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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2015AP000770
Outagamie County Circuit Court Case Nos.
2013CV001086

LITTLE CHUTE VILLAGE MUNICIPAL COURT,

Plaintiff-Respondent,

v.

DENNIS M. FALKOSKY,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT DENNIS M. FALKOSKY

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STATEMENT OF THE ISSUES

Did the trial court erroneously exercise its discretion by reading both JI-Criminal 2668 and 234 in their entirety and not replacing the prima facie effect language of JI-Criminal 2668 with that of JI-Criminal 234, where it found that Mr. Falkosky laid an adequate foundation for showing a curve defense?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Dennis M. Falkosky, (Mr. Falkosky) was charged in Village of Little Chute Municipal Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) on May 25, 2013. On September 6, 2013, a trial before the court was held in municipal court where the court found Mr. Falkosky guilty of both of the above offenses. On September 10, 2013, Mr. Falkosky timely filed an appeal of the municipal court decision, and requested a de novo review and trial by jury. The municipal court filed the record with the circuit court on September 13, 2013. (R.1:1).

A jury trial was held on March 11, 2015, the Honorable Vincent R. Biskupic, Judge, Outagamie County Circuit Court, presiding. The jury returned a verdict of guilty to the charge of operating a motor vehicle with a prohibited alcohol concentration in violation of Wis.Stat. §346.63(1)(b). (R.12:1). The jury returned a verdict of not guilty to the charge of operating a motor vehicle while under the influence of an intoxicant, Wis.Stat. §346.633(1)(a). The jury also found that

Mr. Falkosky did not have an alcohol concentration above .15 at the time of the offense.

The defendant timely filed a Notice of Appeal on April 15, 2015. The appeal stems from the judgment of conviction, and the court ruling at denying the defendant's motion to modify the substantive Jury Instruction, JI-Criminal 2668 by inserting the language of JI-Criminal 234 under the heading "How to Use the Test Result Evidence" and removing the first seven sentences under that same heading.

The pertinent facts to this appeal were adduced at the jury trial held March 11, 2015. Village of Little Chute Police Officer Michael Grumann testified that on May 25, 2013 at approximately 11:19 p.m., he was working an OWI Enforcement Grant in the Village of Little Chute. (R.19:20/ A.App. 1). On that date, he was running radar. As he was running radar, he observed Mr. Falkosky's vehicle traveling 42 miles per hour in a 25 mile per hour zone. (R.19:22/ A.App. 2). He caught up to Mr. Falkosky, and activated his lights, Mr. Falkosky stopped on Madison Street in the right turn lane by the stop sign. (R.19:24/ A.App. 3). Upon contact with Mr. Falkosky, Grumann also noticed a strong odor of intoxicant coming from the vehicle, and observed Mr. Falkosky's eyes to be watery and speech to be

moderately slurred. (R.19:25/ A.App. 4). Mr. Falkosky indicated that he had consumed one bourbon and coke at a birthday party. (R.19:26/ A.App. 5). Mr. Falkosky said he had consumed that drink 20 minutes prior to the stop. ***Id.***

After running checks on Mr. Falkosky's license, Officer Grumann requested Mr. Falkosky exit the vehicle for field sobriety testing. As Mr. Falkosky exited the vehicle Grumann noticed Mr. Falkosky's balance was off a little bit. (R.19:28/ A.App. 6).

Grumann then had Mr. Falkosky submit to field sobriety testing. The first test performed was the Horizontal Gaze Nystagmus test. During that test Grumann observed six of a possible six clues of intoxication. (R.19:31/ A.App. 7). Grumann next had Mr. Falkosky perform the Walk and Turn test. During the instruction portion of that test, Mr. Falkosky broke a heel to toe position in the instruction stance contrary to Officer Grumann's directions. (R.19:33/ A.App. 8). Grumann also testified that Mr. Falkosky missed heel to toe, stepped off of the line, turned improperly, took the wrong number of steps, and stopped during the test. (R.19:35/ A.App. 9). Officer Grumann testified that there are eight clues of intoxication on the walk and

turn test, and Mr. Falkosky exhibited six of those clues. (R.19:36/ A.App. 10).

Additionally, Officer Grumann asked Mr. Falkosky to perform the One Leg Stand test. During that test, Mr. Falkosky exhibited all four of the possible clues of intoxication. Grumann testified that Mr. Falkosky swayed, hopped, raised his arms from his side, and put his foot down during the test.

Finally, Officer Grumann had Mr. Falkosky perform the Rhomberg Balance test, to gauge Mr. Falkosky's internal clock. (R.19:39/ A.App. 11). During that test Officer Grumann observed Mr. Falkosky to slightly sway and noted that Mr. Falkosky's internal clock was off inasmuch as he estimated 30 seconds in 47 seconds. (R.19:40/ A.App. 12). After field sobriety testing, Officer Grumann again asked Mr. Falkosky how much alcohol he consumed. Mr. Falkosky said he consumed five drinks and started drinking at 5:00 p.m., and stopped about fifteen minutes ago. (R.19:41/ A.App. 13). Mr. Falkosky said he was drinking at Tiger's Tavern in the Village of Kimberly which is in close proximity to Little Chute. ***Id.*** Based on his observations, Officer Grumann placed Mr. Falkosky under arrest for OWI.

Subsequently, Officer Grumann read Mr. Falkosky the Informing the Accused Form and asked if Mr. Falkosky would submit to a chemical test of his blood. (R.19:43/ A.App. 14). Mr. Falkosky's blood was drawn without incident at the Appleton Medical Center. (R.19:43-48/ A.App. 14-19).

After the blood draw Officer Grumann asked Mr. Falkosky questions contained on a form entitled "Alcohol and Drug Influence" report. In response to questions from that form, Mr. Falkosky said he had consumed three drinks, and started drinking at 6:00 p.m., and ended at 11:15 p.m. which was minutes after the stop. (R.19:53/ A.App. 20). Mr. Falkosky said he had been consuming whiskey. ***Id.***

The parties orally stipulated that the blood was properly drawn at 12:22 a.m. on May 26, 2013. (R.19:56/ A.App. 21).

On cross-examination, defense counsel challenged Officer Grumann's speed estimation. Grumann testified that when he first observed Mr. Falkosky's vehicle, the vehicle was 100 feet from his squad and both vehicles were approaching from opposite directions. (R.19:58/ A.App. 22). Within the 100 feet distance, Grumann contended that he made the speed determination and within a few hundred feet after that, he had Mr. Falkosky's vehicle stopped. (R.19:61-62/ A.App. 23-24).

Grumann conceded that Mr. Falkosky appropriately recognized his squad lights, stopped and pulled to the side of the road. (R.19:62/ A.App. 24). Furthermore, Grumann agreed that aside from the position of the vehicle after stopping, there was nothing about Mr. Falkosky's driving that led Grumann to suspect that Mr. Falkosky was impaired. (R.19:64/ A.App. 25).

Furthermore, Officer Grumann testified that he observed nothing about Mr. Falkosky's motor coordination that led him to suspect that Mr. Falkosky was impaired. (R.19:68/ A.App. 26). Additionally, on cross-examination, Officer Grumann agreed that he had never met Mr. Falkosky before and would not know what he normally sounds like. ***Id***. Grumann also agreed that the strong odor of intoxicant that he had observed could be consistent with recent consumption and did not necessarily suggest impairment. (R.19:69/ A.App. 27).

Also, Grumann testified that he was not trained in the physiology of the human eye, and simply performed the Horizontal Gaze Nystagmus (HGN) test as he was trained. (R.19:71/ A.App. 28). Furthermore, Grumann testified that during the HGN test, he instructed Mr. Falkosky to stand with his feet together and hands at his side. As Mr. Falkosky stood in this position, Grumann observed no balance problems. ***Id.***

On the Walk and Turn test, Grumann agreed that on 14 of the 20 steps, Mr. Falkosky walked on line. However, on step six his foot was a little to the left or right of the lead foot. (R.19:73/ A.App. 29). Additionally, he testified that on 19 of 20 steps Mr. Falkosky walked heel to toe. (R.19:74/ A.App. 30), and on all 20 steps he kept his arms to his sides as instructed. (R.19:75/ A.App. 31).

Officer Grumann testified that he arrested Mr. Falkosky at 11:38 p.m. (R.19:76/ A.App. 32).

Senior Chemist Michael Knutsen also provided testimony. Knutsen testified that he had been employed with the Wisconsin State Lab of Hygiene since 2002. (R.19:94/ A.App. 33). Knutsen testified that he performed the analysis on the blood sample of Mr. Falkosky and that the test result was a .158 grams per 100 milliliters of blood. (R.19:101/ A.App. 34).

On cross-examination, Knutsen conceded that the .158 test result was the alcohol level at 12:22 a.m. Knutsen also testified that he had been trained in terms of the absorption and elimination of alcohol. (R.19:103/ A.App. 35). Knutsen testified that it normally takes anywhere from 30 to 90 minutes for alcohol to fully absorb and there are several factors, including the presence of food in the stomach, that might affect an

individual's absorption rate. (R.19:104-5/ A.App. 36-7). Knutsen further testified that one and one-quarter ounce of 80 proof alcohol would raise a 245 pound male's alcohol concentration by .015. (R.19:106/ A.App. 38). Using the .158 test result received in the case, and Mr. Falkosky's weight, defense counsel asked how many ounces of alcohol would have to be unabsorbed for Mr. Falkosky to be under .08 at 11:19, at the time of the stop. Knutzen opined that about eight ounces of 80 proof bourbon. (R.19:108/ A.App. 39).

Terri Gessner also testified. She indicated that she was with Mr. Falkosky on May 25, 2013. She testified that she spoke with Mr. Falkosky at approximately 5:00 p.m. on that date, and did not think he sounded impaired. (R.19:112/ A.App. 40). Mr. Falkosky then went to dinner with a friend, and Ms. Gessner did not have contact with him again until approximately 7:15-7:30 on that same date. Ms. Gessner admitted she could not testify as to what Mr. Falkosky consumed between 5:00 p.m. and 7:30 p.m., as she was not with him during that period. However, when they met at his residence at 7:30, Ms. Gessner did not think Mr. Falkosky was impaired. (R.19:112-113/ A.App. 40-1).

Gessner recalled that they arrived at the Pump House bar in Little Chute at around 8:00 p.m. At the Pump House, Gessner witnessed Mr. Falkosky drink two pint bourbon and diet Cokes. (R.19:114/ A.App. 42). After leaving the Pump House Gessner recalled them traveling to Tiger's tavern. At Tiger's tavern, Mr. Falkosky consumed another pint sized bourbon and diet coke. (R.19:114-115/ A.App. 42-3). According to Ms. Gessner, the couple left Tiger's Tavern approximately 15 minutes prior to the time they were stopped by Officer Grumann. ***Id.***

Gessner testified that she did not believe that Mr. Falkosky was speeding, and did not think that Mr. Falkosky was impaired. (R.19:115-116/ A.App. 43-4).

On cross-examination, Ms. Gessner conceded that she did not see the drinks being poured (R.19:117/ A.App. 45), nor could she recall when in time each drink was ordered. (R.19:118/ A.App. 46). Gessner estimated leaving the Pump House at approximately 10:45 p.m. and arriving at Tiger's tavern about 10 minutes later. (R.19:119/ A.App. 47).

Mr. Falkosky testified that about 5:15-5:30 p.m., he went to dinner with a friend to Nakashima's in Appleton. (R.19:126/ A.App. 48). According to Mr. Falkosky, he had a big dinner and two drinks. (R.19:127/ A.App. 49). After finishing dinner at

about 6:45 p.m. and they traveled back to his apartment to pick up Ms. Gessner. ***Id.*** After picking up Ms. Gessner at 7:30 p.m., they traveled to the Pump House arriving at approximately 8:00 p.m. (R.19:128/ A.App. 50). Mr. Falkosky recalled ordering two bourbon and diet cokes at the Pump House. He testified that the first one took him some time to drink, and the second one was consumed between 9:30 and finished at approximately 10:30 p.m. (R.19:128-129/ A.App. 50-1). Mr. Falkosky testified that they left the Pump House at approximately 10:45 p.m. and traveled to Tiger's Tavern arriving shortly before 11:00 p.m. (R.19:129/ A.App. 51).

Mr. Falkosky indicated that he consumed a bourbon and coke at Tiger's Tavern. ***Id.*** He further testified that on May 25, 2013, he weighed approximately 245 pounds and that he was six foot two inches tall. (R.19:131/ A.App. 52). Additionally, he indicated that the bourbon that he consumed was 80 proof bourbon. ***Id.*** Falkosky also denied speeding.

Mr. Falkosky further testified that he felt that he had no problem with driving and no problem with his motor coordination. (R.19:133/ A.App. 53). On cross-examination, acknowledged the answers he gave as per the Alcohol and Drug Influence report. (R.19:136-137/ A.App. 54-5). He also

conceded that he did not watch the bartender pour each drink. (R.19:138/ A.App. 56). He also acknowledged that he did not know how many shots were in each drink (R.19:145/ A.App. 57), but indicated that it was hard to tell the strength by taste because the bourbon he was drinking was a sweeter bourbon. (R.19:147/ A.App. 58).

During the jury instruction conference, defense counsel requested Criminal-JI 234 and argued that it should replace the first seven lines of Criminal-JI 2668. (R.19:158-159/ A.App. 59-60). The prosecutor indicated that he believed there was an issue with respect to Mr. Falkosky being under .15 at the time of driving, but that he believed that there was no issue with respect to being under .08. (R.19:159/ A.App. 60). Furthermore, the Village agreed that Criminal-JI 234 should be read, but that it should not replace the language in Criminal-JI 2668 as defense counsel requested. (R.19:160-1/ A.App. 61-2). The Court found that the Mr. Falkosky laid a sufficient foundation for a curve argument. (R.19:164/ A.App. 63). However, decided to read both Criminal-JI 2668 and 234 in their entirety. ***Id.*** The court then instructed the jury reading both instructions in their entirety. (R.19:171-173/ A.App. 64-5). The jury found Mr. Falkosky not guilty of OWI but found Mr. Falkosky guilty of

operating a motor vehicle with a prohibited alcohol concentration. The appeal herein stems from the court failing to modify Criminal-JI 2668 by adding the language of Criminal-JI 234. Mr. Falkosky timely filed a Notice of Appeal on April 15, 2015.

STANDARD OF REVIEW

A trial court has broad discretion in determining what jury instruction to give, the appellate court review is limited to whether the trial court erroneously exercised its discretion. ***State v. Coleman***, 206 Wis.2d 199, 556 N.W.2d 701 (1996). Whether to give a jury instruction lies within the specific discretion of the trial court. ***State. v. Miller*** , 231 Wis.2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999). The court "will reverse and order a new trial only if the instruction, taken as a whole, communicated an incorrect statement of law or otherwise probably misled the jury. ***State v. Randall***, 222 Wis.2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). "The validity of [a] jury's verdict [is affected by] the correctness of the jury instruction." ***State v. Dodson***, 219 Wis.2d 65, 87, 580 N.W.2d 181 (1998). 'A challenge to [a conviction based on] an allegedly erroneous jury instruction warrants reversal and a new trial only if the error [is] prejudicial.' ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485

N.W.2d 10 (1992). ***Id.*** at 850, 485 N.W.2d 10. We will not reverse a conviction if the overall meaning communicated by the jury instruction was a correct statement of the law. *See* ***State v. Paulson***, 106 Wis.2d 96, 108, 315 N.W.2d 350 (1982)." ***State v. Fonte***, 2005 WI 77, ¶15, 281 Wis. 654, 698 N.W.2d 594. "The test to be applied in determining whether such an error is prejudicial is the probability and not merely the possibility that the jury was misled thereby." ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.***, 121 Wis.2d 338, 378, 360 N.W.2d 2, 20 (1984).

ARGUMENT

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT READ BOTH JI-CRIMINAL 2668 AND 234 IN THEIR ENTIRETY RATHER THAN REPLACING THE PRIMA FACIE EFFECT LANGUAGE OF JI-CRIMINAL 2668 WITH THE LANGUAGE IN JI CRIMINAL 234 WHERE THE DEFENDANT ADEQUATELY LAID A FOUNDATION SHOWING THERE WAS AN ISSUE WITH HIS POSITION ON THE BLOOD ALCOHOL CURVE

"A defendant is entitled to an instruction on a valid theory of defense, but not to an instruction that merely highlights evidentiary factors." ***State v. Morgan,*** 195 Wis.2d 388, 448, 536 N.W.2d 425 (Ct.App. 1995).

Wis. JI-Criminal 2668 creates a permissive presumption and gives the test result prima facie effect. ***State v. Vick,*** 104 Wis.2d 678, 688-689, 312 N.W.2d 489 (1981). If a test result

shows an alcohol concentration above .08 and there is "no issue relating to the defendant on the "blood-alcohol curve" the presumption permits the jury to specifically find that if a defendant had a prohibited alcohol concentration at the time of the test, that the jury can use that test result to find that the defendant had a prohibited alcohol concentration at the time of the driving. Wis. JI-Criminal 2600 states that "The committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it 'prima facie effect'". ***Id.*** at section VII, subsection C.

Wis. JI-Criminal 234 provides the language that should be used to replace the "prima facie effect" language of Wis. JI-Criminal 2668. JI-Criminal 234 reads as follows:

> Evidence has been received that, within three hours after the defendant's alleged driving of a motor vehicle, as ample of the defendant's blood was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant had a prohibited alcohol concentration or was under the influence at the time of the alleged driving. Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the blood sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case giving it the weight you believe it is entitled to receive.

The question as to whether the language in JI-Criminal 234 should replace the language in JI-Criminal 2668 is dependent upon the defendant establishing that there is an issue with his position on the blood alcohol curve. If the defendant establishes an issue with his position on the blood alcohol curve, then there is not necessarily a 'rational connection' between the basic fact (that the defendant had a prohibited alcohol concentration at the time of testing), and ultimate presumed fact (that the defendant had a prohibited alcohol concentration at the time of the driving). The test is whether it can be said with substantial assurance that the latter is " 'more likely than not to flow from' the former." ***Vick,*** at 696. In a case where there is a problem with the defendant's position on the blood alcohol curve, the presumed fact that the defendant had a prohibited alcohol concentration at the time of the driving, does not "more likely than not" flow from the proven fact of a prohibited alcohol concentration at the time of testing. ***Id.*** In such a situation the court should treat the test result a relevant evidence and replace the presumptive language of Wis. JI-Criminal 2668 with that of Wis. JI-Criminal 234.

Here, the court specifically found that the defendant laid an appropriate foundation for a curve argument. (R.19:164/

A.app.). Thus, the defendant established that there was a problem with his position on the blood alcohol curve. (The analyst from the State Lab of Hygiene testified regarding absorption and elimination of alcohol. He testified that it takes 30-90 minutes for full absorption of one drink. He testified that a person of Mr. Falkosky's size and weight would have to have 8 ounces of 80 proof alcohol unabsorbed to be under .08 at the time of operation. Furthermore, Mr. Falkosky testified that he had two pint glasses within less than 90 minutes of driving, and the last drink within about 15 minutes of being stopped.) However, despite finding that Mr. Falkosky laid an appropriate foundation for a curve defense, the court refused to replace the presumptive language of Wis. JI-Criminal 2668, with that in Wis. JI-Criminal 234. The court read both 2668 and 234 in their entirety. Thus, the jury was told that the test result was both relevant evidence of Mr. Falkosky's alcohol concentration at the time of driving, Wis. JI-Criminal 234 and that if they found that the test result at the time of testing was over .08, that they could find based on the test result alone that Mr. Falkosky had a prohibited alcohol concentration at the time of the test. Wis. JI-Criminal 2668.

Because Mr. Falkosky laid an appropriate foundation for an alcohol curve defense, the presumed fact that Mr. Falkosky had a prohibited alcohol concentration at the time of driving, did not "more likely than not" flow from the proven fact of a prohibited alcohol concentration at the time of test. Thus, the court erred in reading both Wis. JI-Criminal 2668 and 234 in their entirety.

The Jury Instruction Committee employing the rationale of ***Vick,*** specifically contemplated a fact pattern similar to that in Mr. Falkosky's case. Language in JI-Criminal 2668 under the heading "How to Use the Test Result Evidence" states "where test result showing .08 grams or more have been admitted and there is no issue relating to the defendant's position on the "blood alcohol curve" the jury should be instructed as follows." However, when there is an issue with the defendant's position on the blood alcohol curve the court should instruct the jury using JI-Criminal 234. As defense counsel requested, the court should have substituted the language of JI-Criminal 234 for that in JI-Criminal 2668. To read both was an error.

Thus, the jury instruction provided an incorrect statement of law. Furthermore, the error was prejudicial to Mr. Falkosky inasmuch as the test result was afforded the prima facie effect

despite no rational connection between the basic fact and the presumed fact. Because of this, the trial court erroneously exercised its discretion by reading both instructions in their entirety where a sufficient foundation was laid for a curve defense.

CONCLUSION

Because the trial court erroneously exercised its jurisdiction when it instructed the jury reading the entirety of both JI Criminal 2668 and 234, and because Mr. Falkosky was prejudiced by the error, this Court should vacate the judgment of conviction and grant Mr. Falkosky a new trial.

Dated this 29th day of June, 2015.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 27 pages. The word count is 5294.

Dated this 29th day of June, 2015.

Respectfully Submitted

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of June, 2015.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of June, 2015.

Respectfully submitted,

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APPENDIX

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