COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2187 **Cir. Ct. No. 2012CF72**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

KYLE LEE MONAHAN,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Judgment affirmed; order reversed and causes remanded with directions*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Kyle Monahan appeals a judgment of conviction entered upon a jury verdict finding Monahan guilty of homicide by intoxicated use of a motor vehicle. The charge stems from an auto accident where

Rebecca Cushman, Monahan's girlfriend, was thrown from the car in which Cushman and Monahan were riding. Cushman died from her resulting injuries. The sole issue at trial was whether Monahan was driving the motor vehicle at the time of the accident. The sole issue on appeal is whether the circuit court erroneously excluded evidence of GPS data that measured the speed of the car when Cushman purportedly was the driver.

¶2 The State concedes on appeal that the circuit court erred in excluding the challenged GPS data as "other acts" evidence, and the State does not provide an alternative basis for us to affirm the court's evidentiary ruling. We do not weigh in on whether the court erroneously excluded the GPS data. However, for purposes of this appeal, we accept the State's concession. Having accepted the State's concession that the court erred in excluding the GPS data, our inquiry turns to whether the court's error was harmless. For the reasons we explain below, we conclude that the court's error constituted harmless error.

¶3 The State cross-appeals the circuit court's order vacating the $250 DNA surcharge the court imposed on Monahan at sentencing, pursuant to WIS. STAT. § 973.046(1r)(a) (2015-16).[1] The issue on the cross-appeal is whether imposition of the mandatory $250 DNA surcharge violates the ex post facto clauses of the United States and Wisconsin Constitutions, and therefore, whether the statute is unconstitutional as applied to Monahan. Our supreme court in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, considered the same issue presented in this case, and concluded there that the statute does not violate

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the ex post facto clauses on the ground that the defendant failed to establish that the statute was punitive in intent or effect. Our decision in this case is guided by the court's decision in ***Scruggs***, and therefore, as in ***Scruggs***, we reject Monahan's contention that § 973.046(1r)(a) is unconstitutional as applied to him. Accordingly, we affirm in part and reverse in part and remand with directions.

BACKGROUND

¶4 The following facts are taken from the trial record. In August 2011, Cushman and Monahan took Cushman's vehicle to a party north of Shullsburg. After leaving the party, Cushman and Monahan returned to Shullsburg in Cushman's car. Conflicting evidence was presented to the jury as to who drove the car from the party to Shullsburg. For purposes of this appeal, we will assume that Cushman drove the car from the party to Shullsburg.

¶5 Cushman owned a GPS device which first responders found lying on the ground near her car after the accident. According to admitted GPS data from this device, the car made a two-minute stop in Shullsburg before continuing to the location east of Shullsburg where the accident occurred. The State's primary theory at trial was that Monahan was the driver when he and Cushman left the party until the time of the accident. Alternatively, the State took the position at trial that even if Cushman was driving when she and Monahan left the party, she and Monahan switched spots during the two-minute stop in Shullsburg. In other words, the jury had reason to find that Monahan was driving the car at the time of the accident even if it determined, as we assume for the purposes of this appeal, that Cushman was driving when she and Monahan left the party.

¶6 GPS data taken from Cushman's device established that the vehicle was traveling close to 100 miles per hour when the vehicle crashed. Monahan and

Cushman were both ejected from the car during the accident; Cushman died and Monahan suffered injuries. An EMT found Monahan lying on the ground and unconscious; Monahan remained unresponsive until EMTs moved Monahan to the roadside. Monahan regained consciousness shortly thereafter.

¶7 Significant here, during the four and one-half hour period following the accident, Monahan made many statements to first responders, medical personnel, and law enforcement related to who was driving the car at the time of the accident. As far as we can tell, there is no dispute that these statements were voluntary. Monahan did not argue in the circuit court, and does not argue on appeal, that these statements should be suppressed on constitutional grounds. We will discuss in greater detail below the statements Monahan made during this time period. Suffice it to say, the general thread running through Monahan's statements was that he was "probably" the driver or that he was the driver. Only once, in a statement to a State Trooper ten days after the accident, did Monahan deny that he was the driver.

¶8 Before trial, the State filed several motions in limine including a motion to exclude "other acts" evidence and a motion to prohibit Monahan from introducing character evidence. Monahan filed a pretrial brief, which argued that GPS data and cell phone records from Cushman's vehicle and phone should be admitted because this evidence "goes to the identity of the driver of the vehicle at the time of the accident." The GPS data that Monahan argued should be admitted measured the speed of the car from when Monahan and Cushman left the party that they had attended until the two-minute stop in Shullsburg. Monahan sought to admit this evidence to establish the identity of the driver at the time of the accident. Specifically, Monahan argued at the motion hearing that the GPS data recorded from the time he and Cushman left the party until the time they arrived in

Shullsburg was relevant and probative as to who was driving at the time of the accident. Monahan argued that the data would establish that Cushman drove at high and dangerous speeds before they arrived at Shullsburg, which, in Monahan's view, made it more likely that Cushman was driving the vehicle when the accident occurred. The State opposed the motion and argued that the challenged GPS data was inadmissible "other acts" evidence.

¶9 Following the hearing, the circuit court denied Monahan's motion on the ground that the evidence constituted inadmissible "other acts" evidence under the ***State v. Sullivan***[2] analysis and excluded it primarily on that basis.

¶10 Monahan brought a motion for reconsideration, and a hearing was held. At the hearing, the court clarified that it would allow GPS data evidence only from the point of the two-minute stop in Shullsburg until four minutes later when the accident occurred, because "[t]hat starts the continuum to the accident." The court reaffirmed its ruling that it would not admit the GPS data of the vehicle's speed from the party house to the two-minute stop in Shullsburg because it was "propensity evidence, you are having character, habit evidence, other acts evidence."

¶11 The case was tried to a jury, and Monahan was found guilty of the charged felony. Monahan appeals.

[2] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

DISCUSSION

A. *The Circuit Court's Exclusion of the GPS Data Constituted Harmless Error*

¶12 Monahan makes three arguments in his main brief, all of which challenge the grounds upon which the circuit court excluded the challenged GPS data. As we indicated, we need not decide whether the court was in error by excluding the GPS data because the State concedes on appeal that the court erroneously excluded the evidence. Thus, the issue we must address is whether the court's error was harmless, and for the reasons we explain below, we conclude that the court's error was harmless.

¶13 "A circuit court's erroneous exercise of discretion in admitting evidence is subject to the harmless error rule." ***State v. Hunt***, 2014 WI 102, ¶21, 360 Wis. 2d 576, 851 N.W.2d 434. Whether the error was harmless presents a question of law subject to de novo review. ***Id.***

¶14 An error is harmless if the beneficiary of the error, here the State, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (quoting another source). To determine whether the error contributed to the verdict, we must consider the error in the context of the entire trial record. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶15 When a circuit court has improperly excluded evidence, we affirm "unless an examination of the entire proceeding reveals that the admission of the evidence has 'affected the substantial rights' of the party seeking … reversal." ***State v. Jackson***, 2014 WI 4, ¶87, 352 Wis. 2d 249, 841 N.W.2d 791 (quoting ***State v. Armstrong***, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999)); *see also* WIS.

STAT. § 901.03(1). A court's improper exclusion of evidence will be reversed when "there is a reasonable probability that, but for … [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Armstrong***, 223 Wis. 2d at 369 (quoting another source).

¶16 An appellate court may consider the following factors in conducting a harmless error analysis when evidence has been erroneously excluded: the importance of the excluded evidence, the presence or absence of evidence that corroborates or contradicts the excluded evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. ***Hunt***, 360 Wis. 2d 576, ¶27.

¶17 Applying the harmless error analysis to the trial record as a whole, we conclude that the jury would have found Monahan guilty absent the error in excluding the GPS data. The State has shown beyond a reasonable doubt that the jury would have found that Monahan was driving when the accident occurred even if Monahan was allowed to present GPS evidence that Cushman was driving at excessive and dangerous speeds earlier in the evening.

¶18 The State built its case around (1) Monahan's self-incriminating statements to emergency responders, law enforcement officers, and medical personnel during the first hours after the accident; (2) testimony from the State's crash reconstruction experts; and (3) DNA evidence taken from the driver's side air bag. Monahan's statements were direct evidence that he was driving the car, and the crash reconstruction evidence provided strong physical evidence that supported Monahan's voluntary statements that he was the driver. The DNA evidence conclusively established that Monahan had contact with the driver's side

air bag and was inconclusive as to the second set of DNA evidence found on the air bag. We turn first to testimony from the State's witnesses regarding statements Monahan made during the first four and one half hours following the accident.

1. Monahan's admissions that he was the driver

¶19 The accident occurred around 8:00 p.m. A Shullsburg firefighter found Monahan lying in a corn field approximately thirty-eight feet away from the car. Lee Smith, an EMT who responded to the scene, testified that Monahan was initially unresponsive and did not regain consciousness until he was moved to the roadside. Soon after Monahan regained consciousness, he was asked several times who was driving the car, to which Monahan answered, "I was driving, I guess," and voluntarily stated: "I fell asleep" and that "I'll never drink again."

¶20 Paul Klang, a Lafayette County Sheriff's Department deputy, testified that he responded to the accident scene, and as he approached Monahan, Deputy Klang asked Monahan his name and Monahan correctly answered "Kyle Monahan." Deputy Klang asked if Monahan was the driver and Monahan stated that he did not remember. Monahan asked whether there was a woman in the car and Deputy Klang said "yes." Monahan then said, "I probably was driving, then." A few minutes later, Deputy Klang overheard Monahan state to one of the emergency personnel, "[t]hat is the last time I will drink and drive."

¶21 Michael Gorham, Lafayette County Sheriff's Department deputy, testified that he spoke to Monahan while Monahan was still on the backboard placed on the roadside and asked Monahan who the driver was, and Monahan responded, "I might have been, I guess." Gorham then recorded a conversation he had with Monahan while Monahan was still lying on the roadside. Deputy Gorham told Monahan that one of the firefighters told Deputy Gorham that the

firefighter saw Monahan driving in Shullsburg shortly before the accident. Deputy Gorham said to Monahan, "so you were the driver," and Monahan responded, "Yeah, I guess." Deputy Gorham again asked, "You were?" and Monahan answered, "Yeah."

¶22 Deputy Gorham also testified that he asked Monahan how the accident occurred, and Monahan stated that "My tires went off the side of the road and I believe it was I lost control." This recording was played for the jury. In the recording, Monahan is heard saying, "I just remember fuckin' my tires going off the [edge or ditch][3] and I could not correct it." According to the State, the jury was able to discern from the recording that, although Monahan was obviously in pain, Monahan appeared to be alert and responded appropriately to Deputy Gorham's questions. Monahan does not dispute the State's characterization of Monahan's demeanor as depicted on the recording.

¶23 Monahan asserts that the above statements are unreliable because they were made shortly after he regained consciousness. We understand Monahan to be saying that the statements that he made while he was lying in the corn field and on the side of the road indicating that he was driving were unreliable because his memory was affected by the force of the accident and because those statements were made shortly after he regained consciousness. We recognize that the self-incriminating statements that Monahan made shortly after regaining consciousness regarding who was driving the car arguably may not be as reliable as the State represents. However, any question as to the reliability of Monahan's numerous

[3] A minor dispute exists as to whether Monahan said "ditch" or "edge." Regardless, the point is that Monahan told Deputy Gorham that *his* tires went off the side of the road and that *he* was unable to correct it.

admissions that he was the driver is a question for the jury to decide, and apparently the jury determined that Monahan's admissions were reliable. In addition, the potential lack of reliability of Monahan's admissions dissipated before he made further statements that he was the driver while he was flown to the hospital and after having undergone surgery.

¶24 For example, Jed Baehr, a flight medic, and Amy Helms, a flight nurse, testified that they transported Monahan to a hospital in an air ambulance and that Monahan was "conscious, alert, and oriented times three and answer[ed] all questions appropriately." Helms testified that she determined that Monahan's level of neurological intactness during the flight to the hospital was at the highest possible score of fifteen. According to Baehr and Helms, Monahan said to them in the air ambulance that he remembered how the accident happened, that he was the driver, and that he was wearing a seatbelt.[4] Monahan was flown to the hospital in the air ambulance approximately two hours after the accident. Testimony from Baehr and Helms supports the idea that Monahan was sufficiently alert to understand what he was saying when he admitted to Baehr and Helms that he was the driver.

¶25 More compelling are the statements Monahan made post-surgery. Patricia Smith, a nurse who worked in the hospital's neuro/trauma intensive care unit and tended to Monahan after the surgery, testified that according to a medical report she prepared for Monahan, at 12:30 a.m., four and one-half hours after the accident, Monahan was alert after emergency surgery. Nurse Smith testified that

[4] This last statement, that Monahan was wearing his seatbelt at the time of the accident, is inconsistent with the testimony of the crash reconstruction experts that Monahan was not wearing his seatbelt.

she wrote in her medical report that the sedation was turned off after the surgery and that Monahan "remained calm while sedation has been off and is able to indicate that he understands his injuries and where he is." Nurse Smith reported that Monahan motioned for a pen and paper because he was intubated with a breathing tube. In her report, Nurse Smith noted that the "[p]atient wrote that he remembered the accident, writing that he was going too fast over a hill and lost control of the vehicle." Thus, even if we accept Monahan's assertion that the admissions he made soon after the accident are unreliable, and therefore, should be ignored, Monahan does not make any attempt to explain how the admissions he made to Baehr, Helms, and Smith are unreliable.

¶26 We acknowledge that, ten days after the accident, Monahan denied that he was driving Cushman's car. State Trooper Ryan Zukowski spoke to Monahan ten days after the accident, and Monahan told him that "he had no idea" who was driving and never drove Cushman's vehicle. Trooper Zukowski spoke with Monahan again on January 13, 2012, when he took Monahan's DNA swab. During that meeting, Monahan said, "It doesn't matter, you know, I wasn't driving." However, in July 2012, State Troopers Zukowski and Thomas Parrott spoke to Monahan who said, "It's not like I meant … it -- to F'ing happen." This last statement by Monahan is consistent with his prior admissions that he was the driver. It is notable that during the latter exchange, Monahan never affirmatively denied that he was driving.

¶27 Monahan points to two statements the prosecutor made during her initial closing argument suggesting to the jury that Cushman could not have been the driver. The prosecutor made the following two statements during her initial closing argument:

> Rebecca didn't know her way around. So using your common sense, you need to ask yourself, does it make sense that a young girl who doesn't know the area is driving on some rural road and driving, no less, after she'd been drinking and at speeds of 40 to 50 miles per hour over the speed limit? That doesn't make sense.… Using your common sense, that tells you it's the defendant behind the wheel.
>
> ….
>
> If it's Rebecca who was driving that night, again we'd have to believe she's driving on that rural country road in a place she's not familiar with on a road she's not familiar with. Despite the fact that she's not familiar with that road, we have to believe that she's traveling—after having some drinks, traveling 40 to 50 miles per hour over the speed limit on a road she has no experience or familiarity with.

¶28 Monahan did not object to these statements when they were made, but he now complains that, by making the above quoted statements, the State improperly left the jury with an "incomplete understanding" of the circumstances leading up to and surrounding the accident. In other words, Monahan takes the position that the jury was given the false impression that Cushman could not have driven the night of the accident because of her lack of familiarity with the roads, despite the State being aware that the excluded GPS data would have informed the jury that Cushman was driving at a high rate of speed from the party to Shullsburg. Monahan argues that the excluded GPS data would have demonstrated that it was not "common sense," as the prosecutor framed it, that Cushman would not have been driving well above the speed limit. Monahan argues that the exclusion of the GPS data "permitted the state effectively to alter the facts of the case."

¶29 The State's response to Monahan's argument is tepid at best, which was that this was not the only argument that the prosecutor made to the jury. We agree with Monahan that it appears that the prosecutor's challenged statements

improperly exploited the circuit court's ruling that excluded the GPS evidence, which the prosecutor herself had sought to exclude. Such behavior by a prosecutor is strongly frowned upon. Nevertheless, Monahan fails to develop a persuasive argument that the prosecutor's apparent mischaracterization of Cushman's driving habits on the evening of the accident should result in reversing the judgment of conviction. We fail to see how these statements prejudiced Monahan. The improper statements by the prosecutor referenced above were short and made only twice. The challenged statements comprised only five sentences out of seventy pages of the trial transcript. The two short references to the improbability of Cushman driving were mitigated by the trial as a whole.

¶30 To summarize, testimony regarding Monahan's repeated admissions that he was the driver significantly undermined any probative value that the challenged GPS data evidence could have provided. In light of Monahan's admissions that he was driving, we are satisfied that the excluded GPS evidence would not have changed the outcome of the trial.

2. Crash Reconstruction Evidence

¶31 The State presented the testimony of a crash reconstruction expert, Trooper Parrott, who was assigned to the Technical Reconstruction Unit for the State of Wisconsin. The jury heard that Trooper Parrott was a certified crash reconstruction analyst with more than twenty years of training and experience in crash reconstruction, that he had published papers on crash reconstruction, and that he was an instructor in crash reconstruction at the Wisconsin State Patrol Academy.

¶32 Trooper Parrott conducted an extensive physical investigation of the accident scene for the purpose of reconstructing the sequence of events during the

accident. Based on his investigation, Trooper Parrott concluded that Monahan was driving when the accident occurred.

¶33 Trooper Parrott's investigation of the accident scene led to the following opinions: (1) the front passenger's side window was open at the time of the accident, and the front driver's side window was closed and remained intact; (2) the vehicle was moving at a high rate of speed when it crashed; (3) Cushman was ejected out of the car first, which indicated that she was sitting in the passenger seat and that Monahan was driving; (4) the vehicle rotated counter-clockwise as it went off the shoulder meaning that the occupants of the car moved towards the passenger side door, which supports Trooper Parrott's opinion that Cushman was the passenger; (5) Cushman was found close to the point where the car first went airborne, that the car continued past her, indicating that, as the passenger, Cushman was ejected first; and (6) Monahan was found approximately thirty-eight feet beyond the car's resting place, indicating that Monahan was the last person ejected from the car, and therefore, was the driver.

¶34 Finally, Trooper Parrott determined, based on his physical investigation of the accident scene, that the car skidded across the road, went into a ditch, and bottomed out, furrowing the ground as it slid in the ditch. This is important because, according to Trooper Parrott, the furrowing of the car in the ditch caused dirt to enter the passenger side of the car, which is indicated by the "great deal of dirt" on Cushman's clothing. In contrast, Monahan's clothing contained "dramatic[ally]" less dirt than Cushman's clothing, which is another indication that Monahan was the driver. Additionally, Trooper Parrott relied on evidence from the State Crime Lab that most of the DNA found on the driver's side air bag belonged to Monahan.

¶35 Considering Trooper Parrott's testimony regarding the results of his physical investigation of the accident scene and the conclusions that he drew from his investigation, the State presented strong evidence that Monahan was the driver, further weakening any probability that the excluded GPS data would have changed the outcome of the trial.

¶36 In support of his defense, Monahan presented the testimony of a crash reconstruction expert, Paul Erdtmann, who has a master's degree in mechanical engineering and a background in air bag design. Erdtmann also worked for eight years for an engineering company doing primarily accident reconstruction.

¶37 Erdtmann's investigation included reviewing evidence collected by law enforcement after the accident, his inspection of the accident site two years after the accident, and occupant testing using human models and a vehicle that was comparable to Cushman's vehicle. Based on his investigation, Erdtmann concluded that it was *possible* that either Monahan or Cushman was the driver. In other words, Erdtmann opined that he could not determine from the evidence who was driving the car. Erdtmann agreed with Trooper Parrott that Cushman was ejected from the car first, but Erdtmann was unable to determine from this evidence who was driving.

¶38 On the topic of the position of the front seats of Cushman's car for the purpose of determining who was the driver, Trooper Zukowski, a crash reconstruction specialist, testified on behalf of the State. When the vehicle was examined after the accident, the driver's seat position was four inches farther back than the front passenger seat. Trooper Zukowski testified that the seat positions would not have changed during the accident because the severe violence of the

crash interrupted the electrical power that moves the electronically controlled seats. The evidence showed that Monahan was six inches taller than Cushman, and Cushman's mother testified that Cushman always drove with the car seat as close to the steering wheel as possible.

¶39 Erdtmann presented pictures during trial showing that it was possible for a woman of Cushman's height and size to drive with the seat positioned as it was at the time of the accident. Even so, the strong inference from the positions of the driver's seat and the front passenger seat is that the taller Monahan was driving and Cushman was sitting in the passenger seat at the time of the accident. Notably, the circuit court did not admit Erdtmann's report into evidence because it contained information that was "extraneous, irrelevant, hearsay" and had other evidentiary problems.

¶40 When considering the trial as a whole, we conclude that even if the jury heard the excluded GPS data evidence, the GPS data would have paled in comparison to the strong evidence that Monahan was driving at the time of the accident. There is no reason to think that, in light of all the evidence that Monahan was the driver, admission of the excluded evidence would have changed the outcome of this case. Although the jury was possibly left in the dark about a detail that may have given them more information about the night's events, which is the excluded GPS data, we are satisfied that the State carried its burden in proving "beyond a reasonable doubt that a rational jury would have found [Monahan] guilty absent the error" in excluding the GPS data. ***Hunt***, 360 Wis.2d 576, ¶26 (quoting another source).

B. *The $250 DNA Surcharge is Constitutional as Applied to Monahan*

¶41 The State cross-appeals the circuit court's order vacating the court's previous order imposing a $250 DNA surcharge against Monahan. At the sentencing hearing, the court imposed the surcharge pursuant to WIS. STAT. § 973.046(1r)(a) (2015-16), which amended WIS. STAT. § 973.046(1g) (2011-12). *See* 2013 Wis. Act 20, § 9326(1)(g). Section 973.046(1g) (2011-12) left it to the circuit court's discretion whether to impose a DNA surcharge at sentencing. On January 1, 2014, § 973.046(1r)(a) (2013-14) took effect pursuant to 2013 Wis. Act 20, § 9326(1)(g). The Act specified that it would apply to all felony sentences imposed after January 1, 2014, regardless when the underlying offense was committed. ***Id.*** Thus, although § 973.046(1g) (2011-12) was in effect when Monahan committed the instant offense, when imposition of the DNA surcharge was discretionary, Monahan was sentenced after the amended statute took effect, when imposition of the surcharge was mandatory.

¶42 Monahan filed a postconviction motion alleging that WIS. STAT. § 973.046(1r)(a) was an unconstitutional ex post facto law as applied to him,[5] and on that basis sought an order vacating the $250 DNA surcharge. The circuit court granted Monahan's postconviction motion on the ground that the statute violated the ex post facto clause because the statute "works to make it more punitive for the defendant." The court entered a written order directing that the judgment of conviction against Monahan be amended to remove the DNA surcharge. The State appeals the court's order.

[5] Article I, section 12 of the Wisconsin Constitution prohibits ex post facto laws, which are laws that impose punishments for acts already committed. *See also* U.S. CONST. art I, § 10, cl. 1; *see* ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994).

¶43 The constitutionality of a statute is a question of law, which we review de novo. ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Statutes are generally presumed to be constitutional. ***State v. Smith***, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. "To overcome that presumption, a party challenging a statute's constitutionality bears a heavy burden." ***Id.*** The party challenging the constitutionality of a statute must prove that the statute is unconstitutional beyond a reasonable doubt. ***Id.***

¶44 Monahan appears to suggest that his challenge to the constitutionality of the 2014 amended statute is a facial challenge. However, we interpret Monahan's challenge to WIS. STAT. § 973.046(1r)(a) as a claim that the statute is unconstitutional as applied to him. Therefore, Monahan carries the heavy burden of proving that WIS. STAT. § 973.046(1r)(a) is unconstitutional as applied to him.

¶45 Generally speaking, our analysis begins with the appellant's arguments, and then we proceed to the respondent's arguments. However, because Monahan carries the burden of proving beyond a reasonable doubt that the statute is unconstitutional as applied to him, we begin with his arguments.

¶46 On appeal, Monahan renews his contention that the imposition of the single $250 DNA surcharge is punitive in nature, and therefore, the statute violates the ex post facto clauses of the United States and Wisconsin Constitutions. Specifically, Monahan argues that because the statute was discretionary when he committed the crime, but mandatory when he was sentenced, the statute retroactively increases the burden on him, and as such the statute is punitive, and therefore, unconstitutional as applied to him. In support, Monahan asserts that ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, although not

directly on point, provides guidance on how to resolve the issue in this case and that ***Radaj*** dictates that WIS. STAT. § 973.046(1r)(a) is unconstitutional.

¶47 In ***Radaj***, the defendant challenged the imposition of the amended statute based upon a $1000 surcharge imposed for four felony convictions. ***Id.***, ¶1. Unlike Monahan, Radaj was assessed a $250 surcharge for each felony conviction, totaling $1000. We concluded in ***Radaj*** that the 2014 amended statute violated the ex post facto clauses of the United States and Wisconsin Constitutions because the surcharges for multiple convictions were punitive in effect. ***Id.***, ¶35. This court reasoned that "the legislative decision to tie the amount of the surcharge to the number of convictions … casts doubt on legislative intent." ***Id.***, ¶21. This court expressly left for another day the issue Monahan raises here, which is whether a defendant who has been convicted of a single felony, and thereby assessed a mandatory surcharge of only $250, would violate the ex post facto clauses. ***Id.***, ¶36.

¶48 The outcome of this case is governed by our supreme court's recent decision in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. In ***Scruggs***, the supreme court considered the issue this court left for consideration in ***Radaj***. As Monahan argues in the instant case, the defendant in ***Scruggs*** argued that imposing the 2014 amended statute was a violation of the ex post facto clauses of the United States and Wisconsin Constitutions because the DNA surcharge in effect when the defendant committed the crime was discretionary, but the amended statute made the imposition of the surcharge mandatory at sentencing. Thus, according to the defendant in ***Scruggs***, the 2014 amended statute was punitive "for a defendant sentenced for a single felony offense after the effective date of the 2014 Amendment for an offense committed before it." ***Id.***, ¶9.

¶49 The ***Scruggs*** court applied the "intent-effects" test set forth in ***Hudson v. United States***, 522 U.S. 93 (1997), for determining whether a statute is punitive for ex post facto purposes. ***Id.***, ¶16. The test first requires a determination of whether the legislative intent in enacting the challenged statute was to impose punishment or to impose a civil and nonpunitive regulatory scheme. ***Id.***, ¶16. To make this determination is a matter of statutory interpretation. ***Id.***, ¶17.

¶50 The ***Scruggs*** court construed WIS. STAT. § 973.046(1r)(a), and, after doing so, concluded that the legislative intent in enacting the amended statute was "to offset the increased burden on the Department of Justice … in collecting, analyzing, and maintaining the additional DNA samples …." ***Id.***, ¶24 (quoting another source); *see* WIS. STAT. § 973.046(3) (2013-14) ("All moneys collected from deoxyribonucleic acid analysis surcharges shall be deposited by the secretary of administration … and utilized under s. 165.77."). WISCONSIN STAT. § 165.77 establishes the "requirements that the DOJ provide for the analysis of the collected samples and maintain a state DNA databank." ***Scruggs***, 373 Wis. 2d 312, ¶26. More precisely the court determined that:

> The amount of the DNA surcharge for a single felony conviction suggests that the fee was not intended to be a punishment.… [I]t is instead intended to offset the costs associated with the collection and analysis of samples together with the maintenance of the state's DNA databank.

Id., ¶30.

¶51 After considering the mandatory surcharge in the context of the purposes for the surcharge, the court concluded that the legislative intent in imposing the mandatory surcharge was for "a nonpunitive cost-recovery intent." ***Id.***, ¶26.

¶52 As we indicated, Monahan's challenge to the constitutionality of WIS. STAT. § 973.046(1r)(a) is based on the same theory that the defendant advanced in ***Scruggs***, namely that the statute is punitive and therefore violative of the ex post facto clauses. Monahan's reliance on ***Radaj*** is misplaced; as the ***Scruggs*** court explained, ***Radaj*** spoke to the constitutionality of the 2014 amended statute in the context of multiple convictions, whereas the issue in ***Scruggs***, as in this case, was whether a single DNA surcharge for a single felony conviction is punitive. ***Id.***, ¶35.

¶53 Monahan argues that there is no rational basis for imposing the $250 DNA surcharge when the defendant has already provided a sample. Putting aside for the moment that this argument is not developed, Monahan is also wrong.

¶54 Monahan incorrectly assumes that the only rational purpose for imposing the surcharge is when the DNA sample is being taken from a defendant for the first time. Monahan misses the point. The purpose of the DNA surcharge has been said to be for a broader purpose, namely "to offset the costs associated with the collection and analysis of samples *together with the maintenance of the state's DNA databank*." ***Id.***, ¶30 (emphasis added). In other words, the underlying purpose for the DNA surcharge is not only to defray the costs incurred by collecting and analyzing DNA samples, but *also* to offset the costs to the State to maintain the DNA databank. Monahan does not argue that imposing a DNA surcharge to offset the costs to maintain the DNA databank is not rational.

¶55 As we indicated, there is a second part to the test in determining whether WIS. STAT. § 973.046(1r)(a) is punitive for purposes of an ex post facto challenge, which is whether the statute is so punitive in effect as to transform the $250 DNA discharge into a criminal penalty. ***Id.***, ¶39. This part of the intent-

effects test entails the consideration of seven factors set forth in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144, 168-69 (1963). We need not analyze these seven factors to determine whether the 2014 amended statute has the effect of transforming the $250 DNA surcharge into a criminal penalty because Monahan refers to only one of the factors and fails to analyze whether the surcharge has a punitive effect based on an analysis of the other six factors.

¶56 Applying the rationale in ***Scruggs*** to the facts of this case, we conclude that Monahan has failed to establish that the mandatory imposition of the single $250 DNA surcharge is intentionally or effectively punitive against him, and therefore, in violation of the ex post facto clauses of the state or federal constitution. Accordingly, we conclude that Monahan has not met his burden of proving beyond a reasonable doubt that WIS. STAT. § 973.046(14)(a) is unconstitutional as applied to him.

CONCLUSION

¶57 For the reasons explained above, we conclude that the circuit court's erroneous exclusion of the GPS data at trial constituted harmless error, and therefore, affirm Monahan's conviction. As for the State's cross-appeal, we conclude that the court erred in vacating the mandatory $250 DNA discharge assessed against Monahan, and therefore, we reverse the court's order to vacate the $250 DNA surcharge and remand to the circuit court with directions to reinstate its previous order imposing the DNA surcharge on Monahan.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.