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DEMONSTRATIVE EVIDENCE: THE SHOW AND TELL OF TRIAL LAWYERING

Thomas P. Franczyk

Mentor-at-Large to the

Assigned Counsel Program

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INTRODUCTION

It has been said that a picture is worth a thousand words. That is why public speakers, teachers, preachers, and the like often use visual aids of one type or another to capture and hold the attention of their audience.

Trial lawyers who are schooled in the art of persuasion understand that, by and large, people are visual learners and that while meaning can get lost in the mind-numbing monotony of droning discourse, pictures, photographs, diagrams, drawings, demonstrations, and videos can bring the story of their case to life in ways that words alone cannot.

Demonstrative evidence refers to visual, graphic, or sound aids that are used to EXPLAIN or ILLUSTRATE a witness' testimony or the presentation of the proponent's case (NY Guide to Evidence Rule 11.03[1]). As noted in *People v DelVermo*, (192 NY 470 [1908]), "it is common practice in the courts of this state... to furnish (graphic) assistance to jurors by the (use) of maps, diagrams, drawings and models, the purpose being to enable the jury use their eyes aa well as their ears...to gain an intelligent comprehension of the case."

In *DelVermo*, the Court of Appeals held that it was not error for the trial court to permit the People to introduce a MODEL of a knife that approximated the spring-action knife that was used to fatally stab the victim in the abdomen during a drunken altercation on the street following an argument in a saloon.

Although the defendant admitted to a police officer that he had stabbed the victim (and was glad of it), at trial, he denied doing so and testified that that the victim, a third party and he fell to the ground in a scrum after which the victim realized that he had been stabbed.

Although the knife that caused the victim's death was not recovered, there was plenty of testimony from witnesses who, at one time or another, had seen the defendant in possession of a knife which closely resembled the model that the prosecutor used for illustrative purposes. (There was also testimony about a similar looking blood-stained knife that was found in the bathroom of a train station to which the defendant had fled before being arrested at his sister's house).

In approving the use of the model, the Court noted that its similarity to the actual knife was vouched for by several witnesses who said that it resembled the one seen in the defendant's possession. The Court remarked that in attempting to prove the defendant's possession of such a knife, the prosecution was NOT RESTRICTED TO VERBAL DESCRIPTIONS by the various witnesses in a case where the appearance of the weapon was rather exceptional, and a much more accurate idea of its true character could be conveyed by a model rather than words alone. As the Court observed, it is enough to render a model receivable for purposes of illustration if it FAIRLY REPRESENTS the original (citing *Archer v New York, New Haven, and Hartford RR Co.*, 106 NY 589 [1907]).

It is important to note that demonstrative evidence which is used to illustrate or enhance testimony is generally NOT considered to be substantive evidence per se as it is only representational in nature.

ADMISSIBILITY

NY GUIDE TO EVIDENCE RULE 11.03 (2) states that a visual/graphic aid proffered as demonstrative evidence may be exhibited to the fact finder provided:

- a. It fairly and accurately depicts what it purports to represent (*People v Byrnes*, 33 NY2d 343 [1974]), and
- b. It HELPS the fact finder BETTER UNDERSTAND the testimony of a witness or the presentation of a party's case (*People v Mirenda*, 23 NY2d 439 [1969]: Duplicate sunglasses not necessary to help jury appreciate the witness testimony describing sunglasses left on path from crime scene through which the defendant fled after shooting the victim).

Rule 11.03(3) states, however, that the court may, in the exercise of its DISCRETION, LIMIT the SCOPE of its admissibility to a particular purpose (or to a particular defendant in a multi-party case). In such case, the court MUST provide the jury with an appropriate LIMITING INSTRUCTION and if such an instruction doesn't provide adequate protection, the court may exclude the evidence altogether.

DEMONSTRATIONS

NY GUIDE TO EVIDENCE RULE 11.09 (1) states that an in-court demonstration/experiment may, in the court's discretion, be authorized when the result thereof:

1. WILL BE PROBATIVE of an issue in the case.
2. Can REASONABLY BE CONDUCTED IN COURT under conditions SUBSTANTIALLY SIMILAR to the conditions at the time of the occurrence at issue.
3. Will not unreasonably delay or disrupt the trial and
4. Will be helpful to and will not mislead or confuse the jury.

In *People v Barnes* (80 NY2d 867 [1992]), for example, the Court held that it was not error to permit use of court officers to illustrate the relative positions of the defendant and the victim according to witness testimony regarding the shooting.

And in *People v Kendall* (254 AD2d 809 [4th Dept 1998]), the Fourth Department held that it was proper for the trial court in this shaken baby manslaughter case (wherein the defendant admitted shaking the infant twice to stop him from crying), to permit the People's expert to demonstrate the mechanism by which the child could sustain brain trauma without any visible external injuries.

In the Court's view, because the conditions and circumstances of the demonstration were SIMILAR to the original event, it was within the trial court's SOUND EXERCISE OF DISCRETION to allow the demonstration (citing, inter alia, *People v Estrada*, 109 AD2d 977 [3rd Dept 1985]).

In *Estrada*, the court held that it was not error for the trial court to permit the prosecution to recreate the fatal shooting scenario by having a person who was similar in size to the victim/driver hold a same-size shotgun as was used in the shooting while seated in the same kind of vehicle (a 1979 T-Bird) to refute the defendant's claim that the victim shot the front seat passenger from his position in the driver's seat (before the defendant wrestled the gun away and shot him).

The People contended that the defendant, while seated in the back seat, shot the victim (his ex-girlfriend/mother of his son who was on her lap) because she and her current boyfriend (the driver) would not relinquish custody of the child. A witness testified that she had heard the defendant say that he would kill them if they wouldn't give up the child.

The point of the demonstration was to show that the shotgun was too long for the driver to be able to shoot the passenger from across the front seat of the car.

The court noted that demonstrative evidence is admissible as long as the conditions thereof are SUFFICIENTLY SIMILAR to those existing at the time of the incident to make the result achieved by the test relevant to a material issue in the case (citing *People v Acevedo*, 40 NY2d 701 [1976]).

In this case, the conditions of the re-creation were virtually identical to the circumstances of the actual shooting. Therefore, the demonstration was deemed to be highly relevant to determining whose version of the shooting was more plausible.

In contrast, see *People v Cohen* (50 NY2d 908 [1980]), where the trial court was deemed to have properly excluded evidence of a prosecution-offered shooting experiment to show the effect on human skin because the People failed to establish that the animal hide into which the test shots were fired were like human skin.

As noted in *Uss v of Oyster Bay* (37 NY2d 639, 641 [1975]), "though court room tests and demonstrations are not lightly to be rejected when they play a positive and helpful role in the ascertainment of truth, courts must be ALERT TO THE DANGER that, when ill-designed or not properly relevant to the point in issue,... (they) may serve to mislead, confuse, divert or prejudice the purposes of the trial" (emphasis added).

It is worth noting that minor variations and differences between an event and a recreation/reconstruction thereof are generally NOT a basis for exclusion (*Bolm v Triumph Corp*, 71 AD2d 429 [4th Dept 1979]). It is only when such differences are CONSEQUENTIAL or UNEXPLAINABLE that they should be disallowed (*People v Cohen*, supra).

In *Bolm*, the Fourth Department held that it was error for the trial court to exclude evidence of an "impact experiment" utilizing a motorcycle gas tank which, though obtained from a motorcycle of a

different year, was similar to the original in all important respects. The variation in vintage, in the court's estimation, was a matter of weight not admissibility.

THE VOICE HAS IT

In *People v Acevedo* (40 NY2d 701 [1976]), the trial court was deemed to have properly excluded the defendant's request to test the victim's ability to identify a voice by having her listen while blindfolded to his brother speaking a couple sentences.

The victim, a hotel assistant manager, testified that a nylon stocking-masked robber and a female accomplice directed her into the manager's office where he ordered her to get on the floor while the manager opened the safe. The male robber spoke in Spanish to his accomplice and in English to the victim. He prattled on extensively over the course of 25 minutes, noting that hotel management was foolish not to have security on duty.

The victim testified that she recognized the defendant's voice from over a hundred encounters in which he spoke to her on the job. (He was a security guard at the hotel). She said she recognized a pronounced sibilance in his pronunciation of certain words such as "security."

Rather than challenge the victim's vocal recognition of the defendant's ophidian tendencies, defense counsel sought to have her listen to a few words spoken by the defendant's brother who was an on-again/off again painter at the hotel. The victim hadn't seen or heard the brother in over two years.

The trial court was deemed to have correctly rejected the defense's proposed test because it did not, in any meaningful way, approximate the circumstances of the identification of the defendant with whom she was well familiar and who spoke freely during the robbery. The defense also failed to establish how frequently she had heard the brother speak, and the proposed use of just a couple short sentences seemed more like a ploy to confuse rather than enlighten the jury on her capacity to identify the defendant based on the sound of HIS VOICE.

As such, the proposed test was found to be IRRELEVANT and UNDULY PREJUDICIAL.

See also *People v Scarola* (71 NY2d 769 [1989]), where the trial court properly declined to permit the defendant to speak in court to demonstrate his speech impediment (which the victim did not mention in describing the man who robbed her at knife point). In the Court's view, there was too great a risk that the defendant could feign a speech defect. The court also noted that the victim's identification of the defendant was based on sight, not sound.

The court noted that when faced with an offer of demonstrative evidence, the trial court must exercise its sound discretion and decide based on the NATURE of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice (citing *Uss v Town of Oyster Bay*, supra at 639).

FINAL THOUGHT

Demonstrations, illustrations, and other visual illustrations can be effective ways to show a jury how, for example, a defendant (in a self-defense case) received defensive wounds (e.g., to his forearms) before stabbing the victim, how a stab wound was inflicted (e.g., downward thrust or sideways slashing), the relative positions of shooter and victim when a weapon was discharged, whether a particular theory of

causation is supported by the physical evidence (e.g., *People v Estrada*, supra), how (and at what speed) a vehicle traveled before, during and after impact (e.g., accident reconstruction video), what type of weapon was used to inflict injury (e.g., a jagged or smooth-edged object or a blunt instrument), how a projectile travelled at a shooting scene and/or into and through the victim's body.

The possibilities are limited only by the imagination and the rules of evidence which do not require exactitude in replication, but a fair and reasonable representation of the object, person or activity depicted so that the evidence will be RELEVANT to and descriptive of important facts in the case (*Bolm v Triumph Corp*, supra).

Such evidence can be powerfully persuasive not just on direct examination but also on cross examination and in closing arguments where counsel can SHOW (rather than just tell) the jury why a particular (desired) conclusion is warranted and a contrary (unhelpful) one is refuted by the evidence in the case.