

June 2021

## Real Evidence in Criminal Law

Albert Brenman

Robert Rosnik

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Albert Brenman & Robert Rosnik, Real Evidence in Criminal Law, 29 Dicta 261 (1952).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

## REAL EVIDENCE IN CRIMINAL LAW

ALBERT BRENNAN AND ROBERT ROSNIK\*

Demonstrative or real evidence is evidence addressed directly to the senses without the intervention of witnesses, as by actual sight, hearing, or taste. In criminal law such evidence is inadmissible if it explains no fact and is not relevant to any disputed issue. Models, casts, and other reproductions of relevant objects may be used to illustrate oral testimony.<sup>1</sup> In this article an attempt will be made to point out various types of real evidence that the Colorado Supreme Court has held admissible.

### REAL EVIDENCE WHICH FORMS PART OF THE TRANSACTION

Articles which form a part of the transaction or which serve to unfold or explain it may be accepted in evidence if they are properly identified and are in substantially the same condition as at the time of the offense.

In *Cliff v. People*<sup>2</sup> where the defendant, a bank president, was being prosecuted for embezzlement, certain bank books and memoranda were admitted over the defendant's objection that they were not in defendant's handwriting and were not shown to have been made under defendant's direction or with his knowledge. The supreme court held that such direction and knowledge need not be proved by direct evidence, circumstantial evidence being sufficient. Here the bank was small, the president was in direct control and there was an unavoidable inference that all book entries and memos were made with defendant's knowledge and direction.

In *Trujillo v. People*,<sup>3</sup> the defendant was charged with failure to provide support for an illegitimate child of the complaining witness. The court was confronted with the admissibility of a hotel register which the defendant acknowledged signing on three separate occasions, claiming that on those occasions he was at the hotel with a woman other than the complainant. The register was admitted in evidence after being identified by the husband of the owner of the hotel even though such witness had not seen the defendant sign it. The supreme court sustained the trial court's ruling admitting the register in evidence, for not only did the complainant identify defendant's signature, but on cross-examination the defendant admitted signing the book. The register merely corroborated the testimony of the parties.

### PROPERTY OF THE ACCUSED

Property of the accused which is sufficiently identified and shown to belong to the accused or to have come from his possession, and which throws light upon the crime or serves to connect the accused with it, is admissible. The accused may be permitted to introduce property belonging to him to impeach the prosecu-

\* Students, University of Denver College of law.

<sup>1</sup> 22 C.J.S. 1201 § 708.

<sup>2</sup> 84 Colo. 254, 269 P. 907 (1928).

<sup>3</sup> 122 Colo. 436, 222 P. 2d 775 (1950).

tion's witness. In *Wolf v. People*<sup>4</sup> where the defendant was charged with burglary with force, burglary without force, and receiving stolen goods, evidence consisting of articles identified as stolen from the premises were held admissible by the Colorado court. These articles were recovered by police either in the apartment occupied by defendant and his wife, in the shop of defendant, or otherwise definitely proven to have been in his possession shortly after the burglary in question.

The defendants in *Rude v. United States*<sup>5</sup> were charged with false advertising through the mails with intent to defraud. The court allowed in evidence a suit purchased by a post office inspector which was advertised as an unclaimed \$5 suit but which turned out to be a regular stock suit.

In a suit for divorce on the grounds that the wife shot at her husband, there was admitted into evidence a pistol, alleged to have been used by the wife, and a coat worn by the plaintiff through which the bullet was alleged to have passed.<sup>6</sup> It was said to be within the discretion of the trial court to allow the jury to have the pistol and coat in the jury room during their deliberations. The supreme court said that the trial court's discretion will not be interfered with in the absence of manifest abuse. The court further stated that it was proper that the objects to which testimony relates should be brought into court and exhibited, when this can be done. This was said to be more satisfactory than a description of such evidence by witnesses who have inspected it outside of court.

In a case in which the defendants were charged with conspiracy to commit arson and conspiracy to burn a house to defraud the insurers, a valise and a bundle of letters addressed to the husband of the owner of the house were admitted in evidence to show knowledge and preparation for the crime. The sole purpose of admitting this evidence was to show that the owner of the house, a defendant, was expecting the house to burn, and therefore, articles such as these would naturally have been removed by him.<sup>7</sup>

#### PROPERTY OF THE VICTIM

Property of the injured or killed party found at the scene of the crime or accident, in or about the defendant's possession, or elsewhere, is admissible in evidence. For example, in a prosecution for homicide, the deceased's bloodstained clothing was admitted over the defendant's objection the defendant stating that the exhibition was unnecessary and was calculated to, and did, arouse the passions of the jurors and sway their judgment. The court held, on appeal, that if evidence is competent, relevant, and material as this evidence was, it should not be rejected because it brings vividly to the jury the details of a shocking crime. This,

<sup>4</sup> 123 Colo. 487, 230 P. 2d 581 (1951).

<sup>5</sup> 74 Fed. 2d 673 (1935).

<sup>6</sup> *Fowler v. Fowler*, 63 Colo. 451, 168 P. 648 (1917).

<sup>7</sup> *Mukuri v. People*, 92 Colo. 306, 19 P. 2d 1040 (1933).

the court said is the lawful purpose of evidence. Such holding is in accord with the general rule that although the introduction of real evidence may incite the jury, it may be admitted as long as it illustrates and makes clear the issue of the case.<sup>8</sup>

In an early federal case<sup>9</sup> where the problem of admitting demonstrative evidence arose, the court held that clothing worn by deceased at the time of the accident is admissible for the purpose of identifying the deceased and establishing the nature and extent of the injuries. A later case,<sup>10</sup> held that there was no error in admitting in evidence burned shoes worn by decedent when death occurred from contact with a high tension wire. The shoes were admitted to support the plaintiff's theory that the decedent slipped on the roof of a house and came in contact with the wires. This evidence tended to show how the accident came about because of marks of paint and striations on the shoes. The court stated that the plaintiff had a right to prove his theory, and such evidence ought not to be rejected unless it clearly has no tendency to prove or disprove relevant facts.

#### INSTRUMENTS OF THE CRIME

Weapons, instruments, and articles identified as the means by which a crime was committed are admissible, provided they are substantially in the same condition as at the time of the offense. In *Brown v. People*<sup>11</sup> the defendant was charged with statutory rape. The evidence introduced was a prophylactic wrapper which the sheriff had found the next morning when he searched the automobile in which the alleged offense was committed. This substantiated the victim's statement that the defendant made use of a contraceptive. Likewise, in a case where the defendant was charged with burglary and the possession of burglary tools, a tire iron and other tools, which were not intrinsically burglary tools, were properly admitted to show possession of burglary tools, a separate crime, after the jury had found the defendant guilty of the crime of burglary. The only objection of the defendant was that he should not have been convicted of the burglary because of lack of sufficient identification, which issue was resolved against him.<sup>12</sup>

In an abortion case<sup>13</sup> where the defendant was found and arrested while attending the prosecuting witness, it was held proper to admit in evidence the tools used in the abortion, which consisted of a bottle containing white pills and other pills in yellow cellophane both trade-marked "HR", a dark fluid in a bottle, a metal piece with a rubber hose attached thereto, a grease gun, and a speculum.

<sup>8</sup> *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930).

<sup>9</sup> *Baggs v. Martin*, 108 Fed. 33, 44 C.C.A. 175 (1901).

<sup>10</sup> *Southern Colo. Power Co. v. Pestano*, 80 Colo. 375, 251 P. 224 (1926).

<sup>11</sup> 120 Colo. 493, 210 P. 2d 837 (1949).

<sup>12</sup> *Smalley v. People*, 116 Colo. 598, 183 P. 2d 558 (1947).

<sup>13</sup> *Montgomery v. People*, 117 Colo. 118, 184 P. 2d 480 (1947).

### CLOTHING OF THE ACCUSED

Articles of clothing belonging to or connected with the accused and sufficiently identified and connected with the crime are admissible when they tend to throw light on a material inquiry and are in substantially the same condition as at the time of the offense. Thus in *Burnham v. People*<sup>14</sup> where the defendant was convicted of receiving stolen goods, the court said that clothing other than that found in defendant's possession but part of the stock of merchandise stolen from the same store in the same transaction was admissible to show that the clothing he did have in his possession had been stolen. This is illustrative of an exception to the rule that evidence of other crimes is not admissible against the defendant. Evidence of thefts of other goods from the same owner by the same thief is admissible where it is connected with the same transaction.

### LIQUOR

Liquors and related articles identified as having been in the possession of the accused or otherwise connected with him are admissible, provided there has been no substantial change in their condition. In *Enyart v. People*,<sup>15</sup> the Colorado court held that where defendant was charged with violation of the Prohibition Act it was proper for the jury to look at and smell of the liquor alleged to be intoxicating for the purpose of determining its character.

### PEOPLE AS REAL EVIDENCE

In general the jury may view the injured person to see his scars and wounds if they tend to solve or are material to a controverted issue. This admission is competent even when it shows horrible consequences of an assault. However, a connection must be shown with the crime committed. For the purpose of showing the fact of a birth of a child, where such fact is material, the admission of the child is competent; but when the paternity is in question, the authorities are divided on the child's admissibility to show the resemblance of the child to its putative father. A search failed to reveal a pertinent Colorado case on the subject.

### DEMONSTRATIONS

Demonstrations to illustrate matters in issue may be permitted in the court's discretion. In an automobile negligence case, *Small v. Clark*,<sup>16</sup> toy automobiles and maps of the scene, both drawn and built to scale, were held admissible. These were for illustrative purposes in connection with the testimony.

### PHOTOGRAPHS

Photographs, though not considered demonstrative evidence are very closely related thereto, and for that reason are mentioned here. In a recent Colorado case, the defendant assaulted his wife and threw her down steep basement steps. The next morning he

<sup>14</sup> 104 Colo. 472, 93 P. 2d 899 (1939).

<sup>15</sup> 70 Colo. 362, 201 P. 564 (1921).

<sup>16</sup> 83 Colo. 211, 263 P. 933 (1928).

found her body at the bottom of the steps. He buried her in the cellar. Photographs were admitted of the decomposed body of the victim. The court held these admissible, saying,<sup>17</sup>

Photographs are the pictured expressions of data, observed by a witness. They are often more accurate than any description by words, and give clearer comprehension of the physical facts than can be obtained from testimony of witnesses. Ordinarily, photographs are competent evidence of anything which it is competent for a witness to describe in words. Their admissibility does not depend upon whether the objects they portray could be described in words, but on whether it would be helpful to permit the witness to supplement his description by their use. They are not inadmissible because they bring vividly to the jurors, the details of a shocking crime, or tend to arouse passion or prejudice. It is only when photographs do not illustrate or make clear some issue of the case and are of such a character as to prejudice the jury, that they are not admissible. Its admission rests largely in the discretion of the trial judge, and his decision will not be disturbed on review unless an abuse of discretion is shown.

#### CONCLUSION

Demonstrative evidence is the most clear cut and convincing type of evidence which may be brought before a court. A search of the Colorado cases does not reveal an instance where the supreme court has overruled the trial court's discretion in admitting evidence of this type. As long as the articles admitted are connected in some manner to the case, and tend to shed light on motive, means, or manner of the act or crime, their admissibility will be sustained, even though such admission might inflame or enrage the jurors to prejudice.

Wigmore has aptly expressed the general consensus in regard to this matter as follows:<sup>18</sup>

It seems too rigorous to forbid a party to prove his case by the clearest evidence, and a jury which through violent prejudice would not be restrained by the court's instructions would probably give way to its prejudice even without this evidence. The courts impose no prohibition except so far as the discretion of the trial courts may prevent abuses.

<sup>17</sup> *Potts v. People*, 114 Colo. 253, 158 P. 2d 739 (1945). See also *Carson v. People*, 93 Colo. 478, 26 P. 2d 1068 (1933); *Rowan v. People*, 93 Colo. 473, 26 P. 2d 1066 (1933); *Mow v. People*, 31 Colo. 351, 72 P. 1069 (1903); *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930); *King v. People*, 87 Colo. 11, 285 P. 157 (1930); *De Salvo v. People*, 98 Colo. 368, 56 P. 2d 28 (1938); *Millitella v. People*, 95 Colo. 519, 37 P. 2d 527 (1934); *Maynes v. People*, 110 Colo. 149, 200 P. 2d 915 (1948).

<sup>18</sup> Wigmore on Evidence, § 1158, p. 259 (3d ed.)