

11.03. Demonstrative Evidence

(1) Definition. “Demonstrative evidence” refers to a visual, graphic, or sound aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case.

(2) Admissibility. A visual or graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided:

(a) it is a fair and accurate depiction or representation of what it purportedly depicts or represents; and

(b) it helps the factfinder to better understand the testimony of a witness or the presentation of a party’s case.

(3) The court may, in the exercise of its discretion, exclude the offered demonstrative evidence pursuant to Guide to New York Evidence rule 4.07.

Note

Subdivision (1) broadly defines “demonstrative evidence.” Any type of visual, graphic, or sound aid that is capable of explaining or illustrating oral testimony or the presentation of the proponent’s case may constitute demonstrative evidence. In particular, New York has long approved the admission in evidence of a map, diagram, drawing, photograph, model and similar demonstrative evidence when the evidence is properly authenticated, is relevant to a particular issue, and would assist the finder of fact in understanding the case (*see People v Del Vermo*, 192 NY 470, 482-483 [1908] [model of knife]; *Hinlicky v Dreyfuss*, 6 NY3d 636, 645-647 [2006] [flow diagram]; *People v Russell*, 79 NY2d 1024, 1025 [1992] [bank surveillance photographs]; *People v Acevedo*, 40 NY2d 701, 704-705 [1976] [voice identification test]; *People v Mariner*, 147 AD2d 659 [2d Dept 1989] [in-court demonstration as to ability to observe drug transaction at a distance with binoculars]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715 [2d Dept 1986] [out-of-court reconstruction of accident]; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] [computer generated animation of accident]).

In *Del Vermo*, the Court of Appeals recognized the general usefulness of demonstrative evidence. The Court held that the trial court ruling allowing the People to place before the jury a knife as a “model” of the knife allegedly owned by the defendant was not error. The Court reasoned that the “district attorney was not restricted to verbal descriptions by the various witnesses in a case where the construction of the instrument was somewhat exceptional, and a much more accurate idea of its true character could be conveyed to the jury by means of a model than by word of mouth” (192 NY at 482). “It is a common practice in the courts of this state and probably throughout the Union to furnish such assistance to jurors by the employment of maps, diagrams, drawings and photographs as well as by models, the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case” (*id.*).

Normally, “real evidence” is admitted for the truth of what it represents; on the other hand, “demonstrative evidence,” while probative, is not necessarily admitted for its truth but rather as an “aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case” (Guide to NY Evid rule 11.03 [1]; *see e.g. Hinlicky*, 6 NY3d at 645-646).

Subdivision (2) sets forth the foundation requirements for demonstrative evidence.

Subdivision (2) (a) requires authentication of the demonstrative evidence, that is, the proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represent (*see People v Byrnes*, 33 NY2d 343, 347 [1974] [sufficient authentication shown where witness with personal knowledge identified the subjects and verified that the photographs accurately represented the subjects]; *People v Del Vermo*, 192 NY 470, 482-483 [1908] [“(I)t is enough to render a model receivable for purposes of illustration if it fairly represents the original object”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [“(D)rawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence”]; *People v Kendall*, 254 AD2d 809 [4th Dept 1998] [expert witness was properly allowed to demonstrate mechanics of Shaken Baby Syndrome to explain how an infant could sustain massive brain injury with no apparent external body trauma]).

Notably, the offered demonstrative evidence need not be identical in all respects to what it illustrates or explains (*Del Vermo*, 192 NY at 482-483; *Flah’s, Inc. v Rosette Elec.*, 155 AD2d 772, 773 [3d Dept 1989] [“In our view, the subject diagram was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue”]; *Norfleet v New York City Tr. Auth.*, 124 AD2d 715, 716-717 [2d Dept 1986] [“The circumstances under which the (accident reconstruction) was conducted were sufficiently similar to those existing at the time of the incident to make the result achieved by the test relevant to the

issues”]). Variations or differences which are minor and inconsequential are not a basis for exclusion (*see Bolm v Triumph Corp.*, 71 AD2d 429, 438-439 [4th Dept 1979]).

Differences that cannot be explained or shown to be inconsequential, however, may preclude the proffered demonstrative evidence (*see People v Cohen*, 50 NY2d 908, 910 [1980] [trial court erred in admitting results of test-firing of a weapon at animal skins where there was no proof that the skins of the test subjects and that of the human victim were similar]; *but see Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [the trial court “might have been justified in forbidding (defendants’ counsel’s) demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs’ legitimate interests could be sufficiently protected by affording plaintiffs’ counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration”]).

Subdivision (2) (b) restates Court of Appeals precedent that requires a court to determine that the demonstrative evidence will be helpful to the trier of fact in better understanding the testimony of a witness or the presentation of the proponent’s case (*People v Mirenda*, 23 NY2d 439, 453 [1969] [Court indicated that proffered demonstrative evidence is unnecessary where the trier of fact does not need its assistance in understanding the admitted evidence; thus, in the case before it, the Court noted “there was no need to offer a model because the particular object being discussed—to wit sunglasses—is not so difficult to visualize that a model is required to assist the jury in understanding the witness’ testimony”]; *Archer v New York, New Haven & Hartford R.R. Co.*, 106 NY 589, 603 [1887] [maps, diagrams and drawing are “uniformly received . . . to enable courts and juries to comprehend readily the question in dispute”]; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, 937 [4th Dept 1989] [“The trial court has broad discretion with respect to the admission of such evidence, especially with reference to the question of the similarity of conditions. The most broadly stated or recognized standard is whether the evidence tends to enlighten rather than to mislead the jury”]; *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239, 242 [2d Dept 2004] [the Court held that the trial court erred “in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert’s opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident”]).

Subdivision (3) makes clear that the admission of demonstrative evidence is subject to the discretion of the court and that such discretion may be exercised to exclude the proffered demonstrative evidence when its probative value is outweighed by countervailing factors as set forth in Guide to New York Evidence

rule 4.07 (*People v Acevedo*, 40 NY2d 701, 704 [1976] [(T)hough tests and demonstrations in the courtroom are not lightly to be rejected when they would 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 at issue, instead of being helpful they may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial. When there is such a threat, the trial court itself must decide in the exercise of a sound discretion . . . whether the value of the evidence outweighs its potential for prejudice”]; *Uss*, 37 NY2d at 641 [where the proffered demonstrative evidence is “deceptive, sensational, disruptive of the trial, or purely conjectural” it should be precluded]).