CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STEPHEN J. R.* *v.* COMMISSIONER OF CORRECTION (AC 39251)

Keller, Mullins and Lavery, Js.**

Syllabus

The petitioner, who had been convicted of various crimes in connection with his alleged sexual abuse of the child victim, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to consult with and present the testimony of an expert on false memory syndrome in child sexual assault cases. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that trial counsel's performance was deficient: it was clear from the record that trial counsel's decision to focus on the victim's lack of credibility and the inconsistency in her story was a matter of trial strategy, and there was no requirement that counsel call an expert when counsel, after conducting his own research, specifically considered the false memory defense and made the strategic decision to attack the victim's credibility rather than present expert testimony, which was a reasonable strategic approach; accordingly, the petitioner failed to demonstrate that the issue raised was debatable among jurists of reason,

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* In accordance with our policy of protecting the privacy interests of victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

that a court could resolve the issue differently, or that the question raised deserved encouragement to proceed further.

Argued September 13—officially released November 7, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Fuger*, *J.*, rendered judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Grayson Colt Holmes*, former special deputy assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Stephen J. R., appeals following the habeas court's denial of his petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly denied his petition for certification to appeal after erroneously concluding that his criminal trial counsel, Christopher Eddy, had provided effective assistance despite his decision not to consult with and present the testimony of an expert on false memory syndrome in child sexual assault cases. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal, and, accordingly, we dismiss the appeal.

On direct appeal from the petitioner's underlying conviction, our Supreme Court set forth the following relevant facts that the jury reasonably could have found.

"During all relevant periods of time, the [petitioner] was a long haul truck driver from Georgia, whose job took him through Connecticut at various times throughout the year. In the spring of 2002, the [petitioner] and [the victim's] mother, A, met and later began a dating relationship. This relationship lasted from approximately April, 2002 to April, 2003, when [the victim] was approximately seven years old. During that period of time, the [petitioner] stayed with A and [the victim] in their one bedroom apartment . . . four or five times, in stays ranging from overnight to three or four days, in addition to a multiweek stay on one occasion while A recuperated from an accident. When the [petitioner] stayed overnight, he routinely would drive A to work at 8:30 a.m. and pick her up at approximately 5:30 p.m. At approximately 3 p.m., the [petitioner] would pick [the victim] up from school. As a result, the [petitioner] and [the victim] were alone in the apartment each afternoon for approximately one and one-half hours.

"One day between April and June, 2002, when [the victim] was at home after school, she went from the living room into the bedroom that she shared with her mother to play with her dollhouse. When [the victim] entered the bedroom, she found the [petitioner] undressed on the bed. The [petitioner] told her to put his penis in her mouth, and she did. The [petitioner] then pulled down her clothing from the waist down and put his tongue on her vagina. Afterward, the [petitioner] instructed [the victim] not to tell her mother about what had happened.

"Several months into A's relationship with the [petitioner], she noticed a change in [the victim's] attitude toward the [petitioner]. [The victim] seemed afraid of the [petitioner] and uncomfortable around him. On one occasion, when the [petitioner] asked [the victim] to go somewhere with him, she ran to her mother and said, 'Mommy, I don't want to go with him anymore.'

In April, 2003, A broke off her relationship with the [petitioner].

"In January or February, 2006, the [petitioner's] sister called A and asked her if the [petitioner] had done anything sexually to [the victim]. A then posed that question to [the victim]. [The victim] denied the abuse to her mother because she thought that if she 'broke that secret that something bad would happen.' Several more times during the next two years [the victim] denied to her mother that the [petitioner] had sexually assaulted her. In November or December, 2007, however, [the victim] admitted to a friend that the [petitioner] had 'raped' her. In February, 2008, [the victim] finally admitted to her mother that the [petitioner] had sexually assaulted her. Soon after, A contacted the police, which led to the [petitioner's] arrest.

"With respect to the three additional incidents,[1] the state offered the following evidence. [The victim] testified that the incident she had described occurred '[three] or four times' before her mother broke off her relationship with the [petitioner] in April, 2003. [The victim] stated that '[i]t was always the same thing' and in 'the same place.' When the [petitioner] was engaging in these acts, he would entice [the victim] with promises of taking her out for ice cream or to play miniature golf. He fulfilled those promises . . . . Further, the [petitioner] told her to keep the sexual acts a secret from her mother 'every other time it would happen.'

"The state also presented the DVD of [the victim's] April 11, 2008 diagnostic interview with Lisa Murphy-Cipolla, a clinical child interview supervisor at the

[1] Our Supreme Court noted that, although the long form information did not indicate that the sixteen counts with which the petitioner had been charged occurred in the course of four incidents, the defendant and the state agreed that the state's theory at trial was predicated on the sixteen counts occurring during the course of four incidents. *State* v. *Stephen J. R.*, 309 Conn. 586, 589 n.3, 72 A.3d 379 (2013).

Aetna Foundation Children's Center at Saint Francis Hospital and Medical Center. During the interview, [the victim] told Murphy-Cipolla that the [petitioner] would put his mouth on her vagina and he would make her put her mouth on his penis. [The victim] also identified on diagrams of male and female anatomy where she had touched the [petitioner] and where he had touched her, consistent with her statements. When asked how many times this conduct occurred, [the victim] answered 'five to six times.' Murphy-Cipolla testified that delayed disclosure is common in cases of reported child abuse.

"At the end of the state's case, the [petitioner] moved for a judgment of acquittal on all charges. The court denied the [petitioner's] oral motion, and the jury thereafter returned a verdict of guilty on all sixteen counts. The trial court rendered judgment in accordance with the jury's verdict . . . ." (Footnotes altered.) *State* v. *Stephen J. R.*, 309 Conn. 586, 589–92, 72 A.3d 379 (2013). Our Supreme Court affirmed the petitioner's conviction on direct appeal. Id., 607.

On July 24, 2015, the petitioner filed a second amended petition for a writ of habeas corpus in which he alleged in relevant part that his criminal trial counsel had provided ineffective assistance by failing to "investigate alternative theories to explain why the [victim] would fabricate, lie, or provide inaccurate, mistaken, or incorrect information alleging sexual abuse" and by failing to present expert testimony. In a May 4, 2016 memorandum of decision, the habeas court denied the petition after finding that criminal trial counsel's "assistance was completely reasonable considering all the circumstances: he investigated the case, prepared for trial, and employed reasonable trial strategies." The habeas court further found that, even if it assumed, arguendo, that criminal trial counsel had performed deficiently in a manner alleged by the petitioner, the

petitioner had not established that he was prejudiced by that performance. The habeas court, accordingly, denied the petition for a writ of habeas corpus. The court, thereafter, also denied the petition for certification to appeal. This appeal followed.

On appeal, the petitioner contends that the court abused its discretion in denying his petition for certification to appeal from the denial of his petition for a writ of habeas corpus. Specifically, he argues that the habeas court erred because the record established that his criminal trial counsel had provided ineffective assistance by failing "to utilize an expert to support a false memory[2] defense."[3] (Footnote added.) We disagree.

Initially, we set forth our standard of review. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be

[2] The petitioner's expert, David Mantell, a forensic psychologist, testified that "repeated questioning of children and adults can lead some adults to form false memories about events that didn't occur, or [that] didn't occur in the way that they are being recalled. . . . [The repeated questioning] . . . can . . . lead to the development of an entirely false memory . . . ."

[3] Although this precise allegation of ineffectiveness does not appear in the petition for a writ of habeas corpus or in the petitioner's pretrial brief to the habeas court, and, in fact, the words "false memory" do not appear in those documents at all, the petitioner's habeas counsel presented expert testimony from Dr. Mantell on this theory and included it in his closing argument at the habeas trial. The habeas court construed the petition to have included such a claim or a close variation thereof, and stated, in its memorandum of decision, that the petitioner in part had alleged that criminal trial counsel failed to "adequately present testimony that contradicts, refutes, offers alternative explanations for and otherwise challenges the [victim's] allegations." The respondent has not objected to the claim set forth by the petitioner on appeal or to our consideration of the claim as presented.

made on the basis of the record before the habeas court and the applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"[As it relates to the petitioner's substantive claims, our] standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the underlying] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result

unreliable." (Citation omitted; internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448–49, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

"To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong . . . ." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 538–39, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

"We also are mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 66–67, 127 A.3d 1011 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1095

(2016); see also *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015).

"[T]he United States Supreme Court has emphasized that a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, supra, 172 Conn. App. 539–40. We now turn to the merits of the petitioner's claim.

The petitioner claims that his criminal trial counsel rendered ineffective assistance of counsel by failing "to utilize an expert to [present and] support a false memory defense." He contends that the result of the criminal trial likely would have been different had counsel consulted and presented such an expert. The respondent, the Commissioner of Correction, asserts that the habeas court properly found that the assistance provided by counsel was "completely reasonable" in this case and that, even if counsel had performed deficiently in the manner alleged, such deficiency was not prejudicial to the petitioner. We conclude that trial counsel's performance was objectively reasonable and, therefore, that the petitioner failed to prove his ineffective assistance claim.

During the habeas trial, the petitioner presented the testimony of David Mantell, a licensed clinical psychologist, who has a Ph.D in clinical psychology, among other degrees. Mantell testified about proper protocol for interviewing suspected child abuse victims. He opined

that yes and no questions lead to less reliable information because they present a "forced choice closed option" situation. He also opined that questions that cause children to guess at the answer or that provide multiple optional responses are unreliable. Mantell explained that in his opinion answers to open-ended questions are the most reliable. Mantell stated that he had reviewed the child forensic interview aspects of this case, and that, in his opinion, the interview that had been conducted was thorough in some respects and not thorough in other respects.

Mantell discussed some of the things that he believed were not thoroughly covered in Murphy-Cipolla's questions to the victim. He also criticized Murphy-Cipolla for not formulating an alternative hypothesis to bring "to the attention of the child . . . other possibilities through which the child might have acquired the suspicion or belief that abuse had occurred, when perhaps it had not occurred." Mantell then opined that he thought it was possible that the victim "may have developed a false memory of abuse based on the fact that she had been asked about abuse multiple times . . . ." Mantell testified that he came to this conclusion for several reasons. He thought it was significant that the victim did not report the abuse prior to being questioned by her mother several years after it had happened. He also found it significant that the petitioner had not been involved in the victim's life for many years prior to her disclosure, and that she failed to provide a level of detail of the abuse. He found it persuasive that the victim also was inconsistent about her age and her grade level at the time of the abuse, and that she used a different developmental level of language or words when describing these events, some being much more adult and others being more childlike. He stated that this combination of facts led him to conclude that the

victim may have experienced false memories of the alleged abuse.

Criminal trial counsel, Eddy, also was called to testify at the habeas trial. He testified that, through discovery, he received the forensic interview file and the DVD of the actual interview conducted by Murphy-Cipolla. He also received the victim's records from the Wheeler Clinic. Eddy was asked by the petitioner's habeas attorney to describe the theory of defense that he had chosen for the petitioner's criminal trial. Eddy responded: "I think my theory of the case was one of reasonable doubt, that the [victim] made inconsistent and incomplete reports; her testimony was inconsistent and incomplete. That the state did not prove beyond a reasonable doubt that abuse occurred. That there were . . . denials and that . . . the disclosure lacked sensory details, and that, ultimately, the jury should determine that [the victim] lacks credibility because you have to assess whether the child used her own vocabulary. Did the child reenact trauma? Was the child's affect consistent with the accusations? Did the child have a good recall of those details? And the answers to all of those questions is no. There was no threat and no pressure or coercion—just, frankly, the story doesn't make sense. It's not plausible. There is a lack of progression from a less to more intimate physical contact . . . ."

Eddy further explained that, since there was no medical evidence to substantiate the abuse allegations, the case "obviously [came] down to credibility," and he acknowledged that his job was to attack the victim's credibility and to make her seem unbelievable. He stated that he defended the case in a manner that would give the jury a reasonable doubt about the crimes charged. He also testified that he had sought successfully to exclude information of prior sexual misconduct

committed by the petitioner against other children, for which the petitioner had served time in Florida.

Additionally, Eddy testified that he conducted research in anticipation of cross-examining Murphy-Cipolla, as well as other witnesses, by going to the Yale Law Library and reading several publications, including: " 'Child Sexual Abuse: Disclosure, Delay, and Denial,' [by] Pipe, Lamb, Orbach and Cederborg, 2007; 'Tell Me What Happened: Structured Investigated Interviews of Child Victims and Witnesses' by [Lamb, Hershkowitz, Orbach and Esplin], 2008; 'Investigative Interviews of Children: [A Guide for Helping Professionals]' by Poole and Lamb; 'Jeopardy in the Courtroom: [A] Scientific Analysis of Children's Testimony' by Bruck and Ceci; [and] 'Expert Witnesses in Child Abuse Cases: [What Can and Should Be Said in Court]' by Ceci and Hembrooke, among others." He also familiarized himself with the RATAC[4] protocols used by forensic interviewers, and he reviewed the victim's mental health records.

When asked whether it was a strategic decision not to call an expert, Eddy explained: "Yes. The reason I didn't call an expert was because we didn't have a situation where there was custody or explanation for the child lying. The state was not attempting to introduce lots of child behavioral issues. Having watched the video [of the forensic interview], there was not a strong claim that could be made that it was overly suggest[ive]. There w[ere] no dolls being used or play therapy, the things that are found to be not appropriate.

[4] Mantell explained that the CornerHouse RATAC Protocol "was one of many available protocols to guide forensic interviews . . . [a]nd it was the one that was selected here in Connecticut, and also in many other states across the country . . . . And it describe[s] a series of phases or steps that interviewers [are] expected to pass through in order to conduct a protocol compliant best practice interview." Mantell also explained what the RATAC initials stand for: "R, is for rapport building, A, is for anatomical body-part review, T is for touch-contact review, A, is for abuse inquiry, and, C is for closure."

There were no medical findings that I needed to dispute. This is not a situation where we had a *Jarzbek* situation[5] or anything like that, so that was my rationale for not calling an expert." (Footnote added.) He also stated that he had considered false memory, but did not argue it.

Following closing argument at the habeas trial, the court denied the petition for a writ of habeas corpus on the ground that Eddy's performance was not deficient and that the petitioner had not demonstrated prejudice. Specifically, the court concluded that Eddy's "assistance was completely reasonable considering all the circumstances: he investigated the case, prepared for trial, and employed reasonable trial strategies." The court further concluded that even assuming, arguendo, that Eddy's performance was deficient, the petitioner had failed to demonstrate that such deficiency caused him prejudice. We agree with the habeas court and conclude that the petitioner has failed to demonstrate that criminal trial counsel's performance was deficient.

It is clear from the record as set forth previously in this opinion that trial counsel's decision to focus on the victim's lack of credibility and the inconsistency in her story was a matter of trial strategy. Although the petitioner argues that trial counsel should have called an expert to discuss false memory syndrome, there is no requirement that counsel call an expert when he has developed a different trial strategy. "[T]here is no per

[5] "In cases involving the alleged sexual abuse of children, the practice of videotaping the testimony of a minor victim outside the physical presence of the defendant is, in appropriate circumstances, constitutionally permissible. To that end, in such cases, the state files a motion pursuant to *State* v. *Jarzbek*, [204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988)], and a hearing is held to determine whether it is necessary to exclude a defendant from the room during the videotaping of a child victim's testimony in order to preserve the accuracy and reliability of that testimony." *Ruiz* v. *Commissioner of Correction*, 156 Conn. App. 321, 324 n.2, 113 A.3d 485, cert. granted, 319 Conn. 923, 125 A.3d 199 (2015) (appeal withdrawn, January 28, 2016).

se rule that requires a trial attorney to seek out an expert witness. . . . Furthermore, trial counsel is entitled to make strategic choices in preparation for trial." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, supra, 172 Conn. App. 542.

Indeed, our Supreme Court expressly has declined to adopt a bright line rule that an expert witness for the defense is necessary in every sexual assault case. *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012). We recognize, however, as the petitioner points out, that our Supreme Court also has stated that "in certain instances, the employment of an expert for the defense may be constitutionally mandated by the facts and surrounding circumstances of the case . . . ." Id., 101. The petitioner, however, has not demonstrated that the present case is such a matter. In this case, which boiled down to a credibility contest, trial counsel, after conducting his own research, specifically considering the false memory defense, and reviewing the facts of the case, made the strategic decision to attack the victim's credibility rather than present expert testimony. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 444, 159 A.3d 109 (2016).

Here, trial counsel told the habeas court that he, in fact, had considered false memory but did not argue that theory to the jury, instead focusing on the victim's lack of credibility. Trial counsel explained that he wanted the jury to find the victim not credible and to conclude that there was a reasonable doubt as to the petitioner's guilt, and that he proceeded with that trial strategy. He also conducted independent research to assist with the petitioner's defense. A review of trial counsel's closing argument at the petitioner's criminal

trial reveals that counsel pointed out to the jury that there were many inconsistencies in the victim's testimony and that her details were incomplete. He argued that there were inconsistencies in her statements as to her age and her grade level at the time the abuse was alleged to have occurred. He also pointed out the victim's delay in reporting and her repeated denials that abuse had occurred, despite the fact that the petitioner was no longer present in the home or involved with her or A. He discussed the lack of emotion from the victim and her varied vocabulary and descriptions of the abuse, which, at times, sounded "almost clinical." On the basis of this record, we agree with the habeas court that this was a reasonable strategic approach.

"It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 831–32, 167 A.3d 389 (2017).

We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. The petitioner has not demonstrated that the issue he raised on appeal is debatable among jurists of reason, that the court could resolve the issue in a different manner, or that the question raised deserves encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TROY JACKSON (AC 36790)

Lavine, Elgo and Beach, Js.

Syllabus

Convicted, following a jury trial, of the crime of murder in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that the trial court committed plain error in failing to give the jury a special accomplice credibility instruction as to the testimony of two witnesses, C and N, due to their presence at the scene of the shooting. This court affirmed the defendant's conviction, concluding, inter alia, that he had waived review of his plain error claim. Thereafter, the defendant filed a petition for certification with our Supreme Court, which remanded the matter to this court to consider the merits of the claim that the trial court committed plain error in failing to provide an accomplice credibility instruction to the jury. On remand, *held*:

1. The trial court did not commit plain error by failing to sua sponte provide an accomplice liability instruction, as the defendant failed to establish an indisputable instructional error on the part of the trial court that was so clear and obvious as to require the extraordinary remedy of reversal, which he was required to show under the first prong of the plain error doctrine; neither C nor N was charged with any crimes relating to the murder, nor did either confess to being an accomplice, there was no evidence adduced at trial that C and N had participated in planning the murder, the defendant never suggested that C and N were his accomplices, but argued that the evidence did not support a finding that he was at the scene of the shooting, and, thus, an accomplice credibility instruction would have implicated the defendant in the murder and arguably contravened his right to control the conduct of his own defense.

2. Even if the trial court's failure to provide a special accomplice credibility instruction was an error satisfying the first prong of the plain error doctrine, the defendant's claim nevertheless failed the second prong because the error did not result in manifest injustice: the jury was apprised of any personal motivation or self-interest of C and N in testifying on behalf of the state, including the facts that both of them were incarcerated on unrelated matters, and that N's guilty plea in the other matter included a plea deal pertaining to N's testimony in the present case; moreover, the jury was provided with a general instruction on credibility of witnesses, including an instruction to consider whether the witnesses before it had any interest in the outcome of the case or any bias or prejudice concerning any party or any matter involved in the case, and the jury was presumed to have followed those instructions.

Argued September 8—officially released November 7, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the charge of murder was tried to the jury before *B. Fischer*, *J.*, verdict of guilty; thereafter, the charges of criminal possession of a firearm and carrying a pistol without a permit were tried to the court; judgment of guilty, from which the defendant appealed to our Supreme Court, which transferred the appeal to this court, which affirmed the judgment; subsequently, the defendant filed a petition for certification to appeal with the Supreme Court, which remanded the matter to this court to consider the defendant's claim. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. This criminal appeal returns to this court following a remand by our Supreme Court. *State* v.

Jackson, 325 Conn. 917, 163 A.3d 617 (2017). On remand, the Supreme Court has directed this court to consider the merits of the claim of the defendant, Troy Jackson, that the trial court committed plain error in failing to provide a special accomplice credibility instruction to the jury. Id. We conclude that the defendant has not met his burden pursuant to the plain error doctrine and, accordingly, affirm the judgment of the trial court.

As this court noted in its earlier decision, the jury reasonably could have found, on the basis of the evidence adduced at trial, that "[o]n the evening of June 4, 2007, the victim, Julian Ellis, was standing with Sterling Cole on the corner of Lloyd and Exchange Streets in New Haven. The defendant approached the victim along with several unidentified individuals, including Nicholas Newton, and asked whether the victim was dealing drugs in the defendant's territory. After a short exchange, the victim fled. As he ran, the defendant shot him in the back multiple times, resulting in his death.

"The defendant was subsequently arrested and charged in a long form information with murder in violation of [General Statutes] § 53a-54a (a), criminal possession of a firearm in violation of General Statutes § 53a-217, and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. The defendant elected a jury trial on the murder charge and a court trial on the firearms charges. Following the presentation of evidence, the jury found the defendant guilty of murder and the court found the defendant guilty of the remaining charges. The court sentenced the defendant to a total effective term of sixty years incarceration. The defendant then filed the present appeal." *State* v. *Jackson*, 159 Conn. App. 670, 672–73, 123 A.3d 1244 (2015), remanded, 325 Conn. 917, 163 A.3d 617 (2017).

On appeal, the defendant raised two distinct claims. First, he asked this court to exercise its supervisory

powers "to require trial courts to give a special credibility instruction when an incarcerated witness receives a benefit from the state in exchange for testimony regarding a crime that he claims he personally observed prior to his incarceration." Id., 673. This court declined to do so. Id., 675. Second, the defendant claimed that "the [trial] court committed plain error when it failed to give a special accomplice credibility instruction as to the testimony of Cole and Newton." Id. Consistent with the precedent of our Supreme Court established in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011),[1] this court concluded that the defendant had waived review of that claim. *State* v. *Jackson*, supra, 159 Conn. App. 677–79. The defendant thereafter filed a petition for certification with our Supreme Court.[2]

While that petition was pending, the Supreme Court issued its decision in *State* v. *McClain*, 324 Conn. 802, 155 A.3d 209 (2017). In *McClain*, the court clarified that "a *Kitchens* waiver does not foreclose claims of plain error." Id., 815. In so doing, the court explained that "the policy behind the waiver rule in *Kitchens* is inapposite in the context of claims of plain error . . . ." Id.

In response, the defendant filed a motion for leave to amend his petition for certification with the Supreme Court. By order dated April 26, 2017, the court denied the defendant's request, but granted his petition and remanded his appeal "to the Appellate Court with direction to consider [his] claim of plain error in light of

[1] In *Kitchens*, our Supreme Court held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83.

[2] In his October 5, 2015 petition for certification, the defendant stated that, with respect to his first claim regarding the exercise of supervisory authority, "[c]ertification is not sought from disposition of this issue."

State v. *McClain*, [supra, 324 Conn. 802]." The parties thereafter filed supplemental briefs with this court on the issue of whether the defendant's conviction should be reversed pursuant to the plain error doctrine because the trial court "did not sua sponte give a special credibility instruction" to the jury. This court heard oral argument on that issue on September 8, 2017.

As a preliminary matter, we note that "the plain error doctrine in Connecticut, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts [only] to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 437, 147 A.3d 655 (2016). "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 813–14.

In *McClain*, our Supreme Court reiterated "the two-pronged nature" of the plain error doctrine, stating that an appellant cannot prevail thereunder "unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) Id., 812. With respect to the first prong, the claimed error must be "patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not

debatable." (Internal quotation marks omitted.) Id.; see also *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009) ("the party seeking plain error review must demonstrate that the claimed impropriety was . . . clear, obvious and indisputable"). With respect to the second prong, an appellant must demonstrate "that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 288, 963 A.2d 11 (2009). The Supreme Court has described that second prong as a "stringent standard" that "will be met only upon a showing that, as a result of the obvious impropriety, the defendant has suffered harm so grievous that fundamental fairness requires a new trial." *State* v. *Jamison*, 320 Conn. 589, 599, 134 A.3d 560 (2016). Given that very "demanding" standard, our precedent instructs that "[p]lain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Bellamy*, supra, 323 Conn. 437–38.

I

The defendant contends that the trial court committed plain error by failing to sua sponte provide the jury with a special accomplice credibility instruction regarding the testimony of Cole and Newton due to their presence and behavior at the scene of the shooting. "Generally, a defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely. . . . An exception to this rule, however, involves the credibility of accomplice witnesses. . . . [When] it is warranted by the evidence, it is the *court's duty* to caution the jury to scrutinize carefully the testimony if the jury finds that the witness intentionally assisted in the commission, or if [he or she] assisted or aided or abetted in the commission, of the offense with which the defendant is charged. . . . [I]n order for one to be an accomplice there must be mutuality of intent and community

of unlawful purpose." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 227, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

On appeal, the defendant claims that the presence and behavior of Cole and Newton at the scene of the shooting reasonably supports an inference that Cole and Newton either possessed a mutuality of intent and community of unlawful purpose or that they intentionally assisted, or aided and abetted, in the commission of the murder. The defendant notes that Newton arrived at the scene of the shooting with the defendant, while Cole arrived with the victim.[3] Furthermore, the defendant relies on a security camera video of the shooting that was admitted into evidence and played for the jury several times at trial, which depicts Cole and Newton in a circle with the victim and other unidentified individuals moments before the shooting. In that video, the defendant claims that "[a]s the shooter stepped toward the victim raising a gun, Cole faced east and Newton faced west, watching both directions as the crime occurred." The defendant also argues that "Cole remained present instead of riding away on his bicycle when the shooting started and . . . he stayed looking up the street away from the commotion" at a time when "[e]veryone else [had] immediately run away." In light of the foregoing, the defendant argues that the evidence was sufficient to establish that Cole and Newton were accomplices to the murder of the victim. As such, the defendant maintains that the court was obligated to furnish an accomplice credibility instruction to the jury regarding their testimony.

We disagree that the court's failure to sua sponte provide an accomplice liability instruction under the

[3] In their respective police statements and trial testimony, Cole and Newton acknowledged their presence at the scene of the shooting.

particular circumstances of this case was plain error. The record reveals that neither Cole nor Newton was charged with any crimes relating to the murder of the victim. See *State* v. *Underwood*, 142 Conn. App. 666, 677, 64 A.3d 1274 (rejecting challenge to court's failure to provide accomplice credibility instruction to jury when, inter alia, witness "was not charged with the same crimes as was the defendant"), cert. denied, 310 Conn. 927, 78 A.3d 146 (2013). This also is not a case in which Cole and Newton confessed to being accomplices. See *State* v. *Jamison*, supra, 320 Conn. 593–94; *State* v. *Brown*, 187 Conn. 602, 613, 447 A.2d 734 (1982).

There also was no evidence at trial that Cole and Newton "had participated in planning the murder." *State* v. *Sanchez*, 50 Conn. App. 145, 156, 718 A.2d 52, cert. denied, 247 Conn. 922, 722 A.2d 811 (1998). Significantly, the defendant never suggested, at trial or in closing argument, that Cole and Newton were his accomplices. Rather, the defendant steadfastly argued that the evidence did not support a finding that he was at the scene of the shooting. In such instances, we cannot conclude that the court's failure to sua sponte provide a special accomplice credibility instruction was plain error on the part of the trial court. Indeed, furnishing that instruction to the jury arguably would have contravened the defendant's well established right to control the conduct of his own defense,[4] as an accomplice credibility instruction, by its very nature, would have implicated the defendant in the victim's murder.

[4] See, e.g., *Faretta* v. *California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (the sixth amendment "grants to the accused personally the right to make his defense . . . for it is he who suffers the consequences if the defense fails"); *State* v. *Bonilla*, 317 Conn. 758, 772, 120 A.3d 481 (2015) ("[o]ur well established approach to jury instructions and defenses respects the defendant's right to control the conduct of his own defense" [internal quotation marks omitted]); *State* v. *Peeler*, 265 Conn. 460, 470, 828 A.2d 1216 (2003) (observing that "a primary purpose of the sixth amendment is to grant a criminal defendant effective control over the conduct of his defense"), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004).

To prevail under the first prong of a plain error analysis, an appellant must demonstrate that the alleged error is "obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [appellant] simply to demonstrate that his position is correct. Rather, the [appellant] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 373, 33 A.3d 239 (2012). The defendant has not established such an indisputable instructional error on the part of the trial court. He therefore cannot satisfy the first prong of the plain error doctrine.

II

Even if we were to assume that the court's failure to provide a special accomplice credibility instruction was an error satisfying the first prong of the plain error doctrine, the defendant's claim nevertheless fails the second prong because that error did not result in manifest injustice. See, e.g., *State* v. *Sanchez*, 308 Conn. 64, 84, 60 A.3d 271 (2013) ("assuming that it is not debatable that [trial court improperly failed to give particular jury instruction] . . . the omitted jury instruction did not result in manifest injustice"); *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 804, 54 A.3d 232 (2012) ("assum[ing] that the [conduct in question] was an error in satisfaction of the first prong of the plain error test, we would be unable to conclude that the results of such a claimed error rose to the level of fundamental unfairness in satisfaction of the second prong of the test"). The appellate courts of this state repeatedly and consistently have held that a trial court's failure to provide a special accomplice credibility instruction does not constitute plain error. See, e.g., *State* v. *Jamison*, supra, 320 Conn. 606 ("we cannot conclude that the omission of the accomplice

credibility instruction was so harmful that a failure to reverse the defendant's conviction . . . would result in a manifest injustice"); *State* v. *Diaz*, 302 Conn. 93, 103, 25 A.3d 594 (2011) ("the trial court's failure to give, sua sponte, a jailhouse informant instruction . . . does not constitute plain error when the trial court has instructed the jury on the credibility of witnesses and the jury is aware of the witness' motivation for testifying"); *State* v. *Moore*, 293 Conn. 781, 819, 981 A.2d 1030 (2009) (concluding that defendant "has not met his burden of demonstrating harm under the plain error doctrine" resulting from court's failure to give accomplice testimony instruction), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010); *State* v. *Miller*, 150 Conn. App. 667, 681–82, 92 A.3d 986 (concluding that court's failure to provide specific accomplice instruction did not result in manifest injustice), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014); *State* v. *Schmidt*, 92 Conn. App. 665, 673, 886 A.2d 854 (2005) (concluding that court's failure to provide specific accomplice instruction did not result in manifest injustice when court provided general instruction on credibility that "referred the jury to matters of bias and motivation" and jury was made aware at trial of witness' "motivation and interest in testifying"), cert. denied, 277 Conn. 908, 894 A.2d 989 (2006); *State* v. *Solman*, 67 Conn. App. 235, 240–41, 786 A.2d 1184 (2001) (same), cert. denied, 259 Conn. 917, 791 A.2d 568 (2002). Indeed, as our Supreme Court recently noted, no criminal conviction in this state has been reversed "under the plain error doctrine on the basis of a trial court's failure to give an accomplice credibility instruction." *State* v. *Jamison*, supra, 600; see id., 598 (rejecting claim of plain error under manifest injustice prong despite fact that "the trial court's failure to give an accomplice credibility instruction was an obvious and readily discernible error").

"[T]he fundamental purpose of an accomplice credibility instruction is to impress on the jury that an accomplice's testimony should be closely scrutinized" because the accomplice may possess a personal motivation or self-interest in testifying on behalf of the state. Id., 606–607. Accordingly, our precedent instructs that "[w]hen that concern is brought to the jury's attention . . . and the jury is given a general credibility instruction that it is presumed to have followed, we see no reason to conclude that the trial court's failure to give an accomplice credibility instruction likely was so harmful that reversal is the only way to avoid manifest injustice to the defendant and to preserve public confidence in the fairness of the judicial proceeding." Id., 607. Such is the case here.

At trial, Newton testified that he currently was incarcerated following his guilty plea in an unrelated murder. His total effective sentence for that crime was thirty-eight years. Newton further acknowledged that, pursuant to the terms of that plea, the state agreed to permit him to apply for a sentence modification that would reduce his sentence from thirty-eight years to thirty-three years if he testified truthfully in the defendant's criminal proceeding. Newton testified that, if he did so, he "would get thirty-three years to serve." On the same day that he entered that plea before the court, Newton provided a statement to the police, in which he identified the defendant as the person who shot the victim on June 4, 2007. Months later, Newton was sentenced in accordance with the terms of his plea agreement.

In his testimony at the defendant's trial, Newton acknowledged that the defendant was the brother of Octavia Jackson, with whom Newton had a son. Newton then testified that he never saw the defendant on June 4, 2007. Although he witnessed the shooting, Newton testified the defendant was not present at that time. In light of that testimony, the court permitted the state,

pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986),[5] to introduce portions of Newton's statement to the police, in which Newton incriminated the defendant. In his closing argument, the defendant's counsel cautioned jurors that Newton's testimony should be closely scrutinized because he was testifying upon a promise of leniency from the state. As counsel stated: "He also told you that he's in jail for thirty-eight years, which may very well be reduced to thirty-three years just for testifying in this case. That's a deal he cut with [the prosecutor]. . . . Which story of [Newton's] do you believe? This one now that he told you based upon [the prosecutor's] instructions to make sure he tells the truth in court? Or is it the one he told police so he could get out of jail earlier?"

The jury also was apprised of Cole's potential motivation for testifying at the defendant's trial. In his July 26, 2007 and May 3, 2010 statements to police, as well as his trial testimony on November 29, 2012, Cole identified the defendant as the person who shot the victim on the evening of June 4, 2007. During closing argument, the defendant's counsel noted that Cole had testified at trial that he was incarcerated when a police detective interviewed him regarding the victim's murder. Counsel then asked the jury to consider Cole's motivation for providing his statements to police, stating in relevant

[5] In *State* v. *Whelan*, supra, 200 Conn. 753, our Supreme Court determined that an out-of-court statement is admissible as substantive evidence if (1) the statement is a prior inconsistent statement, (2) it is signed by the declarant, (3) the declarant has personal knowledge of the facts stated therein, and (4) the declarant testifies at trial and is subject to cross-examination. That rule has since been codified in § 8-5 (1) of the Connecticut Code of Evidence, which "incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 769, 155 A.3d 188 (2017). In this appeal, the defendant has not raised any claim regarding the admission of Newton's prior inconsistent statements.

part: "Why is he doing that? Maybe he's just a poor observer of things. Does he have no idea that the guy he is trying to place at the scene of a murder some five years ago is nearly half a foot taller than he's claiming? Was he even telling the truth when he said he had known [the defendant] for two years prior to the shooting . . . . [During his testimony, Cole] volunteered . . . that he was incarcerated, volunteered that. Why did police seek him out? These are fair questions, all of them, and they go right to the heart of [Cole's] reliability." The plain import of that argument was that, as an incarcerated individual, Cole's cooperation with law enforcement officials investigating the victim's murder might have been motivated by self-interest.

In addition, the jury was provided with a general instruction on credibility, which we presume it followed. See *State* v. *Wooten*, 227 Conn. 677, 694, 631 A.2d 271 (1993) ("[j]urors are presumed to follow the instructions given by the judge" [internal quotation marks omitted]). The court first advised the jury that it was obligated to "decide which testimony to believe and which testimony not to believe. You may believe or disbelieve all, none, or any part of the witness' testimony." The court then instructed the jury that, in making its credibility determinations, it could consider a number of factors, including whether the witnesses had "any interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in this case . . . ." The court also instructed the jury on impeachment with prior inconsistent statements pursuant to *Whelan*, with prior convictions of a witness, and principles governing eyewitness identification.

In the present case, the defendant bore the burden of establishing that he was entitled to relief under the plain error doctrine. See *State* v. *Myers*, supra, 290 Conn. 288. He has not met that burden. The jury was

specifically instructed by the court to consider whether the witnesses before it had "any interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in this case . . . ." The jury also heard testimony that both Newton and Cole were incarcerated for unrelated crimes, and that Newton's guilty plea included an agreement pertaining to his testimony in the present case. Furthermore, during closing arguments, the defendant's counsel encouraged the jury to carefully scrutinize the testimony of Newton and Cole due to their potential motivation and interest in cooperating with the state. We therefore conclude that the defendant has not demonstrated that the court's failure to provide a special accomplice credibility instruction was of "such monumental proportion" that it threatened to erode our system of justice; (internal quotation marks omitted) *State* v. *Bellamy*, supra, 323 Conn. 437; or that it resulted in "harm so grievous that fundamental fairness requires a new trial." *State* v. *Jamison*, supra, 320 Conn. 599.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JULIO TORRES
(AC 38571)

Keller, Mullins and Lavery, Js.*

Syllabus

Convicted, after a jury trial, of the crime of murder, the defendant appealed, claiming, inter alia, that certain portions of the trial court's instruction to the jury on reasonable doubt and the cumulative effect of those portions of the instruction constituted plain error. This court affirmed the defendant's conviction, holding that he had waived his challenge to the reasonable doubt instruction. Thereafter, the defendant, on the granting of certification, appealed to our Supreme Court, which

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

remanded the case to this court for consideration of the defendant's claim of plain error. *Held* that there was no merit to the defendant's claim that the trial court's reasonable doubt instruction constituted plain error; our Supreme Court has consistently upheld instructions with language similar to the portions of the instruction challenged by the defendant, and has rejected the cumulative error approach with respect to claims of instructional error, and this court was bound by and would not reevaluate Supreme Court precedent.

Argued September 13—officially released November 7, 2017

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*, verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which transferred the appeal to this court, which affirmed the judgment of the trial court; thereafter, the defendant, on the granting of certification, appealed to the Supreme Court, which remanded the case to this court for consideration of the defendant's claim of plain error. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVERY, J. The defendant, Julio Torres, was convicted of murder in violation of General Statutes § 53a-54a and was sentenced to fifty years of imprisonment. He appealed, claiming, among other things, that portions of the trial court's instruction on reasonable doubt constituted plain error. The defendant also claimed that the cumulative effect of these portions of the instruction constituted plain error. This court affirmed the defendant's conviction, holding that he waived his challenge

to the reasonable doubt instruction under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). See *State* v. *Torres*, 168 Conn. App. 611, 627–29, 148 A.3d 238 (2016). The defendant filed a petition for certification to appeal, claiming that this court improperly declined to review the reasonable doubt instruction for plain error. Our Supreme Court granted the petition and remanded the case to this court for consideration of his plain error claim in light of its recent decision in *State* v. *McClain*, 324 Conn. 802, 812–15, 155 A.3d 209 (2017), which held that a *Kitchens* waiver does not preclude appellate relief under the plain error doctrine. *State* v. *Torres*, 325 Conn. 919, 163 A.3d 618 (2017). After further review, we affirm the judgment of the trial court.

The following facts are pertinent to our decision. At trial, the court gave the following instruction to the jury concerning reasonable doubt: "The meaning of reasonable doubt can be arrived at by emphasizing the word reasonable. *It is not a surmise, a guess or mere conjecture.* It is not a doubt raised by anyone simply for the sake of raising a doubt. *It is such a doubt as in serious affairs that concern you, you would pay attention to; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance.* It is not a hesitation springing from any feelings of pity or sympathy for the accused or any other person who might be affected by your decision. *It is, in other words, a real doubt, an honest doubt, a doubt that has . . . its foundation in the evidence or lack of evidence.* It is doubt that is honestly entertained and is reasonable in light of the evidence after a fair comparison and careful examination of the entire evidence." (Emphasis added.)

The defendant claims that the following portions of that instruction constitute plain error: that reasonable doubt "is not a surmise, a guess or mere conjecture";

that "[i]t is such a doubt as in serious affairs that concern you, you would pay attention to; that is such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance"; and that it is "a real doubt, an honest doubt, a doubt that has . . . its foundation in the evidence [or] lack of evidence." The defendant also claims that the cumulative effect of these portions of the instruction constitutes plain error. We disagree.

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes

in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812–14.

After reviewing the defendant's claim against this standard, we conclude that it is without merit because it is well settled that the trial court's instruction on reasonable doubt did not constitute plain error, let alone error. In fact, our Supreme Court has consistently upheld instructions with language similar to the portions of the instruction that the defendant challenges here. See, e.g., *State* v. *Coward*, 292 Conn. 296, 317, 972 A.2d 691 (2009) (rejecting challenges to instruction that reasonable doubt is "a real doubt, an honest doubt" and "the kind of doubt which, in serious affairs which concern you in everyday life, you would pay heed and attention to" [internal quotation marks omitted]); *State* v. *Davis*, 283 Conn. 280, 332, 929 A.2d 278 (2007) (rejecting challenges to instruction that reasonable doubt is not "a surmise, a guess or a conjecture" and "a real or honest doubt" [internal quotation marks omitted]); *State* v. *Ross*, 269 Conn. 213, 335, 849 A.2d 648 (2004) (rejecting challenges to instruction that reasonable doubt "is such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance" and "a real doubt, an honest doubt" [internal quotation marks omitted]); *State* v. *Ferguson*, 260 Conn. 339, 369–71, 796 A.2d 1118 (2002) (rejecting challenge to instruction that reasonable doubt is "a real doubt," "an honest doubt," and "such a doubt that as in the serious affairs of everyday life you would pay

heed to" [internal quotation marks omitted]); *State* v. *Lemoine*, 256 Conn. 193, 201–204, 770 A.2d 491 (2001) (rejecting challenges to instruction that reasonable doubt is "more than a guess or surmise" and "a real doubt, an honest doubt, a doubt which has its foundation in the evidence or lack of evidence" [internal quotation marks omitted]); *State* v. *Velasco*, 253 Conn. 210, 246–49, 751 A.2d 800 (2000) (rejecting challenge to instruction that reasonable doubt is "a real doubt, an honest doubt, a doubt which has its foundation in the evidence or lack of evidence" [internal quotation marks omitted]); *State* v. *Griffin*, 253 Conn. 195, 204–205, 749 A.2d 1192 (2000) (rejecting challenges to instruction that reasonable doubt is "not a surmise, a guess or mere conjecture," "a real doubt, an honest doubt, a doubt that has its foundations in the evidence or lack of evidence," and "such a doubt, as in serious affairs that concern you, you would heed, that is, such a doubt as would cause reasonable men and women to act in matters of importance" [internal quotation marks omitted]). "It is axiomatic that we are bound by our Supreme Court precedent." (Internal quotation marks omitted.) *State* v. *Colon*, 71 Conn. App. 217, 246, 800 A.2d 1268, cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002).

Furthermore, we reject the defendant's claim that even if the individual portions of the instruction were not erroneous, their cumulative effect constituted plain error. The defendant relies on *Gaines* v. *Kelly*, 202 F.3d 598, 607 (2d Cir. 2000), as support for the notion that several components that individually are not error can be aggregated to create error, but our Supreme Court, citing *State* v. *Harris*, 182 Conn. 220, 230–33, 438 A.2d 38 (1980), rejected the cumulative error approach regarding claims of instructional error in *State* v. *Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 1125 S. Ct. 3000, 120 L. Ed. 2d 876 (1992). In addition, this court previously has rejected

arguments to "abandon our Supreme Court precedent [in *Tillman*] and adopt the cumulative error approach followed by the United States Court of Appeals for the Second Circuit [in *Gaines*]." *State* v. *Billie*, 123 Conn. App. 690, 705–706, 2 A.3d 1034 (2010). "Whether a Supreme Court holding should be reevaluated and possibly discarded is not for this court to decide." (Internal quotation marks omitted.) Id., 706.

On the basis of our Supreme Court's precedent, we conclude that it is not debatable that the instruction on reasonable doubt given by the trial court in the present case did not constitute plain error, let alone error. Therefore, our inquiry ends there, and we do not address any claim of manifest injustice.

The judgment is affirmed.

In this opinion the other judges concurred.

FRAUENGLASS AND ASSOCIATES, LLC *v.* HELEN ENAGBARE (AC 38122)

DiPentima, C. J., and Lavine and Kahn, Js.*

Syllabus

The plaintiff law firm brought this action against the defendant for, inter alia, breach of contract, seeking to recover unpaid legal fees for the plaintiff's representation of the defendant in a prior dissolution proceeding. The trial court rendered judgment for the plaintiff, and the defendant appealed to this court, which affirmed the judgment. Subsequently, the plaintiff filed motions seeking postjudgment interest and attorney's fees from the date of the underlying judgment through the date of payment in full. The trial court granted the plaintiff's motions, and the defendant appealed to this court. She claimed, inter alia, that the trial court improperly failed to consider newly discovered evidence that the underlying judgment had been obtained by fraud, and that the plaintiff and its attorney, W, committed fraud by fabricating invoices and tampering

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

with evidence. *Held* that the defendant's claims regarding the attorney's fees charged by the plaintiff in the underlying matter constituted an impermissible collateral attack on the underlying judgment: although the plaintiff's motions for attorney's fees and postjudgment interest were the subject of the proceedings before the trial court, the defendant failed to challenge the propriety of the court's award of attorney's fees and statutory interest to the plaintiff, which was the subject of this appeal, and, instead, focused on the plaintiff's conduct in the underlying matter, namely, the attorney's fees charged by the plaintiff for its services provided to the defendant in the underlying dissolution case, and because that matter had been decided in favor of the plaintiff at both the trial and appellate levels, the defendant's arguments could not be addressed or ruled on by the trial court, nor could they be considered by this court, which would have constituted an improper collateral attack on the judgment; moreover, this court declined to consider the defendant's allegations of newly discovered evidence of fraudulent conduct by the plaintiff and W, as those allegations pertained primarily to the legal fees in the underlying action, the defendant did not file a motion to open the judgment in that action on the basis of fraud so as to place the issue of newly discovered evidence of fraud before the trial court, and, to the extent that the defendant claimed, for the first time on appeal, that W's legal fees were fraudulent, this court declined to consider that claim as well.

Argued September 13—officially released November 7, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant filed a counterclaim; thereafter, the matter was referred to *Edward G. McAnaney*, attorney fact finder, who filed a report recommending judgment for the plaintiff on the complaint and on the counterclaim; subsequently, the court, *Hon. Richard M. Rittenband*, judge trial referee, rendered judgment in accordance with the fact finder's report, from which the defendant appealed to this court, which affirmed the trial court's judgment; thereafter, the court, *Elgo*, *J.*, granted the plaintiff's motions for attorney's fees and postjudgment interest, and the defendant appealed to this court. *Affirmed.*

Helen Enagbare, self-represented, the appellant (defendant).

Lloyd Frauenglass, for the appellee (plaintiff).

Opinion

PER CURIAM. In *Frauenglass & Associates, LLC* v. *Enagbare*, 149 Conn. App. 103, 88 A.3d 1246, cert. denied, 314 Conn. 927, 101 A.3d 273 (2014), this court affirmed the judgment of the trial court awarding the plaintiff, Frauenglass & Associates, LLC, $33,189.97 for unpaid legal fees and interest (underlying action) for its representation of the defendant, Helen Enagbare. Following the defendant's unsuccessful appeal, the plaintiff sought postjudgment interest and attorney's fees. On May 5, 2015, the court awarded the plaintiff $17,270 in attorney's fees for the underlying action, $11,797.50 in appellate attorney's fees and statutory interest of 10 percent from the date of judgment, August 24, 2012, through the date of payment in full.

The self-represented defendant appeals from the award of attorney's fees and interest. Specifically, she claims that the court improperly failed to consider (1) newly discovered evidence that the judgment had been obtained by fraud, (2) evidence that the plaintiff's attorney, Robert H. Weinstein, committed a fraud by fabricating invoices and tampering with evidence, (3) her claim of a violation of General Statutes § 53a-155 (a)[1] and (4) that the plaintiff's conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), § 42-110a et seq. We conclude that the defendant's arguments in the present action constitute an improper collateral attack on the judgment in the underlying action and that she failed to challenge the propriety of the May 5, 2015 award of

[1] General Statutes § 53a-155 (a) provides: "A person is guilty of tampering with or fabricating physical evidence if, believing that a criminal investigation conducted by a law enforcement agency or an official proceeding is pending, or about to be instituted, such person: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such criminal investigation or official proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such criminal investigation or official proceeding."

attorney's fees and statutory interest. Last, her allegations of evidence of newly discovered fraud were not raised properly before the trial court and cannot be considered for the first time on appeal. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The defendant had retained the plaintiff to represent her in a marital dissolution and child custody case. *Frauenglass & Associates, LLC* v. *Enagbare*, supra, 149 Conn. App. 106. In October, 2008, the defendant signed a retainer agreement and paid $7780 to the plaintiff. Id. Approximately four months later, the defendant terminated the services of the plaintiff, and, at that time, owed the plaintiff $21,551.93 for legal fees and costs.[2] Id., 107. The plaintiff initiated the action that underlies this appeal. In that action, the trial court, *Hon. Richard M. Rittenband*, judge trial referee, rendered judgment in favor of the plaintiff in the amount of $21,551.93 plus $11,638.04 in interest, for a total of $33,189.97. Id., 108–109.

On August 28, 2012, the plaintiff filed motions for its own counsel fees in prosecuting the underlying action and for postjudgment interest, which are the subject of this appeal. In the meantime, on August 27, 2012, the defendant filed an appeal from the underlying action, raising four issues. Id., 104. On April 1, 2014, we affirmed the judgment of the court in the underlying action. Id., 103. On April 22, 2014, the plaintiff filed a motion pursuant to General Statutes § 37-3a for interest from August 24, 2012, the date of the underlying judgment, through the date of payment in full. On that same day, the plaintiff also filed a motion seeking appellate attorney's fees.

[2] "The [attorney] fact finder found that the case was complicated by issues of Nigerian law, child custody, and the fact that the defendant's husband controlled all of the couple's assets." *Frauenglass & Associates, LLC* v. *Enagbare*, supra, 149 Conn. App. 107.

The court, *Elgo*, *J.*, held a hearing on the pending motions for attorney's fees and postjudgment interest on February 17, 2015. At that hearing, Weinstein introduced into evidence the retainer agreement and noted that it provided for interest and collection costs, including reasonable attorney's fees. Weinstein subsequently testified that he was seeking $17,270 for his trial work and $11,797.50 for his appellate work on behalf of the plaintiff in the underlying matter, as well as postjudgment statutory interest.[3]

During the defendant's testimony, she stated that the bill she had received from the plaintiff was fraudulent, and therefore she was not liable to pay it. Specifically, she referred to the defendant's exhibit A, which was the invoice, dated October 31, 2008, from the plaintiff to the defendant for legal services provided in the underlying action. The defendant later stated that the plaintiff and Weinstein had prepared a fraudulent invoice for the legal services provided by the plaintiff in the underlying action.

At a second hearing held on May 4, 2015, the defendant iterated her belief that she did not owe the plaintiff any money and that the plaintiff's invoices were fraudulent. These contentions, however, were directed at the plaintiff's conduct with respect to the underlying action, and not at the motions for attorney's fees for the work performed by Weinstein and for postjudgment interest. After hearing argument from the parties, the court inquired: "So, are you still referring to the underlying fees, ma'am?" The defendant responded in the affirmative. After further questioning, the defendant indicated that her claims stemmed from the invoices from the plaintiff, which, as Weinstein correctly noted, applied

[3] On June 19, 2014, Weinstein filed affidavits of attorney's fees, along with itemized statements detailing his work during the trial and appellate proceedings.

to the underlying case and were not the subject of the motions presently before the court.[4]

On May 4, 2015, the court issued the following order: "[T]his court finds that the requested attorney's fees for the underlying matter and for defending the appeal of this matter are fair, reasonable and appropriate. The record in this case and the degree to which this litigation has been before the courts, and, ultimately, found in favor of the plaintiff, strongly justifies postjudgment interest and the attorney's fees itemized and entered into evidence. *Moreover, to this day, and as a review of the defendant's court filings reveals, the defendant's challenge to these fees improperly focuses on her arguments in the plaintiff's underlying claim for attorney's fees in the dissolution, which has already been adjudicated in the plaintiff's favor and upheld on appeal.* Unfortunately, the defendant's persistently misguided perspective has perpetuated the litigation, to the detriment of the plaintiff's ability not only to secure finality with respect to securing duly earned fees but [also] to controlling the costs of litigation." (Emphasis added.) It awarded attorney's fees in the amount of $29,067.50 and postjudgment statutory interest.[5] The court denied the defendant's subsequent motion to "set aside [the] judgment and [for] reconsideration," and this appeal followed.

[4] In the defendant's February 13, 2015 written objection to the plaintiff's motions for attorney's fees and interest, she challenged the fees charged to her by the plaintiff as being unreasonable and also claimed that the plaintiff fraudulently filed several motions that she "did not want" and that "were not necessary . . . ." Significantly, the defendant's motion did not address the motions for attorney's fees for Weinstein's trial and appellate work on behalf of the plaintiff or postjudgment statutory interest.

[5] The court's order stated: "The court grants the plaintiff's motion for interest at the statutory rate of 10 percent for the period of August 24, 2012, the date of judgment in this matter, through to the date of payment in full of all sums found due, pursuant to General Statutes § 37-3a and under *Rostad* v. *Hirsch*, 148 Conn. App. 441, 451, 85 A.3d 1212 (2014), appeals dismissed, 317 Conn. 290, 116 A.3d 307 (2015) (certification improvidently granted)."

Following the resolution of the underlying case, the plaintiff sought attorney's fees and postjudgment interest. These were the subject of the proceedings before Judge Elgo. Rather than responding to these issues, the defendant instead focused on the plaintiff's conduct during the underlying matter, namely, the attorney's fees charged by the plaintiff for its services provided to the defendant in the dissolution case.[6] As properly noted by the trial court, the underlying matter had been decided in favor of the plaintiff at both the trial and appellate levels. Simply put, the defendant's arguments regarding the attorney's fees from the underlying case could not be addressed or ruled on by Judge Elgo. Similarly, we cannot consider the defendant's claims regarding the fees charged by the plaintiff in the underlying matter. To do so would constitute a collateral attack on that judgment, which is not permitted under our law. See *Cimino* v. *Cimino*, 174 Conn. App. 1, 7, 164 A.3d 787, cert. denied, 327 Conn. 929, A.3d (2017).

We briefly address the defendant's claim of newly discovered evidence of fraud. On March 4, 2015, the defendant filed a request for argument on the plaintiff's motions, which the court granted. In this request, the defendant claimed that "the plaintiff fabricated invoices, recorded work not done for the defendant and overbilled those that were done for her. The plaintiff violated several Connecticut codes of conducts and violated [CUTPA], among other violations in this case." In her amended objection to the plaintiff's motions, the defendant argued, inter alia, that the amount of damages that had been awarded to the plaintiff was excessive

[6] At the February 17, 2015 hearing, the defendant challenged the validity of the bill that she had received from the plaintiff for its services provided to her in the underlying action. She also argued that that bill was excessive. At the May 4, 2015 hearing, the plaintiff claimed that the plaintiff had violated "many of the professional code of conducts," and committed fraud by excessive billing for work that had not been performed and by overbilling.

because those fees were unreasonable, that the plaintiff fraudulently had filed unnecessary motions, that the plaintiff had created fraudulent invoices after learning that the defendant had hired another lawyer, and that the plaintiff had breached the contract and the covenant of good faith and fair dealing, and had violated CUTPA.

Again, the defendant's allegations of fraud by the plaintiff and Weinstein pertain primarily to the legal fees in the underlying action and to Weinstein's fees. Further, the defendant has not filed a motion to open the judgment in the underlying action on the basis of fraud. See *Brody* v. *Brody*, 153 Conn. App. 625, 631, 103 A.3d 981 (well established general rule that motion to open judgment based on fraud not subject to four month limitation), cert. denied, 315 Conn. 910, 105 A.3d 901 (2014); *Terry* v. *Terry*, 102 Conn. App. 215, 222, 925 A.2d 375 (same), cert. denied, 284 Conn. 911, 931 A.2d 934 (2007). In other words, the defendant failed to place the issue of newly discovered evidence of fraud before the court, *Elgo*, *J.* "It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citation omitted; internal quotation marks omitted.) *Dejana* v. *Dejana*, 176 Conn. App. 104, 111, A.3d (2017). Accordingly, we decline to consider the defendant's claim regarding the alleged fraudulent conduct of the plaintiff and Weinstein with respect to the underlying action. To the extent that the defendant also claims, for the first time on appeal, that Weinstein's fees were fraudulent, we likewise decline to consider that claim.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* ANDRE GILL
(AC 39841)

DiPentima, C. J., and Alvord and Kahn, Js.*

Syllabus

Convicted, after a jury trial, of, inter alia, the crime of murder in connection with an incident in which the defendant shot the victim in the parking lot of a nightclub, the defendant appealed, claiming that there was insufficient evidence to prove the specific intent element necessary to support his murder conviction. *Held* that the state presented sufficient evidence from which the jury reasonably could have inferred that the defendant intended to cause the victim's death to support the defendant's conviction of murder: the evidence and testimony presented by the state demonstrated that the victim had grabbed the defendant by the throat during a fight inside the nightclub and that the dispute continued in the club's parking lot, where the defendant yelled at the victim, got out of his car with a revolver as the victim walked toward the car, and fired the revolver directly at the victim, striking him in his torso, just below the breastbone; moreover, there was ample evidence of the defendant's conduct after the shooting from which the jury could have inferred an intent to kill, as the defendant displayed a consciousness of guilt by cleaning the revolver and another gun involved in the incident with bleach to remove any fingerprints or DNA, asking his brother's friend to dispose of the guns, and making untruthful statements to the police.

Argued September 13—officially released November 7, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, criminal possession of a firearm, carrying a revolver without a permit, tampering with a witness, false statement in the second degree and tampering with evidence, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; thereafter, the charge of criminal possession of a firearm was tried to the court; verdict and judgment of guilty of murder, criminal possession of a firearm, carrying a revolver without a permit, false statement in the second

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

degree and tampering with evidence; subsequently, the court denied the defendant's motion for a judgment of acquittal, and the defendant appealed. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anne Mahoney*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Andre Gill, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes §§ 53a-54a and 53a-8; carrying a revolver without a permit in violation of General Statutes § 29-35 (a); false statement in the second degree in violation of General Statutes (Rev. to 2011) § 53a-157b; and tampering with physical evidence in violation of General Statutes §§ 53a-155 and 53a-8.[1] On appeal, the defendant's sole claim is that there was insufficient evidence to prove the element of specific intent necessary to support the murder conviction. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, are relevant to the defendant's appeal. On the night of November 18, 2011, the defendant drove his Acura with his friend Charles Young to a nightclub in Hartford, Mi Bar, to perform rap music. At the time, the defendant lived at his grandmother's house with his children and others, including Young. A few days earlier, the house had been invaded, and the defendant's

[1] The defendant also was convicted of criminal possession of a firearm, in violation of General Statutes § 53a-217 (a) (1), which charge was tried to the court. The jury acquitted the defendant of the charges of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a; and tampering with a witness in violation of General Statutes § 53a-151.

daughter and Young were tied up. After the home invasion, the defendant asked his brother's friend, Antoine Armour, to bring a gun to the house for protection. Armour provided the defendant with a .38 caliber Taurus revolver and a .380 caliber semiautomatic handgun. Armour also gave the defendant ammunition.

Initially, the defendant did not bring the guns to Mi Bar on November 18, 2011. After seeing people in the nightclub whom he knew to be associated with the home invasion, however, he returned to his grandmother's house with Young to retrieve the two guns. They then returned to Mi Bar, left the guns in the defendant's car, and reentered the nightclub.

During a performance by Arkeit Iverson, the sound system in the nightclub malfunctioned, at which point a fight broke out. The performer at the time, Iverson, was a cousin of the victim, Fred Pines. Iverson began pushing through the crowd, which included the defendant and the defendant's cousin, to reach the disc jockey. The defendant tried to stop Iverson from reaching the disc jockey, at which time the victim grabbed the defendant by the throat. The fight was captured on video, which was played for the jury during the evidentiary portion of the trial.

After the fight, people began running out of the nightclub into the parking lot, where the argument continued. The defendant testified that he was "having some words" with the victim in the parking lot. According to Young, the defendant went back to his car and got into the driver's seat, and Young got into the passenger's seat. The defendant began to drive out of the parking lot, but stopped to roll down his window and yell at the victim. The victim walked toward the car, at which time the defendant got out of the car. Young also got out of the car with the .380 caliber semiutomatic handgun and fired two shots into the air. The defendant then

fired one shot from the .38 caliber revolver at the victim. Young heard the victim say: "You missed. You ain't hit nothing." The defendant and Young ran to the back of the nightclub, got into cars located there, and left separately.

The defendant and Young met back at the defendant's grandmother's house, and the defendant called his brother, Morgan Gill, and Armour to ask them to get rid of the guns. The defendant, Morgan Gill, and Armour first cleaned the guns with bleach to remove any fingerprints or DNA. Armour then left with the guns and dumped them in the Connecticut River. The next morning the defendant and Young learned that the victim had died. Harold Wayne Carver, the chief medical examiner at the time of the shooting who had conducted the autopsy of the victim, concluded that the victim died as a result of a single gunshot wound to his trunk.[2] The bullet entered the victim's trunk close to the bottom of the breastbone, caused damage to the right lung, and passed through the diaphragm.

On November 19, 2011, the day after the shooting, the defendant went to the police station and voluntarily gave a written statement, in which he stated that he saw Young with a gun and that Young "pulled up and fired." He also falsely told the police during that interview that he went to Mi Bar alone on the night of November 18, 2011, because, he explained later, he "did not want to be associated with somebody who made a stupid decision." The defendant thereafter was arrested, charged with murder, among other crimes,

[2] Carver removed the bullet from the victim's body and provided it to the police. James Stephenson, a state firearms and tool mark examiner, testified that the bullet had been fired from either a .38 caliber revolver or a .357 caliber revolver and that it could not have been fired from a .380 caliber semiautomatic weapon. Two shell casings were also recovered from the crime scene. Stephenson testified that the shell casings were consistent with having been fired from a ".380 auto caliber firearm."

tried before the jury, and convicted.[3] The court sentenced the defendant to a total effective term of fifty years of incarceration. This appeal followed.

The defendant claims that there was insufficient evidence presented at trial to convict him of murder. Specifically, he argues that the state failed to present sufficient evidence that he had intended to cause the victim's death, and, therefore, his conviction of murder cannot stand. We are not persuaded.

We first set forth our standard of review and the legal principles relevant to a claim of evidentiary insufficiency. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Franklin*, 175 Conn. App. 22, 30, 166 A.3d 24 (2017).

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

[3] As noted previously in this opinion, the defendant also was convicted of carrying a revolver without a permit, false statement in the second degree, tampering with physical evidence, and criminal possession of a firearm.

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *White*, 127 Conn. App. 846, 850, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). "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 [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 17, 115 A.3d 447 (2015).

Section 53a-54a (a) provides in relevant part that "[a] person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ." "[T]he specific intent to kill is an essential element of the crime of murder. To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death.

. . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012).

The defendant's contention on appeal is that, on the basis of the evidence presented, the jury could have concluded that he had committed manslaughter, not murder.[4] The defendant seeks to distinguish the facts of this case from the facts in cases in which our courts have found sufficient evidence of intent to kill the victim. He emphasizes the fact that he fired only a single shot and that the victim did not know that he had been injured. He claims that if he really had intended to kill the victim, he "could have fired another shot" after the victim seemed unhurt by the first shot. He further argues that the fight in the nightclub prior to the shooting was not "serious" enough to permit the jury to infer an intent to kill the victim. Lastly, the defendant claims that his conduct after the shooting, including but not limited to cleaning the guns and asking Armour to get rid of the guns, reflected "a consciousness of guilt of assault and, later, of manslaughter, not murder."

As noted previously, "a factfinder may infer an intent to kill from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death . . . ." (Internal quotation marks omitted.) *State* v. *Robinson*, 125 Conn. App. 484, 488, 8 A.3d 1120 (2010), cert. denied, 300 Conn. 911, 12 A.3d 1006 (2011). There was testimony, which the jury could have credited, to support the defendant's intent to kill the victim, including that the

[4] The jury was instructed on lesser included offenses within the crime of murder, including manslaughter, and the defendant makes no claims of instructional error.

defendant fired a revolver *directly at the victim*, and the autopsy revealed that the bullet struck the victim in his torso, just below the bottom of the breastbone. See *State* v. *Moye*, 119 Conn. App. 143, 149, 986 A.2d 1134, cert. denied, 297 Conn. 907, 995 A.2d 638 (2010) ("a person who uses a deadly weapon upon a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was an intent to kill" [internal quotation marks omitted]).

The state also presented evidence regarding the events leading to the shooting from which the jury reasonably could have inferred the defendant's intent to cause the victim's death. There was evidence of a fight inside the nightclub, during which the victim grabbed the defendant by the throat. Moreover, there was evidence that the argument continued in the parking lot. The defendant testified that he and the victim were "having some words." Young testified that the defendant had stopped his car on the way out of the parking lot to yell at the victim and that the defendant got out of the car with the revolver as the victim walked toward the car. Although the defendant seeks to characterize the dispute as a "scuffle" and argues that prior cases "have involved much more serious disputes," our Supreme Court has stated that "[t]he jury is not required to close its eyes to the unfortunate reality that murders frequently are committed in response to seemingly minor provocations." *State* v. *Gary*, 273 Conn. 393, 408, 869 A.2d 1236 (2005).

There also was ample evidence of the defendant's conduct after the shooting from which the jury reasonably could have drawn an inference of his intent to kill the victim. The defendant himself testified that he called

Armour after the shooting to get rid of the gun.[5] Armour and Young both testified that the defendant cleaned the guns with bleach or household cleaners after the shooting. Detective Joseph Fargnoli of the Hartford Police Department testified that the defendant told him that he had cleaned the guns to remove any fingerprints or DNA. Moreover, the defendant acknowledged making untruthful statements to the police after the murder. Our Supreme Court has concluded that "consciousness of guilt evidence [is] part of the evidence from which a jury may draw an inference of an intent to kill." (Internal quotation marks omitted.) *State* v. *Otto*, supra, 305 Conn. 73; see also *State* v. *Moye*, supra, 119 Conn. App. 150 ("[a] trial court may admit [e]vidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, [which] is ordinarily the basis for a charge on the inference of consciousness of guilt" [internal quotation marks omitted]).

To the extent that the defendant requests this court to draw inferences contrary to those necessarily drawn by the jury, we note that "[i]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Grant*, 219 Conn. 596, 604, 594 A.2d 459 (1991). "That the jury might have drawn other possible inferences from these facts is not sufficient to undermine its verdict, since proof of guilt must be established beyond a

[5] Although the defendant testified that Armour had given him only one gun, the .380 caliber semiautomatic handgun, Armour and Young both testified that there were two guns, the .380 caliber semiautomatic handgun and a .38 caliber revolver.

reasonable doubt, not beyond a possible doubt." (Internal quotation marks omitted.) Id.

Mindful of our standard of review, which requires us to view the evidence in the light most favorable to sustaining the jury's verdict, we reject the defendant's claim and conclude that there was sufficient evidence presented at trial to support the defendant's conviction of murder.

The judgment is affirmed.

In this opinion the other judges concurred.

HASAN SAMAKAAB *v.* DEPARTMENT OF SOCIAL SERVICES (AC 39067)

DiPentima, C. J., and Alvord and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant Department of Social Services for alleged employment discrimination after he was denied a certain promotion during his employment with the defendant. The plaintiff claimed that the defendant discriminated against him on the basis of his age, sex and national origin, and his prior opposition to unlawful employment practices in violation of the applicable provision (§ 46a-60) of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding that the evidence submitted by the plaintiff did not support a finding that a genuine issue of material fact existed as to whether he had been discriminated against or retaliated against because he had engaged in a protected activity. On appeal to this court, the plaintiff claimed that the trial court improperly held that he had presented insufficient facts to support a prima facie case of discrimination or retaliation. *Held* that the judgment of the trial court granting the defendant's motion for summary judgment was affirmed; the trial court having thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a statement of the facts and the applicable law on the issues.

Argued October 5—officially released November 7, 2017

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Hasan Samakaab, self-represented, the appellant (plaintiff).

Carolyn Ennis, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Ann E. Lynch*, assistant attorney general, for the appellee (defendant).

Opinion

PER CURIAM. In this employment discrimination action, the plaintiff, Hasan Samakaab, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Department of Social Services. On appeal, the plaintiff contends that the court improperly held that insufficient facts were presented to support a prima facie case of discrimination or retaliation. We affirm the judgment of the trial court.

The record and the trial court's opinion reveal the following facts and procedural history. The plaintiff is employed as an eligibility services specialist by the defendant. On September 5, 2013, the plaintiff interviewed for a promotion to the position of eligibility services supervisor. On the basis of the plaintiff's responses during his interview, he was no longer considered for the eligibility services supervisor position. On December 26, 2014, the plaintiff filed the operative complaint against the defendant in Superior Court. In his complaint, the plaintiff alleged that he was denied a promotion because of his age, sex, national origin, and his prior opposition to unlawful employment practices in violation of General Statutes § 46a-60 of the

Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. Following the close of discovery, on November 9, 2015, the defendant filed a motion for summary judgment as to the plaintiff's complaint. On March 10, 2016, the court, *Scholl*, *J.*, issued a memorandum of decision rendering summary judgment in favor of the defendant. The court found that the evidence submitted by the plaintiff, principally his self-serving affidavit and deposition testimony, did not support a finding that a genuine issue of material fact exists as to whether the plaintiff had been discriminated against in the denial of a promotion, or retaliated against because he had engaged in a protected activity.

Upon examination of the record on appeal and the briefs and arguments of the parties, we conclude that the judgment of the trial court should be affirmed. Because the court's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issues. See *Samakaab* v. *Dept. of Social Services*, Superior Court, judicial district of Hartford, Docket No. CV-15-6056335-S (March 10, 2016) (reprinted at 177 Conn. App. 54). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Geiger* v. *Carey*, 170 Conn. App. 459, 462, 154 A.3d 1093 (2017).

The judgment is affirmed.

APPENDIX
HASAN SAMAKAAB *v.* DEPARTMENT OF SOCIAL SERVICES*

Superior Court, Judicial District of Hartford
File No. CV-15-6056335S
Memorandum filed March 10, 2016

* Affirmed. *Samakaab* v. *Dept. of Social Services*, 177 Conn. App. 52, A.3d (2017).

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Katrena Engstrom, for the plaintiff.

Carolynn Ennis, assistant attorney general, for the defendant.

Opinion

SCHOLL, J.

INTRODUCTION

This an action by the plaintiff, Hasan Samakaab, pursuant to the Connecticut Fair Employment Practices Act, General Statutes § 46a-60 et seq., against his employer, the defendant state of Connecticut Department of Social Services (DSS). The plaintiff claims that he was denied a promotion to the position of eligibility services supervisor on December 1, 2013, because of his age, sex, Somalian descent, and his prior opposition to unlawful employment practices.

The defendant has moved for summary judgment on the plaintiff's claims because he cannot establish a prima facie case of discrimination or retaliation and, in any event, the decision not to promote him was made for a legitimate, nondiscriminatory and nonretaliatory reason. In support of its position, the defendant submitted portions of the plaintiff's deposition; exhibits to the deposition, which included: the plaintiff's affidavit of illegal discrimination provided to the Commission on Human Rights and Opportunities, the job description for eligibility supervisor, a letter to the commissioner of DSS signed by the plaintiff as well as others; the affidavit of Astread Ferron-Poole, the director of administration for DSS; and the affidavit of Lisa Wells, social services operations manager for DSS. The plaintiff submitted a brief in opposition to the motion for summary

judgment as well as his affidavit; his deposition; the letter to the commissioner also submitted by the defendant; his responses to interrogatories; and letters and memos of recommendation and appreciation.

DISCUSSION

"Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact [however] a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . . As a general rule, then, [w]hen a motion for summary judgment is filed and supported by affidavits and other documents, an adverse party, by affidavit or as otherwise provided by . . . [the rules of practice], must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him. . . . Requiring the nonmovant to produce such evidence does not shift the burden of proof. Rather, it ensures that the nonmovant has not raised a specious issue for the sole purpose of forcing

the case to trial. . . . [H]owever, one important exception exists . . . to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition . . . . On a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 593–95, 113 A.3d 932 (2015).

Section 46a-60 provides in relevant part: "(a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness . . . (4) For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

"The framework for the burden of production of evidence and the burden of persuasion in an employment discrimination case is well established. [*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)] and subsequent decisions have established an allocation of the burden of production and an order of presentation of proof . . . in discriminatory-treatment cases. . . . First, the [complainant] must establish a prima facie case of discrimination. . . . In order to establish a prima facie case, the complainant must prove that: (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. . . . Once the complainant establishes a prima facie case, the employer then must produce legitimate, nondiscriminatory reasons for its adverse employment action. . . . This burden is one of production, not persuasion; it can involve no credibility assessment. . . . After the plaintiff has established a prima facie case, and the defendant has produced evidence of a legitimate, nondiscriminatory reason for the employment action, [t]he plaintiff retains the burden of persuasion. [The plaintiff] now must have the opportunity to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. . . . Employment discrimination therefore can be proven either directly, with evidence that the employer was motivated by a discriminatory reason, or indirectly, by proving that the reason given by the

employer was pretextual. . . . Evidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 400–401, 880 A.2d 151 (2005). "Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [complainant] remains at all times with the [complainant]." (Internal quotation marks omitted.) *Dept. of Transportation* v. *Commission on Human Rights & Opportunities*, 272 Conn. 457, 463 n.9, 863 A.2d 204 (2005).

The defendant argues that the plaintiff's claims of discrimination fail because his allegations do not support a prima facie case of discrimination. "To establish a prima facie case of discrimination in the employment context, the plaintiff must present evidence that: (1) [he] belongs to a protected class; (2) [he] was subject to an adverse employment action; and (3) the adverse action took place under circumstances permitting an inference of discrimination. . . . To establish the third prong, a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than [he] was. . . . To be probative, this evidence must establish that the plaintiff and the individuals to whom [he] seeks to compare [himself] were similarly situated in all *material* respects . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 514, 43 A.3d 69 (2012). "[T]he standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases,

rather than a showing that both cases are identical. . . . In other words, the comparator must be similarly situated to the plaintiff in all material respects." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *County of Rockland*, 609 F.3d 486, 494 (2d Cir. 2010).

The plaintiff principally relies on his own affidavit and deposition in support of his claims. The court agrees with the defendant that they contain mostly self-serving and unsupported claims. "The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence." (Emphasis omitted; internal quotation marks omitted.) *Gianetti* v. *Health Net of Connecticut, Inc.*, 116 Conn. App. 459, 464–65, 976 A.2d 23 (2009). "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation

marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008).

Even considering the plaintiff's evidence, it does not support a finding that an issue of fact exists as to the validity of his claims. The plaintiff alleges that a number of females, as well as one male, were promoted instead of him. Some he claims were younger than he was. Most he claims were promoted because of their personal relationship with management, not as a result of discrimination. The defendant argues that the employees the plaintiff references were not similarly situated because they were not promoted as a result of the applicant pool for the position for which the plaintiff applied. Of the two employees referenced in the plaintiff's brief, Randalyn Muzzio and Deidre Smith, Muzzio was the only one who was in the same applicant pool as the plaintiff. But she was promoted by reclassification, which requires a different process of approvals. As to Smith, the plaintiff's claim does not relate to her promotion, but her being given the opportunity to temporarily serve in a higher class. His discrimination claim here does not relate to the loss of such opportunities, but to his failure to be promoted to eligibility services supervisor. Thus, the plaintiff's evidence does not support a finding that a disputed issue of fact exists as to whether the circumstances surrounding the denial of his promotion would give rise to an inference of discrimination.

The defendant also claims that the plaintiff's discrimination claims fail because DSS had a legitimate, nondiscriminatory reason for not promoting him. The court agrees. The plaintiff was rated unacceptable overall following his interview for the eligibility supervisor position and therefore not eligible to be considered for the position. The plaintiff also has not demonstrated that DSS' reasons for not promoting him were pretextual. Although the plaintiff claims that the interviewer, Wells, was hostile to him, the other interviewer

rated him unacceptable as well. The plaintiff has submitted no evidence that would indicate that the ratings were unsupported or based on discriminatory motives. Although the plaintiff claims that he was not a half hour late, as the interviewers noted, or rambled, as they also noted, the evidence submitted does not raise into the question the validity of the other conclusions reached by the interviewers. They noted that he "did not provide clear examples to resolve staff difficulties," "he did not come prepared for interview, responses were long and drawn out but lacked substance," and "displays neediness for additional support in making decisions." Both interviewers concluded that they "could not determine supervisory or leadership qualities based on responses." Interviewers of the plaintiff for promotion in 2012 also noted that his supervisory ability was not evident. Therefore, the plaintiff has failed to provide evidence which would indicate that there is an issue of fact as to whether he was the subject of discrimination in the denial of promotion.

The defendant also claims that the plaintiff cannot establish a claim of retaliation. The court agrees. "To establish a prima facie case of retaliation, an employee must show (1) the employee was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action." (Internal quotation marks omitted.) *Darden* v. *Stratford*, 420 F. Supp. 2d 36, 45 (D. Conn. 2006). "Relying on Second Circuit case law, Connecticut courts have found that [a] protected activity is an action taken to protect or oppose statutorily prohibited discrimination. These actions can include the filing of formal charges of discrimination, as well as, informal protests of discriminatory employment practices, including complaints to management, writing critical letters to

customers, protecting against discrimination by industry and expressing support of co-workers who have filed formal charges." (Internal quotation marks omitted.) *Lewis* v. *Golden Hawk, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-12-6030233S, 2015 WL 36846666, *4 (May 20, 2015) (*Nazzaro, J.*). The letter the plaintiff references as the basis for his claim of retaliation is basically a complaint about management. It references "managers' malfeasance," their stifling of "debate, innovation and communications," and waste of resources. The letter suggests the managers should be replaced. There is no reference to any claim that the signatories were protesting or opposing discrimination but only what they perceived as bad management. The plaintiff, in his brief in opposition to summary judgment, characterizes the letter as raising "significant management and morale issues." This does not constitute evidence that the plaintiff opposed a discriminatory employment practice as required to establish a retaliation claim pursuant to § 46a-60.

CONCLUSION

The motion for summary judgment is granted.