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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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