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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1404-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

GEORGE STEVEN BURCH,

Defendant-Appellant.

ON CERTIFICATION FROM THE WISCONSIN COURT OF APPEALS FROM A JUDGMENT OF CONVICTION ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ZAKOWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
oneilar@doj.state.wi.us

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STATEMENT OF THE ISSUES

A jury convicted George Burch of killing Nicole VanderHeyden. Police initially thought that VanderHeyden's boyfriend, Douglas Detrie, had killed her. But Detrie's Fitbit showed that he had not taken enough steps during the relevant time to be the killer.

Burch's DNA was at the crime scene. The Brown County Sheriff's Office (BCSO) learned that the Green Bay Police Department (GBPD) had previously extracted his cell phone's contents with his consent in an unrelated investigation. The BCSO reviewed the extracted data and found additional evidence connecting Burch to the crime.

Burch contends, first, that the circuit court erred when it held that the BCSO did not violate the Fourth Amendment when it examined his phone's data. This Court should conclude that because the GBPD extracted the data with Burch's consent, the BCSO's examination of it did not violate the Fourth Amendment. The BCSO also acted in good faith. Finally, remand to allow the circuit court to assess the independent-source doctrine may be appropriate.

Burch also argues that the circuit court erred in admitting the Fitbit evidence without an expert witness and over his authentication and confrontation objections. This Court should reject these claims.

Finally, if this Court finds that the circuit court erred by admitting either the phone-data or Fitbit evidence, it should conclude that any error was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has already scheduled this case for oral argument. As with any case this Court accepts for review, publication is appropriate.

STATEMENT OF THE CASE

VanderHeyden's disappearance

VanderHeyden and Detrie were in a relationship. They lived together in the Town of Ledgeview and had a young son. (242:117–21) On the night of May 20, 2016, VanderHeyden, Detrie, and others went to a concert at a Green Bay bar called the Watering Hole. (242:11–14, 53, 122–24.) After the concert, the group decided to go to another bar, the Sardine Can, located on South Broadway. (242:18–19, 228–29.) Detrie had gotten separated from VanderHeyden and stayed at the Watering Hole with another member of the group, Greg Mathu. (242:17–19, 57–58, 127–28.) They planned to meet later with the rest of the group. (242:56–57.)

VanderHeyden sent Detrie angry text messages, calling him abusive and accusing him of infidelity. (242:163–67.) She got upset when Detrie did not answer her phone call. (242:22–23.) VanderHeyden left the Sardine Can and walked away. (242:24–28.)

Detrie and Mathu left the Watering Hole in Mathu's car. (242:58, 169.) On the way, Detrie called VanderHeyden, who "wasn't making any sense." (242:170.) Mathu asked VanderHeyden where she was so they could pick her up, but her phone shut off. (242:58–59.) Detrie's subsequent calls to VanderHeyden's phone went to voicemail. (242:59–71.) Later analysis showed that VanderHeyden's phone was not manually shut off. (251:41.)

The men looked for VanderHeyden but did not find her. (242:60–61, 171–72.) They went inside the Sardine Can for an hour, leaving at 2:15 a.m. (242:61, 173–75.) No one from the original group was still there. (242:61.) Mathu drove Detrie home, arriving around 2:30 or 2:45 a.m. (242:64, 177.)

Inside, Detrie spoke with the babysitter, mentioning the argument with VanderHeyden. (240:185–87, 198; 242:178.) Concerned, Detrie had the babysitter call VanderHeyden three or four times, but her phone was either dead or off. (240:185–86.) Mathu and the babysitter left. (240:185–86.) Detrie called the babysitter at 3:07 a.m. and asked her to keep calling VanderHeyden. (240:188–89; 242:179–80; 251:44.)

Detrie went to sleep. (242:180.) He woke up to feed his son around 6:30 a.m., went back to bed and got up again around 10:30 a.m. (242:180.) VanderHeyden was not home, and he sent messages to people asking if they had heard from her. (242:183–84; 251:46–47.) He also tried calling her, but her phone was still off. (242:184.) That afternoon, Detrie reported VanderHeyden missing. (242:185.)

The discovery of VanderHeyden's body and the investigation of Detrie, his arrest, and eventual release

By the time Detrie called police, three people had found VanderHeyden's dead body in a field about three miles from her and Detrie's house. (239:52–94; 240:29–33, 259.) The body's face had "obvious trauma," and its back had scratches and abrasions. (240:15.) The body had only socks and a pink wristband on it. (240:15.) Dental records were needed to conclusively identify VanderHeyden. (240:26.) The cause of death was ligature strangulation and blunt-force trauma to the head. (240:117.)

The officer who took Detrie's missing-person report said that he did not have any visible injuries. (240:262.) Detrie was worried and was "very forthcoming, cooperative" during the interview. (240:263–64, 268.) Detrie did not try to hide VanderHeyden's text messages to him. (240:284.)

Just before midnight, Detrie voluntarily went to the BCSO for an interview. (240:270–71.) Detrie "wanted to provide as much information as possible to find [VanderHeyden]." (245:35, 46.) The interviewers did not see any injuries on Detrie's arms and hands. (245:47.) Detrie mentioned that he had seen a news report about a body found in a field and asked if it was VanderHeyden's. (245:36–37, 46.) When the interviewers responded that the body was possibly hers, Detrie "pretty much lost it, he was crying, sobbing, seemed to be hyperventilating." (245:36–37, 46–47.)

Early on the morning of May 22, law enforcement searched Detrie's house with a warrant. (240:169–71.) When told about the search, Detrie told an officer, "[T]hat's fine, you know, whatever, I understand, whatever you guys need to do." (245:37–38.)

Later that morning, law enforcement found clothes and a lanyard with VanderHeyden's photo on it on a highway ramp. (240:165–66, 171–73.)

On May 23, Detrie's neighbor told police that he had found blood and a piece of a cord in his front yard the morning of May 21. (245:100–04.) Police found hairs in the blood, and hair pins and two pieces of wire in the yard. (245:145.)

The night of May 23, police again searched Detrie's house with a warrant. (245:152.) They seized a pair of shoes with apparent blood on them and another pair that had a pattern on the bottom that looked consistent with a pattern

on VanderHeyden's body. (246:42–44.) They also found blood on the garage floor near VanderHeyden's car. (246:50.) Her car had smudges and stains that appeared to be blood. (246:50.) Police suspected that the car had been used to transport VanderHeyden's body. (246:50.)

Police arrested Detrie for VanderHeyden's homicide on May 23. (240:283–84; 246:49–50.) Detrie "broke down and started crying" in the police car. (246:51–52.) When officers took a buccal swab from Detrie the next day, "[h]e was crying, his face was red, his eyes were puffy, and he appeared very sad." (245:156.)

As the investigation continued, additional evidence suggested that Detrie did not kill VanderHeyden.

In June 2016, Tyler Behling, a forensic crime analyst with the BCSO, examined the Fitbit app on Detrie's cell phone. (251:50.) It showed that Detrie's Fitbit had registered only 12 steps between 3:10 a.m. and 6:10 a.m. on May 21. (251:50–58.) Detrie's step-activity data from Fitbit, Inc., was consistent with the app's data. (251:12, 51–52.)

The evidence seized from the house did not connect Detrie to the crime. VanderHeyden's car had not moved during the relevant time. (246:61; 255:33–44.) The smudge from her car tested negative for blood. (246:179.) The blood on the garage floor was not human. (246:61, 170.) And only one of the suspected blood spots on the shoes turned out to be blood, and none contained VanderHeyden's DNA. (246:61, 172–73.)

Finally, DNA testing of items sent to the State Crime Laboratory revealed a "consistent unknown male Y profile" that did not match Detrie's profile. (246:61–62, 184–85.)

These developments led law enforcement to release Detrie from custody. (246:51–53, 61.)

Burch's emergence as a suspect

A crime lab analyst found the unknown Y profile, "Y Profile 1," on swabs from VanderHeyden's body and the cord found in the neighbor's yard. (149; 150; 246:180–84, 191–92.) VanderHeyden's DNA was also on the cord, swabs taken from the street outside the neighbor's house, and the clothes police recovered on the road. (246:180–86.)

Autosomal DNA testing of the socks on VanderHeyden's body revealed DNA matching both VanderHeyden's profile and "Y Profile 1." (151; 246:192–94.) The analyst entered the "Y Profile 1" into a national database, and it matched Burch's profile. (246:194–95.)

The BCSO learned about the DNA match in August 2016 and began investigating Burch. (246:93, 195.) The office discovered that the GBPD had contact with Burch in June 2016 for a hit-and-run investigation and had downloaded the data from his cell phone with his consent. (246:94.) The BCSO retrieved the data from the GBPD and learned that Burch had a Gmail account. (246:95–96.)

The BCSO got a search warrant for the Google Dashboard records associated with Burch's account. (246:95–96; 251:73.) These records can show where a cell phone was located using data collected from cell phone towers, Wi-Fi, and the phone's GPS. (246:95; 251:72–74.) Burch's records showed that, at 2:45 a.m. on May 21, Burch's phone was in the area of a bar on South Broadway. (251:79–80.) It then travelled to his nearby residence for a short time before moving into DePere and then to near Detrie and VanderHeyden's residence. (141:6–8; 142:1–2; 251:77–89.) Burch's phone was there from 3:01 a.m. until 3:52 a.m. (251:80–88.) The phone was next in the field where VanderHeyden's body was found from 3:58 a.m. until just

after 4:00 a.m. (142:3–6; 251:77, 89–90.) It was back at Burch's residence by 4:28 a.m. (251:77, 91.)

In addition, the internet history in the data showed 64 viewings of news stories about VanderHeyden's disappearance. (141:3–5; 251:66–68.)

The BCSO arrested Burch on September 7, 2016 and took a buccal swab from him. (246:98–99.) The DNA profile from this swab confirmed that Burch was the source of the DNA on VanderHeyden's sock and that his DNA was consistent with "Y Profile 1." (152; 246:16–98, 200.) The State charged Burch with first-degree intentional homicide. (8.)

Pretrial proceedings

At a pretrial hearing, Burch asked for a *Daubert*[1] hearing on any expert that the State would be calling from Fitbit to testify about the data taken from Detrie's Fitbit. (231:3.) After learning that the State would not be calling such a witness, Burch moved to prevent the State from introducing any Fitbit-related evidence. (47; 63; 64.) Burch argued that the evidence required expert testimony and authentication by a witness who worked for the company. (47:2; 64:4–12.) He also claimed that admission of the evidence without these witnesses would violate the Confrontation Clause. (7:2; 64:21–22.)

The circuit court denied Burch's motion. (70; 231.) The State will discuss the court's reasoning in the argument section of this brief.

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Burch also moved to suppress the Google Dashboard data and internet history discovered from his phone data. (68.) The circuit court denied Burch's motion after an evidentiary hearing. (101; 234.) The State will discuss the court's decision in the argument section of this brief.

Jury trial

At trial, the State presented the evidence from the Fitbit, Google Dashboard, and Burch's phone data's internet history through Behling. (251:48–92.)

Burch testified that he met VanderHeyden at a bar on Broadway early on May 20. (252:112–19.) When the bar closed, they left together, and Burch invited her back to his residence. (252:120–21.) He said that she agreed, and they went to his house. (252:121–22.) They later left, and VanderHeyden gave Burch directions to her house. (252:122–23.) Burch said that she told him to park outside because a light was on in the house. (252:125.) He said that they talked for a few minutes and then began kissing. (252:125–26.) Burch claimed that this progressed to their having sexual intercourse, with VanderHeyden lying on the back seat of Burch's car and Burch standing outside the rear passenger door. (252:125–33.)

Burch testified that the next thing he remembered was waking up on the ground near the curb with Detrie pointing a gun at him. (252:133, 137, 150.) Burch said that VanderHeyden was on the ground behind his car; she had a bloody face and was not moving. (252:141–42.) Detrie made Burch put VanderHeyden's body in the car. (252:144–45.)

Detrie forced Burch to drive to the field and take VanderHeyden's body out of the car. (252:151–62.) Detrie got distracted, and Burch knocked him down, ran back to his car, and drove away. (252:162–65.)

Burch admitted that he did not tell anyone about what happened. (252:169.) He said that this was because he was on probation and did not want to get sent to prison. (252:169–70.)

The jury convicted Burch of first-degree intentional homicide. (255:158.) The circuit court sentenced him to life imprisonment without the possibility of release. (201.)

Burch's appeal

Burch appealed. (215.) He challenged the circuit court's decision to admit the Google Dashboard evidence and internet history obtained from the BCSO's examination of his cell-phone data. Burch also argued that the circuit court erred by not suppressing the evidence from Detrie's Fitbit.

The court of appeals certified Burch's Fourth Amendment challenge. This Court granted the certification.

STANDARDS OF REVIEW

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560 (citation omitted). Under this standard, this Court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id.* This Court reviews independently the court's application of constitutional principles to those facts. *Id.*

This court reviews a circuit court's evidentiary decisions for an erroneous exercise of discretion. *State v. Zamzow*, 2017 WI 29, ¶ 10, 374 Wis. 2d 220, 892 N.W.2d 637. This Court upholds discretionary decisions if the circuit court examined "the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *State v. Kandutsch*, 2011 WI 78, ¶ 23, 336 Wis. 2d 478, 799 N.W.2d 865 (citation omitted).

Whether the admission of evidence violates a defendant's confrontation rights is a question of law this Court reviews de novo. *Id.*

Whether an error is harmless is a question of law this court reviews de novo. *State v. Magett*, 2014 WI 67, ¶ 29, 355 Wis. 2d 617, 850 N.W.2d 42.

ARGUMENT

I. The circuit court properly admitted the evidence discovered from the examination of the data extracted from Burch's cell phone.

A. Additional facts and the circuit court's decision on Burch's suppression motion.

Burch moved to suppress the Google Dashboard data and his internet search history that the BCSO discovered by examining his phone's data. (68.) He argued that the examination exceeded the scope of the consent that he gave to GBPD. (R. 68:3–4.) That consent, he maintained, was limited to a search by the GBPD for information about the hit-and-run investigation. (68:3–4.) Burch claimed that the BCSO should have gotten a warrant to examine the data. (68:3–4; 234:95.)

The State called three witnesses at the suppression hearing. The first was GBPD Officer Robert Bourdelais. (234:4–40.) On June 8, 2016, Bourdelais was investigating an auto theft complaint made by the couple that Burch lived with. (234:4–5.) Their car had just been found burned and also reported in a hit-and-run the night before. (234:5–8.) Burch had last driven the car, but, in a conversation with Bourdelais on the couple's porch, he denied involvement in the accident or the fire. (234:6–8.)

Burch further told Bourdelais that a friend of his lived near the hit-and-run location, and they had text messaged each other the night before. (234:9.) Bourdelais asked to see the messages. (234:10.) He also asked if he could download the information off of Burch's phone. (234:10–11.) Burch agreed and signed a written consent form that says "City of Green Bay Police Department" at the top. (78; 234:25.) The form said that Burch gave Detective Danielski, Officer Bourdelais "or any assisting personnel permission to search my . . . . Samsung cellphone." (78; 234:11–13.)

Bourdelais testified that he did not tell Burch that he was limiting the download request to Burch's text messages because he wanted to see any communication that Burch had with the friend. (234:11.) Bourdelais also wanted to recover any deleted information. (234:11–12.) Burch did not limit or revoke his consent. (234:13, 15.) Bourdelais took the phone to be downloaded and returned it to Burch within an hour. (234:14–15.)

Bourdelais also testified that he had never needed to get a search warrant to examine records from another law enforcement agency. (234:35.)

Kendall Danielski, a forensic computer examiner for the GBPD, testified that she downloaded Burch's phone data at Bourdelais's request. (234:41–42.) Danielski downloaded the phone's entire contents. (234:44.) She said that Bourdelais "wanted all data but he just wanted the report from me to have all data after June 7th." (234:42.) Bourdelais wanted "[a]ll content" but "specifically anything that would have any messaging back and forth," like text messages or email. (234:43.) The software she used allowed her to download just text messages, but then she would not have seen any text messages that Burch deleted or communication he sent by other means. (234:44.) She could not have limited the download to a specific date. (234:50.)

Danielski was not aware of any policies about how long the GBPD retained downloaded phone information. (234:44–45.) She thought that all the downloads she had done in her two years on the job were still in storage. (234:45.) It was very common for the department to share downloads with other agencies. (234:51.)

BCSO Detective Richard Loppnow testified that he could access the GBPD's reports for the hit-and-run from his computer and saw that GBPD had downloaded the contents of Burch's phone with his consent. (234:54–55.) Another member of the BCSO retrieved a copy of the download. (234:55–56.) Loppnow got a copy of the download and did not get a warrant before reviewing it because one "wouldn't be needed if it was documents that are kept on record in their normal course of business in their reports." (234:56.) Loppnow had never demanded a warrant from other agencies to share evidence. (234:56–57.)

Loppnow also testified that Burch had his cell phone when he was arrested for the homicide, and it was seized and searched. (234:58.) When the State asked if his Gmail address was on the phone "when it was searched incident to his arrest," Loppnow answered, "It was." (234:58.) At a later hearing, though, the State told the court that the phone had been in Burch's possession when he was arrested for the homicide, and the BCSO had subsequently downloaded its data with a search warrant. (235:3–4.)

The circuit court denied Burch's motion. (101.) It concluded that Burch consented to have police download his phone's information. (101:5–9.) A reasonable person in Burch's position

> would understand that relinquishing control of your phone to the police in order for them to download the data from it, without questioning the parameters of that download, in addition to signing a consent form that did not outline any parameters, would mean that you are giving consent to the police to have access to all of the data available on your phone at that time.

(101:7.)

The court next determined that the BCSO properly examined the data that the GBPD had downloaded. (101:10–12.) The examination of the phone, the court said, was a "second look" at lawfully seized evidence that did not require a warrant. (101:10–12.)

The court also concluded that the BCSO would have inevitably discovered the data on Burch's phone. (101:12–14.) It reasoned that the phone data was not necessary to provide probable cause to arrest Burch. (101:13–14.) The BCSO would have seized the phone when it arrested Burch. (101:14.) The court further noted that "the phone on Burch's person at the time of his arrest was searched incident to arrest and revealed the same email address." (101:14.)

Finally, the court concluded that Loppnow acted in good faith because he reviewed the consent form before examining the data and it contained no limitations. (101:14–15.)

B. The examination of Burch's cell-phone data did not violate the Fourth Amendment, and even if it did, suppression was not required.

This Court should conclude that the BCSO's review of Burch's cell-phone data did not violate the Fourth Amendment. Burch consented to the extraction of all his phone's data. By doing so, he gave up his right to privacy in

that data. The BCSO's later examination thus was not a search under the Fourth Amendment.

Further, even if the examination was a search, suppression was not required. The BCSO examined the data in good faith. And it likely had an independent source for the data, though further proceedings are necessary to confirm this.

1. The circuit court correctly determined that Burch consented to the extraction of all his phone's data.

"The ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). (citation omitted). "The general rule is that searches and seizures conducted without a warrant are not reasonable." *State v. Randall*, 2019 WI 80, ¶ 10, 387 Wis. 2d 744, 930 N.W.2d 223 (citing *Riley v. California*, 573 U.S. 373, 382 (2014)). Consent is an exception to the warrant requirement. *Id.* Searches and seizures conducted with voluntary consent are reasonable if conducted within the scope of the consent given, and the consent is not withdrawn. *See id.*

A person who consents to a search may limit its scope. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). The standard for measuring the scope of consent is objective reasonableness. *State v. Kelley*, 2005 WI App 199, ¶ 13, 285 Wis. 2d 756, 704 N.W.2d 377. This asks what the typical reasonable person would have understood from the exchange between the officer and the suspect. *Id.* "The scope

of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 251.[2]

The circuit court did not err when it concluded that Burch consented to the extraction of his phone's contents. A reasonable person in Burch's position would have understood that he was allowing law enforcement to access all the data on his phone. While the initial conversation between Burch and Bourdelais focused on obtaining Burch's text messages, the discussion expanded when Bourdelais "asked for consent to download the information on Burch's phone." (101:6.) Burch did not "raise any concerns about what was included" or try to limit his consent or what could be looked at. (101:2, 6–7.) A reasonable person would understand that law enforcement was asking to download all the data. This understanding was confirmed by the written consent form, which allowed law enforcement to "search" the phone and did not list any parameters or otherwise limit the scope of the download. (101:6–7.) Thus, a reasonable person in these circumstances would know that he or she was allowing law enforcement to download the entire phone.

Burch disagrees, arguing that he consented only to have his text messages downloaded. (Burch's Br. 11–16.) He claims that Bourdelais unilaterally expanded the scope of

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[2] The State agrees with the court of appeals' conclusion that whether the facts here show that an objectively reasonable person in Burch's position would know he or she is consenting to the extraction of all the phone's data is a question of law reviewed independently. *See State v. Burch*, No. 2019AP1404-CR, at 7 n.2 (Wis. Ct. App. Oct. 20, 2020). But the circuit court's determination of facts—for example, its findings that Burch placed no parameters on the scope of his consent or what police could look at—are reviewed under the clearly erroneous standard. (100:2.) *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995).

the search in two ways. (Burch's Br. 13–14.) First, Bourdelais actually intended to look at any possible communication between Burch and his friend, not just text messages. (Burch's Br. 13–14.) Second, Bourdelais had Danielski extract all the phone's data, not just the text messages. (Burch's Br. 14.)

This Court should reject this argument. While Bourdelais initially mentioned looking at Burch's text messages, he ultimately asked for and obtained Burch's consent to take his phone and download its contents. The consent form confirms this understanding. It says that Burch agreed to let law enforcement search his phone and contains no limitations. A reasonable person would understand that, under these circumstances, police would be able to extract and examine all the phone's content.

Burch further contends that because the definite article "the" refers to something specific and unique, here, "the information" must have meant only the text messages that he and Bourdelais discussed. (Burch's Br. 15.) That is not obvious. It is more likely here that the "the information" referred to all the information on the phone. This is particularly true given that Burch agreed to let Bourdelais take his phone to download its contents, Bourdelais never said that he was only going to look at the text messages, and Burch gave written consent to search the phone without limitation.

Burch also criticizes the circuit court's finding that neither he nor Bourdelais limited "the information" to text messages when they discussed extracting the information. (Burch's Br. 15.) He argues that "a failure to limit does not equate to expanding the scope of consent that has already been limited." (Burch's Br. 15.) He relies on *United States v. Cotton*, 722 F.3d 271, 277 (5th Cir. 2013). (Burch's Br. 15.) But that decision rejected an argument that a defendant

needed to rein in an officer's expansion of an *ongoing* search when the officer exceeded the consent given. The issue here is what Burch consented to *before* police downloaded his phone.

Finally, Burch argues that the circuit court was wrong to rely on the lack of limits on the consent form. (Burch's Br. 16.) He notes correctly that a general consent form can be overridden by more explicit statements. (Burch's Br. 16 (citing *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002)).) But here, the form reflected what Burch had consented to in person: a full download and search of his phone's data. The court did not rely on the form to impermissibly expand what Burch had consented to.

2. Burch's argument that the GBPD violated the Fourth Amendment by retaining the phone extraction is forfeited, he is estopped from making it, and it fails on the merits.

a. Burch forfeited this argument and is estopped from making it.

Next, Burch argues that, even if the GBPD could download all the data, they could not keep it. (Burch's Br. 16–20.) He says that the GBPD could keep information relevant to the hit-and-run investigation, but only until a trial was complete or the State decided not to file charges. (Burch's Br. 16–17.) Burch further contends that the department needed to return or destroy any information not relevant to the hit-and-run. (Burch's Br. 16–17.)

This argument is forfeited because Burch did not raise it in the circuit court. *See State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619. Below, Burch argued that examination of the phone data by the BCSO violated the scope of his consent and that the office should have gotten a

warrant. (68:3–4; 234:73–87, 93–97.) He never claimed that the GBPD separately violated the Fourth Amendment by retaining the data. The claim is thus forfeited.

In addition, Burch is estopped from making this claim because he admitted in the circuit court that the BCSO could have examined the data with a warrant. Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). When the circuit court asked Burch's counsel what the BSCO should have done when it learned about the data retained by the GBPD, he responded that it "should have obtained a search warrant. That would have cured all of this." (234:95.) Burch is now arguing that the GBPD should never have had the data for the BCSO to look at, with or without a warrant. That argument is inconsistent with what Burch said in circuit court, and Burch should be estopped from making it now.

b. Police may retain and examine evidence that is lawfully in their possession.

This Court should also reject Burch's argument on the merits. Law enforcement can retain and reexamine evidence that is lawfully in its possession. The scope of that reexamination is limited by the legal basis that allowed law enforcement to seize and search the evidence originally. Here, Burch consented, without limitation, to have the GBPD download his data. By doing so, he gave up his right to privacy in that data. Thus, the BCSO was free to examine the data without limitation while investigating VanderHeyden's homicide.

By consenting to a search, a person gives up their right to privacy in the thing to be searched. *See State v. Stout*, 2002 WI App 41, ¶ 17 n.5, 250 Wis. 2d 768, 641 N.W.2d 474. Thus, "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 411. "[O]nce the police have lawfully seized and searched an item, subsequent warrantless searches of that item are lawful so long as the item remains in the police's continuous possession." *United States v. Pace*, 898 F.2d 1218, 1243, (7th Cir. 1990).

Wisconsin case law establishes that law enforcement does not violate the Fourth Amendment by examining evidence that is lawfully in its possession.

In *State v. Petrone*, this Court rejected an argument that developing rolls of film seized with a warrant was a second search requiring another warrant. 161 Wis. 2d 530, 544–45, 468 N.W.2d 676 (1991). The warrant allowed the officers to seize the film because it possibly contained nude photos of children. *Id.* at 538–44. Developing the film, the court said, "is simply a method of examining a lawfully seized object" and made the information on it accessible to see if it was evidence of the crime alleged. *Id.* at 545.

The court of appeals relied on *Petrone* in *VanLaarhoven* to conclude that a warrant was not required to test a blood sample taken under the implied-consent law. *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 12, 14–16. Once evidence is lawfully seized, either by a warrant or an exception to the warrant requirement, police do not need a warrant to examine it. *Id.* ¶ 16. Examining the evidence "is an essential part of the seizure and does not require a judicially authorized warrant." *Id.* ¶ 16. *See also State v.*

Reidel, 2003 WI App 18, ¶¶ 6, 11–16, 259 Wis. 2d 921, 656 N.W.2d 789 (extending the reasoning of *VanLaarhoven* to a blood sample seized under the exigent circumstances exception to the warrant requirement).

Cases similarly establish that a defendant has a reduced expectation of privacy in evidence lawfully in police possession. That expectation is reduced to the same extent as it was by the legal basis on which police took the evidence into custody in the first place.

In *Randall*, a two-justice lead opinion and a concurrence by three other justices agreed that a defendant lacked a reasonable expectation of privacy in her blood alcohol content after police took a blood sample with her consent. 387 Wis. 2d 744, ¶ 39 n.14 (lead opinion); *id.* ¶¶ 42, 55 (Roggensack, C.J., concurring). The opinions relied on *VanLaarhoven*, *Reidel*, and *Petrone* to reach this conclusion. *Id.* ¶¶ 29–30 (lead opinion, relying on *VanLaarhoven*); *id.* ¶¶ 56–63 (Roggensack, C.J., concurring, relying on all three cases). The defendant consented to the blood draw under the implied consent law, which meant that she agreed to a test of her blood's alcohol content. *Id.* ¶¶ 2, 34. By consenting, she gave up the privacy interest she had in her blood alcohol content, and the police could test it without implicating the Fourth Amendment. *Id.* ¶ 36 (lead opinion); *id.* ¶ 55 (Roggensack, C.J., concurring).

Similarly, in *State v. Betterley*, this Court determined that defendants have a diminished expectation of privacy in evidence that police already have unobjectionable access to. 191 Wis. 2d 406, 417–18, 529 N.W.2d 216 (1995). There, police seized a ring from the defendant during a jail inventory search. *Id.* at 415. Police later examined the ring more closely, believing it was evidence that the defendant had committed insurance fraud. *Id.* at 412–15.

This Court rejected the defendant's argument that the "second look" at the ring violated his Fourth Amendment rights. *Id.* at 415–18. The defendant, the court said, had a diminished expectation of privacy in items legitimately in police possession. *Id.* at 417–18. The diminished expectation is caused by the prior exposure of the item to police. *Id.* at 418. And the expectation is diminished to the same extent that it was during the initial search, so police can take a second look at the item to the same extent that they could during the initial search. *Id.*

These cases all show that the examination of Burch's phone data by the BCSO did not violate the Fourth Amendment. *Petrone*, *Reidel*, and *VanLaarhoven* all hold that law enforcement does not violate the Fourth Amendment by examining evidence that is lawfully in its possession. And *Randall* and *Betterley* make clear that the reason for this is because the defendant has lost his or her expectation of privacy in the evidence to the same extent that it was during the initial search or seizure. Here, Burch consented to the GBPD's downloading and searching his phone's data without limitation. This consent eliminated any expectation of privacy he had in the data, and the BCSO was free to examine it. The admission of the evidence discovered as a result of that examination was proper.

This Court should also reject Burch's arguments that the GBPD could not retain his cell-phone data. He contends, first, that once police isolated the information relevant to the hit-and-run, it needed to return or destroy the remaining information. Second, Burch asserts, police could only keep the relevant information until a trial was complete or the State decided not to issue charges. (Burch's Br. 16.)

Burch's proposal conflicts with the Fourth Amendment's reasonableness inquiry, which eschews bright-line rules and instead emphasizes the facts of each case. *State v. Sumner*, 2008 WI 94, ¶ 20, 312 Wis. 2d 292, 752 N.W.2d 783. Police acted reasonably here by retaining all the phone's data because Burch consented without limitation to give that data to the police and gave up his right to privacy in it.

Burch's relies on three cases to support his proposed rule: *People v. McCavitt*, 145 N.E.3d 638; *People v. Thompson*, 28 N.Y.S.3d 237 (2016); and *United States v. Ganias*, 755 F.3d 125 (2nd Cir. 2014). (Burch's Br. 16–20.) But none of those cases involve a consent search like the one here. Instead, they all involve search warrants that limited what could be searched for. *Thompson*, 28 N.Y.S.3d at 241–42; *Ganias*, 755 F.3d at 128–29; *McCavitt*, 145 N.E.3d 638, ¶ 4. These decisions do not say that the police may not retain and search electronic data that a defendant voluntarily turns over without limitation.

In addition, Burch's proposed rule is unworkable. Commentators have criticized proposals like Burch's and the requirements in the *Ganias* case as inconsistent with the realities of computer forensics and the need to properly authenticate imaged computer data.

When a forensic examiner makes an image of a computer drive, as they did here with Burch's phone, they use an algorithm to create the "hash value" of both the original and the copy. *See Fourth Amendment-Search and Seizure and Evidence Retention-Second Circuit Creates A Potential "Right to Deletion" of Imaged Hard Drives.—United States v. Ganias, 755 F.3d 125 (2d Cir. 2014)*, 128 Harv. L. Rev. 743, 748 (2014). Hash values are "strings of characters described as 'digital fingerprints.'" *Id.* Vast

quantities of data can be reduced to a hash value that takes up just a couple of lines on a page. *Id.*

Hash values uniquely identify the underlying data that they are generated from. Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 Harv. L. Rev. 38, 40 (2005). If the hash value of the original and the copy are the same, then the examiner knows that the copy is an exact replica of the original and the value can be used to authenticate that copy and original are the same. *Id.* "Any alteration to an imaged hard drive, no matter how minor, changes the hash value, rendering it useless as a means of proving that the drive's contents, including the responsive files, were not altered at any point." 128 Harv. L. Rev. at 749. "Requiring police to delete all nonresponsive files on a copied hard drive would change the hash value, and, in turn, open the government to a host of challenges on the authenticity of its electronic evidence," in particular, that the data had been manipulated. *Id.*

Thus, requiring the State to return or discard non-responsive data would make it difficult, if not impossible, to use the responsive data in a potential prosecution. Retaining the entire image of the drive is necessary since "there is no other forensically sound manner by which to preserve digital evidence in an investigation." Stephen Moccia, *Bits, Bytes, and Constitutional Rights: Navigating Digital Data and the Fourth Amendment*, 46 Fordham Urb. L. J. 162, 189 (2019). The State needs to retain the entire image to not only prove its case, but also to rebut any charge that it manipulated evidence.

Further, Burch has not shown that it is reasonable to require the State to always return or destroy the data once a decision not to charge is made or a trial is concluded. Burch does not explain what he means by a decision not to file charges. Is it when police close an investigation without

referring it for prosecution? Or is it when the State declines to prosecute referred charges? Either of these possibilities would leave the decision up to the government, which could simply leave a case open if it wanted to retain the data. Further, a completed trial is not necessarily the end of the criminal process. If a defendant prevails on appeal, the data might be needed at a retrial.

And it is possible that the State could not destroy or return the data. It might contain exculpatory evidence that the State has a duty to preserve. *See State v. Luedtke*, 2015 WI 42, ¶ 7, 362 Wis. 2d 1, 863 N.W.2d 592. And if the data contains contraband, it cannot be returned. *See* Wis. Stat. 968.20(1g). Burch has not shown that his blanket rule is reasonable under the Fourth Amendment.

Further, even if the hit-and-run investigation's status was relevant to whether the GBPD could retain Burch's data, Burch has not proven that the investigation was closed. (Burch's Br. 19.) Bourdelais did not testify that he closed the investigation. And while his report says that he had no information to prove that Burch was driving the car during the accident, it also indicates that another officer was still investigating. (77:2.) The record does not conclusively prove that the investigation was closed.

Finally, the State notes that Wis. Stat. § 968.20 establishes procedures for people to seek the return of property in law enforcement's custody that is no longer needed for evidentiary or investigatory reasons. Under section 968.20(1) and (1g), a circuit court can order such property returned. And under section 968.20(2), law enforcement may simply return the property to the owner. These statutes sufficiently balance a person's rights to his or her property and the need for the State to use it. There is no need for this Court to impose Burch's proposed rule as a constitutional requirement.

3. The examination of the data was not a search that required any separate authorization.

Burch next argues that the BCSO's examination of the retained data was a search under the Fourth Amendment. (Burch's Br. 20–21.) It was not. As argued, Burch gave up his expectation of privacy in the data when he turned it over to the police, so the later examination of the data did not implicate the Fourth Amendment.

Relatedly, Burch contends that even assuming he is wrong that the download and retention of his data violated the Fourth Amendment, the BCSO still had no authority to search the data because it did not get á warrant. (Burch's Br. 21–22.) But again, this argument incorrectly assumes that the examination of the data was a search. Burch gave up his expectation of privacy in the data when he initially consented to have police extract and search it.

The same is true for his argument that his consent was not perpetual and instead was "exhausted" when the BCSO examined the data. (Burch's Br. 21–22.) Burch cites *State v. Douglas* for the proposition that police can rely on a person's consent to conduct a subsequent intrusion only if it is a continuation of the first. (Burch's Br. 21–22); 123 Wis. 2d 13, 21–24 365 N.W.2d 580 (1985). But *Douglas* involved the repeated search of a suspect's house, not a suspect's willingly turning property over to police. *Id.* And the consent there was limited to the initial entry. *Id.* Here, Burch consented to have law enforcement download and search his entire phone. Its later examination of the phone's data did not implicate the Fourth Amendment.

Burch further argues that, if police search a house with consent to look for marijuana possession, they could not use that consent to search the house months later to look for evidence of a homicide. (Burch's Br. 22.) That is true. But that situation is not analogous to what happened here. Police did not try to search Burch's phone again months after he consented. Instead, they merely looked at data that he had voluntarily turned over to them. That did not constitute a search.

Burch also argues that this Court should not extend *Betterly*'s "second look" doctrine beyond inventory searches. (Burch's Br. 22–24.) He notes, correctly, that no Wisconsin court has addressed the doctrine outside the context of inventory searches. (Burch's Br. 23.)

This Court should reject this argument. The point of *Betterley* is that police may subsequently examine an item lawfully in their possession to the same extent they could originally search the item. *Betterley*, 191 Wis. 2d at 418. And, as explained, other decisions establish that police do not need a warrant to examine evidence already in their possession. Burch's consent allowed the police to fully download and search the data on his phone. Thus, the later examination of the data was proper under *Betterley*.

Finally, Burch notes that his consent "did not permit GBPD to copy of all the data, retain it, and share it indefinitely with other agencies." (Burch's Br. 16, n.4.) The State has already argued that Burch consented to have all the data copied and the Fourth Amendment does not restrict law enforcement's retention of it. In addition, the suppression-hearing testimony established that cross-agency information sharing is routine. And Burch has not pointed to any case law holding that the Fourth Amendment prohibits one law enforcement agency from sharing information validly in its possession with another or that his affirmative

consent was required for it. This Court should reject any suggestion that the GBPD could not share the data with the BCSO.

C. Suppression is not warranted because the BCSO acted in good faith.

This Court should alternatively determine that suppression is not required because the BCSO acted in good faith when it examined Burch's phone data.

"[T]he singular purpose of the exclusionary rule is to deter police misconduct." *State v. Kerr*, 2018 WI 87, ¶ 21, 383 Wis. 2d 306, 913 N.W.2d 787. The rule is a judicially created remedy, "and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97. "Broadly defined, the exclusionary rule is not applied when the officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" *Id.* ¶ 33 (citation omitted).

"That means that just because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies." *Id.* ¶ 35. "[E]xclusion is the last resort." *Id.* The rule applies where the benefits of future police misconduct will outweigh the costs of suppressing evidence. *Id.* The rule is intended to deter only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Suppressing the evidence developed from Burch's phone data would not serve the purposes of the exclusionary rule because the BCSO acted in good faith when it examined the data. The information available to the office led it to reasonably believe that Burch unconditionally consented to the initial download and search of the data. And existing

case law established that reviewing the data would not violate the Fourth Amendment.

The BCSO reasonably believed that Burch had consented to have all the data on his phone downloaded and searched. It was routine for the BCSO and the GBPD to share investigative information. Loppnow could access the GBPD's reports from his computer. The reports indicated that Burch had consented to a download of his phone. They did not suggest that Burch had placed any restrictions on his consent. (234:66–67.) Under the circumstances, it was reasonable for the BCSO to think that Burch had consented to have all the data on his phone downloaded and searched.

Herring demonstrates that the BCSO acted in good faith. There, a sheriff's investigator had the clerk in his county ask a neighboring county's clerk to check if Herring had any outstanding warrants. *Herring*, 555 U.S. at 137. The neighboring clerk checked her county's database and discovered Herring had a warrant. *Id.* Once the investigator learned this information, he arrested Herring and found drugs and a gun. *Id.* But the neighboring county's information was bad—the warrant against Herring had been recalled months earlier. *Id.* at 137–38. The neighboring county had failed to update its information. *Id.*

The Supreme Court ruled that the good-faith exception applied and suppression was not required. *Id.* at 145–48. It concluded that the negligent recordkeeping error by the neighboring police agency did not justify excluding the evidence. *Id.* The arresting officer had no reason to question information from the neighboring county, and the clerks could not remember a similar error having occurred. *Id.* at 147–48. The error was not reckless or deliberately false, which could trigger exclusion. *Id.* at 146.

Similarly, here, Loppnow had no reason to doubt the information from the GBPD. The BCSO and the GBPD routinely shared information. And nothing that Loppnow reviewed suggested that Burch's consent was limited. There is also nothing to indicate that the GBPD deliberately or recklessly kept information from their reports about Burch's consent that showed that he limited it. Under the circumstances, it was reasonable for the BCSO to believe that Burch had consented to a full search of his phone.

The BCSO also acted in good faith by believing that they were legally allowed to examine the phone data. When police act in accordance with clear and settled Wisconsin precedent, they act in good faith. *State v. Kennedy*, 2014 WI 132, ¶ 37, 359 Wis. 2d 454, 856 N.W.2d 834.

When the BSCO examined the data in 2016, the law in Wisconsin was clear that police could examine evidence that was properly in their possession without a warrant to the extent that they could have searched the evidence initially, including evidence obtained with consent. *See Betterley*, 191 Wis. 2d at 418; *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16. The BCSO's actions complied with this principle, given its reasonable belief about Burch's consent.

Burch disagrees that good faith applies. (Burch's Br. 25–26.) He claims that the State forfeited this argument by not raising it before the suppression hearing. (Burch's Br. 26.) But the State asserted good faith in its argument at the suppression hearing, and the circuit court considered it. (234:87.) And respondents on appeal are "not barred from asserting any valid grounds to affirm the lower court's ruling." *State v. Kiekhefer*, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997). The State's good-faith argument is properly before this Court.

Burch also argues that the law was not settled when the BCSO examined the data. (Burch's Br. 26.) While perhaps there was no case addressing Burch's cell-phone-specific theories, *Betterley*, *Petrone*, *Reidel*, and *VanLaarhoven* were settled law in 2016. The BCSO acted in accordance with the law when they examined his phone's data.

D. Remand to the circuit court to address the independent-source doctrine may be appropriate.

If this Court determines that the BCSO violated the Fourth Amendment and did not act in good faith, it should remand to the circuit court to address whether the independent-source doctrine applies.

Under the independent-source doctrine, tainted evidence may be admissible "if the State can show it was also obtained by independent, lawful means." *State v. Anker*, 2014 WI App 107, ¶ 25, 357 Wis. 2d 565, 855 N.W.2d 483. The State must show that the illegality did not affect law enforcement's decision to seek a warrant or a judge's decision to grant it. *State v. Carroll*, 2010 WI 8, ¶ 45, 322 Wis. 2d 299, 778 N.W.2d 1.

Remand to address this doctrine is appropriate if this Court finds a Fourth Amendment violation and a lack of good faith. The State searched Burch's phone with a warrant after his arrest. This could provide a basis for finding that the State had an unobjectionable source for Burch's cell-phone data. The results of the search, though, are not in the record, and the circuit court did not make factual findings based on them. Remand to allow the court to make these findings and address the doctrine would be appropriate. *See Anker*, 357 Wis. 2d 565, ¶¶ 26–27.

The circuit court addressed the inevitable-discovery doctrine in its suppression decision. (101:12–14.) That doctrine, though related to the independent-source doctrine, does not apply when police "in fact acquire certain evidence by reliance upon an untainted source." *State v. Jackson*, 2016 WI 56, ¶ 47, 369 Wis. 2d 673, 882 N.W.2d 422. The court did not address the independent-source doctrine, so a remand is warranted to let the court make factual findings and address the issue in the first instance.

Admittedly, the State did not raise the independent-source doctrine below, but that should not prevent a remand. It is appropriate to allow the State to raise the doctrine when it did not originally raise it in the circuit court. *Anker*, 357 Wis. 2d 565, ¶¶ 26–27. And it appears that the State did not learn about the search warrant until after briefing and the evidentiary hearing in the circuit court. The State told the court about the search once it learned about it. And there was no reason for the court to address the issue after it determined that there was no Fourth Amendment violation. Under the circumstances, it is appropriate for this Court to remand if it reaches this issue.[3]

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[3] The BCSO actually searched Burch's phone twice with a warrant. The State's comment to the court references the first search, since the second search had not happened at the time of the State's comment.

The record does not contain anything referencing the second search. Given the arguments in this brief, though, counsel believes that his duty of candor to this Court requires him to disclose the second search.

II. The circuit court properly admitted the Fitbit evidence.

A. Expert testimony was not required to introduce the evidence from Detrie's Fitbit.

A court may admit expert testimony under Wis. Stat. § 907.02 if it would help the jury understand evidence or determine the facts. *Kandutsch*, 336 Wis. 2d 478, ¶ 26. A court may require expert testimony to let a party introduce kinds of evidence that is "more difficult than others for jurors to weigh." *Id.* ¶ 27.

But "the requirement of expert testimony is an extraordinary one." *Id.* ¶ 28. Only when the issues are unusually complex or esoteric—that is, not within the ordinary experience of the average juror—is expert testimony required. *Id.* ¶¶ 28–29.

The circuit court reasonably concluded that expert testimony was not required to admit the Fitbit evidence. The court considered two cases in making its decision. (70:6–10.)

One case, *Kandutsch*, involved the admission of a report generated from an electronic monitoring device (EMD) that a defendant was wearing. (70:6–8); *Kandutsch*, 336 Wis. 2d 478, ¶ 2. This Court concluded that the technology underlying the EMD—radio signals and telephone connections—were "well within the comprehension of the average juror." *Id.* ¶¶ 37–38.

The other case is *State v. Doerr*, 229 Wis. 2d 616, 599 N.W.2d 897 (Ct. App. 1999). There, the court of appeals determined that a preliminary breath test (PBT) "is a scientific device and that an ordinary person requires expert testimony to interpret evidence from this device." *Id.* at 624. The Court relied primarily on the Legislature's and the

Department of Transportation's failure to afford PBT results a presumption of validity and accuracy. *Id.*

The circuit court determined that the Fitbit evidence was "significantly more" like the evidence in *Kandutsch* because jurors would be familiar with it. (70:8.) It said that while Fitbit began selling its products in 2009, "the [principal] idea behind pedometers has been in the public marketplace for a significantly longer period than that." (70:8.) The court added that pedometers are used by a "significant" part of the population, numerous models are available, and many smartphones are equipped with them by default. (70:8.)

In contrast, the court said, few members of the public would likely have encountered a PBT in their lives or needed to submit to one. (70:8.) The court acknowledged that few people would have likely encountered EMD, either. (70:9.) But, it concluded, the technology that EMD used was similar to cordless phones, which people used in everyday life and understood generally. (70:9.) People also used and relied on other types of everyday technology, like watches and speedometers, even if they did not understand exactly how they worked. (70:9.) A Fitbit was that type of technology, so no expert was needed. (70:9.)

This was a reasonable exercise of discretion. The court reasoned that a Fitbit was like a pedometer, which was something people were generally familiar with. While jurors might not understand the technology underlying the Fitbit, a pedometer, or a similar device, they understand what these things do and rely on them. Thus, the technology was like the EMD in *Kandutsch*, average jurors could understand it, and it was admissible without expert testimony. This Court should affirm that decision.

Burch contends that the court erred. He notes that this is the first case to address whether a Fitbit's technology is reliable and accurate. (Burch's Br. 27–30.) Thus, he argues, the science underlying the technology is not "widely accepted and deemed unassailable." (Burch's Br. 28.) A Fitbit, Burch contends, is complex, uses lots of technology, and its data might be unreliable. (Burch's Br. 28–29.) Burch also notes that there are pending lawsuits against Fitbit challenging the accuracy of the devices. (Burch's Br. 29.)

This Court should reject these arguments. The relevant standard is whether the jurors need an expert to understand the evidence, not whether the underlying science is accepted. Thus, Burch's reliance on *State v. Hanson*, which involved whether a court could take judicial notice of the science of a type of radar speed detector, is misplaced. 85 Wis. 2d 233, 237–244, 270 N.W.2d 212 (1978). Burch also ignores the court's determination that it was not necessary for the jurors to fully understand the science underlying the Fitbit. Rather, it was enough that they were familiar with Fitbits and similar everyday devices and knew how they worked generally.

The circuit court also reasonably resolved Burch's argument that Fitbits might have accuracy problems. It noted that the lawsuits Burch identified were challenging the heart-rate and sleep-monitoring functions of some Fitbits, not the step-counting feature. (70:4–5.) Detrie's Fitbit did not monitor his heart rate. (70:4.) It did track Detrie's sleep, but the court precluded the State from introducing any sleep data because of the lawsuit challenging that function. (70:4–5.) Thus, the court limited the admissibility of the Fitbit data to its step-counting function, which the court reasonably determined a jury could understand without expert testimony. (70:4–5.)

B. The State properly authenticated the evidence from Detrie's Fitbit.

Burch next argues that the State failed to authenticate the Fitbit evidence. (Burch's Br. 30–34.) He does not challenge the circuit court's conclusion that the State properly authenticated the records from Fitbit containing the data. (Burch's Br. 31.) Instead, he argues that the State failed to authenticate the step data within the records by proving that it was reliably recorded and transmitted to Fitbit. (Burch's Br. 31.)

This Court should reject this argument. Burch cites nothing to establish that the reliability of evidence is relevant to whether a party can authenticate it. A party authenticates evidence by demonstrating that the "matter in question is what its proponent claims." Wis. Stat. § 909.01.

Burch notes that under Wis. Stat. § 909.015(9), evidence of a system or process used to produce a result can be authenticated by showing that the system or process produces an accurate result. (Burch's Br. 30.) But if this is what Burch is relying on to argue that a party must show that evidence is reliable to authenticate it, his argument fails. The authentication methods in section 909.015 are illustrative, not requirements or limitations. Wis. Stat. § 909.015.

And regardless, the circuit court reasonably determined that the Fitbit data was reliable. The court, relying on medical-journal articles provided by the State, concluded that "[t]he step-counting data collected by Fitbit devices has been studied and proved to be accurate and reliable by medical professionals." (53:4–5; 70:18.) The court also noted that the State had represented that Detrie would testify that his Fitbit "generally represented accurately the steps that he took." (70:18; 233:14.) Detrie testified at trial

that his Fitbit "seemed to be accurate." (242:204.) Finally, the court pointed to video evidence that the State had of Detrie either walking or not walking at specific times that was consistent with the Fitbit data. (70:19; 233:66–67.) The State presented this evidence at trial. (140:5–10; 251:15–22, 58–65.)

Burch argues that the court erred. He contends that the studies described in the journal articles were too small to establish reliability. (Burch's Br. 35) But he does not explain why this is so. This Court should not consider his undeveloped argument. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Burch also maintains that the court failed to consider the possibility that the data from Detrie's Fitbit was manipulated or not accurately transmitted to the company. (Burch's Br. 33–35.) He further asserts that this creates a problem with the chain of custody. (Burch's Br. 33–34.)

Burch, though, points to nothing to suggest that manipulating the data was even possible. He ignores the circuit court's finding that "[t]here is no active manipulation by the wearer to achieve the results; the results are simply a record of the wearer's movements." (70:10.) Burch acknowledges the State's comment that if there were data manipulation, the records from Fitbit would have said so. (Burch's Br. 34; 251:103.) But his response—merely questioning "How do we know that?"—is insufficient to show any error. (Burch's Br. 33–34.) Burch has not shown that the data could have been manipulated.

The same is true for Burch's argument that the data shows that Detrie's Fitbit was not connected to the internet when VanderHeyden was killed. Burch suggests that this might mean the device was off or the data was edited. (Burch's Br. 34.) Burch has provided absolutely no evidence

to suggest that the lack of an internet connection could mean either of these things.

Burch maintains that the videos corroborating the data were inadequate because the State showed only one at trial. (Burch's Br. 35–36.) But the State presented evidence about both videos, and, anyway, Burch does not explain how showing just one makes the evidence unreliable. Burch also argues that the videos are a "far cry" from the reliability of the EMD evidence in *Kandutsch*. (Burch's Br. 36.) But the question was whether Detrie's Fitbit was accurately tracking the steps he took. The videos showed that it generally was, and thus, they were sufficient to show that the data was reliable.

Finally, Burch contends that the evidence was unreliable because Behling did not understand the Fitbit's underlying technology. (Burch's Br. 31–33.) That argument, which consists mostly of an excerpt of Behling's testimony, seems to be no more than a rehash of Burch's unpersuasive claim that expert testimony was necessary.

C. The admission of the Fitbit data did not violate Burch's confrontation rights.

Burch's last argument is that the admission of the Fitbit data without an expert and a witness from Fitbit violated the Confrontation Clause. (Burch's Br. 36–38.) The circuit court rejected this argument, concluding that the data were business records, and thus, nontestimonial statements. (70:20–21.) *See State v. Doss*, 2008 WI 93, ¶¶ 46–56, 312 Wis. 2d 570, 754 N.W.2d 150 (holding that business records are nontestimonial hearsay).

Burch has shown no error. He says that the circuit court's decision "failed to account" for the data contained in the business records. (Burch's Br. 36.) And he makes a policy argument that he should have the right to cross-examine

witnesses about how Fitbits work and whether they are reliable. (Burch's Br. 36–38.) But Burch does not even try to prove that the data constitutes testimonial hearsay that implicates the Confrontation Clause. *See State v. Nieves*, 2017 WI 69, ¶ 29, 376 Wis. 2d 300, 897 N.W.2d 363. This Court should not consider his undeveloped argument. *Pettit*, 171 Wis. 2d at 646–47.

III. If the circuit court erred in admitting the Fitbit data or the evidence derived from the phone data, it was harmless.

Finally, this Court should conclude that if the circuit court erred by admitting the evidence developed from the cell-phone data or the evidence from Detrie's Fitbit, it was harmless error. The jury would have still convicted Burch of killing VanderHeyden even if it had not heard this evidence.

An error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Harris*, 2008 WI 15, ¶ 42, 307 Wis. 2d 555, 745 N.W.2d 397. Alternatively stated, an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *See id.* ¶ 43. (citation omitted).

The court considers a variety of factors in assessing harmlessness. *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97. They include the error's frequency, the nature and strength of the State's and defense's cases, the importance of the evidence, and the existence of corroborating or duplicative evidence. *Id.*

The jury would have still found Burch guilty without the evidence developed from the phone data or Fitbit data. While this evidence was important, the State's case was still strong without it.

The Google Dashboard evidence derived from the email address in the phone data showed that Burch was outside VanderHeyden's house and at the field where her body was found on the night she died. But the DNA evidence showed the same things; Burch's DNA was on the cord found in the neighbor's yard and on VanderHeyden's body. Thus, the State still had very strong evidence connecting Burch to the crime.

And because the DNA evidence mirrored the Google Dashboard evidence, Burch's defense would have been the same without the latter. Burch would still have claimed that he met VanderHeyden at a bar, had consensual sex with her in his car parked on the street outside of her house, and that Detrie came out and killed her and made him help move the body.

But that defense was extraordinarily weak, and there is no reason to believe that the jury would have accepted it even had the State not presented the Google Dashboard evidence. Burch's story that he convinced VanderHeyden to leave a bar with him so she could have sex with him not only in public, but on a residential street in front of her and her neighbors' houses, is ludicrous. The jury was never going to believe that happened.

Equally unbelievable is Burch's placing the blame on Detrie. While the Fitbit evidence helped refute Burch's shifting of blame, there was plenty of other evidence that showed Detrie was innocent. For example, Detrie had no injuries when police interviewed him right after VanderHeyden's death. That makes little sense if, as Burch claims, Detrie beat him up and killed VanderHeyden.

Additionally, Detrie's behavior was consistent with his innocence. He reported VanderHeyden missing and cooperated with the investigation, allowing police to access his phone even though it had messages from VanderHeyden accusing him of abuse and infidelity. Additionally, Detrie's genuine emotional reactions learning of VanderHeyden's death were not those of a killer.

In contrast, Burch's post-crime behavior is inconsistent with his innocence. Burch did not tell anyone that he had been forced to participate in a murder plot. Instead, he discarded VanderHeyden's clothes on the side of the road and then went fishing on Lake Michigan. (252:128–69.) Burch claimed to be afraid to speak to police because he was on probation in Virginia. But Burch had no problem absconding from his supervision to come to Wisconsin. (252:174.) And he had no qualms about turning his phone over to the police when they investigated the hit-and-run a month later. The jury would have rejected Burch's weak defense even without the Fitbit evidence.

The last piece of evidence is the internet search history in the phone data. It showed that he viewed more than 60 stories about VanderHeyden in the days after her death. But that evidence added little to the State's overall case. And it would hardly be surprising that Burch looked at news about the death if, as he claims, he was forced to participate in it. Even if the court should not have admitted the phone and Fitbit evidence, its errors were harmless.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction.

Dated February 19, 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Aaron R. O'Neil

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,998 words.

Aaron R. O'Neil

AARON R. O'NEIL
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 19th day of February 2021.

Aaron R. O'Neil

AARON R. O'NEIL
Assistant Attorney General