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State v. Roach Respondent's Brief Dckt. 41221

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 JAY ALTON ROACH,)
)
 Defendant-Appellant.)
)

No. 41221
Bonneville Co. Case No.
CR-2011-9167

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

HONORABLE DANE H. WATKINS, JR.
District Judge

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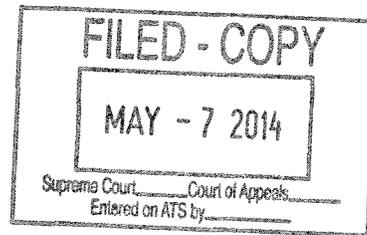


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STATEMENT OF THE CASE

Nature Of The Case

Jay Alton Roach appeals from the district court's intermediate appellate decision affirming the magistrate court's order excluding irrelevant expert opinion testimony from his trial for driving under the influence. On appeal, Roach contends that the exclusion of the expert's testimony deprived him of his constitutional rights.

Statement Of The Facts And Course Of The Proceedings

The factual and procedural background of this case, as set forth by the district court, is as follows:

On June 11, 2011, Jay Roach was arrested by Officer Neil Stevens for driving under the influence in violation of Idaho Code § 18-8004. Officer Stevens administered a breath alcohol test, which indicated Roach had a breath alcohol concentration of 0.143 and 0.144.

On March 23, 2012, Roach filed Defendant's Response to Plaintiff's Request for Disclosure of Expert Witness Under Rule 16, disclosing Dr. Michael Hlastala as an expert witness.

On March 27, 2012, the State filed an Objection to Defendant's Expert Witness Disclosure of Dr. Michael Hlastala and Motion to Exclude Expert Witness Under I.C.R. 16(c)(4) and 16(e)(2).

On March 29, 2012, the State filed a Motion in Limine to Exclude Expert Testimony.

On March 30, 2012, Roach filed an Objection to Motion in Limine.

Trial in this case began on March 30, 2012. After the selection of the jury and before the presentation of evidence, the State brought a Motion in Limine to exclude the expert testimony of Dr. Michael Hlastala. At the hearing on the motion, Hlastala made a proffer of his testimony. The trial was continued pending the outcome of the Court's decision regarding Hlastala's testimony.

On April 13, 2012, the magistrate court entered Court's Order on Expert Testimony, excluding Hlastala's testimony.

On June 21, 2012, the magistrate court entered an order certifying its April 13, 2012 Court's Order on Expert Testimony and granting Roach's motion for permissive appeal.

(R., pp.165-66.)

Roach appealed to the district court.¹ (R., pp.96-98.) After briefing by the parties (R., pp.116-61) and oral argument (R., p.163), the district court, acting in its intermediate appellate capacity, issued an opinion affirming the magistrate court (R., pp.165-77). Roach filed a timely notice of appeal. (R., pp.179-80.)

¹ The state objected to Roach's notice of appeal and moved to dismiss it because an order excluding expert testimony is not a final order and Roach failed to move the district court for permission to appeal, as required by Idaho Appellate Rule 12. (R., pp.101-05.) Subsequently, the state withdrew the motion to dismiss and argued the appeal on its merits. (R., p.110.) Because the state withdrew the motion below, and because the failure to comply with Idaho Appellate Rule 12 is not a jurisdictional defect, see I.A.R. 21, the state does not pursue this issue on appeal.

ISSUE

Roach states the issues on appeal as:

1. Did the trial Court error [sic] in its conclusion that the expert's testimony was only partition ratio testimony?
2. Did the trial Court error [sic] in its conclusion that the expert's testimony was irrelevant and inadmissible?
3. Was the exclusion of the expert witness a violation of the Defendant's Fourteenth and Sixth Amendment rights to confront the evidence against him and to produce evidence in his favor?
4. Was the exclusion of the expert witness contrary to Idaho Rules of Evidence 401 and 403?

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Roach failed to show error in the district court's appellate decision affirming the magistrate court's order excluding irrelevant expert opinion testimony?

ARGUMENT

Roach Has Failed To Show Error In The District Court's Appellate Decision Affirming The Magistrate's Order Excluding Irrelevant Expert Opinion Testimony

A. Introduction

Below, Roach sought to present opinion testimony attacking the reliability of breath tests, generally, in determining if a person was intoxicated. (3/30/2012 Tr., p.32, L.5 – p.34, L.15.) The magistrate court correctly determined that, under State v. Hardesty, 136 Idaho 707, 39 P.3d 647 (Ct. App. 2002), such evidence was legally irrelevant and properly excluded the testimony. (R., pp.86-91.) Roach was granted a permissive appeal to the district court (R., pp.94-98), which affirmed the magistrate court (R., pp.165-77).

On appeal to this Court, Roach asserts that the magistrate court erred by excluding the expert opinion testimony. (Appellant's brief, pp.5-21.) Roach's argument fails on two bases: First, Roach has failed to allege, must less show, error by the district court acting in its intermediate appellate capacity. Second, on the merits, Roach has failed to show an abuse of the magistrate court's discretion in excluding irrelevant opinion testimony.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2005)). "This Court freely reviews the question of relevancy as an issue of law." State v. Johnson, 148 Idaho 664, 667, 227

P.3d 918, 921 (2010). Whether to admit expert testimony is discretionary and will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Crea, 119 Idaho 352, 806 P.2d 445 (1991).

C. The District Court Correctly Affirmed The Magistrate Court's Proper Exclusion Of Irrelevant Expert Opinion Testimony

This Court has clearly and repeatedly stated that it is the appellant's burden to demonstrate error on appeal. Stewart v. Sun Valley Co., 140 Idaho 381, 384, 94 P.3d 686, 689 (2004) ("Error is never presumed on appeal and the burden of showing it is on the party alleging it." (quotations omitted)); Farrell v. Board of Com'rs, Lemhi County, 138 Idaho 378, 390, 64 P.3d 304, 316 (2002) (appellant carries burden of showing error on record and error never presumed); State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996) (appellant has burden of showing error in record). Roach had the burden of demonstrating error by the district court. Far from showing error, Roach has failed to so much as allege error by the district court, but instead confines his argument to the decision of the magistrate court. Because Roach failed to even attempt to carry his burden of demonstrating error by the district court, the district court's appellate decision should be affirmed.

Even if this Court construes Roach's attacks on the ruling of the magistrate court as an indirect claim of error by the district court, Roach's arguments still fail on the merits. Distilled, the issue raised by Roach is whether expert opinion testimony offered to attack the reliability of breath testing, generally, to determine a subject's level of intoxication is relevant following the amendment to Idaho Code § 18-8004 which made it a *per se* violation to have a breath alcohol concentration above the statutorily prescribed

limit. This issue was already decided by the Court of Appeals in Hardesty. In that case, the Court held that expert opinion testimony that a breath test could vary from a true measure of blood alcohol content was irrelevant because breath alcohol concentration above the prescribed limit is by itself a *per se* violation of Idaho Code § 18-8004, regardless of what the subject's "true" level of intoxication may be. Hardesty, 136 Idaho at 709, 39 P.3d at 649.

The Court's holding in Hardesty is controlling. Roach's expert did not anticipate testifying that the machine inaccurately read the alcohol content of Roach's breath sample. (3/30/2012 Tr., p.34, Ls.12-15.) Rather, Roach sought to introduce expert opinion testimony that certain physiological variations in persons who are subjected to breath tests created inherent unreliability in a breath test's ability to truly measure intoxication. (3/30/2012 Tr., p.32, L.5 – p.34, L.11.) Such testimony, however, is irrelevant where the legislature has determined that a person with a breath alcohol concentration above the prescribed limit is *per se* intoxicated. Because the expert's opinion testimony was legally irrelevant, the magistrate court properly excluded it under Idaho Rule of Evidence 402. The district court, therefore, correctly affirmed the magistrate court and should be affirmed.

Roach presents on appeal essentially the same arguments he put before the district court. (Compare Appellant's brief, pp.5-21 with R., pp.5-19.) The district court specifically responded to each of these arguments in turn in its intermediate appellate decision. (See R., pp.167-77.) The state adopts as part of its argument on appeal the district court's analysis as set forth at pages 3-13 of its "Memorandum Decision and Order Re: Appeal," a copy of which is attached hereto as "Appendix A."

The opinion testimony Roach sought to introduce at trial was not relevant. The magistrate court properly excluded it and the district court correctly affirmed the magistrate court. Roach does not claim that the district court erred. The district court's intermediate appellate opinion should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's appellate decision affirming the magistrate's order to exclude irrelevant expert opinion testimony.

DATED this 7th day of May, 2014.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 7th day of May, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

RONALD L. SWAFFORD
Swafford Law Office, Chartered
525 Ninth Street
Idaho Falls, ID 83404



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm

APPENDIX A

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2013 APR 26 PM 4:55
770 WEST WASHINGTON
BOONVILLE DISTRICT
COUNTY ID

STATE OF IDAHO,)
)
Plaintiff/Respondent,)
)
vs.)
)
JAY ALTON ROACH,)
)
Defendant/Appellant.)
_____)

Case No. CR-2011-9167

**MEMORANDUM DECISION AND
ORDER RE: APPEAL**

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 11, 2011, Jay Roach was arrested by Officer Neil Stevens for driving under the influence in violation of Idaho Code § 18-8004. Officer Stevens administered a breath alcohol test, which indicated Roach had a breath alcohol concentration of 0.143 and 0.144.

On March 23, 2012, Roach filed Defendant's Response to Plaintiff's Request for Disclosure of Expert Witness Under Rule 16, disclosing Dr. Michael Hlastala as an expert witness.

On March 27, 2012, the State filed an Objection to Defendant's Expert Witness Disclosure of Dr. Michael Hlastala and Motion to Exclude Expert Witness Under I.C.R. 16(c)(4) and 16(e)(2).

On March 29, 2012, the State filed a Motion in Limine to Exclude Expert Testimony.

On March 30, 2012, Roach filed an Objection to Motion in Limine.

Trial in this case began on March 30, 2012. After the selection of the jury and before the presentation of evidence, the State brought a Motion in Limine to exclude the

expert testimony of Dr. Michael Hlastala. At the hearing on the motion, Hlastala made a proffer of his testimony. The trial was continued pending the outcome of the Court's decision regarding Hlastala's testimony.

On April 13, 2012, the magistrate court entered Court's Order on Expert Testimony, excluding Hlastala's testimony.

On June 21, 2012, the magistrate court entered an order certifying its April 13, 2012 Court's Order on Expert Testimony and granting Roach's motion for permissive appeal.

On July 5, 2012, Roach filed a Notice of Appeal.

Roach filed Appellant's Brief on February 11, 2013.

The State filed Respondent's Brief on March 11, 2013.

Roach filed Appellant's Reply Brief on April 1, 2013.

Oral argument was held on April 11, 2013.

II. STANDARD OF ADJUDICATION

The district court must review a magistrate judge's decision on appeal upon the same standards of review as an appeal from the district court to the Idaho Supreme Court. Rule 83(u), I.R.C.P.; *Winn v. Winn*, 101 Idaho 270, 272, 611 P.2d 1055, 1057 (1980).

Although questions of admissibility of evidence often involve the exercise of the trial court's discretion, the threshold determination of whether the evidence offered is relevant presents an issue of law over which we exercise free review. *State v. Edmondson*, 125 Idaho 132, 134, 867 P.2d 1006, 1008 (Ct.App.1994).

State v. Hardesty, 136 Idaho 707, 708, 39 P.3d 647, 648 (Ct. App. 2002); accord *State v. Tapia*, 127 Idaho 249, 254, 899 P.2d 959, 964 (1995) ("whether evidence is relevant is an issue of law").

III. DISCUSSION

Roach raises four issues on appeal: (1) whether the trial court erred in concluding the expert's testimony was partition ratio testimony; (2) whether the trial court erred in concluding the expert testimony was irrelevant under *Hardesty*; (3) whether the exclusion violated Roach's Fourteenth and Sixth Amendment rights to confront the evidence against him and to produce evidence in his favor; and (4) whether the exclusion of expert testimony was contrary to I.R.E. §§ 401 and 403.

A. Partition Ratio Testimony

Roach argues the magistrate court erred in determining Hlastala's testimony would consist of partition ratio testimony. He notes that challenges based on partition ratios were eliminated when state law was amended to permit DUI charges based on breath test results without any partition ratio comparison to blood alcohol levels. Roach argues that Hlastala's testimony addressed variations in breath sample analyses while excluding any discussion regarding the partition ratio.

The State responds:

Although he did not define "breath alcohol level" as it relates to a person, Dr. Hlastala opined that none of the breath testing instruments on the market accurately measured breath alcohol. R. at 85. This is because his opinions are based on comparison between breath alcohol testing and blood alcohol. For example, he said that human variability results in changes to the breath sample, which "in effect [makes] it less related to what's in the human body." R. at 86. In light of his inability to define breath alcohol, one can only conclude that he's expressing that the breath sample becomes unrelated to the person's blood alcohol level. He also said that "breath testing instruments are biased against females because they have smaller lung volumes and that you would get *for the same blood level, you would get a higher breath level* in a female because they have smaller lung volumes." R. at 87.

Respondent's Br. at 9 (emphasis in original).

In its Order on Expert Witness, the magistrate court stated:

While the Doctor indicated that he was not going to touch upon those issues precluded to him by *Hardesty*, it is clear that the challenge remained to essentially the same issues; to-wit: is breath testing a valid measure of intoxication? . . .

...

. . . Based upon *Hardesty*, the Court can conclude that the challenge *while not specifically related to partition ratio* is a challenge to the underlying theory of breath testing and to the criteria that the legislature has adopted in order to determine impairment.

Order on Expert Witness at 5-6 (emphasis added).

The magistrate court did not, as Roach alleges, determine Hlastala's testimony would address partition ratios. Rather, the court recognized that Hlastala's testimony would challenge the validity of the underlying legislation in Idaho Code § 18-8004, thereby having a similar result as an attack on the partition ratio. The magistrate's conclusion was not in error.

B. Relevance Under *Hardesty*

Roach next argues the trial court erred in concluding the expert testimony was irrelevant under *Hardesty*. He argues *Hardesty* is distinguishable from this case because the court in *Hardesty* was addressing the use of expert testimony to attack breath tests based on the partition ratio. Roach explains:

The Defendant in this case did not call Dr. Hlastala to testify either that individuals vary generally in their partition coefficient or that this specific partition ratio was below the norm. Rather, he called Dr. Hlastala to testify that the breath alcohol concentration taken from the sample of exhaled breath has proven to be an unreliable estimator of the alcohol concentration in the breath because, among other factors, none of that measurement derives from the alveolar sacs deep in the lungs and the measured air is highly affected by breathing patterns.

...

. . . The testimony is a scientific challenge to the data obtained by breath test machines, before the partition ratio is applied to convert such breath

test data to blood-alcohol concentration by weight.

Appellant's Br. at 14-15. Finally, "The testimony is a scientific challenge to the data obtained by breath test machines, before the partition ratio is applied to convert such breath test data to blood-alcohol concentration by weight." *Id.* at 15.

The State responds that: "Where the statute defines how breath alcohol is to be measured under the statute and the results meet the legal definition, testimony concerning a competing scientific definition is irrelevant under the principles of *Hardesty*."

Respondent's Br. at 13.

I.R.E. 401 provides: "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Idaho Code § 18-8004 provides:

(1) (a) It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, *or breath*, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

...

(4) For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, *per two hundred ten (210) liters of breath* or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or

quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

(Emphasis added).

The Court of Appeals has held that while challenges to the reliability and performance of a specific machine are valid, the “general admissibility of the breath analysis process has been too long established to be subjected to challenge now on the basis of its scientific acceptability.” *State v. Hartwig*, 112 Idaho 370, 375, 732 P.2d 339, 344 (Ct. App. 1987).

In *Hardesty*, the defendant was arrested and charged with violating Idaho Code § 18-8004(1)(a) after a breath test indicated a .15 and .14 percent breath alcohol concentration. Prior to trial, Hardesty filed a motion to allow expert testimony concerning the unreliability and variability of the partition ratio used to convert a person’s breath alcohol concentration to a blood alcohol concentration. Hardesty made a vague offer of proof, arguing that variations in individual partition ratios render the standard partition ratio inaccurate. Without specifically addressing the issue of relevancy, the magistrate granted Hardesty’s motion. On interlocutory appeal, the district court reversed the magistrate, holding that the expert testimony was speculative and irrelevant.

On appeal from the district court, the Court of Appeals limited the discussion to “the admissibility of evidence regarding the variability of the partition ratio among individuals.” *Id.* at 708, 39 P.3d at 648. The Court of Appeals explained the legislative history pertaining to breath and blood alcohol tests and the partition ratio as a means of converting breath alcohol concentration to blood alcohol concentration. Idaho ultimately

amended its DUI statutes so that when a breath analysis is administered to an individual suspected of driving under the influence, a determination of per se intoxication is made by measuring the breath alcohol concentration alone, without any determination of blood alcohol concentration.

The court in *Hardesty* explained:

Under the language of Idaho's amended DUI statute, therefore, a breath alcohol concentration above the proscribed limit of .08 percent is a *per se* violation of the statute regardless of blood alcohol content. *Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.* *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct.App.2001). The language of the statute is to be given its plain, obvious, and rational meaning. *Id.* Accordingly, conversion from breath alcohol concentration to blood alcohol content is unnecessary, and a person's blood alcohol content is no longer of sole legal consequence. Hardesty's evidence regarding the variability of the standard partition ratio is thus irrelevant. Under I.R.E. 402, evidence that is not relevant is not admissible. Other courts interpreting DUI statutes that, like Idaho's, define driving under the influence in terms of a breath alcohol concentration in excess of the statutory limit have also held that evidence of the variability of the 2100:1 partition ratio is irrelevant and, therefore, inadmissible. *See Cooley v. Anchorage*, 649 P.2d 251, 254 n. 6 (Alaska Ct.App.1982); *Ireland*, 39 Cal.Rptr.2d at 876; *Brayman*, 751 P.2d at 298–99; *McManus*, 447 N.W.2d at 657.

Hardesty attempts to avoid this result by citing two Idaho cases, which he claims entitle him to challenge the partition ratio used by breath testing instruments. First, Hardesty cites *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct.App.1987). In *Hopkins*, the defendant was charged with DUI after a breath test showed he had a blood alcohol concentration of .16 percent. On appeal, the sole issue before this Court was whether the magistrate abused its discretion in refusing to accept a defense witness as a qualified expert on the Intoximeter 3000. This Court held that the reliability of the Intoximeter 3000 had been sufficiently recognized such that it was unnecessary for the state to introduce expert testimony on the machine's design and methodology in order to establish a foundation for evidence of a blood alcohol concentration test result. However, in dicta, this Court stated that the unreliability of the scientific methodology underlying the design on the Intoximeter 3000, as well as whether the particular machine used to test the defendant's breath was functioning properly, were both challenges that could be maintained. This Court ultimately held that the witness was qualified as an expert and reversed the

magistrate's decision.

Here, Hardesty's reliance on *Hopkins* for the proposition that expert testimony regarding the variability of the partition ratio is admissible is misplaced. *Under Hopkins, Hardesty would be entitled to challenge the scientific methodology underlying the design of the Intoxilyzer 5000 so far as it measured Hardesty's breath alcohol concentration. Therefore, as the district court concluded, Hardesty could challenge whether the Intoxilyzer 5000 accurately measured his breath alcohol concentration at the time Hardesty's breath test was administered.* In addition, Hardesty could challenge whether the particular instrument used to measure his breath alcohol concentration was working properly at the time of his breath test and whether his breath test was administered correctly. However, *Hopkins* does not stand for the broad proposition that Hardesty was entitled to challenge the accuracy of the standard partition ratio.

Second, Hardesty cites *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct.App.1991). In *Pressnall*, the defendant was charged with DUI. At trial, the defendant testified that during a six-hour period, he consumed approximately seven beers and two shots of tequila. The defendant's breath alcohol content was measured by an Intoximeter 3000 approximately five and one-half hours later and showed a breath alcohol content of .15 percent and .17 percent. The defendant's expert testified that, after drinking the amount of alcohol the defendant claimed to have consumed, a man of the defendant's height and weight would have had a blood alcohol content of between .05 percent and .09 percent. Through an offer of proof, the defendant indicated that his expert would further testify that the defendant's blood alcohol level was related to the alcohol content of his breath. The defendant sought to establish through the expert's testimony that that his alcohol content could not have been .10 percent or more, implying that the results of the Intoximeter 3000 were inaccurate. The district court ruled that any evidence concerning the defendant's blood alcohol content, or its relationship to the level of alcohol present in the defendant's breath, was irrelevant to the question of whether the defendant's breath alcohol content exceeded the statutory limit, and excluded the testimony.

On appeal, this Court held that *a defendant charged with DUI by proof of excessive alcohol content was entitled to offer any competent evidence tending to impeach the results of the evidentiary tests admitted.* Thus, this Court held that in a prosecution for DUI while having an alcohol content of .10 percent or more as shown by analysis of blood, breath or urine, *evidence of a contradictory alcohol content, otherwise proper, was admissible for the purpose of impeaching the results of the evidentiary tests submitted by the state. The probative value of such evidence was left to the jury.* This Court further held that once a breath test result had been admitted into evidence, the reliability and performance of the given

machine was subject to challenge and that the reliability of the process utilized may also be challenged.

Here, Hardesty's application of *Pressnall* is overbroad. As the district court noted in its intermediate appellate decision, the defendant in *Pressnall* sought to impeach the accuracy of his *specific* breath test result with evidence that his *own* blood alcohol content was different than his breath alcohol content. The district court's ruling in this case also provides for such a challenge. Here, however, Hardesty also sought to introduce expert testimony regarding the inaccuracy of the standard partition ratio as it relates to some individuals. Like this Court's holding in *Hopkins*, the holding in *Pressnall* did not entitle Hardesty to maintain such a challenge through expert testimony.^{FN2}

FN2. *We note that, although a person's blood alcohol content is irrelevant to whether there has been a violation of the prohibition against driving with a breath alcohol concentration above .08 found in I.C. § 18-8004, our holding does not preclude a person charged with DUI from introducing a contradictory blood or urine alcohol concentration test result taken at the time as impeachment towards the accuracy of his or her individual breath test result. Thus, our holding in this case should not be read to be inconsistent with the holding in Pressnall in that regard.*

Hardesty's argument is, in effect, a challenge to the legislature's formula for determining the proscribed alcohol concentration in a person's breath. Hardesty claims that this formula is a variation of the standard 2100:1 partition ratio used by breath testing devices and that he should not be prevented from introducing expert testimony regarding the variability of the standard partition ratio based on the statutory definition of driving under the influence. This is a challenge to what the legislature has determined to be an element of the crime of DUI. It is uniformly held that the power to define crime and fix punishment rests with the legislature and that the legislature has great latitude in the exercise of that power. Malloroy v. State, 91 Idaho 914, 915, 435 P.2d 254, 255 (1967); see also State v. Lesley, 133 Idaho 23, 26, 981 P.2d 748, 751 (Ct.App.1999). We conclude, as did the district court, that allowing Hardesty's expert to testify regarding the variability of the standard partition ratio would be speculative as it related to Hardesty. Thus, we hold that Hardesty's evidence challenging the accuracy of the standard partition ratio was inadmissible and, therefore, the magistrate erred.

Under I.C. § 18-8004, Hardesty's proffered evidence of the variability of the standard 2100:1 partition ratio is irrelevant because a breath alcohol concentration above the prescribed limit of .08 percent is a per se violation of the statute regardless of blood alcohol content. Therefore, we hold that the magistrate erred by granting Hardesty's motion to introduce evidence

regarding the variability of the standard partition ratio because such evidence was irrelevant and inadmissible. The district court's intermediate appellate decision reversing the magistrate's order is affirmed.

Id. at 709-11, 39 P.3d at 649-51 (emphasis added).

First, this Court agrees with the magistrate that although Hlastala was not testifying regarding the partition ratio, his challenge to the scientific methodology underlying the breath alcohol test addresses essentially the same issue.¹

Second, the language of Idaho Code § 18-8004 is plain and unambiguous. If an individual has a breath alcohol concentration of 0.08 or higher, as defined by section 18-8004(4), that person is in violation of the law, regardless of what that individual's blood alcohol concentration is.

Third, although Hlastala's testimony would have challenged the scientific methodology underlying the design of all breathalyzers, it did not specifically impeach the results of tests administered to Roach individually. Neither did Hlastala attack the reliability of the given machine.

Like in *Hardesty*, Roach's argument is based on challenging "the legislature's formula for determining the proscribed alcohol concentration in a person's breath." *Id.* at

¹ Theoretically, at least, where a statute defines a per se breath offense, it is not necessary even to allege that a given breath-alcohol level corresponds with any particular blood-alcohol level. In practice, however, the per se illegal breath-alcohol level adopted by these new statutes has been 0.1 gram of alcohol per 210.0 liters of breath, or its equivalent, which is the same level that was previously used to prove a blood-alcohol percentage of 0.10 percent, based on the 2100 to 1 partition ratio. In effect, if one accepts the proposition that what is "really" being penalized is blood alcohol, this type of statute places the 2100 to 1 conversion ratio in the statute, rather than in the internal circuitry of the breath-testing machine.

711, 39 P.3d at 651. Allowing Hlastala to testify regarding the variability of breath alcohol tests would be speculative as to Roach himself and not relevant to the question of whether Roach's breath alcohol concentration exceeded the 0.08 limit established by Idaho Code § 18-8004.

The magistrate court did not err in determining Hlastala's testimony was not relevant under *Hardesty*.

C. 14th and 6th Amendment Rights

Roach argues that by excluding Hlastala's testimony, the court violated Roach's 14th Amendment due process right to produce relevant evidence and to confront the evidence against him. Roach cites *State v. Ward*, 135 Idaho 400, 17 P.3d 901 (Ct. App. 2001) in support of his argument.

The State responds that *Ward* is inapposite to this case because it discusses challenges to the performance and reliability of a specific breath testing instrument, not the testing technique in general.

In *Ward*, the Idaho Court of Appeals explained:

[O]nce the trial court has made the threshold determination of admissibility, a defendant is free to attack the reliability and accuracy of the admitted evidence through the presentation of evidence at trial. *See State v. Bell*, 115 Idaho 36, 40, 764 P.2d 113, 117 (Ct.App.1988). This evidence could include concessions elicited on cross-examination of the officer who administered the test or testimony from a defense expert. As stated previously by this Court:

Obviously the reliability and performance of any given machine is subject to challenge. If there is evidence that any particular machine has malfunctioned or was designed or operated so as to produce unreliable results, such evidence would be relevant both to the admissibility and the weight of the test results.

State v. Hartwig, 112 Idaho 370, 375, 732 P.2d 339, 344 (Ct.App.1987). In addition, a party is free to challenge the officer's actions in observing the suspect for the requisite fifteen-minute period. *See State v. Carson*,

133 Idaho 451, 453, 988 P.2d 225, 227 (Ct.App.1999). Thus, a trial court's "general admissibility of the results of [a breathalyzer test] in no way limits the right of a party to introduce before the jury evidence relevant to the weight and credibility of such evidence." *State v. Van Sickle*, 120 Idaho 99, 104, n. 2, 813 P.2d 910, 915, n. 2 (Ct.App.1991). The burden of persuading the jury that the test results are accurate remains with the prosecution. *Id.*

In the instant case, the controversy centers around the use and meaning of the terms "valid" and "validity." We note the considerable discussion between counsel for Ward and the magistrate in attempting to distinguish between "admissibility" and "validity." However, this confusion notwithstanding, the magistrate's ruling had the effect of preventing Ward from challenging the accuracy of the breathalyzer test, the weight to be afforded to the breathalyzer evidence, and the test's overall reliability. Although it is within the province of the trial court to determine the admissibility of evidence, it is the province of the jury to determine the weight, accuracy, and reliability to be afforded the evidence once it is admitted. The reliability both of the test's results and the process utilized to obtain the evidence are subject to attack. *See Hartwig*, 112 Idaho at 375, 732 P.2d at 344. Therefore, having determined that the breathalyzer test was admissible, the magistrate erred in further ruling that Ward was prohibited from attacking the accuracy, weight, or reliability to be afforded to the test results at trial.

Id. at 404-405, 17 P.3d at 905-906.

Ward deals specifically with a defendant's right to attack the reliability and accuracy of an administered test. It does not discuss whether a defendant has the right to attack the scientific acceptability of breathalyzers generally.

In comparison, in *Hartwig*, the Court of Appeals held that while challenges to the reliability and performance of a specific machine are valid, the "general admissibility of the breath analysis process has been too long established to be subjected to challenge now on the basis of its scientific acceptability." *State v. Hartwig*, 112 Idaho 370, 375, 732 P.2d 339, 344 (Ct. App. 1987).

The magistrate court did not violate Roach's 14th and 6th Amendment rights by excluding Hlastala's testimony.

D. I.R.E. 401 and 403

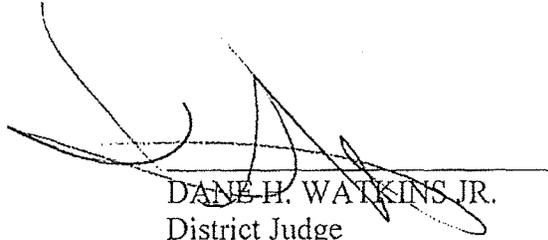
Roach argues that Hlastala's testimony was relevant regarding the accuracy and reliability of Intoxilyzer and the breath test. He adds that the testimony was not unduly prejudicial.

As discussed above, under the Court of Appeal's holding in *Hardesty*, the scientific methodology behind breath alcohol tests is not relevant to a per se violation of the Idaho DUI statutes. Consequently, the magistrate court did not err in concluding Hlastala's testimony was not relevant.

IV. CONCLUSION AND ORDER

The magistrate's decision to exclude Hlastala's testimony is affirmed.

DATED this 20 day of April 2013.


DANE H. WATKINS JR.
District Judge