

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 46632-2018
 Plaintiff-Respondent,)
) Teton County Case No.
 v.) CR-2015-252
)
 LINDSEY JEAN ASSELIN,)
)
 Defendant-Appellant.)
)
)

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Lindsey Jean Asselin appeals from the district court's decision affirming the magistrate court's denial of her motion in limine.

Statement Of The Facts And Course Of The Proceedings

Officer Lemieux pulled Asselin over early in the morning on April 11, 2015, after observing her vehicle swerve in its lane and cross the center line. (8/28/2015 Tr., p. 94, L. 15 – p. 95, L. 14.) Officer Lemieux smelled alcohol coming from the vehicle and Asselin admitted she had consumed alcohol. (8/28/2015 Tr., p. 96, L. 4 – p. 97, L. 4.) Officer Lemieux conducted standard field sobriety tests and Asselin met decision points on each test. (See 8/28/2015 Tr., p. 97, L. 19 – p. 102, L. 20.) Officer Lemieux placed Asselin under arrest for driving under the influence (DUI) and transported her to the Teton County Sheriff's Office. (8/28/2015 Tr., p. 103, Ls. 11-21.) After observing her for a 15-minute waiting period, Officer Lemieux placed a new disposable mouthpiece on a LifeLoc FC20 breathalyzer and attempted to obtain breath samples from Asselin. (8/28/2015 Tr., p. 104, L. 19 – p. 108, L. 18.) Asselin's first two blows were insufficient to provide an adequate breath sample. (8/28/2015 Tr., p. 108, Ls. 19-23; State's Ex. 2.) Asselin provided three more blows, one of which was insufficient; the other two blows tested at .165 and .167 breath alcohol content. (8/28/2015 Tr., p. 111, L. 2 – p. 112, L. 2; State's Ex. 3.) Officer Lemieux used the same mouthpiece for Asselin's breath samples. (8/28/2015 Tr., p. 132, Ls. 19-25.)

Officer Lemieux cited Asselin for misdemeanor DUI. (R., p. 19.) The magistrate court appointed a public defender to represent Asselin based on her asserted lack of income, assets, and

equity in her home. (5/6/2015 Tr., p. 14, Ls. 22-23; p. 17, Ls. 5-20.) The case proceeded to a jury trial. (See R., pp. 48-71.)

Before trial, Asselin filed a motion in limine, seeking to limit the state's use of the breathalyzer results. (R., pp. 22-23.) Asselin sought to exclude the breath test results because a new mouthpiece was not used for each breath sample she provided. (8/28/2015 Tr., p. 63, Ls. 18-22.) Asselin cited to the Idaho State Police (ISP) standard operating procedure breath test manual to support her contention that a new mouthpiece was needed: "The operator should use a **new mouthpiece** for each individual and for each series of tests (i.e. complete set of breath testing samples)." (R., p. 46; 8/28/2015 Tr., p. 64, L. 14 – p. 65, L. 2.) The state agreed that the same mouthpiece was used for all Asselin's breath samples, but disagreed that the ISP manual requires a new mouthpiece for each blow. (8/28/2015 Tr., p. 64, L. 3 – p. 65, L. 16.) The state noted that the manual states a new mouthpiece should be used "[f]or hygienic reasons," and the provision Asselin relied on appears in a section regarding minors, not in the general breathalyzer procedure sections. (R., pp. 41, 46.) Additionally, the state argued that the provision requires a new mouthpiece for each individual, or for each series of tests; one mouthpiece could properly be used for multiple breath samples provided by one individual in the course of a single "series of tests." (8/28/2018 Tr., p. 68, L. 9 – p. 70, L. 1.)

The magistrate court first found that the manual directed the use of a new mouthpiece for hygienic reasons, "not because it will interfere with the test." (8/28/2015 Tr., p. 71, Ls. 8-16.) The magistrate court also determined that the manual requires a new mouthpiece "for each individual person and then also for each series" of breath tests, but not for each individual breath sample provided by one person in a series of tests. (8/28/2015 Tr., p. 66, Ls. 1-14; p. 71, Ls. 17-24.) Because the state had shown that ISP's breath test procedures were properly followed in

accordance with Idaho Code § 18-8004(4), the magistrate court denied Asselin's motion in limine. (8/28/2015 Tr., p. 66, Ls. 10-14; p. 71, L. 25 – p. 72, L. 8.)

During trial, Asselin questioned Officer Lemieux about the mouthpiece and moved to introduce the ISP breath test manual. (8/28/2015 Tr., p. 131, L. 19 – p. 133, L. 2; p. 148, L. 12 – p. 150, L. 5.) The magistrate court allowed the exhibit to be introduced based on the state's non-objection, but stated it would not permit cross-examination to "back-door" the motion in limine. (See 8/28/2015 Tr., p. 150, L. 21 – p. 153, L. 21.) Additionally, the magistrate court stated it would not allow Officer Lemieux to testify to the scientific reliability of the breath test, given that he was qualified to operate the breathalyzer but not qualified as an expert in the science of breath tests generally. (8/28/2015 Tr., p. 152, Ls. 18-24.)

The jury found Asselin guilty of DUI. (8/28/2015 Tr., p. 215, Ls. 18-25; R., p. 73.) Following trial, Asselin's counsel moved to withdraw, asserting that Asselin was dissatisfied with the representation she received and wished to represent herself. (R., pp. 74-75.) Thereafter, Asselin apparently signed a Stipulated Substitution of Counsel, agreeing to discharge court-appointed counsel and represent herself. (See R., p. 76.¹) Asselin filed a pro se notice of appeal on October 9, 2015 (within 42 days of the jury's verdict), along with a motion to stay sentencing pending her appeal, which was denied. (See R., pp. 7-8, 76.)

Asselin failed to appear at sentencing on September 16, 2015, because she was held involuntarily out of state. (See R., p. 116; see also 9/7/2016 Tr., p. 4, L. 18 – p. 6, L. 1.²) Asselin appeared before the magistrate court on September 7, 2016. (See generally 9/7/2016 Tr.)

¹ The Stipulated Substitution of Counsel referenced in the court's order does not appear in the record on appeal.

² The September 7, 2016 transcript appears in the Reporter's Supplemental Transcript electronic document.

Asselin requested court-appointed counsel. (9/7/2016 Tr., p. 11, L. 18 – p. 12, L. 1.) The magistrate court denied her request after determining that she did not qualify as indigent, based on her reported equity of \$150,000 in her home. (9/7/2016 Tr., p. 12, L. 4 – p. 13, L. 12; p. 14, Ls. 14-16.) A week later, Asselin was sentenced to 180 days in jail with credit for 10 days served and the remaining time suspended; Asselin was placed on probation for 18 months, with the first three months supervised but the ability to move for unsupervised probation thereafter on the probation officer's recommendation. (9/14/2016 Tr., p. 228, L. 19 – p. 230, L. 16.) The final judgment of conviction was entered on September 14, 2016. (See R., p. 12.)

In October 2017, the court held a hearing regarding Asselin's notice of appeal. (See R., pp. 128-29.) In 2015, the court determined that Asselin was indigent and ordered that transcripts be prepared at public expense, but that had not been done. (See R., pp. 78, 128.) The court reordered the preparation of transcripts and granted Asselin an extension of time to file an appellate brief. (See R., pp. 129, 131.) Asselin indicated she might proceed pro se and the court reminded her that if she did so, she would be required to follow the court rules. (See R., p. 129.)

Asselin filed her untimely pro se brief on May 31, 2018. (See R., p. 17.) The state filed a motion to dismiss, asserting that the issues were not preserved, were unsupported by citation to the record or relevant authorities, and the brief was untimely; the state also moved to strike items attached to Asselin's brief that were not part of the record. (R., pp. 135-40.)

The district court granted the state's motion to strike but denied the motion to dismiss. (R., pp. 142-43.) The district court addressed Asselin's preserved claim that the magistrate court abused its discretion by denying her motion in limine. (R., pp. 143-45.) The district court determined that the magistrate court did not abuse its discretion when it determined that the manual did not require a new mouthpiece for each blow, and that the breath test results were

admissible. (R., pp. 143-45.) The district court declined to address Asselin's additional issues raised on appeal because they were not properly raised before the magistrate court. (R., pp. 145-46.) Asselin timely appealed from the district court's decision. (R., pp. 148-49.)

ISSUES

Asselin states the issues on appeal as:

- 1.) Did the county judge abuse his discretion by knowingly conducting the motion in limine without an expert, and denying the motion but still preventing the defense from discussing the breathalyzer with the jury?
- 2.) Was the defense counsel ineffective because he was unprepared with the scientific arguments showing that the FC20 was not properly validated? Was the defense counsel ineffective because he failed to provide an expert witness?
- 3.) When the defense counsel removed himself after Ms. Asselin expressed her frustrations, the defense counsel submitted a Stipulated Substitution of Counsel. Did the court abuse its discretion by denying Ms. Asselin an attorney for sentencing even when no counsel had been substituted?
- 4.) The lack of attorney affected Ms. Asselin's appeal because she had no advice on how to write an appeal. Did this affect Ms. Asselin's Sixth Amendment rights, her ability to defend herself and to assert an appeal?

(Appellant's brief, p. 4)

The state rephrases the issues as:

- I. Should Asselin's appeal be dismissed because the district court lacked jurisdiction over her intermediate appeal?
- II. Has Asselin failed to show that the district court erred when it affirmed the magistrate court's denial of her motion in limine?
- III. Should this Court decline to address Asselin's remaining claims, because they are unpreserved and do not rise to the level of fundamental error?

ARGUMENT

I.

Asselin's Appeal Should Be Dismissed Because The District Court Lacked Jurisdiction Over Her Intermediate Appeal

A. Introduction

Asselin filed her notice of appeal to the district court from the jury verdict in magistrate court. (See R., pp. 7-8.) The final judgment of conviction was entered more than a year later. (See R., p. 12.) Asselin did not file a new or amended notice of appeal within 42 days of the final judgment. Because Asselin did not file a timely notice of appeal from an appealable order, the district court lacked jurisdiction over her intermediate appeal. This Court should dismiss Asselin's appeal for lack of jurisdiction.

B. Standard Of Review

“Whether a court lacks jurisdiction is a question of law over which this Court exercises free review.” State v. Daniels, 158 Idaho 30, 31, 343 P.3d 59, 60 (Ct. App. 2014) (citing State v. Jones, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004)). “Unless review is specifically provided for by statute or rule, this Court may only review appeals from final judgments.” Chandler v. Hayden, 147 Idaho 765, 772, 215 P.3d 485, 492 (2009). “When an appeal is taken from a non-appealable order, it should be dismissed—if not by motion of one of the parties, by the court itself—for lack of jurisdiction.” Daniels, 158 Idaho at 31, 343 P.3d at 60 (citing Highlands Dev. Corp. v. City of Boise, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008)). A court's lack of jurisdiction is an issue that “may be raised at any time.” Jones, 140 Idaho at 757, 101 P.3d at 701.

C. Asselin Did Not Appeal From An Appealable Order

Idaho Criminal Rule 54(a)(1) specifies from which orders a party may appeal from magistrate court to the district court.³ A defendant may appeal from a final judgment of conviction. I.C.R. 54(a)(1)(A). However, the statute does not include a jury verdict as an independent appealable order, before final judgment has been entered. See I.C.R. 54(a)(1).

A jury found Asselin guilty of DUI on August 28, 2015, and she filed a notice of appeal on October 9, 2015. (See R., pp. 7-8.) However, the final judgment of conviction was not entered until Asselin was sentenced on September 14, 2016. (See R., p. 12.) Asselin did not file a new or amended notice of appeal within 42 days of the final judgment. Because Idaho Criminal Rule 54 does not allow a party to appeal a jury verdict, the appeal was not properly filed and the district court lacked jurisdiction. Because the district court lacked appellate jurisdiction, “this Court, likewise, is without jurisdiction due to the untimely filing of the notice of appeal from the magistrate division.” State v. Jensen, 138 Idaho 941, 944, 71 P.3d 1088, 1091 (Ct. App. 2003).

II.

Asselin Has Failed To Show That The District Court Erred When It Affirmed The Magistrate Court’s Denial Of Her Motion In Limine

A. Introduction

If this Court determines that the district court had jurisdiction, it should affirm the district court’s decision. On appeal to this Court, Asselin again challenges the magistrate court’s denial of her motion in limine. (Appellant’s brief, pp. 10-12.) However, Asselin does not directly

³ At the time Asselin appealed, the applicable rule was Idaho Criminal Rule 54.1, which was similar to the current rule in all material respects relevant to this case.

challenge the district court's decision affirming the magistrate court's ruling. The district court properly affirmed the magistrate court's denial of Asselin's motion in limine. The breath test was conducted according to ISP's standard operating procedure; that procedure does not require that a new mouthpiece be used for each breath sample provided by one individual. Thus, the use of one mouthpiece for all Asselin's blows was not a basis to exclude the breath test results at trial.

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 (2008)). If the district court properly applied the law to the facts, the appellate court will affirm the district court's order. See id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)). The appellate court "reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." State v. Tregeagle, 161 Idaho 763, 765, 391 P.3d 21, 23 (Ct. App. 2017).

Trial courts are afforded broad discretion when ruling on motions in limine. Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005). Consequently, this Court reviews decisions to grant or deny motions in limine with an abuse of discretion standard. Id. In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal

standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” State v. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. The District Court Did Not Err When It Affirmed The Magistrate Court’s Denial Of Asselin’s Motion In Limine

Though this Court directly reviews the district court’s intermediate appellate decision, Asselin has not asserted any district court error. Asselin does not challenge the district court’s intermediate appellate decision on this issue and asserts only that the magistrate court erred. (See generally Appellant’s brief.) Because Asselin has not attempted to meet her burden to show district court error, this Court may affirm the district court’s intermediate appellate decision on that basis. See State v. Phipps, 166 Idaho 1, ___, 454 P.3d 1084, 1087 (2019) (“[T]his Court does not review the decision of the magistrate court. Rather, we are procedurally bound to affirm or reverse the decisions of the district court.” (citations and quotation marks omitted)).

If this Court addresses the merits, the district court properly concluded that the magistrate court did not abuse its discretion by denying Asselin’s motion in limine to exclude the breath test results. “In order to have the results of a breath test admitted at trial, the State . . . may establish that the administrative procedures, which ensure the reliability of that test, have been met.” State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011). “Under I.C. § 18-8004(4), the State can meet this foundational requirement by showing a state agency approved the equipment and an officer operated the equipment and administered the test in conformity with applicable standards.” Id. at 736-37, 264 P.3d at 77-78 (footnote omitted).

The state met its foundational burden to introduce the breath test results by showing that the breath test was performed on an approved breathalyzer by a certified officer and in

accordance with ISP's standard operating procedures. The state produced evidence showing that the breath test was conducted on a properly calibrated breathalyzer. (See State's Exs. 1-3.) Performance verifications were timely completed on the breathalyzer. (8/28/2015 Tr., p. 106, L. 11 – p. 107, L. 14; State's Ex. 1.) Officer Lemieux was a certified breath test operator. (8/28/2015 Tr., p. 92, Ls. 12-18; p. 105, Ls. 18-20; p. 143, Ls. 10-13.) He followed ISP's standard operating procedures, including observing Asselin during a fifteen-minute waiting period and completing two-minute air blank samples between each of Asselin's blows. (See 8/28/2015 Tr., p. 104, L. 8 – p. 105, L. 13; State's Exs. 2-3; see also Def. Ex. D, pp. 16-17.) Asselin does not dispute those facts on appeal. In fact, Asselin concedes that Officer Lemieux was a certified breath test operator. (Appellant's brief, p. 6.). Because the state met its burden of showing that the "administrative procedures, which ensure the reliability of [the breath test], have been met," the breath test results were admissible, the magistrate court properly denied the motion in limine, and the district court properly affirmed that ruling. See Healy, 151 Idaho at 736, 264 P.3d at 77.

Asselin argues that the magistrate court should have granted her motion in limine and excluded the breath test results because a new mouthpiece was not used between each breath sample she provided.⁴ (Appellant's brief, pp. 10-12.) However, ISP's standard operating procedures do not require that a new mouthpiece be used for each breath sample an individual

⁴ As a corollary to this argument, Asselin also argues that magistrate court erred when it heard the motion in limine without expert testimony. (See Appellant's brief, p. 4.) As the district court noted, "Asselin did not argue . . . that scientific evidence would be needed to prove the reliability of the breath test" before the magistrate court. (R., p. 153.) The district court declined to consider the argument, because it was raised for the first time on appeal. This Court should do the same. Even if this Court considers her argument, I.C. § 18-8004(4) makes clear that expert testimony is not required where a breath test is conducted according to ISP's standard operating procedures.

provides. The manual states that “for hygienic reasons, the Operator should use a **new mouthpiece** for each series of tests.” (Def. Ex. D, p. 17 (emphasis in original).) A breath alcohol test is defined as “a breath sample or series of separate breath samples provided during a breath testing sequences.” (Def. Ex. D, p. 2.) Later, in a section that relates only to minors, the manual states that a new mouthpiece should be used “for each individual and each series of tests (i.e. complete *set* of breath testing samples).” (Def. Ex. D, p. 22 (emphasis added).) That section defines a “complete breath alcohol test” as including two valid breath samples taken from the individual being tested. (Def. Ex. D, p. 22.) Asselin, one individual, was given a new mouthpiece that was used for all of her blows, culminating in two valid breath samples, which completed her breath alcohol test. (8/28/2015 Tr., p. 104, L. 19 – p. 108, L. 23; p. 111, L. 2 – p. 112, L. 2.) Officer Lemieux followed the ISP procedure when he gave Asselin a new mouthpiece and used that same mouthpiece to complete her breath test; the manual simply does not require a new mouthpiece for each individual blow. Asselin has conceded as much on appeal: “Idaho’s Standard Operating Procedure (SOP) for the use of the FC20 does not include the instructions to change the mouthpiece tube.” (Appellant’s brief, p. 5.) The magistrate court did not abuse its discretion when it denied Asselin’s motion in limine to exclude the breath test results, nor did the district court err when it affirmed the magistrate court’s ruling.

III.

This Court Should Disregard Asselin’s Remaining Claims On Appeal, Because They Are Unpreserved And Do Not Rise To The Level Of Fundamental Error

A. Introduction

Asselin raises a new set of issues on appeal, in addition to challenging the denial of her motion in limine. On appeal to this Court, Asselin now raises an ineffective assistance of trial

counsel claim and asserts deprivation of counsel at sentencing and on appeal to the district court. (Appellant's brief, p. 4.) These claims were not raised before the district court in its intermediate capacity and are therefore not properly before this Court on appeal. This Court should decline to address Asselin's unpreserved claims.

If this Court reaches the merits, Asselin's unpreserved claims fail. Her ineffective assistance of counsel claim fails because counsel's performance was not deficient, nor was Asselin prejudiced by the alleged deficiency. Asselin's deprivation of counsel claim also fails, because she waived counsel in order to proceed pro se, was no longer eligible for court-appointed counsel at sentencing, and declined to hire private counsel.

B. Standard Of Review

"It is well settled that an appellant may not raise issues before this Court that he has not raised and preserved before the district court in its capacity as an intermediate appellate court." State v. Bailey, 117 Idaho 941, 943, 792 P.2d 966, 968 (Ct. App. 1990); State v. Voss, 152 Idaho 148, 150, 267 P.3d 735, 737 (Ct. App. 2011). "The Court will not consider issues that are raised for the first time on appeal." Fed. Home Loan Mortg. Corp. v. Butcher, 157 Idaho 577, 581, 338 P.3d 556, 560 (2014). "An issue not raised at trial or on intermediate appeal may not be raised at a subsequent stage of the appellate process, unless the alleged error constitutes fundamental error." State v. Camp, 134 Idaho 662, 668, 8 P.3d 657, 663 (Ct. App. 2000) (citation and quotation marks omitted).

"When a violation of a constitutional right is asserted, the appellate court should give deference to the trial court's factual findings unless those findings are clearly erroneous." State v. Suiter, 138 Idaho 662, 665, 67 P.3d 1274, 1277 (Ct. App. 2003).

C. Asselin Has Failed To Show That She Received Ineffective Assistance Of Trial Counsel

For the first time on appeal, Asselin asserts that trial counsel was ineffective because he was unprepared to argue scientific evidence and failed to procure an expert witness for the hearing on the motion in limine. (Appellant’s brief, pp. 12-14.) Asselin could have brought this claim before the district court on intermediate appeal but apparently did not do so. This Court should decline to consider this claim, because it was not raised before the district court on intermediate appeal. See Bailey, 117 Idaho at 943, 792 P.2d at 968. Additionally, this claim would be more appropriately raised in a petition for post-conviction relief. Even if this Court reaches the merits, Asselin’s claim fails.

1. Asselin’s Ineffective Assistance Of Counsel Claim Would Be More Appropriately Raised In A Petition For Post-Conviction Relief

Asselin’s ineffective assistance of counsel claim would be better raised in a petition for post-conviction relief. “Ordinarily we do not address claims of ineffective assistance of counsel on direct appeal because the record is rarely adequate for review of such claims. They are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed.” State v. Pentico, 151 Idaho 906, 913, 265 P.3d 519, 526 (Ct. App. 2011) (citations omitted); see also Sparks v. State, 140 Idaho 292, 296, 92 P.3d 542, 546 (Ct. App. 2004); State v. Elison, 135 Idaho 546, 551-52, 21 P.3d 483, 488-89 (2001).

Asselin asserts that counsel “was unprepared for the trial and hadn’t procured an expert witness although Asselin had shown him the research on the FC20 breathalyzer.” (Appellant’s brief, p. 6.) The record does not detail counsel’s preparation or efforts to obtain an expert witness, nor does it document Asselin’s conversations with counsel or any research on the topic

that she may have provided him. Thus, her claim would be more appropriately raised in a post-conviction petition where the record could be further developed.

2. Asselin's Ineffective Assistance Claim Fails On The Merits

If this Court decides to address Asselin's claim on its merits, the claim fails. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. Grove v. State, 161 Idaho 840, 854, 392 P.3d 18, 32 (Ct. App. 2017) (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). The defendant bears the burden of showing: (1) "that the attorney's representation fell below an objective standard of reasonableness"; and (2) "a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." Id. (citing Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988)). Asselin has failed to satisfy either prong.

First, the record does not show that counsel's representation fell below an objective standard of reasonableness. Counsel filed a motion in limine to exclude the state's breath test results at trial. (R., pp. 22-23.) Counsel argued that motion before the district court, ably citing to specific provisions of the ISP manual and to the LifeLoc manual to bolster his argument. (See 8/28/2015 Tr., p. 63, L. 16 – p. 70, L. 16.) Additionally, counsel's decision to not call an expert witness to testify at the motion in limine hearing was a strategic decision. Neither the state nor Asselin's counsel called expert witnesses to testify at the hearing on the motion in limine. (See 8/28/2015 Tr., p. 63, L. 16 – p. 70, L. 16.) Idaho Code § 18-8004(4) makes clear that expert witness testimony regarding the general reliability of breath testing is not appropriate so long as the test is conducted in compliance with ISP's standard operating procedures. See State v. Roach, 157 Idaho 551, 555, 337 P.3d 1280, 1284 (Ct. App. 2014) (holding that "evidence

admitted to generally attack the validity of breath testing is irrelevant” and defense’s expert testimony was properly excluded). Counsel reasonably decided to challenge whether the procedures had been followed, rather than attack the general validity of the approved testing procedures. Counsel’s performance did not fall below an objective standard of reasonableness and was therefore not deficient.

Asselin argues that counsel was deficient because he was unprepared with the scientific evidence and did not provide an expert witness. (Appellant’s brief, pp. 12-13.) However, the record on appeal does not show that trial counsel lacked preparation and Asselin does not cite to the record to support her broad assertion. Additionally, Idaho Code § 18-8004(4) provides an objectively reasonable basis for counsel’s decision to not call an expert witness. Asselin has failed to show that counsel’s performance was deficient.

Second, any alleged deficiency of counsel did not change the outcome of the proceedings. Idaho law makes clear that breath test results that are obtained in accordance with ISP’s standard operating procedures are admissible, and that defense expert testimony that seeks to attack the general validity of breath testing is irrelevant and properly excluded where proper testing procedures were followed. See I.C. § 18-8004(4); see also Roach, 157 Idaho at 555, 337 P.3d at 1284. Thus, even if counsel had been more prepared or called an expert witness, the breath test results would have been admitted at trial, demonstrating to the jury that Asselin was driving with a blood alcohol content over twice the legal limit, and resulting in her conviction for DUI.

Asselin summarily asserts that “[h]ad we had an expert testify, the results of the trial would have been different.” (Appellant’s brief, p. 13.) However she provides no further argument as to how the results of trial would have changed. Asselin’s bare assertion that she was prejudiced by trial counsel’s alleged deficient performance is insufficient to meet her burden on

her ineffective assistance of counsel claim. Because counsel was not deficient and Asselin was not prejudiced by any alleged deficiency, her ineffective assistance of counsel claim fails on the merits.

D. Asselin Has Failed To Show A Sixth Amendment Violation Of Her Right To Counsel Rising To The Level Of Fundamental Error

For the first time on appeal to this Court, Asselin asserts that she was denied the right to counsel at her sentencing and on her appeal to the district court. (Appellant’s brief, pp. 13-14.) This Court should decline to consider this claim, because it was not raised before the district court on intermediate appeal and does not amount to fundamental error. See Bailey, 117 Idaho at 943, 792 P.2d at 968.

In order for Asselin to obtain relief on her unpreserved claim, she bears the burden of demonstrating that the alleged error is fundamental by showing that: (1) “one or more of [her] unwaived constitutional rights were violated”; (2) the error is “clear or obvious, without the need for any additional information not contained in the appellate record”; and (3) the error “affected the outcome” of the proceedings. State v. Miller, 165 Idaho 115, 443 P.3d 129, 133 (2019). Asselin has failed on each prong.

First, Asselin’s unwaived Sixth Amendment right to counsel was not violated. The Sixth Amendment guarantees criminal defendants the right to counsel at all critical stages of a criminal proceeding, including at sentencing and on a first appeal. U.S. Const. amend. VI; United States v. Wade, 388 U.S. 218, 224 (1967); Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006). It also guarantees a defendant the right to proceed pro se. See Faretta v. California, 422 U.S. 806 (1975). “Ultimately, the decision of whether to exercise the right to counsel or proceed

pro se is for the defendant to make.” State v. Hoppe, 139 Idaho 871, 874, 88 P.3d 690, 693 (2003) (quotation marks and citation omitted).

A defendant is entitled to court-appointed counsel only if she is indigent. See State v. Schwab, 153 Idaho 325, 333, 281 P.3d 1103, 1111 (Ct. App. 2012). The trial court “shall determine, with respect to each proceeding,” whether a person seeking court-appointed counsel is indigent. I.C. § 19-854(1). In making such a determination, the court “may consider such factors as income, property owned, outstanding obligations, the number and ages of his dependents and the cost of bail.” I.C. § 19-854(3).

Asselin waived her right to counsel and exercised her right to proceed pro se after trial. Asselin was initially appointed a public defender based in part on her assertion to the magistrate court that she did not have any equity in her home. (5/6/2015 Tr., p. 11, L. 19 – p. 15, L. 22.) After trial, Asselin’s counsel withdrew and Asselin made the decision to represent herself moving forward. (See R., pp. 74-75 (“Defendant desires to represent herself going forward, Defendant has expressed dissatisfaction with attorney.”); see also p. 76 (“Asselin signed a *Stipulated Substitution of Counsel* whereby she agreed to discharge her court-appointed attorney and represent herself.”).) In doing so, Asselin waived her right to counsel so she could exercise her right of self-representation.

Even if her right to counsel was not waived by her decision to proceed pro se, Asselin was not denied counsel in violation of the Sixth Amendment. At a hearing prior to her sentencing date, Asselin requested the assistance of a public defender; the magistrate court questioned Asselin about her financial means. (9/7/2016 Tr., p. 11, L. 24 – p. 12, L. 20.) Asselin told the court that she had \$150,000 of equity in her home. (9/7/2016 Tr., p. 12, Ls. 18-24.) The magistrate court determined that Asselin did not qualify as indigent, based on the equity in her

home and her ability to use that equity to obtain private counsel. (9/7/2016 Tr., p. 12, L. 25 – p. 13, L. 12.) Asselin does not challenge that factual finding on appeal. Because Asselin did not qualify as indigent, she was not entitled to court-appointed counsel. She could have, but did not, hire a private attorney to represent her at her sentencing or on appeal, nor did she request more time with which to do so. Instead, she elected to proceed pro se. Thus, Asselin has failed to show that her Sixth Amendment right to counsel was violated.

Second, the record on appeal does not demonstrate clear or obvious error. The record shows that trial counsel moved to withdraw based on Asselin's request and intention to represent herself in further proceedings. (R., pp. 74-75.) Additionally, Asselin apparently signed a stipulated substitution of counsel that effectively waived her right to counsel and reflected her intention to proceed pro se. (See R., p. 76.) That stipulation does not appear in the record on appeal. However, the record shows that Asselin, then-represented by counsel, communicated with counsel and the court her desire to have counsel withdraw so she could proceed pro se, and that the court granted counsel's withdrawal based on Asselin's desire to proceed pro se. (R., pp. 74-76.) Asselin evidently changed her mind at sentencing, but was no longer eligible for court-appointed counsel. (9/7/2016 Tr., p. 12, L. 4 – p. 13, L. 12.) The record shows that Asselin had time before sentencing in which she could have obtained private counsel but did not; the record shows that Asselin did not request more time to do so. Thus, the record does not show any clear or obvious error.

Third, even if Asselin's Sixth Amendment right to counsel was violated, which it was not, that error did not affect the outcome of the proceedings. Asselin was represented by counsel when she was found guilty of DUI. (R., p. 73.) Over a year later, she was sentenced to credit time served with the remainder suspended and she was placed on a period of supervised

probation with the opportunity to move to unsupervised probation within as little as three months. (9/14/2016 Tr., p. 228, L. 19 – p. 230, L. 16.) Asselin has failed to show, or make any argument, that she would have received a more favorable sentence with the assistance of counsel. Additionally, Asselin appealed the motion in limine along with other unpreserved issues that the district court declined to consider. (See R., pp. 152-56.) Asselin asserts that she would have been able to raise the “correct issues” with counsel’s advice, but makes no argument as to what those issues may have been or their likelihood to succeed. (Appellant’s brief, pp. 13-14.) Thus, Asselin has failed to show that the alleged deprivation of counsel actually affected the outcome of either sentencing or her appeal to the district court.

Asselin contends she was denied counsel at sentencing after her court-appointed counsel withdrew and no substitution counsel was appointed. (Appellant’s brief, p. 13.) However, the record shows that Asselin asked counsel to withdraw so she could proceed pro se and stipulated to substituting in as her own counsel. (R., pp. 74-76.) Asselin next asserts that she was denied counsel at sentencing and “this condition spilled over to her appeal.” (Appellant’s brief, p. 13.) However, Asselin has not shown that she was denied counsel; the record demonstrates only that she was not eligible for court-appointed counsel, which she does not challenge on appeal. (See 9/7/2016 Tr., p. 12, L. 25 – p. 13, L. 12.) Asselin could have obtained private legal counsel to assist her at sentencing and on appeal to the district court but instead elected to proceed pro se. Asselin has failed to show a Sixth Amendment violation rising to the level of fundamental error.

CONCLUSION

The state respectfully requests this Court to affirm the district court's intermediate appellate decision affirming the magistrate court's ruling, and to affirm Asselin's conviction.

DATED this 10th day of April, 2020.

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of April, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the individual listed below by means of iCourt File and Serve:

LINDSEY JEAN ASSELIN
asselin.lindsey@gmail.com

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

KLJ/dd