



# Demonstrative Evidence

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# Topics

- What is Demonstrative Evidence?
- Why use Demonstrative Evidence?
- Foundations for Demonstrative Evidence
- Challenges to Demonstrative Evidence
- Examples of Demonstrative Evidence

# What is Demonstrative Evidence?

- Demonstrative Evidence is NOT the real thing involved in the case, but represents the real thing or communicates information about the case.
- Used to illustrate witness's testimony to make it more comprehensible.
- Examples:
  - Photographs, Video, Models
  - Maps, Drawings, Animations, Diagrams
  - Replica and Facsimile items
  - Pedagogical Exhibits (charts, summaries, etc.)



# What is Demonstrative Evidence?

- Real Evidence, by contrast, is the thing involved in the case.
- Examples:
  - Drugs
  - Weapons
  - Documents





# Why Demonstrative Evidence?

- “a picture is worth a thousand words” Frederick R. Barnard (1921)
- We live in a visual society.
  - 98% of population have at least one television
  - Average person watches 25-30 hours a week
- CSI Effect
  - Jurors expect to see exhibits, scientific evidence, and visuals
- Memory Retention and Persuasion
  - People learn faster, understand more, and retain more when they *see* and *hear* information at the same time.
  - Psychologically, studies have shown that presentations with visual aids were 43% more persuasive than ones that did not have visual aids.
  - Your exhibits can accompany jurors back into deliberations!

# Why Demonstrative Evidence?

**Which has more impact?**

- “The guy had a knife that he held in his right hand. The blade was about 3” long and it had a black handle. He pointed it at me and screamed ‘Do you want to die!’ He looked crazy and his face, I will never forget it.”

**Statement plus Demonstrative Evidence**





# Why Demonstrative Evidence?

- Trial Visuals are very important because they:
  - Inform the jury about the facts of the case
  - Clarify evidence that might otherwise be difficult to describe
  - Memorable because they are seen and heard, and many times taken with jurors to deliberations
  - Persuasive because they continue to be “your” witness even after the trial is complete and deliberation has begun.

# Why use Demonstrative Evidence?

- Opening Statements

- Studies have shown that despite admonitions not to decide the case until all the evidence is heard, up to 90% of jurors decide how they will vote after opening statements. And they rarely change their mind.
- An attorney may use any exhibit in opening statement if there is a good faith basis for admissibility. If the exhibit is subsequently received in evidence, there can be no error.
  - See 16 A.L.R. 4<sup>th</sup> 810



# Foundations

- Foundation:

- The requirement that the evidence to be admitted has been satisfactorily proven to be relevant (URE 401), fulfills any other requirement set for in the Rules of Evidence (i.e., hearsay), and there has been enough information to “support a finding that that the item is what the proponent claims it is.”  
U.R.E. 901(a).



# Foundations

- Procedure for Handling Exhibits
  - Mark the exhibit (do this before testimony)
  - Establish Relevancy
  - Show Exhibit to Opposing Counsel
  - Lay Appropriate Foundation
  - Offer the Exhibit into Evidence
    - Voir Dire: may be allowed during direct about exhibit
  - Court Ruling on Admission
  - Publish to Jury





# Foundations

- Source is Irrelevant for demonstrative evidence
  - Does not have to be created by the witness
  - Witness does not need to know how, when, or who created the evidence
  - No Chain of custody requirement
- Foundational Requirements (generally)
  - Evidence is “relevant”
  - Evidence is a “fair and accurate depiction” of something at the relevant time the witness is testifying about (authentication)
    - See U.R.E. 901(b)(1) *Testimony by a Witness with Knowledge*: “testimony that a matter is what it is claimed to be”
  - Evidence would be “helpful” to explain testimony



# Foundations

- Foundational Requirements
  - True accuracy seldom matters so long as the *witness* testifies that it is accurate to the way he or she remembers.
    - It does not need to be to scale, or dimensional, etc.
  - All witnesses that use the same exhibit should testify to its accuracy according to their recollection.
  - Exhibit need not be created or taken at the time of the crime



# Foundations

- Foundational Requirements
  - Compare with “Real Evidence”
    - Chain of Custody: requirement that a tangible object is the same object from the relevant time and that it is in the same or similar condition as it was at the relevant time.
    - Demonstrate it has not been tampered with, altered, substituted, added to, subtracted from, etc.
    - An account of the items passage from person to person and what happened to it.
    - Important for items that have been tested (i.e., drugs).
    - Most weaknesses go to the weight to be given to the evidence and the subject of argument.

# Foundations

- Other Considerations:
  - Is it too large? Too small?
  - View obstructed?
    - Set it up and look at it from jury box or bench
  - Create a Record! (“The knife was this big and he held it like this.”)
    - What does that mean?
    - Transcripts do not tell us anything meaningful without verbal descriptions





# Foundations

- Other Considerations:
  - Looping: (Can get important parts of story more than once)
    - Have witness describe event, then use visual to describe it again
  - Mark exhibit with relevant locations
    - Mark and write on exhibit by witness: “saw Jimmy point gun” written on exhibit to show where this occurred.
    - Goes to jury and continues to persuade for you!



# Demonstrative Evidence Challenges

- Challenges to Foundation
  - Witness is not capable of testifying it's "fair and accurate" (U.R.E. 602 and 702)
    - Witness lacks personal knowledge
    - Knowledge required is that of an expert, which the witness is not qualified
- Alteration: potential that exhibit has been changed or altered from original condition
  - Example: photograph has been cropped or darkened



# Demonstrative Evidence Challenges

- Rule 403 Based Challenges:
  - “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .”
  - Examples:
    - Gruesome or Dramatic Photographs /Video
    - Evidence is objectively inaccurate (misleading)
      - Lighting, Distances, Dimensions (ex., fisheye lens)
      - Distorts perception



# Demonstrative Evidence Challenges

- Rule 403 Based Challenges:
  - State v. Stapley, 249 P.3d 572 (Utah App. 2011): held that admission of 8 x 10 photos showing gaping wounds inflicted by ax wielding assailant were properly admitted to show intent and assess claim of accidental infliction of injuries.
  - State v. Lafferty, 749 P.3d 1239 (Utah 1988): held that the admission of photographs of murder victim's bodies (mother and baby in crib) and wounds was error, but held to be harmless.
    - “there is no legitimate need for the gruesome photographs of a homicide victim's corpse that prosecutors usually seek to introduce.”
    - See Addendum to this presentation collecting cases



# Demonstrative Evidence Challenges

- Rule 403 Based Challenges:
  - Gruesome Photograph Analysis:
    - Is the photograph relevant?
    - Is the photograph gruesome?
    - If gruesome, then STATE must show the probative value of the photograph **SUBSTANTIALLY** outweighs the danger of unfair prejudice. (“unusual probative value”)
    - If not gruesome, the DEFENDANT must show the risk of unfair prejudice **SUBSTANTIALLY** outweighs the probative value of the photograph



# Demonstrative Evidence Challenges

- Rule 403 Based Challenges:
  - Ways to deal with potential gruesome photos
    - Limit the number of photographs
    - Don't duplicate injuries, etc.
    - Avoid the mass quantities of blood or other tissue
    - Avoid enlarging them beyond 8" x 10"
    - Avoid over publishing or emphasizing them
    - Do not distort or over emphasize the extent of injuries
    - Can the particularly relevant point be made in other ways that the use of a "gruesome" photo which do not carry the risk of unfair prejudice?
    - Are the facts shown disputed by the Defendant?



# Demonstrative Evidence Challenges

- Rule 403 Based Challenges:
  - “A photograph is not gruesome, however, merely because it is unpleasant to view.” State v. Jiron(1994)
  - “Gruesome”: means ‘something much stronger than being offensive, embarrassing, or graphic.... It inspires horror or repulsion.’ (“grisly” or “hideous”).
  - Factors: (1) whether the photograph is in color (-) or black and white (+); (2) whether it is an enlargement or close-up shot (-), (3) when the photo was taken in relation to the crime; (4) whether other details in the photo, aside from the victim, exacerbate the photograph’s impact on the viewer.

# Examples of Demonstrative Evidence

- Photographs:
  - Foundational Questions
    - Did you have the opportunity to see the (insert location/object/etc.) at the time of the (insert event)?
    - Do you remember how it looked that day?
    - Showing you exhibit number 1, do you recognize what it is?
    - What do you recognize it as?
      - Do you know when this picture was taken? When was it taken?
      - Do you know who took this picture? Who took the picture?
      - Do you know how that person took this picture? How was the picture taken?
      - Have you seen this picture before?



# Examples of Demonstrative Evidence

- Photographs:
  - Foundational Questions
    - Would it be helpful to you to use this exhibit when explaining your testimony?
    - Does it fairly and accurately show the (insert location) at the time of the (insert event)?
    - Your Honor, the State moves to admit Exhibit 2 into evidence.
    - May we publish Exhibit 2 to the jury?



# Examples of Demonstrative Evidence

- Videos:
  - Foundational Questions
    - Same as for photographs, except add:
    - Have you viewed this video before coming to court today?
    - Does it fairly and accurately show.....



# Examples of Demonstrative Evidence

- The “Silent Witness”
  - What if no one was there to witness the picture/video when it captured the relevant images?
    - Example store security video captures a nighttime burglary
  - Utah Rule of Evidence 901(b)(9)  
Authentication/Identification Requirements
    - *Process or System*: Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result





# Examples of Demonstrative Evidence

- The “Silent Witness”
  - Witness: Manager or Store Security Person (someone familiar with security system)
  - Questions:
    - Foundational questions about witness (position, duties, access to security system, experience with system, how long had system, etc.)
    - Describe security system
      - Motion sensor? Timer? Continuous?
      - Cameras, where information stored,
      - Tamperproof? Access?



# Examples of Demonstrative Evidence

- The “Silent Witness”
  - Questions:
    - Was the system working properly on July 15, 2013 at 2:14 A.M.?
    - Have you observed the system record events previously to this one? How often do you check for proper operation?
    - Has it done so accurately?
    - Does it track the date? Time? Is it accurate?
    - Did the system capture the events occurring in your store on July 15, 2013?

# Examples of Demonstrative Evidence

- The “Silent Witness”
  - Questions:
    - Showing you Exhibit 4, do you recognize this item?
    - What do you recognize it as?
    - How do you know that this is the video from your security camera? (shows something unique about store (URE Rule 901(b)(4))
    - Have you seen this video before today?
    - Did it fairly and accurately capture the events that happened on July 15, 2013 at and around 2:14 A.M.?
    - Has this video been altered from the original footage that you observed when the video was originally viewed?
    - **MOVE TO ADMIT, PUBLISH, AND EXPLAIN**





# Examples of Demonstrative Evidence

- Sound Recordings:
  - Examples: Telephone recordings, face-to-face (wired witness), etc.
  - Foundation:
    - Competent Witness with firsthand knowledge testifies that (usually one person in the conversation):
      - Fairly and accurately recorded the conversation;
      - Identify voices on recording (at least relevant ones); AND
      - No alteration or tampering.
    - See URE 901(b)(6): *Telephone conversations*: requires that (1) call made to number assigned to person; and (2) if person, self identification or other circumstances showing person was the one called.

# 911 Call Sample



# Examples of Demonstrative Evidence

- X-Rays, Sonograms, CAT scans, etc.
  - Medical or Scientific images that show details invisible to naked eye.
    - Generally Accepted by relevant medical/scientific communities, so 702 testimony not required to lay foundation underlying process
  - Foundation:
    - Testimony from witness with firsthand knowledge of necessary facts of what the x-ray shows, that it is fair and accurate, and the procedures produce accurate results; OR
    - See URE 803(6) (business record) and URE 902(11) (business record)



# Examples of Demonstrative Evidence

- Diagrams, Models, Maps, and Drawings
  - Foundation:
    - Foundation witness that has personal knowledge of how the real thing looked at the relevant time;
    - Witness can state the exhibit “fairly and accurately” represents the real thing; AND
    - Witness can state the exhibit would “help” explain what happened.
  - Tips for their use
    - Make sure the witness is familiar with the exhibit BEFORE trial
    - Avoid having the witness draw on the spot in court
      - Avoid questioning the witness while drawing
    - Difficult to admit the Court’s marker board



# Examples of Demonstrative Evidence

- Computer Animations/Simulations:
  - May be visual creation of expert opinion of events
  - May be visual creation of witnesses statements
- Foundation:
  - *Expert Testimony* required (see Rule 702), to prove qualified, relevant and reliable, helpful to jury, and accurately applied to facts of the case.
  - *Expert* will testify about how visual was created, how its accuracy was maintained, and how the animation “fairly and accurately” illustrates opinion.
- Cautionary Jury Instruction: jury should not consider the animation as a re-creation of actual event, but only opinion of expert if not based upon witness statements.
- Simulations: if based upon witness’s statement, then must use have expert testify that data used was reliable, that the simulation program is capable of fairly and accurately using data to produce and accurate result, witness should verify too.





# Computer Simulation

- Play Rico Perea Animations
- See State v. Perea, 2013 UT 68;
  - Holding:
    - Animations: sufficient evidence to support the claim that it accurately depicts a witness's testimony as well as any uncontested relevant facts.
      - Not require: foundation about who created it, when, how, based upon facts
    - Simulations: must meet a higher threshold showing of authenticity than that required for demonstrative evidence. (Substantive Evidence)

# Examples of Demonstrative Evidence

- Similar Objects: (knife, gun, etc.)
  - Demonstrative evidence may be relevant and helpful if it assists the trier of fact in understanding the nature of the crime charged or how it occurred.
  - State v. Royball, 710 P.2d 168 (Utah 1985): upheld the admission of a substitute knife and ruler to illustrate victim's testimony about description of knife and the threatening manner of use.
    - Rejected 403 argument claiming the verbal description was enough and that the substitute knife was too prejudicial.



# Examples of Demonstrative Evidence

- Summaries: (URE 1006)
  - “Voluminous writings, recordings, or photographs that cannot be conveniently examined in court” may be proven by “summary, chart, or calculation to prove the content.”
- Requirements:
  - Make originals or duplicates available for other side
  - May be ordered produced in court
  - Show inconvenience to court through testimony
  - Practice Pointer: obtain stipulation or file motion in limine



# Examples of Demonstrative Evidence

- Reenactments:
  - Almost unavoidable in testimony on some level
    - Example:
      - Q: How did he hit you?
      - A: He punched me in the face with his right hand like this.
  - Foundation:
    - Demonstration is relevant
    - Would not endanger or create undue sympathy
      - No alternative means of proving the same facts with the same degree of accuracy
      - Similarity to original conditions and circumstances of original event.
    - Avoid using the Defendant! (See O.J. Simpson).



# Examples of Demonstrative Evidence



# Reenactment



# Examples of Demonstrative Evidence

- Pedagogical Exhibits: Summarizes or clarifies other evidence or testimony.
  - Used to summarize complex testimony
    - Example: scientific steps in testing evidence, voluminous telephone calls in wiretap case, etc.
  - Can be created during testimony or in advance
  - Could be considered Argumentative if overdone.
    - Example: Elements checklist where prosecutor would check the box during testimony and evidence as trial progressed



# Examples of Demonstrative Evidence

- Closing Argument Visuals:
  - Pedagogical summaries of evidence and elements of crime are useful for closing arguments!
  - Help the prosecutor cover the elements, organize thoughts, be more dynamic, more persuasive, increase retention, etc.

