CURTIS D. DEANE *v.* AMY DAY KAHN ET AL.
(AC 39006)
(AC 39011)

Alvord, Prescott and Kahn

Syllabus

The plaintiff brought this action seeking, inter alia, a judgment determining the rights of the parties as to a claimed right-of-way along a riverfront over certain real property of the defendant G, and a claimed riverfront easement by necessity and implication over certain real property of the defendant K. The properties of the plaintiff, G and K had been part of a large estate of riverfront property that previously was owned by W. In 1935, pursuant to the terms of a deed, W conveyed to H a fee simple interest in a portion of her estate lying directly on the river free of encumbrances, except that a right-of-way was reserved across the property "along the route now in use." Following several conveyances over the years, that property is now owned by G. In 1960, the eastern portion of W's estate was divided into two properties, and after several conveyances over the years, those properties are now owned by the plaintiff and K. The divided properties consisted of an upper portion near the main road and a lower portion along the river, and the upper and lower portions were separated by a very steep slope, which made access between them very difficult and virtually impossible for vehicles. The deeds in the chain of title of the properties now owned by G and K did not make reference to the 1935 right-of-way, and the deeds in the chain of title to the property now owned by the plaintiff did not mention the 1935 right-of-way reserved by W over the property now owned by G. The trial court concluded that the plaintiff had an easement by deed over G's property by virtue of the 1935 deed of conveyance by W and that he had an easement by necessity over K's property that arose in 1960 when the properties now owned by the plaintiff and K originally were divided into separate parcels and were conveyed separately. The trial court rendered judgment in favor of the plaintiff, and G and K filed separate appeals to this court, which reversed the judgment in part. Thereafter, on the granting of certification, the plaintiff appealed to our Supreme Court, which reversed in part this court's judgment and remanded the case to this court with direction to remand the case to the trial court for further proceedings on the plaintiff's claim of an easement by implication. On remand, the trial court rendered judgment in favor of the plaintiff, concluding that he had an implied easement over K's property and that, as a result of the implied easement, the easement by deed over G's property in favor of the plaintiff's property was not extinguished by the severance of the plaintiff's and K's properties. Thereafter K and her husband, who was also a defendant, and G filed

separate appeals to this court. *Held* that there was sufficient evidence in the record to support the trial court's conclusion that an implied easement existed over K's property in favor of the plaintiff's property: on the basis of the circumstantial evidence presented, including numerous photographs of the subject properties, the trial court's observations from twice having walked the properties and the testimony of two witnesses, who the court found credible and who had intimate and prolonged knowledge of the uses related to the properties over the years, the trial court reasonably and logically could have inferred that the parties to the 1960 conveyance were aware of the historic right-of-way along the riverfront, that the use of the right-of-way continued at the time of the conveyance, that the parties to the conveyance had the requisite implied intent to create the subject easement and that the easement was reasonably necessary for the use and normal enjoyment of the plaintiff's property; moreover, this court rejected the defendants' claim that the trial court improperly considered, as a matter of law, evidence of the use of K's property other than the use that existed at or close to the time of the 1960 conveyance, as the defendants did not raise any evidentiary challenges before the trial court on remand or seek to limit the evidence that the court could consider in deciding whether an implied easement existed, and our Supreme Court in the prior appeal in this matter concluded that this court had impermissibly narrowed the scope of evidence that was admissible as proof of a grantor's intent with respect to the existence of an easement by deed, and there was no indication that that holding did not extend to a court's consideration of an easement by implication; furthermore, there was no merit to the defendants' argument that because the parties to the 1960 conveyance expressly set forth in the deed a common driveway and mutual boundary easements, they necessarily would have also expressly set forth any other intended easement, including any easement necessary to access the lower portion of the plaintiff's property, as the fact that parties to the 1960 conveyance created express easements by deed in no way precluded the trial court from finding that an additional easement was created by implication, and the defendants failed to cite any binding authority in support of their argument to the contrary.

Argued September 19—officially released January 2, 2018

Procedural History

Action for, inter alia, a judgment determining the rights of the parties as to a right-of-way on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant et al. filed a counterclaim; thereafter, the matter was transferred

to the Complex Litigation Docket and tried to the court, *Shortall*, *J.*; judgment in part for the plaintiff; subsequently, the named defendant et al. appealed to this court, which reversed in part the judgment of the trial court, and the plaintiff, on the granting of certification, appealed to our Supreme Court, which affirmed in part and reversed in part this court's judgment and remanded the case to this court with direction to remand the case to the trial court for further proceedings; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, rendered judgment for the plaintiff, from which the named defendant et al. and the defendant John Gorman filed separate appeals with this court. *Affirmed.*

Lloyd L. Langhammer, for the appellants (named defendant et al.).

Kerry R. Callahan, with whom, on the brief, was *Sean P. Clark*, for the appellant (defendant John Gorman).

Wesley W. Horton, with whom were *Brendon P. Levesque* and, on the brief, *F. Thor Holth*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. Since at least 2001, the parties in this case have been engaged in a lengthy legal dispute regarding abutting properties that sit along the bonny banks of the Connecticut River in Lyme. The defendants Amy Day Kahn, Robert Kahn, and John Gorman[1] appeal from the judgment of the trial court finding that an easement exists in favor of the plaintiff, Curtis D. Deane, over the parcels of real property owned by Amy Day Kahn (Kahn property) and Gorman (Gorman property).

[1] Ellyssa Gorman and Pan Acres Nursery, LLC, were also named as defendants in this action, but they have not participated in the present appeal. Accordingly, we refer in this opinion to the Kahns and John Gorman collectively as the defendants and individually by name where appropriate.

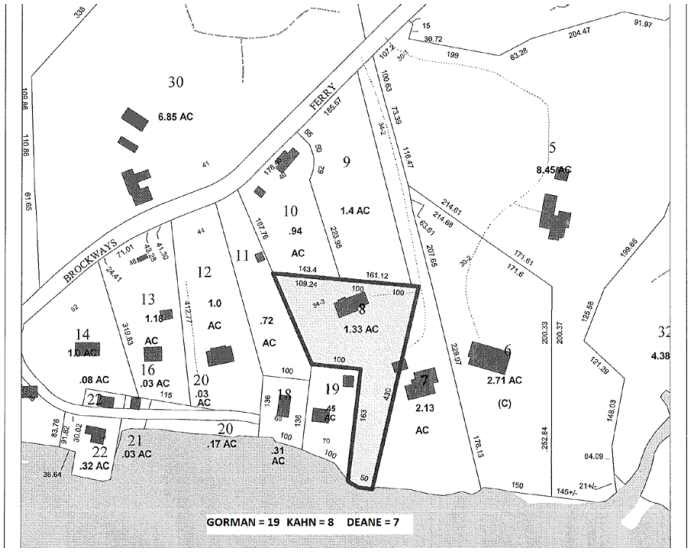
The defendants' principal claim is that the evidence was insufficient to support the court's ultimate legal conclusion that an easement by implication exists over the Kahn property and, correspondingly, that an easement by deed continues to exist over the Gorman property.[2] We affirm the judgment of the court.

The following facts and procedural history, much of which was set out in the prior appeal in this case, are

[2] The Kahns separately claim on appeal that the issue of whether an easement by implication exists over their property was not properly before the trial court because the plaintiff failed to pursue and, thus, abandoned the allegations contained in count fifteen of the operative complaint, which, the Kahns assert, was the "only count that could be construed to deal with an implied easement." This abandonment argument, however, was never properly preserved for review because it was not raised or argued before the trial court on remand or as part of the prior appeal. As they acknowledged at oral argument before this court, the abandonment issue was not considered by our Supreme Court, which expressly remanded this matter to the trial court with direction to adjudicate whether the evidence in the record supported finding an easement by implication. "It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning . . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Emphasis omitted; internal quotation marks omitted.) *Bruno* v. *Civil Service Commission*, 192 Conn. 335, 343, 472 A.2d 328 (1984). "Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed." (Citation omitted.) *Nowell* v. *Nowell*, 163 Conn. 116, 121, 302 A.2d 260 (1972).

Thus, the trial court was bound to follow the Supreme Court's remand order, and this court lacks any authority to conclude that the remand order was made in error. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent"). If the Kahns believed that the claim of an easement by implication was abandoned at the pleading stage or at trial, they should have raised this with the Supreme Court through a motion for reargument or reconsideration. No such motions were filed. Only our Supreme Court has the authority to correct perceived errors in its own decisions, including its remand orders. Accordingly, for all the reasons stated, we are not persuaded by the Kahns' additional claim of error.

relevant to the defendants' appeals. To aid the reader, we include the following visual representation of the area, which was constructed from a map entered into evidence at trial as plaintiff's exhibit 49.



"In the early 1900s, Harriet Warner owned a large estate of land along the shore of the Connecticut River in Lyme. The estate was shaped roughly like a triangle, with its base running along the riverfront on the south side of the estate, where the river flows from west to east. The estate was accessible from the northeast via Brockway's Ferry Road, a public road that ran from northeast to southwest along the upper left or northwest side of the estate. As the road approached the river, however, near the southwest corner of the estate, it split into two branches, one of which continued southwestward while the other turned sharply to the east and continued eastward, parallel to the river, part way across the south side of the estate. . . .

"The estate would later be divided into a series of parcels that the parties in the present case would come

to own. The three properties owned by the parties are contiguous, with the Gorman property to the west, the Kahn property in the middle, and the [plaintiff's property (Deane property)] to the east. . . . Common to all three properties is the private right-of-way at issue in the present case, which extends from the end of the eastward branch of Brockway's Ferry Road, and continues parallel to the river part of the way across the south side of the estate. In this action to quiet title, the plaintiff . . . claims that he has the right to access the southern, riverfront portion of his sloping property from the west, across: (1) [the Gorman property] . . . over which the plaintiff claims a right-of-way pursuant to [a] 1935 deed; and (2) [the Kahn property] . . . over which the plaintiff claims an easement by necessity [that arose in 1960]. . . .

"On January 19, 1935, Harriet Warner conveyed a fee simple interest in [the Gorman property] to Walter Hastings. Under the terms of Harriet Warner's deed to Walter Hastings . . . the tract conveyed to him was to be free of encumbrances, except that a [right-of-way] is reserved in perpetuity across said tract along the route now in use. The 1935 deed contained no other language describing the location, direction, dimensions, uses or purposes of the right-of-way so reserved, or of the route now in use along which it was to run. . . .

"In 1936, Harriet Warner conveyed the remainder of her estate to her children, Hester Warner and [Musa Warner] Caples. Although Harriet Warner reserved a life use of the property so conveyed for herself, her deeds to her daughters made no mention of the right-of-way across the Gorman property reserved in the 1935 deed. On December 30, 1936, Hester Warner and Caples split the property between themselves, Caples conveying the western portion of the property to Hester Warner and Hester Warner conveying the eastern portion of the property, including [what would become] the Kahn and Deane properties, to Caples.

"In 1938, the Gorman property was transferred by certificate of devise from the estate of Walter Hastings to William Hastings, whereafter, in 1945, it was conveyed by William Hastings to Kenneth Johnson. . . . No mention of the 1935 right-of-way was made in any of the above-described conveyances of the Gorman property.

"On February 8, 1955, Johnson conveyed the Gorman property to [Marion Srebroff and Charles Srebroff]. The 1955 deed from Johnson to the Srebroffs mentioned the right-of-way reserved by the 1935 conveyance for the first time since that date. It provided, more particularly, that the property so conveyed was subject: To a [right-of-way] reserved in [the 1935] deed recorded in Volume 51 at page 25 of the Lyme land records in perpetuity across the land above described as parcel 1 and along the route now in use. There has been no other reference to the 1935 reservation in any other deed in the chain of title by which the Gorman property ultimately descended to Gorman from the Srebroffs . . . .

"On July 6, 1960, Caples simultaneously conveyed a portion of her property that would later become the Kahn property to Marion Srebroff and an adjoining parcel directly to the east of it that would later become the Deane property to Charles Srebroff. The deed to Marion Srebroff created a common driveway easement and a mutual boundary easement to provide the Kahn property with access over the Deane property to and from Brockway's Ferry Road. . . . This deed did not mention the right-of-way at issue in the present case, though it did contain language stating that it was conveyed with the appurtenances thereof. . . .

"On January 14, 1970, Marion Srebroff conveyed the Kahn property to Frank [Heineman] and Denise Heineman . . . . On May 13, 1981, Marion Srebroff and her daughter, [Carole] Schmitt, who then jointly owned the

Gorman property, granted the Heinemans a right-of-way over the riverfront portion of that property, along that strip of land which is the easterly exten[sion] of the ancient private dirt road, as it now lays, across the property. . . . In none of [the] deeds in the chain of title to the Kahn property, from Harriet Warner to Amy Day Kahn, is there any reference to the 1935 reservation. In all [but one] of them, however . . . the Kahn property is conveyed with the appurtenances thereof. . . .

"All conveyances of the Deane property were specifically made subject to the common driveway and mutual boundary easements created by Caples in favor of the Kahn property when she first separated the Kahn property from the Deane property and sold them respectively to Marion Srebroff and Charles Srebroff. In none of the deeds to the Deane property, however, is there any mention of the right-of-way reserved by Harriet Warner over what is now the Gorman property in 1935. In all of those deeds, however, the Deane property is conveyed with the appurtenances thereof.

"On August 20, 2001, the plaintiff filed this action seeking, inter alia, to quiet title to his alleged right-of-way across the Gorman and Kahn properties to access the lower portion of [the Deane property], and to enjoin the defendants from interfering with his quiet enjoyment and use of that right-of-way. . . .

"In a thorough memorandum of decision, the trial court concluded, inter alia, that the plaintiff has an easement over the Gorman property by virtue of the 1935 deed and an easement by necessity over the Kahn property, which arose in 1960 when . . . Caples, who then owned the eastern portion of [Harriet Warner's] former estate, which included both the Deane property and the Kahn property, divided those properties into separate tracts and conveyed them, respectively, to Charles Srebroff and Marion Srebroff . . . . Upon reaching the foregoing conclusions, the court went on

to rule that the scope of the deeded easement over the Gorman property and the easement by necessity over the Kahn property should be defined in identical terms, which it then described in great detail, specifying its location on the burdened properties, its dimensions and its scope, including both the purposes for which and the time and manner in which it could be used. . . . Although the trial court ruled in favor of the plaintiff with respect to two counts—namely, the count alleging the creation of an easement by deed over the Gorman property and the count alleging the creation of an easement by necessity over the Kahn property—it did not rule on the count alleging the creation of an easement by implication over the Kahn property.

"The defendants appealed from the judgment of the trial court to the Appellate Court, which concluded that the plaintiff failed to prove, either by the language of the 1935 deed or by the circumstances existing at the time of its execution, that the 1935 deed created an easement [by deed] appurtenant to Harriet Warner's property across the Gorman property and that the plaintiff failed to prove that he is entitled to an easement by necessity over the Kahn property, either by showing that his property would be landlocked without it, which it would not be, or by showing that the parties intended to create such an easement at the time of its alleged creation in 1960, based upon evidence of the necessity for or the use of the claimed easement at that time. . . . The Appellate Court, accordingly, reversed the judgment of the trial court in part. . . .

"The plaintiff petitioned for certification to appeal from the judgment of the Appellate Court. [Our Supreme Court] granted the plaintiff's petition for certification to appeal limited to the following issues: (1) Did the Appellate Court properly reverse the judgment of the trial court enforcing a right-of-way by deed on the ground that the plaintiff failed to prove its location

or use?; and (2) Did the Appellate Court properly reverse the judgment of the trial court enforcing a right-of-way by implication or necessity on the ground that the plaintiff failed to prove what use was made of the right-of-way at the time the riverfront portion of the property became effectively landlocked? . . . The defendants raise[d] two alternative grounds for affirmance: (1) the easement by deed over the Gorman property was not appurtenant to the land; and (2) an easement by necessity over the Kahn property cannot be imposed unless the dominant parcel is landlocked and the easement connects the landlocked parcel to a public road." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Deane* v. *Kahn*, 317 Conn. 157, 160–65, 116 A.3d 259 (2015).

Our Supreme Court reversed in part and affirmed in part the judgment of this court. Id., 160. With respect to the existence of a deeded easement over the Gorman property, our Supreme Court agreed with the plaintiff that this court improperly had concluded that the plaintiff could have proven the location and use of such an easement only with evidence exclusively from the time of the 1935 conveyance. Id., 165–66. The Supreme Court concluded as follows: "In the present case, the trial court's consideration of evidence of the location and use of the right-of-way before and immediately after the 1935 conveyance, including credible evidence of use of the well worn path in the 1940s and 1950s by Schmitt and Sutton, was not [improper]. Because the trial court properly considered this evidence, and because the determination of the scope of an easement is a question of fact that will not be overturned unless clearly erroneous . . . we conclude that there is sufficient evidence in the record to support the trial court's finding of the location and use of an easement by deed over the Gorman property." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 171.

The Supreme Court also rejected the alternative ground for affirmance raised by the defendants, concluding that the same post-1935 evidence offered to establish the easement also established the appurtenance of the easement. Id.

Turning to the Kahn property, the Supreme Court first affirmed this court's decision that the plaintiff had failed to prove the existence of an easement by necessity over the Kahn property in favor of the plaintiff, albeit on the basis of the defendants' alternative ground, namely, "that an easement by necessity cannot be imposed unless the dominant parcel is landlocked and the easement connects the landlocked parcel to a public road." Id., 174.[3] The Supreme Court, however, reversed the Appellate Court's decision to reject outright the plaintiff's alternative ground for affirming the trial court's judgment, namely, that the trial court's factual findings were sufficient to support an easement by implication over the Kahn property.[4] Id., 178.

The Supreme Court considered anew whether there were sufficient factual findings in the record to support an easement by implication and reasoned as follows: "Our review of the record leads us to conclude that, *although the trial court made some factual findings that likely will support the plaintiff's claim for an easement by implication over the Kahn property*, such findings may merely be incidental to the judgment that

[3] The Appellate Court had reversed the trial court's determination that an easement by necessity existed because the trial court failed to make findings regarding the "use of the right-of-way at the time of the 1960 conveyances" or "the existence of the need for vehicular access at the time of the purported creation of the easement by necessity." *Deane* v. *Kahn*, supra, 149 Conn. App. 83–84.

[4] This court rejected the plaintiff's alternative ground for affirmance in a footnote, concluding that because "the [trial] court made no findings as to the use of the purported riverfront easement at the time of the 1960 severance, and that the record, in fact, discloses no such use, the plaintiff's claim of an implied easement must fail." *Deane* v. *Kahn*, 149 Conn. App. 62, 85 n.24, 88 A.3d 1230 (2014).

the trial court rendered solely on the plaintiff's count of easement by necessity. We decline to surmise whether the trial court would have made any additional factual findings if it had rendered judgment on other counts of the plaintiff's complaint, especially in light of the fact that *this opinion clarified what evidence is probative of the parties' intent with respect to the scope and use of an easement.* We therefore reverse the judgment of the Appellate Court as to easement by implication and remand the case to that court with direction to remand the case to the trial court for further proceedings on that count of the plaintiff's complaint." (Emphasis altered.) Id., 183.

On remand, the trial court ordered the parties to submit briefs in support of their positions regarding the existence of an easement by implication. The court determined that it was unnecessary for it to conduct any additional hearing or to consider additional evidence and instructed the parties to confine their discussion to the evidence that was presented at the original 2006 trial in this matter. The parties did not object to this procedure or ask for an opportunity to offer additional evidence, and each submitted a brief. On the basis of the evidence and the submissions of the parties, the court issued a memorandum of decision on March 1, 2016, finding in favor of the plaintiff and concluding that he had an implied easement over the Kahn property and that, as a result of that implied easement, "the easement by deed over the Gorman property in favor of [the plaintiff's property] was not extinguished by the severance of the Deane and Kahn properties in 1960."[5] These appeals followed.

[5] This final conclusion is significant because the easement appurtenant created by the 1935 deed existed in favor of Caples' undivided property, which included both the current Kahn and Deane properties. "It is a well established principle that [if] an easement is appurtenant to any part of a dominant estate, and the estate is subsequently divided into parcels, each parcel may use the easement as long as the easement is applicable to the new parcel, and provided the easement can be used by the parcels without additional burden to the servient estate. . . . An easement is applicable to

I

We begin our discussion by setting forth the principles of law that guide our consideration of the principal claim raised by the defendants, including the appropriate standard of review. An easement by implication, also referred to as an implied easement, "is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property." (Internal quotation marks omitted.) *Sanders* v. *Dias*, 108 Conn. App. 283, 293, 947 A.2d 1026 (2008). Although related in concept, an easement by implication differs from an easement by necessity. See *Kelley* v. *Tomas*, 66 Conn. App. 146, 169 n.5, 783 A.2d 1226 (2001). "The difference between the two types of easements is that an easement by necessity requires the party's parcel to be landlocked, and an easement by implication does not require that the parcel be landlocked. An additional difference is that an easement by necessity does not require that the parcel have a preexisting use of an apparent servitude at the time of severance . . . whereas an easement by implication requires such an apparent servitude to be existing at the time of severance, and that the use of the apparent servitude be reasonably necessary to the use and enjoyment of the grantee's property." (Citation omitted.) Id., 170 n.5.

the new subdivision (1) if the easement directly abuts on the new parcel, or (2) *if the owner of the new parcel can reach the easement by traveling over intervening land over which the owner has a legal right of passage*." (Citation omitted; emphasis added.) *Stiefel* v. *Lindemann*, 33 Conn. App. 799, 813, 638 A.2d 642, cert. denied, 229 Conn. 914, 692 A.2d 1211 (1994). Thus, when Caples' property was divided in 1960, the Kahn property would have retained the benefit of the appurtenant right-of-way over the Gorman property because it directly abutted that property, whereas the Deane property could retain the benefit only if it enjoyed some other legal right of passage over the intervening Kahn property, such as an easement by implication. See *Deane* v. *Kahn*, supra, 317 Conn. 173–74.

The creation of an easement by implication is governed by the often cited test set forth in *Rischall* v. *Bauchmann*, 132 Conn. 637, 642–43, 46 A.2d 898 (1946). "[If] . . . an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance, is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage in substantially the same condition in which it appeared and was used when the grant was made. . . . [I]n so far as necessity is significant it is sufficient if the easement is highly convenient and beneficial for the enjoyment of the portion granted. . . . The reason that absolute necessity is not essential is because fundamentally such a grant by implication depends on the intention of the parties as shown by the instrument and the situation with reference to the instrument, and it is not strictly the necessity for a right of way that creates it." (Citations omitted; internal quotation marks omitted.) Id.

"The two principal elements we examine in determining whether an easement by implication has arisen are (1) the intention of the parties, and (2) if the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." *Utay* v. *G.C.S. Realty, LLC*, 72 Conn. App. 630, 636–37, 806 A.2d 573 (2002). In considering whether a grantor intended to create an easement, the court, in addition to examining the deed, maps and recorded instruments introduced as evidence, always may "consider the circumstances of the parties

connected with the transaction." Id., 637. "With respect to the second prong of the test . . . [a]n easement by implication does not arise by mere convenience or economy, but exists because of some significant or unreasonable burden as to access that demands the easement's presence." (Citation omitted; internal quotation marks omitted.) Id., 638.

Turning to our standard of review in the present case, we note that, generally, "[t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. [If], however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Cirinna* v. *Kosciuszkiewicz*, 139 Conn. App. 813, 818, 57 A.3d 837 (2012).

The circumstances in the present case, however, are somewhat unique and require a slightly different approach. The defendants do not claim that the court misstated the applicable law with respect to implied easements. Additionally, with one exception, they do not claim that the court made clearly erroneous factual findings or otherwise challenge the factual basis of the court's decision.[6] Rather, the defendants' primary claim on appeal is that the court misapplied the applicable law to the subordinate facts in reaching its ultimate determination that an implied easement existed.

[6] When asked at oral argument before this court whether they were claiming that any of the court's factual findings were clearly erroneous, the Kahns explained that, to the extent that the trial court had found that Caples had the intent to create an implied easement, they believed that that finding was clearly erroneous given that she also had created express easements as part of the 1960 conveyance. As we discuss later in part II of this opinion, we reject the premise of this argument and, thus, cannot agree that the court's finding of an implied intent was clearly erroneous.

In other words, the defendants' claim is best understood as implicating the evidentiary sufficiency of the court's legal conclusion. We have applied the following standard when considering sufficiency claims in other civil cases and conclude that the same approach is appropriate under the present circumstances. If the appropriate standard of review is one of evidentiary sufficiency, we consider "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 588, 122 A.3d 1247 (2015). With these principles in mind, we turn to whether the cumulative effect of evidence in the record supports the court's determination that an easement by implication exists.[7]

II

In their respective appeals, the defendants each claim that the trial court improperly concluded on the basis of the factual record before it that the parties to the 1960 severance of the Deane and Kahn properties intended to create an easement by implication in addition to certain other easements expressly set forth by deed. Having reviewed the court's decision, however, we are convinced that the evidence relied upon by the court was sufficient to support its conclusion that the plaintiff met his burden of establishing by a preponderance of

[7] We acknowledge that we previously have stated that the finding of an easement by implication is a question of law over which our review is plenary. See *Utay* v. *G.C.S. Realty, LLC*, supra, 72 Conn. App. 636. Even if we were to apply a more exacting plenary standard of review in the present case, and thus make an independent determination regarding the existence of an implied easement, we nonetheless would affirm the judgment of the trial court.

the evidence that an easement over the Kahn property was both implicitly intended by the parties to the 1960 conveyance and reasonably necessary for the use and normal enjoyment of the Deane property. Accordingly, we reject the defendants' claims.

As a preliminary matter, we reject the defendants' suggestion that the court improperly considered, as a matter of law, evidence of the Kahn property's use other than that which existed either at or closely around the time of the 1960 conveyance. First, the defendants did not raise any evidentiary challenges before the trial court on remand or seek to limit the evidentiary lens through which the court viewed whether an implied easement existed. Furthermore, our Supreme Court already held in the prior appeal in this matter that this court impermissibly narrowed the scope of evidence that was admissible as proof of a grantor's intent with respect to the existence of an easement by deed, and there is no indication that that holding does not extend to a court's consideration of an easement by implication. Certainly, to establish an easement by implication, the plaintiff has the burden of demonstrating a preexisting use of an apparent servitude at the time the property was severed into separate parcels. *Sanders* v. *Dias*, 108 Conn. App. 283, 293, 947 A.2d 1026 (2008). Such use may be established by direct evidence of that use by the grantor, but may also be established, more indirectly, by circumstantial evidence of the existence of a use both prior to and after the severance from which it reasonably may be inferred that the same use by the grantor existed at the time of conveyance and was intended to continue. The fact that the trial court here relied on such circumstantial evidence is not fatal to its legal conclusions.

Furthermore, we also must reject outright the defendants' legal argument that, because the parties to the

1960 conveyance expressly set forth in the deed a common driveway and mutual boundary easements, they necessarily would have also expressly set forth any other intended easement, including any easement necessary to access the lower portion of the Deane property. The fact, however, that parties to a deed created express easements by deed in no way precludes a court from finding that additional easements were created by implication. The defendants have not cited any binding authority in support of their argument to the contrary, and we are not persuaded by their reliance on authority from courts in other jurisdictions. Our Supreme Court rejected a nearly identical argument in *D'Amato* v. *Weiss*, 141 Conn. 713, 109 A.2d 586 (1954). The court in *D'Amato* stated: "It is true that the express grant of one or more easements in a deed *may* negate an intent to grant another easement *of a similar character* by implication. . . . It does not, however, *necessarily* do so. . . . The question is always what the intention of the parties was, as it can be gleaned from the deed *in the light of the attendant circumstances*." (Citations omitted; emphasis added.) Id., 718. Certainly, if express and implied easements concern different issues of access and different portions of the property, the existence of an express easement in the deed will have far less of a significance in evaluating whether the parties also implicitly intended a separate and distinct easement.

As stated in the relevant 1960 deed, the common driveway and mutual boundary easements were created to provide common access from the portion of the roadway running north of what is now the Kahn and Deane properties "for passage on foot and in vehicles and for the installation of public utility services for the benefit of the [conveyed] land." Those easements, therefore, benefit the upper portions of the conveyed property, but did nothing with respect to access to the lower,

riverfront portions of the property, which the court found on the basis of its own observations during two site visits were all but inaccessible from the upper portions due to the steep slope of the land. On these facts, it was not unreasonable for the court to conclude that the parties to the 1960 conveyance may have chosen to expressly set forth in the deed the newly created common driveway and mutual boundary easements and yet still implicitly intended the continuation of a long-standing practice of access over the lower riverfront portion of the properties by way of the easement over the Gorman property.

Finally, we turn to whether there was sufficient evidence to support the trial court's determination that an easement by implication existed over the Kahn property in favor of the Deane property. We conclude that the evidence before the court was sufficient to support both that the parties to the 1960 conveyance had the requisite implied intent to create such an easement and that the easement was reasonably necessary for the full enjoyment of the Deane property.

The trial court set forth the following facts in support of its determination that an easement by implication exists in the present case. First, on the basis of numerous photographs of the Deane and Kahn properties introduced at trial, as well as the court's own observations from twice having walked the site, the court found that "[e]ach property consists of an upper portion near to the road and a lower portion along the river, the portions being separated by a very steep slope, which makes access from the upper portion to the lower portion and the river exceedingly difficult. Moreover, access from the lower portion to the road via the slope and the upper portion of the property is virtually impossible, especially for vehicles. There is no evidence whatever that the configuration of these properties was any different in 1960 than it is today."

The court also set forth additional facts, taken from its prior decision in this matter, relative to whether the implied easement was "reasonably necessary for the use and enjoyment" of the plaintiff's property. In particular, the court stated: "[T]his is not a case where access to the lower portion from the upper portion of the Deane property is merely inconvenient. . . . Without direct vehicular access from the road [the plaintiff] has been and will continue to be unable to conduct ordinary maintenance of the lower portion of his property on a regular basis, to deal with damage to that portion caused by unusual events, such as a severe storm or flooding, to maintain his well or seawall or to construct a beach or boat dock on the river. . . . [I]n 1960, [Caples] was conveying to [Charles] Srebroff a tract of land, the lower portion of which along the riverfront was inaccessible to vehicular traffic from the upper portion due to a steep slope separating the two, thus precluding its reasonable and productive use and development without access to the road via the riverfront easement. Even access by foot was problematic due to the steepness of the slope." (Citation omitted; internal quotation marks omitted.) These findings, taken together, are sufficient to establish that there was a "significant or unreasonable burden as to access" to the lower portion of the Deane property, and, that an easement along the riverside was needed to provide such access for the maintenance and enjoyment of the lower portion of the property below the slope.

Regarding its conclusion that such use of the property existed at the time of the 1960 conveyance and that it reasonably could be implied that the parties to the conveyance intended to create an easement continuing that use, the court relied on the following evidence. First, and most significantly, the court credited the trial testimony of two witnesses—Robert Sutton, the nephew of Harriett Warner and the cousin of Caples,

and Carole Schmitt, the Srebroffs' daughter—whom the court described as having "intimate and prolonged knowledge of the uses to which these properties along the Connecticut River had been put."

The court found with respect to Sutton that he "has lived among these properties all his life" and that he had "crossed over [Caples'] property on his way to and beyond what is now the Deane property 'thousands and thousands of times' " beginning "in 1945, when . . . Caples owned them, and continu[ing] up to and beyond 1960, when she sold them to the Srebroffs." The court appears to have credited Sutton's testimony that "there were well-worn tracks across what is now the Kahn property for many years, evidencing the frequent and regular traffic over the property to, from and beyond what is now the Deane property" and that "the traffic across the Kahn property was not limited to foot traffic: on a regular basis stores in town delivered both fuel oil and groceries to a house previously located on the lower portion of the Deane property." Significantly, the court found that it was reasonable and logical to infer that "Caples would have known of this extensive use of her property by [Sutton], other members of her family and others during her time as owner and of the importance of this use in obtaining access from the lower portion of the property to the road."

With respect to Schmitt, the court found that "she was in residence with [the Srebroffs] in 1960 when the property was divided and sold to them by [Caples]." The court credited her testimony that, "[t]he reason the properties were divided . . . was to allow [Charles] Srebroff to sell off his portion of [Caples'] land, thereby providing the financial wherewithal to build a house on [Marion] Srebroff's portion for use by [Schmitt] and her family." The court found that at the time Schmitt lived on the Kahn property and the Heffernans lived on the Deane property, the area by the river generally was

overgrown, but credited her testimony that "one area that wasn't overgrown was in the so called right-of-way that everybody is talking about." (Internal quotation marks omitted.) The court further credited Schmitt's testimony that "the Heffernans used the established right-of-way over the Kahn property for the purpose of maintaining and improving the riverfront portion of their property, now the Deane property" and that on several occasions workmen presumably hired by the Heffernans came to clear debris. Those workmen passed over the property in their trucks. According to Schmitt, the right-of-way remained apparent through 1968 when she vacated the Kahn property.

The court viewed the testimony of Sutton and Schmitt as persuasive evidence that the use of the land at the time of the 1960 conveyances was "open, visible, continuous and necessary to the enjoyment" of the Deane property, and that same evidence warranted an inference "that the parties' intention in the division and conveyance of [Caples'] property was to preserve the established right-of-way."

The court further found that between 1955 and 1960, the Srebroffs, who were living on what is now the Gorman property, were well aware of the easement across the Gorman property because their deed mentioned "the right-of-way reserved by the 1935 conveyance." Further, they were aware of "the frequent traffic across their property and onto and through [Caples'] property." Finally, the court found that they "knew from their familiarity with the lay of the land along the shore that the portion of [Caples'] property conveyed to [Charles] Srebroff in 1960 required passage over the property conveyed to [Marion] Srebroff for its full use and enjoyment. This would have been of particular importance to them since it was their intention to sell [Charles] Srebroff's portion of the property, and ready access from its riverfront portion to the road would have

enhanced its value." The court concluded that it reasonably and logically could deduce from those facts that "it was the Srebroffs' intent in 1960 that the historic right-of-way be preserved from [Charles] Srebroff's portion over [Marion] Srebroff's portion and further over what is now the Gorman property and on to the road."

After reaching its conclusion, on the basis of the evidence it recited, that the parties to the 1960 conveyance implicitly intended to create an easement across the lower portion of the Kahn property, the court set forth the following as supporting the reasonable necessity of such an easement. Between 1976 and 1986, "the plaintiff crossed over both the Kahn and Gorman properties without hindrance and brought in vehicles from the road via that route to improve and maintain the lower portion of his property"; the plaintiff crossed over the Kahn property for an additional fifteen years until the Kahns erected a fence in 2001; and [Amy Day] Kahn joined the plaintiff in his walks along the riverfront. The court, citing *Deane* v. *Kahn*, supra, 317 Conn. 170, reasoned that this postconveyance evidence was an example of the type of facts the Supreme Court contemplated as "bear[ing] a reasonable relation to what was considered reasonably necessary for [the conveyance's] use and normal enjoyment at the time of the conveyance . . . ." (Internal quotation marks omitted.)

Although it is clear from our review of the record that there is not overwhelming direct evidence of Caples' own use of the Kahn property to serve the lower portion of the Deane property precisely at the time of the 1960 conveyance, there, nonetheless, was evidence that such a use certainly existed both before and after the conveyance, as evidenced by the testimony of Sutton and Schmitt. We conclude that the court reasonably and logically inferred on the basis of the circumstantial evidence presented that the parties to the 1960 conveyance were aware of the historic right-of-way along the

riverfront and that that use continued, in some form, at the time of the conveyance. It also was reasonable to infer that the parties intended to continue the use in the future because it was necessary for the proper enjoyment of the resulting severed parcels. We are convinced that there was sufficient evidence in the record to support the trial court's decision that an easement by implication existed across the Kahn property for the benefit of the Deane property, and, accordingly, we reject all of the defendants' arguments to the contrary.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVID GRANT
(AC 39921)

DiPentima, C. J., and Lavine and Elgo, Js.

Syllabus

Convicted, after a jury trial, of the crimes of manslaughter in the first degree with a firearm and assault in the first degree in connection with an incident in which the defendant shot two witnesses at a restaurant, the defendant appealed. During the defendant's trial, the court admitted into evidence a digital video recording of an interview of the defendant by the police following his arrest and a written statement in which the defendant had admitted to being the shooter and that he sold drugs to make money. The state also presented forensic evidence and testimony from various eyewitnesses, including V, who testified, inter alia, that he had personal knowledge that the defendant sold drugs and had possessed a firearm prior to the time of the shooting. Following V's testimony, the trial court gave a limiting instruction to the jury regarding prior misconduct evidence. On the defendant's appeal, *held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in admitting V's testimony and the portions of the defendant's statements to the police that indicated that he was involved in the sale of drugs, as any alleged error in the admission of that evidence was harmless: the defendant failed to demonstrated that the admission of the subject evidence had a significant impact on the jury's verdict, as the state's case against the defendant was strong, the state having presented an abundance of independent evidence that substantiated the jury's verdict, including eyewitness testimony identifying the defendant

as the shooter, forensic evidence indicating that a firearm recovered near the restaurant fired the bullets that were recovered from the victims' bodies, documentary and testimonial evidence that the defendant's DNA was present on that firearm and the written and recorded statements made by the defendant, in which he admitted his involvement in the shooting and the manner in which it transpired; moreover, the evidence that the defendant sold drugs was not a prominent part of the state's case or more egregious in nature than the evidence related to the shooting incident, the record was barren of any evidence that contradicted V's testimony and the court provided the jury with a limiting instruction regarding prior misconduct evidence immediately following V's testimony.

2. The defendant's claim that the trial court abused its discretion in permitting the state to elicit testimony from V that he had observed the defendant carrying a firearm on a prior occasion was unavailing, as any alleged error in the admission of V's statement was harmless; in light of the various factors discussed in this court's analysis of the defendant's first claim, this court was left with a fair assurance that the admission of V's statement did not substantially affect the jury's verdict.

Argued October 17, 2017—officially released January 2, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, where the first and second counts were tried to the jury before *Jongbloed, J.*, and the third count was tried to the court; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm, assault in the first degree and criminal possession of a firearm, from which the defendant appealed. *Affirmed.*

Daniel J. Foster, for the appellant (defendant).

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, David Grant, appeals from the judgment of conviction, rendered after a jury trial,

of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a, and assault in the first degree in violation of General Statutes § 53a-59 (a) (5).[1] On appeal, the defendant claims that the trial court improperly (1) admitted evidence of his involvement in the sale of drugs and (2) permitted the state on redirect examination to inquire as to whether a witness had observed the defendant carrying a firearm on a prior occasion. We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. At approximately 1:40 a.m. on June 24, 2012, a 911 dispatcher with the Norwich Police Department received reports of a shooting at the Mai Thai restaurant and bar in Norwich (establishment). Officers Steven Schmidt and Patrick Lajoie, who were investigating a complaint at an American Legion hall located approximately one third of a mile from the establishment, responded to an emergency dispatch. They arrived moments later and encountered a chaotic scene as patrons fled the establishment. Schmidt entered the building and immediately discovered an unresponsive female, later identified as Donna Richardson, lying in a pool of blood on the floor. Richardson was transported by emergency personnel to the William W. Backus Hospital, where she was pronounced dead. Following an autopsy, the medical examiner determined that her cause of death was a gunshot wound to the chest and that the manner of death was a homicide. While conducting that autopsy, the medical examiner removed a projectile from Richardson's body and gave

[1] The defendant also was convicted, in a separate count tried to the court, of criminal possession of a firearm in violation of General Statutes § 53a-217 (a). That count was predicated on the defendant's status as a convicted felon at the time of the underlying crime. In this appeal, the defendant does not challenge the judgment of conviction with respect to that count.

it to a detective with the Norwich Police Department, who packaged it as evidence.

A second patron at the establishment, Crystal Roderick, suffered a gunshot wound to her right thigh. Although she heard gunshots, Roderick did not see her assailant. Roderick was transported from the establishment to the William W. Backus Hospital, where medical personnel determined that a bullet was lodged in "a very superficial location" in her thigh. A surgeon later removed the bullet, which was secured by members of the Norwich Police Department.

On the night of the shooting, both Richardson and Roderick had attended a high school graduation party held in a private room at the establishment. Roderick testified that, later in the evening, "[t]here [were] a lot of people" at the establishment, including the defendant and a person known as Steven Velez, whom she identified as "Cuda." Approximately fifteen minutes before being shot, Roderick had a conversation with the defendant, whom she described as a friend, on a deck at the rear of the building that served as the main entrance to the establishment. During that conversation, Roderick exchanged phone numbers with the defendant, who "smelled like he was drinking."

Ashleigh Hontz was at the establishment that evening with her mother to celebrate a friend's birthday. Hontz saw the defendant and Velez together, both of whom she previously had known, and remarked to her mother that she found the defendant's attire unusual for "what you wore out at night," particularly because she had seen the defendant in the same attire at a retail store earlier that day. When "last call" was announced at approximately 1:30 a.m., Hontz retreated to her vehicle in a parking lot by the deck. She heard a scuffle on the deck and then observed the defendant and Velez descending its stairs. At that time, Hontz watched as

the defendant "pulled a gun up with his right hand and fired . . . [s]traight up into the deck aimlessly, it looked like." She continued to observe the defendant as he walked to the front of the building and entered a vehicle driven by Velez, which "drove away fast."

In his testimony at trial, Anthony Zemko provided a similar eyewitness account. Zemko arrived at the establishment sometime before 1:30 a.m. to pick up a friend. He parked his vehicle directly across from the deck and waited while "facing directly to the back of the building." Zemko then saw two men coming down the stairs of the deck when the second one "lost his balance a little bit and fell over to the railing. . . . [H]e didn't fall completely. He stumbled into the stair rail and handrail, and something fell out of his waistband . . . . It landed on the ground and made a bang with a flash." Zemko testified that the item appeared to be a pistol, and continued: "That gentleman picked the pistol up, put it in . . . his right pocket [and] began walking away . . . . [He] then spun around and took the gun out and just pointed at the crowd [on the deck] and started shooting." Zemko testified that the two men then fled in a speeding vehicle. When the police officers arrived at the establishment moments later, there were approximately thirty to fifty people on the deck.

Norman Tonucci was working as a groundskeeper at the Mohegan Sun casino on June 24, 2012. Approximately six hours after the shooting, Tonucci discovered a firearm on top of a bed of mulch by the entrance to the casino. Law enforcement officials also recovered spent shell casings from the establishment and ammunition found in front of the American Legion hall located a short distance from the establishment. The firearm, shell casings, and ammunition were compared with the projectiles removed from the bodies of the two victims by Jill Therriault, a firearms and toolmark examiner with the state Department of Emergency Services and

Public Protection's division of scientific services. In her report, which was admitted into evidence, Therriault concluded that the projectiles and shell casings were associated with the firearm. She also testified at trial that the projectiles recovered from the victim's bodies both were fired from the firearm recovered near the Mohegan Sun casino. In addition, DNA samples were extracted from the firearm. Subsequent forensic testing revealed multiple contributors. Although Velez was not "a source of or contributor to" any of the DNA samples, the defendant was included as a contributor to one of the samples. At trial, Dahong Sun, a forensic examiner at the state forensic science laboratory, testified that the expected frequency of individuals who could be a contributor to that particular sample was "less than one in seven billion in the African-American, Caucasian, and Hispanic populations."

Velez also testified at the defendant's criminal trial. At that time, he was incarcerated and had multiple charges pending against him. Velez testified that he was a drug dealer and had moved from New York to Norwich to make money "[s]elling drugs." On the night of the shooting, Velez had been drinking alcohol with the defendant at a friend's house. Sometime around midnight, they headed to the establishment. When the lights later came on at the bar to indicate that it was closing, Velez exited through the deck at the rear of the building. Velez testified that he then heard gunshots and ran to his vehicle, which was parked at the front of the building. When the defendant then appeared around the corner, Velez told him to get in the vehicle, and they quickly departed. Velez testified that he asked the defendant what had happened, and the defendant replied that he had fired shots after seeing "Zay," an individual also known as Isaiah Lee. Velez testified that the defendant had a gun in his hand when he entered the vehicle. As they drove away, the defendant "threw some bullets"

out the window and later tossed the gun "somewhere" along the highway. When the defendant received a phone call informing him that someone had been shot, the two proceeded to Brooklyn, New York, where they parted.

Several months later, the defendant was arrested in Maryland as a fugitive from justice and agreed to be extradited to Connecticut. During the trip to Connecticut, officers from the Norwich Police Department advised the defendant of his *Miranda* rights[2] and proceeded to question him about the shooting. Because the audio recording equipment in the vehicle was not working properly, the officers conducted a second interview upon returning to Norwich. At that time, the defendant provided a written acknowledgement of his *Miranda* rights. In the interview that followed, the defendant admitted to being the shooter at the establishment on June 24, 2012. A digital video recording of that interview was made, which was admitted into evidence and played for the jury at trial. The defendant also provided a written statement to the police, which also was admitted into evidence.

In those statements, the defendant indicated that he arrived at the establishment approximately thirty minutes before closing time on the night of the shooting. He had been drinking heavily and was "wasted" at that time. When he was on the dance floor, Velez approached him and handed him a revolver while noting that Zay was across the room. The defendant acknowledged that he did not "know Zay too well, but I know he goes around shooting at people" and had shot at both Velez and another friend in the past. As Velez and the defendant headed to the deck area, the defendant observed that Zay "was standing there like he did have a gun"

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and was "moving around like he was getting ready to do something."

In his statements to the police, the defendant indicated that Velez then told him that he was going to start his vehicle. At that time, the defendant fired a shot in Zay's direction. When asked why he had fired that shot, the defendant stated, "I just got nervous and scared really."[3] The defendant stated that he was only trying to scare Zay and did not intend to kill him. As the defendant descended the stairs of the deck, he slipped and fell. While doing so, he fired another shot. The defendant then heard what sounded like another gunshot and fired a third shot in response. As he stated, "I heard some like—it sounded like a shot or whatever, and I just swung my hand back and shot. I didn't even look. I didn't even look where I was shooting really." The defendant also noted that "[i]f I was focused and more conscious, I probably would have just never did that—recklessly just shoot like nobody can't get hurt."

The defendant stated that he and Velez then fled to Velez' vehicle and drove away. From his passenger seat in the vehicle, the defendant removed the remaining bullets from the gun and tossed them out the window. Sometime later, the defendant threw the gun out the window, though he did not recall precisely where. When they later received a phone call informing them that someone had died as a result of the shooting, the two proceeded to Brooklyn. As the defendant put it, "[s]ince then, I've been on the run." At the end of his written statement, the defendant noted, "I didn't mean for that lady to get killed or for [Roderick] to get shot. I was just doing my thing out here. I sold crack cocaine to get by to feed my family. If it wasn't for [Velez] giving me that gun, I would have went home to my family that night."

[3] In his police statements, the defendant indicated that he had been shot on a prior occasion and "wasn't about to get shot at again."

The defendant subsequently was charged with murder in violation of General Statutes § 53a-54a (a), assault in the first degree in violation of § 53a-59 (a) (5), and criminal possession of a firearm in violation of § 53a-217 (a). A trial followed, at the conclusion of which the jury acquitted the defendant on the charge of murder, but found him guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of §§ 53a-55 (a) (1) and 53a-55a.[4] The jury also found the defendant guilty of assault in the first degree. On the criminal possession of a firearm charge; see footnote 1 of this opinion; the court found the defendant guilty. The court rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of forty-seven years incarceration, followed by ten years of special parole. From that judgment, the defendant now appeals.

I

The defendant contends that the court improperly admitted evidence that he was involved in the sale of drugs. Specifically, he claims that the court abused its discretion in admitting both Velez' testimony that the defendant sold drugs and the portions of the defendant's written and recorded statements in which he acknowledged that he "sold crack cocaine to get by to feed [his] family." In response, the state argues that (1) the court properly determined that the probative value of that

[4] General Statutes § 53a-55a provides in relevant part that "[a] person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ."

General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ." The verdict form completed by the jury indicates that it found the defendant guilty of that offense.

evidence outweighed its prejudicial effect and (2) any error in its admission was harmless. We agree with the latter contention.[5]

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in the [state's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the [state's] case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014).

The following additional facts are relevant to this claim. At a pretrial hearing, the state indicated that it intended to present evidence of prior bad acts on the part of the defendant—namely, that he "has engaged in the drug trade as a seller of drugs, and also that he has been known [to] unlawfully possess firearms before the shooting." The state further informed the court that

[5] Because we agree that the alleged evidentiary impropriety was harmless, we do not address the issue of whether the trial court abused its discretion in admitting that evidence. See, e.g., *State* v. *Rodriguez*, 311 Conn. 80, 88, 83 A.3d 595 (2014) ("we need not address the defendant's other reasons in support of his contention that the testimony was inadmissible because, even if we assume, without deciding, that the trial court should have excluded the testimony, its admission was harmless").

such evidence primarily would be introduced through testimony by Velez. In response, the defendant objected to that evidence. After noting the defendant's objection, the court advised the parties that its ultimate ruling on the admissibility of such evidence would be made "in the context of the evidence that has been received up to the point at which it is offered." The court at that time cautioned the state not to elicit any such testimony from witnesses at trial without first providing the court and the defendant an opportunity to properly address the issue.

On the second day of trial, the state complied with that admonition. Prior to Velez taking the witness stand and outside the presence of the jury, the prosecutor informed the court that he expected Velez to testify that the defendant was "engaged in the drug trade in the city of Norwich" and that the defendant possessed firearms prior to the night of the shooting. He argued that such evidence was material and relevant because "the fact that he's been previously engaged in the drug trade explains why he's here, why he's associated with Mr. Velez, why he carries a gun, all these things important to the state's case." In response, defense counsel argued that such evidence was irrelevant and prejudicial. The court disagreed, stating: "I do think under all the circumstances, at least as presented to this point, that it certainly does meet the standards for admissibility. I will find that it's relevant and material to the circumstances as outlined by the prosecutor, including motive, identity, intent, absence of mistake or accident, and to complete the prosecution story. I also find that the probative value outweighs its prejudicial effect and so I am going to permit the testimony." The court then advised the parties that it would provide a limiting instruction to the jury regarding any such prior misconduct evidence.

Velez thereafter testified on direct examination by the state that the defendant moved from New York to Norwich to make money selling drugs. On redirect examination, Velez testified that he had personal knowledge that the defendant sold drugs and possessed a firearm prior to 2012. When Velez' testimony concluded, the court gave a limiting instruction to the jury regarding prior misconduct evidence.[6]

Assuming, without deciding, that it was improper for the court to admit the aforementioned evidence, we nonetheless conclude that the defendant has not demonstrated that its admission was harmful. The state's case was quite strong. Multiple eyewitnesses to the shooting testified at trial. Hontz, who knew the defendant prior to the night of the shooting, identified him

[6] The court instructed the jury as follows: "Through the last witness who testified—that was Mr. Steven Velez—the state offered evidence of other acts of misconduct of the defendant, namely, narcotics trafficking and prior possession of a firearm. This evidence is not being admitted to prove the bad character of the defendant or the defendant's tendency to commit criminal acts. Such evidence is being admitting solely to show or establish the defendant's intent, motive for commission of the crimes alleged, absence of mistake or accident on the part of the defendant, and the complete story as presented by the prosecution.

"You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues of, again, intent, motive, absence of mistake or accident, and the complete story as presented by the prosecution. On the other hand, if you do not believe such evidence or even if you do, if you find that it does not logically, rationally, and conclusively support the issues for which it is being offered by the state, then you may not consider that testimony for any purpose.

"You may not consider evidence of other misconduct of the defendant for any purpose other than the ones I've just told you because it may predispose your mind uncritically to believe that the defendant may be guilty of the offenses here charged merely because of the alleged other misconduct. For this reason, you may consider this evidence only on the issues of motive, identity, intent, absence of mistake or accident on the part of the defendant and the complete story as presented by the prosecution and for no other purpose."

at trial as the shooter. The state also offered the testimony of Velez, who testified that the defendant was holding a gun when he entered Velez' vehicle immediately after the shooting and admitted that he had fired shots at the establishment. See *State* v. *Bouknight*, 323 Conn. 620, 627, 149 A.3d 975 (2016) (any error in admitting certain photographs into evidence harmless where, inter alia, multiple eyewitnesses testified regarding shooting and at least one identified defendant as shooter); *State* v. *Rodriguez*, supra, 311 Conn. 91–92 (any error in admitting testimony harmless where, inter alia, multiple eyewitnesses testified to defendant's involvement in crime and incriminating statements); *State* v. *Bonner*, 290 Conn. 468, 501, 964 A.2d 73 (2009) (any error harmless where multiple eyewitnesses saw defendant point gun at time of shooting, flee scene, or confess). The state introduced forensic evidence indicating that the firearm recovered outside the Mohegan Sun casino fired the bullets that were recovered from the victims' bodies. The state also produced documentary and testimonial evidence to establish that the defendant's DNA was present on that firearm. Perhaps most significantly, the state also introduced the written and recorded statements made by the defendant, in which he confessed his involvement in the shooting and the manner in which it transpired.

In addition, the evidence that the defendant sold drugs was not a prominent part of the state's case. See *State* v. *Urbanowski*, 163 Conn. App. 377, 408, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, A.3d (2017). Furthermore, "in terms of its impact, the evidence was not more egregious in nature than the evidence related to the incident in the present case." Id.; see also *State* v. *Allen*, 140 Conn. App. 423, 440–41, 59 A.3d 351 (uncharged misconduct evidence not unduly prejudicial when not more egregious than evidence related to charged misconduct), cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). We also note that the record is barren

of any evidence that contradicts Velez' testimony that the defendant was engaged in the sale of drugs. See *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017) (absence of evidence contradicting testimony factor in harmlessness analysis).

Moreover, the court provided the jury with a limiting instruction regarding prior misconduct evidence immediately after Velez' testimony concluded. See footnote 6 of this opinion. Such instructions "about the restricted purpose for which the jury may consider prior misconduct evidence serve to minimize any prejudicial effect that such evidence otherwise may have had . . . . [I]n the absence of evidence to the contrary, we presume that the jury properly followed those instructions." (Citations omitted; internal quotation marks omitted.) *State* v. *Cutler*, 293 Conn. 303, 314, 977 A.2d 209 (2009).

In light of the foregoing, we conclude that the defendant has not demonstrated that the admission of the evidence that he sold drugs had a significant impact on the jury's verdict. The state presented an abundance of independent evidence, including eyewitness testimony, forensic analysis, and statements by the defendant, that substantiated the jury's verdict. Any error in the admission of the evidence that the defendant sold drugs, therefore, was harmless.

II

The defendant also claims that the court abused its discretion in permitting the state, on redirect examination, to elicit testimony from Velez that he had observed the defendant carrying a firearm on a prior occasion.[7]

[7] On redirect examination, the following colloquy occurred over the objection of the defendant:

"[The Prosecutor]: Ha[ve] you ever been aware of [the defendant] possessing a firearm before—

"[Velez]: Yeah.

"[The Prosecutor]: —June 24, 2012?

"[Velez]: Yeah.

"[The Prosecutor]: And ha[ve] you personally seen that?

"[Velez]: Yeah."

As with the defendant's prior claim, that contention is evidentiary in nature and subject to a harmless error analysis. See *State* v. *Payne*, 303 Conn. 538, 558–59, 34 A.3d 370 (2012). The analysis set forth in part I of this opinion applies equally to this claim, and it would serve no useful purpose to repeat it. It suffices to say that, in light of the various factors discussed therein, we are left with a fair assurance that the admission of Velez' statement did not substantially affect the jury's verdict in the present case. See id., 559. Accordingly, any error in the admission of that statement was harmless.

The judgment is affirmed.

In this opinion the other judges concurred.