

Caught on Camera

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It seems that video cameras are everywhere, these days: at the bank, at every youth soccer game, in jails and prisons, at Wal-Mart. One often-cited (but apparently [questionable](#)) statistic suggests that Londoners are caught on camera 300 times per day. Americans, too, are videotaped frequently. Some of the cameras [belong to police departments](#), who often [use federal homeland security money](#) to purchase them, while others belong to businesses and individuals. And some events are required by law to be videotaped. For example, G.S. 15A-284.52(b)(14) requires that live lineups be recorded. Likewise, G.S. 15A-211 requires that custodial interrogations in homicide cases be recorded (though it allows audio or video recording).

Whatever your views about the prevalence of video cameras or the law's recording requirements, one thing is clear: the number of cases in which recordings are important evidence will continue to increase. I may post later about the foundation that must be established in order for such evidence to be admissible, but today, because the Court of Appeals recently decided [State v. Miller](#), a case on point, I'm going to write about the hearsay issues that arise when recordings are introduced.

Let's start with an easy example: Ollie Officer suspects Dan Defendant of murder. Ollie asks Dan to come in for an interview, and Dan agrees. Ollie records the conversation. Dan makes incriminating remarks, and at his subsequent trial, the state seeks to introduce the recording. Dan objects, acknowledging that his statements fall within Rule 801(d)'s exception for statements by a party opponent, but arguing that Ollie's questions are hearsay. How do you rule?

If you overruled the objection, give yourself a point. Ollie's questions are not hearsay because (1) they are not "statements," they're questions, and (2) they are not offered to prove the truth of the matter asserted -- they're offered to explain and provide context for Dan's responses.

The next question is harder. Suppose that during the conversation, Ollie asked Dan whether he had a blue car (the type of vehicle an eyewitness saw leaving the scene of the crime), Dan said no, and Ollie responded that he'd been by Dan's house the day before and saw him washing a blue car. Dan then "remembered" that he did, indeed, own such a car. Dan objects to playing the portion of the video that includes Ollie's statement about his trip to Dan's house. What do you say, Your Honor?

If you overruled this objection, too, give yourself another point. Ollie's statement (not a question, in this example) still isn't being offered to prove the truth of the matter asserted, it's just providing context for Dan's response. If you issued a limiting instruction, advising the jury that any statements made by Ollie should not be considered as evidence of the truth of what he said, give yourself a bonus point.

Now we're in advanced territory. What if Dan tells Ollie something that a *third party* said, e.g., "your girlfriend, Wanda Witness, says that you admitted the killing to her?" *Now* do we have a hearsay problem? The *Miller* court said no: "[T]he purported statements of co-defendants and others that were contained in the detectives' questions were not offered to prove the truth of the matters asserted therein but to show the effect they had on defendant and his response." There is some limit to this principle, though. If the state appears to be more interested in admitting the third

parties' statements than in Dan's response, courts will find a hearsay problem. See, e.g., *State v. Canady*, 355 N.C. 242 (2002).

Finally, what if Ollie tells Dan something false, like "we have your fingerprints on the murder weapon"? Is the recording still admissible? Now the answer is probably no, at least not without redaction. This isn't a hearsay problem -- Ollie's false statement certainly isn't being offered for the truth of the matter asserted -- but it is a prejudice problem under Rule 403. As the *Miller* court put it "the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that [are] inadmissible in open court." Such material should be redacted, or edited out, before a recording is presented to a jury.

Let me know if there are recurrent scenarios about hearsay and redaction that I didn't address, and I'll try to address them. And, as always, let me know if you disagree with my analysis.