STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP002187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals
Affirming the Lafayette County Circuit Court,
The Honorable William D. Johnston, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-CROSS-RESPONDENT-PETITIONER

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

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ISSUE PRESENTED

Kyle Monahan and R.C. were both ejected from R.C.'s car when it crashed. The car had been going roughly 90 miles per hour when it skidded off the road. R.C. died, and Mr. Monahan was eventually charged with causing her death. At trial, witnesses testified that R.C. was driving at the beginning of the trip that led to the crash. The state argued, however, that the two had switched places during a two-minute stop a few minutes before the accident. Mr. Monahan sought to introduce GPS evidence showing the vehicle had been traveling over 100 miles per hour before the stop during which the state claimed he had taken the wheel. The circuit court excluded this evidence. The state subsequently argued to the jury that Mr. Monahan must have been driving during the crash because R.C., who was not from the area, would never drive so fast on unfamiliar roads.

The state has now conceded that Mr. Monahan should have been allowed to present his evidence. The issue presented is whether the court's erroneous exclusion of this evidence was harmless.

The circuit court did not decide this question.

The court of appeals found any error harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for this court.

STATEMENT OF THE CASE AND FACTS

At around 8:00 p.m. on August 20, 2011, a resident of Dunbarton Road in the Town of Shullsburg heard a car speeding up a hill on the road near his home. (152:7-8). He heard a "pop" and, going to investigate, saw the car upside down. (152:9-10). He also saw a woman, later identified as R.C., lying in a nearby creek. (152:10-11, 44). He called 911. (152:12). Emergency responders eventually located Kyle Monahan lying in a cornfield near the vehicle. (152:25, 33). R.C. died later that night. (2:10).

More than a year passed before the state charged Mr. Monahan with causing R.C.'s death. (2). Mr. Monahan pled not guilty and the case was tried to a jury. (151-56, 160). There was no dispute that Mr. Monahan and R.C. had both been intoxicated. He had a BAC of .14; she .112. (153:173, 179). It was also clear that whoever had been driving had been driving at very high speed just before the crash. (154:69-70).

The sole issue at trial was which of the vehicle's occupants, both of whom were ejected in the crash, had been the driver. The car was R.C.'s; she and Mr. Monahan had taken it to a party at the Leahy residence north of Shullsburg. (2:8; 51:28; 160:47; App. 138). After leaving the party, they returned to Shullsburg in her car. (51:28; App. 138).

The car was equipped with a GPS device. After the crash, police extracted its data. This data showed the car's routes and speed for the entire day leading up to the crash. It also showed that the car stopped for two minutes on Gratiot Street in Shullsburg before continuing to the location, east of town, where the crash occurred. (51:28; App. 138). Two witnesses testified that R.C. was driving when she and Mr. Monahan left the Leahys'. (160:147-48, 157-58). The

state argued to the jury that the two had switched positions during the two-minute stop in Shullsburg. (156:84-85).

At trial, the state introduced testimony about the GPS data covering the last mile the vehicle traveled before the crash, which showed the car accelerating to an average of 96 mph. (154:69-70). But before trial, Mr. Monahan asked the court to let him discuss GPS data from earlier. This data would have shown that the vehicle was traveling at similarly high speeds both before the two-minute stop (when witnesses said R.C. had been the driver) and after. (51:27-29, 61:2-4, 8-9; App. 137-39). The court refused to let the jury hear these facts. (150:25-27; App. 134-136).

This appeal is about the exclusion of that evidence. Its importance can't be understood without understanding the other evidence at trial.

Mr. Monahan's statements

When he was found in the cornfield, Mr. Monahan was unconscious. At trial an EMT testified he stayed unresponsive for some time while being put on a back board, having a protective collar placed around his neck, and being moved up to the roadside. (160:33-35). On regaining consciousness, Mr. Monahan asked several times "what happened" and where R.C. was. (160:36). The EMT later heard Mr. Monahan say "I fell asleep" and "I'll never drink again" (160:37-38); another witness, a sheriff's deputy, testified that the statement was "that is the last time I will drink and drive," though he testified the scene was noisy and he was six feet away. (152:72, 83).

The same sheriff's deputy testified that he asked Mr. Monahan if he was the driver and Mr. Monahan answered that he did not remember. (152:71). Mr. Monahan

asked whether there had been a female in the vehicle. On being told there was, he responded "I probably was driving, then." (152:71). Mr. Monahan also told the deputy he did not remember where they had been coming from. (152:71-72).

A firefighter testified that, while still lying in the cornfield, Mr. Monahan was asked whether he knew where he was and answered "no." (153:10-11). He also did not know how many people were in the car. (153:12). As to who was driving, after being asked several times, Mr. Monahan responded "I was driving, I guess." (153:12).

The Shullsburg police chief testified that he spoke with Mr. Monahan after he was moved to the roadside. (152:37). Mr. Monahan said he had been coming from Shullsburg, from Al Leahy's, and didn't know who the driver was. (152:27).

Another sheriff's deputy testified he had also spoken with Mr. Monahan after he was moved to the roadside. Mr. Monahan was able to tell the deputy that R.C. was the female who had been located, but he did not know if anyone else had been in the vehicle, and could not recall who was driving. (152:44, 47).

A third sheriff's deputy, Michael Gorham, also testified about speaking to Mr. Monahan on the side of the road, after he had been removed from the field. Deputy Gorham said he had asked Mr. Monahan how many people were in the car, to which Mr. Monahan had responded "It depends who's asking." (152:91). Asked again, he responded that there had been two occupants, him and his girlfriend. (152:91). Deputy Gorham testified that he asked Mr. Monahan who was the driver, to which Mr. Monahan responded "I might have been, I guess." (152:91).

Deputy Gorham testified he was then directed by another deputy sheriff to get a more definitive statement from Mr. Monahan, so he reapproached him, this time with an audio recorder running. (152:92). Gorham said he told Mr. Monahan that "We need to be clear about something" and asked how many people were in the car, to which Mr. Monahan responded "two." (152:92). Asked "Were you the driver?" Mr. Monahan replied "Yeah, I guess." (152:92). Deputy Gorham testified that during that conversation, he told Mr. Monahan that a firefighter had seen him driving the car out of Shullsburg. (152:92).

The audio of the conversation was played at trial. It records the exchange as follows:

> Gorham: Kyle, we need to be clear about some stuff. There was only two of you in the car?
>
> Monahan: Yeah.
>
> ….
>
> Gorham: OK. One of the firemen said that they saw you driving the car out of Shullsburg – so you were the driver?
>
> Monahan: Yeah.
>
> Gorham: You were?
>
> Monahan: Yeah.
>
> Gorham: OK. You're not BSing or anything right?
>
> Monahan: I don't think so.
>
> Gorham: You don't think so?
>
> Monahan: [Groans]

> [Here the interview briefly pauses, as medical personnel are attempting to insert an IV and Mr. Monahan expresses that he is in pain]
>
> Gorham: Is there anything else that, can you explain what happened?
>
> Monahan: No.
>
> Gorham: You don't remember how the crash occurred?
>
> Monahan: I just remember fuckin' my tires go off the ditch [or "edge;" the recording is unclear] and I could not correct it. [Groans]
>
> Gorham: You remember the tires going off the … what was that?
>
> Monahan: Can we talk tomorrow?
>
> Gorham: Alright, I'll let the EMT's continue to treat you, OK?

(92:Exh. 12).

Gorham testified that he later interviewed firefighters but did not locate any who had in fact seen Kyle driving the car out of Shullsburg. Gorham maintained, however, that a firefighter he didn't know had told him this at the accident scene. (152:97-98). This firefighter was never found. (152:99).

Mr. Monahan was taken from the crash scene in a helicopter. (154:7, 9). At trial a flight nurse read from her report that "Patient states that he remembers the accident and appears to have full recall of the incident. Patient states that he was the driver of the vehicle and was wearing his seat belt," (154:27-28), though in fact neither Mr. Monahan nor R.C. were wearing their seatbelts. (154:62).

At 12:30 in the morning, Mr. Monahan was taken off sedation briefly in the hospital. (160:9). At trial a nurse read from her notes that after he woke up, he wrote that he remembered the accident, and that he was going too fast over a hill and lost control of the vehicle. (160:9).

Ten days after the crash, Mr. Monahan was interviewed by a state trooper. (153:45). Mr. Monahan told the trooper he had "no idea" who had been driving at the time of the crash. (153:48). At a subsequent interview, he told the trooper that R.C. was an aggressive, "kind of nuts" driver. (153:56).

Crash reconstructions/physical evidence

The state called as an expert a state trooper, certified in crash reconstruction, who had conducted a crash reconstruction analysis. (154:51). Based on damage to the vehicle, skid marks, furrowing and debris on the ground, the shape of the terrain, and the GPS data, the trooper hypothesized a path for the vehicle from the beginning to the end of the crash. (154:58-65). The trooper opined that the vehicle had been moving between 87 and 98 miles per hour when it began to skid. (154:67, 72). It skidded off the left shoulder and into the ditch, and began to yaw to the left so that the passenger side was leading. (154:66-67). It traveled across the ground sideways for some distance before it "tripped" and began to tumble sideways. (154:108-09). At some point the tumbling became more end-over-end before the vehicle finally came to rest. (154:114).

The trooper also testified the GPS data showed the vehicle traveling an average of 60, 76 and 96 miles per hour on three "segments" of the trip leading up to the crash. (154:69-70).

The trooper testified he believed the occupants would have been moving toward either the front or the passenger side during the crash sequence. (154:108-20). He opined that the passenger would have been ejected first through the open passenger window, and that because R.C. was found closer to where the crash began, she must have been the passenger. (154:130-31, 134). He claimed the driver could not have been ejected first because the passenger would have "blocked" the path through the window. (154:136).

Mr. Monahan presented expert testimony from an engineer who had also analyzed the crash. He opined that either the driver or the passenger could have been ejected first. He noted that the open sunroof provided another port through which the driver could have been ejected during the rollover while the passenger remained in the vehicle. (160:90-95).

The trooper also discussed the condition of the clothing Mr. Monahan and R.C. had been wearing. (154:121). R.C.'s shirt and pants had a great deal of dirt on them, whereas Mr. Monahan's clothing had less. (154:122, 129). From this, the trooper inferred that R.C. was sitting in the passenger seat during the earlier portion of the crash sequence, when the vehicle was "furrowing" and kicking up dirt. (154:126). Mr. Monahan's expert noted the dirt was on both R.C.'s inner and outer clothing and on the back of her pants, and that there were dirt and grass stains on both the outside and inside of her shirt. This meant the dirt relied on by the trooper would not have come from a "spray" through the passenger window—more likely it got on her clothing after her ejection from the vehicle as she tumbled. (160:96-99).

The trooper also noted the position of the front seats of the vehicle; specifically, that the driver's seat was further back than the passenger's. (154:129; 153:92). R.C. was between five feet five inches and five feet eight inches tall; Mr. Monahan is between six feet and six feet one inch tall. (154:130; 152:143). R.C.'s mother testified that R.C. always sat with her seat as close to the steering wheel as possible. (155:115). Mr. Monahan's expert explained that he had located a vehicle of the same year, make and model as R.C.'s, and had adjusted the steering wheel and seats to match their locations in the crashed vehicle. (160:82-88). He located a male and female of approximately the same stature as Mr. Monahan and R.C.. (160:88). The female sat in the driver's seat of the vehicle and the male in the passenger's seat; and photographs were taken. (160:88-89). The expert testified both were able to sit comfortably in the seats, and the female was easily able to use the brake and accelerator pedals and steering wheel. (160:89-91).

The trooper showed photographs of the brake and accelerator pedals and opined—though he had no specialized training in the matter—that there was a pattern of dirt on the pedal that looked more like the sole of Mr. Monahan's footwear than that of R.C.'s. (154:78-83). The forensic analyst from the state crime lab testified that on examining the pedals, she did not see any impression that she could conclusively say was a footwear impression. (160:44-45).

A DNA analysis was performed on certain portions of the car. The analyst, from the state crime lab, testified that the DNA of two different people was found on the driver's side airbag. (153:154). Kyle Monahan was the source of the major component of this DNA, but the source of the minor component could not be identified. (153:154-55). The state's trooper expert witness opined that R.C. would have been

thrown from the vehicle before the airbag deployed, while Mr. Monahan's testified that the "furrowing" closer to the beginning of the crash would have been sufficient to deploy the airbag. (155:85, 89-90; 160:121-22). Mr. Monahan's expert testified that given that there were two people in the car, it was likely that R.C. was the source of the other DNA on the airbag. (160:80).

In the end, the state's expert opined that Mr. Monahan had been driving the car, while Mr. Monahan's testified it was impossible to conclude from the available evidence whether he or R.C. had been driving. (154:136; 160:90).

Witnesses from the Leahy party

Linda Scott, a guest at the Leahy party, testified that she had seen Mr. Monahan and R.C. depart the gathering. (160:147). She testified that R.C. was driving, and she recalled Mr. Monahan giving her a "kind of goo-goo smile" from the passenger seat, which stuck in her mind because she thought it was sweet. (160:147-48).

Jason Scott, another guest, also testified that he saw R.C. and Mr. Monahan leaving the party. (160:157). He recalled saying goodbye to them as they walked toward her car, and then seeing R.C. get in on the driver's side, and Mr. Monahan on the passenger side. (160:157-58).

Mr. Monahan also testified. He told the jury that R.C. never let anyone drive her car, and that she told him (and others) that her grandparents gave it to her and she didn't want anyone driving it. (155:35). Mr. Monahan also recalled that R.C. was driving when the two left the Leahy farm. (155:41).

The excluded evidence

Using the same GPS data relied on by the state's expert, Mr. Monahan's expert determined the vehicle's speeds both on the trip to the Leahy farm and the trip from the farm to Shullsburg immediately before the crash. This data showed the vehicle traveling at high speeds for both trips. (51:27-28; 69:1-2; 155:35; 160:147-48, 157-58; App. 137-39). Specifically, the GPS data showed speeds of 79-82, 86, and 93 miles per hour on different stretches of the trip to the Leahy farm which began at 4:32 and ended at 4:40 p.m. (the posted speed limit was 55 miles per hour). (51:27-28; 69:1; App. 137-38). On the trip away from the Leahy farm and into Shullsburg, between 7:39 and 7:49 p.m., the GPS revealed speeds of 82 to 85, 86, and 102 to 105 miles per hour. (51:28; 69:2; App. 138). After a two-minute stop at Gratiot Street in Shullsburg, the vehicle headed out of town, reaching 97 and 117 to 120 miles per hour leading up to the crash at 7:54 p.m. (51:28-29, 69:2; App. 138-39).

Mr. Monahan sought to introduce this evidence to show that the same driver, R.C., was driving during each of these periods. (61:2-4, 8-9). The state sought to exclude it as "character" evidence and argued it was unfairly prejudicial. (149:35). The circuit court excluded it at a pretrial hearing, concluding that it was inadmissible other-acts evidence under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (149:38-39, 45; App. 126-27, 133). Mr. Monahan moved the court to reconsider, submitting that the GPS information fell under the exception for evidence offered to show identity. (70:2; 150:23). He also argued that the driving in the minutes leading up to the accident was part of a single act; "a continuum of the conduct [which] lasted more than the final 3 minutes and 27 seconds. To exclude it until the final

journey will deprive the jury of important context it needs to make its decision." (70:3; 150:23). Mr. Monahan finally argued that excluding the evidence would deny his constitutional right to present relevant evidence in his defense. (70:3; 150:21). The court denied the motion. It held that the "continuum" of conduct commenced only after the vehicle's stop at Gratiot Street a few minutes before the crash; and that all evidence of speed before that time would be excluded. (150:25-27; 80; App. 134-36).

The closing argument

During closing, the state argued that Mr. Monahan and R.C. must have switched positions after leaving the Leahy party during the two-minute stop in Shullsburg, saying "[t]he evidence if there was a switch would come and all the evidence we've gathered post-crash is that, in fact, it was the defendant behind the wheel. The evidence of the seat position, DNA. How could there not have been a switch? There is definitely evidence of it." (156:84-85).

The state also twice argued to the jury that, being unfamiliar with the roads in the area, R.C. would never have driven on them as fast as the vehicle was traveling before the crash:

> 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 at speeds of 40 to 50 miles per hour over the speed limit? That doesn't make sense. So we've got that. Using your common sense, that tells you it's the defendant behind the wheel.

(156:32).

> If it's [R.C.] 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.

(156:44-45).

The jury convicted Mr. Monahan of three counts related to R.C.'s death. (110). The court subsequently dismissed two of the counts as barred by statute and multiplicitous. (157:3-7). On the remaining count the court sentenced Mr. Monahan to 20 years of imprisonment, with 10 years of initial confinement and 10 years of extended supervision. (132). Mr. Monahan filed a postconviction motion to eliminate the DNA surcharge, which was granted. (161; 178). Mr. Monahan filed a notice of appeal. (171).[1]

In the court of appeals, Mr. Monahan renewed his arguments that the pre-stop GPS evidence should have been admitted for three reasons: that it was not "other acts" evidence at all, but was instead part of a continuum of acts relevant to the crime; that even if it was "other acts" evidence, it was admissible to show identity; and finally, that even if the evidence was inadmissible under Wisconsin rules, excluding it violated Mr. Monahan's constitutional right to present a defense.

The state conceded that the evidence was admissible, and that the trial court erred by keeping it out. Respondent's

[1] The state also cross-appealed the order removing the DNA surcharge. The state prevailed on this issue in the court of appeals and Mr. Monahan did not ask this court to review the issue.

Brief at 2. However, it argued that this error was harmless in light of other evidence presented at trial.

The court of appeals affirmed. It assumed without deciding that the evidence should have been admitted, but found its exclusion harmless. Though the court said the prosecutor had "improperly exploited" the absence of evidence that she herself had sought to exclude—which behavior it "strongly frowned upon"—it found the other evidence rendered the improper argument harmless as well. ***State v. Monahan***, No. 2014AP2187, 2017 WL 1504259 (Wis. Ct. App. 2017).

ARGUMENT

The exclusion of evidence that R.C. was driving her car recklessly minutes before the crash was not harmless error.

A. Introduction and standard of review.

The state has conceded that Mr. Monahan should have been allowed to show the jury that, at the time witnesses placed R.C. in the driver's seat, the car was driven at reckless speeds, just as it was a few minutes later when it crashed. This evidence was the only way he could rebut the state's claim that the two had switched seats before the crash. Moreover, it would have blunted the state's argument that Mr. Monahan *must* have been the driver in the crash because an intoxicated R.C. would never have driven so dangerously over unfamiliar country roads.

Despite its concession, the state now argues that this evidence, which it fought to exclude, made no difference in the case. This is so, the state claims, because of "the strength of the state's case" that Mr. Monahan was the driver. But as

this brief will show, the evidence that Mr. Monahan was the driver was anything but conclusive. To be sure, the state presented evidence sufficient to sustain a jury verdict in the absence of error—"the evidence, viewed most favorably to the state and the conviction, [is not] so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). But a reviewing court's job in deciding whether an error is harmless is not to decide whether a reasonable jury *could* have found for the state. The question is whether the court can say, beyond a reasonable doubt, that any reasonable jury *would* convict absent the error.

There are two important things to note about this. First, we are talking about a jury that would itself be applying the proper standard of proof beyond a reasonable doubt. So the issue is not merely whether the reviewing judges are convinced beyond a reasonable doubt of guilt, but whether they can conclude that *any reasonable person* would be convinced beyond a reasonable doubt of guilt. The burden is, in this sense, higher than the one the state must meet at trial.

Second, a jury is free to draw any reasonable inference from the evidence presented. The state will no doubt present its view of the facts here, as it did in the court of appeals. But if its presentation is anything like that it made below, it will depend crucially on this court drawing those inferences that would favor a guilty verdict, rather than those which would support a reasonable doubt. This is not the harmless error test, because an appellate court is not a fact finder—that role belongs to the jury. An appellate court should find an error harmless only if there is no set of reasonable inferences that could give rise to reasonable doubt. To do otherwise is to usurp the fact-finding role of the jury.

Here, examining the evidence presented, along with that which was wrongly excluded, a jury drawing reasonable inferences in Mr. Monahan's favor could easily have a reasonable doubt that he was driving the car when it crashed. As such, the exclusion of evidence was not harmless beyond a reasonable doubt.

Whether a particular error is harmless beyond a reasonable doubt is a question of law. ***State v. Nelson***, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317.

B. It was error to exclude the GPS evidence.

Though the parties now dispute only whether excluding the GPS evidence was harmless, the reasons for its admissibility also demonstrate its importance.

The sole issue at the seven-day trial was whether Mr. Monahan or R.C. had been driving the speeding vehicle when it crashed. Two witnesses testified that R.C. was driving when the two left the Leahy farm on the final trip. Mr. Monahan testified to this as well, and also that R.C. was driving the car on earlier trips that day. The state argued to the jury that R.C. and Mr. Monahan switched drivers during a two-minute stop in Shullsburg revealed by the GPS data. (156:84).

The circuit court prevented the jury from hearing additional GPS evidence that would have shown that, both on the way to the Leahy farm and on the way from the farm to the purported driver switch, the vehicle traveled at speeds ranging from 79 to 105 miles per hour. The court excluded this information on the theory that it was "other acts" evidence and thus inadmissible under Wis. Stat. § 904.04(2). But the court was wrong, for three reasons.

The driving before the stop was not "other acts" but part of the continuum of events leading to the crash.

The GPS data was not "other acts" evidence at all. "[A]cts … closely linked in time, place and manner" "should be scrutinized for relevancy under Wis. Stat. § 904.01 and probative value under Wis. Stat. § 904.03; there is no need to resort to the three-step ***Sullivan*** analysis." Daniel D. Blinka, Wisconsin Evidence § 404.6 at 175 (3rd ed. 2008). Here, the driving within a few minutes of the crash was part of an "integrated event" and thus not subject to § 904.04(2). ***Hammen v. State***, 87 Wis. 2d 791, 799, 275 N.W.2d 709 (1979) (defendant's offer to sell hashish not severable from threat to shoot companion shortly thereafter).

Evidence that R.C. was driving her car at 80, 90, and 100 miles per hour a few minutes before that car left the road at 90 miles per hour is not "character" evidence. It is relevant not because it shows that R.C. was, in general, predisposed to high-speed driving, but because it shows she was driving at high speeds in the moments before her car crashed at high speed.

The knowledge that a person is engaging in a particular activity at a given moment gives rise to a reasonable inference that the person was engaging in that same activity a few minutes later, independent of any judgment about the "character" of that person. If you see a neighbor out bicycling and then hear, a few moments later, that a cyclist has been struck by a car, you are concerned for your neighbor not because he has a "character" for cycling but because you know he had been cycling and reasonably believe that he may have continued.

The same concept is also sometimes expressed by naming "context" as an exception to the Wis. Stat.

§ 904.04(2) rule of exclusion. The essence of the "context" exception is to admit evidence that "is not only helpful in understanding what happened, but … necessary to complete the story by filling in otherwise misleading or confusing gaps." Blinka, § 404.07 at 199.

In this case, preventing the jury from hearing evidence that R.C. was driving at high speeds moments before the crash left them "with an incomplete understanding" of the circumstances surrounding the accident. Moreover, the state exploited this incomplete understanding to create a false impression for the jury, twice suggesting during closing that it was "common sense" that R.C., being unfamiliar with the local roads, would never drive at so high a speed as that which caused the crash, and so could not have been the driver. (156:32, 44).

What the state knew, and the jury did not, was that there is reason to believe that R.C. did exactly what "common sense" says she would not have, and that she was in fact doing it just moments before the fatal crash occurred. The exclusion of R.C.'s driving thus permitted the state effectively to alter the facts of the case. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 531, 470 N.W.2d 322 (Ct. App. 1991) (evidence of other acts admissible where excluding them would require "altering the facts of the case"); *see also* ***Com. v. Carroll***, 789 N.E.2d 1062, 1068-69 (2003) (prosecutor "improperly exploited the absence of evidence that had been excluded at his request").

Even if it was "other acts," evidence, the GPS data was admissible to show identity

Where the state offers other-acts evidence to show the identity of a defendant, it must show "such a concurrence of common features and so many points of similarity between

the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant." ***State v. Scheidell***, 227 Wis. 2d 285, 304, 595 N.W.2d 661 (1999) (citation omitted). However, where a defendant offers such evidence to show that another party committed the crime, the standard is relaxed: instead of showing the "'imprint' or 'signature'" of that other party, the defendant need only show "similarities between the other act evidence and the charged crime." ***Id.*** at 304-05; *see also* ***State v. Johnson***, 184 Wis. 2d 324, 353, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J., concurring) (noting that risk of prejudice underlying other-acts rule is absent where not offered against criminal defendant).

Such "similarity" between the charged crime and the other act is measured by "nearness of time, place, and circumstance of the other act to the crime alleged." ***Scheidell***, 227 Wis. 2d at 305. The probative value of the proffered evidence becomes a factor in the overarching other-acts framework set out in ***Sullivan***. ***Scheidell***, 227 Wis. 2d at 306. That framework asks three questions: whether the evidence is offered for a permissible purpose, whether it is relevant and probative, and whether its probative value is substantially outweighed by the risk of "unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence[.]" ***Sullivan***, 216 Wis. 2d at 772-73.

The GPS evidence excluded by the court amply satisfies the ***Sullivan*** test. First, it was offered for an acceptable purpose—to show the similarity between the driving when witnesses said R.C. was operating and the driving that preceded the crash, and thus to indicate that R.C. was the driver when the crash occurred: that is, to show the identity of the driver.

Second, the GPS evidence was highly relevant and probative to this purpose. As noted above, a defendant doesn't need to show the offered behavior was so unusual as to amount to a "signature" or modus operandi; he or she must only show "similarity" with respect to time, place and circumstance. ***Scheidell***, 227 Wis. 2d at 304-05. As to time and place, the driving Mr. Monahan sought to introduce occurred from about three and a half hours to five minutes before the crash and within a few miles of the crash site. (51:27-29, 69:1-2; App. 115-17). As to "circumstance," the circumstances of the driving were virtually identical—in the same vehicle, along county highways and rural roads, at the same drastically excessive speeds.

Moreover, the evidence was especially probative on identity because this is not the typical "other acts" identity case. Such cases usually involve an attempt to show that a person (often the defendant) has committed acts very similar to the charged crime: so similar that it would be surprising—would "defy the odds"—to find that some other person had happened to commit such a distinctive act. *See* ***Scheidell***, 227 Wis. 2d at 308. This is why the "similarity" bar is typically set quite high, at least for the state. The other acts must be so similar as to, in effect, distinguish the defendant from the entire universe of other potential suspects.

Here, by contrast, the universe of potential drivers at the time of the crash is quite small, consisting of two people. The jury's task was to identify the operator of the vehicle not from the entire world of drivers, but from the two people in the car. If this were a charge of a hit-and-run involving speeding by an unknown vehicle, evidence of prior speeding by the defendant would be of low probative value because there are many, many other speeders in the world who could have committed the crime. But here, R.C. was one of two

people who may have been driving over 100 miles per hour seconds before the crash. Evidence showing that she was driving over 100 miles per hour on the same journey minutes before the crash is good evidence that she was also doing so minutes later.

The evidence was also probative in a different way. As the state recognized in its closing, there is a natural, commonsense assumption that a person like R.C., who was a visitor to the area, would not drive on an unfamiliar road at the speed that led to the crash. This assumption, which the state sought to deploy against Mr. Monahan, would have been countered by the evidence of R.C.'s earlier driving.

Finally, turning to the third prong of the ***Sullivan*** test, the probative value of the evidence was not substantially outweighed by any other consideration. The "unfair prejudice" typically associated with other-acts evidence is that the jury will view the other bad acts as reason to "punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783. Whether or not fast driving would truly arouse a jury's instinct to "punish" a defendant, here the offered evidence involved speeding by a person not on trial—a person who was deceased and so could not be "punished." There was no realistic danger the evidence Mr. Monahan offered would sway the jury from performing its duty to determine whether he caused R.C.'s death.

Nor were any of the other Wis. Stat. § 904.03 factors implicated. There was no risk of confusing or misleading the jury as to the issues, because the sole question was who was driving, and the proffered evidence bears directly on that question. The GPS evidence was simple and discrete and

could have been presented in a few minutes, and it was not cumulative to any other evidence.

Because the proffered evidence was highly relevant and probative as to the identity of the driver—a Wis. Stat. § 904.04(2) exception and the sole issue in the trial—the circuit court erroneously exercised its discretion in excluding it.

Even if the circuit court properly applied Wisconsin evidentiary law, its exclusion of the GPS data violated Mr. Monahan's constitutional right to present a defense.

The federal and state constitutions each guarantee a criminal defendant "a meaningful opportunity to present a complete defense." ***California v. Trombetta***, 467 U.S. 479, 485 (1984); ***State v. St. George***, 2002 WI 50, ¶14 & n.8, 252 Wis. 2d 499, 643 N.W.2d 777.

The Supreme Court has stated a test for when the exclusion of evidence violates the Constitution:

> State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits…. [T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citations omitted).

Excluding Mr. Monahan's GPS evidence "infringed upon a weighty interest" in a manner both "arbitrary" and

"disproportionate to the purposes" of the other-acts rule. The identity of the driver during the crash was the only contested issue. Mr. Monahan's witnesses placed him in the passenger seat, and R.C. in the driver's seat, 15 minutes before the crash, but the state posited that they had exchanged places during the trip. The connection between R.C.'s driving and the driving that caused the crash was Mr. Monahan's only means of countering the state's argument—clearly a "weighty interest." But Mr. Monahan was denied the chance to present this connection to the jury.

And he was denied that chance by a ruling that excluded *only* that speed evidence that would have been helpful to him. The court ruled that all GPS evidence of the vehicle's speed *after* the state's theorized driver switch would be admissible. (150:25-27; App. 134-36). There was no logical basis for this ruling other than a conclusory statement that the vehicle's pause at that time was the beginning of the "continuum" leading to the crash. (150:26-27; App. 135-36). Cutting off the speed evidence at the point where it becomes useful to the defendant is the very definition of an "arbitrary" application of the other-acts rule. *See* ***Holmes***, 547 U.S. at 324.

The exclusion of the GPS evidence was also "disproportionate to the purposes" of Wis. Stat. § 904.04(2). As discussed above, the rule is intended to avoid tempting the jury to "punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783. This was not a possibility in Mr. Monahan's case; nor is there a realistic likelihood that the jury would elect to "punish" the deceased R.C. for her prior "crime" of speeding by acquitting Mr. Monahan. The only effect of admitting the proffered GPS evidence would have been to allow the jury to hear the full story of the events

leading to R.C.'s death. The effect of excluding it was to prevent this, and to deny Mr. Monahan his right to present a defense.

C. Harmless error is not sufficiency; a reviewing court must not find an error harmless unless it concludes there is no set of reasonable inferences that could support reasonable doubt.

When a defendant claims insufficient evidence to convict, he faces a heavy burden: he must show that "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Poellinger***, 153 Wis. 2d at 507. This deference to the jury has an important implication. Because a jury is free to choose among reasonable (but conflicting) inferences drawn from the evidence, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact" unless the evidence is incredible as a matter of law. ***Id.*** at 506-07. Put another way, "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt" the appellate court must affirm. ***Id.*** at 507.

But a court deciding whether a trial error was harmless has a different task. Instead of asking whether a jury reasonably *could* find guilt, it must determine, beyond a reasonable doubt, whether a jury *would* find guilt in the absence of error. ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270. And it remains true that a jury is free to choose among reasonable inferences. Thus, to find a trial error harmless, an appellate court must be

convinced that there is *no set* of reasonable inferences a jury could draw that would create a reasonable doubt of guilt. To do otherwise would make the appellate court a finder of fact. *See* ***State v. Mendoza***, 80 Wis. 2d 122, 152, 258 N.W.2d 260 (1977) (for an appellate court to accept one version of the facts and reject another "invade[s] the province of the jury").

Stated another way, the question is whether the evidence permits any set of reasonable inferences consistent with reasonable doubt—when viewed in the light most favorable to the defendant. "[W]hen assessing harm, the court should recognize that a different fact finder could draw the inferences in favor of the defendant and should therefore draw all inferences in favor of the defendant, giving weight to arguments that reframe the evidence in light of the identified error." *Anne Bowen Poulin, Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. Pa. J. Const. L. 991, 1049 (2015).

D. A jury presented with all the evidence, including the erroneously excluded GPS evidence, could easily have reasonable doubt of Mr. Monahan's guilt.

In the court of appeals the state recited evidence that, in its view, made it "clear beyond a reasonable doubt that the jury would have convicted Monahan" even if the GPS evidence had been admitted. This evidence included certain selected statements of Mr. Monahan, the crash reconstruction evidence, the positioning of the car seats, and the DNA found in the car. But as we shall see, all of this evidence admits of reasonable inferences pointing toward Mr. Monahan's innocence.

(Some of) Mr. Monahan's statements

As to the statements, they were largely conflicting and ambiguous—in the court of appeals the state merely relied on the ones it found most favorable. What is more, the conditions under which the statements were made cast doubt on their reliability. Mr. Monahan, having been knocked unconscious by the crash, initially asked "what happened" and said he did not know where he was, how many people were in the car, or if he had been driving. (160:33-36; 152:71; 153:12). After being asked several times, he responded (apparently without knowing whether anyone else was in the vehicle) "I was driving, I guess." (153:12). Later, on the side of the road, he again said he could not remember whether he was the driver, and asked if a female had been in the car. (152:71). Only on being told that there had been a female did he respond that "I probably was driving, then." (152:71).

When initially asked by Deputy Gorham who was driving, Mr. Monahan again responded uncertainly: "I might have been, I guess." (152:91). It was at this point that Deputy Gorham told Mr. Monahan that a firefighter (who, the state does not contest, was never found and did not testify) "saw you driving the car out of Shullsburg—so you were the driver?" (92:Exh. 12). Mr. Monahan responded "yeah." Asked whether he was "BSing," he responded "I don't think so." (92:Exh. 12).

It was only during and after Deputy Gorham's suggestive questioning of the newly-conscious Mr. Monahan that he began to supply any details about the accident. Some were accurate: tires going off the road, going too fast on a hill. (92:Exh. 12; 160:9). Some were not: that he had been wearing his seatbelt and that he had been coming from the Wheel Inn (where in fact they had been earlier that day).

(155:60-61,34). Taken as a whole, Mr. Monahan's statements about his "memory" of the crash carry real doubts about reliability. Perhaps this explains why the state, despite being in possession of all of these statements, did not charge Mr. Monahan with any crime for over a year after the crash. (2:1).

The physical evidence

The state's expert, as discussed above, offered an opinion that Mr. Monahan had been the driver in the crash. But his testimony (which, he noted, itself relied on Mr. Monahan's statements) was contradicted by Mr. Monahan's own expert. That expert offered an alternative hypothesis in which R.C. was ejected first, though she was in the driver's seat. He noted the trooper's claim that the dirt on R.C.'s clothing came in a spray through the open passenger window was not consistent with it being on the inside of her clothing and the back of her pants. He showed that a woman of R.C.'s stature could comfortably have sat and driven in the driver's seat as positioned, and that Mr. Monahan could fit in the passenger's seat. He testified that the driver's side airbag could have deployed early in the crash, and that R.C.'s DNA was likely on it. In the end, he concluded that the physical evidence didn't provide a basis to determine who was driving the car that night.

Of course, which expert testimony to credit is for the factfinder. So there can be no question that a jury could decide Mr. Monahan's expert was correct and the state's expert simply wrong.

The position of the car seats

As noted above, the driver's seat in the car was positioned further back than the passenger seat, and

Mr. Monahan is taller than R.C. was. R.C.'s mother testified that her daughter preferred to have her seat far forward, but there was also evidence that Mr. Monahan or R.C. could comfortably sit in either seat.

The DNA evidence

Two people's DNA was found on the driver's side airbag. Mr. Monahan's was present, but there was also a second person's DNA; the sample was such that the person could not be identified. Monahan's expert opined, reasonably, that this DNA likely came from R.C. as she was the only other person who had been in the car during the crash.

A reasonable jury, hearing all the evidence, could have reasonable doubt

The evidence above obviously admits of inferences consistent with Mr. Monahan's guilt. If a jury credited the state's expert on how the crash happened; if it believed Mr. Monahan's statements that he remembered the crash, rather than the ones where he said he did not (and if it could reconcile the inconsistencies even within those statements); if it believed that R.C. would never, even if she were intoxicated, sit in a driver's seat in a different position from the one her mother said she liked—if a jury drew all those inferences, it could be convinced beyond a reasonable doubt of Mr. Monahan's guilt.

But just as clearly, a jury could draw other reasonable inferences. It could conclude that Mr. Monahan, intoxicated and recently knocked unconscious from the crash, was merely agreeing with the suggestive questioning of Deputy Gorham when he first said he had been the driver, and that his later confused statements about the circumstances of the crash were confabulations. It could conclude, with Mr. Monahan's

expert, that the circumstances of the crash do not permit a confident conclusion about which of the two occupants was driving. It could have doubts about how unbreakable was R.C.'s habit of sitting close to the steering wheel. It could believe that in a violently tumbling car, with nobody wearing a seatbelt, it wouldn't be surprising that both occupants' DNA ended up on the airbag.

The question is not which set of inferences is stronger, or more reasonable. It's whether a jury *could* draw reasonable inferences favorable to the defendant. And these favorable inferences needn't prove Mr. Monahan was innocent—they need only instill a reasonable doubt that he was guilty.

Against this background, the court must consider the GPS evidence the jury did not hear. Accused of being the driver in a reckless high-speed crash, Mr. Monahan had evidence that the *other* person in the car was driving the same vehicle at recklessly high speeds minutes before the crash occurred. The power of this evidence is obvious, as the state recognized when it fought to keep it out. The state further demonstrated the value of this evidence by exploiting its absence in closing, twice arguing that R.C. would never drive over unfamiliar roads at such speeds as led to the crash—despite knowing that it had suppressed evidence tending to show that she *had* driven at such speeds, moments before the crash. (156:32, 44).

Jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on" the government's case. ***Davis v. Alaska***, 415 U.S. 308, 317 (1974). The state hamstrung Mr. Monahan's defense theory by excluding evidence it now agrees should have been admitted. Thus the jury heard the state's story, but not Mr. Monahan's. It is a

jury, and not an appellate court, that should decide which story is true. Mr. Monahan is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that this court reverse his conviction and sentence and remand the case to the circuit court for a new trial.

Dated this 13th day of December, 2017.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,026 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 13th day of December, 2017.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 13th day of December, 2017.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM D. JOHNSTON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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ISSUE PRESENTED

In this trial for homicide by intoxicated use of a vehicle, the vehicle in question traveled a distance, stopped for two minutes, and then resumed traveling before the fatal crash. The circuit court excluded GPS evidence of the speed of the vehicle before its two-minute stop. Was the exclusion of that evidence harmless error?

The circuit court did not address this issue.

The court of appeals held that the error was harmless.

This Court should hold that the error was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, oral argument and publication of the Court's decision are warranted.

INTRODUCTION

After Kyle Monahan and Rebecca Cushman left a party together, they drove to Shullsburg, stopped for two minutes, and resumed driving. The vehicle crashed after leaving Shullsburg, killing Ms. Cushman.

The circuit court excluded GPS evidence about the speed the vehicle traveled before it got to the party and between the party and Shullsburg. Following a jury trial at which the only issue in dispute was the identity of the driver, Monahan was convicted of homicide by intoxicated use of a motor vehicle.

The State has conceded on appeal that the circuit court erred when it excluded the GPS speed evidence.

Although Monahan devotes a substantial portion of his brief to arguing that the trial court erred when it excluded that evidence, the only issue before this Court is whether the exclusion of that evidence was harmless.

This Court should conclude that the error was harmless because the State presented compelling evidence that Monahan was the driver. That evidence included multiple statements that Monahan made in which he admitted being the driver, evidence that the driver's seat was positioned much further back than Ms. Cushman kept it when she was driving the car, crash reconstruction evidence, and evidence that Monahan was the source of the only identifiable DNA on the driver's side airbag.

Applying the well-established standard for harmless error review, the court of appeals concluded that "considering the trial as a whole, . . . 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." *State v. Monahan*, No. 2014AP2187, 2017 WL 1504259, ¶ 40 (Wis. Ct. App. Apr. 27, 2017) (unpublished), Pet-App. 116. The court of appeals was correct, and this Court should affirm its decision.

STATEMENT OF THE CASE

At about 8:00 p.m. on August 20, 2011, first responders arrived at the scene of a one-car rollover crash near Shullsburg. (R. 152:17–18, 23.) Emergency personnel found Kyle Monahan in a cornfield and Rebecca Cushman, who owned the car, lying in a creek. (R. 152:23; 153:8–10). Ms. Cushman died from multiple blunt force injuries she sustained in the crash. (R. 152:141.)

Monahan's blood alcohol level was 0.14. (R. 153:173.) He was convicted following a seven-day jury trial of homicide by intoxicated use of a motor vehicle. (R. 169:1.)

The excluded evidence.

At a pretrial hearing, the circuit court and the parties addressed the admissibility of evidence obtained from the GPS in Ms. Cushman's car about the speed the vehicle traveled at various times on the day of the crash. (R. 149:22–45.) Monahan sought to admit evidence about the vehicle's speed between the time it left Shullsburg at about 4:23 p.m. and its arrival at the party at the Leahy residence at 4:39 p.m.; between the time it left the Leahy residence at 7:39 p.m. and its arrival in Shullsburg at 7:49 p.m.; and from its departure from Shullsburg at 7:51 p.m. until the crash about three minutes later. (R. 61:1–4.)

The circuit court excluded all evidence about the vehicle's speed other than for the final segment between Shullsburg and the crash site. (R. 149:38–39, 45, Pet-App. 126–27, 133.) The court held that the evidence regarding the vehicle's speed before the final leg was inadmissible other-acts evidence. (*Id.*) The court subsequently denied Monahan's request to reconsider that ruling, holding that the relevant conduct was the final segment of travel before the crash and that the evidence of the car's speed before then was impermissible propensity evidence. (R. 150:25–27, Pet-App. 134–36.)

The trial evidence.

Monahan's statements. In the hours after the crash, Monahan made many statements about who was driving the car. He told some people that he did not know or did not remember who the driver was. (R. 152:27, 44; 153:48.) On at

least five different occasions, Monahan said that he was the driver.

1. Shullsburg firefighter Tim Corley, who was one of the first people to arrive at the scene, found Monahan in a cornfield. (R. 153:8–10.) As EMTs attended to Monahan in the field, Corley knelt a couple of feet away. (R. 153:11.) They asked Monahan how many people were in the car, and Monahan said that he did not know. (R. 153:12.) After they asked him several times who was driving, Monahan responded, "I was driving, I guess." (*Id.*).

2. Deputy Paul Klang responded to the scene of the crash. (R. 152:65–66.) Klang approached Monahan as Monahan was lying on an immobilization backboard by the side of the road. (R. 152:71.) Klang testified that as he approached Monahan, he heard him say, "That is the last time I will drink and drive." (R. 152:72.)

Klang asked Monahan who he was and Monahan gave his name. (R. 152:71.) Klang then asked him if he was the driver and Monahan said that he did not remember. (*Id.*) Monahan then asked if there was a female in the vehicle. (*Id.*) When Deputy Klang said yes, Monahan said, "I was probably driving, then." (*Id.*)

3. Deputy Michael Gorham also spoke to Monahan as Monahan was lying on the backboard. (R. 152:91.) When he asked Monahan how many people were in the car, Monahan responded, "It depends who's asking." (*Id.*) Deputy Gorham explained that the fire department was asking because they were trying to identify the number of victims. (*Id.*) He again asked Monahan who the driver was, and Monahan responded, "I might have been, I guess." (*Id.*)

Deputy Gorham then conferred with his sergeant, who directed Gorham to get a recorded statement. (R. 152:92.) Gorham told Monahan that one of the firefighters had seen Monahan driving the car in Shullsburg just before the accident and said to Monahan, "so you were the driver." (*Id.*) Monahan responded, "Yeah, I guess." (*Id.*) Deputy Gorham again asked, "You were?" and Monahan said, "Yeah." (*Id.*)

Deputy Gorham asked Monahan how the crash had occurred. (R. 152:93.) Gorham testified that Monahan responded, "My tires went off the side of the road and I believe it was I lost control." (*Id.*) Gorham's recording of his conversation with Monahan, which was played for the jury (*id.*), shows that Monahan said, "I just remember fuckin' my tires going off the [edge or ditch] and I could not correct it" (R. 92:Exhibit12, at 01:00–01:04).

4. Monahan was transported from the crash scene to a hospital by helicopter air ambulance. (R. 154:7–9.) He was assessed by an air ambulance medic and nurse, who determined that he was "conscious, alert, and oriented times three and answers all questions appropriately." (R. 154:10, 27.) The nurse determined that Monahan's Glasgow score, which assesses a patient's level of neurological intactness, was at the highest possible score of fifteen. (R. 154:29–30.)

Both the medic and the nurse testified that the report they prepared stated that Monahan said that he remembered the accident and appeared to have full recall of the incident. (R. 154:10–11, 27.) Monahan told them that he was the driver of the vehicle. (R. 154:11, 27–28.)

Monahan also said that he was wearing his seatbelt. (*Id.*) That statement conflicted with the testimony of the crash reconstruction experts, who testified that the seatbelts had not been in use. (R. 154:62; 160:65.)

5. Patricia Smith, a nurse who worked at the hospital's neuro/trauma unit, testified that the patient record she prepared for Monahan indicated that at 12:30 a.m., after he had undergone surgery, Monahan was alert. (R. 160:5, 9.) His sedation was turned off to allow the staff to conduct a thorough neurological examination. (R. 160:9.) Smith's report stated that Monahan "has remained calm while sedation has been off and is able to indicate that he understands his injuries and where he is." (*Id*.) She testified that Monahan was very calm and understood directions and that he was neurologically intact, with an understanding of what was going on in his surroundings. (R. 160:16.)

Nurse Smith reported that Monahan, who was unable to speak because he was intubated with a breathing tube, asked for a pen and paper. (R. 160:9–10.) Smith's report stated that "[p]atient wrote that he remembered the accident, writing that he was going too fast over a hill and lost control of the vehicle." (R. 160:9.)

Trooper Ryan Zukowski testified that when he interviewed Monahan ten days after the crash, Monahan said that he had no idea who was driving. (R. 153:48.) When Trooper Zukowski met with Monahan several months later to collect a DNA sample, Monahan said as he signed a consent form, "It doesn't matter, you know, I wasn't driving." (R. 153:57-58.)

Monahan spoke to Trooper Thomas Parrott in July, 2012, more than ten months after the crash. (R. 154:85.) Parrott testified that Monahan said that the last thing he remembered was holding Ms. Cushman by the left hand, apparently referring to Monahan's left hand, but that Monahan never denied being the driver or said that Ms. Cushman was driving. (R. 154:96, 98–99.) In response to

Parrott's comment "there are a lot of times where I have the good guys make bad mistakes," Monahan said, "I just really can't . . . I don't know how to answer that because it just happened. It's not like I meant to it – to F'ing happen" (R. 154:93–94.)

Crash reconstruction evidence. The State's crash reconstruction expert was Trooper Parrott, a senior trooper assigned to the Technical Reconstruction Unit. (R. 154:42.) Trooper Parrott is a certified crash reconstruction analyst who has more than twenty years of training and experience in crash reconstruction, has published papers on crash reconstruction, and is an instructor in crash reconstruction at the Wisconsin State Patrol Academy. (R. 98:Exhibit 77:1–18; 154:42–51).

Trooper Parrot examined the physical evidence from the scene, including tire marks, the damage to the vehicle, the topography of the roadway, the furrowing of the ground that occurred when the vehicle went off the road, and the location of debris, as well as speed information derived from GPS data, DNA evidence, and witness statements. (R. 154:42–136.) Based on that information, Trooper Parrott reconstructed the sequence of events during the crash and concluded that Monahan was driving when the car crashed. (*Id.*)

Trooper Parrott testified that the window on the front passenger side of the car was open when the car crashed and that the driver's side front window was closed and remained intact. (R. 154:61.) He calculated that the car was going between 87 and 98 miles an hour at the beginning of the crash. (R. 154:67.)

The crash began, Parrott testified, when the car went off the right edge of the road, came back onto the roadway,

and started to rotate counterclockwise. (R. 94:Exhibit 75:1–2; 154:66–67, 110.) The car skidded across the roadway, went into a ditch, and bottomed out, furrowing the ground as it slid in the ditch. (R. 94:Exhibit 75:2–4; 154:66, 112.) As the car slid sideways in the ditch, with the front end facing away from the road, it went airborne and began to tumble sideways. (R. 94:Exhibit 75:4; 154:66, 108–09.) He characterized that tumbling as "a high lateral roll-over type of crash." (R. 154:75.) The car then hit the ground and began an end-over-end rollover that continued until it tumbled to its final rest. (R. 154:114–15.)

Trooper Parrott testified that as the vehicle went sideways in the ditch before rolling over, the occupants went from moving forward toward the dash to moving sideways toward the passenger side of the car. (R. 154:116–17.) When the car hit the ground after it first went airborne, Trooper Parrott testified, the occupants "move[d] forcibly towards the passenger side." (R. 154:118.)

Parrott testified that, in general, "those occupants that are closest to the leading edge of the vehicle as it rolls will be the first to come out" and that "[t]he leading edge in this case was the passenger's side of the car." (R. 154:130.) He also testified that Ms. Cushman was found beyond the point where the car first went airborne and that the car continued past her, indicating that she came out first. (R. 154:131–32, 134.) Monahan was found beyond the car's final resting place, which indicated that he was the last person out of the car. (*Id*.)

The condition of the clothing worn by Monahan and Ms. Cushman was part of evidence that led Trooper Parrott to conclude that Ms. Cushman was in the passenger seat. The furrowing of the car in the ditch caused dirt to enter the passenger side of the car. (R. 154:117.) Parrott testified that

Ms. Cushman's clothes had a "great deal of dirt on them" (R. 154:122) and that Monahan's clothes had "dramatic[ally]" less dirt on them than Ms. Cushman's clothing (R. 154:128).

Trooper Parrott testified that based on all the information available to him, it was not possible for the driver of the car to have been ejected first. (R. 154:135–36.) He opined that Monahan was the driver. (R. 154:136.)

The defense crash reconstruction expert, Paul Erdtmann, has a master's degree in mechanical engineering and a background in airbag design, and has worked for eight years for an engineering company primarily doing accident reconstruction work. (R. 160:53–56.) Erdtmann based his reconstruction on evidence collected by law enforcement after the crash, his inspection of the crash site two years later, and occupant testing using models and a vehicle comparable to the crashed vehicle. (R. 160:57–59, 110).

Mr. Erdtmann testified that it was equally possible that Monahan and Ms. Cushman was the driver. (R. 160:95.) His ultimate opinion was that it cannot be determined who was driving. (R. 160:135.)

Erdtmann agreed with Trooper Parrott that Ms. Cushman was the first occupant to be ejected from the vehicle. (R. 160:94, 100, 113.) He described the two scenarios under which it was possible for either Monahan or Ms. Cushman to have been the driver even though Ms. Cushman was ejected first. (R. 160:92–100.) In the scenario in which Ms. Cushman was the driver, Erdtmann testified, she was ejected through the sunroof as the car rolled over. (R. 160:94.)

Erdtmann testified that the front airbags deployed at the beginning of the car's furrowing in the ditch (R. 160:121–22), before it began to roll over (R. 160:76–78). He contended that even though the vehicle was traveling mostly sideways, there was sufficient front-to-rear deceleration when the vehicle was furrowing to cause the front airbags to deploy. (R. 160:121–23.)

Erdtmann acknowledged on cross-examination that witness statements are one source of information that may be considered when determining what happened in a crash. (R. 160:136–37.) In this case, he testified, he gave no weight to any of the statements of the witnesses who stated that Monahan had said that he was the driver because those statements were inconsistent with Monahan's statement to Trooper Parrott. (R. 160:135–37.)

Called as a rebuttal witness, Trooper Parrott testified that airbag system modules do not "wake up, let alone deploy" until a vehicle experiences one to two G's of deceleration. (R. 155:89.) He testified that the Cushman vehicle would not have experienced even one G prior to it striking the ground after rolling over end-to-end and that it was not possible for the airbag to have deployed when it went into the ditch and began furrowing. (R. 155:90.) He testified that Ms. Cushman would have been ejected before the front airbags deployed. (R. 155:91.)

Position of the seats. The driver's seat in the crashed vehicle was positioned four inches farther back than the front passenger seat. (R. 153:92.) Trooper Zukowski, who also is a crash reconstruction specialist, testified that the seat position would not have changed on impact because the crash was so violent that there would not have been electrical power to move the power seats. (R. 153:19, 95.)

Trooper Zukowski also testified that larger people generally require the seat position to be more rearward and that smaller people generally have their seat more forward. (R. 153:96.) Ms. Cushman was about six inches shorter than Monahan—she was about five feet, six inches tall and Monahan is six feet to six feet, one inch tall. (R. 154:129–30.) Ms. Cushman's mother testified that when Ms. Cushman was driving "[s]he would always have her seat as close up to the steering wheel as she possibly could." (R. 155:115.)

The defense expert, Mr. Erdtmann, obtained a car of the same make, model, and year as Ms. Cushman's car, a 2001 Saab 9-5 station wagon. (R. 160:82). Erdtmann set up the seat and steering wheel positions in the same positions as Ms. Cushman's car, and had individuals who were about the same size and stature as Monahan and Ms. Cushman sit in the vehicle. (R. 160:82–86). Erdtmann testified that the woman was able to reach the steering wheel without leaning forward and that "her feet are comfortably in front of her, and she's able to reach both the brake pedal and the accelerator pedal." (R. 160:88.) Erdtmann also testified that the male model was able to sit comfortably in the passenger seat without his knees touching the glove box. (R. 160:89.)

Erdtmann opined that the seat position did not exclude either of the occupants from being in the driver's seat or passenger seat. (R. 160:90.) Ms. Cushman's mother testified that the model in Erdtmann's reconstruction "is much farther back than Rebecca would have been." (R. 155:117.)

DNA evidence. A DNA analyst from the State Crime Lab tested several items she received from the crashed vehicle as well as samples from Monahan and Ms. Cushman. (R. 153:147–49.) The analyst was able to find testable biological material on only one item, the driver's side airbag.

(R. 153:151–54.) She testified that her analysis revealed a mixture of two individuals consisting of a major component and a minor component. (R. 153:154.) Monahan was the source of the major component. (R. 153:154–55.) The analysis of the minor component was inconclusive; the analyst was unable to include or exclude Ms. Cushman as the source of the minor component or determine whether the minor component came from a male or female. (R. 153:155.)

Monahan's crash reconstruction expert, Mr. Erdtmann, testified that although the State Crime Lab could not identify the second contributor, he believed it likely was Ms. Cushman because she was the other person in the vehicle. (R. 160:80–81.) On cross-examination, Erdtmann acknowledged that he had no training or experience in DNA analysis and that his opinion regarding the identity of the second contributor was "[t]o a reasonable degree of engineering certainty" rather than to a "DNA analysis certainty." (R. 160:114, 116.)

The defense evidence. Linda Scott was a guest at the party at the Leahy residence. (R. 160:145.) She testified that she saw Ms. Cushman and Monahan arrive at the party in "a small little sports car" but that she did not remember who was driving. (R. 160:147.) She also testified that Cushman was driving that car when they left. (R. 160:147–48.)

Jason Scott testified that he remembered Monahan and Ms. Cushman leaving the party. (R. 160:157.) He testified that Monahan and Cushman walked past him and exchanged greetings with him, that they walked to the vehicle, that she got in the driver's side, and that they drove off. (*Id*.)

Mr. Scott gave varying estimates of how far away Monahan and Ms. Cushman were when they got in the car.

He first said that it was a hundred yards. (R. 160:160.) When defense counsel observed that that was pretty far, Mr. Scott said, "let me take that back. I'm not good at distances. I want to say probably a hundred feet, a hundred, 200 feet something like that." (*Id.*) He then testified the distance was that from the witness seat to the back of the courtroom. (*Id.*)

Monahan testified that Ms. Cushman did not want anyone else to drive her car and that she was driving when they left the Leahy residence. (R. 155:35, 41.) But, he testified, he did not recall anything between their leaving the Leahy party and his waking up in the hospital. (R. 155:41–42.)

The prosecutor's closing argument.

In her closing argument, the prosecutor argued that the crash reconstruction evidence, the seat position evidence, the DNA evidence, and Monahan's own statements demonstrated that Monahan was the driver. (R. 156:32–48.) The prosecutor argued that the Scotts' testimony that Ms. Cushman was driving was not credible. (R. 156:83–84.) She further argued that even if those witnesses were correct, the evidence showed that there was a two-minute stop in Shullsburg and that all of the evidence gathered after the crash showed that Monahan had been driving when the car crashed (R. 156:84–85). The prosecutor also argued that it made no sense for Ms. Cushman, who was unfamiliar with the area, to have been driving at speeds of 40 to 50 miles an hour over the speed limit (R. 156:32, 44–45).

The court of appeals' decision.

Monahan argued on appeal that the trial court erred when it excluded the GPS evidence relating to the speed of

the vehicle before it arrived in Shullsburg. The State agreed with Monahan that the trial court erred when it excluded that evidence, but argued that the error was harmless. *See Monahan*, 2017 WL 1504259, ¶ 2, Pet-App. 102.

The court of appeals did "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." *Id.* ¶ 12, Pet-App. 106. Rather, "[a]pplying the harmless error analysis to the trial record as a whole," the court of appeals concluded "that the jury would have found Monahan guilty absent the error in excluding the GPS data." *Id.* ¶ 17, Pet-App. 107. The court of appeals held that "[t]he 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." *Id.*[1]

STANDARD OF REVIEW

Whether the circuit court's erroneous exclusion of evidence was harmless presents a question of law that this Court reviews de novo. *State v. Hunt*, 2014 WI 102, ¶ 21, 360 Wis. 2d 576, 851 N.W.2d 434.

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[1] The State cross-appealed from a postconviction order vacating a DNA surcharge (R. 170:1), and the court of appeals reversed that order (*Monahan*, 2017 WL 1504259, ¶ 3, Pet-App. 102–03). Monahan does not ask this Court to review that issue. (Monahan's Br. 13 n.1.)

ARGUMENT

The exclusion of the GPS evidence was harmless error.

I. Legal standards governing harmless error review.

A circuit court's erroneous exclusion of evidence is subject to the harmless error rule. *Hunt*, 360 Wis. 2d 576, ¶¶ 21, 26. "Harmless error analysis requires [the court] to look to the effect of the error on the jury's verdict." *Id.* ¶ 26. For the error to be deemed harmless, the party that benefited from the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* "Stated differently, the error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (quoted sources omitted).

This Court has identified "several factors to assist in a harmless error analysis, including but not limited to: the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27. Those factors are non-exhaustive, but assist in the determination of whether the exclusion of defense evidence was harmless. *See id.*

II. The error was harmless.

The State presented a compelling case that proved that Monahan was driving Rebecca Cushman's car when it crashed. That evidence included Monahan's statements in which he not only said that he was the driver but accurately

described how the accident began, evidence that the driver's seat was positioned farther back than it would have been had Ms. Cushman been driving, expert testimony by a crash reconstructionist, and the identification of Monahan's DNA in the center of the driver's side airbag. Given the strength of the State's case, it is clear beyond a reasonable doubt that the jury would have convicted Monahan even if it had heard the excluded evidence about the speed of the vehicle before the final segment of its travel.

Monahan's statements. In the hours after the crash, Monahan made many statements about who was driving the car. He told some people that he did not know or did not remember who the driver was. (R. 152:27, 44; 153:48.) On at least five different occasions, though, Monahan said that he was the driver.

1. As EMTs attended to Monahan in the corn field, they asked Monahan how many people were in the car (R. 153:11–12.) Monahan said that he did not know. (R. 153:12.) After they asked him several times who was driving, Monahan said, "I was driving, I guess." (*Id.*)

2. Deputy Paul Klang approached Monahan as Monahan was lying on an immobilization backboard by the side of the road. (R. 152:71.) Klang testified that Monahan said, "That is the last time I will drink and drive." (R. 152:72.) (As Monahan notes in his brief, *see* Monahan's brief at 3, an EMT testified that Monahan said, "I fell asleep" and "I'll never drink again." (R. 160:37–38.))

Klang asked Monahan if he was the driver and Monahan said that he did not remember. (R. 152:71.) Monahan then asked if there was a female in the vehicle. (*Id.*) When Deputy Klang said there was, Monahan said, "I was probably driving, then." (*Id.*)

3. Deputy Michael Gorham also spoke to Monahan as Monahan was lying on the backboard. (R. 152:91.) When he asked Monahan how many people were in the car, Monahan responded, "It depends who's asking." (R. 152:91.) Deputy Gorham explained that the fire department was asking because they were trying to identify the number of victims. (*Id.*). He again asked Monahan who the driver was, and Monahan responded, "I might have been, I guess." (*Id.*)

After Deputy Gorham conferred with his sergeant, who directed Gorham to get a recorded statement, Gorham told Monahan that one of the firefighters had seen Monahan driving the car in Shullsburg just before the accident. (R. 152:92.) Gorham asked Monahan, "so you were the driver," and Monahan responded, "Yeah, I guess." (*Id.*) Deputy Gorham again asked, "You were?" and Monahan said, "Yeah." (*Id.*)[2]

Deputy Gorham asked Monahan how the crash had occurred. (R. 152:93.) Gorham testified that Monahan responded, "My tires went off the side of the road and I believe it was I lost control." (*Id.*) Gorham's recording of his conversation with Monahan, which was played for the jury (R. 152:93), shows that Monahan said, "I just remember

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[2]In his brief, Monahan states that Deputy Gorham "testified that he later interviewed firefighters but did not locate any who had in fact seen Kyle driving the car out of Shullsburg." (Monahan's Br. 6.) In fact, Gorham testified that he had interviewed just two firefighters and neither of them had seen Monahan driving. (R. 152:98.) Gorham testified that he did not continue his investigation into the identity of the firefighter because Monahan had admitted to being the driver. (R. 152:104.) Deputy Gorham was firm in his testimony that a Shullsburg firefighter told Gorham at the scene that he saw a man driving the car. (R. 152:98–99, 104, 129–30.)

fuckin' my tires going off the [edge or ditch] and I could not correct it" (R. 92:Exhibit12, at 01:00–01:04).

Monahan says that the bracketed word in his statement is either "ditch" or "edge." (Monahan's Br. 6.) The State believes that the word is "edge" but agrees it might be "ditch." However, it makes no difference which word Monahan used. What is important is that Monahan said that *his* tires went off the road and that *he* could not correct it.

Monahan's statement to Deputy Gorham was compelling evidence because the recording was played for the jury. (R. 152:93.) The jury was able to hear that Monahan, while clearly in pain, sounded alert and responded appropriately to the deputy's questions. (R. 92:Exhibit12, at 00:11–01:19.)

Monahan's description of the how the crash occurred is significant because it was consistent with the testimony of both parties' crash reconstruction experts. The State's expert, Trooper Thomas Parrott, testified that skid marks indicated that at the beginning of the accident, the vehicle went just off the road onto the shoulder, came back on to the road, and began to spin counterclockwise. (R. 154:110.) The defense expert, Paul Erdtmann, likewise testified at the beginning of the accident the vehicle momentarily went off the edge of the roadway and began to rotate counterclockwise. (R. 160:74.)

4. Monahan was assessed by an air ambulance medic and nurse, who determined that he was "conscious, alert, and oriented times three and answers all questions appropriately." (R. 154:10, 27.) The nurse determined that Monahan's Glasgow score, which assesses a patient's level of

neurological intactness, was at the highest possible score of fifteen. (R. 154:29–30.)

Both the medic and the nurse testified that their report stated that Monahan said that he remembered the accident and appeared to have full recall of the incident. (R. 154:10–11, 27.) Monahan told them that he was the driver of the vehicle. (R. 154:11, 27–28.)

Monahan also said that he was wearing his seatbelt. (*Id*.) That statement conflicted with the testimony of the crash reconstruction experts, who testified that the seatbelts had not been in use. (R. 154:62; 160:65.) Nevertheless, as the court of appeals noted, "[t]estimony from [the nurse and medic] supports the idea that Monahan was sufficiently alert to understand what he was saying when he admitted to [them] that he was the driver." *Monahan*, 2017 WL 1504259, ¶ 24, Pet-App. 110.

5. A nurse who worked at the hospital's neuro/trauma unit testified that the patient record she prepared for Monahan indicated that at 12:30 a.m., after he had undergone surgery, Monahan was alert. (R. 160:5, 9.) His sedation was turned off to allow the staff to conduct a thorough neurological examination. (R. 160:9.) The nurse's report stated that Monahan "has remained calm while sedation has been off and is able to indicate that he understands his injuries and where he is." (*Id*.) She testified that Monahan was very calm and understood directions and that he was neurologically intact, with an understanding of what was going on in his surroundings. (R. 160:16.)

The nurse reported that Monahan, who could not speak because he was intubated, asked for a pen and paper. (R. 160:9–10.) According to the nurse's report, Monahan "wrote that he remembered the accident, writing that he was

going too fast over a hill and lost control of the vehicle." (R.160:9.)

Monahan's written statement in the hospital that he was going too fast and lost control is powerful evidence that he was the driver. There was nothing even arguably suggestive about the circumstances surrounding that statement; to the contrary, Monahan asked for a pen and paper. And before he wrote that statement, his sedation had been turned off and he was calm and neurologically intact.

As the court of appeals pointed out, "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 [the flight medic, the flight nurse, and the hospital nurse] are unreliable." *Monahan*, 2017 WL 1504259, ¶ 25, Pet-App. 111. Monahan makes no attempt to do so in his brief in this Court, either.

In all of the statements he made about the crash, Monahan only once denied that he was the driver. Trooper Ryan Zukowski testified that when he interviewed Monahan ten days after the crash, Monahan said that he had no idea who was driving. (R. 153:48.) However, when Trooper Zukowski met with Monahan several months later to collect a DNA sample, Monahan said as he signed a consent form, "It doesn't matter, you know, I wasn't driving." (R. 153:57–58.)

Monahan spoke to Trooper Parrott in July, 2012, more than ten months after the crash. (R. 154:85.) Parrott testified that Monahan said that the last thing he remembered was holding Ms. Cushman by the left hand, apparently referring to Monahan's left hand, but that Monahan never denied being the driver or said that Ms.

Cushman was driving. (R. 154:96, 98–99.) Responding to Parrott's comment that "there are a lot of times where I have the good guys make bad mistakes," Monahan said, "I just really can't . . . I don't know how to answer that because it just happened. It's not like I meant to it—to F'ing happen." (R. 154:93–94.)

The seat position evidence. The position of the front seats in the crashed vehicle provided compelling evidence that Monahan was the driver. The driver's seat was positioned four inches farther back than the front passenger seat. (R. 153:92.) Trooper Zukowski testified without contradiction that the seat position would not have changed on impact because the crash was so violent that it cut the electricity to the power seats. (R. 153:19, 95.)

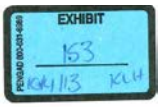
Ms. Cushman was about six inches shorter than Monahan—she was about five feet, six inches tall and Monahan is six feet to six feet, one inch tall. (R. 154:129–30.) Ms. Cushman's mother testified that when Ms. Cushman was driving "[s]he would always have her seat as close up to the steering wheel as she possibly could." (R. 155:115.)

To counter the State's seat position evidence, the defense expert, Paul Erdtmann, obtained a car of the same make, model, and year as Ms. Cushman's car, set up the seat and steering wheel positions in the same positions as Ms. Cushman's car, and had individuals who were about the same size and stature as Monahan and Ms. Cushman sit in the vehicle. (R. 160:82–86.) Erdtmann testified that the woman was able to reach the steering wheel without leaning forward and that "her feet are comfortably in front of her, and she's able to reach both the brake pedal and the accelerator pedal." (R. 160:88.) Erdtmann also testified that the male model was able to sit comfortably in the passenger seat without his knees touching the glove box. (R. 160:89.)

He opined that the seat position did not exclude either of the occupants from being in the driver's seat or passenger seat. (R. 160:90.)

But the photographs of Erdtmann's demonstration, which were shown to the jury (R. 160:82), painted a different picture, particularly with respect to the driver's seat. The photos show that while the female model was able to reach the steering wheel and pedals, she had to extend her arms and legs to do so.

Saab – Female Model in the Driver Seat (Exemplar Saab)



Erdtmann photo: 0136.JPG (8/9/2013)

(R. 101:Exhibit 153.)

That position was inconsistent with the undisputed testimony of Ms. Cushman's mother that Ms. Cushman "would always have her seat as close up to the steering wheel as she possibly could." (R. 155:115.) And, her mother also testified, the woman in Erdtmann's reconstruction "is much farther back than Rebecca would have been."

(R. 155:117.) The defense did not present any evidence that contradicted Ms. Cushman's mother's testimony about Ms. Cushman's driving position.

Monahan's brief gives short shrift to the seat position evidence—a mere two sentences. (Monahan's Br. 27–28.) In doing so, he understates the strength of that evidence. He writes that Ms. Cushman's mother "testified that her daughter preferred to have her seat far forward" (*id*. 28), but she actually testified that Ms. Cushman "would always have her seat as close up to the steering wheel as she possibly could" when driving. (R. 155:115.) Nor does he acknowledge Ms. Cushman's mother's testimony that the woman in Erdtmann's reconstruction "is much farther back than Rebecca would have been." (R. 155:117.)

Crash reconstruction evidence. The State's crash reconstruction expert, Trooper Parrott, examined the physical evidence from the scene, including tire marks, the damage to the vehicle, the topography of the roadway, the furrowing of the ground that occurred when the vehicle went off the road, and the location of debris, as well as speed information derived from GPS data, DNA evidence, and witness statements. (R. 154:42–136.) Based on that information, Trooper Parrott reconstructed the sequence of events during the crash and concluded that Monahan was driving when the car crashed. (*Id*.)

Trooper Parrott testified that the window on the front passenger side of the car was open when the car crashed and that the driver's side front window was closed and remained intact. (R. 154:61.) He calculated that the car was going between 87 and 98 miles an hour at the beginning of the crash. (R. 154:67.)

The crash began, Parrott testified, when the car went off the right edge of the road, came back onto the roadway, and started to rotate counterclockwise. (R. 94:Exhibit 75:1–2; 154:66–67, 110.) The car skidded across the road, went into a ditch, and bottomed out, furrowing the ground as it slid in the ditch. (R. 94:Exhibit 75:2–4; 154:66, 112.) As the car slid sideways in the ditch, with the front end facing away from the road, it went airborne and began to tumble sideways. (R. 94:Exhibit 75:4; 154:66, 108–09.) The car then hit the ground and began an end-over-end rollover that continued until it tumbled to its final rest. (R. 154:114–15.)

Parrott testified that, in general, "those occupants that are closest to the leading edge of the vehicle as it rolls will be the first to come out" and that "[t]he leading edge in this case was the passenger's side of the car." (R. 154:130.) He also testified that Ms. Cushman was found beyond the point where the car first went airborne and that the car continued past her, indicating that she came out first. (R. 154:131–32, 134.) Monahan was found beyond the car's final resting place, which indicated that he was the last person out of the car. (*Id*.)

The condition of the clothing worn by Monahan and Ms. Cushman was part of evidence that led Trooper Parrott to conclude that Ms. Cushman was in the passenger seat. The furrowing of the car in the ditch caused dirt to enter the passenger side of the car. (R. 154:117.) Parrott testified that Ms. Cushman's clothing had a "great deal of dirt on them" (R. 154:122) and that Monahan's clothing had "dramatic[ally]" less dirt on them than Ms. Cushman's clothing (R. 154:128).

Trooper Parrott testified that based on all the information available to him, it was not possible for the

driver of the car to have been ejected first. (R. 154:135–36.) He opined that Monahan was the driver. (R. 154:136.)

The defense crash reconstruction expert, Mr. Erdtmann, testified that it was equally possible that Monahan and Ms. Cushman was the driver. (R. 160:95). His ultimate opinion was that it cannot be determined which of them was driving. (R. 160:135.)

Erdtmann agreed with Trooper Parrott that Ms. Cushman was the first occupant to be ejected from the vehicle. (R. 160:94, 100, 113.) He described the two scenarios under which it was possible for Monahan or Ms. Cushman to have been the driver even though Ms. Cushman was ejected first. (R. 160:92–100.) In the scenario in which Ms. Cushman was the driver, Erdtmann testified, she was ejected through the sunroof as the car rolled over. (R. 160:94.)

Erdtmann testified that the front airbags deployed at the beginning of the car's furrowing in the ditch (R. 160:121–22), before it began to roll over (R. 160:76–78). He contended that even though the vehicle was traveling mostly sideways, there was sufficient front-to-rear deceleration when the vehicle was furrowing to cause the front airbags to deploy. (R. 160:121–23.)

Trooper Parrott testified on rebuttal that airbag system modules do not "wake up, let alone deploy" until a vehicle experiences one to two G's of deceleration. (R. 155:89.) He testified that the Cushman vehicle would not have experienced even one G prior to it striking the ground after rolling over end-to-end and that it was not possible for the airbag to have deployed when it went into the ditch and began furrowing. (R. 155:90.) He testified that Ms. Cushman would have been ejected before the front airbags deployed. (R. 155:91.)

Trooper Parrott's rebuttal testimony refuted Erdtmann's description of the scenario under which Erdtmann believed that Ms. Cushman could have been the driver. Monahan did not present any evidence to challenge Trooper Parrott's rebuttal testimony or otherwise rehabilitate Mr. Erdtmann's testimony on that point.

In addition, Erdtmann acknowledged on cross-examination that witness statements are one source of information that may be considered when determining what happened in a crash. (R. 160:136–37.) But, he testified, he had given no weight to Monahan's multiple statements that he was the driver because those statements were inconsistent with Monahan's later statement to Trooper Parrott. (R. 160:135–37.) Erdtmann's wholesale disregard for Monahan's multiple statements that he was the driver further undermined his conclusion that either occupant could have been the driver. [3]

DNA evidence. A DNA analyst from the State Crime Lab found testable biological material on one item, the driver's side airbag. (R. 153:151–54.) She testified that her analysis revealed a mixture of two individuals consisting of a

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[3] In the court of appeals, Monahan asserted that Trooper Parrott's accident reconstruction "depended on" Monahan's post-crash statements. (Monahan's court of appeals reply brief at 3.) Trooper Parrott testified that he had spoken with the flight EMT and with Monahan and had relied upon their statements. (R. 154:84.) But he explained that when he relies on witness statements, those statements "could be one component to many pieces of the puzzle" and that his investigation and reconstruction would continue even if witness statements were available. (R. 154:84–85.) As the foregoing summary of Trooper Parrott's testimony shows, his investigation and crash reconstruction involved far more than consideration of witness statements.

major component and a minor component. (R. 153:154.) Monahan was the source of the major component (R. 153:154–55). The analysis of the minor component was inconclusive; the analyst was unable to include or exclude Ms. Cushman as the source of the minor component or even determine whether the minor component came from a male or female. (R. 153:155.)

Monahan's crash reconstruction expert, Mr. Erdtmann, testified that although the State Crime Lab could not identify the second contributor, he believed it likely was Ms. Cushman because she was the other person in the vehicle. (R. 160:80–81.) But he acknowledged on cross-examination that he had no training or experience in DNA analysis and that his opinion regarding the identity of the second contributor was "[t]o a reasonable degree of engineering certainty" rather than to a "DNA analysis certainty." (R. 160:114, 116.)

The defense evidence. In addition to his crash reconstruction expert, who could say only that he could not tell who the driver was (R. 160:95, 135), Monahan put on several witnesses in an attempt to show that Ms. Cushman was driving at the time of the crash. Their testimony fell far short of accomplishing that goal.

Linda Scott testified that Ms. Cushman was driving when Cushman and Monahan left the Leahy residence. (R. 160:147–48.) But her testimony was undermined considerably by her description of the vehicle: she described it as "a small little sports car." (*Id.*) In fact, Ms. Cushman's car was a 2001 Saab 9-5 station wagon. (R. 160:82.) The jury was shown a picture of the intact 2001 Saab 9-5 station

wagon that Mr. Erdtmann used in his demonstration (R. 101:Exhibit 134; 160:82)[4], and by no stretch of the English language could that station wagon be described as a "small little sports car."

Jason Scott testified that when Monahan and Cushman left the party, they walked past him and exchanged greetings, walked to the vehicle, and that she got in the driver's side and that they drove off. (R. 160:157.) Mr. Scott gave varying estimates of how far away Monahan and Ms. Cushman were when they got in the car, ranging from 100 feet to 200 feet to 100 yards before testifying that the distance was that from the witness seat to the back of the courtroom. (R. 160:160.)

Mr. Scott's testimony not only was inconsistent with respect to how far away Monahan and Ms. Cushman were when he saw them get in the car, it also conflicted with Monahan's testimony about what happened when he and Ms. Cushman left the Leahy residence. Monahan testified that at some point Ms. Cushman had wandered away from him and he went looking for her. (R. 155:40.) Someone told

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him that she was sitting in her car. (*Id*.) He went to her and asked her what was going on and whether she was bored. (R. 155:40–41.) She told him that she was tired and wanted to go. (R. 155:41.) He said that they could go "[a]nd then I hopped in and we left." (*Id*.)

Monahan testified that Ms. Cushman was driving when they left the Leahy residence. (R. 155:41.) But he did not testify that she was driving between the stop in Shullsburg and the point where the car went off the road. Rather, he testified that he did not recall anything between the time they left the Leahy party and waking up in the hospital. (R. 155:41–42.)

The excluded evidence. The trial court excluded GPS evidence regarding the vehicle's speed between the time it left Shullsburg at about 4:23 p.m. and its arrival at the party at the Leahy residence at 4:39 p.m. and between the time it left the Leahy residence at 7:39 p.m. and its arrival in Shullsburg at 7:49 p.m. (R. 61:1–4; R. 149:38–39, 45, Pet-App. 126–27, 133.) Monahan argues that evidence that Ms. Cushman "was driving her car at 80, 90, and 100 miles per hour a few minutes before that car left the road at 90 miles per hour" was relevant "because it shows she was driving at high speeds in the moments before her car crashed at high speed." (Monahan's Br. 17.) But even if the jury would infer from the GPS evidence that Ms. Cushman also drove very fast, that would have no impact on all of the other evidence that proved that Monahan was driving at the time of the crash.

The State recognizes that the prosecutor, in her closing argument, argued that it made no sense for Ms. Cushman, who was unfamiliar with the area, to have been driving at speeds of 40 to 50 miles an hour over the speed limit. (R. 156:32, 44–45.) If the jury believed the

Scotts' testimony that Ms. Cushman was driving when she and Monahan left the Leahy residence, evidence that the car was being driven very fast between the Leahy residence and Shullsburg would have undercut the inference the prosecutor was asking the jury to draw.[5] But the prosecutor also told the jurors that they did not "have to just rely on your common sense. We obviously had to put on evidence to meet our burden, and we did that." (R. 156:32.) The prosecutor then explained at length and in detail why the evidence, including the crash reconstruction evidence, the seat position evidence, the DNA evidence, and Monahan's own statements, satisfied the State's burden. (R. 156:32–48.)[6]

This Court held in *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637, that the admission of inculpatory evidence in violation of the defendant's right to confrontation was harmless error even though the prosecutor referred to that evidence "twice during opening statements, four times during closing argument, and once again during rebuttal." *Id.* ¶ 62. The Court determined that the error was harmless because "the nature of the references was brief" and the improperly admitted evidence "was not

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[5] Monahan was the only witness who testified that Ms. Cushman was driving the car when they drove from Shullsburg to the Leahy residence. (R. 155:35.)

[6] The State notes that the assistant attorney general who delivered the closing argument was not part of the prosecution team when the circuit court excluded the GPS evidence; her first appearance for the State was at trial. (R. 149:1–2; 150:1, 3; 151:1, 5–6.) Although it has no bearing on the harmless error analysis, the State did not intentionally "exploit" the absence of the excluded evidence.

particularly important to the determination of [the defendant's] guilt." *Id.* ¶ 63.

So, too, in this case, the prosecutor's comments that Ms. Cushman would not be driving well over the speed limit because she was unfamiliar with the rural road were brief: 15 transcript lines (R. 156:32, 44–45) out of 24 pages of the prosecutor's closing argument (R. 156:23–28) and no mention at all in 11 pages of rebuttal argument (R. 156:82–93). Moreover, those comments were not important to the determination of Monahan's guilt because the prosecutor argued that even if the jury believed that Ms. Cushman was driving when she and Monahan left the Leahy party, the GPS evidence showed that there was a two-minute stop in Shullsburg and that other evidence, including Monahan's statements, the seat position, and the DNA, showed that Monahan had been driving when the car crashed (R. 156:84–85).

Monahan argues that because the GPS speed evidence was excluded, "the jury heard the state's story, but not Mr. Monahan's." (Monahan's Br. 29.) But the speed evidence, though relevant, would not have been particularly probative in light of all of the other evidence that demonstrated that Monahan was driving the car at the time of the fatal crash. As the court of appeals correctly concluded, "considering the trial as a whole, . . . 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." *Monahan*, 2017 WL 1504259, ¶ 40, Pet-App. 116.

Given the nature and the strength of the State's case, it is clear beyond a reasonable doubt that the jury would have convicted Monahan even if it had heard the excluded evidence about the speed of the vehicle. This court should

conclude, therefore, that the exclusion of the GPS speed evidence was harmless error.

III. Monahan's argument relies on an erroneous characterization of harmless error review.

Monahan's argument that the exclusion of the GPS evidence was not harmless is based on an incorrect understanding of harmless error law. He begins correctly by citing this Court's statement in *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270, that, to find an error harmless, "this court must be satisfied, beyond a reasonable doubt, not that the jury could have convicted the defendant . . . but rather that the jury would have arrived at the same verdict had the error not occurred." (*See* Monahan's Br. 24.) But his argument goes off course when he states that because "a jury is free to choose among reasonable inferences," "to find a trial error harmless, an appellate court must be convinced that there is no set of reasonable inferences a jury could draw that would create a reasonable doubt of guilt." (*Id*. 24–25.) "Stated another way," Monahan asserts, "the question is whether the evidence permits any set of reasonable inferences consistent with reasonable doubt—when viewed in the light most favorable to the defendant." (*Id*. 25.)

There are several flaws in Monahan's contention that a court making a harmless error determination must view the evidence in the light most favorable to the defendant.

1. The only case that he cites to support that argument, *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), is not a harmless error case. Rather, the issue in *Mendoza* was whether the trial court erred when it refused the defendant's request for jury instructions on lesser-included offenses. *See id*. at 131. This Court held that

"neither the trial court nor this court may, under the law, look to the 'totality' of the evidence . . . in determining whether the instruction was warranted." *Id.* at 152. "To do so," the Court held, "would require the court to weight the evidence accepting one version of facts, rejecting another and thus invade the province of the jury." *Id.* The question "is not what the totality of the evidence reveals but rather, whether a reasonable construction of the evidence will support the defendant's theory viewed in the most favorable light it will reasonably admit of from the standpoint of the accused." *Id.* at 153 (quotation marks omitted).

This "minimal quantum of 'some evidence'" remains the standard for determining whether a defendant is entitled to a requested jury instruction. *State v. Stietz*, 2017 WI 58, ¶ 59, 375 Wis. 2d 572, 895 N.W.2d 796. It is not, however, the standard for determining harmless error.

2. Under Monahan's "most favorable light" formulation of the harmless error test, which requires only "whether a jury *could* draw reasonable inferences favorable to the defendant" (Monahan's Br. 29), cases in which a court could determine that an error was harmless would be virtually non-existent, if for no other reason that a jury in any case *could* decide not to believe the prosecution's witnesses. But, as both this Court and the United States Supreme Court have observed, "[t]o set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)); *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189 (same).

3. Monahan makes no attempt to reconcile his "most favorable light" standard with this Court's recognition that the nature and overall strength of the State's case are appropriate factors to consider in a harmless error analysis. *See Hunt*, 360 Wis. 2d 576, ¶ 27; *Hale*, 277 Wis. 2d 593, ¶ 61. Indeed, Monahan's brief does not acknowledge that those are proper factors for a court to consider. (*See* Monahan's Br. 14–30.)

In two recent cases, this Court has held that a trial error was harmless based on the strength of the State's case. In *State v. Anthony*, 2015 WI 20, 361 Wis. 2d 116, 860 N.W.2d 10, the defendant was charged with first-degree intentional homicide. *Id.* ¶ 4. To support his claim of self-defense, the defendant intended to testify at trial. *Id.* ¶ 2. But the trial court refused to allow him to testify because he insisted that when he testified, he would disobey the court's evidentiary ruling. *Id.* ¶¶ 2–7.

This Court held that even if the trial court erred when it prohibited the defendant from testifying in his own defense, that error was harmless. *Id.* ¶ 102. The Court noted that a reviewing court should consider "(1) the importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and (4) the overall strength of the prosecution's case" when determining whether the denial of the right to testify was harmless beyond a reasonable doubt. *Id.* ¶ 102.

This Court said that "[t]he first two factors weigh in [the defendant's] favor, as it is clear that [his] self-defense testimony was important to his defense, and no other witness could have provided that evidence. *Id.* ¶ 103. "As a

result, [the defendant] had no way to rebut the State's allegation that he intentionally killed [the victim]." *Id.*

"However," the Court held, "the latter two factors clearly favor the State, and, in our view, tip the scales in support of harmless error." *Id.* ¶ 104. The Court reached that conclusion because "the evidence of [the defendant's] guilt was substantial" and "[t]he majority of evidence presented at trial contradicted [his] self-defense theory, thereby contributing to the overall strength of the State's case." *Id.*; *see also id.* ¶ 110 (A.W. Bradley, J., concurring) (agreeing with the majority that "any error was harmless" because "[t]he evidence of the defendant's guilt was substantial").

This Court reached the same conclusion in *State v. Nelson*, 2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317. The defendant in *Nelson* was convicted following a jury trial of sexual assault of a child. *Id.* ¶ 1. The trial court precluded her from testifying because, although she wanted to challenge the victim's description of how the sexual assaults occurred, her testimony was not relevant to the elements the State needed to prove. *Id.* ¶¶ 15–16.

The State conceded on appeal that the circuit court had erred when it precluded the defendant from testifying. *Id.* ¶ 21. This Court did not decide that issue because it determined that the error was harmless. *Id.* ¶¶ 21, 23.

The Court noted that the defendant "wished to offer a different account of the timing of the events and testify that she did not unbuckle [the victim's] pants," though she did not intend to deny that "she had sexual intercourse with [the victim] on three separate occasions and that she knew he was under the age of 16." *Id.* ¶ 48. Rather, the sole theory of

the defense was to put the State to its burden of proving her guilty beyond a reasonable doubt. *Id.* ¶ 49.

The Court acknowledged that "[i]nterjecting an alternative version of events may have made it more difficult for a jury to find [the defendant] guilty beyond a reasonable doubt." *Id.* ¶ 49. "For instance," the Court noted, "it could have cast doubt on [the victim's] ability to accurately recall the assaults." *Id.* But, the Court held, the error was harmless because "the jury could have convicted [the defendant] even if its members did not agree on the timing of the events or who unbuckled [the victim's] pants" and because of "the overwhelming strength of the prosecution's case." *Id.* ¶¶ 50, 51.

Other cases in which this Court has held that trial error was harmless based on the strength of the State's case include *State v. Brecht*, 143 Wis. 2d 297, 319, 421 N.W.2d 96 (1988) ("[G]iven the infrequency of the references in the context of the entire trial and the strength of the State's evidence against Brecht, the State's references to Brecht's silence were harmless beyond a reasonable doubt."), *State v. Grant*, 139 Wis. 2d 45, 53–54, 406 N.W.2d 744 (1987) ("Viewing the error in the context of the entire trial, and considering the strength of the untainted evidence, we conclude that the error was harmless."), and *State v. Fishnick*, 127 Wis. 2d 247, 267, 378 N.W.2d 272 (1985) (holding that the erroneous admission of other-acts evidence was harmless based on "[t]he strength of the untainted evidence").

Monahan's contention that "[a]n appellate court should find an error harmless only if there is no set of reasonable inferences that could give rise to reasonable doubt" (Monahan's Br. 15) conflicts with this Court's recognition that the nature and strength of the State's case

not only are relevant to the harmless error analysis but may in some cases be determinative. In this case, the probative value of the excluded evidence was minor compared to the strength of the State's case. Accordingly, this Court should conclude that the erroneous exclusion of the GPS evidence was harmless.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the court of appeals affirming the judgment of conviction.

Dated this 12th day of January, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-
Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,012 words.

_____
JEFFERY J. KASSEL
Assistant Attorney General

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Dated this 12th day of January, 2018.

_____
JEFFERY J. KASSEL
Assistant Attorney General

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals
Affirming the Lafayette County Circuit Court,
The Honorable William D. Johnston, Presiding

REPLY BRIEF

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

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The exclusion of evidence that R.C. was driving her car recklessly minutes before the crash was not harmless error.

The state takes issue with Mr. Monahan's assertion that an appellate court deciding whether an error was harmless must ask itself whether a jury, drawing reasonable inferences in the defendant's favor, could find reasonable doubt. Respondent's Brief at 32-36.

The state's objection has no merit. How could a court find an error harmless—that is, decide "no reasonable jury" would find for the defendant had the error not occurred, ***State v. Magett***, 2014 WI 67, ¶10, 355 Wis. 2d 617, 850 N.W.2d 42—without asking what a reasonable jury could do? If the correction of the error could lead a reasonable jury, drawing reasonable inferences, to find for the defendant, then by definition, the error is not harmless. You cannot say beyond a reasonable doubt that a jury would convict if you refuse to consider how it might acquit.

And though it is true that ***State v. Mendoza***, 80 Wis. 2d 122, 258 N.W.2d 260 (1977), is about the failure to give a requested jury instruction, what difference does this make? When a jury is erroneously instructed, it cannot decide whether the evidence satisfies the elements. When a jury is not allowed to hear compelling defense evidence, it is likewise prevented from deciding whether the all the evidence establishes guilt beyond a reasonable doubt. If, in deciding whether these errors mattered, an appellate court draws inferences favoring the state, it is not applying the harmless error test. It is stepping into the role of the jury, making a decision—who to believe—that is the jury's alone to make.

This simple notion does not, despite what the state seems to think, mean that the strength of the state's case can't lead to a conclusion of harmlessness, nor that there can never be a harmless error. Respondent's Brief at 33. The key word is "reasonable." Of course a jury can always acquit—it has that power under our Constitution. But the question of harmlessness is not whether a jury could nullify; the question is whether a reasonable jury could find reasonable doubt. Where the state's case is very strong, and the defense one very weak, there comes a point that inferences in the defendant's favor make no sense—they're unreasonable.

But this is just not that case, despite the state's best efforts. To be sure, the state had an expert, who gave a plausible account of how he concluded Mr. Monahan had been the driver. But Mr. Monahan also had an expert, who gave a plausible explanation for why it was impossible, given the physical evidence, to reach any firm conclusion about who was driving.[1] The state argues, in effect, that Trooper Parrott was more credible than Erdtmann, claiming, for example, that Parrott "refuted" Erdtmann's conclusion about when the airbag deployed. Respondent's Brief at 25. What Parrott did was *disagree* with Erdtmann (who had worked as a designer of airbags). The state just wants this court to take Parrott's side in the disagreement. But that's not for an appellate court; it's for a properly instructed jury that has heard all the evidence—including the defendant's.

Likewise, the state wants this court to believe some of Mr. Monahan's statements about the crash, but not others.

[1] As it did in the court of appeals, the state mischaracterizes Mr. Erdtmann's conclusion in its argument, saying he "could say only that he could not tell who the driver was" despite acknowledging in its facts section that he concluded "it cannot be determined who was driving." Respondent's Brief at 27, 9.

Respondent's Brief at 13-19. Again, this question—whether Mr. Monahan really recalled what happened, or whether he was simply, in his post-concussion state, telling people what they wanted to hear (and what had been told to him, by Deputy Gorham)—is a question of credibility. Decisions about credibility are for the jury; a credibility call is not a valid way for an appellate court to declare an error harmless.

As for the remaining evidence—basically, a photo showing a woman of R.C.'s size sitting, apparently comfortably, in the driver's seat as it was positioned, her mother's assertion that she preferred to sit close to the steering wheel, and the fact that Mr. Monahan's DNA was on the steering-wheel airbag, along with one other person's—it falls far short of establishing that no jury could find reasonable doubt.

And despite the state's argument, the evidence Mr. Monahan wanted to introduce mattered. The state understood this when it was fighting to exclude it. It understood this when it was arguing to the jury that R.C. would never have driven as it seems she did.[2] R.C.'s reckless driving moments before the crash was powerful evidence that it was her reckless driving, and not Mr. Monahan's, that caused the accident.

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[2] It's unclear how the state can assert that the prosecutor did not "intentionally exploit" the absence of the GPS evidence. Respondent's Brief at 30. She was not the lawyer at the time the evidentiary ruling was made, but she was co-counsel for the entire trial and gave the entire closing argument. Is the state suggesting she played this role without learning the facts of the case, what the court had let in, and what it had kept out? In any case, Mr. Monahan agrees with the state on the main point—he doesn't need to show this improper argument was intentional.

The evidence against Mr. Monahan is real, but it is not overwhelming. The fact that he did not get to put on a crucial part of his case—that he was deprived of his constitutional right to a complete defense—could very easily have changed the outcome. Mr. Monahan was, and remains, entitled to a fair trial. This court should order that he receive one.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that this court reverse his conviction and sentence and remand the case to the circuit court for a new trial.

Dated this 29th day of January, 2018.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

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Dated this 29th day of January, 2018.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Cross-Respondent-Petitioner

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,
v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Lafayette County, the Honorable William D. Johnston, Presiding

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Wisconsin Association
of Criminal Defense Lawyers

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Defendant-Appellant-Cross-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief in support of Kyle Lee Monahan, to address the oft-cited but likewise oft misunderstood and misapplied standards for assessing whether a given error may be excused as harmless.[1]

While WACDL takes no position regarding application of those standards to the particular facts, it is concerned about the state's attempt to use this appeal as a vehicle to institutionalize a radical theory of "harmlessness" that conflicts with controlling standards and undermines the right to trial by jury by resting the harmless error determination on the particular judge's subjective

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[1] While "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," ***Chapman v. California***, 386 U.S. 18, 23 & n.8 (1967) (citations omitted), this case does not involve that class of "structural errors" that "affect the 'framework within which the trial proceeds.'" ***United States v. Marcus***, 560 U.S. 258, 263 (2010) (citation and some internal marking omitted).

perception of the strength of the state's case rather than on objective standards.

At the same time, Monahan's particular expression of the standard, while properly recognizing an objective standard viewing the evidence most favorably to the defense, inadvertently suggests a more restrictive standard for harmlessness than is justified. The issue is not simply whether the evidence, viewed most favorably to the defense, raises a reasonable doubt, but whether the error impacted that determination.

ARGUMENT

I.

THE WHY AND THE WHAT OF HARMLESS ERROR

The Supreme Court has long recognized that "trial by jury in criminal cases is fundamental to the American scheme of justice." ***Duncan v. Louisiana***, 391 U.S. 145, 149 (1968). The "intended purpose" of a jury trial in a criminal case is to "mak[e] judicial or prosecutorial unfairness less likely;" "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." ***Id.*** at 158, 156. *See also* ***United States v. Martin Linen Supply Co.***, 430 U.S. 564, 572 (1977) ("[Jurors'] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction."). It is a defendant's right to "prefer[ ] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge." ***Duncan***, 391 U.S. at 156.

The jury system also serves as "a fundamental reservation of power in our constitutional structure" for the people to

exercise "control in the judiciary." ***Blakely v. Washington***, 542 U.S. 296, 306 (2004). Hence, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." ***Martin Linen Supply Co.***, 430 U.S. at 572–73 (citations omitted).

The Sixth Amendment's guarantee of a jury trial allocates to actual jurors the exclusive responsibility to render criminal verdicts. Accordingly, such jurors must be the focus of harmless error analysis. ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993). A standard that too easily excuses trial error encourages appellate judges to substitute their subjective views for a jury verdict. ***Id.*** at 280 ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal.").

During the Nineteenth Century, near automatic reversal based on trial errors was deemed necessary to "insure that the appellate court did not encroach upon the jury's fact finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt." Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984). "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." ***Kotteakos v. United States***, 328 U.S. 750, 759 (1946).

In reaction to the perceived abuses, Congress adopted the federal harmless error rule, intended "to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." ***Bruno v. United States***, 308 U.S. 287, 293 (1939); *see* 28 U.S.C. § 391 (1911). The states, including Wisconsin, followed

suite. *See, e.g.*, Wis. Stat. §971.26.

As is often the case, however, reaction to perceived abuses produced overreaction and abuses of it own. As the Supreme Court has recognized, "harmless-error rules can work very unfair and mischievous results" when misapplied. ***Chapman v. California***, 386 U.S. 18, 22 (1967). For instance, at issue in ***Chapman*** was California's rule deeming errors "harmless" whenever courts viewed the evidence as "overwhelming." ***Id.*** at 23 & n.7.

Faced with the extremes – on one side, an argument that constitutional errors can never be harmless, and on the other, the claim that errors are harmless whenever an appellate court views the evidence as sufficiently "overwhelming," – the ***Chapman*** Court chose a middle ground. The Court held that most constitutional errors are subject to harmless error review, but likewise rejected California's "overwhelming evidence" test.

Instead, the Court imposed the now-familiar ***Chapman*** standard, "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** at 24. The Court rejected any suggestion that this constitutional standard is met merely because the remaining evidence untainted by the error could be deemed sufficient for conviction. ***Id.*** at 25-26 ("though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners [citation omitted], it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts.").

For years, this Court "struggled" with finding "a coherent articulable philosophy" balancing the right to trial by jury and the recognition that many trial errors are, in fact, harmless. ***State***

v. Dyess, 124 Wis.2d 525, 540-41, 370 N.W.2d 222 (1985). In ***Wold v. State***, 57 Wis.2d 344, 356, 204 N.W.2d 482 (1973), for instance, it announced a sufficiency test for harmless error:

> The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt.

Id. at 356.

In ***Dyess***, however, the Court firmly rejected the "sufficiency" standard and adopted the ***Chapman*** standard. 124 Wis.2d at 540-45. Regardless whether the error is constitutional, an error is not harmless unless the state meets its burden "to establish that there is no reasonable possibility that the error contributed to the conviction." ***Id.*** at 543. "The court determines whether the error is harmless by assessing the impact of the erroneously admitted evidence on the minds of an average jury, . . . that is, by assessing whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***State v. Poh***, 116 Wis.2d 510, 529, 343 N.W.2d 108 (1984) (citations and footnote omitted).

This Court's subsequent decisions reaffirm that the ***Chapman*** standard provides the proper balance between the right to a jury determination and avoiding unnecessary retrials. *E.g.*, ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis.2d 278, 306, 816 N.W.2d 270, 285; ***State v. Weed***, 2003 WI 85, ¶¶28-29, 263 Wis.2d 434, 666 N.W.2d 485 (reaffirming rejection of "sufficiency of the untainted evidence" standard); ***State v. Harvey***, 2002 WI 93, 254 Wis.2d 442, 647 N.W.2d 189.

Yet, "[a]lthough the ***Chapman*** standard is easy to state, it has not always been easy to apply." ***State v. Hale***, 2005 WI 7

¶61, 277 Wis.2d 593, 691 N.W.2d 637. Though the task may be difficult, it nevertheless must be done. And while doing so, the Court must strive to keep the balance recognized in ***Chapman*** true by protecting the defendant's right to a jury determination of guilt following a fair trial unless the identified error is proved harmless beyond a reasonable doubt.

II.

THE STATE'S PROPOSED TRANSFORMATION OF HARMLESS ERROR ANALYSIS

The state's primary argument reprises the same "overwhelming evidence" theory of harmless error rejected by the Supreme Court in ***Chapman***. There, as the state does here, California argued that appellate determination the evidence was "overwhelming" alone rendered the error harmless. The ***Chapman*** Court rejected that theory. Rather, the relevant question is whether the state has proven beyond a reasonable doubt that the error had no impact on the verdict. *E.g.*, ***State v. Billings***, 110 Wis.2d 661, 668, 329 N.W.2d 192 (1983) ("The court cannot, as the United States Supreme Court has admonished, give too much emphasis to 'overwhelming evidence' of guilt. [citing ***Chapman].*** Emphasizing the sufficiency of untainted evidence independently of the erroneously admitted evidence creates a danger of substituting the court's judgment for the jury's. Rather, the court must inquire whether on the basis of all the evidence there is a 'reasonable possibility' that the constitutional error 'might have contributed to the conviction.'").

This is not to say that the strength of the state's case is irrelevant. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." ***Strickland v. Washington***, 466 U.S. 668, 696 (1984). So too, errors are less likely to have impacted the verdict where the evidence untainted by error is

truly "overwhelming" or undisputed.

However, the state's suggestion that a reviewing court's subjective perception of the evidence *alone* trumps the right to a jury verdict overlooks at least four critical facts. First, as the Supreme Court held in ***Chapman***, the reviewing court's perception of the evidence is not a substitute for the required finding beyond a reasonable doubt that the error had no impact on the verdict; it is merely one factor in making that ultimate determination. The focus is on the impact of the error on the *jury* not the reviewing court. *See also* ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring)

Second, harmless error presents a question of law, ***State v. Moore***, 2015 WI 54, ¶ 54, 363 Wis.2d 376, 864 N.W.2d 827, for which there necessarily is one objectively correct answer, not a factual or discretionary determination for which varying answers may be deemed acceptable based on the subjective views of the particular decision-maker. *Cf.* ***Strickland***, 466 U.S. at 695 (Assessment of prejudice "should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). Just as with appellate review of challenges to evidentiary sufficiency, an objective standard is necessary for harmless error so that reviewing judges do not succumb to the temptation to substitute their subjective views on the evidence for the views of a jury. *See* Edwards, Harry T., *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated*? 70 N.Y.U. L. Rev. 1167, 1170 (1996); *cf.* ***State v. Hanks***, 252 Wis. 414, 416, 31 N.W.2d 596 (1948).

Third, the state overlooks the Supreme Court's recognition in ***Holmes v. South Carolina***, 547 U.S. 319, 330 (2006), that, "[j]ust because the prosecution's evidence, *if credited,* would provide

strong support for a guilty verdict, it does not follow that" other evidence could have no impact. "[W]here the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." ***Id.***

More to the point, the state's argument overlooks the fact that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." ***Id.*** at 331; ***United States v. Wolf***, 787 F.2d 1094, 1098-99 (7th Cir. 1986) (although evidence overwhelming if prosecution witness is believed, improprieties which negatively affected defendant's credibility were prejudicial where jury had reason to doubt prosecution witness).

Finally, the state's proposal that a reviewing court assume that its own subjective views of the evidence necessarily equal those of a jury also overlooks the practical problems with such an approach. As the Seventh Circuit has recognized:

> It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been. *See* Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis.L.Rev. 1147. The lay mind evaluates evidence differently from the legal mind, and while many appellate judges have substantial experience with juries and perhaps great insight into the thinking process of juries, others do not. This is a reason to be wary about invoking the doctrine of harmless error . . . with regard to evidentiary rulings in jury cases.

United States v. Cerro, 775 F.2d 908, 915-16 (7th Cir. 1985) (citations omitted). At the very least, a reviewing court must

account for the fact that a reasonable jury will not necessarily view the evidence the same as the court does.

In an attempt to overcome this defect in its argument, the state tethers its faulty "overwhelming evidence" theory to an equally invalid assertion that, in assessing whether an error is harmless, it is not necessary to assess the evidence most favorably to the defendant. State's Brief at 32-37. Once again, the state's position overlooks both logic and controlling law. *See, e.g.*, Wis. J.I.–Crim. 190 ("The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses").

Given the state's burden of proving harmlessness beyond a reasonable doubt, it necessarily follows that the evidence and impact of the trial error must be viewed most favorably to the defense. If a reasonable juror, based on the evidence untainted by the error, could have a reasonable doubt that he or she did not have at the original, defective trial, then the state necessarily has not proven harmlessness beyond a reasonable doubt. And, in assessing whether a reasonable juror reasonably could reach a particular result, it is necessary to view the evidence most favorably to that result. *E.g.*, ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

It therefore is not surprising that controlling authority likewise requires that, in assessing harmlessness or resulting prejudice, the evidence must be viewed most favorably to the defense. In ***Neder v. United States***, 527 U.S. 1, 19 (1999), for instance, the Supreme Court rejected the state's theory here that the reviewing court should act effectively as a "second jury" when assessing harmlessness. Instead, the Court held that, where the defendant contested the issue affected by the error, and the evidence viewed most favorably to the defendant

supports his theory, it is for the jury to determine whether to believe it. ***Id.*** ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless").

This Court's decisions recognize the same basic principle. *See, e.g.*, ***Jenkins***, 2014 WI 59, ¶¶50-65; ***id.***, ¶¶69-98 (Crooks, J. concurring); ***State v. Wilson***, 149 Wis.2d 878, 898-901, 440 N.W.2d 534 (1989) (failure to instruct on lesser-included offense is reversible error where evidence, viewed "in the most favorable light it will reasonably admit from the standpoint of the accused," provides reasonable grounds for acquittal on greater charge and conviction on lesser).[2]

III.

MONAHAN'S SUMMARY OF THE CONTROLLING STANDARD

Compared to the state's attempt to radically transform harmless error analysis, Monahan's error is minor. He asserts that "the question is whether the evidence permits any set of reasonable inferences consistent with reasonable doubt—when viewed in the light most favorable to the defendant." Monahan's Brief at 25. As such, he inadvertently omits the *impact of the error* from his statement of the standard.

As Monahan notes elsewhere, Monhana's Brief at 24, the issue is whether *the error* is harmless beyond a reasonable doubt, not simply whether a hypothetical jury could have acquitted based on the evidence presented. After all, whatever doubts a reasonable jury might have had based on the evidence presented

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[2] The state's suggestion, State's Brief at 32-33, that evidence must be viewed most favorably to the defense when deciding whether the trial court erred by denying a lesser-included offense instruction but not when assessing whether that error was harmless makes no sense. It understandably cites no authority for that position.

at trial, Monahan's jury convicted him based on that evidence. The question is whether the state can meet its burden of proving that the identified error did not contribute to that verdict.

A more accurate statement of the issue thus is whether it is clear beyond a reasonable doubt that no reasonable juror, viewing all of the evidence most favorably to the defense in light of the erroneously excluded evidence, would have reasonable doubt regarding the state's evidence beyond reasons available at the original trial. Alternatively, has the state proven beyond a reasonable doubt that no reasonable juror could find that the erroneously excluded evidence, viewed most favorably to the defendant, either raised any new reasons to doubt the state's evidence or strengthened any reasons to doubt that already existed given the original evidence? Unless the state has met that burden, then the error is not harmless and Monahan is entitled to a new trial.

CONCLUSION

WACDL therefore asks that the Court reject the state's novel interpretation of harmless error analysis. Harmlessness must be based on objective standards rather than a particular judge's or court's subjective views of the supposed strength of the state's case.

Dated at Milwaukee, Wisconsin, February 12, 2018.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

_____

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300
henaklaw@sbcglobal.net

RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 3,000 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 12th day of February, 2018, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak

Monahan WACDL Amicus Brief.wpd