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Back to Basics: Attack SFSTs, Not the Officer

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In the heat of trial, all trial attorneys fight vigorously for their DWI clients. In that fight, it's understandable that you want to destroy the officer, destroy the Standard Field Sobriety Tests (SFSTs), and vindicate your client. Oftentimes, however, juries end up feeling sorry for the bumbling police officer and will hold it against the client if the attorney berates or embarrasses the officer. This article will explore a trial-tested, proven method that educates a jury on the complexities and meticulous grading system of the SFSTs rather than attacking the officer. Attack the system, not the officer. In the end, if done properly, the jury will empathize with the client. This empathy will assist the jury in finding the client not guilty?without leaving

jurors feeling guilty for voting against law enforcement.

The Officer Is a Human Being

We can all agree there are good and bad officers. Just like attorneys. And contrary to popular belief, even "bad" officers are people too. Just because officers may be "bad" or incompetent at their jobs doesn't mean they are evil. Somewhere, to someone, they are human with all the emotions, positive attributes, negative attributes, good days, bad days, highs and lows that we all enjoy and suffer. Someone out there loves them. They are someone's family member. Once upon a time, they took an oath to protect and serve the community we live in. Most of the time, they may still be trying to do their best, but their best is sub-par. Remember this?seriously.

You must think like an average juror. How many clients are shocked that the officer "is bold-faced lying" on the stand? We can't let our daily experiences jade and warp us. Put yourself in the shoes of your family or friends who have minimal police contact. Most respect police and admire their sacrifice. Growing up we were all probably taught to respect and trust the police. And honestly, most of us still do, for the most part. Hell, even criminal defense lawyers introduce their kids to their police friends and teach their kids to respect and honor the police. Most of our jurors were raised the same and probably raise their own kids this way.

Only in roughly the last seven years did police misconduct and abuse of power really start making the news. In the past couple years, the pendulum has swung?giving jurors cause to be wary or even scared of the police in certain situations. The world is slowly recognizing the magnitude of the problem and the catastrophic consequences when police lie, hide or destroy evidence, collude, or make "honest" mistakes.

To conclude this paean to the humanity of police officers, just try your best to remember the jury starts out thinking they are good cops. Being one of the biggest offenders of the scorched-earth cross-examination, we understand the eye rolls. But it's not about what we know, it's how we convey it to the jury. In the famous words of Dalton from "Road House": "Be nice. I want you to be nice, until it's time not to be nice."

Standard Field Sobriety Test Hard Truths

The Standard Field Sobriety tests were developed around 1975 when National Highway Traffic and Safety Administration (NHTSA) performed research with South California Research Institute (SCRI) to determine which roadside field sobriety tests were the most accurate.¹ SCRI published three reports:

1. California 1977 (Lab);
2. California 1981 (Lab and Field); and
3. Maryland, D.C., V.A., N.C. 1983 (Field).

SCRI originally travelled around the United States with six tests, but narrowed it to the three tests we know today: Horizontal Gaze Nystagmus (HGN), Walk and Turn (WAT), and the One Leg Stand (OLS).

Twenty years later, three validation tests were undertaken between 1995 and 1998:

1. Colorado 1995;
2. Florida 1997;
3. San Diego 1998.²

Many other articles examine the pitfalls and biases of these validation studies. Concocted in the '70s and validated in the '90s, these tests are now 40+ years old and haven't been revalidated in the last 20 years. SFSTs are not a law of physics or science?meaning they are not indisputable. These are simply coordination exercises created by police and "scientists" in the '70s.³

How the Officer Is Trained to Administer the SFSTs

Before we dive into the actual SFSTs, it's important to educate the jury on just how this officer was trained and who trained them. Set the stage to illustrate the difference between how they were graded on their SFST proficiency test and how they now grade people on the SFSTs. Before we get into the tests, can we just explore how you learned to give these tests? Officers are usually happy to boast about their training. Start by establishing when the officer was first certified to administer the tests. It's usually in the academy.⁴

- And how long was your course (usually 24-40 hours, around a week)?
- Who trained you (other officers)?
- When you were trained, did your teacher tell you how to administer the tests and then just grade you on administering them?
- No, you were provided a textbook? the SFST manual? You still have it? Did you bring it today?

At this point, if not done prior, establish that the NHTSA student SFST manual is a learned treatise under Texas Rules of Evidence 803(18). Rule 803(18) clearly states that a learned treatise may be read into evidence, but not received as an exhibit.

Be ready for the State's objections when you begin reading from the manual. Many untrained prosecutors will try to prohibit you from reading a document not in evidence or try to admit the manual. Your honor, I would love to admit this manual, but unfortunately under TRE 803(18) it's specifically prohibited. The prosecutor may also object to defense counsel reading it into evidence and not the officer. Nowhere in 803(18) does it say who is allowed to read the learned treatise. And who do you think puts more inflection and importance in reading the necessary language? The defense attorney should read it and is absolutely allowed to once it's established as a learned treatise.

- Officer, you were trained according to the NHTSA student manual? And you agree it's authoritative on how to administer these tests? BAM! 803(18)

If the officer gets shifty with what year manual, all of the manuals can be found online and you can find most on the TCDLA app. Prior to trial, it helps to establish either with the State or the officer on which edition of the manual they were trained and on whether they accept that it is authoritative. If the officer is really difficult and wants to use his manual, ask for a continuance so the officer can go get his manual or send the officer a subpoena duces tecum to bring their SFST manual prior to trial. Most judges are very familiar with the NHTSA SFST manual and will not tolerate the officer's games.

Back to examining their training:

- When you were trained, you got to practice administering these tests?
- You were allowed to study the entire week? You were allowed to practice the entire week?
- You knew at the end of the week you would be tested?
- You knew that you would be tested on the clues, the definitions, and administration?
- And you had to get a 70, 75, 80% grade to pass? (Most don't know the actual passing percentage.)
- Now when graded, you got credit for the answers you got right?
- Just like in school and every test you've ever taken?
- On a 100-question multiple-choice test, you miss 6, what's your grade (94)?
- That's because you get credit for every answer you got right?
- If your kid came home from school, missed six, and had an F written next to that 94, what would you do? (Most say march down to that school. Agree. And welcome the sidebar objection.)

Officer, I'm Not Here to Bust Your Chops?

Say it 10 times during your cross. Do not attack the officer?attack the tests. ?Officer, I know these aren't your tests. You didn't design them. You are just following what you were trained to do. So, I'm not busting your chops.? Repeat this over and over. Let the jury know we are not attacking this officer. We are not complaining about the officer. We don't hate the player; we hate the game.

?But, Officer, if someone admits to drinking or you think they might be intoxicated, you are going to give them these tests in this same standard way.? Start putting the jurors' minds in the shoes of the client. Many times, I've even gestured around the entire courtroom and stated: ?So everyone in this entire courtroom, as long as they are not intoxicated, should be able to pass these tests? Judge, reporter, bailiffs, people in the gallery, everyone in this whole courtroom??"

Purposefully leave out the jurors to avoid any potential objection. Some officers may pause because they know there are certain limitations on the SFSTs. ?Well, I mean there are certain people that may have difficulty with these tests naturally, right? Those over 65 years old, 50 pounds or more overweight, leg, back, or neck injuries, head injuries or trauma, and lots of other ailments??"

Remind the jury the officer has no medical training and wasn't trained by any doctors or nurses. Most officers were told to just take the client's age, weight, or injuries ?into consideration? when determining intoxication. Yeah, right! ?But again, officer, I'm not here to bust your chops. Let's examine these tests so that if anyone wanted to try them out, they could know what to look for and how to grade them.? What's the officer going to say?

Before examining the SFSTs, it's helpful for the jury to visually understand the tests and clues. Whether you bring an easel and butcher paper, your tablet on the screen, or even a dry-erase board, make sure it's a large and colorful demonstration. Imagine a CLE with no PowerPoint versus one with colorful displays. Like us, jurors appreciate, learn better from, and remember colorful presentations.



Horizontal Gaze Nystagmus (HGN)

Most jurors have seen some sort of advertisement or illustration of an officer waiving a pen in front of the eyes. Before getting into the HGN, dive a little deeper into their training. Explore their range of knowledge. "Officer, you know there are many different types of nystagmus?" "Actually?" It's unimportant how many types of nystagmus the officer knows, but he will always agree there are many. Only a few are listed in the NHTSA student manual. Most officers have only read about these other types, or maybe seen them on video. Very few have actually seen them in person or done testing and seen these. It's important to educate the jury that there are so many different ways the eyes can jerk and for a variety of medical, environmental, or natural conditions. Additionally, the jury needs to know who trained the police officer to distinguish the minute jerks of the eye.

- Now, officer, I'm not busting your chops, but were you trained by an ophthalmologist?
- Optometrist?
- Nurse?
- Person who worked for Lens Crafters?
- Anyone wearing a white lab coat?
- The police officer that trained you, he didn't show you the other types?
- Have you ever heard of Bruns, latent, pendular, vestibulo ocular, spasmus, or rebound nystagmus?
- Has anyone showed you the difference between those and horizontal gaze nystagmus?
- In your manual, you have optokinetic, rotational, post rotational, caloric, and positional alcohol?
- Have you ever even seen those?
- And those look just like horizontal gaze, but for non-intoxicated reasons?

Now start demonstrating the HGN main points for the jury to see. Write HGN in black on the top of the pad

on your easel. ?How far do the eyes have to jerk in order to be counted as a jerk?? Most officers get confused and hesitate. ?If we wanted to put a ruler underneath the human eye, the jerk of the eye is millimeters, right? Maybe a centimeter? Maybe 1/32 of an inch? So how far does the NHTSA manual say the eye must jerk in order to be counted as a jerk? How many millimeters?? If the officer continues to hesitate, rescue him: ?Sorry, Officer, I'm not busting your chops. There is no definition, right?? Write: *No Def. of How Far Jerk (mm)*.

?How many times does the NHTSA manual say the eye must jerk in order to be counted as a clue of intoxication?? Write: *No Def # of Jerks*. Some officers may get cheeky and say it just has to be distinct and sustained. Break it down for the officer, gently. ?Distinct means you clearly see it. And sustained means it must be continual. And that's just for the second pass when you are holding it out for at least four seconds. What about in the first clue?lack of smooth pursuit? How many times does it have to jerk when you are just going side to side? And then in the third clue?onset prior to 45 degrees?how many times does it have to jerk before 45 degrees for you to stop your pen before you get to their shoulder?? Most officers will state just once. If they are still being evasive, refer back to the learned treatise NHTSA manual. ?Show me in this manual where it says once, twice, three times a lady that it had to jerk?? Even writing this type of evasive answering makes me want to destroy this officer. Repeat to yourself: This officer is human, he is loved by someone, somewhere. Get back to your center. ?Officer, I'm not trying to bust your chops, this is not your test, you did not design these tests. Nowhere in this manual did anyone ever state how far or how many times the eyes had to jerk??

Most prosecutors have already bored the judge and jury to death with the timing of the HGN. Usually the officer has been properly woodshedded by the state and knows the HGN timing. If he doesn't, or did it grossly wrong on the video, you may want to show the jury the difference between NHTSA standards and how the officer administered it.

But this article suggests a different tactic in attacking the HGN, one that is not based on breaking down the timing. The HGN is not a divided-attention test like the Walk and Turn (WAT) or the One Leg Stand (OLS). The officer will agree. If not, the NHTSA manual defines the WAT and OLS as divided-attention tests. The manual defines HGN as an involuntary jerking of the eyes as they gaze toward the side. Nothing about HGN or Nystagmus says divided attention. Remember to be careful with your words here: ?Nystagmus does not measure mental or physical faculties?? No, it doesn't. Inexperienced officers will try to argue that it does. To combat this, simply illustrate that nystagmus is an ?involuntary? jerking and cannot be controlled by our eye muscles, as much as we may want to. And we cannot make our brains, through the neurons, control this involuntary jerking, as much as we want to. Some persistent officers will continue to argue, at which point you may need to distinguish where the loss of mental or physical faculties comes into the WAT and OLS, and how that's not possible in the HGN. Nowhere in the NHTSA manual does it say loss of mental or physical faculties for HGN. Depending on the remarks in the video, if the officer just will not agree nystagmus doesn't measure mental or physical, ask them about the client's performance, like this:

- He had no problem following your stimulus?
- You never had to tell him not to move his head?
- So, he displayed good mental faculties in following your instructions?
- He displayed good physical faculties in watching your stimulus and not moving his head?

The jury will be turned off and the officer will damage credibility by continuing to argue.

Under your HGN heading, write: *Does Not Measure Mental or Physical Faculties*. After this amount of cross, the officer has already established a reputation with the jury. Discuss the findings on the HGN. ?You found six out of six clues on my client? That's all of them, maxed out?? Write: *6/6* on the board in the top left in red. We will come back to this at the end of all the SFSTs.⁵

?There is no way that I can prove you didn't see those little jerks? Stimulus is 12?15 inches from their face, your face is about another 12?15 inches from your hand. That?s 24?30 inches from his eye, at night, looking for millimeters of jerks.? The jury gets it.

?You never stated out loud when you saw these clues on camera? You never said lack of smooth pursuit, maximum, onset into your mic while you were doing them? In fact, you wrote down how many clues you saw when writing you report? You wrote your report after you had determined he was intoxicated? After you had arrested him? After you towed his car??

Some officers may say they are prohibited from stating the clues on the video by law, which is correct under *Fischer*. ?Well you could have said them and then we just would have muted it. But it could serve to remind you which clues you actually saw? But you remembered later, you saw all of them? We just have to trust you?? Write: *Trust Me* in big red letters on the top right of the board.

?You didn't arrest him after the HGN test, did you? Even though you got all six out of six clues? The next test you administered was the Walk and Turn??6

The Walk and Turn (WAT)

The WAT is a divided-attention test meaning that it is supposed to measure your mental and physical faculties. In plain English, they want to see how well you can listen to instructions (mental) and then perform what you just heard (physical). The WAT is a test where the video will actually show us the client?s performance. There is no ?trust me? in the WAT. The overall intent in dissecting this test is honestly for the jury to go home, try it, and realize how absolutely ridiculous this test is and how strictly it?s graded. Slowly break down this test to the jury using the officer and the NHTSA manual.

Turn to a new page on your easel and write WAT in big black letters at the top of your display. Then lay out the eight clues of intoxication NHTSA established. Know them by heart; it?s your profession. Start writing them down on the board as you recite them. ?The first two clues come in the Instruction Phase, meaning they have to stand like this while you give the instructions and demonstrate. 1. Can?t Maintain Balance; 2. Starts Too Soon. The next six come during the Walking Phase. 3. Steps Off Line. 4. Misses Heel to Toe. 5. Raises Arms. 6. Stops While Walking. 7. Incorrect Number of Steps. 8. Improper Turn.? Now the jury can clearly see what the test is graded on.7

Next, show the jury how the test is really administered. Ask the judge to stand up and demonstrate portions.

- ?Officer, this test has 18 unique instructions? Don?t worry, I?m not quizzing you. Let?s go through them together (count these out on your fingers as you go so that the jury can follow along):

1. Place your feet on a line
2. In a heel-to-toe manner
3. Left foot behind right foot
4. With arms at sides and give a demonstration, tell subject
5. Not to begin until instructed to so do and ask if subject understands. Tell subject to take
6. Nine
7. Heel-to-toe steps
8. On the line and demonstrates. Explain and demonstrate the turning procedure:
9. Lead foot planted
10. Take a series of small steps
11. To the left direction. Tell the subject to
12. Return on the line
13. Taking nine

14. Heel-to-toe steps
15. Count out loud
16. Look at feet while walking
17. Don't raise arms from sides. And
18. Do not stop once they have started. Do they understand?

Write: *18 Instructions* on the board top left in red. "How many times did you demonstrate the test?" Write: *1x Demo* or whatever they say. "How many times did you allow him to practice this test before grading him?" Write: *0 Practice*. "Did you tell him the clues you would be grading him on?" Write: *0 Clues Given*. "Did you give him credit for all the good stuff he did right?" Some may argue or be confused. Circle back to their training and their testing and how they were given credit for all the answers they got right. Hell, every test anyone has ever taken they got credit for the stuff done right! "You agree age, weight, leg, back, or neck injuries may affect an individual's performance on this test?" Write: [whatever issue your client has]. "Now tell the jury how many clues equals failure or the decision point?" Write: *2 = Intox*.

Next show the jury how meticulous the test is scored. Go through each of the clues and define them. When you get to heel-to-toe, ask the officer to show the jury with his fingers just how far someone has to miss heel-to-toe in order to be counted as a clue of intoxication. And make sure to ask if that half inch is between his fingernails or finger beds, on just one step. Write: the measurements of $\frac{1}{2}$ inch and >6 inches next to *heel-to-toe and raises arms*. Be sure to put green check marks next to all the clues your client didn't exhibit. When you get to improper turn, you should slow down and explain to the jury that there are three ways you can get that clue: series of small steps, leave the lead foot planted, and turn to the left. Let the jury see all of the ways there are to get a clue of intoxication.⁹

Bring it home for the jury. Ask the officer how many clues your client exhibited. Write *4/8* or whatever it was. "So, you're telling me that every single sober person in here has to get a zero or one on this test? Because two equals intoxication?" Look at the jury after the officer admits this. Share that common ground with them. "So you're telling me, if someone were to go home and try this test, not that anyone would, but now knowing all of the clues and how it's graded [optional sidebar: which is something my client didn't know], they should be able to get a zero or a one on it?" You have to love the zealous officer who will not only agree but add that the tests are easy, or that he sees plenty of people pass them.

Finish off the cross with a final blow. "Officer, is this a normal or abnormal way to walk?" Most officers will never admit it's "abnormal." Ask them: "Who else walks like that?" Most either can't think of it or don't want to say it? gymnasts on a balance beam (but they get to balance with their arms to the side) and tight rope walkers (but they get that long bar). Write: *Abnormal* in the top left in red. "Now, I'm not busting your chops, these aren't your tests, but you're supposed to judge whether someone has lost the normal use of their mental and physical faculties on an abnormal test? And you still didn't arrest my client after this test?"

The One Leg Stand (OLS)

Very similar to the WAT, lay out the OLS. Start with the clues: 1. Sways; 2. Hops; 3. Drops; and 4. Raises Arms. Count out the instructions: 1. Stand straight; 2. Place feet together; 3. Hold arms at sides; 4. Tell subject not to begin until instructed to do so and ask if they understand; 5. Raise one leg, either leg; 6. Approximately 6 inches off the ground; 7. Keeping the raised foot parallel to the ground (and give a demonstration), tell subject: 8. Keep both legs straight; and 9. Look at the elevated foot; 10. Count out loud, in the following manner: 11. One thousand and one, one thousand and two, one thousand and three 12. Until told to stop. And give demonstration.

Follow the pattern in the WAT and write: *12 instructions, 1x demo, 0 practice, 0 clues given, 0 credit given, age, weight, back, leg, or neck injuries may affect, 2 = intoxicated*.

When examining each clue, be sure to establish there is no distance for sway as defined by NHTSA.¹⁰ No definition of how many inches or how long someone must sway. Write: "You don't need to save the abnormal surprise; the jury gets it. Is this a normal or abnormal way to stand? Even the Karate Kid got to raise his arms for balance." And then bring it home: "So everyone in this room better be able to get a zero or one on this test? And all humans have a natural sway when standing on one leg? So that's one clue already with no definition of how far or how long one must sway? That means everyone should be able to stand on one leg for 30 seconds without dropping it, and not raise their arms or hop the entire time? Not that anyone would ever try that at home."

Before you wrap up your cross, come back around to the HGN. "My client got 4/8 on the WAT and 2/4 on the OLS, right? Never maxed out any of these tests as we can clearly see on video. But after you arrested him, towed his car, and got to write your report, you wrote 6/6 on the HGN?" The jury sees where you are going. The officer sees where you are going. It's a rhetorical question. Let the jury ask and answer it in their heads. "So, we just have to trust you that he failed that miserably, but on the video, he looked good (we probably are not in trial if he doesn't look good)?"

Lastly, bring the fear home. "Not to bust your chops officer, because these aren't your tests, but if someone is pulled over on the way home from dinner and smells like alcohol or admits to drinking at dinner, they could have to do these tests? And then if they do these tests, you will have to administer it in the standardized manner only and grade it just like we saw? Zero or one to go home?"

This will resonate with everyone. As you can tell from breaking down these tests, they are next-to impossible. We as defense lawyers know these tests, and on any given day with the weather, nerves, and our conditioning, we couldn't pass these. To assume regular, everyday people who don't know these tests are capable of passing . . . Let's be honest: It's whether the officer wants to arrest you or not. They are purely subjective.

Conclusion

This article is not suggesting that no tests should be given to suspected drunk drivers. Rather, it breaks down the simple reality of how stringently and subjectively these tests are graded. Unfortunately, many people who "fail" these tests will not have the ability to fight these tests—be it for financial reasons, time constraints, or by hiring an attorney who doesn't want or care to fight it.

We as trial lawyers must know these tests better than the officers. Only once you truly understand these tests can you simplify their basic elements and effectively communicate their unfairness to a jury. Many times, at the end of a trial, jurors will remark how they are never drinking and driving again because there is no way they can pass these tests. These are normal people, just like our clients. And it's not about the officer; don't bust his chops. It's an unfair testing system. Jurors can feel confident in a not-guilty verdict for standing up for natural human error in coordination exercises. Break the SFSTs down to the basics—make it about the tests, not the officer. Jurors can still respect law enforcement while finding the client not guilty, even after "failing" these unfair "tests."

Endnotes

1. NHTSA Student Manual HS 178 R2/06; VIII-1 (February 2006).
2. Id.
3. Id.
4. Id. at VIII-2.

5. Texas Rules of Evidence 803(18).
 6. Id. at 2.
 7. Id. at 1.
 8. Fischer v. State, 252 S.W.3d 375 (Tex.CrimApp. 2008).
 9. NHTSA Student Manual XV-1 test at end.
 10. Id.
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