COURT OF APPEALS OF WISCONSIN
DISTRICT III

LITTLE CHUTE VILLAGE MUNICIPAL COURT,

Plaintiff-Respondent,

-vs-

Appeal No. 2015AP000770
Case No. 2013CV1086

DENNIS M. FALKOSKY,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT VILLAGE OF LITTLE CHUTE

An Appeal from the Judgment of Conviction in the Circuit court for Outagamie County, the Honorable Vincent R. Biskupic, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

U.S. Supreme Court:

Wisconsin Supreme Court:

Wisconsin Court of Appeals:

Wisconsin Jury Instructions:

Statutes

Other:

STATEMENT OF THE ISSUES

Did the trial court erroneously exercise its discretion by reading JI-Criminal 2668 in its entirety when a reasonable jury could have drawn the permissive inference from all the facts before it that it was more likely than not that if the defendant were intoxicated at the time of testing, that he was intoxicated at the time of arrest?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. §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

Except as noted herein, the Village of Little Chute (hereinafter the "Village") agrees with the facts as set forth by Dennis M. Falkosky (hereinafter "Falkosky").

STANDARD OF REVIEW

The Village generally agrees with the standard of review as set forth by Falkosky. However, the Village believes that the following is also relevant.

A trial judge may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. *State v. Pruitt*, 95 Wis.2d 69, 80-81, 289 N.W.2d 343 (Ct. App. 1980). This discretion extends to both choice of language and emphasis. *State v. Dix*, 86 Wis.2d 474, 273 N.W.2d 250 (1979). There is a strong interest in orderly trial procedure and preserving the finality of judgments. *State v. Vick*, 104 Wis.2d, 678, 691, 312 N.W.2d 489, 495 (1981). Accordingly, in reviewing challenges to jury instructions, it is a well-established proposition that a single instruction to a jury may not be judged in artificial isolation. *Id.* "While this does not mean that an artificial instruction by itself may never rise to the level of constitutional error, it does recognize that a

judgement of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.* at 496, 312 N.W.2d at 691 (*internal citation omitted*).

"The United States Supreme Court has stated that the burden of demonstrating that an erroneous instruction was so prejudicial that it will be unconstitutional is even greater than the showing required to establish plain error on direct appeal." *Id. citing Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736, 52 L. Ed. 2d 203 (1977). "In assessing whether an alleged erroneous jury instruction has reached this magnitude, the inquiry is not whether ""the instruction is undesirable, erroneous, or even" universally condemned, """but rather the question is ""whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."""" *Id.*

ARGUMENT

I. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION WHEN IT READ JI-CRIMINAL 2668 IN ITS ENTIRETY BECAUSE JURORS COULD HAVE RATIONALLY INFERRED FROM FALKOSKY'S BLOOD ALCOHOL LEVEL AT THE TIME OF TESTING THAT FALKOSKY WAS OVER THE LEGAL LIMIT AT THE TIME OF OPERATION.

Generally, Falkosky argues that when an OWI or PAC defendant lays a foundation for an alcohol curve defense, it is impermissible for a Court to read JI-Criminal 2668 in its entirety. Specifically, Falkosky argues that it is impermissible to read the portion of JI-Criminal 2668 stating:

> If you are satisfied that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of alleged driving or that the defendant had a prohibited alcohol concentration at the time of alleged driving, or both, but you are not required to do so.

The forgoing quoted language from JI-Criminal 2668 shall hereinafter be referred to as the "Permissive Presumption."

Falkosky does not cite any statutory or case law in support of his argument. The only support that Falkosky cites

comes from the comments of the Wisconsin Criminal Jury Instructions Committee contained in JI-Criminal 2668 itself.

However, whether a defendant has laid a foundation for an alcohol curve defense is not relevant under applicable law. Instead, the Permissive Presumption of JI-Criminal 2668 may be read in its entirety as long as jurors could rationally make the connection permitted by the inference. *State v. Vick*, 104 Wis.2d 678, 695, 312 N.W.2d 489, 497 (1981).

A. Wis. Stat. §885.235 Provides Statutory Authority for the Permissive Presumption.

Wis. Stat. §885.235 states, in pertinent part:

> The fact that the analysis shows that the person had an alcohol concentration of .08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of .08 or more.

Because there is statutory authorization for the Permissive Presumption, the only remaining issue is whether the Permissive Presumption is constitutionally sound. That issue is addressed in *Vick*.

B. Falkosky Correctly Characterizes the Subject Language as a "Permissive Presumption" but Incorrectly States that it has a Prima Facie Effect.

There are two types of presumptions: permissive presumptions and mandatory presumptions. *Vick* at 496, 312 N.W.2d at 693. A permissive presumption, or permissive inference, allows, but does not require, the trier of fact to find an element (elemental fact) upon proof by the prosecution of another fact (basic fact), and it places no burden of any kind on the defendant. *Id.* A permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof. *Id.* Accordingly, a permissive presumption does not have a prima facie effect.

A mandatory presumption requires that the trier of fact must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumption. *Id.* at 497, 312 N.W.2d at 693. Accordingly, a mandatory presumption has a prima facie effect.

In *Vick*, the Supreme Court held that an almost identical jury instruction was a permissive presumption. *Id* at 699, 312 N.W.2d at 500. Since *Vick*, the language of JI-

Criminal 2668 has been clarified to emphasize the permissive nature of the presumption by adding the verbiage, "but you are not required to do so." *Compare Vick* at 692, 312 N.W.2d at 496 with the language of the Rebuttable Presumption contained in JI-Criminal 2668.

Falkosky admits, "Wis. JI-Criminal 2668 creates a permissive presumption..." (Br. of Appellant at 13). Falkosky, however, incorrectly states that the Permissive Presumption has a prima facie effect. Contrary to this assertion, *State v. Vick*, 104 Wis.2d 678, 688-689, 312 N.W.2d 489, contains no such language. Instead, it states the exact opposite (the permissive presumption left the trier of fact free to credit or reject the inference).

C. When Reviewing a Permissive Presumption, a Challenging Party has the Burden to Demonstrate its Invalidity as Applied to Him.

When reviewing a permissive presumption, the Supreme Court has required the party challenging it to demonstrate its invalidity as applied to him. *Id.* at 695, 312 N.W.2d at 497.

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference

> and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, **there is no rational way the trier could make the connection permitted by the inference.** For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rationale fact finder to make an erroneous factual determination.
>
> ...
>
> In determining whether there is a "rational connection" between the basic fact that the prosecution proved and the ultimate fact presumed, the test is whether it can be said with substantial assurance that the latter is ""more likely than not to flow from" the former."
> ...
>
> The issue in the instant case is whether the presumed fact that the defendant was under the influence of an intoxicant at the time of driving "more likely than not" flows from the proven fact of intoxication at the time of testing.

Id., 312 N.W.2d at 497-98, **emphasis added.**

Falkosky has the burden to establish that there is no rational way that a jury could make the connection permitted by the inference, namely that Falkosky's blood alcohol concentration more likely than not was in excess of the legal limit at the time of driving because it was in excess of the legal limit at the time of testing. Falkosky cannot satisfy this burden.

D. **A Rational Jury Could Find that the Presumed Fact That Falkosky's Blood Alcohol Concentration Was Over The Legal Limit At The Time Of Driving "More Likely Than Not" Flows From the Proven Fact That His Blood Alcohol Concentration Exceeded the Legal Limit at the Time of Testing.**

When determining whether the ultimate fact presumed "more likely than not" flows from the basic fact that the prosecution proved, a court is to view the evidence of the case in its entirety. *Id.* at 695, 312 N.W.2d at 498.

In *Vick*, the Supreme Court noted:

> The state introduced evidence which, although refuted by the defendant, demonstrated: (1) Defendant told a police officer that he had been drinking earlier in the afternoon; (2) Defendant failed a field sobriety test at the time of arrest; (3) Defendant had been driving erratically; (4) Defendant was uncooperative at the time of arrest; (5) Defendant possessed an odor of alcohol; (6) Defendant admitted having two drinks shortly before his arrest; (7) Defendant's speech was slurred; (8) Defendant had a blood alcohol level in excess of 0.13% at the time of testing, some 36 minutes after his arrest. Defendant introduced evidence to account for the above which the jury was free to accept or reject.
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> ...
>
> We believe it entirely rational that a reasonable jury could have drawn the permissive inference from all the facts before it that it was more likely than not that if defendant were intoxicated at the time of testing, that he was intoxicated at the time of arrest. Our review of the trial court's exercise of discretion in giving the jury instructions in this case has led us to the

> conclusion that they are not constitutionally infirm.

Id.

Similar facts are present in this case: (1) As Officer Grumann was running radar, he observed Falkosky's vehicle traveling 42 m.p.h. in a 25 m.p.h. zone (R. 19:22, A. App-2); (2) Officer Grumann noticed a strong odor of intoxicant coming from the vehicle and observed Falkosky's eyes to be watery and speech to be moderately slurred (R. 19:25, A. App-4); (3) Falkosky admitted that he consumed one bourbon and coke at a birthday party and admitted that he consumed that drink 20 minutes prior to the stop (R. 19:26, A. App-5); (4) Officer Grumann noticed Falkosky's balance was off a little bit (R.19:28, A. App-6); (5) Officer Grumann observed six of six possible clues of intoxication while Falkosky was performing the Horizontal Gaze Nystagmus test (R. 19:31, A. App-7); (6) During the instructional stance for the walk and turn test, Falkosky broke from the heel to toe position contrary to the instructions (R. 19:33, A. App-8); (7) Falkosky missed heel to toe, stepped off of the line, turned improperly, took the wrong number of steps, and stopped during the test,

exhibiting six of eight possible clues in his performance of the Walk and Turn test (R. 19:35-36, A. App-9, 10); (8) During the One-Leg Stand test, Falkosky exhibited four of four possible clues of intoxication (Appellant's Br. at 4); (9) During Falkosky's performance of the Rhomberg Balance test to gauge Falkosky's internal clock, Falkosky swayed and Officer Grumann noted that his internal clock was off in as much as he estimated 30 seconds in 43 seconds (R. 19:39, 40, A. App-11, 12); (10) Following the field sobriety testing, Falkosky changed his story and said that he consumed five drinks, starting drinking at 5:00 p.m., and stopped drinking about 15 minutes earlier (*Id.*); (11) Wisconsin State Laboratory of Hygiene Senior Chemist Michael Knutsen testified that the undisputed test result was .158 grams of alcohol per 100 milliliters of Falkosky's blood, and that he was certain of this result to a reasonable degree of scientific certainty (R. 19:101, 102, A. App-34); (12) Knutsen also testified that within 20 minutes of consumption, approximately 80% of the alcohol consumed in a drink is absorbed into a person's bloodstream and that the absorption

and elimination of alcohol may be occurring at the same time (R. 19:154).

If a jury could have reasonably drawn the permissive inference from the eight facts that the Supreme Court noted in *Vick*, the jury in the present case could have reasonably drawn the same permissive inference from the twelve forgoing facts present in this case.

E. Whether Falkosky Laid a Foundation for an Alcohol Curve Defense is Not Relevant.

Falkosky believes that the circuit court erroneously exercised its discretion by reading the Permissive Inference because Falkosky "laid an appropriate foundation for an alcohol curve defense." There is no statutory or case law that supports Falkosky's argument.

Black's Law Dictionary (10th ed. 2014) defines "foundation" as, "1. The basis on which something is supported; esp., evidence or testimony that establishes the admissibility of other evidence <laying the foundation>."

On cross-examination, Wisconsin State Laboratory of Hygiene Senior Chemist Michael Knutsen testified that it normally takes between 30 to 90 minutes for alcohol to fully

absorb into the bloodstream and that approximately 8 ounces of 80 proof alcohol would have had to be unabsorbed [at the time of the stop] for Mr. Falkosky to be under .08 at 11:19 P.M. [the time of the stop]. He also testified that elimination and absorption occurring at the same time.

However, there is no evidence in the Record indicating the quantity of 80 proof alcohol that Falkosky consumed in the 30 to 90 minutes prior to the stop.

If the above evidence (and lack of evidence) constitutes a "foundation for an alcohol curve defense," then the facts in *Vick* also constitute a foundation for an alcohol curve defense. As the Supreme Court noted:

> Defendant introduced evidence to account for the above which the jury was free to accept or reject. Indeed, our review of the lengthy transcript of the trial proceedings leaves us with no doubt that the defendant had amply set forward his theory of the case: namely, even if the defendant may have been intoxicated at the time of testing, he was not intoxicated at the time of arrest. The jury was apprised of expert testimony to the effect that the expert could not state from the breathalyzer test results what defendant's blood alcohol level would have been at the time of defendant's arrest. We believe it entirely rational that a reasonable jury could have drawn the permissive inference from all the facts before it that it was more likely than not that if the defendant were intoxicated at the time of testing, that he was intoxicated at the time of arrest.

Id. at 696, 312 N.W.2d at 498.

Accordingly, *Vick* does not support Falkosky's contention that the Permissive Presumption cannot be read when a defendant establishes a foundation for an alcohol curve defense. To the contrary, *Vick* suggests that a foundation for an alcohol curve defense is not relevant in the present matter.

F. Falkosky Has Not Argued that JI-Criminal 2668 and JI-Criminal 234 are Inconsistent or Likely to Confuse the Jury if Read Together.

To the extent that Falkosky attempts to allege any inconsistency or likelihood of confusion in their Reply Brief, the Court shall strike or disregard any such arguments. Courts generally do not consider arguments raised for the first time in a reply brief. *See Bilda v. County of Milwaukee*, 2006 WI App. 57, ¶20 n. 7, 292 Wis.2d 212, 713 N.W.2d 661. *See also State v. Tolliver*, 2014 WI 85 ¶6, 85 N.W.2d 251.

G. Falkosky Was Not Prejudiced.

The only argument that Falkosky raised concerning prejudice was, "the error was prejudicial to Mr. Falkosky inasmuch as the test result was afforded the prima facie effect

despite no rationale connection between the basic fact and the presumed fact."

As a threshold matter, Falkosky's legal conclusion falsely assumes that the Permissive Presumption had a prima facie effect and that there is no rationale connection between the basic fact and the presumed fact. Both arguments are addressed above.

More importantly, Falkosky's legal conclusion does not demonstrate that Falkosky suffered any actual prejudice as a result of the allegedly-improper jury instruction.

To suffer prejudice, Falkosky must allege that the allegedly-improper jury instruction likely affected the outcome of the case. In other words, Falkosky must show that he was likely adjudicated guilty of the PAC offense as a result of the allegedly-improper jury instruction.

On that point, it is noteworthy that the jury actually acquitted Falkosky of the OWI offense even after being presented with the allegedly-improper jury instruction. Accordingly, the only evidence in the Record concerning prejudice suggests that Falkosky was not prejudiced as a result of the allegedly-improper instruction. Even if the

Permissive Presumption was read in error, it was a harmless error. As stated above, Falkosky has the burden to demonstrate prejudice and he has not done so. *Vick* at 496, 312 N.W.2d at 691.

CONCLUSION

The trial court did not erroneously exercise its discretion when it ready JI-Criminal 2668 in its entirety. JI-Criminal 2668 contains a permissive presumption and does not have a prima facie effect. If a rationale jury could find that the presumed fact of being over the legal limit at the time of driving "more than likely not" flows from the proven fact of being over the legal limit at the time of testing, the permissive presumption is constitutional. In this case, the presumed fact "more than likely not" flows from the basic fact. Whether a defendant lays an appropriate foundation for an alcohol curve defense is not relevant to the analysis. Finally, Falkosky has not demonstrated that he has been prejudiced by the allegedly-improper jury instruction.

For the foregoing reasons, the Village asks the Court of Appeals to affirm the decision of the circuit court.

Dated this 13th day of July.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b) and 809.19(8)(c) for a brief produced using the following font:

Proportional font: double-spaced, 2-inch margins on the left side and right side and 1-inch margins on the top and bottom. The length of this brief is 16 pages and contains 2,993 words.

Dated this 13th day of July, 2015.

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ELECTRONIC BRIEF CERTIFICATION

As required by section 809.19(12) of the Wisconsin Statutes, I certify that the text of the electronic copy of this Reply Brief is identical to the text paper copy of the Brief.

Respectfully signed this 13th day of July, 2015.

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