CASE NAME: Vermont vs. Farrow (Vermont Sup. Ct., Opinion No. 2014-427)

FACTS:
At approximately 9:20 in the morning of September 17, 2012, the trooper stopped defendant after observing that she was driving a car with an expired inspection sticker. Upon approaching the car and seeing signs that she was intoxicated, the trooper ordered defendant to get out of the car. When she did, the trooper observed three empty six-to-eight-ounce wine bottles on the floorboard of the car. Defendant admitted to the trooper that she had consumed the contents of those bottles that morning. When the trooper asked defendant to perform field sobriety exercises, she said she did not want to because she was old and had problems with her balance. The trooper testified that DUI suspects during roadside stops are not required to perform field sobriety exercises. After defendant declined to do field sobriety exercises, the trooper asked her to stand with her feet together, arms at her side, eyes closed, and her head tilted back while she counted the passage of thirty seconds. The officer testified that defendant started to do the exercise for a few seconds before opening her eyes and saying either that she could not, or did not want to, continue the exercise. He also testified that during the few seconds she attempted to perform the exercise she swayed before opening her eyes and stopping. The jury then watched a brief video recording of defendant attempting to perform the exercise. The trooper testified that he arrested defendant on suspicion of DUI on the basis of the above evidence.

ISSUE:
Under the Vermont Constitution, is a defendant's refusal or failure to perform voluntary field sobriety exercises admissible if the defendant was not advised at the time of the refusal that evidence of a refusal to perform the exercises may be admissible in court?

HOLDING:
Yes. We conclude that the refusal evidence is admissible without regard to whether police advised the individual that a refusal to perform the exercises could be admitted as evidence in court.

Two prior decisions of this Court serve as the starting point for our analysis of this issue. We have twice held that an individual's refusal to perform a requested exercise may be admissible in court. In Curavoo, we rejected the defendant's argument that because he had a right to refuse to perform field dexterity tests, his refusal could not be admitted in court. 156 Vt. at 74-75, 587 A.2d at 964-65. We cited a South Dakota case holding that a refusal to submit to field dexterity tests is evidence of consciousness of guilt, and explained that all relevant evidence is admissible, except as limited by constitutional requirements, statute, rules of evidence, or other legal rules. Id. (citing State v. Hoenscheid, 374 N.W.2d 128, 132 (S.D. 1985)). Because the defendant did not identify any source of law for excluding the evidence, we concluded that it was properly admitted. Id. In a footnote, we acknowledged the defendant's argument that he was not warned that his refusal would be admissible in court, but because he did not raise the argument below, the record was silent regarding whether warnings were, in fact, provided at the time of the request. Finding no plain error, we declined to address the argument. Id. at 74 n.1, 587 A.2d at 964 n.1.

When we elaborated on the issue in Blouin, we emphasized the absence of any statutory or constitutional constraint on the admission of such refusal evidence, but did not revisit the question of whether an officer requesting participation in a field sobriety exercise must warn of the potential admissibility of a refusal. 168 Vt. at 122, 716 A.2d at 828. In that case, the trial court excluded evidence of the defendant's refusal to perform a field sobriety exercise, concluding that because the defendant had a right to refuse to comply with the officer's request, the refusal was inadmissible. This Court granted the State's request for interlocutory appeal. Citing Curavoo for the proposition that evidence of a motorist's refusal to perform a sobriety test is probative of guilt, and therefore relevant, we considered whether any rule of law would nonetheless require exclusion of the evidence. Blouin, 168 Vt. at 121, 716 A.2d at 828. We rejected the argument that introduction of a refusal to perform a field sobriety exercise violated the defendant's privilege against self-incrimination. Id. Relying on a United States Supreme Court decision, we emphasized that the field exercise in question elicits a person's physical, rather than testimonial, response and therefore does not trigger the privilege against self-incrimination. Id. at 121-22, 716 A.2d at 828-29 (citing Pennsylvania v. Muniz, 496 U.S. 582, 602 (1990) for proposition that performance of horizontal gaze nystagmus test constitutes "physical rather than testimonial evidence and thus does not violate privilege against self-incrimination" (quotations omitted)).7 We concluded that in the absence of any statutory language prohibiting introduction of the refusal evidence, the fact that a statute specifically provided for admission of evidence of an individual's refusal to submit to an evidentiary breath test did not by implication mean that a refusal to submit to a field sobriety exercise is not admissible. Id. at 122-23, 716 A.2 at 828. We noted that admission of the evidence was subject to Vermont Rule of Evidence 403, but reaffirmed the absence of any across-the-board restriction against admitting evidence of a refusal to engage in a field sobriety exercise. Id. at 123, 716 A.2d at 829

CONCLUSION:

We conclude that the trial court did not abuse its discretion in admitting the evidence to show that defendant discontinued her participation in the exercise because: (1) the evidence may have some probative value in showing consciousness of guilt, and (2) especially given its instructions to the jury, the trial court could reasonably conclude that the prejudicial effect of the evidence did not substantially outweigh its probative value.

Likewise, we conclude that the trial court acted within its discretion in balancing the probative value and prejudicial effect of the evidence. Rule 403 authorizes the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. V.R.E. 403. Although the court did not specifically state that it was conducting a balancing pursuant to Rule 403, the record reflects that that is exactly what it did. See State v. Ovitt, 2005 VT 74, ¶ 9, 178 Vt. 605, 878 A.2d 314 (mem.) ("The trial judge does not need to articulate the precise weights assigned to the probative value or prejudicial effect of evidence, or specify why one outweighs the other."). In the course of the argument on the motion to suppress, the court not only noted the potential probative value of the evidence as recognized in Curavoo, but it ascertained that the State would not be offering any opinion as to whether the exercise had been successfully completed—one of defendant's biggest concerns with respect to prejudice. Moreover, over the State's objection, the Court expressly instructed the jurors that they could

consider whether defendant refused to perform the tests but were not required to draw any inference from evidence of a refusal. This instruction further mitigated the potential prejudice identified by the defendant, and left defendant ample opportunity to advance alternative explanations for the refusal

AFFIRMED.