STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Appellate Case No.2016AP83-CR
Waukesha County Case No. 2014 CF 1987

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DAVID ROBERT BROWN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal from the Judgment of Conviction
and Decisions Entered in the
Circuit Court for Waukesha County, the
Honorable Michael J. Aprahamian Presiding

Respectfully Submitted,
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STATEMENT OF THE ISSUES

1. Was it a violation of the defendant's constitutional right to due process to give the standard jury instruction allowing a jury to presume the defendant was under the influence and operating with a prohibited alcohol concentration if, within three hours of driving, a test sample was over .08 grams in 210 liters of the defendant's breath, when there was expert testimony presented which supported an alcohol curve defense?

Answer by Circuit Court:

No. The court ruled it was sufficient to combine the standard Wis. Crim J.I. No 2669 and 234 (blood alcohol curve testimony).

2. Was it a violation of Sec. 903.03(2), Wis. Stats. to give a substantive jury instruction that included a presumption that the defendant's breath test result was, alone, sufficient evidence of guilt on both counts given that the testimony, as a whole, negated the basic facts underlying the presumption?

Answer by Circuit Court:

Impliedly no. The court ruled it was proper to give Wis. Crim J.I. No. 2669 even though there was unrebutted testimony establishing that the blood alcohol curve demonstrated that the presumption was unsupported.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Counsel believes that the parties' briefs will adequately address the issue raised in this appeal, and that the Court will therefore deem oral argument to be unnecessary. This is a one judge panel, so publication is not available. However, because the appeal involves a question not yet decided in a published case in Wisconsin, it may be appropriate to assign to a three judge panel.

STATEMENT OF THE CASE

On December 30, 2014, the defendant David R. Brown was charged in a two-count criminal complaint in Waukesha County with Operating a Motor Vehicle Under the Influence (1st offense, with a passenger under the age of sixteen), and Operating a Motor Vehicle with a Prohibited Alcohol Content (1st offense, with a passenger under the age of sixteen). R. 1. The misdemeanor case was scheduled in Branch 9 before Judge Michael Aprahamian. A jury trial was held on May 19-20, 2015, and the jury returned a guilty verdict on both counts. Count Two was later dismissed. On June 22, 2015, the court sentenced the defendant to ten days jail with Huber privileges, twelve months revocation of his driver's license, attendance at a victim impact panel, 50 hours of community service, and a fine and assessments of $1129.00. The defendant, who lives in Nevada, was permitted to complete his victim

impact and community service in his home state. On July 1, 2015, the court stayed the jail portion of the sentence pending appeal.

On July 15, 2015, the defendant retained Buting, Williams & Stilling, SC, and a notice of intent to seek post-conviction relief was filed by Attorney Jerome F. Buting. A notice of appeal was filed on January 4, 2016.

STATEMENT OF FACTS

On December 23, 2014, at approximately 11:00 p.m., two Waukesha County Sheriff deputies, Deputy Sandra Vick and Deputy Charlene Craft came upon a white mini van parked on the shoulder of the road on County Road R in the Town of Nashotah. R. 42: 77-78. The van was not in traffic and a person later identified as David Brown was seen standing nearby, "kind of down in the ditch." *Id.* at 78. Deputy Vick approached to see if everything was okay with the vehicle and Brown told her he had to use the bathroom, so he pulled over at that location to urinate in the ditch. *Id.* at 79. The deputy observed that an adult female was inside the van, along with a twelve year old child. The defendant explained that they were all coming from a family reunion in Delafield, heading to his wife's home in Oconomowoc. *Id.* at 80. The deputy smelled an odor of intoxicants and he admitted he had two beers and a shot, so she asked him to perform field sobriety tests. *Id.* Deputy Vick testified that she had been with the Waukesha County Sheriff's Department only about two

months, with prior experience in Calumet County for just eleven months. *Id* at 75-76. Including the investigation in Brown's case, she had only been involved in "between two and four" prior OWI investigations. *Id.* at 76.

Deputy Vick administered several roadside field sobriety tests. First she administered the HGN test, for which she had been trained the prior year at the police academy. *Id.* at 82. She formed the opinion that the defendant was intoxicated from this lone test. *Id.* at 84. Nevertheless, she continued to administer other tests, including the walk heel to toe test, which she claimed he failed because he missed several steps and raised his arms to maintain balance. *Id.* at 86-89. The deputy also had the defendant perform a "one leg stand test," which she also said he failed because he only held his foot up for twelve seconds. *Id.* at 89-91. Following that third field sobriety test Brown was arrested and conveyed to the Waukesha County Sheriff's Department. *Id.* at 92. At the sheriff's department, the defendant was read the Informing the Accused form at 12:53 a.m., about two hours after the deputies first encountered him at the scene. *Id.* at 94. He admitted to drinking "a couple shots of whiskey." *Id.* at 95. Deputy Vick did not perform the intoximeter breath test. She said that Deputy Craft did that. *Id.* at 94

On cross-examination by defense counsel, Deputy Vick stated that the white van was legally parked on the side of the road, and as she pulled up she

activated the strobe squad lights and the squad spotlight, both of which remained illuminated throughout her field sobriety test investigation. *Id.* at 98-99. The deputy also said that she observed Brown walking up the slope from the ditch to the vehicle without any difficulty. *Id.* at 100. He also exhibited no coordination difficulties removing his wallet and extracting his driver's license, which she would have noted because that could indicate impairment. *Id.* at 101-02. The deputy also conceded that she did not detect any slurred speech and he had no difficulty answering her questions appropriately. *Id.* at 103. She had the defendant sit in his vehicle while she ran his driver's license, which proved to be valid Nevada license. *Id.* at 104.

The deputy further testified that when she returned to Brown's vehicle she asked him to get out and do some field sobriety tests "just to make sure that he was not too impaired to be driving." *Id.* at 105. She testified that he exhibited none of the seven different factors she has been trained on concerning signs of impairment as a suspect gets out of his vehicle. *Id.* 107. She confirmed that there were "absolutely zero clues" that would indicate impairment in the manner in which he got out of the minivan. *Id.* at 108. She also noticed no problems as the defendant walked from his vehicle to the area for field sobriety tests. Id. at 109. Although she had him face away from the

squad, the sheriff's department car had its flashing lights and spotlight on continuously. *Id.* at 110.

Further on cross-examination, Deputy Vick elaborated on the HGN, horizontal gaze nystagmus test. She admitted that she was trained that all people have nystagmus, or involuntary jerking, in their eyes, but that she was looking for "distinct nystagmus" in Mr. Brown's eyes. *Id.* at 110. However, she conceded that she did not recall being trained how much nystagmus must be present to indicate alcohol impairment, and that there were different forms of nystagmus, though she had never seen anything other than "alcohol nystagmus ." *Id* at 110-12. She also conceded that she had been trained to turn off the flashing strobe lights on a squad before administering field sobriety tests, but that she did not do so in this case. *Id.* at 113.

The deputy also admitted that on the one-leg stand test she was trained to ask the subject to raise their foot only six inches off the ground, but that she asked Brown to raise his foot twelve inches off the ground. *Id.* at 114. She conceded that her training manual warned that if the field sobriety tests were not administered according to the instructions that the reliability of those results could be compromised, yet she failed to follow her training instructions in Mr. Brown's case. *Id.*

Deputy Craft also testified for the State. She testified that she was riding along with Deputy Vick on the night Brown was arrested as her back up. R. 45: 6. She observed Vick administer the field sobriety tests and helped transport Brown to the station. She said that several times Brown stated that he was a colonel in the Air Force and asked if something else besides an OWI charge could be worked out. *Id.* at 6-7. She said that was not an option and he remained quiet thereafter. *Id.* Deputy Craft also testified that she administered the breath test at the station, after observing him for twenty minutes beginning at 12:25 a.m. The State introduced Exhibit 1, the "intox subject test record," which indicated the time of driving as 11:14 p.m. *Id* at 11-12. The defendant provided a sufficient sample and the machine noted a value of .11. *Id.* at 14.

The state next called Melissa Kimball, a chemical test coordinator with the state Department of Transportation. She described the manner in which an intoximeter works, and also stated that she was responsible for maintaining the Waukesha County Sheriff's Department machine, which she does approximately every 90 days. *Id.* at 21. Kimball also testified generally how alcohol is absorbed into the blood stream after it is consumed by an individual. *Id.* at 23-27. She said that, generally, the alcohol in a drink is fully absorbed in the body between 30 and 90 minutes after consumption. *Id.* at 25. She concluded that the reading of .11 in Brown's case was a "valid accurate test

result" because the test record card indicated the machine passed its diagnostic tests and its blank control tests. *Id.* at 28-29.

The State rested its case after two stipulations were read to the jury, that the passenger in Brown's vehicle was only 12 years old, and that the intoximeter machine used in this case had been examined by Melissa Kimball and found to be in working order in November of 2014 and February of 2015. *Id.* at 43.

The defendant did not testify. The defense called only one witness, James Oehldrich, a forensic toxicologist, previously employed at the State Crime Lab for over 30 years, and now in private practice as a consultant. He testified about how alcohol is absorbed and metabolized in the human body. R. 45: 51-52. Like the State's chemist, he said that there are three phases in the body's processing of alcohol: absorption, plateau and elimination. *Id.* He testified that there was no one "typical" time within which a drink will be absorbed, because many variables affect absorption, including the amount and type of food that is in the stomach. *Id.* at 52.

Mr. Oehldrich testified that he was retained by the defense in Brown's case and reviewed the police reports and breath alcohol record. *Id.* at 53. He then followed up with an interview of the defendant to determine his height, weight, gender, age and what alcohol he ingested at what times during the

evening of his arrest in this case. *Id.* He considered all of that information as well as the time of the driving, which the police report indicated was 11:10 p.m., and the time of the breath test, at 1:10 a.m.. *Id.* at 55. He expressed his opinion that at the time of driving at 11:10 p.m., David Brown's blood alcohol level was .07 grams per 210 liters of breath. *Id.* at 56. He concluded that Brown was below the level of .08 and that he was in the absorption phase at the time of driving. *Id.* He plotted on a computer generated curve the information he had and concluded that the defendant's explanation of the amount and type of alcohol ingested correctly fit the curve generated by the program, which included a test result of .11 as generated by the intoximeter. *Id.* at 56-57; Exhibit 7. On cross-examination, Mr. Oehldrich testified that his calculations included information received from the defendant, *Id.* at 60-64, and that if that information was not accurate, his conclusion could also be off the mark. *Id* at 70-71. However, he explained that if the defendant's information was not accurate, then his calculation would not have correlated with the intoximeter result of .11. *Id.* at 74.The following morning, the defense rested and the State had no rebuttal. R. 46: 15.

At a jury instruction conference with the parties, the judge reviewed the standard instructions for the charged offenses and created a hybrid of Wis. Crim. J.I. No 2669, which added the element from No. 2663 that there must be

a passenger under the age of sixteen, as well as the language that knowledge of the passenger's age is not required. R. 45: 86. As to the presumption contained within that instruction concerning the effect of a test within three hours of driving, defense counsel asked to consider that further overnight. *Id.* at 87.

The judge concluded the jury instruction conference the following morning, prior to closing arguments. The court queried the prosecutor about the bracketed portion of the instruction on conflicting opinions from expert witnesses, and she replied:

> MS. ZILAVY: After reviewing my notes from testimony, I don't think it's necessary in this case. Essentially, there is the presumption in the law that's in the substantive jury instruction 2668 and then there is Mr. Oehldrich's testimony that's in conflict with that so *Melissa Kimball didn't necessarily give an opinion in conflict with Mr. Oehldrich's opinion. It's really the presumption that is in conflict* so I don't think that the bracketed language is necessary.

R. 46: 6 (emphasis added). Defense counsel and the court agreed so that language was left out of the instruction on expert witnesses. Defense counsel then objected to language in the standard instruction that the jury could presume that a test result over .08 taken within three hours of driving also meant that the defendant was over the limit at the time of driving. *Id.* at 7-8. He stated: "I believe that that language would not be relevant in this case because there is an issue with the alcohol curve in this particular case. . . where

the alcohol curve or the blood alcohol curve is contested." *Id.* at 8. The prosecutor disagreed, stating that there was evidence about the blood alcohol curve, so the standard instruction No 234 should be included, but that the presumption should also be included in the instruction. *Id.* at 9. The court agreed with the State, and decided to insert the language about evidence concerning the blood alcohol curve defense into the substantive jury instruction, after the language giving the State the benefit of the presumption for a test result over .08 taken within three hours of the defendant's driving. *Id.* at 10.

The jury returned guilty verdicts on both counts. This appeal follows.

ARGUMENT

I. The substantive jury instruction that included a presumption that the defendant's breath test result was, alone, sufficient evidence of guilt on both counts violated the defendant's due process rights because alcohol curve evidence was introduced at trial.

A. Standard of review.

"A circuit court has broad discretion in deciding whether to give a requested jury instruction." *State v. Coleman*, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996) (citing *State v. Vick*, 104 Wis.2d 678, 690, 312 N.W.2d 489 (1981)). " 'The decision to give or not to give a requested jury instruction lies within the trial court's discretion' and will not be reversed absent an erroneous exercise of discretion." *Arents v. ANR Pipeline Co.*, 2005 WI App

61, ¶ 42, 281 Wis.2d 173, 696 N.W.2d 194 (quoting *State v. Miller*, 231 Wis.2d 447, 464, 605 N.W.2d 567 (1999)). However, an appellate court independently reviews whether an instruction was an accurate statement of the law. *State v. Anderson*, 2014 WI 93, ¶ 16, 357 Wis. 2d 337, 851 N.W.2d 760.

B. Federal and statutory law governing presumptions.

A presumption allows a "trier of fact to determine the existence of an element of the crime-that is, an 'ultimate' or 'elemental' fact-from the existence of one or more 'evidentiary' or 'basic' facts." *Ulster County Court v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). The presumption can be permissive, which "allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," *id.* at 157, 99 S.Ct. 2213, or it can be mandatory, requiring 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 presumed connection between the two facts," *Id. State v. Gardner*, 2006 WI App 92, ¶ 9, 292 Wis. 2d 682, 688-89, 715 N.W.2d 720, 723-24. A mandatory presumption, whether conclusive or rebuttable, is not constitutional because it relieves the State of its burden to prove every element of an offense beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 521-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Wisconsin's statute on presumptions in criminal cases requires the circuit court to instruct the jury that it may, but is not required to, accept the presumed fact. In other words, Wisconsin's statute mandates only permissive presumptions can be used in criminal cases and only if the basic facts clearly support it:

> **903.03 Presumptions in criminal cases**.
>
> (2) SUBMISSION TO JURY. The judge is not authorized to find a presumed fact against the accused. When the presumed fact establishes guilt or is *an element of the offense* or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, *but only if, a reasonable juror on the evidence as a whole*, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.
>
> (3) INSTRUCTING THE JURY. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact, but *does not require it to do so.* Wis. Stat. § 903.03.

Thus, the rule of evidence governing presumptions in criminal cases, W.S.A. 903.03(3), guarantees to criminal defendants that all presumptions used will have a permissive effect only, and that only the jury can find presumed fact upon inferences from basic facts which themselves must be

proved to a jury beyond reasonable doubt. *State v. Dyess,* 124 Wis.2d 525, 370 N.W.2d 222 (1985).

Not all permissive presumptions are permitted under a defendant's constitutional right to due process. A permissive presumption is constitutional only if there is a rational connection between the basic fact and the elemental fact. *Ulster County Court v. Allen*, 442 U.S. at 165, 99 S.Ct. 2213.

> 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 rational factfinder to make an erroneous factual determination.

Id. at 157, 99 S. Ct. 2213, 2225.

C. The substantive jury instruction included a permissive presumption that was inappropriate because the alcohol curve expert testimony demonstrated there was no longer a rational connection between the presumption and the question of the defendant's alcohol content at the time of driving.

The instruction given in this case violated due process in that it permitted the jury to find that the defendant was under the influence of an intoxicant at the time of driving when there was no longer a rational connection between the presumption and the evidence after the un-rebutted

blood alcohol curve testimony was introduced. The substantive jury instruction used by the court in this case created a permissive presumption:

> COURT:
>
> The law states that the alcohol concentration in a defendant's breath sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of operating.
>
> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of the defendant's breath 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 the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating or both but you are not required to do so.
>
> Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the breath sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case giving the weight you believe it is entitled to receive.

R. 46: 45-46. At the time the jury was given this instruction, there was no a rational connection between the basic fact (the defendant's blood alcohol content at the time of the administration of the test) and the presumptive fact (the defendant's blood alcohol content at the time of driving) to warrant the presumption.

The test for determining whether a rational connection exists was set forth in *County of Ulster*:

> [T]here is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former.

442 U.S. at 165, 99 S. Ct. 2213, 2228-29. Here, the basic fact proved by the prosecution was that the defendant had a breath test result of .11, about two hours after he was known to be driving. The "ultimate fact" presumed is that he was under the influence of an intoxicant and/or that he had a prohibited alcohol concentration at the time of driving, two hours earlier. Under the particular facts of this case, the defendant submits the facts fail the *County of Ulster* test for a "rational connection."

Here, the State's own witness was only able to testify that that the .11 test instrument result was accurate *as of the time the sample was taken, not at the time of driving*.

> Q. And maybe I worded the question wrong but what is your opinion regarding that .11 test result?
>
> A. I believe this is a valid accurate test result.
>
> Q. And is it a valid accurate test result at a certain time?
>
> A. It is a valid accurate test result at 1:10 a.m.

R. 45: 28. The State's position that the test reflected the blood alcohol content at the time of driving was further undermined when their expert, Ms. Kimball, also stated that she could not state to a reasonable degree of certainty what the defendant's blood alcohol content was at the time of driving:

Q. Sure. So would you agree that it's impossible to say to a reasonable degree of scientific certainty that the blood alcohol content of an individual at the time of testing is a true and accurate reflection of the blood alcohol content of an individual at the time of driving?

A. *I can't say that it is or it isn't*. It would depend on a lot of factors.

Q. Okay, So it would be impossible to say that to a reasonable degree of scientific certainty?

A. It's hard to answer that question.

Q. Okay. No. I understand you testified there are a variety of factors that come into play, correct?

A. Correct.

Q. Okay. So given everything that you've testified to and everything that we've discussed today, you can't tell me exactly what my client's blood alcohol content was at the time he was operating a motor vehicle, can you?

A. I can do calculations but I would have to make a number of assumptions at this point without knowing more information.

Q. Okay. So it would be possible for another expert in your field to come to a different conclusion as to what an individual's blood alcohol content was at the time of driving?

A. Depending on what the, what information. If we were given the same information, the same facts making the same assumption, I would expect that we would come to a similar conclusion using the same facts.

R. 45: 39-40 (emphasis added). At no time did the State's expert ever express the opinion that the .11 test result from the defendant's breath sample taken at 1:10 a.m. was an accurate indication of his blood alcohol concentration at the time of driving, two hours earlier. Thus, she undercut the presumption given to the jury and relied upon by them because she said she could not state that the test result was an accurate reflection of a person's alcohol concentration at the time of driving. *Id.* at 39. She conceded that an expert could calculate what Mr. Brown's blood alcohol content was at the time of driving, if they were given more information than she had at that point. *Id.* at 39-40. The defense expert did just that.

Unlike the State's witness, Mr. Oehldrich was able to testify to the calculated alcohol content in Mr. Brown at the time of driving, and it was below .08. He testified that he had a software program that could plot one's alcohol curve, which he did in Brown's case and put into an "Anterograde Alcohol Extrapolation report." R. 45: 60; R. 21: Exhibit 7. He was able to input Brown's height, weight, age, gender and the information Brown told him about what he drank and when he drank it, as well as the data from the police report as to the time of driving and breath test record indicating the time of the test. R. 45: 55. In doing so, Mr. Oehldrich and his software program calculated Brown's blood alcohol content at the time of his contact with the police at

11:10 p.m. was "0.07 grams per 210 liters of breath." *Id.* at 56. He gave the further opinion that Brown "was below the .08 and in my opinion he was in the absorption phase of his alcohol curve." *Id.*

On cross-examination, the prosecutor challenged Oehldrich's opinion because it was based, in part, on the information the defendant had given him. *Id.* at 73. However, Oehlrich explained that if the defendant actually drank more than he admitted or less than he admitted, then his calculation would not have shown him at a .11 at the time of the test, as the intoximeter test showed.

> Q. And if it is true that he drank more than what he told you, your analysis would be different?
>
> A. If – if the information pertaining to drinking is incorrect, then the results would be incorrect. But also I would not be able to do my calculation and come up with the value that is identical to the breath test if he drank more and it would be highly unlikely in the time period that he had to hit the .11 breath test if he drank less then I would not be able to hit the .11 at the time of the breath test.

Id. at 74. Thus, Oehldrich's conclusion was bolstered by the fact that his calculation coincided with the breath test result that the State's expert said was a "valid and accurate test result at 1:10 a.m." *Id.* at 28. If the defendant was minimizing his consumption of alcohol, as the prosecutor inferred, then Oehlrich's curve would have shown him to be above the .11 test result actually obtained two hours after driving. But that was not the case, so the defense expert's testimony is the only evidence of what the defendant's alcohol content

was at the time of driving. That evidence, as a whole, established that Brown was below .08 at the time of driving, contrary to the presumption the jury was given to use.

The State had no evidence from its expert that contradicted Oehlrich's opinion. Indeed, during the jury instruction conference the prosecutor conceded that it was not necessary for the court to give an instruction on differing expert opinions because "Melissa Kimball didn't necessarily give an opinion in conflict with Mr. Oehldrich's opinion. It's really the presumption that is in conflict so I don't think that the bracketed language is necessary." R. 46:6. The State's concession demonstrates that there was no rational connection between the test result and the blood alcohol content at the time of Brown's driving in this case. The presumption that the blood alcohol test taken two hours later reflected Brown's blood alcohol at the time of driving was in direct conflict with the expert testimony of both sides. The State's expert could not and did not give the opinion that the .11 test result established that Brown was over the limit two hours earlier when he was driving. Indeed she stated that she was unable to make that calculation without assuming information she did not have. The defense expert, who did have that other information, performed those calculations which showed the defendant was below the legal limit at the time of driving. Where, as in this case, the expert

testimony from both parties fails to support the presumption given and, in fact, supports a blood alcohol content below the legal limit at the time of driving it is error to give an instruction that tells the jury they may infer otherwise and conclude – on the basis of the test result alone – that the State met its burden of proof on the under the influence of an intoxicant element and the element of a prohibited alcohol concentration.

Brown was clearly prejudiced by this erroneous instruction. First, it relieved the State of its burden on the two critical elements of the two charged offenses. By providing the jury with a permissive presumption which had no rational connection to the evidence in this case, the defendant's due process rights to hold the state to its burden of proof beyond a reasonable doubt were violated. Moreover, the presumption undercut the only expert testimony in the case which established that Brown was under the legal limit at the time of driving. To compound the problem, as argued below, there was no credible, physical evidence to support the presumption of intoxication, another fatal flaw.

In the absence of a rational connection between the basic and presumed facts, it was a violation of due process to give the instruction.

II. The substantive jury instruction that included a presumption that the defendant's breath test result was, alone, sufficient evidence of guilt on both counts violated Sec. 903.03(2), Wis. Stats.

Sec. 903.03, Wis. Stats. requires that a presumption not only be permissive but that it also be supported by evidence beyond a reasonable doubt. Before the court is permitted by statute to submit the question of guilt or the existence of the presumed fact to the jury, the court must find that "a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt." In this case, it was error for the court to find that the evidence as a whole supported the presumed fact, whether Brown had a blood alcohol content .08 or above at the time of driving. The expert testimony from the State failed to establish that the presumption survived the defense expert's opinion regarding Brown's blood alcohol content at the only time that mattered, when he was driving.

Absent the breath test result, this was a very close case. There was no bad driving observed by either officer. The vehicle was legally and properly parked on the shoulder of the road. R. 42: 97-98. The defendant was observed walking up a slope from a ditch on the side of the road with no difficulty in his balance noted. *Id.* at 99-100. Nor was any coordination impairment noted as he removed his license from his wallet. *Id.* at 101-02. The officer said he

answered her questions appropriately and she did not note any slurred speech or glassy or blood shot eyes. *Id.* at 103, 106. She noted an odor of intoxicants, but that only indicated that he had been drinking *some* alcohol, not the quantity consumed. *Id.* at 106. The officer observed no balance or walking impairment as he got out of his vehicle and walked to the location she instructed for field sobriety tests. *Id.* at 107-09. The officer was very inexperienced, having made only 2 to 4 OWI arrests, including this one. *Id.* at 97. She admitted that she could not recall exactly what her training manual told her she was to look for on the nystagmus eye test she performed. *Id.* at 111. And, she admitted that her training required the flashing strobe lights to be turned off before having a suspect perform roadside sobriety tests, but she failed to take this simple, but required, step before conducting the tests on Brown. *Id* at 113. Finally, she admitted that she gave the wrong instructions to Brown for the one leg balance test, asking him to lift his foot twice as high off the ground (12 inches instead of 6), contrary to her training manual. *Id.* at 114.

Thus, the State's evidence of intoxication, besides the breath test result, was weak at best, having been gathered by a very inexperienced officer who disregarded or forgot what her training manual told her about how to conduct roadside sobriety tests. With no other signs of intoxication, such as bad driving or lack of balance while walking around or inability to answer questions

appropriately, the State's case that Brown was under the influence at the time of driving was highly questionable, and certainly reasonable jurors could find reasonable doubt. In such circumstances the erroneous presumption instruction clearly prejudiced Brown's case.

CONCLUSION

For all of the foregoing reasons, Brown submits the jury instruction given in his case violated his right to due process. He requests the conviction be vacated and he be granted a new trial.

Dated at Brookfield, Wisconsin, this 22nd day of April, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Document conforms to the rules contained in this Court's order granting review, and § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this document is 5817 words.

Dated this 22nd day of April, 2016.

s/ Jerome F. Buting
Jerome F. Buting

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I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 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 necessary to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

By: s/Jerome F. Buting
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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.

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Jerome F. Buting

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I hereby certify that I am filing this brief on today's date by placing ten copies in a package addressed to:

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s/ Jerome F. Buting
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