project, the defendant taking his gun for cleaning and retrieving it in time for the shooting, the victim telling a diner patron of his meeting on the morning in question, the victim's cigarette lighter found under the driver seat of his torched car, the blood at the scene containing a rare blood type also found in an old sample of the victim's blood (as reflected in VA hospital records), human blood found in the defendant's van which he abandoned in a supermarket parking lot, fibers from the defendant's van found at the scene, the defendant lying to the police about his movements and failure to mention the plan to get his estranged brother out to the site (where neighbors heard a gunshot during the relevant time period).

In upholding the defendant's conviction, the court stated that the law does not require overt proof of death and of the criminal agency that caused it. Rather, the *corpus delicti* (i.e., evidence of criminality) may be established by circumstantial evidence, and the failure to locate the victim's body was not an impediment to conviction as long as the evidence is sufficient to prove beyond a reasonable doubt that the defendant intentionally killed his brother. In the court's view, the evidence created a reasonable inference of guilt and excluded any innocent explanation beyond a reasonable doubt. (Citing *People v Sanchez*, 61 NY2d 1022 [1984]).

Similarly, in *People v Bierenbaum*, *supra*, where the victim's remains were never found nor were there any eyewitnesses to the killing, the court, citing *Seifert* and following *People v Benzinger*, *supra* (36 NY2d at 32), assumed that the jury credited the People's witnesses and accorded their evidence the full

weight it deserved, and did not view these factors as creating an impediment to a conviction. (Citing *People v Lipsky*, 52 NY2d 560 [1980]).

CONDITIONAL RELEVANCE

Sometimes, a party may wish to introduce evidence the relevance of which depends on the admission of other (foundational) evidence which may or may not be available beforehand (e.g., where the ballistics witness who test fired the gun testifies before the officer who took it from the defendant). In such case, the court may permit the testimony (out of sequence) SUBJECT TO CONNECTION with the foundational testimony that establishes its relevance. (See Advisory Evidence Rule 4.05 and *People v Caban*, 5 NY3d 143 [2005]).

While trial courts have leeway to modify the order of proof, counsel must make sure that the necessary connection has been made and if not, MOVE TO STRIKE the evidence that was admitted provisionally. (*People v Stone*, 29 NY3d 166 [2017]). In some instances, where undue prejudice arises from the conditional receipt of evidence that was not tied together, a motion for a mistrial may be in order.

FINAL THOUGHT:

In order to make a proper objection or an offer of proof based on relevance, counsel must be fully familiar with the elements of proof and the law of the case because, as noted at the outset, relevance is relative to the purpose for which the evidence is offered. And, even if the proffered evidence bears some relevance to a material issue in the case, the next step is to determine whether its probative value is outweighed by the prejudice its introduction may cause in terms of confusing or misleading the jury to decide the case on an improper basis such as propensity over proper proof of the crime charged.

When all is said and done, the Rules of Evidence come down to this: If evidence is relevant because it tends to prove or disprove a material fact and is reliable because it is likely to be true (and in proper form), and it is not unduly prejudicial to one side or the other, it should be admitted for the jury's consideration. If not, it has no business in the case.