**STATE OF WISCONSIN, CIRCUIT COURT, BROWN COUNTY**

STATE OF WISCONSIN,

Plaintiff,

v.

GEORGE STEVEN BURCH,

Defendant.

Case No.: 16CF1309

## DECISION AND ORDER

Before the Court is a Motion to Exclude All Fitbit-Related Evidence from Defendant George Steven Burch ("Burch"). For the following reasons, Burch's motion will be **GRANTED in part** and **DENIED in part**.

## FACTUAL BACKGROUND

The victim, Nicole VanderHeyden ("VanderHeyden)," her boyfriend, Douglas Detrie ("Detrie") and some friends attended a concert on the night of May 20, 2016. Detrie and VanderHeyden fought throughout the night, and the two parted company. Detrie went home alone after 2:00 am to the house he shared with VanderHeyden and their infant son. After leaving the bar she had been at with Detrie, VanderHeyden ended up at Richard Cranium's Bar, where she met Burch. Although Detrie had tried to contact VanderHeyden throughout the night, he ceased his attempts after approximately 3:00 am on May 21, 2016, which is when he told police he had fallen asleep. At around 4:30 pm on May 21, 2016, Detrie reported VanderHeyden missing.

VanderHeyden's body was found in a field on the afternoon of May 21, 2016, over three miles from Detrie's and VanderHeyden's home. VanderHeyden's death was deemed a homicide,

and the cause of death was determined to be severe blunt force trauma to her head and strangulation. The severe blunt force trauma included a skull fracture and broken jaw. VanderHeyden also suffered additional internal and external injuries throughout her body. On May 23, 2016, the neighbor across the street from VanderHeyden and Detrie's residence called police to report finding blood and bloody wire on his lawn and on the roadway in front of his residence. The blood and hair found were determined to be VanderHeyden's. Detrie was initially a person of interest in VanderHeyden's death. He was interviewed by police and cooperated, allowing them to search his home and garage.

Burch became a person of interest and was subsequently arrested and charged with the homicide of VanderHeyden. GPS coordinates obtained from Burch's phone indicate he was present in the vicinity of VanderHeyden's home and in the area in which VanderHeyden's body was found. The coordinates also place Burch near highway 172, and VanderHeyden's clothes were found on an onramp to highway 172 at that location on May 22, 2016. Numerous DNA swabs were taken from various areas on VanderHeyden's body and clothing, and a sample from VanderHeyden's sock matched Burch. Other samples matched Burch as well.

Burch states that he and VanderHeyden hit it off after they met at Richard Cranium's Bar, and that VanderHeyden invited Burch back to her house. He claims they stopped at his house for a condom first. According to Burch, they observed a light on inside VanderHeyden's house when they arrived, so Burch and VanderHeyden decided to engage in sexual acts inside Burch's vehicle. He asserts that he was suddenly blindsided, immediately incapacitated, and that when he when he regained consciousness, he awoke to Detrie pointing a gun at him, and that he observed VanderHeyden on the ground, bloodied and unconscious. Burch further claims that Detrie then ordered him to lift VanderHeyden's body into the vehicle and drive to the location where

VanderHeyden's body was eventually found. He emphasizes that he did all of this under duress and under the threat of Detrie's gun. In the process of dumping VanderHeyden's body, Detrie got too close to Burch, at which point Burch was able to push Detrie down a ravine and escape back to his car. Burch claims he then raced home and in a panic discarded VanderHeyden's clothes at the location they were ultimately located. Burch did not go to the police to report any of these activities, asserting that he knew the police had arrested the correct person after seeing Detrie on the news.

In its October 19, 2017, Decision and Order ("October Decision") the Court held that Burch could present his version of events for the night VanderHeyden was killed, including certain third party perpetrator evidence against Detrie. In order to rebut Burch's assertion that Detrie is the person responsible for VanderHeyden's death, the State intends to introduce data recorded by Detrie's Fitbit Flex and obtained from his phone that will corroborate Detrie's assertion that he was sleeping at the time of VanderHeyden's death. While the State initially intended to have a Fitbit representative appear, Fitbit is no longer willing and/or able to provide one and the State now intends to introduce the evidence in question without an expert witness from Fitbit. (Jan. 19, 2018, Mot. Hr'g Tr. 68:8-15.) The State also notes that its original intent to have an expert does not mean it conceded that an expert is required for the admission of such evidence. (*Id*. at 69:8-11.)

**ANALYSIS**

Burch seeks to exclude all Fitbit-related evidence on the grounds that: (1) the State cannot introduce the evidence without an expert; (2) any expert provided by Fitbit would not meet the *Daubert* standards; (3) any expert offered outside of Fitbit would lack the requisite knowledge to establish the data as reliable; (4) the State has not provided any evidence to

demonstrate the Fitbit evidence is reliable; (5) the State cannot properly authenticate the Fitbit records without a custodial witness from Fitbit; (6) Burch's right to confrontation would be violated without a witness from Fitbit to cross-examine; and (7) the Fitbit records are inadmissible hearsay and do not qualify under the records of regularly conducted activity exception. (Def.'s Mot. Exclude All Fitbit-Related Evidence 2.) The Court will address each issue in turn.

## I. Fitbit Sleep Data

As an initial matter, the Court notes that Burch's motion seeks to exclude all Fitbit-related data. The Fitbit model in question is the Fitbit Flex, which is purported to track both the number of steps a person takes and their sleep patterns. Burch is seeking to exclude the step-tracking data and the sleep data, noting two pending lawsuits against Fitbit. In the first suit, the complaint against Fitbit alleges that the heart rate tracking technology available in some Fitbit models was significantly inaccurate. *See generally*, *Robb v. Fitbit Inc.*, 216 F. Supp. 3d 1017, 1023 (N.D. Cal. 2016), *reconsideration denied*, No. 16-CV-00151-SI, 2017 WL 219673 (N.D. Cal. Jan. 19, 2017). Notably, this lawsuit does not include the Fitbit Flex, as the feature to track one's heart rate is not available in the Fitbit Flex. *Id*. It also does not involve any challenges to with the accuracy of the step-counting feature of the Fitbit models in question. *Id*.

The second lawsuit is a class action suit that does include the Fitbit Flex. It alleges that "Fitbit knowingly misled consumers about the utility and efficacy of its sleep tracking functionality." *Brickman v. Fitbit, Inc.*, No. 15-CV-02077-JD, 2016 WL 3844327, at *1 (N.D. Cal. July 15, 2016). There are allegations that in certain situations the sleep monitoring information was off by as much as 45 minutes. While this lawsuit does raise a question as to the reliability of the sleep monitoring data, it also does not allege any issues as to the accuracy of the

step-counting feature of the Fitbit Flex. Given that this current pending lawsuit calls into question the reliability of the sleep-monitoring data of the Fitbit Flex, the Court finds the prejudicial nature of this evidence, coupled with its, at best, questionable reliability, is outweighed by its probative nature and thus is inadmissible. However, neither of these lawsuits question the reliability of the step-counting data and therefore the Court finds that they are irrelevant to analysis of that particular information. Accordingly, the Court will address the remaining issues solely as they relate to the step-counting data.[1]

## II. Expert Witness

The Court will first consider whether the State is required to present expert testimony for the Fitbit data to properly be introduced into evidence. "Courts have long recognized that certain kinds of evidence are more difficult than others for jurors to weigh and comprehend without the benefit of expert testimony." *State v. Kandutsch*, 2011 WI 78, ¶ 27, 336 Wis. 2d 478, 799 N.W.2d 865. When determining that an issue does not require expert testimony, "the circuit court must first find that the underlying issue is [] within the realm of the ordinary experience of mankind." *Id*. at ¶ 28 (internal quotations and citation omitted). "There is not one specific definition as to what constitutes the 'ordinary experience of mankind'—i.e., the average juror." *Id*. ¶ 29. Instead, the court should ascertain, "on a case-by-case basis, whether expert testimony is required because the issue is outside the realm of lay comprehension." *Id*. "When an issue can be determined 'by common knowledge' the circuit court should allow the issue to go to a jury without first requiring expert testimony." *Id*. On the other hand, an expert is required "when interpreting the evidence involves special knowledge, skill or experience that is not within an ordinary person's realm of experience or knowledge." *State v. Doerr*, 229 Wis. 2d 616, 624, 599 N.W.2d 897 (Ct. App. 1999). "In such complex and technical situations, the trier of fact without

[1] All references hereafter to "Fitbit data" are solely to the step-counting data, unless otherwise indicated.

the assistance of expert testimony would be speculating, and the lack of expert testimony in such cases constitutes an insufficiency of proof." *Id*. at 623-24.

Burch asserts that the Fitbit data cannot be entered into evidence without an expert witness from Fitbit to explain the mechanics and science behind the device. Burch likens the situation to the holding found in *Doerr*. In that case, Doerr was pulled over by Deputy Eric Dallmann ("Deputy Dallmann") after he was observed driving erratically. *Doerr*, 229 Wis. 2d 619-20. Deputy Dallmann administered a field sobriety test on Doerr, including a preliminary breath test (PBT), which showed Doerr had a blood alcohol level of 0.21%. *Id*. at 620. When Deputy Dallmann attempted to search Doerr before placing him in the squad car, Doerr kicked Deputy Dallmann and another officer. *Id*. Doerr was charged with, among other things, two counts of battery to a law enforcement officer, and one count of resisting an officer. *Id*.

The trial court ultimately allowed the PBT results into evidence after finding that Deputy Dallmann had laid a sufficient foundation for its admission. *Id*. at 623. Doerr was convicted and appealed his conviction on several grounds, including the fact that the trial court improperly allowed the PBT evidence in without an expert laying the proper foundation before its admission. *Id*. at 622. The Court of Appeals agreed with Doerr, holding that "the PBT is a scientific device and that an ordinary person requires expert testimony to interpret evidence from this device." *Id*. at 624. "Dallmann's testimony was insufficient to inform the jury about the device's scientific accuracy, reliability and compatibility with accepted scientific methods." *Id*. at 626.

Conversely, the State asserts that the issue at hand is more similar to that found in *Kandutsch*, and that the Fitbit data can be introduced without an expert witness. At the time of his arrest, Kandutsch was wearing an electronic monitoring device ("EMD") on his ankle.

*Kandutsch*, 336 Wis. 2d 478, ¶ 1. The EMD showed Kandutsch leaving his mother's house in Rib Mountain at 10:03 p.m., approximately a 15-minute drive away from his estranged wife's house in Wausau, where he was subsequently arrested, heavily intoxicated, at 10:23 p.m. *Id.* at ¶¶ 2, 11-12. Kandutsch's defense was that the EMD had malfunctioned and that he did not consume any alcohol until after he had driven. *Id*. at ¶ 11. He asserted that he actually left his mother's house at 9:10, arriving at his wife's house around 9:35, parking his vehicle in a nearby lot. *Id*. He received no response when he knocked, so he walked to a tavern approximately three blocks away, leaving his vehicle in the nearby lot. *Id*. He consumed a significant amount of alcohol at the tavern and subsequently returned to his wife's home. *Id*. at ¶ 12. His wife called the police to report someone attempting to break in. *Id*. at ¶ 6. When the officers arrived, they found Kandutsch inside the home, injured due to breaking a glass door in order to gain entry. *Id*. After being transported to the hospital for treatment of his injuries, a blood draw revealed Kandutsch had a blood alcohol content of .23 percent. *Id*. at ¶ 7.

At trial, the State introduced the record created by the EMD, without an expert, and asked the jury to focus on the time frame in order to infer that Kandutsch had driven while intoxicated. *Id*. at ¶ 3. To lay the foundation for the EMD report to be admitted into evidence, the State offered two witnesses: Kandutsch's probation agent, Amy Klarkowski ("Klarkowski") and Klarkowski's Department of Corrections ("DOC") supervisor, Agent Michael Williams ("Agent Williams"). *Id*. at ¶¶ 13, 16. Klarkowski explained that the mechanics of electronic monitoring "consist[ed] of a home monitoring unit and a radio frequency device, usually attached to the person's ankle … that the monitoring unit has a range of about 150 feet and is connected by telephone to an electronic monitoring center staffed by the DOC." *Id*. at ¶ 13. Klarkowski and Agent Williams also testified at length to the reliability of the EMD, discussed *infra*. Kandutsch

ultimately was convicted of operating a vehicle while under the influence of an intoxicant, even though no one had actually observed him operating his vehicle. *Id*. at ¶ 2.

Kandutsch appealed his conviction on several grounds, one of which was that the EMD report was improperly admitted into evidence without an expert explaining the mechanics of the electronic monitoring system. The Wisconsin Supreme Court disagreed with Kandutsch's assertion that an expert was required, first incorporating the Court of Appeals' comparison of the EMD technology to that of a cordless phone. *Id*. at ¶ 39. After utilizing that comparison, the court then held that "[n]either the EMD itself nor the report derived from it is so 'unusually complex or esoteric' that expert testimony was required to lay a foundation for the admission of the report as evidence." *Id*. at ¶ 5.

The Court finds that the case at hand is significantly more akin to *Kandutsch* than it is to *Doerr*. First, after further review, the Court disagrees with Burch's assertion that "the average Brown County resident is more knowledgeable about PBT evidence than Fitbit evidence." (Def.'s Br. Supp. Mot. Exclude All Fitbit-Related Evidence 4.) While the Fitbit Flex was introduced in 2013, Fitbit began selling step counters in 2009, and the principle idea behind pedometers has been in the public marketplace for a significantly longer period than that. Pedometers in general are also utilized by a significant portion of the population. There are numerous models across a multitude of companies for purchase, such as KeayTech, MoreFit, Letufit, Skagen, Striiv, and Sodial, just to name a few. There are also applications available for download on smartphones, and some smartphones now come equipped with a pedometer by default. Fitbit estimated over 23 million people were active Fitbit users at the end of 2016.

Conversely, while the average Brown County resident may be familiar with the concept of a PBT, very few encounter a PBT in their daily lives or have been required to submit to one.

Moreover, while few Brown County residents have encountered EMD in their daily lives, the principle technology behind an EMD is one that the Wisconsin Supreme Court found not to be "so 'unusually complex or esoteric' that the jury required the aid of expert testimony to interpret the information," and liken it to technology – cordless phones – that is used in everyday life and whose general principles are widely understood, even though the minutia may not be. *Kandutsch*, 336 Wis. 2d 478, ¶¶ 39-40. During the January 19, 2018, Motion Hearing, the Court referred to the example of a watch, noting that the public generally understands the principle of how it functions and accepts its reliability without knowing the exact mechanics of its internal workings. Similarly, automobile drivers have a general understanding of the workings of a speedometer and accept its reliability without knowing exactly how it works. The Court finds these types of information and the ability of a jury to interpret them is similar to that of a Fitbit device.

Finally, Burch's reliance on the complexity of a Fitbit device and his continued comparison to the complexity of the PBT technology in *Doerr* to be misplaced. The *Kandutsch* court specifically noted that "the decision in *Doerr* focused primarily on whether the Department of Transportation had approved the device for chemical analysis of an individual's breath, *not* the particular complexity of the PBT device." *Id*. at ¶ 36 (emphasis original).

Next, the Court finds that Burch's comparison of the Fitbit data to the use of DNA evidence, fingerprint analysis, blood alcohol concentration tests, tool mark evidence, and accident reconstruction to be unpersuasive. First, few people encounter those things in their everyday life. Moreover, DNA evidence, fingerprint analysis, blood alcohol concentration tests, tool mark evidence, and accident reconstruction all require active human manipulation through

the various testing processes in order to achieve the results, whatever those results may be.[2] Even the PBT found in *Doerr* requires the active participation and manipulation of a person, achieved by the person blowing into the device, in order for it to obtain a reading.

Conversely, Fitbits and the data collected via the devices are significantly more similar to the EMD. Both devices are passively worn by a person, which collect data based on that person's movements, which is then transmitted and recorded. There is no active manipulation by the wearer to achieve the results; the results are simply a record of the wearer's movements, i.e., their location or the number of steps they took. These are significantly different from the multitude of examples offered by Burch, all of which require active human manipulation in some form to obtain results. Accordingly, the Court finds that the step-counting feature of the Fitbit Flex, like the EMD, is not so unusually complex or esoteric that the jury will require the aid of expert testimony to interpret the information, but rather finds it is within the ordinary experience of the average juror.

The Court finds that the Fitbit technology does not require an expert, and therefore it need not address whether an expert from Fitbit would satisfy the standards for an expert established in *Daubert*.

## III. Hearsay

In Wisconsin, the relevant statutory definitions with respect to hearsay are:

> (1) A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.
> (2) A "declarant" is a person who makes a statement.
> (3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

[2] The Court's use of the word "manipulation" is in reference to the fact that that a person has to actually do something in order to obtain the results.

WIS. STAT. § 908.01(1)-(3). The Court will first address whether the Fitbit data qualifies as hearsay.

### A. Computer-stored records vs. Computer-generated records

In *Kandutsch*, the Wisconsin Supreme Court had the opportunity to address the distinction between computer-stored records and computer-generated records and the implications of the existence of hearsay within each category. 336 Wis. 2d 478, ¶ 59. The purpose of the hearsay rule is to "protect against 'the four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory.'" *Id. at* ¶ 60 (citing Laurence H. Tribe, *Triangulating Hearsay,* 87 Harv. L.Rev. 957, 958 (March 1974)). "Computer-*stored* records constitute hearsay because they merely store or maintain the statements and assertions of a human being." *Id*. at ¶ 57. These records "memorialize the assertions of human declarants." *Id*. at ¶ 59. "Computer-*generated* records, on the other hand, are those that represent the self-generated record of a computer's operations resulting from the computer's programming." *Id*. A computer-generated record "cannot lie. It cannot forget or misunderstand. Although data may be lost or garbled as a result of some malfunction, such a malfunction would go to the weight of the evidence, not its admissibility." *Id*. at ¶ 61. A computer-generated record also "does not present the danger of being taken out of context, because the opposing party has a right to put it in context." *Id*. The Wisconsin Supreme Court therefore held that 'a computer-generated report is not hearsay when it is simply the result of an automated process free from human input or intervention." *Id*. at ¶ 66.

Other jurisdictions have discussed the difference between computer-stored and computer-generated records and opined that computer-generated records are not hearsay. The

Massachusetts Appeals Court, after analyzing the *Kandutsch* decision, expanded upon these principles further by stating "[t]he distinction between computer-stored and computer-generated records depends on the manner in which the content was created—by a person or by a machine." *Com. v. Royal*, 89 Mass. App. Ct. 168, 171, 46 N.E.3d 583, 587 (2016). "Computer-generated records are the result of computer programs that follow designated algorithms when processing input and do not require human participation." *Id*., *citing* Kerr, Computer Records and the Federal Rules of Evidence, 49 U.S. Attorneys' Bull. 25, 26 (Mar. 2001). Examples of computer-generated records "include automated teller machine receipts, log-in records from Internet service providers, and telephone records." *Id*. "Computer-stored records generally refer to documents that contain writings of a person or persons that have been reduced to electronic form, such as electronic mail messages, online posts, and word processing files." *Id*. at 171-72.

The United States Court of Appeals for the Ninth Circuit has held that assertions made by a machine "without any human intervention" are not hearsay because "there's no statement as defined by the hearsay rule. " *United States v. Lizarraga – Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015). Accordingly, the court held that a "tack" placed on a map and automatically labeled with global positioning system coordinates by Google Earth was not hearsay. *Id*. at 1109-1110. The court further observed that concerns regarding the accuracy and reliability of "machine statements" "are addressed by the rules of authentication, not hearsay." *Id.* at 110. *Com v. Royal*, 89 Mass. App. Ct. 168, 172, 46 N.E. 3d 583, 587 (2016).

The *Kandutsch* court ultimately concluded that the report provided by the EMD was not hearsay because it was "generated as the result of an automated process free of human intervention." *Id*. at ¶ 62 (internal quotations and citation omitted). The data compiled by Fitbit is substantially similar to that compiled by the EMD. The EMD and the Fitbit are worn by a person

and the data is subsequently collected by via the wearer's passive use. The records created from both are a result of a computerized process. Burch attempts to differentiate *Kandutsch* from the case at hand by asserting that "the human user has the ability to edit the data recorded." (Def.'s Br. Supp. Mot. Exclude All Fitbit-Related Evidence 15.) However, the State correctly notes that Fitbit's own website states that "[i]t's not possible to delete steps." (Pl.'s Br. Reply Def.'s Resp. Br. Re. Admissibility Fitbit Evidence 3 n.1.) The Fitbit data, much like the EMD data, is therefore generated as a result of an automated process free of human intervention. Furthermore, the question of whether Detrie was wearing a Fitbit or using it correctly does not constitute "editing data." Cross-examination of Detrie, discussed more at length *infra*, in this area goes to the weight and credibility of his testimony. Accordingly, the Court finds that the Fitbit data is a computer-generated record and as such is not as hearsay.

**B. Records of Regularly Conducted Activity**

While the Court finds that the Fitbit data qualifies as computer-generated record and is not hearsay, even if the data did qualify as hearsay, it would still be admissible under the hearsay exception for "Records of Regularly Conducted Activity." This exception allows into evidence

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

WIS. STATS. § 908.03(6). The majority of Burch's argument rests upon his assertions that the report provided by Fitbit of the data was (1) not created at or near the time of VanderHeyden's murder, but rather at some point in August 2017; and (2) it was not created in the course of a

regularly-conducted activity. Therefore it does not qualify under statutory exception. (Def.'s Br. Supp. Mot. Exclude All Fitbit-Related Evidence 17.)

The Court finds this argument unavailing as well. Truly, the entirety of Fitbit's business model centers upon the creation of records of regularly-conducted activity. All Fitbit models track the number of steps a person takes while wearing their device, which is documented in real time, and then transmitted, recorded, and compiled for the wearer to view at a later point in time. In Detrie's case, his Fitbit Flex recorded the number of steps he took during the time in question. Although the report currently relied upon by the State did not exist until August 2017, the data itself on which the report is based was compiled at or near the time in question. As the State articulated at the motion hearing, "[w]e're not just talking about records from Fitbit with some of their own unique authentication issues, but we're also talking about data that is obtained directly from the device itself, the device being the phone." (Jan. 19, 2018, Mot. Hr'g Tr. 7:20-23.)[3] Moreover, the Seventh Circuit has specifically reached this same conclusion: printouts of computer data complied and prepared for trail are admissible, even though the printouts themselves were not kept in the ordinary course of business. *U.S. v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002).

The remainder of Burch's argument that the "Records of Regularly Conducted Activity" exception is inapplicable is based on his assertion that the State fails to substantially comply with the acceptable certification requirement outlined Wisconsin Statutes section 909.12. That statute states:

> (a) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03 (6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying all of the following:

[3] The Fitbit device transmits its information to Detrie's phone, and therefore the data is retrieved from his phone.

> 1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
> 2. That the record was kept in the course of the regularly conducted activity.
> 3. That the record was made of the regularly conducted activity as a regular practice.
>
> (b) A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of the offer of the record and certification into evidence to provide an adverse party with a fair opportunity to challenge the record and certification.

WIS. STATS. 909.02(12)(a-b).

Burch attempts to raise issue with the Affidavit of Records Custodian ("Affidavit") provided by Brett S. Millar ("Millar"), Global Director of Brand Protection for Fitbit, Inc. First, the Court finds that the Affidavit provided by Millar is statutorily sufficient. Burch points to the fact that little is known about Millar, and that the Affidavit itself only meets the minimal requirement of Wisconsin Statues section 909.02(12). Despite the litany of questions about Millar and his irrelevant alleged criminal record, Burch fails to actually articulate anything relevant that would require the Court to disregard the statutorily sufficient affidavit from Millar. Accordingly, the Court finds that the State has also carried its burden under Wisconsin Statues 909.02(12), and if the Fitbit data was hearsay, it would be admissible under Wisconsin Statutes section 908.03(6).

## IV. Authentication and Reliability of Fitbit Data

As the Court has found that an expert is not necessary to lay a foundation for the Fitbit data before its introduction into evidence, the Court must now determine what is required to lay the proper foundation as to the authentication and the reliability of the Fitbit data. "Even where expert testimony is not required, the proponent of non-testimonial evidence is usually required to lay the foundation for the admissibility of that evidence through lay witnesses." *Kandutsch*, 336

Wis. 2d 478, ¶ 41. A foundation for admissibility is laid "by evidence sufficient to support a finding that the matter in question is what the proponent claims." WIS. STATS. § 909.01. Wisconsin Statutes section 909.015 provides "[b]y way of illustration only, and not by way of limitation," examples of how to satisfy the requirements of Wisconsin Statues section 909.01.

One such example of authentication and identification, utilized in *Kandustch*, refers "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." WIS. STAT. § 909.015(9). With respect to the reliability of the EMD, Klarkowski testified that

> electronic monitoring is commonly used throughout the state, and that she had never had any problems with its functioning. The system is designed to keep working despite power outages or attempts to remove the ankle bracelet. Klarkowski had been employed by the DOC for five years and had personally supervised 30–35 individuals through the electronic monitoring system. She testified that not only had she never had any problems with a unit herself, but also had never heard of a unit generating a false report.

336 Wis. 2d 478, ¶ 15. Likewise, Agent Williams testified that "the electronic monitoring system is a routine supervision tool and that he has used it for 20 years. In that time, he had never heard of a faulty unit or report during his employment with the DOC. Agent Williams further testified that the particular EMD unit used to supervise Kandutsch had been reissued to supervise another individual in Ashland County." *Id*. at ¶ 16. The court found that the testimony of Klarkowski and Agent Williams was "sufficient in this case to provide a foundation for the report's accuracy and reliability." *Id*. at ¶ 5. Notably, the *Kandutsch* court found that the State had carried its burden not on the basis of one single part of either Klarkowski's or Agent Williams's testimony, but rather based on the totality of their testimonies combined. Here, too, the State must properly authenticate the Fitbit report and establish its reliability, but it can carry its burden by utilizing a combination of things.

### A. Authentication

The State argues that Wisconsin Statutes sections 909.01, 908.03(6), and 909.02(12) provide the framework for authentication of the Fitbit data, all discussed *supra*. The State asserts that the data is self authenticating, given that evidence admissible under Wisconsin Statutes section 908.03(6), records of regularly-conducted activity, are self-authenticating, so long as the requirements of Wisconsin Statutes section 909.02(12) are also satisfied. As discussed *supra*, the Court found that the Fitbit data does qualify as a record of regularly-conducted activity and that the Affidavit provided by Millar meets the statutory requirements of 909.02(12). Also discussed *supra*, Burch has failed to offer a valid reason why the Affidavit is insufficient. Therefore, the Court finds that the Fitbit data is self-authenticating under Wisconsin Statutes section 909.02(12).

Moreover, the State has offered additional steps it plans to take in order to further authenticate the Fitbit data. One way is to lay a foundation is through the "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." WIS. STAT. § 909.015(1). The State intends to offer the testimony of Tyler Behling ("Behling"), an analyst for the Brown County Sheriff's Office. Behling retrieved the Fitbit data from Detrie's phone via a forensic download and will testify that the data is, in fact, what it is claimed to be. Furthermore, "authentication can be accomplished through circumstantial evidence." *State v. Giacomantonio*, 2016 WI App 62, ¶ 20, 371 Wis. 2d 452, 463–64, 885 N.W.2d 394, 400, *review denied*, 2017 WI 20, ¶ 20, 373 Wis. 2d 644, 896 N.W.2d 360; *see also* WIS. STAT. § 909.015(4) (examples of authentication include "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."). Also similar to *Kandutsch*,

Wisconsin Statutes section 909.015(9) "General Provisions Illustrations," would also be applicable, provided the State offers sufficient proof to satisfy the statute.

There are multiple facets of the Fitbit data that the State plans to offer in order to authenticate it. The combination of these aspects, much like the combination of the testimonies in *Kandutsch* which were sufficient to authenticate the EMD report, will be sufficient. Accordingly, the Court preliminarily finds that the State has ability to authenticate the Fitbit data, thus satisfying this requirement before its admission into evidence. However, the Court also finds that should the State fail to adequately authenticate the Fitbit data during trial, its admission will be barred.

**B. Reliability**

The step-counting data collected by Fitbit devices has been studied and proved to be accurate and reliable by medical professionals. (Pl.'s Br. Resp. Def.'s Mot. Exclude All Fitbit-Related Evidence 4-5.) While Burch correctly raises concerns that some Fitbit users have reported issues with their devices, there does not appear to be any evidence of these issues with Detrie's own personal Fitbit Flex. "Further, Doug Detrie himself can and will testify that he wore that Fitbit device regularly, that he routinely observed his step count on the app, he did that twice a day, and that generally he found it be accurate… he wore it, he found it in good working order, and he found that it generally represented accurately the steps that he took." (Jan. 19, 2018, Mot. Hr'g Tr. 14:1-8.) This is similar to the testimony provided by Klarkowski and Agent Williams that addressed the reliability of the specific EMD in *Kandustch*. The State further acknowledges that Detrie "will be subject to cross-examination on that point, but that goes to the weight and not the admissibility of the evidence." (Jan. 19, 2018, Mot. Hr'g Tr. 14:23-25.)

The State is also able to corroborate Detrie's potential testimony about the reliability of his Fitbit with two specific instances: (1) the State has video evidence of Detrie walking around outside a bar, corroborated by the steps shown on his Fitbit; and (2) the timeframe for when Detrie was being questioned and not walking around much at all, also corroborated in this case by the lack of steps recorded on his Fitbit. (*Id*. at 66:1-67:2.) Not only will Burch have the opportunity to cross-examine Detrie with regards to the reliability of his Fitbit, but it appears Burch intends to call his own expert witness to rebut Detrie's testimony as well. Truly, all of Burch's objections go the amount of weight and credibility that should be afforded to the evidence, which is best left to the fact-finder's determination. The Court also notes that Burch's issues with the chain of custody also go to the weight and credibility of the evidence, not its admissibility, and are therefore best left to the fact-finder as well.

The Court is also unpersuaded by Burch's reliance on *State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978), and his assertion that the Court should adopt similar guidelines for determining the reliability of the Fitbit data. In *Hanson*, the Wisconsin Supreme Court found that moving radar was a significantly newer technology and as such it was improper for the trial court to take judicial notice of and afford it the same presumption of reliability and accuracy given to stationary radar. *Id*. at 237-40. The court then established five principles to be met to allow a *prima facie* finding of accuracy. *Id*. at 245. However, at the time the incident in *Hanson* occurred, moving radar had only been in use in Wisconsin for three months. *Id*. at 239. Conversely, the Fitbit Flex was released in 2013 and thus been in use for three years at the time of VanderHeyden's death. Moreover, technological advances occur significantly faster now than they were at the time of the *Hanson* holding 40 years ago in 1978. Technology that has existed for three years is often considered old by today's standards. Burch also completely ignores *City*

*of Wauwatosa v. Collett*, in which the Court of Appeals held that the five principles espoused in *Hanson* apply only to moving radar devices, thus making the holding in *Hanson* fact-specific. 99 Wis. 2d 522, 523, 299 N.W.2d 620 (Ct. App. 1980).

## V. Confrontation Clause

Burch asserts that his right to confrontation, pursuant to the Sixth Amendment, will be violated if he is not afforded the opportunity to cross-examine someone from Fitbit about the Fitbit evidence. "The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." *State v. Hale*, 2005 WI 7, ¶ 43, 277 Wis. 2d 593, 691 N.W.2d 637; U.S. Const. amend. VI; Wis. Const. art. I, § 7. In *Crawford v. Washington*, the Supreme Court held that out-of-court testimonial hearsay statements are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 68, 124 S. Ct. 1354 (2004); *State v. Mattox*, 2017 WI 9, ¶ 24, 373 Wis. 2d 122, 890 N.W.2d 256, *cert. denied*, No. 16-9167, 2017 WL 2189106 (U.S. Oct. 16, 2017). Although the *Crawford* Court explicitly did not provide a comprehensive definition of what constitutes a "testimonial" statement, the Court concluded that, "at a minimum," statements made during police interrogations are testimonial in nature. 541 U.S. at 68. In *Davis v. Washington*, the Court did expand upon the definition of a testimonial statement, finding that statements made when there is no ongoing emergency and when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" were testimonial, thus implicating the confrontation clause. 547 U.S. 813, 822 (2006). While there exists a substantial debate around what constitutes a testimonial statement, there are several clear guidelines about what a testimonial statement is not. One such guideline established by the Wisconsin courts is that business records are

considered nontestimonial statements. *See State v. Doss*, 2008 WI 93, ¶ 38, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. Manuel*, 281 Wis. 2d 554, ¶ 38, n. 9, 697 N.W.2d 811.

As discussed *supra*, the Fitbit data itself would qualify as a record of regularly conducted activity, which was created during the time frame in question. The State correctly points out that this qualifies the data for the classification of a business record and, as such, it is also classified as nontestimonial under *Doss* and *Manuel*. Accordingly, Burch's claim that his right to confrontation will be infringed upon without someone from Fitbit to cross-examine is without merit. Moreover, Burch will have the opportunity to cross examine Detrie and the officer who recovered the data, thus preserving his right to confrontation.

**CONCLUSION & ORDER**

Based on the foregoing, it is hereby **ORDERED** that Burch's Motion to Exclude with respect to the Fitbit data related to sleep-monitoring is **GRANTED**.

It is further **ORDERED** that Burch's Motion to Exclude with respect to the Fitbit data related to step-counting is **DENIED**.

Dated this ___ day of January, 2018

BY THE COURT:

Electronically signed by John P. Zakowski

Circuit Court Judge

_____

John P. Zakowski
Circuit Judge

01/31/2018