

For The Road



Idaho Prosecuting Attorneys Association, Inc.

Elmore Jury Gives Proper Diagnosis—"Guilty of DUI"

Facing a defense expert at trial can be a daunting task, especially if it is your first time. Yet, Deputy Prosecutor Jethelyn Haverfield took on the challenge and was awarded a guilty verdict by an Elmore County jury.

On December 9, 2006, Sergeant Russell Griggs of the Mountain Home Police Department responded to a citizen's complaint of a possible impaired driver. Upon investigation, Sgt. Griggs determined Chantel Grant was in fact driving under the influence of alcohol. However, at trial, defense counsel argued Grant's signs of impairment were caused by Attention Deficit Hyperactivity Disorder (ADHD), not alcohol. Dr. Clay Ward, a defense witness was hired to champion the ADHD argument.

"He was a decent, nice man," Haverfield reported. "Rather than attack him, I focused on the behaviors the defendant exhibited that were not related to ADHD, but were related to alcohol impairment."

ADHD is a disorder characterized by consistent inattention, hyperactivity or impulsiveness. The defense wanted the jury to believe



Elmore County Courthouse

the officer's observations were attributed to this disorder. To combat this defense, Haverfield researched ADHD and prepared an effective cross of the defendant's expert. Her preparation included consulting with a pharmacologist and a doctor she works closely with in mental commitment hearings. Haverfield also studied the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which became key to her success.

"Understanding the DSM-IV was critical in my preparation to cross-examine Dr. Ward," Haverfield said. "It is basically their bible in making a proper diagnosis."

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Web Sites

- Idaho TSRP
TSRP-Idaho.org
- Idaho Prosecuting Attorneys Association
www.ipaa.cc
- ITD Office of Highway Safety
itd.idaho.gov/ohs/
- Idaho POST Academy (includes DRE site)
www.idaho-post.org
- National Highway Traffic Safety Administration
www.nhtsa.dot
- National Association of Prosecutor Coordinators
www.napcsite.org
- NDAA/APRI & NTLC
www.ndaa-apri.org

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Idaho TSRP Website Unveiled — www.TSRP-Idaho.org

I am thrilled to announce today's launch of the Idaho's Traffic Safety Resource Prosecutor website onto the information highway located at www.tsrp-idaho.org. Just like the summer construction on Idaho's roads, this project has been in the works over the last few months. I was not sure whether I would ever complete it.

However, all lanes are now open for prosecutors, law enforcement and community members to browse the site and take it for a spin.

Users will be able to download publications, sign up for training, and educate themselves on traffic crimes. In the future, more sections will be added to intersect today's technologies with quality training.

It is my pleasure to unveil to you www.tsrp-idaho.org. May it serve as a face to represent the many dedicated Idaho prosecutors and law enforcement officers working to make Idaho a safer place to live and drive.

The Credibility Match-up: Potential Attacks on Defense Experts

By John Kwasnoski, PhD



Photo courtesy of Rick Ohnsman, ISP

“Many police reconstructionists have more formal training, more field experience with active crash scenes, . . . than some professional experts and engineers.”

—John Kwasnoski



Photo courtesy of Rick Ohnsman, ISP

In many cases the prosecutor is faced by the challenge of a professional expert being retained by the defense, and the potential for a highly credentialed expert to be pitted against the police reconstruction witness. Prosecutors must clearly evaluate the strengths of their own witness regarding a true comparison to the professional witness regarding the relevant qualifications. Many police (sheriffs, state police) reconstructionists have more formal training, more field experience with active crash scenes, and a more current competence in the technology of reconstruction than some professional experts and engineers. In this regard the prosecutor should evaluate the potential attacks on the professional witness, which might include the fact that the defense expert:

- Did not personally observe evidence at the scene.
- Relied on police measurements /photos.
- Did not speak with police investigator or civilian witnesses.
- Did not visit the scene until long after the crash - evidence was gone; perhaps never went to the scene.
- Does not specialize in MV crash reconstruction – generalist.
- Has academic publications/experience not related to reconstruction of MV crashes – look over the resume carefully – your police reconstructionist is often better qualified by his/her experience.
- Prepared/amended report in reaction to prosecution’s report.
- May have a bias based on the fee being paid by the defense.
- Is former police officer who has no better credentials than state’s witness.
- Did not have anyone check his/her work for potential mistakes or errors.
- Must confirm that reconstruction from evidence is more reliable than witness observations in most cases.
- Used assumptions for calculations; the results are only as valid as the assumptions: were the assumptions chosen from the extreme end of a range to favor the defendant?
- Could not reproduce conditions at time of crash for later testing.

- Will confirm investigative activities were correct (affirmative cross).
- Will confirm that police calculations are mathematically correct.
- Did not reconstruct the crash, but only finds fault with police reconstruction.
- May have to agree with a hypothetical that confirms the negligence of the defendant.
- Can be impeached by prior testimony (do your research, and get those transcripts).
- Has never worked for prosecution.
- Has a relationship with this defense attorney, and is therefore biased.

The professional resume in many cases is not a match for the prosecution’s police witness who reconstructs MV collisions on a regular basis, is specifically trained to do so, and is a specialist within his/her agency. In addition, the issue of bias usually favors the state’s witness. In that regard it is important for the prosecutor to establish the credibility of the state’s witness during the direct examination by highlighting any investigative activity that would show a fair and unbiased investigation, including; seeking potentially exculpatory evidence, collecting evidence according to established protocols, and making multiple measurements to ensure fairness and completeness, etc.

The author has observed in many cases that the professional expert is no match for the state’s witness because jurors can make the most crucial decision in their comparison of the experts — who is more credible?

Editor’s Note: John B. Kwasnoski is Professor Emeritus of Forensic Physics at Western New England College, Springfield, MA after 31 years on the faculty. He is a certified police trainer in more than 20 states. He is the crash reconstructionist on the “Lethal Weapon - DWI Homicide” team formed by the National Traffic Law Center to teach prosecutors how to utilize expert witness testimony and cross examine adverse expert witnesses. He is the author of, “Investigation and Prosecution of DWI and Vehicular Homicide.” Prof. Kwasnoski has reconstructed over 650 crashes.

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Elmore Jury Gives Proper Diagnosis

(From Page 1)

The DSM-IV contains information on how to properly diagnose ADHD. Prior to trial, defense counsel tried to get Haverfield to stipulate that Chantel Grant was ADHD, which Haverfield declined. Then during cross of Dr. Ward, Haverfield not only obtained admissions he did not comply with the DSM-IV in diagnosing the defendant, but that he had just diagnosed Grant earlier that week, merely days before trial.

“I don’t think the jury was buying it,” Haverfield said. “I certainly wouldn’t recommend it [ADHD defense] to any defense attorneys.”

The jury deliberated for about 30 minutes before returning the diagnosis Grant was guilty of DUI. Grant was sentenced to 90 days in jail with 83 suspended, a \$1000 fine with \$600 suspended, 180-day driver’s license suspension, and 12 months of supervised probation.

Garden City Prosecutor Corrals Defense Witness

Defense witnesses (the term “expert” rarely applies) often try to stray from their field of knowledge if not properly fenced in by the prosecutor. Garden City Prosecutor, Charles Wadams did some great fence work, with defense witness Robert La Pier, in a recent DUI jury trial. La Pier regularly appears as a paid defense witness in impaired driving cases. In this particular case, the defendant’s BAC was .10/.10 and La Pier attempted to testify about retrograde extrapolation.

Retrograde extrapolation is the computation back in time of the blood-alcohol level, or the estimation of the defendant’s BAC at the time of driving based on a test result at some later time. Wadams objected to La Pier testifying to retrograde extrapolation and requested to ask questions in aid of the objection, outside the presence of the jury. According to Wadams, the questioning went like this:

Q: “Describe your pharmacology training.”

A: “I have none.”

Q: “Describe your toxicologist training.”

A: “I have none.”

Q: “Describe your advanced training of toxins on the body.”

A: “I have none.”

Q: “Describe your medical training.”

A: “I have none.”

Wadams asked La Pier if retrograde extrapolation was scientifically accepted with which La Pier testified it is only an “approximate.” The judge sustained Wadams objection holding La Pier was not an expert on retrograde extrapolation. The jury returned a verdict of guilty for DUI. Good work Charles!

Cross-Examination Tips for ADHD Defense

- First, get a copy of the complete psycho/educational assessment. One should have been performed to make a diagnosis.
- Second, the defendant should have had a thorough physical examination as part of this assessment. This may help debunk other claims of bad backs, flat feet, diabetes, etc...
- Third, there should have been a series of interviews with key persons in the defendant’s life (family, co-workers, etc). This may also uncover various gems for cross examination.



Case Law Update:

State v. Anderson (Ct.App.2007): Anderson is arrested for DUI and submits to a breath test on the Intoxilyzer 5000. The first sample was 0.22 and the second was 0.19. Because the variance exceeded 0.02, the officer had him perform a third test per ISP’s standard operating procedures, which returned a result of 0.24. Anderson argues he cannot be charged with excessive DUI (I.C. § 18-8004C) due to the 0.19 test. Court agreed stating the 0.19 was a valid test and less than the minimum alcohol concentration necessary for a conviction. *See State v. Mills*, 128 Idaho 426 (Ct.App.1996). The State is required to show at trial the 0.19 result is not a valid sample or test, in order for the finder of fact to be able to disregard it.

State v. Williamson (Ct.App.2007): Court holds laser speed detection devices are generally reliable and their results may be admitted into evidence in Idaho courts. Note: It remains necessary to provide foundation that the officer was trained to operate the device, the device was properly maintained, and that it was used correctly.

State v. Webb (Ct.App.2007): Webb contends the State failed to prove the *corpus delicti* of the crime of DWP (I.C. § 18-8002) independent of his extrajudicial admission. Although his confession, standing alone, is not sufficient to support a conviction, only slight corroborating evidence is necessary, and the corroborating evidence need not be sufficient to establish each element of the *corpus delicti*. Here, the Court held there was sufficient evidence tending to corroborate Webb’s confession his license was suspended. This included his failure to produce a driver’s license, providing an Idaho identification card instead, and engaging in evasive driving when the officer pulled behind him.

State v. Robinson (Ct.App.2007): Due to the charge being a misdemeanor, the trial court granted a motion to suppress when officers entered Robinson’s home without a warrant to make a DUI arrest. Court of Appeals reversed stating, “Because the Fourth Amendment permits a reasonably tailored warrantless entry into a residence upon coexistence of probable cause for a jailable offense and exigent circumstances, the officers lawfully entered Robinson’s home without a warrant to prevent destruction of blood alcohol evidence.”



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Idaho Transportation Department

WE ARE ON THE WEB!!
WWW.TSRP-IDAHO.ORG

UPCOMING TRAININGS & CONFERENCES NOTICE

- NDAA Summer Conference — July 29-August 1, 2007, Portland, Oregon.
- NAPC Summer Conference — July 30-August 2, 2007, Portland, Oregon.
- 13th Annual IACP DRE Conference — July 31-August 2, 2007, Las Vegas, NV.
- IPAA Summer Conference — August 6-8, 2007, West Yellowstone, Montana.
- Idaho Alcohol Law Enforcement Training — August 21, 2007, Idaho Falls, Idaho.
- Idaho Alcohol Law Enforcement Training — October 19, 2007, Twin Falls, Idaho.

Last Call:

In recent travels, I have met with many good prosecutors and law enforcement officers working to make Idaho roads safer. While in McCall conducting training, I was impressed how the police officers spoke highly of the Valley County & McCall City prosecutors. It was evident they worked closely together on matters such as underage drinking. To reach the goal of **Toward Zero Deaths** will require this type of team effort. I applaud their efforts!

This issue of *For The Road* has focused on paid defense witnesses in traffic related cases. It is evident from the articles that preparation is key when dealing with these witnesses. This does not have to be a chore! We should be able to help each other prepare for these cases. Currently, I am collecting transcripts, CVs and other information on defense witnesses testifying in DUI and crash reconstruction cases. I need your transcripts! Please forward copies of their testimonies (even if it is just the audio tape) to me so other prosecutors may benefit from your experiences. Send the information to me, at the above address or email jared.olson@post.idaho.gov. —Jared

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