

Search

The

Prosecutor, January-February 2015, Volume 45, No. 1

When 'intoxicated' is a defendant's 'normal'

2015

By Lori J. Kaspar

[Journal archive](#)

County Attorney in Hood County

How Hood County prosecutors tried a DWI case with legally prescribed drugs as the intoxicants

We faced what seemed to be an insurmountable challenge in State v. Brian Thomas Miller.¹ The defendant was a disabled veteran who looked like a member of ZZ Top. He had been caught speeding and driving recklessly on a stretch of highway in Hood County. He had a 25-year history of chronic pain and anxiety. He took Soma (carisprodol), Vicodin (hydrocodone), Valium (diazepam), and Restoril (temazepam) every day. Miller's doctor claimed there was "no indication he appeared to be overmedicated, sedated, or lethargic" during his regular check-ups and said there was "no record of medication misuse."

The defense repeatedly urged us to drop the case, saying Miller was "mistakenly charged with DWI." Defense counsel even tried to argue that no one had ever warned Miller not to drive while on his medication. Everyone who had had regular contact with Miller told us he looked "normal" on the video. But what they were really saying was this: Being intoxicated on prescription meds was Miller's "normal."

While the defense's arguments might have sounded persuasive, the case looked a lot different from our perspective.

We were convinced that Miller was a danger to himself and others and had no business driving on our roads.

The stop and arrest

At 1:46 p.m., a DPS trooper spotted Miller's car going too fast on a two-lane road. He clocked Miller's speed at 71 miles per hour in a 60-mph zone. Miller passed another car less than a

- [2017 Journal Archive \(/journal/2017\)](#)
- [2016 Journal Archive \(/journal/2016\)](#)
- [2015 Journal Archive \(/journal/2015\)](#)
- [2014 Journal Archive \(/journal/2014\)](#)
- [2013 Journal Archive \(/journal/2013\)](#)
- [2012 Journal Archive \(/journal/2012\)](#)
- [2011 Journal Archive \(/journal/2011\)](#)
- [2010 Journal Archive \(/journal/2010\)](#)
- [2009 Journal Archive \(/journal/2009\)](#)
- [2008 Journal Archive \(/journal/2008\)](#)
- [2007 Journal Archive \(/journal/2007\)](#)

quarter mile before a stoplight, made a right turn, immediately got into the left-turn lane, and pulled into a convenience store. The trooper turned on his lights and pulled into the parking lot behind him.

The trooper immediately noticed that Miller's speech was "extremely slow and slurred." Miller had a white film buildup in the corner of his mouth and also had a white film stuck in his beard. (Our drug recognition expert [DRE] would testify that the white film indicates ingestion of a narcotic analgesic.) When the trooper asked for his insurance, Miller stared at a Discount Tire envelope as if he thought it were his insurance document.

When the trooper told Miller he was going 71 in a 60, Miller mumbled that he thought the speed limit was 70. When the trooper asked Miller why he passed a vehicle just before the intersection, Miller said his mother was sick and he needed to get back to the house. The trooper asked Miller if he worked; Miller replied he was disabled and had what sounded like "Rhome Tory Arthritis." Miller initially denied taking any medication for his disability, but later he admitted taking one 5-milligram hydrocodone pill earlier in the day. He also tried to name three other medications, but his speech was so slurred the trooper couldn't understand what he was saying. (During the patrol video, most of Miller's words were unintelligible.)

When Miller got out of the car, he stumbled and swayed so much he nearly fell over. The trooper conducted field sobriety tests. On the horizontal gaze nystagmus (HGN), he detected six out of six clues. On the Walk-and-Turn, he detected seven out of eight clues. Miller told the trooper he couldn't complete the One-Leg Stand test. The trooper asked Miller to recite the alphabet. He hesitated after "T" but other than that, he completed the task with no hiccups. The trooper asked Miller to count from 56 backwards to 43. Miller stopped at 50 and said, "I forgot what you wanted me to count to." The trooper administered the finger count test. Miller couldn't perform the test at all.

After Miller's arrest for DWI, Miller consented to a blood draw. The results showed therapeutic levels of carisprodol, hydrocodone, dia-zepam, and temazepam in his system.

The road to trial

Before trial, defense counsel continued to badger us about how Miller wasn't intoxicated and why we should drop the case. We offered a deal that involved Miller permanently relinquishing his driver's license, but Miller and his attorney refused to budge so we continued on the trial track.

We consulted with our drug recognition expert (DRE), Game Warden Joni Kuykendall. Although she wasn't called out to the scene (as we would have preferred) she was able to educate us on the effects and interactions between the four drugs found in Miller's system. She also reviewed the offense report, video, and lab report. She gave us her opinion that Miller was intoxicated on prescription drugs. Carisprodol, diazepam, and temazepam are central nervous system (CNS) depressants that slow down bodily functions (as does alcohol); CNS depressants will also cause nystagmus. Hydrocodone is a narcotic analgesic or opioid; opioids can also produce drowsiness and mental confusion. When all of these drugs are taken together, their effects can be compounded and cause extreme impairment.

We filed an expert notice, and the defense let us know that Miller's doctor and pharmacist would testify. Interestingly, that same pharmacist was someone we had used in the past to testify about drug interactions. When I called him to talk about the case, the pharmacist said he had known Miller as a customer for years and had regularly observed him. The pharmacist was adamant that Miller's demeanor and speech on the video appeared "normal." (Of course he meant "normal for Miller," not "normal normal.") We subpoenaed the pharmacist to bring Miller's records and included a request that he bring the mandatory warnings given with each prescription.

We knew the defense strategy would be that because Miller took the drugs every day, Miller was acting "normally" on the day of his arrest and thus, Miller wasn't intoxicated. We knew we'd have to get past that in voir dire. We'd have to get the jury to understand that "normal" use of faculties doesn't change from person to person; rather, it is how a normal person would act without drugs or alcohol in his system. (Defense attorneys often try to confuse juries by asking officers, "You don't know what his 'normal' is, do you? Then how can you testify that he lost the normal use of his abilities?")

We knew our driving facts weren't that bad, but we also knew that Miller looked and sounded terrible on the video. (I still remember my first impression when I saw Miller stumble out of his car. I thought, "Wow, that guy is drunk!")

I showed the jury the same statutory definition of intoxication we always use. However, this time I simplified "intoxication" as a two-part test: 1) Has the person lost the normal use of a mental or physical ability? And 2) Is that loss caused by some substance that he has introduced into his body? If the answer to either question is no, the person is not intoxicated. If the answer to both questions is yes, the person is intoxicated.

We ran through a few examples and I got the jury to buy into my "intoxication" test using these questions.

Example 1: I have arthritis in both of my knees and I have difficulty walking. Have I lost the normal use of a physical ability? Yes. Was the loss caused by a substance? No. Am I intoxicated? No.

Example 2: My mother has age-related dementia, and she has difficulty remembering simple commands. Has she lost the normal use of a mental ability? Yes. Was it caused by a substance? No. Is she intoxicated? No.

Example 3: Let's say I'm having a bad day and I'm in a lot of pain because of my arthritic knees. So I take a Vicodin (prescribed to me) for the pain. The Vicodin alleviates my pain, but it also causes me to become lightheaded and dizzy. I have trouble thinking clearly. Have I lost the normal use of a physical or mental ability? Yes. Is it caused by a substance? Yes. Am I intoxicated? Yes. Should I be driving? No!

Of course, the last scenario was exactly where we were headed in this trial. I knew that if the jury bought into my two-part test, we had a chance of succeeding.

The trial

During opening, I reminded the jury of the two-part intoxication test. I asked jurors to make mental notes of their first impressions when they watched the defendant get out of his car. (I was hoping they'd have the same reaction I did: "Wow, that guy is really drunk!") I asked each juror to listen closely to the defendant's speech and make a mental note of what it sounded like. (I had already prepared snippets of the video with Miller's extremely slurred speech to play in closing.)

The trial proceeded as we expected. I put on the trooper and my DRE.² The trooper testified about the stop and the field sobriety tests and concluded that Miller was intoxicated. My DRE testified about her extensive training and experience. She explained how DREs use different tests to determine which drug or drugs a subject has in his system. She explained that there are seven major categories of drugs; they are grouped according to the known effects they have on people. DREs are also trained in the interactions between drugs when more than one substance is ingested, and she testified in detail about CNS depressants and narcotic analgesics (the two categories of drugs found in Miller's system) and correlated the effects of each category of drug with Miller's actions and behaviors. Even though she wasn't present at the scene, she testified that after having reviewed the offense report, video, and lab report, her opinion was that Miller was impaired because of the drugs and that it was unsafe for him to operate a motor vehicle. In essence, our DRE confirmed for the jury everything they had already seen and heard on the video and from the lab report. My trial partner did such a good job with her direct of the DRE, there wasn't much left for Miller's attorney on cross.

Incidentally, we've consulted with our DRE before in drugged driving cases. She has always been helpful in explaining the effects of drugs on a person's mental and physical abilities. We had never been able to use her as a witness in trial because in our other cases, our evidence was never adequate to support her giving an expert opinion. But in this case, the officer's descriptions of Miller's behavior, white film on his mouth and beard, video depicting his extremely "drunk-like" actions, and the lab report were sufficient for her to give an expert opinion.

Ideally, DREs should be used either at the scene or at the jail. It is critical that they be able to perform their own tests on the subjects rather than rely on evidence obtained by others. DREs are the only experts who can definitively say that a suspect's behaviors are caused by the ingestion of particular substances. That causal link is important. A lab report isn't enough. No matter which drugs are present in a person's system, prosecutors must prove that the drugs caused the impairment (Question No. 2 in my two-part intoxication definition).

Those prosecutors without access to a DRE can educate themselves on drug interactions on www.drugs.com, though you can't enter the interaction information as evidence. Before we had our DRE, we called a pharmacist to testify as an expert. While a pharmacist cannot testify about Question No. 2 in the two-part intoxication definition, he can educate jurors as to drug interactions.

The defense put on Miller's doctor and pharmacist. Both testified that Miller always took the four meds and he always looked and sounded like he did on the video. They tried to claim that

the stumbling and the slurred speech were “normal” for Miller. On cross, I had the pharmacist produce the mandatory warning sheets given to every person who picks up any of those four drugs. All of the warning sheets said, “May increase dizziness, may increase drowsiness, may increase difficulty concentrating, may impair thinking and judgment, and avoid driving or operating hazardous machinery until you know how medications affect you.”

Defense counsel, however, threw us a curve ball when he asked the judge—outside of the jury’s presence—to allow Miller to get on the stand and give a voice exemplar without subjecting him to cross-examination. He cited *Williams v. State*,³ a 2003 Court of Criminal Appeals case that had originated in Hood County.⁴ In *Williams*, trial counsel had asked the court to allow the defense to rebut the State’s video (where the defendant exhibited slurred speech) by providing a voice exemplar of the defendant’s normal speech. The defense asked to do this without waiving *Williams*’ privilege against self-incrimination. The trial court denied the request and the jury convicted the defendant.⁵ The court of appeals agreed with the trial court; however, the Court of Criminal Appeals disagreed. That Court said, “Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, does not, without more, compel him to provide a ‘testimonial’ response for purposes of the privilege.”⁶ The Court held the voice exemplar was not testimonial, reversed, and remanded the case.

I quickly scanned the case. How could I overcome this? I knew Miller’s voice would be slurred because he took those meds every day. Then I scanned the court of appeals opinion. It was there I found this gem: In his bill of exceptions, *Williams*’ defense counsel had instructed the appellant to bare his gums to his sister. The sister testified that *Williams* was missing a large number of his teeth! I argued that our case was 180 degrees different from *Williams*. *Williams* sought an exemplar because his slurred speech was due to dental problems, not drugs. In our case, the defendant’s own witnesses testified that Miller took the same medications everyday, so Miller was likely intoxicated even today in court.

I said the State would not oppose a voice exemplar as long as Miller agreed to let my trooper perform an HGN test outside the presence of the jury before taking the stand. If the HGN results indicated Miller was not intoxicated, then an exemplar would be proper. However, if the HGN results indicated Miller was intoxicated, then an exemplar would not be probative. (I was 99-percent sure Miller would fail the HGN.)

The judge agreed with my argument. He said if Miller would consent to an HGN and the trooper was satisfied Miller wasn’t intoxicated, the judge would allow the voice exemplar. Otherwise, he would not. Miller’s defense counsel turned down the HGN. The defense rested without a voice exemplar.

On closing, I asked the jurors to recall their first impressions on seeing Miller exit his car. I asked them if they were thinking, “Wow, that guy is really drunk!” They responded with several head nods, so I knew I was on the right track. Then I played the snippets from the video where Miller’s speech was extremely slurred. I asked them what they thought when they heard Miller’s voice. Were they thinking, “Wow, that guy is really drunk!”? More nods. I reminded them that

Miller had stared at the Discount Tire envelope, thinking it was his car insurance. Then I hit them with my two-part intoxication test: 1) Had Miller lost his physical abilities? Yes. Had Miller lost his mental abilities? Yes. 2) Was it caused by a substance or substances? Yes. Was the defendant intoxicated? Yes. Should he have been driving? No!

I closed by telling jurors that in a DWI case, the law doesn't care why or how a person is intoxicated. A mother doesn't care whether the driver who killed her child was "drunk" on prescription meds, methamphetamine, or a fifth of Jack Daniels. (If memory serves, that drew an objection from the defense, but it was overruled.)

The jury convicted Miller of driving while intoxicated, and Miller opted for the judge to punish him. After the judge thanked the jurors for their verdict and dismissed them, all six jurors came back in the courtroom to watch punishment. Miller took the stand to testify about his limited disability income. My cross was brief and went something like this:

State: Mr. Miller, I notice your speech is much clearer today than it was on the day of your arrest. You haven't taken all of your medications today, have you?

Miller: No, I stopped taking my Soma yesterday.

State: Because of the trial, right?

Miller: Yes.

State: And today you're in pain, aren't you?

Miller: Yes.

State: And after the trial, you're going to take your Soma again, right?

Miller: Yes.

The judge sentenced Miller to six months probated for 12 months. He also assessed a fine and court costs. Most importantly, he suspended Miller's driver's license for six months.

Was it a defense strategy to have Miller skip Soma during the trial? It's hard to say. On one hand, I'm sure the defense didn't want Miller to appear intoxicated in court. On the other hand, skipping Soma made Miller's speech almost perfectly clear. That would have surely backfired on the exemplar (that is, unless Miller planned to "fake" having slurred speech).

All in all, we got a dangerous driver off the streets and made our community safer for a little while. And in the process, we learned a lot about how to prosecute a defendant who was "drunk" on prescription meds.

Endnotes

- 1 The defendant's name has been changed.
- 2 The defense agreed to stipulate to the lab results because they weren't contesting the drugs in his system so we didn't need our toxicologist.
- 3 116 S.W.3d 788.
- 4 The judge in our case was not the same judge as in Williams.
- 5 Trial counsel made a bill of exceptions after the trial that included a tape of the defendant

reading five paragraphs from the court's charge.

6 Williams, 74 S.W.3d at 904.