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.

REPLY BRIEF 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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ARGUMENT

I. The substantive jury instruction violated the defendant's due process rights and the Wisconsin statutory limitations on the use of presumptions set forth in Sec. 903.03(2).

The defendant's brief-in-chief raised two different issues: (1) whether the substantive jury instruction violated his constitutional right to due process (Defendant's Brief at 1, 14-21); and (2) whether the jury instruction violated the statutory limitation on the use of presumptions in criminal cases as set forth in § 903.03(2). (Defendant's Brief at 1, 13-14, 22-24). The State's Brief does not address the second issue presented on appeal, so it must be deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp*., 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) (issues raised on appeal that are not addressed are deemed conceded).

As to the other issue, based on constitutional due process, the State primarily relies on *State v. Vick*, 104 Wis. 2d 678, 312 N.W.2d 489 (1981), and the unpublished, one-judge opinion in *Little Chute Vill. Mun. Court v. Falkosky*, 2015 WI App 82, ¶ 1, 365 Wis. 2d 350, 871 N.W.2d 693, cited not as authority but for its persuasive value. State's Brief at 16. Both cases are easily distinguishable, and thus do not control the outcome of Brown's case.

First, in neither of those cases was there any unrebutted testimony presented by a defense expert as to the alcohol curve defense, as at Brown's

trial. Instead, the arguments presented on appeal were much weaker than Brown's case because the defendant relied on testimony of the state's chemist as to the possible effect of delayed absorption on the reliability of the blood alcohol test result as a measure of the degree of intoxication at the time of driving. In contrast, Brown presented testimony from a defense expert that he was below the limit at the time of driving, and the state's chemist was unable to rebut that opinion.

Moreover, in *Vick* and *Little Chute* there was much more non-chemical evidence that at the time of driving, each defendant was intoxicated. As argued in the Brown's brief-in-chief at 22-24, absent the presumption on the breath test, this was not a strong case for the state. There was no bad driving observed. When approached by the officers, the vehicle was legally and properly parked on the shoulder of the road. R. 42: 97-98. The defendant walked up a slope from a ditch on the side of the road with no balance difficulties or staggering gait. *Id.* at 99-100. He had no difficulty removing his license from his wallet. *Id.* at 101-02. He was cooperative and answered questions appropriately, and he did not have any slurred speech or blood shot eyes. *Id.* at 103, 106. The arresting office did note an odor of intoxicants, but she admitted she could not discern anything about 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 claimed that he failed the HGN test, but she was very inexperienced and admitted that she could not recall what her training manual told her she was to look for on the nystagmus eye test she performed. *Id.* at 111. She also failed to extinguish the distracting flashing strobe lights before having Brown perform roadside sobriety tests. *Id* at 113. She even 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.

The State makes frequent note of Brown's comment to the officers that he was a retired colonel in the Air Force and couldn't they just "work something out." Contrary to the State's argument, this adds nothing to the equation. Such comments do not equate consciousness of guilt. It would be entirely normal for anyone going through their first arrest and consequent transport in custody to the police station to prefer to work out some arrangement in lieu of formal prosecution. This was particularly true for Brown, a Nevada resident who was only in Wisconsin for the holidays with his wife's family, and who had never been arrested before and was unacquainted with Wisconsin arrest procedures.

The State also argues that the defense expert's testimony was largely based on the information he received from the defendant, and that therefore it was for the jury to reject his opinion that the defendant was below the limit at the time of driving. But that ignores the expert's further explanation that if the defendant minimized his consumption of alcohol, then his end point calculation would not have coincided with the result of the BAC test taken two hours after driving. R. 45: 74.

In contrast, in *Vick*, there was strong evidence of impairment even before the breath test was performed. The defendant was weaving over the center line and unresponsive to the officer's efforts to pull him over. 104 Wis. 2d at 681. The officer pursued him for 2 1/2 miles with his red lights on before the defendant finally pulled over. *Id.* He was argumentative and uncooperative, had a strong odor of alcohol about his person, as well as slurred speech, and was unable to perform the standard heel to toe test. *Id.* A breath test result of .13 was obtained a mere 36 minutes after the defendant's driving. *Id.* at 682-83. While the state's chemist admitted that absorption rates varied and he was unable to state what the defendant's blood alcohol level would have been at the time of driving without additional facts, he also negated the possibility that the defendant could have been below the limit based on his calculation that a man of the defendant's size would have had to consume 10

ounces of 100 proof liquor to reach the .13 test result. *Id.* at 684. This contradicted the defendant's statements at the time of arrest as well as his trial testimony that he only consumed 2 drinks of 7/8 ounces of brandy. *Id.*

Examining the entire record, the court of appeals in *Vick* concluded:

> [T]he jurors could have rationally inferred that the defendant, who had a blood alcohol level of 0.13 plus percent at the time of testing, was under the influence of an intoxicant at the time of operation of his vehicle. Under the test for a permissive inference established in *Ulster County Court v. Allen, supra*, we uphold the trial court's discretion in concluding that the inferred fact of driving while intoxicated flows more likely than not from the proven fact of the breathalyzer results based upon all the evidence presented in the case.

104 Wis. 2d at 699.

The constitutional due process argument in Brown's appeal is closer to the *Little Chute* case, but still distinguishable. In *Little Chute*, the defendant's blood alcohol level of .158 was nearly twice the legal limit when tested 63 minutes after the time of driving. 2015 WI App 82, ¶ 7. The state's chemist testified that for a person of Falkosky's height and weight to have been below the .08 limit at the time of driving, six drinks, or close to eight ounces of 80 proof bourbon would have to be unabsorbed in the person's system. *Id.* The chemist admitted that it could take 30-90 minutes for alcohol to be fully absorbed into a person's system, but he testified that within twenty minutes eighty percent of a drink is absorbed. *Id.* As in Brown's case, the judge gave

both the jury instruction containing the presumption and the instruction on the blood alcohol curve. On appeal, the defendant argued it was error to give the presumption jury instruction because once he laid the foundation for an alcohol curve defense, there was no "rational connection" between the basic fact of his 0.158 BAC test result and the jury instruction presumption that he had a prohibited alcohol content at the time of driving.

The appellate judge reviewed the law on permissive presumptions:

> A permissive presumption allows, but does not require, a jury to infer an elemental fact from proof of a basic fact and does not place a burden on the defendant. *State v. Vick*, 104 Wis.2d 678, 694, 312 N.W.2d 489 (1981). Because a permissive presumption "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," its use is improper "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* at 695, 312 N.W.2d 489 (quoting *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)). The test for determining whether a "rational connection" exists between the basic fact and the elemental fact to be inferred is "whether it can be said with a substantial assurance that the latter is 'more likely than not to flow from the former.' " *Id.* (quoting *Allen*, 442 U.S. at 165).

2015 WI App 82, ¶ 12. The appellate judge then rejected Falkosky's argument by considering the entirety of the evidence, which included not only that his blood alcohol concentration was nearly twice the legal limit just one hour after driving, but also that he was observed speeding, had a strong odor of alcohol, watery eyes, slurred speech, and he was staggering and stumbling as he got out

of his vehicle. *Id.* at ¶ 3, ¶ 15. The court concluded that "[w]hile not recommended, under the facts of this case, the circuit court's decision to include the permissive presumption language from Wis JI–Criminal 2668, along with Wis JI—Criminal 234, in its instructions to the jury was not improper and not an erroneous exercise of its discretion." 2015 WI App 82, ¶ 17.

In Brown's case, on the other hand, there was very little evidence of his intoxication at the time of driving, such that there was no rational connection between the basic fact (his BAC of 0.11 two hours after driving) and the presumed fact (that he was intoxicated and had a prohibited alcohol concentration at the time of driving). It cannot be said with a substantial assurance that the latter is "more likely than not to flow from the former". *Allen* 442 U.S. at 165. The defense expert's opinion that Brown was under the limit at the time of driving was unrebutted by the state, such that the prosecutor conceded there was no need for a jury instruction on conflicting expert opinions. R. 46:6. The State's expert did not express the opinion that the .11 BAC test result established that Brown was over the limit two hours earlier when he was driving. Thus, unlike *Falkosky*, the expert testimony from both parties failed to support the permissive presumption jury instruction and, rather supports a blood alcohol content below the legal limit at the time of driving.

Under the circumstances of this case, it was error to instruct the jury that they may 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.

The State alternatively argues that even if giving both the alcohol curve instruction and the presumption jury instruction was erroneous, the defendant has not met his burden to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Vick*, 104 Wis. 2d at 691. First, the *Vick* court quotes a U.S. supreme court case for that proposition, *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977), but that was a collateral federal habeas challenge of a state court conviction, not a direct appeal. Strong interests in finality of judgments and special comity concerns are involved in federal collateral attacks of state convictions, so the burden on a defendant is much higher than in a direct appeal. *Engle v. Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783 (1982). Second, the erroneous presumption instruction did cause great prejudice to Brown, because it concerned the key element in both the operating under the influence and the prohibited alcohol counts. Moreover, it undercut the primary alcohol curve defense by permitting the jury to infer from the test result alone that he was

over the limit and operating under the influence, despite unrebutted expert opinion evidence to the contrary.

Finally, as to the defendant's statutory grounds raised in Issue Two of his brief-in-chief, it should be noted that § 903.03(2) limits a judge's authority to submit even a permissive presumption to the jury. When the presumption goes to an element of the offense, the judge may submit it to a jury "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." That is a high burden and is in addition to the "rational connection" due process standard. Given the relatively weak evidence of impairment at the time of driving in this case, and the unrebutted testimony of the alcohol curve defense expert that Brown was below the legal limit at the time of driving, a reasonable juror could not have concluded beyond a reasonable doubt that Brown was under the influence or operating with a prohibited alcohol content at the time of driving.

CONCLUSION

For all of the foregoing reasons, and those in his brief-in-chief, Brown submits the jury instruction given in his case violated his right to due process and violated § 903.03(2), Wis. Stats. He requests the conviction be vacated and he be granted a new trial.

Dated at Brookfield, Wisconsin, this 11th day of July, 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 2293 words.

Dated this 11th day of July, 2016.

s/ Jerome F. Buting
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.

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

Dated this 11th day of July, 2016.

s/Jerome F. Buting
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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Dated this 11th day of July, 2016.

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