PAY NO ATTENTION TO THE MAN BEHIND THE CURTAIN (OR THE REALLY BAD PROOF YOU JUST HEARD)

I often claim, in Evidence lectures, that Rule 105 is the most powerful of the rules. Why? It justifies admission of almost any piece of proof, no matter how much collateral damage it carries, because "[t]he presumption that jurors follow limiting instructions," *Samia v. United States*, 599 U.S. 635, 646 (2024), is an article of faith in the law. But legal history and science undercut this dogma, and as advocates we need to know both what the law is and where it is vulnerable to challenge based on research.

This issue came to the fore in an *Amicus* Brief this author contributed to in a case where, during a recorded police interrogation, the Detective is heard saying "I know that you were right there" and "We're quite confident we have the right person here." The question being briefed was how to remedy such situations, because the only current option was to tell jurors 'don't use those words for their truth but to explain how the suspect was questioned and then responded.' The brief urged redaction of taped interrogations because, in our view, a limiting instruction could not work. The balance of this BRAIN LESSON is from the Brief and its discussion of the fallacy of the *Samia* presumption, slightly edited for this article.

THE BRIEF

The presupposition that jurors can indeed pay no attention to the man behind the curtain has at times been recognized by jurists as questionable, with the most notable instance being Justice Jackson in 1949: "The naïve assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). The Supreme Court cited Justice Jackson's admonition approvingly nearly twenty years later. *See Burgett v. Texas*, 389 U.S. 109, 115 n.7 (1967) ("What Mr. Justice Jackon said in *Krulewitch* . . . in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crimes. . . .").

Even when endorsing the proposition, some jurists acknowledge the difficulty a juror will have in following the direction.

> it is difficult to set aside opinions that arise naturally and to confine evidence of an inflammatory nature to a purpose whose limitations conflict with intuitive thought processes. I have no doubt that jurors across this Commonwealth are capable of rising to this challenge, and that they do so on a daily basis in our courtrooms. This does not, however, obviate the fact that putting aside such innate reactions is a daunting task for any person.

Commonwealth v. Hicks, 156 A.3d 1114, 1157-58 (Wecht, J., dissenting).

Indeed, courts have long recognized that certain forms of evidence are so prejudicial that limiting instructions are an insufficient remedy and, instead,

preclusion is required. In dealing with the admission of an unredacted confession of a non-testifying codefendant, the United States Supreme Court explained:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Bruton v. United States, 391 U.S. 123, 135-36 (1968) (internal citations omitted).

The presumption that jurors can dutifully follow limiting instructions was developed nearly 150 years ago. Pennsylvania Co. v. Roy, 102 U.S. 451, 459 (1880)) ("The presumption credits jurors by refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court."). This, of course, was at a time when there was no scientific research on cognitive biases or the ability of lay jurors to comprehend and apply legalistic jury instructions. Today, social science confirms that a traditional limiting instruction cannot remedy the disclosure of improper police opinion testimony.

As explained more than a decade ago, "[t]here are two well-known facts about evidentiary instructions of both varieties. The first is that our system relies heavily on these instructions. The second is that they do not work." David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407,

408 (Mar. 2013). Extensive research from over several decades confirms that, in certain scenarios, judicial instructions do not adequately cure jurors' exposure to unfairly prejudicial evidence. *See, e.g.*, Rochelle Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Human Behav. 37, 47 (1985) (concluding that "the presentation of the defendant's criminal record . . . increases the likelihood of conviction, *and . . . the judge's limiting instructions do not appear to correct that error*[] [because] [p]eople's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it" (emphasis added)); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psychol. Pub. Pol'y & L. 677, 677, 703 (Sept. 2000) (finding that "the majority of extant empirical research indicates that jurors do not adhere to limiting instructions" and that they are at best "relatively ineffective" and at worst may backfire, causing jurors to pay *more* attention to inadmissible evidence).

Perhaps the most important compilation of such research is found in Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & Human Behav. 469, 475 (2006). Reviewing over 40 studies, Steblay and colleagues concluded that the science

showed the inadequacy of general limiting instructions, particularly those that did not explain to the jury the reasoning behind the instruction:

> We have learned from these data that when inadmissible evidence ["IE"] does make a significant impression on jurors, a corrective judicial admonition does not fully eliminate the impact. Both defense-slanted and prosecution-slanted IE retained a significant impact on verdicts even after judicial admonition. This effect, although small, was quite robust. For pro-prosecution IE, a stronger effect (i.e., less success of the instruction) was associated with judicial instructions that failed to provide a reason for inadmissibility or justified the admonition with a statement that indicated that the evidence was illegally obtained.

Id. at 486. The overall assessment was that "[t]aken as a whole, it is clear that judicial instructions do not effectively eliminate jurors' use of inadmissible evidence." *Id.* at 487.

As to why this occurs, the reasons are several. One is reactance, a resistance to being told what *not* to do. The second is in the difficulty of understanding what is often complex and somewhat opaque language in the instruction itself. A third is that jurors process information into a narrative, and where evidence is admitted for a limited purpose, it may still be adapted for other improper purposes if it fits the story schema. *See, e.g.*, David A. Sonenshein, *The Misuse of Rule 404(B) on the Issue of Intent in Federal Courts*, 45 Creighton L. Rev. 215, 270-71 (Dec. 2011); Lieberman & Arndt, *supra*, at 694-704; Schuyler C. Davis, *No Substitution for Justice: Solving the* Bruton *Problem Through Per Se Trial Severance*, 50 U. Mem.

L. Rev. 695, 721 (Spring 2020); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 Geo. L.J. 281, 325 (Jan. 2013). As elaborated by Professor Dan Simon:

> Limited purpose instructions are premised on a belief in people's ability to exert formidable control over their cognitive processing. This assumption runs contrary to the research. Many social judgments occur automatically, and this resists conscious control. Given that turning information on and off at will is an unnatural task that is unparalleled in everyday life, it is not surprising to find that this instruction is basically ineffective in preventing the drawing of impermissible conclusions.

Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process*, 187 (Harvard Univ. Press 2012). Ultimately, a "limiting jury instruction could actually increase the prejudicial effect of unfavorable evidence against the defendant by causing jurors to increase their focus on that evidence." Sonenshein, *supra*, at 271.

OUR LESSONS?

What is the upshot? From a proponent's perspective, Rule 105 favors admissibility. From the opponent's position, four issues arise. First, an effective lawyer will try and analogize their circumstance to a codefendant confession case. Regardless, can you use science to say "Judge, under Rule 403 this must be excluded as it can't be fixed by a jury instruction." If that does not prevail, can you get a plain English instruction that explains the 'why' of inadmissibility and maybe get jurors to cabin the proof's use. Finally, can the lawyer do this themselves, in jury selection and then in closing argument – teach the jury the

harm that will be done if the proof is not limited. But don't count on anyone forgetting the man behind the curtain.