

Proving DWI Impairment in Court



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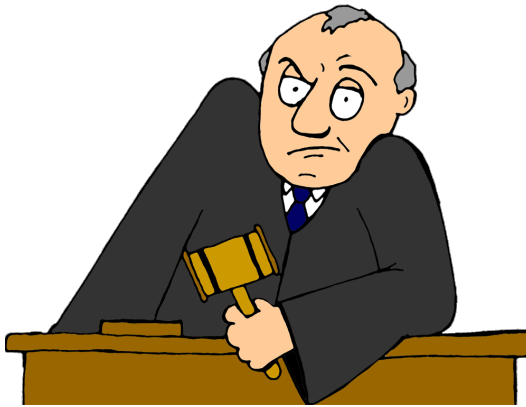
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*For educational purposes only



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.

Cannabis

Minn. Stat. § 169A.20, subd. 1(8):

It is a crime for any person to drive, operate, or be in physical control of a motor vehicle while under the influence of cannabis flower, a cannabis product, a lower-potency hemp edible, a hemp-derived consumer product, an artificially derived cannabinoid, or tetrahydrocannabinols.

*** There is no *per se* limit**

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

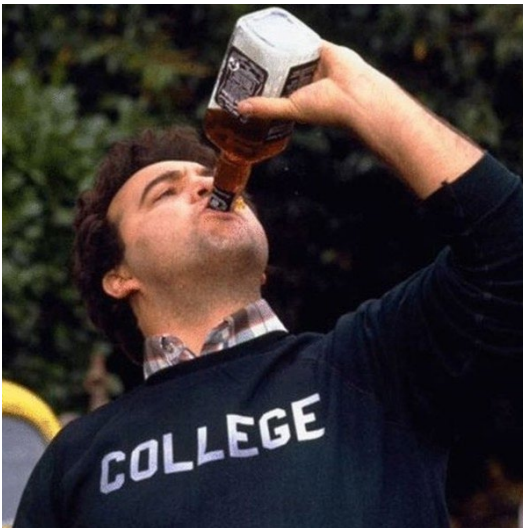
Know Your Audience



Officers become teachers and storytellers

Voir Dire

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



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!

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

Voir Dire - Cannabis

Topics/Questions:

- Does anyone have strong opinions about cannabis?
- Do you or someone you know use cannabis products?
- How does it make them feel?
- Do you expect everyone who uses cannabis products to act the same?
 - Don't prejudge this defendant
- Does anyone have any strong opinions about cannabis use and driving?
- You are required to judge the facts of this case based upon the evidence, which means setting aside anything you learn from other sources. Would anyone have any difficulty doing that?

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/Prosecutor

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



DRE Matrix

INDICATORS CONSISTANT WITH DRUG CATEGORIES							
MAJOR INDICATORS	CNS DE-PRESSANTS	CNS STIM-ULANTS	HALLUC-INOGENS	PHENCY-CLIDINE	NARCO-TICS	INHALANTS	CANNABIS
HORIZ. GAZE NYSTAGMUS	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VERTICAL NYSTAGMUS	PRESENT (HIGH DOSE)*	NONE	NONE	PRESENT	NONE	PRESENT (HIGH DOSE)*	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE OR NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/NORMAL	NORMAL

Establish:

- What you are trained to look for
- Different categories impair differently

DRE Matrix

2021 NHTSA Study: Full DRE Investigation is effective in detecting impairment by cannabis

Porath-Waller, A., Beirness, D., & Smither, D. (2021, May). *Exploring the Predictive Validity of Drug Evaluation and Classification Program Evaluations* (Traffic Tech Technology Transfer Series, Report No. DOT HS 813 013). National Highway Traffic Safety Administration.

https://rosap.nhtl.bts.gov/view/dot/55937/dot_55937_DS1.pdf

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! (non-moving violations)

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



*Consistent with cannabis use

Body Camera Evidence

“The reader of this report should be aware that the BWC provided by AXON is programmed with a 60 second pre-activation buffer which does not contain audio and is merely built in to capture the activity which prompted me to activate the recording.

Furthermore, the BWC’s 1080 resolution does not capture the fine movement, nor does it provide a panoramic view as clear as the human eye.

The BWC and the Fleet system do not depict distance as accurate as the human eye.

The BWC merely captures video of what is directly in-front of me, with a limited radius.”

*** It is very important to explain this to the judge and/or jury!**

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

*Consistent with cannabis use



Cannabis Specific – Signs of Ingestion/Impairment

- Odor
- Red, bloodshot eyes
- Lack of Convergence
- Debris in mouth (green tongue)
- Body Tremors
- Eyelid Tremors



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

*Consistent with cannabis use



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



*Consistent with cannabis use

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

*Consistent with cannabis use



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!



HGN

No HGN = Consistent with Cannabis Use

If suspecting cannabis, why do the HGN?

- Thorough
- Don't skip any steps
- Possible polydrug use



Effects of Cannabis

- Relaxation
- Euphoria
- Relaxed Inhibitions
- Disoriented
- Lack of Concentration
- Altered Time and Distance Perception
- Impaired Memory
- Altercations in Thought Process
- Drowsiness
- Sedation
- Mood Change
- Paranoia

Cannabis Influences...

- Attention
- Concentration
- Decision-making
- Impulsivity
- Inhibition
- Reaction Time
- Risk-taking
- Verbal Fluency
- Working Memory

Polydrug Use

Additive Effect: 1 + 1 = 10

Cannabis plus:

- Alcohol
- CBD
- Xanax
- Prescription drugs
- Cannabis laced with other drugs

MARIJUANA AND ALCOHOL

Consumption of any amount of alcohol with weed significantly increases THC levels in the user's blood, leading to a worsened marijuana intoxication



- Nausea
- Anxiety
- Tremors
- Headaches
- Bloodshot eyes
- Memory problems
- Increased appetite
- Sleepiness & fatigue
- Onset of hallucinations
- Decreased coordination

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!



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)



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



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 cannabis impairment



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



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



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

- 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

BCA Test Result

MINNESOTA DEPARTMENT OF PUBLIC SAFETY
Bureau of Criminal Apprehension - Forensic Science Laboratory

Lab No. XXXXXX
Report No. 1

Results of Laboratory Examination

The following are results confirmed by Liquid Chromatography/Mass Spectrometry:

<u>Type of Drug:</u>	<u>Concentration</u>	<u>Associated Expanded Uncertainty</u>	<u>Units</u>
delta-9-tetrahydrocannabinol (delta-9-THC)	2.95	±0.52	ng/ml
11-hydroxy-delta-9-tetrahydrocannabinol (an active metabolite of delta-9-THC)	1.07	±0.16	ng/ml
11-nor-9-carboxy-delta-9-tetrahydrocannabinol (an inactive metabolite of delta-9-THC)	65	±15	ng/ml
delta-8-tetrahydrocannabinol (delta-8-THC)	Not Detected		
Cannabidiol (CBD)	Not Detected		
Cannabinol (CBN)	Not Detected		
Cannabigerol (CBG)	Not Detected		

*** Psychoactive**

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)

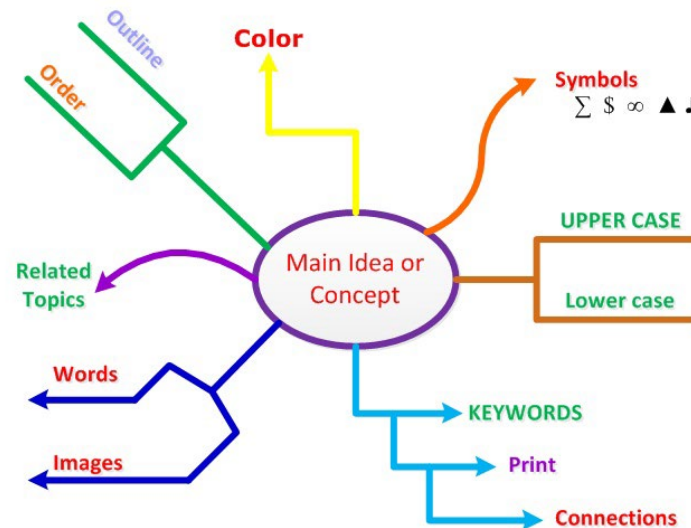
- **Officer's training & experience**
- **Driving Conduct (if applicable)**
- **Observations**
- **Admissions**
- **Performance on SFSTs**
- **DRE Exam**
- **Test Results**



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

Mind Mapping

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



Proving DWI Impairment in Court

Questions?

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