STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP000083-CR

Circuit Court Case No. 2014CT001987

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID ROBERT BROWN,

Defendant-Appellant.

An Appeal From a Judgment of Conviction Entered by the
Honorable Michael J. Aprahamian, Circuit Judge, Branch 9,
Waukesha County

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii-iv

STATEMENT OF THE ISSUES 1

POSITION ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE AND FACTS 3-10

ARGUMENT

I. THE JURY INSTRUCTIONS GIVEN IN MR. BROWN'S CASE WERE NOT ERRONEOUS, AND EVEN ASSUMING THEY WERE, SUCH INSTRUCTIONS DID NOT PREJUDICE MR. BROWN OR VIOLATE HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS 11-30

A. Standard of Review 12-13

B. Relevant Law 13-23

C. There was a rational connection between the facts presented in Mr. Brown's case and the 0.08 presumption, and therefore the instruction was properly given; but even if the instruction was erroneously given, Mr. Brown was not prejudiced by such error. 24-30

CONCLUSION 31

CERTIFICATION OF BRIEF 32

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) 33

TABLE OF CONTENTS OF APPENDIX i

Little Chute Village Municipal Court v. Falkosky, 2015 WI App 82, 365 Wis. 2d 350, 871 N.W.2d 693 (unpublished opinion) ..... App-1 – App-4

CERTIFICATION OF APPENDIX.....App-5 – App-6

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)
.....App-7

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Statutes Section 346.63(1)(a) and (1)(b) (2013-2014) 3

Wisconsin Statutes Section 903.03(2) 14

Wisconsin Jury Instructions

Wisconsin Jury Instruction—Criminal 2669: Operating a Motor Vehicle While Under the Influence of an Intoxicant/Operating a Motor Vehicle With a Prohibited Alcohol Concentration of 0.08 Grams or More—Criminal Charge— §§346.63(1)(a) and 346.63(1)(b).....1, 11-12, 16, 18-19, 24-25, 28-30

Wisconsin Jury Instruction—Criminal 234: Blood-Alcohol Curve 1, 9-12, 16, 18-20, 22-25, 28-30

Federal Cases

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) 14, 15

Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) 13, 14, 16

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) 15, 16

Tot v. U.S., 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943) 15

Wisconsin Cases

Fischer v. Ganju, 168 Wis. 2d 834, 485 N.W.2d 10 (1992).....13

Johnson v. State, 85 Wis. 2d 22, 270 N.W.2d 153 (1978).....13

Little Chute Village Municipal Court v. Falkosky, 2015 WI App 82, 365 Wis. 2d 350, 871 N.W.2d 693 (unpublished opinion used for persuasive value only) 16-20, 24-25, 29

State v. Allen, 2014 WI 93, 357 Wis. 2d 337, 851 N.W.2d 760 .....12, 15

State v. Coleman, 206 Wis. 2d 199, 556 N.W.2d 701 (1996) 12

State v. Fonte, 2005 WI 77, 281 Wis. 2d 654, 698 N.W.2d 594 12

State v. Hubbard, 2008 WI 92, 313 Wis. 2d 1, 752 N.W.2d 839 .....12, 13

State v. Vick, 104 Wis. 2d 678, 312 N.W.2d 489 (1981) 13-16, 20-23, 29

STATEMENT OF THE ISSUES

1. Was it erroneous for the circuit court to give the jury the part of Wisconsin Jury Instruction—Criminal 2669 indicating that if Mr. Brown had 0.08 grams or more of alcohol in 210 liters of breath at the time the intoximeter test was taken, the jury could presume he was under the influence of an intoxicant at the time of operating the vehicle in addition to Wisconsin Jury Instruction—Criminal 234: Blood-Alcohol Curve?

   Circuit Court Answer: No.

2. If it was erroneous for the circuit court to give both the 0.08 presumption instruction and blood-alcohol curve instruction, was Mr. Brown prejudiced by such so as to violate his Fourteenth Amendment Due Process Rights?

   Circuit Court did not answer.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

Mr. Brown was charged with Operating While Intoxicated—1st Offense, with a Minor Child in the Vehicle (OWI), contrary to Wisconsin Statutes Section 346.63(1)(a) (2013-2014), and Operating with a Prohibited Alcohol Concentration—1st Offense, with a Minor Child in the Vehicle (PAC), contrary to sec. 346.63(1)(b), Wis. Stats., for an incident that occurred on December 23, 2014, in the area of County Highway (CTH) R and County Highway (CTH) C, in the Village of Nashotah, Waukesha County, Wisconsin. (R. 1: 3-4.) On May 19 and 20, 2015, a jury trial was held on the charges where Mr. Brown was convicted of the OWI and PAC charges. (R. 42; R. 45; R. 46; R. 19.) A judgment of conviction was entered on the OWI charge, and the PAC was dismissed by operation of law. (R. 29; R. 32.) The trial court sentenced Mr. Brown on June 22, 2015, to 10 days jail with Huber, a $350 fine, and a 12 month revocation of his driver's license. (R. 44: 26.) Mr. Brown is now appealing his conviction for OWI—1st offense with minor passenger.

At the jury trial, the State presented three witnesses: ex-Waukesha County Sheriff's Deputy Sandra Vick, Waukesha County Sheriff's Deputy Charlene Craft, and Chemical Test

Coordinator Melissa Kimball with the Wisconsin Department of Transportation (DOT).

At trial, Vick testified she was working as a Sheriff's Deputy on December 23, 2014, around 11:00 p.m., when she was on patrol in the area of CTH C and CTH R, in the Village of Nashotah, Waukesha County, Wisconsin. (R. 42: 77.) At that time and location, Vick observed a vehicle on the side of the road and a man down in the ditch. (*Id.* at 78.) Vick made contact with the man, who was identified as Mr. Robert Brown. (*Id.*) Mr. Brown indicated to Vick that he needed to use the bathroom, so that is why he was pulled over. (*Id.* at 79.) There were two additional people in the vehicle, one identified as a female named Jennifer, and one identified, as Alex, who was only 12-years-old. (*Id.*)

Vick again spoke with Mr. Brown, and could smell an odor of intoxicants on his breath. (*Id.* at 80.) When asked where he was coming from and where he was going, Mr. Brown indicated he was coming from a family reunion in Delafield and headed home to Oconomowoc. (*Id.*) Vick asked Mr. Brown if he had anything to drink, and he stated that he had two beers, Sam Adams, and one shot. (*Id.*) Based on these initial observations,

Vick asked Mr. Brown to perform standardized field sobriety tests. (*Id.*)

Vick indicated that she was trained on administering field sobriety tests including the Horizontal Gaze Nystagmus (HGN) test, the Walk-and-Turn test, and the One-Leg Stand test. (*Id.* at 82-91.) On the HGN test, Vick observed lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes, nystagmus prior to 45 degrees in both eyes, but no vertical nystagmus. (*Id.* at 85.) Vick testified that based on these results, she believed that Mr. Brown was intoxicated. (*Id.*)

Mr. Brown agreed to perform the Walk-and-Turn test, and during the test, Vick observed Mr. Brown to miss heel-to-toe on several steps, raise his arms for balance, conduct an improper turn, and step off the line. (*Id.* at 88-89.) Additionally, after the first series of steps, Mr. Brown had to be reminded to turn around and complete the second series of steps. (*Id.* at 88.) Based on these results, Vick believed that Mr. Brown was impaired. (*Id.*)

Last, Mr. Brown agreed to perform the One-Leg Stand test, and during that test, Vick observed Mr. Brown raise his foot for approximately 12 seconds then put it down, use his arms for balance, and hop on one foot. (*Id.* at 90-91.) During this test,

after Mr. Brown put his foot down at 12 seconds, he had to be reminded to continue the test as instructed. (*Id.* at 91.) Additionally, Mr. Brown started making comments about being a retired Colonel in the Air Force, and asked if something could be worked out. (*Id.* at 91.) Vick opined that these results indicated to her that Mr. Brown was impaired. (*Id.* at 91.)

Based on the observations made by Vick, she placed Mr. Brown under arrest and then transported him to the Waukesha County Sheriff's Department. (*Id.* at 92.) During the ride to the Sheriff's Department, Mr. Brown repeatedly stated he was a Colonel in the Air Force and asked to "work something out." (*Id.*) When asked what she believed Mr. Brown meant by that, Vick stated that she assumed he wanted them to let him go and not be charged with OWI. (*Id.*) While at the Sheriff's Department, Vick read Mr. Brown the Informing the Accused form, and he agreed to submit to an evidentiary breath test. (*Id.* at 92-93; R. 21: State's Exhibit 2.) Vick also read Mr. Brown his constitutional rights, he waived those rights, and was willing to speak with Vick. (R. 42: 95.) At that time, Mr. Brown now indicated that he had a couple shots of whiskey instead of two beers and a shot as he indicated during Vick's initial contact. (*Id.*)

On cross-examination, Vick admitted that Mr. Brown did not have slurred speech (*id.* at 96), difficulty walking up from the ditch (*id.* at 100), difficulty getting out his driver's license from his wallet (*id.* at 101), difficulty answering deputies questions (*id.* at 103), or bloodshot and glassy eyes (*id.* at 106.)

The State also presented testimony from Deputy Charlene Craft, who Vick's backup officer on Mr. Brown's OWI investigation. (R. 45: 3.) Like Vick testified about, Deputy Craft also heard Mr. Brown indicate several times that he was a retired Colonel in the Air Force and wanted to "work something out." (*Id.* at 6-7.) Mr. Brown made so many comments along this line that while in the squad transporting him to the Sheriff's Department, Deputy Craft turned up her squad radio so she did not have discuss that with Mr. Brown anymore. (*Id.* at 7.) Deputy Craft also indicated that she administered the intoximeter machine in Mr. Brown's case, and that the test result was 0.11 g/210 liters of breath. (*Id.* at 14, R. 21: State's Exhibit 1.)

Last, the State presented evidence from Melissa Kimball, who is a Chemical Test Coordinator with Wisconsin DOT, and is responsible for maintaining the Intoximeter machines in a given region, including Waukesha County. (R. 45: 17; R. 21: State's Exhibit 3.) Ms. Kimball testified about how alcohol is absorbed

in the body and how intoximeter machines work. (*Id.* at 18-27.) She also testified that Mr. Brown's intoximeter result was 0.11 g/210 L of breath, and it was an accurate test result for when he blew into the intoximeter machine at 1:10 a.m. (*Id.* at 28.) On cross-examination, Ms. Kimball admitted that it was possible that Mr. Brown was lower than the 0.11 test result at the time of driving around 11:10 p.m. depending on various factors including a drinking history. (*Id.* at 37.)

After the State presented its witnesses, two stipulations were read to the jury: one indicating that Alex (A.E.) was a minor, and the second being that the intoximeter machine was working properly in Mr. Brown's case. (R. 12; R. 13; R. 45: 42-43.)

Mr. Brown then called James Oehldrich, a forensic toxicologist and drug identification consultant, to testify. (R. 45: 46; R. 21: Defense Exhibit 6.) Like Ms. Kimball, Mr. Oehldrich testified about how alcohol is absorbed in the body, and also discussed the concept of an alcohol curve. (R. 45: 51-53.) Mr. Oehldrich authored a report regarding his application of the alcohol curve in Mr. Brown's case. (*Id.* at 56-57; R. 21: Defense Exhibit 7.) Mr. Oehldrich stated he spoke with Mr. Brown and got his weight, height, age, and drinking history, including exact times when he drank certain alcohol. (R. 45: 55.) Based on all of

the information Mr. Oehldrich reviewed including police reports, the intoximeter test result, and the information provided by Mr. Brown, Mr. Oehldrich opined that Mr. Brown's blood alcohol concentration (BAC) at 11:10 p.m. was 0.07. (*Id.* at 56; R. 14: Defense Exhibit 7.) On cross-examination, Mr. Oehldrich admitted that his opinion and report were based largely on the information Mr. Brown provided about his drinking history, and if that information was inaccurate, then he could not necessarily say that Mr. Brown's BAC was below 0.08 at the time of driving. (R. 45: 69-71.) After Mr. Oehldrich's testimony, no further witnesses were called by either the defense or State. (R. 46: 3.)

During the jury instruction conference, and after hearing arguments from the State and defense, the trial court agreed to provide the jury with both the instruction on the 0.08 presumption and the blood-alcohol curve. (*Id.* at 8-9.) The instruction read to the jury was the following:

> If you are satisfied beyond a reasonable doubt that there was 0.08 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 it the weight you believe it is entitled to receive.

(*Id.* at 45-46.)

At closing arguments, the State argued that the main issue in the case was whether Mr. Brown was under in the influence at the time of driving, and that the jury should look at all of the evidence presented together and not isolate one thing from another. (*Id.* at 16-17.) Further, the State argued that it should follow the jury instruction on the 0.08 presumption and not the blood-alcohol curve because the data for the curve was not necessarily reliable. (*Id.* at 22-24.) The defense argued that the State did not meet its burden to prove each offense beyond a reasonable doubt as Mr. Oehldrich's opinion casted doubt on Mr. Brown being above a 0.08 at the time of driving. (*Id.* at 26-29.)

The jury returned verdicts of guilty on both the OWI and PAC charges. (*Id.* at 52; R. 19.) On motion of the State, a judgment on the verdict was entered on the OWI and the PAC was dismissed. (*Id.* at 53.) Mr. Brown now appeals.

ARGUMENT

I. THE JURY INSTRUCTIONS GIVEN IN MR. BROWN'S CASE WERE NOT ERRONEOUS, AND EVEN ASSUMING THEY WERE, SUCH INSTRUCTIONS DID NOT PREJUDICE MR. BROWN OR VIOLATE HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

Mr. Brown argues that it was erroneous for the circuit court to instruct the jury that they may presume Mr. Brown was under the influence of an intoxicant if they found that he was above 0.08 grams per 210 liters of breath. Mr. Brown contends that the jury should not have been instructed on the presumption as there was evidence introduced regarding a blood alcohol curve, and, therefore, the circuit court should only have given Wisconsin Jury Instruction—Criminal (WIS JI-CRIMINAL) 234: Blood-Alcohol Curve.

The State argues that it was not erroneous to give both jury instructions regarding the blood-alcohol curve *and* the prima face effect of a test result above 0.08 grams per 210 liters of breath. Both instructions give an accurate statement of the law, and, overall, communicated the law applicable to the facts presented to the jury on Mr. Brown's case.

Additionally, Mr. Brown argues that he was prejudiced when the jury was instructed about the presumption of a 0.08

alcohol concentration. The State argues that even if this Court assumed that it was erroneous to give the 0.08 presumption instruction, the instruction did not so infect the trial as to undermine the jury's verdict in this case.

Therefore, the State requests that this Court affirm Mr. Brown's conviction for OWI-1st offense with a minor passenger and deny his request for a new trial.

A. Standard of Review

"A circuit court has broad discretion in deciding whether to give a requested jury instruction." *State v. Allen*, 2014 WI 93, ¶ 16, 357 Wis. 2d 337, 851 N.W.2d 760 (internal quotations and citations omitted) (quoting *State v. Hubbard*, 2008 WI 92, ¶ 28, 313 Wis. 2d 1, 752 N.W.2d 839 (citing *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996))). An appellate court will not disturb "a circuit court's decision to give or not give a requested jury instruction absent an erroneous exercise of discretion." *Id.* But, an appellate court will review a given jury instruction independently and determine whether it was "an accurate statement of the law applicable to the facts of a given case." *Id.* (internal quotations omitted) (quoting *State v. Fonte*, 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594). As long as the "overall meaning communicated by the instructions was a

correct statement of the law, no grounds for reversal exist." *Id.* (internal quotations and citations omitted) (quoting *Hubbard*, 2008 WI 92, ¶ 27) (citing *Fischer v. Ganju*, 168 Wis. 2d 834, 850, 485 N.W.2d 10 (1992))).

B. Relevant Law

It is in the trial court's broad discretion in deciding the jury instructions to give, and it is also the trial court's decision what language and emphasis is used in those instructions. *State v. Vick*, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). Further, "(u)ltimate resolution of the issue of the appropriateness of giving particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground." *Id.* at 690-91 (internal quotations omitted) (quoting *Johnson v. State*, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978)).

When looking at the instructions given, a reviewing court must look at the instructions overall based on the facts of a case, as "a single instruction to a jury may not be judged in artificial isolation." *Id.* at 691 (internal quotations omitted) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 38 L.E.2d 368 (1973)). The Wisconsin Supreme Court explained in *State v. Vick*, 104 Wis. 2d 678, 691, 312 N.W.2d 489 (1981) that by looking at the jury instructions overall, it acknowledges:

> [T]hat a judgment 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. (internal quotations omitted) (quoting *Cupp*, 414 U.S. at 147).

Wisconsin Statutes Section 903.03(2) (2013-2014) governs presumptions in criminal trials and states:

> The judge is not authorized to direct the jury 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.

When a defendant challenges a given presumption, a Court applies the following test:

> When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him . . . . 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.

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.E.2d 777 (1979) (internal citations omitted); *see also Vick*, 104 Wis. 2d at 695.

When assessing the "rational connection," the United States Supreme Court stated in *Tot v. U.S.*, 319 U.S. 463, 467-68, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943) that:

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

See also Allen, 442 U.S. at 165; *see also Vick*, 104 Wis. 2d at 695.

Furthermore, when a Court is determining whether a given jury instruction is so prejudicial it is unconstitutional, the defendant must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 691-92. (internal quotations and citations omitted) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97

S.Ct. 1730, 52 L.E.2d 203 (1977)) (quoting *Cupp*, 414 U.S. at 146))). A defendant's burden on appeal is even greater than the burden required to establish plain error. *Id.* at 691. But, even if the challenged jury instruction is troublesome, a Court will not then presume that a defendant's conviction is invalid unless it is shown that that there was some violation of a defendant's Fourteenth Amendment Due Process Right. *Cupp*, 414 U.S. at 146; *see also Vick*, 104 Wis. 2d at 692.

For example, in *Little Chute Village Municipal Court v. Falkosky*, 2015 WI App 82, ¶ 17, 365 Wis. 2d 350, 871 N.W.2d 693 (Ct. App. 2015) (unpublished opinion) (App-1-4), which this Court can consider for persuasive value, the Court held that "the circuit court's decision to include the permissive presumption language from WIS JI-Criminal 2668, along with WIS JI-Criminal 234 [Blood-Alcohol Curve], in its instructions to the jury was not improper and not an erroneous exercise of its discretion."

In *Falkosky*, the defendant was pulled over around 11:19 p.m. for going 42 miles per hour in a 25 mile per hour zone. *Id.* ¶ 3. The officer smelled a strong odor of intoxicants, noted that the defendant's eyes were watery, had moderately slurred speech,

was staggering a little bit, admitted to having one bourbon and Coke 20 minutes prior, and demonstrated signs of intoxication on the standardized field sobriety tests. *Id.* ¶¶ 3, 4. After the field sobriety tests, the defendant admitted to having five drinks starting at 5:00 p.m. and ending around 11:00 p.m. *Id.* ¶ 4. The defendant was placed under arrest for OWI, and submitted to a blood draw at 12:22 a.m., the result of which was 0.158 grams per 100 milliliters of blood. *Id.* ¶¶ 4, 7. The defendant also agreed to answer questions on the drug influence report, and at that time, stated he now had three drinks between 6:00 p.m. and 11:00 p.m. *Id.* ¶ 4. The defendant was charged with OWI and PAC first offense. *Id.* ¶ 2.

At trial, the defendant and his girlfriend both testified similarly that the defendant had two drinks with dinner around 5:15-5:30 p.m., went to the first bar and had two pint-sized bourbon and diet cokes starting at 8:00 p.m., and then went to a second bar where he consumed another bourbon and diet coke just before 11:00 p.m. *Id.* ¶ 5. The girlfriend stated that she did not believe the defendant was impaired at any point of the night when she was with him. *Id.* ¶ 6.

The State presented evidence at trial from the chemist who performed the analysis on the defendant's blood. *Id.* ¶ 7. The analyst testified about how alcohol absorbs in an individual's body, and how many drinks a person of the defendant's height and weight would have had to have unabsorbed in his system at the time of driving for him to reach the alcohol level he was at. *Id.* ¶ 7. The analyst stated that the defendant would have had around six drinks unabsorbed in his blood at the time of driving to be under a 0.08 and still have a blood test result of 0.158 g/100 mL of blood. *Id.*

When deciding on jury instructions, the defendant "asked the circuit court to replace the first seven lines under 'How to Use the Test Result Evidence' in WIS JI-CRIMINAL 2668 with WIS JI-CRIMINAL 234, Blood-Alcohol Curve." *Id.* ¶ 8. The circuit court agreed that there was evidence presented to warrant the alcohol-curve instruction, and agreed to read all of the Blood-Alcohol Curve instruction. *Id.* But, the court also agreed to read the presumption language in 2668 over the defendant's objection. *Id.* The defendant was found guilty of the PAC

charge, but not the OWI charge, and a judgment of conviction was entered as such. *Id.* ¶ 9.

The Appeals Court found that it was not erroneous to give instructions on the permissive presumption in WIS JI-CRIMINAL 2668 *and* the instruction regarding the Blood-Alcohol Curve. *Id.* ¶ 11. The Court explained that the presumption in WIS JI-CRIMINAL 2668 is a presumption but does not require the jury to find the fact and does not otherwise shift the burden of proof onto the defendant. *Id.* ¶ 12. Additionally, as the Courts have found in *Tot*, *Allen*, and *Vick*, the presumption in the case was not improper because based on the entirety of the evidence, including the odor of alcohol, the watery eyes, the moderately slurred speech, the staggering, the signs of intoxication on the field sobriety tests, the admission of drinking, the test result of 0.158 g/100 mL, and the analyst's testimony about the absorption of alcohol, "a reasonable jury could have concluded that [the defendant] was driving with a prohibited alcohol concentration." *Id.* ¶ 15. The Appellate Court concluded that the jury instructions given were a correct statement of the law, and

did not go any further about whether the instructions prejudiced the defendant. *Id.* ¶ 18.

Additionally, in *Vick*, the defendant similarly argued the blood-alcohol curve, and that there was not sufficient evidence that he had a blood alcohol content of 0.10[1] percent or more by weight of alcohol at the time of driving. *Vick*, 104 Wis. 2d at 682-83. Therefore, the defendant argued that the instruction regarding the presumption of someone being under the influence if they were above 0.10 should not have been given. *Id.* After looking at the case as a whole, the Wisconsin Supreme Court held that it was not erroneous to give the 0.10 presumption instruction, and, further, the jury "could have rationally inferred," that this defendant was under the influence at the time of driving when he had a test result of 0.13 percent. *Id.* at 699.

The defendant in *Vick* was charged with OWI after his vehicle was observed weaving, failed to immediately pull over when the officer activated his emergency lights, smelled of a strong odor of intoxicants, had slurred speech,

[1] The *Vick* case was decided in 1981 when the presumption of an individual being under the influence of an intoxicant was at 0.10 percent instead of 0.08 percent.

was argumentative and uncooperative, did not do well on the standardized field sobriety heel-to-toe test, and had a breathalyzer test result of 0.13 percent of alcohol. *Id.* at 681-83. The defendant was observed driving around 5:00 p.m., and the test result came back at 5:46 p.m. *Id.* At trial, the officer stated that while en route to the police department, the defendant asserted that after picking up a friend from the hospital, they stopped for a sandwich and a few drinks before the defendant took his friend home. *Id.* at 682. The defendant then testified that after dropping his friend off, he had two brandy and sours and a glass of water around 4:30 p.m. before leaving the bar in his vehicle around 4:55 p.m., which was verified by the bartender. *Id.* The defendant stated at trial that he did take a friend home from the hospital but did not drink with him and denied making such statement to the officer. *Id.* The defendant also provided testimony that he had an accident that left him paralyzed on his left side, and the bartender testified that she knew the defendant for a long time and he always slurred his words. *Id.*

The State presented expert testimony at trial about the absorption rates of alcohol, and the State's expert opined that he

believed the defendant would have had alcohol in his system at 5:10 p.m. based on the 0.13 test result at 5:46 p.m. *Id.*at 683-84. The expert could not state what exactly the defendant's alcohol content would be at the time driving, though. *Id.* at 684. On cross examination, the State's expert indicated how much alcohol was in the defendant's system at the time of driving would depend on when the alcohol was drank. *Id.* The defendant suggested that all of the alcohol he drank at the bar would not have been absorbed at the time of driving, and he would not have been above a 0.10. *Id.* at 684-85.

The trial court gave the following instruction to the jury:

> Evidence has been received that, within two hours after defendant's alleged operation of a vehicle, a sample of his breath was taken, and evidence of an analysis of such breath sample has also been received. The law provides that the presence of ten hundredths of one percent or more, by weight, of alcohol in a person's blood, is a sufficient basis for finding that person was under the influence of an intoxicant. Therefore, if you are satisfied beyond a reasonable doubt that, within two hours after the alleged operation of a vehicle, the defendant did have ten hundredths of one percent or more, by weight, of alcohol in his blood, then you may, on this evidence alone, find that he was under the influence of an intoxicant. But, you should so find only if you are satisfied beyond a reasonable doubt from all of the evidence in this case, that the defendant, at the time of the alleged operation of a vehicle, was under the influence of an intoxicant as defined by these Instructions.

Id. at 685-86. The defendant contended that such instruction created an unconstitutional presumption. *Id.* at 686.

The Court found that based on the evidence presented, the instructions given were not unconstitutional. *Id.* at 696. The Court explained that the jury heard the expert testify about how he could not say from the test result alone what the defendant would have been at the time of driving compared to the time the test was done. *Id.* But, based on all the evidence presented to the jury, a jury could rationally make the permissive inference "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." *Id.*

The Court did acknowledge that the instruction was somewhat "ambiguous because it did not state when the jury could find that the defendant was under the influence of an intoxicant, at the time of testing or at the time of operation of the vehicle." *Id.* at 699. But, that error did not make the instruction unconstitutional. *Id.*

C. There was a rational connection between the facts presented in Mr. Brown's case and the 0.08 presumption, and therefore the instruction was properly given; but even if the instruction was erroneously given, Mr. Brown was not prejudiced by such error.

This Court should uphold Mr. Brown's conviction for OWI-1st offense with a minor passenger as the decision to give the challenged jury instruction for the 0.08 presumption along with the blood-alcohol curve was not clearly erroneous.

Furthermore, even if this Court assumed that giving the challenged jury instruction was clearly erroneous, Mr. Brown has not met his burden to demonstrate that such instruction prejudiced him by completely infecting the trial.

First, this Court needs to determine whether, based on *all* of the evidence and arguments presented at Mr. Brown's trial, there was a rational connection between the facts proved and the fact presumed, in order to allow the 0.08 presumption instruction. Like the Court found in *Falkosky*, the trial court giving both the instruction on the presumption and the blood alcohol curve was not clearly erroneous based on the totality of circumstances.

Mr. Brown argues that there was no rational connection between the evidence presented and the presumption because all of the evidence points to Mr. Brown being below a 0.08 at the

time of driving. The State contends that the jury could believe Mr. Brown was under the legal limit at the time of driving, but it was not the only rational decision that they could come to. The facts presented in this case required the jury to weigh all the testimony about the alcohol curve, the 0.11 intoximeter test result, and the other signs of intoxication. Just because the jury concluded that Mr. Brown was under the influence of an intoxicant and had a prohibited alcohol concentration at the time of driving, does not alone demonstrate it was wrong to give both instructions. Giving both the instructions regarding the 0.08 presumption and alcohol curve were a correct statement of the law as it addressed both of the main issues presented by the evidence.

Like in *Falkosky* and *Vick*, in Mr. Brown's case there was not just the test result of 0.11 g/210 L of breath. Vick made the following observations during her OWI investigation: (1) Mr. Brown had pulled over to the side of the road in order to use the bathroom (R. 42: 80); (2) Mr. Brown had an odor of intoxicants on his breath (*id.*); (3) he admitted to drinking two beers and a shot (*id.* at 80); (4) on the HGN, he had lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes, and nystagmus prior to 45 degrees in both

eyes (*id.* at 85); (5) on the walk and turn test, Mr. Brown missed several heel-to-toe steps, did not always count his steps out loud as instructed, raised his arms to maintain his balance, conducted an improper turn, and had to be reinstructed to turn around and do the second series of steps (*id.* at 88-89); (6) on the one leg stand test, Mr. Brown put his foot down after 12 seconds and had to be instructed to continue the test, used his arms for balance, and started hopping on one foot (*id.* at 91); (7) Mr. Brown made several statements throughout his contact with law enforcement about how he was a retired Colonel in the Air Force and asked if there was anyway something could be "worked out" (*id.* at 91-92); and (8) when answering questions off the Alcohol and Drug Influence Report, Mr. Brown then changed his drinking history to a couple shots of whiskey (*id.* at 95).

In addition to Vick's testimony, Deputy Craft testified that she heard Mr. Brown state throughout her interaction with him that he was a Retired Colonel in the Air Force and wanted to "work something out," which the State argued, and still does, shows consciousness of guilt. (R. 45: 6-7.)

Melissa Kimball, the State's expert witness, also testified that she believed the test result of 0.11 grams per 210 liters of breath was an accurate test result for 1:10 a.m. when Mr. Brown

blew into the intoximeter machine. (R. 45: 28.) During cross examination, Ms. Kimball indicated depending on various factors, including a person's drinking history, that someone's blood alcohol concentration could be different two hours prior to a test result, but she could state whether that was the true in Mr. Brown's case. (*Id.* at 38.)

In addition to the evidence presented by the State, Mr. Brown presented the testimony of James Oehldrich who opined that Mr. Brown's blood alcohol at the time of driving was 0.078 grams per 210 liters of breath—just below the legal limit. (*Id.* at 55-56; R. 21: Defense Exhibit 7.) Mr. Oehldrich admitted that his entire report and opinion was largely based on the information given to him by Mr. Brown, and if the information was not accurate, then he could not necessarily state Mr. Brown was below a 0.08 at the time of driving. (R. 45: 69-71.) Furthermore, Mr. Oehldrich's report indicated that at 11:10 p.m. (the time of driving), Mr. Brown would have been at a 0.78, but only two minutes later at 11:12 p.m., he would have been at a 0.08. (*Id.* at 8-16; R. 21: Defense Exhibit 7.) The State argued that it was so convenient for the data provided by Mr. Brown to put him below a 0.08 at the time of driving, and the jury should question how accurate that information was.

It is true that Mr. Brown did not have some common signs of intoxication such as: slurred speech (R. 42: 96), difficulty walking up from the ditch he was in to use the bathroom (*id.* at 100), difficulty getting out his driver's license from his wallet (*id.* at 101), difficulty answering the deputies questions (*id.* at 103), or bloodshot and glassy eyes (*id.* at 106). Not having these certain indicators of impairment does not detract from the indicators of impairment Mr. Brown did have, though.

The case ultimately came down to who was the jury going to believe—Deputies Vick and Craft, and Melissa Kimball, or James Oehldrich. It was for the jury alone to decide which version of events they found to be true, and what evidence they found to be credible. It was not irrational for the jury to believe, based on all of the evidence presented, that Mr. Brown was at a blood alcohol concentration of 0.08 or more and was under the influence of an intoxicant. All of the evidence supported that he could have been lower than a 0.11 as the test result indicated, but still above a 0.08. It was reasonable for the jury to believe that the data provided by Mr. Brown to Mr. Oehldrich was unreliable considering his demeanor and insistence of "working something out" during the OWI investigation. The other information from the initial observations by deputies, to the field sobriety tests, to

Mr. Brown's insistence on "working something out," to the test result itself all indicated being under the influence of an intoxicant.

The State agrees that there was evidence presented of a blood alcohol curve in this case, but there was also sufficient evidence to support the 0.08 presumption. As the court found in *Falkosky*, and can be used as persuasive value by this Court, giving both the alcohol-curve instruction and the presumption instruction was not erroneous. The jury was not required to find that Mr. Brown was absolutely under the influence of an intoxicant if he was above a 0.08 blood alcohol content. Like in *Falkosky*, there were other signs of impairment in Mr. Brown's case other than being above a 0.08 test level.

Therefore, State requests this Court to affirm the judgment of conviction in this case, and find that the trial court was not erroneous when giving both the presumption instruction and blood alcohol curve instruction.

Even if this Court assumed that giving both the alcohol curve instruction and the presumption instruction were erroneous, Mr. Brown has not met his burden to demonstrate that "the ailing instruction by itself so infected the entire trial that the resulting conviction violate due process." *Vick*, 104 Wis. 2d at 691-92.

Mr. Brown argues that "the State's evidence of intoxication, besides the test result, was weak at best." (Brief and Appendix of Defendant-Appellant, 23). Further, Mr. Brown contends that the evidence was gathered by an inexperienced officer "[w]ith no other signs of intoxication, such as bad driving or lack of balance while walking around or inability to answer questions appropriately. (*Id.* at 23-24.) Mr. Brown ignores the majority of evidence presented by the State and already argued in this brief. (*See supra* Plaintiff-Respondent Brief, 24-29.) Furthermore, whether the jury found Deputy Vick's testimony credible was for them to decide as credibility is an issue solely for them.

Mr. Brown has not reached his high burden to demonstrate that giving the 0.08 presumption instruction in addition to the blood alcohol curve instruction was so prejudicial it violated his Fourteenth Amendment Due Process rights. Therefore, the State requests that this Court affirm Mr. Brown's conviction and deny his request for a new trial.

CONCLUSION

The jury instruction regarding the presumption of a 0.08 blood alcohol concentration was not erroneously given, and even if it was, the instruction did not prejudice Mr. Brown. Thus, the State requests that this Court deny Mr. Brown's request to grant a new trial and affirm his conviction for OWI-1st offense with a minor passenger.

Dated this 22nd day of June, 2016.

Respectfully,

_/s/Melissa Zilavy_____
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 7,532 words long.

Dated this 22nd day of June, 2016.

_/s/Melissa Zilavy_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of June, 2016.

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