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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 A JUDGMENT OF CONVICTION ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM D. JOHNSTON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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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.)

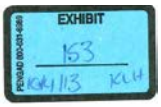
Ms. Cushman was about six inches shorter than Monahan—she was about five feet, six inches tall and Monahan is six feet to six feet, one inch tall. (R. 154:129–30.) Ms. Cushman's mother testified that when Ms. Cushman was driving "[s]he would always have her seat as close up to the steering wheel as she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

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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

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 12th day of January, 2018.

_____
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Assistant Attorney General