

11.09. Demonstration or Experiment

An in-court demonstration or experiment may, in the discretion of the court, be authorized when the result of the demonstration or experiment will be probative of an issue in the case; can reasonably be conducted in court under conditions substantially similar to the conditions at the time of the occurrence at issue; will not unreasonably delay or disrupt the trial; and will be helpful to, and will not mislead or confuse, the jury.

Note

This section is derived from decisional law (*see People v Barnes*, 80 NY2d 867, 868 [1992] [“The trial court did not abuse its discretion in allowing a demonstration in which court officers portrayed the defendant and the victim for the limited purpose of illustrating their relative positions, according to the witness’ testimony, at the time of the shooting”]; *Uss v Town of Oyster Bay*, 37 NY2d 639, 641 [1975] [“the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural”]; *People v Buchanan*, 145 NY 1, 26 [1895] [“As the theory of the prosecution was that morphine was then given (to kill the deceased), it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; (and) that the taste would be bitter (accounting for the victim’s reaction on taking the drug)”]; *see also* Barker & Alexander, *Evidence in New York State and Federal Courts* § 11:18, *Experiments and Demonstrations* (2d ed); Michael J. Hutter, *Admissibility of Demonstrations and Experiments*, NYLJ, Apr. 1, 2020).

In general, as *People v Acevedo* (40 NY2d 701, 704-705 [1976] [citations omitted]) explained, “though 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 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.”

In *Acevedo*, the identification of the defendant as a masked robber was based on the complainant’s recognition of his voice on the day of the robbery, based on “her excellent prior knowledge of his voice but also on 20 to 25 minutes of conversation during the robbery itself” (40 NY2d at 705). The court properly denied a defense proposal for a voice identification “test” of the complainant’s ability to identify the voice of the defendant’s brother. The test “would not have duplicated the circumstances which surrounded [the complainant’s] voice identification of the defendant” (*id.*). The test of the complainant’s ability to recognize the voice of defendant’s brother “was to take place two years after she had last heard it”; there was no proffer of the number of interchanges the complainant had with the brother; and the identification of the brother’s voice was “to depend on the sound of two short sentences alone” (*id.*). *See also People v. Scarola*, 71 N.Y.2d 769 [1988] [voice exemplars were not admissible because “the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect”].

The probative value of the evidence may outweigh any potential for prejudice from inconsequential dissimilarities; in that instance the dissimilarities affect the weight of the evidence, not its admissibility (*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”]).

Care must be taken, however, in determining that the dissimilarities are inconsequential (*see Styles v General Motors Corp.*, 20 AD3d 338, 341 [1st Dept 2005, concurring op] [“While the test conditions need not be identical, there must be sufficient similarity to permit the inference that the results of the experiment shed light on what occurred. . . . Where (the proponent of the test) fails to make the necessary showing of similarity, the experimental evidence must be excluded”]; *People v Cohen*, 50 NY2d 908, 910 [1980] [“If at the new trial the People offer

(again) to show the effects of a gun shot from this weapon on animal tissue, they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim”]).