COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP770 **Cir. Ct. No. 2013CV1086**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LITTLE CHUTE VILLAGE MUNICIPAL COURT,

PLAINTIFF-RESPONDENT,

V.

DENNIS M. FALKOSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: VINCENT R. BISKUPIC, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Dennis Falkosky appeals from a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), first offense, entered by the circuit court after a jury trial. Falkosky argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

court erroneously instructed the jury and that he was prejudiced by that error. We disagree and affirm the judgment.

¶2 Falkosky was found guilty of operating a motor vehicle while intoxicated (OWI), first offense; PAC, first offense; and speeding following a trial in the Village of Little Chute municipal court. Falkosky requested a trial de novo in the circuit court before a six-person jury. The jury trial was held on March 11, 2015.

¶3 Officer Michael Grumann testified that on May 25, 2013, at 11:19 p.m., he observed Falkosky's vehicle traveling forty-two miles per hour in a twenty-five mile-per-hour speed zone. Grumann stopped the vehicle for speeding and identified Falkosky as the driver. Grumann immediately detected a strong odor of alcohol and noticed that Falkosky's eyes were watery and his speech was "moderately slurred." Grumann asked Falkosky whether he had been drinking. Falkosky responded that he consumed one bourbon and Coke twenty minutes before the traffic stop. Grumann observed that Falkosky was "staggering" and "stumbling a little bit" as he got out of his vehicle and that Falkosky's "balance was off."

¶4 Grumann asked Falkosky to perfom field sobriety tests. Falkosky demonstrated signs of intoxication during those tests. After the field sobriety tests, Grumann again asked Falkosky how many drinks he had consumed that evening. This time Falkosky stated he had five drinks. Falkosky also indicated he started drinking at 5:00 p.m. and consumed his last drink fifteen minutes before the traffic stop. Grumann placed Falkosky under arrest and transported him to a hospital for a blood draw. After the blood draw, Grumann reviewed the alcohol and drug

influence report with Falkosky. On that report, Falkosky indicated he consumed three drinks between 6:00 p.m. and 11:15 p.m.

¶5 Falkosky testified that at approximately 5:15 or 5:30 p.m. he went to a restaurant for dinner with a friend. There, he consumed a large dinner and two drinks. He finished dinner around 7:15 p.m. and drove back home to pick up his girlfriend, Terri Gessner, before heading out. Falkosky and Gessner arrived at the first bar around 8:00 p.m., where Falkosky consumed two pint-sized bourbon and Diet Cokes. They left that bar at 10:45 p.m. and arrived at a second bar just before 11:00 p.m. At the second bar, Falkosky consumed another bourbon and Coke, which he finished "just before" officer Grumman stopped him. Falkosky denied having any problems with his driving and coordination.

¶6 Gessner also testified. Gessner's testimony was substantially similar to Falkowsky's testimony. Additionally, Gessner did not believe Falkosky was impaired at any point that night.

¶7 The parties stipulated that Falkosky's blood was drawn on May 26, 2013, at 12:22 a.m. Senior chemist Michael Knutsen performed the analysis of Falkosky's blood sample, which tested at a blood alcohol concentration of 0.158 grams per 100 milliliters of blood. At trial, Knutsen testified that it takes between thirty to ninety minutes for alcohol to fully absorb into a person's system, but that absorption rates can differ depending on certain factors. Additionally, Knutsen explained that the absorption rate is not linear. Within twenty minutes, eighty percent of a drink is absorbed. Knutsen further testified that for a person of Falkosky's weight and height to have a blood alcohol concentration of under 0.08 at 11:19 p.m., where the blood alcohol concentration was 0.158 at 12:22 p.m.,

around six drinks, or close to eight ounces of 80-proof bourbon, would have to be unabsorbed in the person's system at 11:19 p.m.

¶8 During the jury instruction conference, Falkosky 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.[2] The Village agreed instruction 234 should be read but disagreed with using it in place of language in instruction 2668.[3] The court concluded that Falkosky "laid a

[2] WISCONSIN JI—CRIMINAL 234 states:

> Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged (driving) (operating). 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) (blood) (urine) 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.

WIS JI—CRIMINAL 234.

[3] Specifically, Falkosky wanted WIS JI—CRIMINAL 234 to replace the language in WIS JI—CRIMINAL 2668 that states:

> The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied that there was ... .08 grams or more of alcohol in 100 milliliters of the defendant's blood ... at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so.

WIS JI—CRIMINAL 2668. Falkosky refers to this language as both the "prima facie effect language" and the "presumptive language."

foundation for a curve argument" and agreed to read instruction 234 in its entirety. However, over Falkosky's objection, the court did not replace the permissive presumption language in instruction 2668 with instruction 234 but instead read both instructions in their entirety.

¶9 The jury returned a verdict finding Falkosky guilty of the PAC and speeding violations, but not guilty of OWI. On the verdict form, the jury further found Falkosky did not drive a motor vehicle with 0.15 grams or more of alcohol per 100 milliliters of his blood. The circuit court entered a judgment of conviction accordingly. Falkosky now appeals the PAC conviction, arguing the court erroneously exercised its discretion in instructing the jury.

DISCUSSION

¶10 "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). This broad discretion also extends to the court's choice of language and emphasis in framing the instructions. ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979). So long as the court "fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried," the court properly exercises its discretion. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. We will affirm a court's decision to give or not give a requested instruction absent an erroneous exercise of discretion. ***State v. Anderson***, 2014 WI 93, ¶16, 357 Wis. 2d 337, 851 N.W.2d 760. However, we independently review whether an instruction was an accurate statement of the law. ***Id.*** Additionally, "[a] challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial." ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992).

¶11 Falkosky does not dispute WIS JI—CRIMINAL 2668 creates a permissive presumption.[4] Rather, Falkosky argues the permissive presumption was improperly applied in his case because, when he laid the foundation for an alcohol curve argument, the rational connection between the basic fact (that Falkosky had a prohibited alcohol concentration at the time of testing) and the presumed fact (that Falkosky was driving with a prohibited alcohol concentration) was lost. We disagree.

¶12 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 (quoting ***County Court of Ulster Cty. v. Allen***, 442 U.S. 140, 157 (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).

¶13 Falkosky's argument relies in part on the introductory comments to the OWI jury instructions, which in relevant part state:

[4] WISCONSIN STAT. § 885.235(1g)(c) provides the authority for this presumption. Section 885.235(1g)(c) states "[t]he fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more."

> The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which drinks were consumed etc. ...
>
> ***Vick*** presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of the test results *may not* be appropriate since there *may* be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. ...
>
> The Committee concluded that where there is a problem with the "blood alcohol curve," *it is preferable* to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect."

WIS JI—CRIMINAL 2600 (emphasis added).[5] The comments then recommend using WIS JI—CRIMINAL 234 in such circumstances. While we generally view the work of the Criminal Jury Instructions Committee as persuasive, courts are not bound by it. ***State v. O'Neil***, 141 Wis. 2d 535, 541 n.1, 416 N.W.2d 77 (Ct. App. 1987).

¶14 We instead consider whether the presumed fact that Falkosky was operating with a prohibited alcohol concentration more likely than not flows from the proven fact that he exceeded the maximum permissible blood alcohol concentration at the time of testing. *See* ***Vick***, 104 Wis. 2d at 696. To make this determination, we look at the entirety of the evidence presented at trial. *See* ***id.*** at 695.

[5] This comment also appears in WIS JI—CRIMINAL 234.

¶15 Grumann testified that he detected a strong odor of alcohol and observed that Falkosky had watery eyes and moderately slurred speech, and that Falkosky's balance was off. Grumann also testified that Falkosky demonstrated signs of intoxication during the field sobriety tests. In particular, Grumann testitified Falkosky displayed six out of six possible clues of intoxication on the horizontal gaze nystagmus test, six out of eight possible clues on the walk-and-turn test, and four out of four possible clues on the one-leg stand test. Although Falkosky provided varying accounts as to how much alcohol he consumed, both in speaking with Grumann and during his testimony, he admitted to consuming alcohol throughout that evening. Senior chemist Knutsen testified that for a person of Falkosky's weight and height to have a blood alcohol concentration of under 0.08 at 11:19 p.m., where the blood alcohol concentration was at 0.158 at 12:22 p.m., around six drinks, or close to eight ounces of 80 proof bourbon, would have to be unabsorbed in that person's system. Further, Knutsen explained absorption does not occur in a linear fashion and that 80 percent of the beverage would be absorbed into the person's system within the first twenty minutes. Based on this information, in light of his 0.158 blood alcohol concentration at the time of testing, a reasonable jury could have concluded Falkosky was driving with a prohibited alcohol concentration.

¶16 Falkosky further contends, in finding him not guilty of OWI, that the jury rejected the evidence that Falkosky was impaired at the time of driving and, therefore, the presumed fact that Falkosky was operating with a prohibited alcohol concentration could not more likely than not flow from his blood alcohol test result of 0.158. We disagree. The charges of OWI and PAC contain different elements. *See* WIS. STAT. § 346.63(1)(a), (b). The jury could have believed the testimony of Falkosky's girlfriend, who stated Falkosky did not appear impaired

as required for an OWI offense, *see* § 346.63(1)(a), while still finding Falkosky guilty of PAC based on the testimony of Grumann and Knutsen as well as the reported blood alcohol concentration.

¶17 Upon reviewing the entirety of the evidence, we conclude a jury could reasonably infer that, more likely than not, if Falkosky had a prohibited alcohol concentration at the time of testing, he was operating his vehicle with a prohibited alcohol concentration when officer Grumann stopped him. While 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.

¶18 Finally, because we conclude the instructions set forth a correct statement of the law as applied to the facts in this case, we do not consider whether the instructions prejudiced Falkosky. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶2, 311 Wis. 2d 158, 752 N.W.2d 687 (when one issue is dispositive, we need not reach the other issue).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.