



Harmless Error and Jury Unanimity in DWI Cases

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Shortly after I published [last week's post](#) on [State v. Babich](#), an astute reader asked about the court's harmless error analysis. How, he inquired, could the improper admission of expert testimony that the defendant had an alcohol concentration of 0.08 be harmless error? Did the jury's verdict indicate that it found the defendant guilty only under the "under the influence" prong of impairment rather than under the "alcohol concentration of 0.08 or more" prong? To answer these questions, I had to dig into the [record on appeal](#) and provide a bit of background on the requirement for jury unanimity in DWI cases. I thought others might be interested in my response.

Review. A person commits the offense of driving while impaired if she (a) drives, (b) a vehicle, (c) on a street, highway, or public vehicular area, (d) while impaired. [G.S. 20-138.1](#)(a). The State may establish impairment in any one of three ways: by proving that the defendant drove (1) while under the influence of an impairing substance; (2) after having consumed sufficient alcohol that she has, at any relevant time after the driving, an alcohol concentration of 0.08 or more; or (3) with any amount of a Schedule I controlled substance or its metabolites in her blood or urine.

Charging DWI. When charging a defendant with the misdemeanor offense of driving while impaired, the State is not required to allege its theory of impairment. A pleading is sufficient if it states the time and place of the offense and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance. [G.S. 20-138.1\(c\)](#).

Instructing the jury. The pattern jury instruction for misdemeanor impaired driving calls for the judge to instruct the jury about each prong of impairment that is supported by the evidence. Thus, the judge in *Babich* told the jury that the State was required to prove that the defendant was "under the influence of an impairing substance" **or** "had an alcohol concentration of 0.08 or more." [Record on Appeal](#) at 43-44. The jury returned a general verdict, finding Babich "Guilty [of] driving while impaired." *Id.* at 50. The jury was not asked to specify which under which prong of impairment the State met its burden.

We, the jury, ~~unanimously~~ find the defendant, Lori Lee Babich,

Guilty driving while impaired, or

Not Guilty

This the 26 day of February 2016



Signature of the Foreperson of the Jury

Lawrence B. ...

Printed name of Foreperson

Unanimity requirement. The North Carolina Supreme Court in *State v. Oliver*, 343 N.C. 202 (1996), rejected the notion that jurors must be unanimous as to the nature of the defendant's impairment. The court reasoned that G.S. 20-138.1 proscribes "the single offense of driving while impaired," which may be proven in more than one way. *Id.* at 214. Regardless of whether some jurors found that the defendant was under the influence of an impairing substance while others found that his alcohol concentration was 0.08 or more, the *Oliver* court explained that the significant fact was that jurors unanimously found the defendant guilty of the single offense of impaired driving. *Id.* at 215.

Harmless error. As I noted last week, the *Babich* court determined that the improper admission of the expert testimony on retrograde extrapolation did not prejudice the defendant. The court cited as support *State v. Taylor*, 165 N.C. App. 750 (2004), a case holding that the trial court **did not err** by admitting expert testimony on retrograde extrapolation. The *Taylor* court went on to say that even if the trial court had erred by admitting the testimony, the error was not prejudicial in light of other evidence that the defendant was under the influence of an impairing substance. The *Babich* court recited the following evidence in support of its conclusion that there was no reasonable possibility that the jury would have reached a different result absent the impermissible testimony:

- Babich drove 80 miles per hour while approaching a red light and then drove through the red light at about 45 miles per hour;
- An officer smelled alcohol on Babich's breath;
- Babich had glazed and bloodshot eyes and stumbled as she walked;
- Babich ignored the officer's instructions and repeatedly talked over him; and
- Babich performed poorly on field sobriety tests.

I think reasonable minds could differ about this conclusion. There is no question that there was significant evidence of Babich's impairment aside from the retrograde extrapolation result. Yet the court's conclusion that the jury's verdict was not influenced by expert testimony establishing the per se prong of impairment certainly runs afoul of conventional

wisdom regarding the most probative evidence of impairment. Indeed, the *Babich* court did not cite another similar case, *State v. Roach*, 145 N.C. App. 159 (2001), in which the court reversed the defendant's DWI conviction based on concern that the jury may have based its verdict on chemical analysis results that were improperly admitted. The court in *Roach* determined that while there was sufficient evidence from which the jury could convict the defendant under the influence prong of the DWI statute, "the jury was given only two options on the verdict sheet, to find defendant 'guilty of driving while impaired,' or to find defendant 'not guilty.'" *Id.* Thus, it was "not possible to tell whether the jury found defendant guilty based on his blood alcohol concentration level or due to the appreciable impairment of his faculties." *Id.*