STATE OF CONNECTICUT *v.* HORVIL F. LEBRICK
(AC 39980)

Alvord, Prescott and Pellegrino, Js.

Syllabus

Convicted of the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, attempt to commit robbery in the first degree and assault in the first degree in connection with the shooting death of the victim, the defendant appealed. He claimed, inter alia, that the trial court improperly admitted into evidence the former testimony of a witness, P, who testified at the defendant's probable cause hearing. The defendant also claimed that the court improperly permitted the testimony of a firearm and tool mark expert, S, who testified at trial regarding the ballistic evidence collected at the crime scene. *Held*:

1. The defendant could not prevail on his claim that the former testimony of P was inadmissible hearsay because the state failed to establish that P was unavailable and, thus, P's testimony did not fall within the exception to the hearsay rule set forth in § 8-6 (1) of the Connecticut Code of Evidence: the trial court did not abuse its discretion in admitting the challenged testimony, which involved substantially similar issues to those at the defendant's trial, as the record demonstrated that the defendant had a full and fair opportunity to cross-examine P about her testimony at the probable cause hearing, and the state made a good faith effort to locate P by attempting to contact P at her last known address and phone number found in the case file and searching multiple computer databases in order to locate P, which was unsuccessful; moreover, the defendant's claim that the admission of P's former testimony

violated his constitutional right to confrontation was unavailing, as P was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine her at the probable cause hearing regarding her testimony.

2. The defendant's unpreserved claim that the trial court improperly admitted S's testimony in violation of § 4-1 of the Connecticut Code of Evidence because the state failed to establish the relevancy of S's testimony by providing a sufficient evidentiary foundation that the photographs, report, and notes relied on by S were associated with the crimes at issue in the present case was not reviewable, the defendant having failed to raise before the trial court the particular relevancy objection that he asserted on appeal; moreover, even though S's opinion was formulated in part by his review of a ballistic report prepared by a former employee of the state's forensic laboratory who was not available to testify at trial, there was no merit to the defendant's claim that his constitutional right to confrontation was implicated by the admission of S's opinion testimony because, even if the ballistic report contained testimonial hearsay, the state did not seek to introduce the ballistic report or any statement or opinion by the former employee regarding the ballistic evidence through S, who was available for cross-examination at trial regarding his own scientific conclusions and the factual basis underpinning his opinion, and, thus, the defendant was afforded a full opportunity to confront the declarant of the actual scientific conclusions admitted against him.

Argued October 12, 2017—officially released January 16, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree, brought to the Superior Court in the judicial district of Hartford, and tried to the jury before *Dewey*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict and judgment of guilty; subsequently, the defendant's conviction of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree was vacated, and the defendant appealed. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *John F. Fahey* and *Robert Diaz*, senior assistant state's attorneys, and *Allen M. Even*, certified legal intern, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Horvil F. Lebrick, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes (Rev. to 2009) § 53a-54c, home invasion in violation of General Statutes §§ 53a-100aa (a) (2) and 53a-8, conspiracy to commit home invasion in violation of General Statutes §§ 53a-100aa (a) (2) and 53a-48 (a), burglary in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-101 (a) (1), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-101 (a) (1), attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-49 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48 (a), and assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8.[1]

The defendant claims on appeal that the trial court improperly admitted into evidence (1) former testimony of a witness in violation of § 8-6 (1) of the Connecticut Code of Evidence and the confrontation clause of the sixth amendment to the United States constitution, and (2) testimony by the state's firearm and tool mark expert in violation of § 4-1 of the Connecticut Code of Evidence and the confrontation clause of the sixth amendment

[1] The defendant's conviction of the charges of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree was vacated.

to the United States constitution. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. On the morning of May 6, 2010, the defendant and his twin cousins, Andrew and Andraw Moses, were driven by an unidentified fourth man in a Ford Econoline van from New York to an apartment building located at 115 Nutmeg Lane in East Hartford. One of the apartments in that building was rented by Omari Barrett, a purported drug dealer, whom the defendant and the twins intended to rob. When they arrived at the apartment building, the defendant and the twins, who were dressed in workmen's clothes and hard hats, exited the van, entered the building, and knocked on the door of Barrett's third floor apartment. When no one answered after repeated knocking, the defendant kicked open the door, and he and the twins entered the apartment. All three were armed with guns.

Barrett's girlfriend, Shawna Lee Hudson, was alone in the small, two bedroom apartment at that time. She did not open the door when she heard knocking, but instead telephoned Barrett. Barrett told Hudson that he was not expecting any workers and hung up the phone. Hearing someone trying to force entry, Hudson called Barrett back, and he told her to get the .357 magnum revolver that was in the apartment. Barrett ended the call and proceeded to drive to the apartment armed with a nine millimeter revolver. Hudson called him a third time as he was driving and conveyed that the men were in the apartment and that she was hiding in the bedroom closet. As Barrett arrived, he heard on the phone someone saying, "Where's the money? Shut the fuck up," at which point the call ended.

Barrett ran into the building to the apartment, noticing as he approached that the door was open and

appeared to have been kicked in. Barrett entered the apartment and immediately encountered the twins, whom he fatally shot. Barrett then called out to Hudson, who was in the bedroom with the defendant, and asked her how many more people were in the apartment. She said that there was one more. The defendant and Barrett then engaged in a gunfight in which Barrett was shot once in the leg and once in the arm. Barrett retreated from the apartment into the hallway to an alcove by the elevators. He next heard a single gunshot and saw the defendant exit the apartment and flee in the opposite direction down the hallway. Running back into the apartment, Barrett found Hudson, who had been shot once in the chest.

Both Hudson and the twins were pronounced dead at the scene. The police collected numerous bullets and shell casings from in and around the apartment. The only firearm recovered at the scene was a .45 caliber automatic. The police also found an oil change receipt for an Econoline van. That receipt helped the police to identify the defendant as a suspect, and he subsequently was arrested and charged.

Following a jury trial, the defendant was convicted on all charges.[2] He was later sentenced by the court, which imposed a total effective sentence of ninety years of incarceration. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly admitted into evidence the former testimony of a material witness, Keisha Parks, who testified at the defendant's probable cause hearing in this matter. The defendant's arguments in support of that claim are twofold. First, he argues that Parks' former testimony was

[2] See footnote 1 of this opinion.

inadmissible hearsay because it did not fall within the exception to the hearsay rule set forth in § 8-6 (1) of the Connecticut Code of Evidence in light of the state's failure to properly establish that Parks was unavailable for trial, a necessary prerequisite to the exception's applicability. Second, he argues that the admission of the former testimony violated his rights under the confrontation clause of the sixth amendment of the United States constitution, citing *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We disagree with both arguments.

The following additional facts are relevant to our resolution of this claim. Parks was the fiancée of Andrew Moses, one of the defendant's twin cousins. She reluctantly testified at the defendant's probable cause hearing on November 10, 2010. Among other things, she testified about a conversation that she had with the defendant in the early evening of May 6, 2010, in which he implicated himself in the events that transpired that same day at the apartment in East Hartford. The defendant was represented by counsel at the probable cause hearing, and defense counsel extensively cross-examined Parks about her testimony.

On March 5, 2014, the defendant filed a motion asking the court to preclude the state from offering Parks' probable cause testimony as evidence at trial. The defendant argued that Parks' former testimony was hearsay and testimonial in nature and, thus, was admissible only if the state could show that Parks was unavailable and that the defendant had had a full and fair opportunity to cross-examine her. The defendant argued that the state had the burden of demonstrating Parks' unavailability, including that it made a good faith effort to procure her attendance for trial.

On October 16, 2014, during the trial but outside the presence of the jury, the court heard testimony from the

following two witnesses concerning the state's effort to locate Parks for trial: Henry Hightower, a police inspector with the state's criminal justice division, and Frank Garguilo, an investigator with the Brooklyn District Attorney's Office. Hightower testified that the case file contained Parks' last known address and phone number. Hightower called the telephone numbers listed in the case file for Parks but received no answers. He also ran Parks' name and birthdate through several computer database searches. Specifically, he utilized the Hartford Police Department's in-house computer; National Crime Information Center, a national database utilized by the Connecticut State Police to run criminal background checks; and CLEAR, a database that searches publicly available data within a specified state. The CLEAR search was the only one that produced any results, listing several phone numbers and addresses in New York associated with Parks as of 2013. Hightower e-mailed the Brooklyn District Attorney's Office with the most current phone numbers and addresses he could find for Parks, and asked the office to send an investigator to check those addresses and to serve Parks with an interstate summons to appear for trial.

Garguilo testified that the Brooklyn District Attorney's Office assigned him with the task of serving the summons on Parks. He checked the addresses provided by Hightower; he visited the addresses, sometimes twice in one day, but no one answered at any of the locations. Garguilo also called the telephone numbers provided to him and left messages on some answering machines, but got no return response. Garguilo was never asked to conduct an independent investigation into Parks' whereabouts, and he did not do so. Ultimately, neither Hightower nor Garguilo was able to locate Parks.

After hearing from the state's witnesses, the court heard argument from the parties. The state maintained

that the efforts described by Hightower and Garguilo demonstrated that the state exercised reasonable due diligence in locating Parks to secure her testimony for trial. The defendant, on the other hand, took the position that the state's efforts fell far short of meeting its burden of showing the necessary good faith effort to procure Parks' attendance. The defendant referenced our decision in *State* v. *Wright*, 107 Conn. App. 85, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008), both for the proposition that the state must show *substantial* due diligence and as an example of what has qualified previously as a reasonable effort to locate a witness. See id., 90–92. The defendant pointed out that the state had failed to conduct any searches of social media websites, to look for driver's license information in New York, or to access social security information to use as an additional search criterion. The defendant also argued that no effort was made to speak to a landlord or neighbors at the addresses visited by Garguilo in order to determine whether Parks currently lived at those locations or had moved. Finally, the defendant argued that although Hightower testified that he believed that information such as housing matters, civil protective orders and child support orders involving Parks should have been discovered as part of his search of the CLEAR system, he was unable to testify precisely about what information could be obtained by a search in CLEAR. The court reserved ruling on the motion at that time.

At the court's request, the state later presented additional testimony from a CLEAR product specialist employed by Thomson Reuters, Erin Tiernam, who had knowledge of how the CLEAR system operated. Tiernam testified that CLEAR was a subscription service used to search for people and that it acted as a data aggregator, pulling information from a number of public record sources. If a name and date of birth is entered,

the system is designed to return credit histories, utility records, death records, records of court and property records. After hearing from Tiernam, the court ruled that it would allow the state to read the former testimony into the record.[3]

A

We first address the defendant's evidentiary claim that, because the state failed to meet its burden regarding Parks' unavailability, the court should have deemed her former testimony inadmissible hearsay. We are not persuaded.

We begin by discussing our standard of review. In considering the propriety of a court's evidentiary rulings, "the appropriate standard of review is best determined, not as a strict bright line rule, but as one driven by the specific nature of the claim." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." Id. If, however, the court's decision to admit evidence is premised upon a correct view of the law, we review such decisions only for an abuse of discretion. Id.

It is undisputed in the present case that Parks' former testimony is properly classified as hearsay and, thus,

[3] In so ruling, the court made the following statement: "Well, the reason I had wanted to hear or put on the record information about CLEAR was because I realized after the hearing, I knew what it was, but there was no record of what it was. Now, with that on the record, I am going to allow the former testimony."

inadmissible unless it satisfies the exception in § 8-6 (1) of the Connecticut Code of Evidence. The sole challenge here is to the unavailability of Parks, or, more precisely, whether the court properly determined that the state had exercised due diligence to locate and secure Parks' attendance at trial. Because that determination involved the court exercising its discretion to make a "judgment call," the proper standard of review is the abuse of discretion standard. See id.; see also *State* v. *Lopez*, 239 Conn. 56, 79, 681 A.2d 950 (1996) ("it is within the discretion of the trial court to accept or to reject the proponent's representations regarding the unavailability of a declarant and the trial court's ruling will generally not be disturbed unless the court has abused its discretion"). "[W]hen [appellate courts] review claims for an abuse of discretion, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005).

Turning to the applicable law, the Connecticut Code of Evidence § 8-6 provides in relevant part: "The following are not excluded by the hearsay rule *if the declarant is unavailable as a witness*: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing. . . ." (Emphasis added.) In the present case, there is no dispute that Parks' testimony at the defendant's probable cause hearing involved "substantially similar" issues as those

at trial, particularly because both concerned the same substantive criminal charges. See *State* v. *Parker*, 161 Conn. 500, 503–504, 289 A.2d 894 (1971). Furthermore, the defendant had a full and fair opportunity to cross-examine the witness about her testimony at the probable cause hearing and, as reflected in the record, took advantage of that opportunity. Therefore, as we previously have indicated, the sole basis for the defendant's claim that the former testimony was inadmissible hearsay is his argument that the state failed to demonstrate Parks' unavailability for trial.

A declarant is deemed unavailable if he is "absent from the hearing [or trial] and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." (Internal quotation marks omitted.) *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980) (utilizing for state law purposes definition of unavailability contained in rule 804 of Federal Rules of Evidence). Our Supreme Court has interpreted "reasonable means" as requiring the proponent "to exercise due diligence and, at a minimum, make a good faith effort to procure the declarant's attendance." (Internal quotation marks omitted.) *State* v. *Rivera*, 221 Conn. 58, 62, 602 A.2d 571 (1992). Although our Supreme Court has stated that a good faith effort necessarily requires a showing of "substantial diligence"; *State* v. *Lopez*, supra, 239 Conn. 75; it has also explained that "[a] proponent's burden is to demonstrate a diligent and reasonable effort, *not to do everything conceivable*, to secure the witness' presence." (Emphasis added.) Id., 77–78. Therefore, an opponent's ability to point out additional yet unexplored avenues of investigation will not be dispositive of whether a proponent's efforts at locating a witness are deemed reasonable by a court.

In the present case, we agree with the defendant that the state's efforts to locate Parks were not exhaustive.

That, however, is not the standard, nor will we substitute our own judgment for that of the trial court. The standard is whether the state made a good faith effort to locate Parks. Hightower, who was tasked with locating Parks for the state, attempted to find her by using her last known address and phone number found in the case file. When that was unsuccessful, he utilized Parks' name and birthdate to search several computer databases, most notably the CLEAR system. The CLEAR system searched for available public information regarding Parks, including civil and criminal matters in New York. The CLEAR search in fact returned additional addresses and telephone numbers associated with Parks. Hightower engaged the help of the district attorney's office in New York to try to initiate personal contact with Parks or Parks' mother at the addresses obtained from CLEAR and to serve a summons. The assigned investigator from that office, Garguilo, made several attempts personally to visit the addresses provided and to make telephone calls, but was unsuccessful at making any contacts.

Although the defendant provides various additional steps or alternative avenues of investigation that the state might have utilized to locate Parks, including making some effort to speak with third parties to obtain her current whereabouts, the defendant has cited to no authority mandating that such actions are necessary in order to establish a good faith effort to locate a witness. "[T]he question of whether an effort to locate a missing witness has been sufficiently diligent to declare that person unavailable is one that is inherently fact specific and always vulnerable to criticism, due to the fact that one, in hindsight, may always think of other things." (Internal quotation marks omitted.) *State* v. *Miller*, 56 Conn. App. 191, 194, 742 A.2d 402 (1999), cert. denied, 252 Conn. 937, 747 A.2d 4 (2000). In *Miller*, the state's investigator in that case testified at trial that he had

made unsuccessful efforts to contact three witnesses at their last known addresses on file several weeks prior to trial. Id., 194–95. This court concluded that the state had made a good faith effort to locate the witnesses and that the investigator's testimony was satisfactory to prove the witnesses' unavailability. Id., 195. The investigator in the present case did no less, and also attempted to find additional leads by utilizing the CLEAR database search. On the basis of this record, we cannot conclude that the court abused its discretion in finding, albeit implicitly, that the state met its burden of demonstrating Parks' unavailability.[4]

B

In addition to his evidentiary challenge, the defendant also argues that the admission of Parks' former testimony violated his rights under the confrontation clause of the sixth amendment to the United States constitution.[5] Citing to *Crawford* v. *Washington*, supra, 541 U.S. 36, the defendant contends in his brief that "[t]estimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross-examination." Because both conditions were met in the present case, we are not persuaded that the defendant's rights under the confrontation clause are implicated.

[4] Although the court did not provide specific factual findings or legal analysis regarding the state's efforts, by deciding to admit Parks' former testimony, it necessarily determined that the state had demonstrated sufficient and reasonable efforts to secure her availability for trial. Absent some indication to the contrary, we assume that the trial court acted properly in accordance with established legal principles. See *State* v. *Marrero*, 59 Conn. App. 189, 191–92, 757 A.2d 594, cert. denied, 254 Conn. 934, 761 A.2d 756 (2000).

[5] Although the state argues that this aspect of the defendant's claim is unpreserved and raised for the first time on appeal, we conclude that the defendant adequately raised the confrontation argument in his pretrial motion to exclude Parks' former testimony, which was adjudicated at trial.

"Beyond [applicable] evidentiary principles, the state's use of hearsay evidence against an accused in a criminal trial is [also] limited by the confrontation clause of the sixth amendment. . . . The sixth amendment to the constitution of the United States guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This right is secured for defendants in state criminal proceedings. . . . [T]he primary interest secured by confrontation is the right of cross-examination." (Citation omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 712, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). "Traditionally, for purposes of the confrontation clause, all hearsay statements were admissible [under *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)] if (1) the declarant was unavailable to testify, and (2) the statement bore adequate indicia of reliability. . . . [In *Crawford* v. *Washington*, supra, 541 U.S. 68, however], the United States Supreme Court overruled *Roberts* to the extent that it applied to testimonial hearsay statements. . . . In *Crawford*, the court concluded that the reliability standard set forth in the second prong of the *Roberts* test is too amorphous to prevent adequately the improper admission of core testimonial statements that the [c]onfrontation [c]lause plainly meant to exclude." (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 379, 908 A.2d 506 (2006). Accordingly, the United States Supreme Court held that if "testimonial evidence is at issue . . . the [s]ixth [a]mendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford* v. *Washington*, supra, 68.

It is undisputed that Parks' testimony at the probable cause hearing was testimonial in nature and, thus, its admission at trial for the truth of the matters asserted implicated the test established in *Crawford*. See *State*

v. *Skakel*, supra, 276 Conn. 714 (former probable cause hearing testimony "falls squarely within *Crawford*'s core class of testimonial evidence"). To the extent, however, that the defendant's constitutional challenge relies on the same assertion made in support of his evidentiary argument, namely, that the state failed to demonstrate that Parks was unavailable for trial, we again reject it.

Although a court's ultimate determination as to whether a statement is precluded under *Crawford* raises an issue of constitutional law that is subject to plenary review; see *State* v. *Kirby*, supra, 280 Conn. 378; the factual underpinnings of such a determination are entitled to significant deference. *State* v. *Swinton*, 268 Conn. 781, 855, 847 A.2d 921 (2004). Whether a witness is unavailable is such a factual determination. See *State* v. *Schiappa*, 248 Conn. 132, 141, 728 A.2d 466 (recognizing fact-bound nature of unavailability inquiry), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). In reviewing constitutional claims, our customary deference to the trial court's factual finding is "tempered by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Swinton*, supra, 855. Having conducted a scrupulous review of the record, we are convinced that the testimony of Hightower and Garguilo, as discussed in part I A of this opinion, constitutes substantial evidence that fully supports the trial court's implicit findings that the state exercised due diligence to locate Parks, and that Parks was unavailable to testify.

Moreover, the record demonstrates that the defendant had a full and fair opportunity to cross-examine Parks regarding her testimony at the probable cause hearing, defense counsel vigorously cross-examined her at that time, and Parks' cross-examination was part of the testimony that was read back to the jury at trial.

Because Parks was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine her at the probable cause hearing regarding her testimony, his confrontation clause rights were not violated by the admission of her former testimony at trial.

II

The defendant next claims that the court improperly permitted the testimony of James Stephenson, a firearm and tool mark expert who testified at trial regarding the ballistic evidence collected at the crime scene. The defendant's arguments in support of this claim are, again, twofold. First, he argues that the testimony was not relevant and, thus, admitted in violation of § 4-1 of the Connecticut Code of Evidence, and that this error was harmful. Second, he argues that the testimony violated his rights under the confrontation clause of the sixth amendment to the United States constitution. We disagree with both arguments.

The following additional facts and procedural history are relevant to this claim. Gerard Petillo, a former employee of the state's forensic laboratory, performed various tests on the ballistic evidence collected in this case and authored a report containing his findings and analysis. Unfortunately, prior to trial, Petillo passed away and, thus, was unavailable to testify regarding his report and its contents. Stephenson also worked for the state's forensic laboratory at the time that Petillo created the ballistic report in this case and acted as that report's technical reviewer and "second signer." Although the state informed the defendant that it did not intend to offer Petillo's report into evidence, it did indicate that it would offer testimony from Stephenson, who had agreed to testify on the basis of his review of

the photographs and report prepared by Petillo regarding his own, independent conclusions.[6]

The defendant filed a motion to preclude Stephenson's testimony, arguing that Petillo's report was testimonial in nature and hearsay and, thus, that any testimony or evidence concerning that report would violate the defendant's constitutional rights as delineated in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The defendant later supplemented his motion, arguing that Stephenson lacked a proper foundation to render his own opinion in this matter because he had not personally performed any of the testing or measurement of the evidence and that "[p]ermitting Stephenson to testify about the adequacy and accuracy of tests he did not perform is nothing more than a means by which to present evidence of another witness that is not available." In support of this supplemental argument, the defendant cited to § 7-4 of the Connecticut Code of Evidence.[7]

The court held a hearing on the defendant's motion on October 27, 2014. At that time, the defendant

[6] The state indicated on the record before the trial court that it began discussing Petillo's death and the possibility of Stephenson's testimony with the defense during jury selection. The state also explained that it had sought to have the forensic lab retest the evidence, but that the lab had indicated it would not be able to comply prior to trial.

[7] Section 7-4 of the Connecticut Code of Evidence provides in relevant part: "(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

"(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence. . . ."

renewed his objection based on the confrontation clause and raised, for the first time, an objection based on relevancy. With respect to his relevancy argument, the defendant asserted that he could not evaluate the relevancy of Stephenson's testimony because nothing had been proffered regarding that testimony and it was the defendant's understanding that Stephenson had not conducted his own independent testing but would rely upon information in Petillo's report.

The state argued that Stephenson would testify about the projectiles found at the crime scene. In particular, he would opine that the projectile found in Hudson's body and a shell casing recovered in her bedroom were inconsistent with the nine millimeter projectiles found in the twins' bodies and in other areas of the crime scene, suggesting that Hudson was killed by a different nine millimeter gun, presumably one fired by the defendant. Furthermore, the state argued that Stephenson's conclusions, although not any different than those reached by Petillo, would be his own and based on his independent evaluation of the information available. Stephenson would be subject to cross-examination as to those conclusions. Whatever materials or information he reviewed in reaching his conclusions also would be fodder for cross-examination.

The court denied the motion to preclude on the record, indicating to defense counsel that it was going to permit Stephenson to testify. The court explained that the defendant certainly could raise by way of cross-examination that Stephenson had not examined the actual projectiles himself, suggesting that the court may have believed that the defendant's objections to Stephenson's testimony went more to the weight of the evidence to the jury than to its overall admissibility.[8]

[8] The court did not state the factual or legal basis of its ruling on the record.

Before the jury, Stephenson testified consistent with the state's proffer. He never referred to the contents of Petillo's report, including Petillo's conclusions. Rather, he indicated only that he had reviewed a number of reports and photographs relating to evidence submitted to the state lab in preparation for his testimony and, based on his background, training and experience, he was able from that review to formulate his own opinion.

A

We first dispose of the defendant's argument that the court improperly admitted Stephenson's testimony in violation of § 4-1 of the Connecticut Code of Evidence[9] because the state failed to establish the relevancy of Stephenson's testimony by providing a sufficient evidentiary foundation that the photographs, report, and notes relied on by Stephenson were associated with the crimes at issue in this case. The state argues, inter alia, that this evidentiary claim is unreviewable because it was never raised before the trial court. We agree with the state.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. [An appellate court] is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal

[9] Section 4-1 of the Connecticut Code of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence."

will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

The defendant never raised an issue of relevancy in his motion to preclude Stephenson's testimony but did argue relevancy in his argument before the court prior to Stephenson's testimony. That particular argument, however, was premised solely on the fact that the state had not yet made a proffer regarding Stephenson's trial testimony nor had the defense been provided with any report from Stephenson. The defendant asserted, therefore, that he could not yet evaluate the relevancy of Stephenson's testimony. After hearing from the state regarding the nature of Stephenson's testimony, however, the trial court overruled the defendant's objections and decided to allow Stephenson to testify. The defendant thereafter never raised the particular relevancy objection that he now asserts on appeal regarding whether the materials relied on by Stephenson were associated with the crimes at issue in this case. Because the defendant cannot be heard on an evidentiary claim that was never raised before or decided by the trial court, we decline to review this aspect of his claim on appeal.

B

Finally, we turn to the defendant's argument that Stephenson's testimony was admitted in violation of the defendant's rights under the confrontation clause. The defendant argues that because Stephenson's testimony was based entirely on his review of Petillo's ballistic photographs and report, Petillo was, in effect, the witness who the defendant had a right to confront. We are not persuaded that Stephenson's testimony violated the defendant's constitutional rights under the confrontation clause. We have already discussed the intersection between the confrontation clause and the

admissibility of hearsay statements in criminal cases in part I B of this opinion. In short, hearsay statements that are deemed testimonial in nature are admissible in a criminal prosecution only if the declarant is both unavailable for trial and the defendant has had a prior opportunity to cross-examine the declarant regarding those statements. See *Crawford* v. *Washington*, supra, 541 U.S. 68.

"Two cases decided by the United States Supreme Court after *Crawford* apply the confrontation clause in the specific context of scientific evidence. In *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 310–11, the court held that certificates signed and sworn to by state forensics analysts, which set forth the laboratory results of the drug tests of those analysts and which were admitted into evidence in lieu of live testimony from the analysts themselves, were testimonial within the meaning of *Crawford*. In so concluding, the court reasoned that: (1) the certificates clearly were a sworn and solemn declaration by the analysts as to the truth of the facts asserted; (2) under Massachusetts law the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance; and (3) the court could safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves. . . . In *Bullcoming* v. *New Mexico*, [supra, 564 U.S. 652], the court held that the confrontation clause also does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying to the results of a blood alcohol concentration test he performed, through the in-court testimony of another scientist who did not sign the certification or perform or observe the test reported in the certification." (Citation omitted; internal quotation marks omitted.) *State* v.

Buckland, 313 Conn. 205, 213–14, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). In short, an accused has the right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, supra, 652.

Melendez-Diaz and *Bullcoming*, however, addressed only the admission of statements in forensic reports either without any accompanying testimony by the analyst or scientist that prepared them or through a surrogate who lacked direct involvement in the preparation of the report. Neither directly addressed the situation now presented, in which a potentially testimonial forensic report is not itself offered or admitted into evidence, but rather was utilized by another expert witness to form an independent opinion. See id., 673 (*Sotomayor*, *J.*, concurring) ("[w]e would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence"). Although the United States Supreme Court had an opportunity to clarify this aspect of its confrontation clause jurisprudence in *Williams* v. *Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), that case yielded multiple opinions by the court, none of which, for the reasons we explain, is controlling here.

The issue in *Williams* was whether a defendant's confrontation clause rights were violated by the admission of testimony from a police laboratory analyst who had reviewed and compared a DNA profile prepared by an outside laboratory from vaginal swabs taken from the victim and matched it with a DNA profile in the state's DNA database that was produced from a sample of the defendant's blood in an unrelated case. Id., 56–57, 59. The United States Supreme Court upheld the trial

court's admission of the testimony. Id., 57–58. Although a majority of the court concluded that the expert's testimony did not violate the confrontation clause, they did not agree as to the rationale. A plurality of four justices, Justice Alito, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, concluded that the confrontation clause was not violated because the outside laboratory's report was not used to prove the truth of the matter asserted therein and, thus, was not hearsay. Id. Alternatively, those justices concluded that the report was not testimonial in nature because it was produced before any suspect was identified, and, thus, its primary purpose was not to obtain evidence to be used against the defendant. Id., 58. A fifth justice, Justice Thomas, agreed with the plurality's disposition of the case, and with its alternative conclusion that the report was not testimonial in nature.[10] Id., 103–104. In concluding that the report was not testimonial in nature, however, Justice Thomas focused on the report's lack of formality and solemnity, and specifically rejected the plurality's reliance on the "primary purpose test" to determine whether the report was testimonial in nature. Id., 111, 113–18. Thus, the plurality opinion and the opinion by Justice Thomas cannot be read together to provide one analytical path to employ in deciding whether a particular forensic report may be considered testimonial in nature.[11]

"When a fragmented [United States Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by

[10] Justice Thomas did not agree with the plurality's conclusion that the report was not hearsay because it was not offered for the truth of the matter asserted therein. *Williams* v. *Illinois*, supra, 567 U.S. 104.

[11] The four dissenting justices concluded that the expert testimony was "functionally identical to the surrogate testimony" in *Bullcoming* and that *Bullcoming* controlled the outcome. (Internal quotation marks omitted.) *Williams* v. *Illinois*, supra, 567 U.S. 124.

those Members who concurred in the judgments on the narrowest grounds . . . .'' (Internal quotation marks omitted.) *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). The *Marks* test has been explained by the United States Court of Appeals for the District of Columbia Circuit as follows: ''[O]ne opinion can be meaningfully regarded as narrower than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.'' (Internal quotation marks omitted.) *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), cert. denied sub nom. *King* v. *Ridley*, 505 U.S. 1229, 112 S. Ct. 3054, 120 L. Ed. 2d 920 (1992). Given that no readily applicable rationale for the court's holding in *Williams* obtained the approval of a majority of the justices, its precedential value seems, at best, to be confined to the distinct factual scenario at issue in that case.[12] In any event, our ultimate resolution of the present appeal is not inconsistent with the overall result reached in *Williams*.

[12] Courts in a number of other jurisdictions have struggled with how to apply the *Williams* holding. See, e.g., *Washington* v. *Griffin*, Docket No. 15-3831-pr, 2017 WL 5707606, *9 (2d Cir. November 28, 2017) (noting that ''neither of the plurality's rationales commanded a majority''); *State* v. *Michaels*, 219 N.J. 1, 31, 95 A.3d 648 (''[w]e find *Williams*'s force, as precedent, at best unclear''), cert. denied, U.S. , 135 S. Ct. 761, 190 L. Ed. 2d 635 (2014); *State* v. *Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) (''[t]he [United States] Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court''), cert. denied, U.S. , 135 S. Ct. 1535, 191 L. Ed. 2d 565 (2015); *State* v. *Griep*, 361 Wis. 2d 657, 680, 863 N.W.2d 567 (2015) (''[a]s no opinion overlaps with another, the *Marks* narrowest grounds rule does not apply to [*Williams*]''), cert. denied, U.S. , 136 S. Ct. 793, 193 L. Ed. 2d 709 (2016).

Turning to the present case, even assuming that Petillo's report contained testimonial hearsay,[13] there simply is no merit to the defendant's argument that his right to confrontation was implicated in the present case by the admission of Stephenson's opinion testimony, despite Stephenson's opinion having been formulated in part by his review of Petillo's ballistic report. As our Supreme Court indicated in *Buckland*, in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the court's violation of the defendant's confrontation rights occurred because it admitted certain inculpatory statements that were testimonial in nature and were made against the defendant by an individual who was absent at the trial. See *State* v. *Buckland*, supra, 313 Conn. 215–16. Those same circumstances simply are not present here. In the present case, the only inculpatory conclusion or statement regarding the ballistic evidence presented to the jury was made by Stephenson in court. At no point did the state seek to introduce Petillo's report or any statement or opinion by Petillo regarding the ballistic evidence through Stephenson. Stephenson obviously was fully available for cross-examination at trial regarding his own scientific conclusions and the factual basis underpinning his opinion. Indeed, defense counsel not only questioned Stephenson about the allegedly subjective nature of the science involved but was also able to reinforce to the jury the fact that Stephenson's opinion was not formulated on the basis of his own physical

[13] For purposes of our analysis, we will presume without deciding that the ballistic report prepared by Petillo in this matter, which was never introduced into evidence or otherwise made a part of the record in this case, contained certifications or other statements that would be deemed testimonial in accordance with *Crawford*. Although no appellate court in this state squarely has addressed the extent to which contents of a ballistic report are testimonial statements for purposes of confrontation clause analysis, courts in other jurisdiction have treated them as such. See, e.g., *Ayala* v. *Saba*, 940 F. Supp. 2d 18, 20 (D. Mass. 2013); *Conners* v. *State*, 92 So. 3d 676, 684 (Miss. 2012); *Miller* v. *Commonwealth*, Docket No. 1353-08-2, 2009 WL 2997079, *2 (Va. App. September 22, 2009).

examination of the ballistic evidence, and was instead based on his review of photographs and information in other reports. The same attack on the reliability of Stephenson's opinion was repeated by the defense during closing arguments.

There is no dispute that an accused has the right to confront the analyst who states a conclusion drawn from scientific evidence or certifies the results of scientific tests in a report prepared for trial because such statements qualify as testimonial statements subject to the confrontation clause as set forth in *Melendez-Diaz* and its progeny. To the extent, however, that, as in the present case, the defendant was afforded a full opportunity to confront the declarant of the actual scientific conclusions admitted against him, any claim of a confrontation clause violation simply is not persuasive.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL PETTIFORD *v.* STATE OF CONNECTICUT (AC 39296)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The plaintiff P sought to recover damages from the defendant for personal injuries he sustained in connection with an accident in which a vehicle owned by the defendant stuck him while he was crossing a road near an intersection. On the evening of the accident, P had parked his truck on the side of the road to deliver a package to an address on the opposite side of the road. At that time, it was dark and rainy, the road was not well lit and P was wearing dark brown clothing without any reflective

[14] Our conclusion is in accord with the decision of the Wisconsin Supreme Court, which considered a similar issue in *State* v. *Griep*, supra, 361 Wis. 2d 682–83, 691 (holding right of confrontation not violated where expert witness reviewed another analyst's forensic test results in forming independent opinion relayed at trial).

markings. There also were no distinct makings on the road indicating a place for pedestrians to cross in the area where P was struck, and the avenue that intersected the subject road did not have sidewalks at that intersection. In his complaint, P alleged that his injuries were caused by the negligence of the defendant's agent, who was driving the vehicle when it struck him. The defendant filed a special defense, asserting that P's alleged injuries were proximately caused by his own negligence. Following a trial, the court rendered judgment in favor of the defendant. In reaching its decision, the court reviewed the statutory (§ 14-297 [2]) definition of crosswalk and determined that P was not in or near an unmarked crosswalk when he was struck, because there was no prolongation of lateral lines of sidewalks at the subject intersection. The court also determined that P, by crossing a poorly lit road without wearing reflective clothing on a dark, rainy night was at least 60 percent contributorily negligent for his injuries, and, therefore, his recovery was precluded pursuant to the applicable statute (§ 52-572h [b]). On appeal to this court, P claimed that he was entitled to a new trial because the trial court's comparative negligence calculus rested on its erroneous determination that an unmarked crosswalk did not exist in the area where he was struck. *Held* that the trial court properly determined that P did not cross the road at an unmarked crosswalk at the time of the accident: contrary to P's contention that the trial court construed the statutory definition of crosswalk too narrowly under the circumstances of this case, the plain language of § 14-297 (2) applied to the undisputed facts indicated that the court properly determined that no unmarked crosswalk existed in the area where P was struck, and even if an unmarked crosswalk had existed, P failed to demonstrate how that fact would have altered the trial court's judgment, as the record was silent as to whether P was in or near the purported unmarked crosswalk when he was struck by the defendant's vehicle, and, therefore, this court lacked any basis from which to determine the degree to which the trial court's allegedly erroneous finding would have affected, if at all, its assignment of comparative negligence; furthermore, because the plaintiff did not fail to establish negligence on the part of the defendant and merely failed to establish that the defendant's negligence exceeded his own, the trial court, pursuant to § 52-572h, should have rendered a judgment on the merits against the plaintiff and in favor of the defendant, rather than dismissed the action.

Argued November 14, 2017—officially released January 16, 2018

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the

motion to intervene as a plaintiff filed by United Parcel Service; thereafter, the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment dismissing the action; subsequently, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the named plaintiff's motion to reargue, and the named plaintiff appealed to this court. *Improper form of judgment; judgment directed.*

Brenden P. Leydon, for the appellant (named plaintiff).

James E. Coyne, with whom was *Colleen D. Fries*, for the appellee (defendant).

Opinion

PRESCOTT, J. In this action arising out of a motor vehicle collision with a pedestrian, the plaintiff Michael Pettiford appeals, following a trial to the court, from the judgment rendered in favor of the defendant, the state of Connecticut.[1] The court concluded that the plaintiff was "at least" 60 percent contributorily negligent for his injuries and, thus, was barred from recovering damages on the basis of the defendant's negligence in accordance with General Statutes § 52-572h (b).[2] The plaintiff claims on appeal that he is entitled to a new trial because the court's comparative

[1] Pettiford was working for United Parcel Service (UPS) at the time of the incident, and UPS intervened as an additional plaintiff, asserting by intervening complaint that if Pettiford was successful in his action against the defendant, UPS was entitled to recover any workers' compensation benefits that it had paid or would become obligated to pay to him. See General Statutes § 31-293. UPS is not a participating party in the present appeal, however, and, thus, all references to the plaintiff in this opinion are to Pettiford only.

[2] General Statutes § 52–572h (b) provides in relevant part: "In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person . . . to recover damages resulting from personal injury . . . if the negligence was not greater than the combined negligence of the person . . . against whom recovery is sought . . . ."

negligence calculus rested on the court's erroneous determination that there was not an unmarked crosswalk at the location where the plaintiff was struck by the defendant's vehicle. The defendant disputes the existence of an unmarked crosswalk and also argues in the alternative that the existence of an unmarked crosswalk, or lack thereof, is legally insignificant because the trial court found that the plaintiff had failed to prove how and where along the roadway he crossed at the time of the accident. We agree with the defendant that the court properly determined that no unmarked crosswalk existed but conclude in the alternative that, even if an unmarked crosswalk existed, the plaintiff failed to demonstrate that he was in or very near that crosswalk at the time he was hit by the defendant's vehicle, and, therefore, we lack any basis from which to determine whether the claimed error undermined the court's judgment. Because the form of the judgment was improper, however, we reverse the judgment of the trial court and remand the case with direction to render judgment in favor of the defendant.

The following facts, as found by the court in its memorandum of decision,[3] and procedural history are relevant to our resolution of the plaintiff's claim. The accident at issue occurred at approximately 6 p.m. on January 7, 2009, in the westbound lane of Rock Spring Road in Stamford, somewhere near its intersection with Treat Avenue and the entrance to 102 Rock Spring Road. Trevor Jones, a state employee, was driving a GMC

[3] Our recitation of the facts is hampered somewhat by the manner in which the trial court set forth its factual findings in its memorandum of decision. Rather than plainly reciting the facts it found on the basis of the evidence presented, the court often refers to the testimony of fact witnesses without expressly indicating the extent to which it credited that testimony. Nevertheless, it is reasonable for us to infer that the court would not recite testimony in its factual recitation that it declined to credit. Furthermore, the parties are in agreement as to most of the salient facts.

passenger van that was owned by the defendant when he struck the plaintiff, who was crossing the roadway.

Prior to the accident, Jones had been transporting members of the Wilcox Technical High School girls basketball team home from a practice. He dropped off the last girl at the intersection of Rock Spring Road and Coolidge Avenue before proceeding westward on Rock Spring Road. It was rainy that evening, with limited visibility, and the roadway was not well lit. Although Jones had his headlights and windshield wipers on, the headlights of oncoming vehicles made it difficult at times to observe the roadway. Just prior to hitting the plaintiff with the van, Jones observed a United Parcel Service truck that was parked to his left on the eastbound side of the road with its lights on or flashing. The van traveled approximately twenty-five or thirty feet further before striking the plaintiff, who was near the double yellow line in the center of the road.[4] Jones did not see the plaintiff until a split second before the accident, having been blinded by oncoming headlights just seconds before. He tried to maneuver the van to the left to avoid the collision but was unsuccessful. The van was travelling at approximately fifteen to twenty miles per hour at the time it hit the plaintiff. The posted speed limit on Rock Springs Road was twenty-five miles per hour.

The right front corner of the van struck the plaintiff in the right hip, and he sustained serious injuries to his head and body. When emergency responders arrived, the plaintiff was lying near the beginning of the driveway leading to 102 Rock Spring Road. A package addressed to that location was found near the plaintiff, suggesting that he had been in the process of making

[4] Although the plaintiff has no recollection of the accident or other events from that day, the driver of a vehicle traveling eastbound on Rock Spring Road witnessed the accident.

a delivery to that address at the time of the accident. The plaintiff was wearing a dark brown uniform without any reflective markings or devices at the time of the accident. The responding police officer, Jeffrey Boothe, made a nonscale diagram of the accident site, which he included in his official report.

On November 12, 2010, the plaintiff commenced this action against the defendant.[5] The operative amended complaint was filed on October 21, 2015,[6] and contained a single count sounding in negligence. The plaintiff alleged various injuries he sustained as a result of the accident and that those injuries were caused by the negligence of the defendant's agent, Jones, in one or more of the following ways: he failed to keep a reasonable and proper lookout; he operated the van at a greater speed than warranted under the circumstances; he operated the van with inadequate or defective brakes or failed to apply the brakes properly; he failed to keep the van under proper control; failed to maneuver the van around the plaintiff; he operated the van at an unreasonable rate of speed in violation of General Statutes §§ 14-218a or 14-219; he failed to yield the right-of-way to a pedestrian crossing in an unmarked crosswalk in violation of General Statutes § 14-300 (c);[7] he

[5] General Statutes § 52-556 waives the sovereign immunity of the state in cases alleging the negligent operation by a state employee of a motor vehicle "owned and insured by the state against personal injuries or property damage . . . ."

[6] We note that, rather than provide this court with the relevant operative pleadings, the plaintiff included in the appendix of his brief only the original complaint and original answer and special defense. It is the responsibility of the appellant to include in part one of the appendix, inter alia, "all relevant pleadings." Practice Book § 67-8. In a civil matter, the *relevant* pleadings necessarily are the *operative* pleadings.

[7] General Statutes § 14-300 (c) provides in relevant part: "[A]t any crosswalk marked as provided in subsection (a) of this section or any unmarked crosswalk . . . each operator of a vehicle shall grant the right-of-way, and slow or stop such vehicle if necessary to so grant the right-of-way, to any pedestrian crossing the roadway within such crosswalk, provided such pedestrian steps off the curb or into the crosswalk at the entrance to a crosswalk or is within that half of the roadway upon which such operator

failed to exercise due care to avoid striking a pedestrian in violation of General Statutes § 14-300d; and he failed to sound a horn or other noise emitting device to avoid the collision in violation of § 14-300d.

The defendant filed an answer to the complaint and a special defense. The operative answer was filed on April 26, 2011. The final, operative special defense was filed on October 13, 2015. Although the defendant admitted in its answer that the plaintiff was struck by a van owned by the state and operated by a state employee acting within the scope of his employment, it denied all the various specifications of negligence. Furthermore, by way of special defense, the defendant asserted that any injuries alleged by the plaintiff were proximately caused by his own negligence. In particular, the defendant alleged that the plaintiff was negligent in that he failed to ensure that the roadway was clear of approaching vehicles before crossing and failed to be attentive of his surroundings or to keep a proper lookout. The defendant also alleged that the plaintiff abruptly left the safety of the curbside and walked into the path of a vehicle that was so close to the plaintiff that it constituted an immediate hazard to him in violation of General Statutes § 14-300c (b); he crossed the roadway outside of a crosswalk without yielding the right-of-way to the defendant's vehicle in violation of General Statutes § 14-300b (a); and he failed to walk against traffic on the roadway in violation of § 14-300c (a).[8]

of a vehicle is traveling, or such pedestrian steps off the curb or into the crosswalk at the entrance to a crosswalk or is crossing the roadway within such crosswalk from that half of the roadway upon which such operator is not traveling. . . ."

[8] General Statutes § 14-300b (a) provides in relevant part: "Each pedestrian crossing a roadway at any point other than within a crosswalk marked as provided in subsection (a) of section 14-300 or any unmarked crosswalk or at a location controlled by police officers shall yield the right of way to each vehicle upon such roadway. . . ."

General Statutes § 14-300c provides in relevant part: "(a) No pedestrian shall walk along and upon a roadway where a sidewalk adjacent to such roadway is provided and the use thereof is practicable. Where a sidewalk

Finally, the defendant alleged that the plaintiff's actions amounted to negligent use of a highway in violation of General Statutes § 53-182. The plaintiff filed a reply generally denying the allegations in the special defense.

The case was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, between November 5 and November 13, 2015. The parties submitted simultaneous posttrial briefs on January 29, 2016. On April 8, 2016, the court issued a written memorandum of decision, dismissing the action.[9]

is not provided adjacent to a roadway each pedestrian walking along and upon such roadway shall walk only on the shoulder thereof and as far as practicable from the edge of such roadway. Where neither a sidewalk nor a shoulder adjacent to a roadway is provided each pedestrian walking along and upon such roadway shall walk as near as practicable to an outside edge of such roadway and if such roadway carries motor vehicle traffic traveling in opposite directions each pedestrian walking along and upon such roadway shall walk only upon the left side of such roadway.

(b) No pedestrian shall suddenly leave a curb, sidewalk, crosswalk or any other place of safety adjacent to or upon a roadway and walk or run into the path of a vehicle which is so close to such pedestrian as to constitute an immediate hazard to such pedestrian. . . ."

[9] It appears that the court may have believed that because the plaintiff did not prevail in his negligence action brought pursuant to General Statutes § 52-556, which provides a limited waiver of sovereign immunity in cases alleging the negligent operation of a state owned and insured vehicle by a state employee, this somehow divested the court of subject matter jurisdiction and required a dismissal of the action. That belief, however, was misplaced. Once facts sufficient to support a waiver of sovereign immunity pursuant to § 52-556 have been pleaded and the case has gone to trial, the plaintiff's failure to prevail on the merits does not implicate the court's jurisdiction over the action or its authority to render judgment in favor of the prevailing party. See *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012), citing favorably to *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991) (declining to adopt "bizarre interpretation" of General Statutes § 7-465 that would require courts to conclude it lacked of subject matter jurisdiction over case tried before it solely because plaintiff failed to establish essential element of his cause of action). Moreover, in the present case, the plaintiff did not fail to establish negligence on the part of the defendant; he merely failed to establish that the defendant's negligence exceeded his own. The statutory bar against recovery in § 52-572h applies whenever a plaintiff's negligence is found to exceed 50 percent of the combined negligence of those against whom recovery is sought, and its proper application merely results in a judgment on the merits against the plaintiff and in favor

The court began its analysis by rejecting the plaintiff's argument that the defendant's agent had an enhanced duty to avoid the collision because the plaintiff had been in or very near to an "unmarked crosswalk" at the time he was struck by the defendant's van. The court reviewed the statutory definition of "crosswalk" set forth in General Statutes § 14-297 (2), which provides, in relevant part, that crosswalks emanate from "the prolongation or connection of the lateral lines *of sidewalks at intersections* . . . ." (Emphasis added.) It then agreed with the defendant that because Treat Avenue does not have sidewalks at the point where it intersects with Rock Spring Road, "there are no lateral lines of sidewalk on Treat Avenue to prolongate into Rock Spring Road to create an unmarked crosswalk."

The court then turned to a discussion of the various claims of negligence raised by the parties. Importantly, the court commented on the scant evidence pertaining to the plaintiff's actions prior to the accident, stating: "It is not known whether [the plaintiff] crossed at a ninety degree angle or took a longer diagonal crossing from his truck to the delivery address." The court made no specific findings regarding where along Rock Spring Road the plaintiff entered the roadway, the precise path he traveled from his truck before being struck, or whether he was struck in or very near to the plaintiff's proposed unmarked crosswalk.

After reviewing the facts and the applicable law, and considering the arguments of the parties, the court concluded as follows: "[B]oth the plaintiff and the defendant . . . were negligent, and their negligence caused the accident and resulting serious injuries to [the plaintiff]. Under the circumstances on Rock Spring Road on the dark evening of January 7, 2009, the [defendant's] agent Jones had a duty to drive more slowly than he

of the defendant, which was the result here. In sum, the form of the judgment in the present case is improper and should be corrected to reflect a judgment in favor of the defendant rather than a dismissal of the action.

did considering the weather conditions, the darkness and the blinding effect of the headlights of oncoming traffic, and to keep a better lookout of the road ahead. This negligence was a cause of the accident and injuries. On his part, [the plaintiff] had a duty in attempting to cross the road to be more observant of oncoming vehicles, had a statutory and common-law duty not to venture out into a well-traveled roadway where visible approaching motor vehicles had the right-of-way and constituted an immediate hazard to him and particularly not to do so in the dark and rainy conditions without the protection of available reflective clothing that might have provided motor vehicle operators such as Jones the opportunity to observe [the plaintiff] well before the collision. These were acts of negligence that also caused the accident and resulting injuries.

"The court determines [that the plaintiff] was contributorily negligent and was responsible for significantly more than half, at least [60] percent, of all the negligence that caused the accident and his injuries. Based on that finding, Connecticut law, [§ 52–572h (b)], precludes any recovery for the plaintiff."

The plaintiff filed a motion to reargue claiming that the court's finding that the plaintiff had not been wearing available reflective clothing was not supported by the evidence and that the court should reassess its assignment of percentage of liability on that basis. The plaintiff did not challenge the court's finding with respect to the existence of an unmarked crosswalk in its postjudgment motion. The court denied the motion on May 23, 2016. This appeal followed.

The plaintiff's sole claim on appeal is that the court improperly determined that the area where he was struck by the defendant's vehicle was not an unmarked crosswalk. According to the plaintiff, the court, in reaching its conclusion that an unmarked crosswalk

did not exist, too narrowly construed the statutory definition of a crosswalk as set forth in § 14-297 (2), unnecessarily fixating on the lack of sidewalks along Treat Avenue. We do not agree. Furthermore, even if we did conclude that an unmarked crosswalk existed, the record does not reflect that the plaintiff was in or very near such crosswalk at the time of impact, and thus he cannot demonstrate that the court's resolution of the crosswalk issue, even if incorrect, amounted to reversible error in this case.

Whether unmarked crosswalks extend across Rock Spring Road at its intersection with Treat Avenue is a conclusion of law that is made on the basis of applying the facts as they exist to the relevant statutory definition. Ordinarily, we review such mixed questions of law and fact under our plenary standard of review, pursuant to which we must decide whether the court's conclusions are legally and logically correct and supported by the facts in the record. See *Crews* v. *Crews*, 295 Conn. 153, 162–63, 989 A.2d 1060 (2010). Issues of statutory construction also invoke our plenary review. See *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 288, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

In construing a statute, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [In so doing, we] consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Vincent* v. *New Haven*, 285 Conn. 778, 784–85, 941 A.2d 932 (2008). "[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of

the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) Id., 792.

The issue of whether the plaintiff was in or near an unmarked crosswalk was relevant to who had the duty to yield the right-of-way and, thus, to the issue of comparative negligence. Generally, a pedestrian has the duty to yield the right-of-way to vehicles in the roadway unless "within a crosswalk marked as provided in subsection (a) of section 14-300 or *any unmarked crosswalk* or at a location controlled by police officers . . . ." (Emphasis added.) General Statutes § 14-300b. In such instances, the pedestrian has the right-of-way. Thus, if the plaintiff was in or near an unmarked crosswalk when he was struck, Jones arguably had a heightened duty to avoid hitting the plaintiff.

A crosswalk, whether actually marked upon the road's surface or unmarked, is specifically defined by § 14-297 (2) as "that portion of a highway ordinarily included *within the prolongation or connection of the lateral lines of sidewalks at intersections*, or any portion of a highway distinctly indicated, by lines or other markings on the surface, as a crossing for pedestrians, except such prolonged or connecting lines from an alley across a street . . . ." (Emphasis added.) The plaintiff does not argue that the language of the statute is ambiguous, only that it should be interpreted broadly enough to include the circumstance at issue in the present case. By the statute's plain language, however, a crosswalk is created in only two ways: (1) by connecting at the intersections of two roadways the lateral lines of any sidewalks, which resulting crosswalks could be marked or unmarked, or (2) by specifically marking the surface of the roadway, which presumably could occur anywhere along a roadway, not only at an intersection. The

statute also makes clear that an alleyway's intersection with a street does not create a crosswalk.

In the present case, is undisputed that Treat Avenue did not have sidewalks at its intersection with Rock Spring Road. The lack of sidewalks meant there were no "lateral lines of sidewalks" to connect across to the other side of Rock Spring Road. Obviously, there also were no distinct markings on the roadway indicating a place for pedestrians to cross in this area. It would appear that a straightforward application of the statute to the undisputed facts would foreclose any argument that the plaintiff could have been in an unmarked crosswalk at the time of the accident.

The plaintiff nevertheless argues that the concrete curb cutouts leading from the sidewalk along Rock Spring Road onto the road surface at the intersection with Treat Avenue were angled in such a way as to suggest extensions across Rock Spring Road from Treat Avenue. The plaintiff never called a witness at trial to explain the purpose of the concrete cutouts or whether they deviated from other cutouts, nor did he present any other evidence at trial in support of his argument other than pictures of the cutouts. In addition, the plaintiff did not cite any statutory support for his argument or provide the court with relevant case law.

The plaintiff also argues that because an alley ordinarily does not have sidewalks, the exception regarding alleys would be rendered superfluous under the trial court's reading of the statute. "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). We read the exception, however, as addressing an entirely different issue than crosswalks emanating from sidewalks. The exception clarifies that someone walking down an alley cannot, unlike on a pedestrian sidewalk, proceed

across its intersection with a roadway as if an unmarked crosswalk existed at that location.

Viewed in its best light, the plaintiff seems to be making a policy argument, invoking notions of public health and safety, asking us to expand the definition of crosswalk beyond the plain statutory meaning. We conclude that the plaintiff's arguments may be more appropriate for the legislature's consideration. Because we must construe the statute as written and cannot supply additional terms to achieve a particular result; see *Vincent* v. *New Haven*, supra, 285 Conn. 792; we agree with the trial court's conclusion that there was no unmarked crosswalk from Treat Avenue across Rock Spring Road at the time of the incident at issue. Nevertheless, even if we were to agree with the plaintiff that a crosswalk did exist, this would not result in a reversal of the court's judgment and, in particular, its conclusion that the plaintiff's negligence exceeded that of the defendant and, thus, barred recovery.

Contrary to how the plaintiff has framed his claim, the court never made any finding that identifies with any specificity the plaintiff's location on the roadway at the time he was hit or from which it reasonably can be inferred that he was struck in or very near the area of the road that the plaintiff argues constituted an unmarked crosswalk. The court certainly rejected the plaintiff's argument that unmarked crosswalks extend across Rock Spring Road from either side of Treat Avenue's terminus with Rock Spring Road, an intersection that the court found was close to the accident site. The court found that the plaintiff was struck in the middle of the roadway and made no finding that the impact zone was either in or very near to that portion of the roadway where the plaintiff's proposed unmarked crosswalk existed.

The court found that the plaintiff's truck was parked on the eastbound side of Rock Spring Road. The truck

was located some twenty-five to thirty feet eastward of the area of impact, meaning the plaintiff parked it some distance east of the Treat Avenue intersection. The court further indicated that it was "not known" whether the plaintiff "crossed at a ninety degree angle or took a longer diagonal crossing from his truck to the delivery address." We read this as an indication that there was an absence of credible evidence from which the court could determine if the plaintiff had left his truck and walked back along Rock Spring Road to its intersection with Treat Avenue, before turning and attempting to cross Rock Spring Road in the vicinity of what he alleges was an unmark crosswalk, or if he had simply attempted to cross diagonally, walking in the most direct route from his truck's location across to his delivery address at 102 Rock Spring Road. There is no finding indicating whether such a diagonal path would have placed him in or near the alleged unmarked crosswalk.

During his opening argument, the plaintiff's counsel argued that the area of impact was at the intersection of Treat Avenue and Rock Spring Road. Counsel's argument, however, does not constitute evidence. The plaintiff was unable to remember anything from the day of the accident, and testified only as to the extent of his damages, not the location where he was struck. Moreover, the only witnesses that could have testified about whether the impact occurred in the alleged unmarked crosswalk—the responding officer and the eyewitness to the incident—were never asked any questions about the precise impact area. The deposition of the van's driver, Jones, was entered into evidence but provides no further illumination on that precise issue. Finally, the plaintiff did not present the testimony of an accident reconstruction expert to aid the court in determining the precise impact area.

"In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the

burden rests with the appellant to demonstrate reversible error." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Because the record is silent as to whether the plaintiff was in or near the purported unmarked crosswalk when he was struck by the defendant's vehicle, we are left to speculate about the degree to which the court's allegedly erroneous finding regarding the existence of an unmarked crosswalk would have affected, if at all, its assignment of the percent of negligence it attributed to the plaintiff. Under the circumstance in this case, the court concluded that the plaintiff's negligent actions in crossing a poorly lit street without wearing reflective clothing on a dark, rainy night—none of which is challenged by the plaintiff on appeal—outweighed the negligence the court assigned to the defendant. Even if the plaintiff was able to demonstrate that an unmarked crosswalk existed, a claim we have rejected, he has failed to show how that fact would have significantly altered the judgment of the trial court in this case.

The form of the judgment is improper, the judgment dismissing the action is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TRAVIS MONTANA
(AC 39720)

Alvord, Prescott and Lavery, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and risk of injury to a child, the defendant appealed. *Held*:

1. The state presented sufficient evidence to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child;

the victim provided graphic testimony of the sexual assaults, which the jury was free to believe even if there were inconsistencies in that testimony, the jury reasonably could have found the defendant guilty of sexual assault on the basis of that testimony alone, which established the elements necessary to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child, and it was not for this court to assess the credibility of the victim's testimony.

2. The trial court did not abuse its discretion in refusing to admit certain third-party culpability evidence proffered by the defendant, which concerned the victim's father: the nonhearsay evidence did not directly connect the victim's father to the alleged acts of sexual abuse with which the defendant was charged, as the evidence, if believed, merely established that the victim's father may have committed some other crime during a later time frame, and the fact that the victim's father might have had a motive and an opportunity to sexually assault the victim also did not establish a direct connection between the victim's father and the crimes at issue.

Argued October 25, 2017—officially released January 16, 2018

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion to introduce certain evidence and granted the state's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Jodi Zils Gagne, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Ann P. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Travis Montana, appeals from the judgment of conviction rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury

to a child in violation of General Statutes § 53-21 (a) (2).[1] On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction and (2) the court abused its discretion in excluding third-party culpability evidence. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2012, the victim, J,[2] was living with her three biological siblings and her adoptive father in a small room at a motel in Bridgeport (motel). The room had two beds and two air mattresses. In January, 2012, when the victim was twelve years old, the defendant, who was a friend of the family, moved into the room at the motel with the victim and her family. At some point, the defendant began sharing a bed with the victim.

One night while the victim was sleeping, the defendant cut a hole in the victim's pajama pants and digitally penetrated the victim's vagina. On one other occasion, the defendant attempted to force the victim to perform fellatio. On additional occasions, the defendant forced the victim to engage in vaginal intercourse. The victim's father, who was ill and on medication, was "dead asleep" during the abuse. The last incident occurred on February 14, 2012. Shortly thereafter, the defendant moved out of the motel. After the defendant left the

[1] General Statutes § 53a-70 (a) (2) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ." General Statutes § 53-21 (a) (2) provides in relevant part: "Any person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

motel, the victim disclosed the abuse to her older sister and her father. The victim's father informed the victim's physician of the abuse during a physical examination. The physician contacted the Department of Children and Families (department), and the case was referred to the Bridgeport Police Department.

Following a jury trial, the jury returned a verdict finding the defendant guilty of sexual assault in the first degree and risk of injury to a child. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of fifteen years incarceration, followed by ten years special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the state presented insufficient evidence at trial to support his conviction of sexual assault in the first degree and risk of injury to a child. Specifically, the defendant asserts that the state's evidence was insufficient because of inconsistencies in the victim's testimony.[3] We disagree.

The standard of review that we apply to a claim of insufficient evidence is well established. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon

[3] The defendant also argues that the victim's father "had a propensity for committing this crime against his daughters" and the evidence was insufficient to convict the defendant because the jury was precluded from hearing third-party culpability evidence. The court ruled that the third-party culpability evidence proffered by the defendant was inadmissible. See part II of this opinion. We examine the defendant's sufficiency claim on the basis of the evidence admitted at trial and, accordingly, the court's evidentiary ruling excluding third-party culpability evidence has no bearing on our review of the sufficiency of the evidence. Our "sufficiency review does not require initial consideration of the merits of [the defendant's evidentiary claims] . . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.) *State* v. *Coyne*, 118 Conn. App. 818, 826, 985 A.2d 1091 (2010).

the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Tine*, 137 Conn. App. 483, 487–88, 48 A.3d 722, cert. denied, 307 Conn. 919, 54 A.3d 562 (2012).

The defendant asserts that the state failed to establish his guilt beyond a reasonable doubt because "[t]here were simply too many inconsistencies" in the victim's testimony and because it was "not logical to believe that [the defendant] engaged in these acts and no one heard or saw anything at the time."[4] The defendant, essentially, is asking this court to assess the credibility of the victim's testimony and conclude that the state lacked sufficient evidence as a result of the victim's lack of credibility. This we may not do. "As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . [W]e must defer to the [finder] of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor, and attitude. . . . Credibility

[4] The defendant directs our attention to the following minor inconsistencies: the victim told an interviewer that she was wearing shorts during the initial sexual assault but stated at trial she had been wearing pajama pants; the victim did not mention that the defendant cut her pants with scissors during the initial sexual assault until trial; the victim stated to an interviewer that her father did not wake during the sexual assaults because he was on pain medication following surgery, but at trial the victim stated that her father had surgery after the sexual assaults had occurred and offered a different reason for her father having remained asleep. The defendant also argues it is illogical that: (1) the victim did not mention the sexual assaults to an employee of the department when the department became involved with her family for other reasons; and (2) the defendant committed the crimes due to the short period of time in which he resided at the motel.

determinations are the exclusive province of the . . . fact finder, which we refuse to disturb. . . . It is well settled . . . that [e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . Rather, the [finder of fact] [weighs] the conflicting evidence and . . . can decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Douglas F.*, 145 Conn. App. 238, 243–44, 73 A.3d 915, cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013).

We conclude that the evidence at trial was sufficient to convict the defendant because the testimony of the victim established the elements necessary to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child. The victim provided ample graphic testimony of the sexual assaults and it serves no useful purpose to recite her testimony in detail. See *State* v. *Gene C.*, 140 Conn. App. 241, 246, 57 A.3d 885, cert. denied, 308 Conn. 928, 64 A.3d 120 (2013). "The jury, as sole arbiter of credibility, was free to believe that testimony." Id. "[A] jury reasonably can find a defendant guilty of sexual assault on the basis of the victim's testimony alone." Id., 247.

II

The defendant also claims that the court abused its discretion in denying his motion in limine to present third-party culpability evidence. We disagree.

The following additional facts are relevant. On September 14, 2015, the day before the trial began, defense counsel filed a motion in limine requesting a ruling on the admissibility of evidence regarding whether the victim's father touched her in a sexually inappropriate manner and whether the victim's father sent her sexually explicit text messages. The following day, the court permitted defense counsel to make an offer of proof outside the presence of the jury.

During the offer of proof, the victim testified to the following. Her father "touched" her in 2015, but he did not touch her in a sexually inappropriate manner before 2015, or while they were living at the motel. The victim's father sent her sexually explicit text messages in 2015, but he did not send her sexually explicit text messages when she was living at the motel. When the victim told her father and sister that the defendant had abused her, her sister had a "mental relapse" due in part to being sexually abused by their father. She told the victim to be careful of their father. In 2008, the victim's father told the family that he was pursuing a relationship with the victim's sister, but the victim did not know whether the relationship was sexual in nature. The victim did not have personal knowledge of either the relationship between her father and sister, or of her father sexually abusing her sister. The state objected to the admission of the proffered evidence.

The court denied the defendant's motion in limine and sustained the state's objection to the proffered evidence. The court determined that the victim's testimony regarding statements made by her father and sister were inadmissible hearsay. The court also concluded that there was no basis for connecting the victim's nonhearsay statements that her father touched her and sent her sexually explicit text messages in 2015, to the early 2012 incidents at the motel, and, thus, that the statements were not relevant. The court noted that the victim testified in the jury's presence that her father was taking medication and was, therefore, unaware of the sexual abuse at the motel. The court further determined that the evidence was more prejudicial than probative.

On appeal, the defendant argues that the proffered evidence supported his third-party culpability defense because the victim's father had a motive and the opportunity to commit the crimes.[5] He argues that because

[5] The defendant also argues that the court erred by failing to instruct the jury in accordance with his requested third-party culpability charge. "[A]

the victim's father inappropriately touched the victim in 2015, and had a relationship with the victim's older sister, "it would not be a stretch of the imagination to believe [that the victim's father] committed these acts at an earlier time as well . . . ." We do not agree.

"It is well established that a defendant has a right to introduce evidence that another person committed the offense with which the defendant is charged. . . . The defendant must, however, present evidence that directly connects the third party to the crime. . . It is not enough . . . to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevancy is an evidentiary question, and [e]videntiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In determining relevancy, [t]he court must determine whether the proffered evidence is corroborative or coincidental, whether it is probative or tends to obfuscate, and whether it clarifies or obscures. In arriving at its conclusion, the trial court is in the best position to view the evidence in the context of the entire case, and we will not intervene unless there is a clear abuse of the

trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . . [T]he very standards governing the admissibility of third party culpability evidence also should serve as the standards governing a trial court's decision of whether to submit a requested third party culpability charge to the jury." (Citation omitted; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 810, 91 A.3d 384 (2014). We conclude that the court did not err in declining to give a third-party culpability charge because no third-party culpability evidence was admitted at trial to support the charge.

court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Baker*, 50 Conn. App. 268, 277–78, 718 A.2d 450, cert. denied, 247 Conn. 937, 722 A.2d 1216 (1998).

We conclude that the court did not abuse its discretion in refusing to admit the defendant's proffered third-party culpability evidence. The defendant failed to offer any evidence that directly connected the victim's father to the acts of sexual abuse that occurred at the motel. The nonhearsay evidence the defendant sought to introduce,[6] if believed, merely established that the victim's father engaged in factually dissimilar acts of misconduct against the victim three years after the incidents at the motel.[7] The victim testified during the offer of proof that her father did not send her sexually explicit text messages or touch her in a sexually inappropriate manner while they resided at the motel during the relevant time frame.[8] The victim also knew the defendant and clearly identified him as her assailant during her

[6] The defendant does not challenge the court's ruling that the statements by the victim's father and sister were inadmissible hearsay.

[7] "[T]he right of an accused to offer evidence of a person's character, past criminal convictions or other prior bad acts, in support of a third party culpability defense, also is compelled by the right to present a defense guaranteed by the sixth amendment, and, as a general matter, its use should be limited only by the rules relating to relevancy and balancing. . . . [T]he policies underlying "§ 4-4 (a) [character evidence] and 4-5 (a) [prior misconduct evidence] of the Connecticut Code of Evidence have extremely limited applicability when the defendant offers evidence of a character trait or other crimes, wrongs or acts to prove that someone else committed the crime charged." *State* v. *Hedge*, 297 Conn. 621, 653, 1 A.3d 1051 (2010).

[8] The defendant further argues, for the first time on appeal, that (1) the victim could have named the defendant as the perpetrator "simply to cover up for her father's actions" and that the jury should determine whether the victim was being truthful when she stated during her proffered testimony that her father had not touched her while they were residing at the motel; and (2) he was prejudiced by the court's exclusion of the evidence because the jury "had no one else to choose for this crime." We reject the defendant's arguments. As we previously concluded, the court did not abuse its discretion in refusing to admit the proffered evidence.

testimony on direct examination. She also testified on direct examination that her father was medicated while the abuse was occurring at the motel.

The proffered evidence creates a merely tenuous and speculative connection between the victim's father and the crimes at issue. It indicates that the victim's father may have committed some other crime during a later time frame, but does not establish a direct connection between the victim's father and the sexual abuse at the motel. The fact that the victim's father might have had a motive and an opportunity to sexually assault the victim at the motel does not establish a direct connection between the victim's father and the crimes at issue. "It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . . Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–10, 935 A.2d 975 (2007). Accordingly, we conclude that the court did not abuse its discretion by precluding the defendant from introducing third-party culpability evidence.

The judgment is affirmed.

In this opinion the other judges concurred.