

Proving DWI Impairment in Court



**TZD Conference
October 24, 2019**

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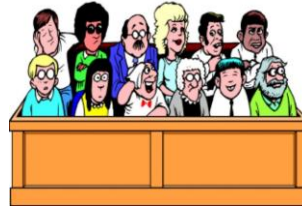
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Minnesota State Patrol**

*For educational purposes only



Overview

**Goal: Effectively Communicate Information
to your Audience in the Courtroom**



- Don't just explain the what, but the why (it matters)
- Explain it in terms that the judge/jury will understand
- Officers are the experts ... show their expertise!



Impairment

If a Schedule I or II controlled substance, *per se* charge applies

- Easy to prove

If a defendant has a prescription for a Schedule I or II controlled substance, can still prove impairment

- More difficult to prove

If a Schedule III or IV controlled substance or intoxicating substance, must prove impairment

- More difficult to prove



Intoxicating Substances

Minn. Stat. § 169A.03, subd. 11(a):

“Intoxicating substance” means a drug or chemical, as those terms are defined in section 151.01, that when introduced into the human body **impairs the central nervous system or impairs the human audio, visual, or mental processes**. The term does not include alcohol or controlled substances.



Impairment

CRIMJIG 29.04: Driving Under the Influence of a Controlled Substance - Elements

“At the time the defendant was (driving/operating/in physical control of) a motor vehicle, the defendant was under the influence of a controlled substance. ... There is no set standard as to the quantity of a controlled substance a person must ingest before a person is regarded as being ‘under the influence.’ **When a person is so affected by a controlled substance that the person does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have, that person is under the influence of a controlled substance.**”



Impairment

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...



Impairment

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

Pictures and video don't always tell the story, so you have to

Use buzz words!

- Lost control
- Not normal
- Involuntary

Compare what you would expect from a sober person to what the defendant exhibited



Know Your Audience

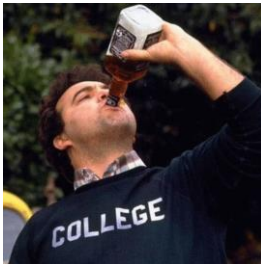


Officers become teachers and storytellers



Voir Dire

Remember: DWIs are crimes in which jurors easily identify with the defendant



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Voir Dire

Remember: DWIs are crimes in which jurors easily identify with the defendant.

You will have jurors that:

- have observed impairment
- have been impaired themselves
- have perhaps driven impaired, or questionably, in the past
- are familiar with alcohol/drugs and (some) side effects
- have previously used illicit drugs
- take prescription drugs
- have or know someone with prior DWI convictions

Know your audience!

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Voir Dire



Voir Dire topics:

- 1) Alcohol/Drugs – use, side effects, thoughts, etc.
- 2) DWI law – in general
- 3) Law enforcement
- 4) Prior DWI convictions
- 5) CSI effect
- 6) Summons reaction



DWI Direct Examination

General outline:

- I. Training & Experience
- II. DWI investigations in general
- III. Your Case
 - I. Driving conduct/reason for dispatch
 - II. Observations
 - III. Field sobriety tests
 - I. HGN
 - II. Divided Attention Tests
 - III. Other
 - IV. PBT
 - V. Arrest
 - VI. DRE Exam (if applicable)
 - VII. Chemical Test

Tip: Use blocks and transitions to give the jury a roadmap of where you are going



Prep – Know Your Officer

Contact your prosecutor/officer in advance!

- *Rasmussen* or Trial
- Cue officer about points of contention
- Heads up about judge, defense attorney
- Know what to review
 - Be specific!
 - Example: Don't just say, SFSTs ... identify all possible clues of impairment on each SFST and explain what they mean



Prosecutors and officers vary in experience level, both with DWI investigations and testifying, so you must prepare together accordingly



Training & Experience

Officers have **specialized** experience ... trained to look for specific indicators of impairment

Cooking Analogy:

- Many people cook at home
- Some are better than others
- Chefs are experts – they do this every day for a living
- Officers are the chefs of DWI enforcement
- They have specialized training and experience, and they do this every day for a living
- Some people see impairment, but officers are trained and see it every day



General DWI Investigation

- Before getting into your specific DWI investigation, have the officer testify what a general DWI investigation looks like:

- Driving conduct
- Observations
- Field sobriety tests
- Admissions
- PBT
- Trained to detect impairment
- Totality of the circumstances



- This shows that your case is what officers are trained to investigate!



Driving Conduct

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

Describe the driving conduct and why it was a concern:

- Defendant did not have normal control of his/her motor vehicle
- Paint the picture and be specific with details
- *Suspected* possible impairment
- Driving conduct consistent with impairment, but not definitive, so continued investigation
 - Not jumping to conclusions



Driving Conduct

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

If no driving conduct ... no problem!

CRIMJIG 29.04:

“If, as a result of consuming a controlled substance, the person's **ability or capacity** to drive/operate/be in physical control of a motor vehicle is impaired, the statute has been violated.”



Focus on the suspect's **ability or capacity to drive** based on all the indicia of impairment observed throughout the investigation.

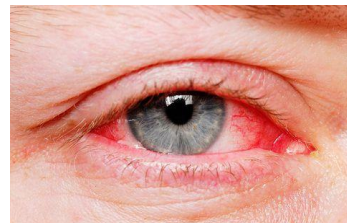


Bloodshot Eyes/Dilated Pupils

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Defendant lost control of eye's physical reactions ... not normal

- We don't tell our eyes to turn red or our pupils to dilate ... involuntary reaction
- For dilated pupils ... explain expected reaction versus actual reaction, and why that is significant



Odor

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Defendant lost control of bodily smell

- Odor is a side effect, not a choice (i.e. not perfume or cologne someone chooses to put on)
- Involuntary smell



Slurred Speech

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Defendant lost control of normal speech functions ... lost clearness of intellect

- Use an example of a syllable or word to explain how it sounds different than normal
- Not slurring on purpose ... involuntary



Slow Motor Skills/Unsteady Gait

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

Defendant lost control of normal motor functions

- Explain difference, i.e. how did Defendant reach for his license, and how is that different from what you would expect?
- Unsteady gait = leaning, off-balance
- Normal vs. impaired functioning
- Involuntary



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Confusion/Incoherence

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

Defendant's responses to questions were not normal

- Defendant lost the clearness of intellect that would be expected from someone who is not impaired



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HGN

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Nystagmus = Involuntary movement of the eyes

- Use windshield wiper analogy
- Show video demonstrative
- Onset of nystagmus prior to 45 degrees ... compare to driving ... blind spots and mirrors are at 45 degrees

Future (hopefully) training: HGN causes loss of peripheral vision, which impairs driving ability!



Divided Attention

Divided Attention = a type of simultaneous attention that allows us to process different information sources and successfully carry out multiple tasks at a time.

- Necessary for operating a motor vehicle safely

While driving, you must simultaneously focus on:

- Hands (steering wheel, stick shift, turn signals, windshield wipers, air controls, radio, and other dash controls)
- Feet (gas and brake pedals)
- Eyes (road ahead, checking mirrors, checking traffic to change lanes or turn, checking on children)
- Mouth (talking on phone – hands free!)
- Brain (focus on driving, thinking about other things)



Divided Attention

Stress the number of tasks required for driving a car and variables that drivers encounter – this is why divided attention is important!



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Walk and Turn

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Stepped off the line = lost control of balance & coordination

- Asked to walk in a straight line, not do flips

Instruction Phase or Did Not Count Steps = lack of divided attention

- Analogize to divided attention of driving
- Instruction phase: if confused, can ask for clarification (but didn't)



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One Leg Stand

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Lost control of balance & coordination

- Many argue they can't do it sober ... emphasize that you ask if there is anything that would affect their balancing skills prior to starting the test
- If put foot down after 20 seconds, different than after 2
- Not only clue, and in conjunction with other indicia, is consistent with impairment
- Demonstrate in front of the jury



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Modified Romberg

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Checking internal clock ... Lost clearness of intellect

- Also checking for involuntary swaying and body movements ... lost control of bodily functions
- Checking for eyelid tremors – classic sign of THC impairment



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DRE Exam: Other Tests

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

- Finger-to-Nose: Lost control of motor functions and coordination
 - Not confident the subject can hit a brake or accelerator, without looking, at the right times → not safe to drive
- Lack of Convergence: Affects focus and depth perception because eyes are not working together
 - Lost control over eyes, affecting vision and ability to drive safely



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DRE Exam: Vital Signs

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have

- Ask what training teaches
 - Substances can cause physiological changes affecting pulse, body temp., blood pressure, and other vitals
- Ask about average range
- Ask about Defendant's measurements
- Establish if within or outside of average range
- Argument: lost control of vitals
 - Involuntary reaction to substances



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Admission

- How much did you have to drink?
 - Common answer: two beers
 - If inconsistent with level of impairment, officer should ask, "What else?"
- Ask officer if answer was consistent with level of impairment observed
- Depending on your facts, ask the officer whether types of beers, size of beers or pours of other types of alcohol, or other drugs (prescription or recreational) can affect impairment
- Not conclusive of impairment, but is a clue to continue investigation



PBT & Test Result

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

- Remember ... the PBT is not admissible except in refusal cases
- Toxicology results → If alcohol concentration is near the legal limit, or the blood test results show lower levels of THC or other controlled substances, remember ... drugs impair the *brain*, not the *blood*
- Alcohol/Drugs affect individuals differently based on tolerance, food intake, and other factors
- Officer should testify that observations of impairment are inconsistent with the toxicology results
- Polydrug use: 1 + 1 = 4

Important tips

- After each clue/SFST, prosecutor should ask if the observations affected the officer's opinion regarding impairment
 - But ... not conclusive ... not jumping to conclusions
 - Wait for all clues and form final opinion based on totality of the circumstances
- On-scene observations are always more accurate than video
- Tie back indicia of impairment, including divided attention tests, on **ability or capacity to drive**
- Innocent explanations made at trial but not made at the time of the arrest are not explanations, but excuses



Closing Argument

... does not possess that clearness of intellect and control of (himself/herself) as (he/she) otherwise would have ...

Emphasize officer's specialized training

- It's easy to Monday morning quarterback, but the officer is the expert

Discuss each indicia of impairment and tie it back to the definition above using the buzz words

- Lost control, not normal, involuntary

Note the totality of the circumstances

- Negates innocent explanations



Closing Arguments

Put the puzzle pieces together (Totality of the Circumstances)

- Officer's training & experience
- Driving Conduct (if applicable)
- Observations
- Admissions
- Performance on SFSTs
- DRE Exam
- Test Results

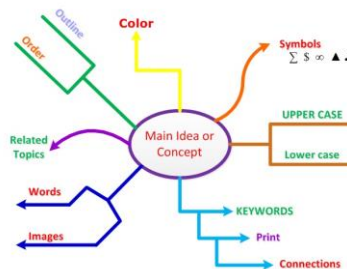


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Mind Mapping

- A visual technique to use with juries.
- Place the focus of the trial back where it belongs – the defendant's conduct



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Questions?

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