STATE OF CONNECTICUT *v.* ANGEL M.*
(AC 39723)

Keller, Mullins and Elgo, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree and risk of injury to a child arising out of his alleged sexual abuse of the minor victim, his stepdaughter, the defendant appealed. *Held*:

1. The trial court did not abuse its discretion by admitting evidence of three incidents of uncharged sexual misconduct involving A, the defendant's daughter: that court properly concluded that the evidence was relevant in light of its findings that A was approximately the same age as was the victim at the time of the alleged abuse, that both girls looked very similar physically, that the defendant was in a position of authority

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

over both girls, and that the charged and uncharged misconduct were sufficiently similar, and although the abuse of the victim occurred four or five years before the alleged abuse of A and the defendant claimed that there was a qualitative difference between A, his biological daughter, and the victim, his stepdaughter, the uncharged misconduct was not too remote in time, and neither the gap in time nor the familial distinction rendered the uncharged misconduct irrelevant to prove that the defendant had a propensity to engage in the charged conduct; moreover, the trial court properly concluded that the probative value of A's testimony was not outweighed by its prejudicial effect, as the uncharged misconduct involved groping A, which was less severe than the charged misconduct concerning the victim, and the court issued limiting instructions that minimized any prejudicial effect of that evidence.

2. The defendant could not prevail on his claim that multiple instances of prosecutorial impropriety during cross-examination and in closing rebuttal argument deprived him of a fair trial: the defendant's claim that the prosecutor improperly referred to facts that were not in evidence when she asked an improper question during cross-examination of the defendant was an unpreserved evidentiary claim and, thus, not reviewable, as it was not of constitutional magnitude, and his claim that the prosecutor improperly referred to facts not in evidence during closing rebuttal argument by mischaracterizing evidence and implying that the defendant never told the police that the allegations were false was unavailing, as the challenged comments were not improper, had an adequate basis in the evidence, simply invited the jury to draw a reasonable inference from the evidence presented and were intended to challenge the defendant's theory that the victim's mother had encouraged the victim and A to fabricate the allegations; moreover, the prosecutor did not appeal to the racial prejudices of the jurors when she referenced the fact that the defendant was born and raised in another country while exploring his background and his views on relationships with minors, and did not improperly appeal to the passions or prejudices of the jury with references to the defendant's ethnicity or ability to speak English, as the prosecutor sought to establish that the defendant spoke and understood English well enough to have informed a police detective about his alibi and that the girls had a motive for accusing him of sexual abuse.

3. Although the prosecutor committed an impropriety when, during cross-examination, she asked the defendant to comment on the veracity of the testimony given by the victim and A, that impropriety did not deprive the defendant of his due process right to a fair trial; because the version of events offered by the victim and A was directly at odds with the defendant's account, there was no way for the jury to reconcile the conflicting testimony except to conclude that someone was lying, and, therefore, it was unlikely that asking the defendant directly whether the

victim and A were lying was so prejudicial as to amount to a violation of due process.

4. The defendant could not prevail on his unpreserved claim that the trial court improperly increased his sentence to penalize him for invoking his fifth amendment privilege against self-incrimination when he refused to apologize to the victim and A at sentencing; the sentencing court properly considered the defendant's denial in evaluating his prospects for rehabilitation, as one consideration among many, in fashioning the sentence imposed, although that court did not explicitly state that it considered the defendant's refusal to admit guilt as indicative of his lack of rehabilitative prospects, it did acknowledge that rehabilitation was one of the factors to be considered in fashioning an appropriate remedy, and even though the sentencing court focused particularly on the defendant's failure to accept responsibility and to apologize to the victim and A in denying him leniency, it expressly stated that it would not punish the defendant for exercising his absolute right not to admit guilt and to appeal his judgment of conviction, and also acknowledged that the defendant had a positive presentence investigation report, that several people spoke on his behalf, and that he successfully had completed a family violence education program, and this court had no reason to doubt the trial court's representation that it did not punish the defendant for exercising his fifth amendment privilege.

Argued September 22, 2017—officially released March 20, 2018

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, attempt to commit sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford, where the court, *Mullarkey*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter the case was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed*.

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy* and *Anne Mahoney*, state's attorneys, for the appellee (state).

Opinion

MULLINS, J. The defendant, Angel M., appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-70 (a) (2), and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the trial court erred by admitting uncharged sexual misconduct evidence, (2) the prosecutor engaged in impropriety that deprived him of the constitutional right to a fair trial, and (3) the trial court violated his right to due process at sentencing by penalizing him for exercising his fifth amendment privilege against self-incrimination. Although we agree with the defendant that one of the prosecutor's comments was improper, we, nevertheless, conclude that the defendant was not deprived of his due process right to a fair trial. We reject the defendant's other claims, and we, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. M is the mother of the victim. M became romantically involved with the defendant when the victim was approximately three or four years old. M had two children, G and the victim, from a previous relationship. The defendant was a father figure to the victim, and she was considered his stepdaughter.

Approximately one year after the defendant and M began dating, they had a child together named A. At some point in 2000, the defendant moved in with M. They lived together with the three children, the victim, G, and A, in an apartment in Hartford until they purchased a house in 2008.

In 2006 or 2007, when the victim was approximately twelve years old,[1] she arrived home after school and went into her mother's bedroom to play a game on the family's computer. While she was playing on the computer, the defendant came up behind her and began kissing her neck. The victim froze. Then the defendant picked her up and threw her on the bed. He locked the bedroom door and "did something near the side of the bed" before lifting up the victim's shirt and licking her breasts. The defendant proceeded to lick the victim's vagina before taking off his pants and attempting to put his penis in her vagina. The victim closed her legs, and the defendant got off of her.[2]

Several years after that incident, on the evening of December 18, 2011, the defendant and M were involved in an incident outside of a restaurant in Newington. That evening, M had gone to the restaurant without the defendant. She was socializing with a female friend and

[1] The victim did not remember exactly how old she was when the sexual abuse occurred, but she testified that she would have been twelve or thirteen because she was in middle school when it happened. She also testified that the abuse took place while the family was living in the apartment in Hartford, during the spring or summer, rather than the house that the defendant and M purchased in 2008.

[2] In addition to the victim's testimony regarding the sexual abuse, the jury heard testimony from three constancy of accusation witnesses. The first was K, the victim's childhood friend. She testified that when they were in fifth or sixth grade, the victim told her that the defendant had molested her. She also testified that the victim provided more details about the molestation when they were freshmen in high school. K's father was the second constancy witness. Although he could not remember an exact date, he recalled the victim telling him that the defendant had molested her. The third witness, G, the victim's brother, testified that the victim had told him via a text message that she had been "touched." He testified that he received the text message at some point in 2010 while he was in Europe.

The victim also testified that the defendant would kiss her neck "and stuff" every time that she would go on the computer and that on one occasion she woke up and saw the defendant in her bedroom pulling his hands out of his pants. In this case, however, the state only charged the defendant on the basis of the single incident in her mother's bedroom that involved cunnilingus and attempted vaginal penetration.

another man. The defendant, who had been waiting impatiently for her to come home, decided to go to the restaurant to find her. When he arrived, he saw M socializing with a man he did not recognize. He became angry. He confronted M in the parking lot and an argument ensued. The defendant struck M multiple times. The police arrived shortly thereafter and arrested the defendant. In January, 2012, a protective order was issued as a result of the incident. Thereafter, the defendant stopped providing financial assistance to M, and he moved out of the house and into his own apartment.

Shortly after the defendant moved out of the house, A ceased all communication with him. The lack of communication between A and the defendant concerned M. As a result, M asked the victim to talk to A in order to figure out why A was ignoring the defendant. On February 7, 2012, the victim started a conversation with A via text messages concerning the change in her relationship with the defendant. In those communications, A told the victim that the defendant had molested her. The victim also revealed that the defendant had molested her, and the victim encouraged A to tell their mother.

Shortly after this conversation, the victim told M that A had been abused by the defendant. Upon learning about the abuse, M contacted A's therapist, Mary Mercado, who reported the abuse to the Department of Children and Families (department). The department referred the case to the Hartford Police Department, and Detective Frank Verrengia investigated the case. The victim and A both participated in forensic interviews in March, 2012. The victim disclosed her abuse during the forensic interview on March 8, 2012. Following an investigation, the police arrested the defendant on April 18, 2013. The case involving A, however, was administratively closed in May, 2013.

The state charged the defendant with one count of sexual assault in the first degree, one count of attempt to commit sexual assault in the first degree, and one count of risk of injury to a child. At trial, the defendant's theory of defense was that the victim and her sister both fabricated the allegations of sexual abuse. Specifically, he claimed that they made these false allegations in retaliation for his having hit their mother during the restaurant incident, and for withdrawing all financial support from the family after moving out of the house. The jury found the defendant guilty on all counts. The court accepted the verdict, rendered a judgment of conviction, and sentenced the defendant to a total effective sentence of forty-five years imprisonment, execution suspended after thirty-three years, with twenty-five years of probation. This appeal followed.

I

The defendant first claims that the trial court abused its discretion by permitting the state to introduce evidence regarding uncharged sexual misconduct involving A, the defendant's biological daughter. We are not persuaded.

The following additional facts and procedural history are relevant to our discussion. Prior to trial, the state filed a "notice of other evidence" detailing the expected testimony of A regarding three incidents of the defendant's prior uncharged sexual misconduct with respect to her. The defendant filed a motion in limine seeking to preclude A's testimony concerning uncharged sexual misconduct, and the court held a hearing outside the presence of the jury.

At the hearing, A testified that the defendant began abusing her when she was eleven years old, approximately four or five years after the sexual abuse of the

victim.[3] The first incident occurred while the defendant still was living in the family's house in Hartford. A was talking to the defendant in his bedroom when he started to tongue kiss her. The defendant removed her shirt and continued kissing her, but she was able to push him off of her. She put her shirt back on and left the bedroom. The second incident occurred approximately one week later. This time the defendant attempted to remove A's shirt and touch her breasts at the family home. A was able to get away from him because her sister-in-law arrived at the house and interrupted him. The third incident occurred after the defendant had moved out of the family home to his own apartment. Again, the defendant started by tongue kissing her, and, then, he removed her shirt. The defendant was trying to touch her vagina and breasts, despite A's attempts to push him off of her. During this incident, the defendant attempted to get undressed while he continued touching A, until she suggested that they go to the movies in order to get out of the house.

After hearing argument from both the state and the defendant, the court issued an oral decision on the motion in limine. The court ruled that A's testimony was admissible. The court found that there were a number of similarities between the uncharged conduct and the charged offense, namely, that A was approximately the same age as was the victim at the time of the alleged abuse, that the sisters looked very similar physically, that the defendant was in a position of authority over both girls, and that the pattern of the conduct that began with kissing and progressed to touching and disrobing was consistent. Finally, the court also concluded that the evidence was more probative than prejudicial.

Following the court's ruling on the uncharged misconduct, the jury heard A's testimony with regard to

[3] A testified that she was eleven years old when the defendant began to abuse her, which would have been around 2011.

the three instances of sexual abuse perpetrated by the defendant. At the conclusion of her testimony, the court issued a limiting instruction to the jury. Also, in its final charge to the jury, the court specifically explained that "evidence of the defendant's commission of another offense or offenses is admissible and may be considered by you for its bearing on any propensity or tendency to engage in criminal sexual behavior. However, evidence of another offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the Information."

We begin by setting forth the applicable standard of review and legal principles that govern our analysis of the defendant's claim. "The admission of evidence of . . . uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done. . . . [T]he burden to prove the harmfulness of an improper evidentiary ruling is borne by the defendant . . . [who] must show that it is more probable than not that the erroneous action of the court affected the result." (Internal quotation marks omitted.) *State* v. *George A.*, 308 Conn. 274, 295, 63 A.3d 918 (2013).

"Generally, [e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person . . . . Conn. Code Evid. § 4-5 (a). Exceptions exist, however, and [e]vidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if certain conditions are satisfied. Conn. Code Evid. § 4-5 (b)." (Internal quotation marks omitted.) *State* v. *Acosta*, 326 Conn. 405, 411–12, 164 A.3d 672 (2017).

"Evidence of prior sexual misconduct . . . may be admitted to prove propensity in a sex crime case pursuant to our Supreme Court's holding in *State* v. *DeJesus*, 288 Conn. 418, 476, 953 A.2d 45 (2008), if (1) the trial court finds that such evidence is relevant to the charged crime in that it is not too remote in time, is similar to the offense charged and is committed upon persons similar to the prosecuting witness; and (2) the trial court concludes that the probative value of such evidence outweighs its prejudicial effect. The trial court must [also] . . . provide an appropriate limiting instruction." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 167 Conn. App. 298, 306–307, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016).

On appeal, the defendant claims that the court improperly admitted into evidence the uncharged misconduct testimony. Specifically, the defendant argues that the conduct involving A "was significantly different from his conduct with [the victim], and the things they had in common were merely general similarities that occur in the majority of sexual assault cases." The defendant further argues that the probative value of A's testimony did not outweigh its prejudicial effect. We disagree.

The first prong in our relevancy analysis requires that we evaluate the time between the charged and uncharged misconduct. Here, although the sexual abuse of the victim occurred approximately four or five years[4] prior to the abuse of A, a gap in time is not dispositive in our analysis. See, e.g., *State* v. *Antonaras*, 137 Conn. App. 703, 717, 49 A.3d 783 ("[e]ven a relatively long hiatus between the charged and uncharged misconduct . . . is not, by itself, determinative . . . especially

[4] The victim was not able to testify as to a specific year in which the incident occurred. See footnote 1 of this opinion.

when there are distinct parallels between the prior misconduct and the charged misconduct" [internal quotation marks omitted]), cert. denied, 307 Conn. 936, 56 A.3d 716 (2012). In fact, this court has concluded that a gap of twelve years between charged and uncharged misconduct; id., 716; was "not too remote to render the uncharged misconduct irrelevant to prove that the defendant had a propensity to engage in the charged abuse, particularly in light of the other two prongs." Id., 717. Therefore, the gap of four or five years, in the circumstances of this case, does not render the uncharged misconduct too remote in time.

As to the second prong of our relevancy analysis, namely, the similarity of the uncharged misconduct to the charged offense, the defendant argues that the conduct alleged by A is dissimilar both in frequency and severity to the charged offense. The defendant specifically claims that whereas A testified that he had molested her on three separate occasions, the victim recounted only one incident.[5] Also, the defendant claims that the conduct involved in the charged offense was more severe than the uncharged conduct because it involved cunnilingus and attempted vaginal penetration, rather than only "kissing and touching" A. We are not persuaded.

"It is well established that the victim and the conduct at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence. . . . Additionally, differences in the severity of misconduct may not illustrate a behavioral distinction of any significance when a victim rebuffs or reports the misconduct." (Citation omitted; internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 416.

[5] Although the charges against the defendant were based on a single incident, as previously noted, the victim did testify that the defendant would kiss her neck "and stuff" whenever she was on the computer in the bedroom.

"With respect to the similarity of the charged and uncharged misconduct, this court has repeatedly recognized that it need not be so unusual and distinctive as to be like a signature . . . . Rather, the question is whether the evidence is sufficiently similar to demonstrate a propensity to engage in the type of aberrant and compulsive criminal sexual behavior with which [the defendant] . . . [was] charged." (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, 321 Conn. 656, 668, 138 A.3d 849 (2016).

In the present case, the charged and uncharged misconduct are sufficiently similar to be relevant. The incidents all occurred in the defendant's bedroom when he was alone with each girl. In each instance of abuse, the defendant began by kissing the girls before undressing them. The defendant attempted to touch each girl's breasts and vagina. A testified that she attempted to push the defendant off of her on each occasion that he kissed and touched her, and, on one occasion, the abuse only stopped because A's sister-in-law arrived at the defendant's house and interrupted the incident. Although A did not claim that the defendant performed cunnilingus during any of the incidents, or that he attempted to vaginally penetrate her, we conclude that this does "not illustrate a behavioral distinction of any significance" under these circumstances. (Internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 416. Indeed, the defendant's assaults on A were substantially similar to, and mirrored, the initial stages of the assault on the victim. See *State* v. *Barry A.*, 145 Conn. App. 582, 593, 76 A.3d 211, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013). Also, this court has stated that "[a]n escalation of sexual assault does not deprive the state of the ability to present the uncharged misconduct." Id. Furthermore, because A rebuffed the defendant's misconduct, the difference in severity does not present a significant behavioral distinction. Thus, under these

circumstances, the court properly concluded that the defendant's conduct was sufficiently similar.

Regarding the third and final relevancy prong, the similarity between the witness and the victim, the defendant argues that "there is a qualitative difference between [the] defendant sexually abusing his own biological daughter and abusing someone unrelated to [him]." We disagree.

First, the trial court specifically noted that the two girls were near the same age when the abuse occurred, they are "startlingly similar in appearance," and the defendant was a parental figure to both girls. Second, the defendant had lived with the victim since she was approximately five or six years old, and he was regarded as her stepfather. Indeed, he considered her to be his stepdaughter, and she considered him to be her stepfather. Considering the similarities of the two girls in this case, and the nature of the defendant's relationship with each girl, it is insignificant that the victim was his stepdaughter rather than his biological daughter. See *State* v. *Barry A.*, supra, 145 Conn. App. 584, 593 (witness and victim similar despite fact that victim was defendant's adopted child and witness was defendant's biological daughter).

Having concluded that the trial court properly found the uncharged misconduct evidence was relevant under the *DeJesus* factors, we consider whether the trial court properly concluded that its probative value was not outweighed by its prejudicial effect. The defendant claims that the probative value of the uncharged misconduct involving A was outweighed by its prejudicial effect. Specifically, the defendant argues that A's testimony involved incest and, therefore, it was "even more egregious than his conduct involving [the victim]." We disagree.

"We previously have held that the process of balancing probative value and prejudicial effect is critical to the determination of whether other crime[s] evidence is admissible. . . . At the same time, however, we . . . do not . . . requir[e] a trial court to use some talismanic phraseology in order to satisfy this balancing process. Rather . . . in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling. . . . In conducting this balancing test, the question before the trial court is not whether [the evidence] is damaging to the defendant but whether [the evidence] will improperly arouse the emotions of the jur[ors]." (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, supra, 321 Conn. 673. Additionally, "[p]roper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct. . . . Furthermore, a jury is presumed to have followed a court's limiting instructions, which serves to lessen any prejudice resulting from the admission of such evidence." (Internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 180, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016).

Upon our review of the record, it is evident that the trial court considered the prejudicial effect of the evidence. In its oral decision, the court noted that the evidence "is not shocking [and] doesn't unduly delay the trial. . . . [W]hile it's not helpful to the defendant, the probative value here strongly outweighs the prejudicial effect." We agree and conclude that, although the uncharged misconduct evidence was not helpful to the defendant, it was not the type of evidence that improperly would arouse the emotions of the jury. In light of the fact that the victim was regarded as the defendant's stepdaughter, the defendant's assertion that because

A's testimony involved incest, the uncharged misconduct was even more egregious than the charged crime, is unavailing. Moreover, the uncharged misconduct was less severe than the charged misconduct—i.e., groping versus cunnilingus and attempted vaginal penetration.

Furthermore, at the conclusion of A's testimony, the court issued a limiting instruction explaining to the jury the appropriate use of uncharged misconduct evidence. Additionally, the court issued another limiting instruction in its final charge to the jury at the close of the evidence. The limiting instructions minimized any prejudicial effect of this evidence. Accordingly, we conclude that the trial court did not abuse its discretion in permitting A to testify regarding the uncharged sexual misconduct.

II

The defendant next claims that the prosecutor committed several improprieties during cross-examination and closing argument that deprived him of a fair trial. Specifically, he claims that the prosecutor improperly (1) asked the defendant to comment on other witnesses' credibility in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), (2) referred to facts not in evidence, and (3) appealed to the jury's emotions, passions, and prejudices. We will address each of these claims in turn.

Before addressing each specific claim of impropriety, the following general principles guide our analysis. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred." (Internal quotation marks omitted.) *State* v. *Carlos E.*, 158 Conn. App. 646, 659-60, 120 A.3d 1239, cert. denied, 319 Conn. 909, 125 A.3d 199 (2015). "Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety,

regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted; internal quotation marks omitted.) Id., 660.

"The defendant bears the burden of satisfying both of these analytical steps. . . . In evaluating whether a defendant has carried that burden, we recognize that prosecutorial inquiries or comments that might be questionable when read in a vacuum often are, indeed, appropriate when review[ed] . . . in the context of the entire trial." (Citation omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 524, 122 A.3d 555 (2015).

A

The defendant first claims that the prosecutor improperly asked him to comment on the veracity of other witnesses during cross-examination in violation of *State* v. *Singh*, supra, 259 Conn. 693. The state argues that the prosecutor "did not ask the defendant to comment on the veracity of other witnesses, but, rather, [she] rhetorically challenged the defendant's testimony denying the accusations, and suggesting that the girls may have been motivated to falsely accuse him." We agree with the defendant.

The following additional facts are relevant to our consideration of the defendant's claim. At trial, the defendant testified on his own behalf. On both direct examination and cross-examination, the defendant denied the allegations made by both A and the victim. The prosecutor asked the defendant: "But you have no explanation for these allegations that [A] is saying that you sexually molested her, the only explanation you have other than it's the truth, is that you left the home

and she might have been upset about that?" The prosecutor further inquired, "but you know the girls are telling the truth, don't you?" The defendant responded by stating: "They're lying."

We begin by recognizing that "[i]t is well established that questions seeking a witness' opinion regarding the veracity of another witness are barred. . . . The underlying basis for such a rule is to prohibit a fact witness from invading the jury's exclusive function to determine the credibility of witnesses. . . . [Q]uestions of this sort . . . create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . This prohibition includes questions that ask whether another witness is lying, mistaken, wrong, or incorrect." (Citations omitted; internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 31, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017).

A review of the transcript demonstrates that the prosecutor's questions sought the defendant's opinion regarding the veracity of A and the victim. Although framed rhetorically, the prosecutor still asked the defendant to comment on the truth of the testimony given by the victim and A. This is precisely the line of questioning that is prohibited by *Singh*. Accordingly, we conclude that the prosecutor's questions were improper.

B

The defendant next claims that on multiple occasions the prosecutor improperly referred to facts not in evidence. Specifically, he claims that the prosecutor referred to facts not in evidence (1) during cross-examination of the defendant and (2) during closing rebuttal argument. We disagree.

1

The following additional facts are relevant to the defendant's claim. The victim testified that the defendant "did something near the side of the bed" before attempting to "put his private" in her. During cross-examination of the defendant, regarding his alleged conduct during the incident described by the victim, the prosecutor asked: "And you went to the cabinet to get a condom?" Defense counsel did not object to the prosecutor's question and the defendant replied, "Nope." The prosecutor did not mention this colloquy or a condom in closing argument.

The defendant argues that "[b]y improperly injecting the idea of a condom without any such evidence, the prosecutor made it appear as though [the] defendant did intend to have vaginal intercourse with the victim, thereby improperly bolstering her testimony." The state argues that this claim is "unreviewable because it is an evidentiary claim masquerading as a claim of prosecutorial impropriety." We agree with the state.

"In *State* v. *Stevenson*, [269 Conn. 563, 572–73, 849 A.2d 626 (2004)], our Supreme Court held that, in cases of claimed prosecutorial impropriety, it is unnecessary for the defendant to seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Such a claim of prosecutorial impropriety must, however, be premised on conduct that is of truly constitutional magnitude, and not mere evidentiary conduct clothed in constitutional garb." (Footnote omitted; internal quotation marks omitted.) *State* v. *Alex B.*, 150 Conn. App. 584, 588, 90 A.3d 1078, cert. denied, 312 Conn. 924, 94 A.3d 1202 (2014).

Essentially, the defendant's claim is that the prosecutor committed an impropriety by asking an improper

question. Although framed as prosecutorial impropriety, upon further review, we conclude that this claim is purely evidentiary.

First, defense counsel did not object to the prosecutor's question, and, therefore, any evidentiary claim regarding the question is unpreserved. Second, the defendant has not alleged that the prosecutor deliberately violated a court order, which should be reviewed as prosecutorial impropriety. See *State* v. *Williams*, 102 Conn. App. 168, 176, 926 A.2d 7 ("appellate courts of this state have held that evidentiary violations of a court order should be reviewed as prosecutorial [impropriety], not evidentiary errors"), cert. denied, 284 Conn. 906, 931 A.2d 267 (2007). Finally, the consequence of defense counsel's failure to object is indicative of the evidentiary nature of the defendant's claim of prosecutorial impropriety. If the defendant had objected, then the prosecutor would have had an opportunity to assert a good faith basis for asking the question.[6] See *State* v. *Robles*, 103 Conn. App. 383, 391 n.5, 930 A.2d 27 ("[w]ithout trial objection, the prosecutor was denied the opportunity to present to the court the basis for questioning the witness"), cert. denied, 284 Conn. 928, 934 A.2d 244 (2007).

"As our Supreme Court has repeatedly held, [a]ppellate review of prosecutorial [impropriety] claims is not intended to provide an avenue for the tactical sandbagging of our trial courts, but rather, to address gross prosecutorial improprieties that clearly have deprived a criminal defendant of his right to a fair trial." (Internal

[6] Although unnecessary to our resolution of the defendant's claim, our review of the record indicates that there was a factual basis for the prosecutor's question. The victim's testimony indicated that the defendant "did something" by the side of the bed and the prosecutor's question related to what the defendant did by the side of the bed. Furthermore, this was an isolated question and the prosecutor did not refer to this colloquy or a condom at any other point during the trial.

quotation marks omitted.) *State* v. *Ampero*, 144 Conn. App. 706, 723, 72 A.3d 435, cert. denied, 310 Conn. 914, 76 A.3d 631 (2013). Consistent with well established precedent, we decline to review the defendant's unpreserved evidentiary claim under the prosecutorial impropriety framework. See *State* v. *Golding*, supra, 213 Conn. 241 ("once identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed").

2

The defendant also claims that the prosecutor improperly referred to facts not in evidence during closing rebuttal argument. The defendant essentially argues that the prosecutor mischaracterized the evidence by implying that the defendant never told the police that the allegations were false. We disagree.

The record reveals the following additional relevant facts and procedural history. Detective Frank Verrengia was the lead investigator for the cases involving A and the victim. Approximately three months after the girls' initial complaints, Verrengia interviewed the defendant at his attorney's office. Verrengia testified at the trial and, during his testimony, defense counsel attempted to elicit from him whether the defendant had denied the allegations made by A and the victim during that initial interview. The prosecutor objected on hearsay grounds and the court sustained the objection.

During the defendant's testimony, defense counsel inquired of the defendant whether he had denied the allegations during the interview with Verrengia, and the defendant responded: "I answered all of his questions." When the defendant was asked how he felt when he learned about the accusations, he said: "My world collapsed. I was angry, I was stressed. I couldn't believe

my family would do something like this to me, my own daughter, my stepdaughter as well."

On cross-examination, the prosecutor repeatedly asked the defendant whether he was able to provide Verrengia with an explanation for the allegations of sexual abuse, and he claimed that he told the detective that the victim likely was mad at him for moving out of the house and refusing to provide financial support to M.[7] Following the defendant's testimony, the prosecutor called Verrengia as a rebuttal witness. The prosecutor asked whether the defendant provided an explanation

[7] The full context of these exchanges between the prosecutor and the defendant are as follows:

"Q. You told the police that [the victim] was angry at you for leaving the home?

"A. It was possible she was mad because of the allegations that she made. . . .

"Q. You told the police . . . you could give them no reason why [A] would make the allegations against you that she did?

"A. I told them it was more than likely she was upset because I left the house and I have not paid any of the bills, the mortgage or anything like that. . . .

"Q. The police asked you if there was any reason why [A] would say these allegations, these sexual allegations against you?

"A. No. . . .

"Q. And the detective asked you why would [A] say these things about you and you could think of no reason why she would say this?

"A. The detective didn't ask me concrete questions.

"Q. Okay. You did not tell the detective that you had hit [M]?

"A. No.

* * *

"Q. But you claimed you gave [the girls] no reason to make up these allegations against you, right?

"A. Correct. . . .

"Q. And the only explanation you could give to the detective was that you had left the home and the victim might have been mad about that?

"A. The detective knew there was a domestic [violence incident] and a restraining [order].

"Q. Did you tell him that?

"A. I didn't know. He knew.

"Q. How do you know he knew?

"A. My attorney that I had . . . he said."

for why A would have accused him of sexual abuse, and Verrengia responded that he did not.

Defense counsel repeatedly referred to the timing of the girls' accusations of sexual assault against the defendant in relation to the domestic violence incident. In particular, during his cross-examination of M, defense counsel emphasized the fact that the allegations of sexual assault only surfaced a mere fifty-four days after he had been arrested for hitting M, despite the fact that the sexual assaults allegedly had occurred several years prior to his assault of M. He asked M, "[i]s the reason these allegations came out fifty-four days after [the defendant] gets arrested for hitting you because you were mad at him?" Then, in his closing argument, defense counsel argued that the girls' allegations were fabricated and that they only made these claims of sexual abuse after the domestic violence incident with M on December 18, 2011. He also referred to the interview with Verrengia, claiming that the defendant "denied the allegations and that was it." Defense counsel further argued: "If you didn't do something, you say I didn't do it, this is false, and that's what he did."

The prosecutor, in her rebuttal argument, responded to defense counsel's closing argument, arguing that the defendant could have said "this is all made up, [M] made these kids make this up because I hit her. He doesn't say any of that. He doesn't come up with any reason why [A] would say this at all and what he says with [the victim] is he says she's mad that I left the house." In her final remarks, the prosecutor commented: "Wouldn't you expect somebody who is falsely accused of this to say I cannot believe these children said this about me, I cannot believe [M] put them up to this? But that is not what he says when he's interviewed by the police and it's not what he says in the courtroom."

The defendant contends that the prosecutor mischaracterized the evidence because there was no evidence that he did not say to Verrengia that the allegations were made up. Moreover, according to the defendant, the prosecutor's comments "injected extraneous matters into the trial by suggesting that in her experience, that was how innocent people behaved." The state responds that the challenged remarks had an adequate basis in the evidence and were intended to challenge the defendant's theory, raised for the first time at trial, that M had encouraged the girls to make the accusations of sexual abuse. We agree with the state.

"Claims involving prosecutorial impropriety during the course of closing arguments require a court to evaluate a prosecutor's statements not for their possible meaning, but for the manner in which the jury reasonably and likely would have understood them. Because the meaning of words and statements typically is dependent on the context in which they are used, a court must carefully consider a prosecutor's challenged statements by carefully considering their context in the entire trial, including the remainder of the state's closing argument." (Internal quotation marks omitted.) *State* v. *LaVoie*, 158 Conn. App. 256, 275-76, 118 A.3d 708, cert. denied, 319 Conn. 929, 125 A.3d 203 (2015), cert. denied, U.S. , 136 S. Ct. 1519, 194 L. Ed. 2d 604 (2016).

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . [T]he state may [however] properly respond to inferences raised by the defendant's closing argument. . . . Furthermore, [a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." (Citation omitted; internal quotation marks omitted.) *State* v.

Fasanelli, 163 Conn. App. 170, 188-89, 133 A.3d 921 (2016).

A prosecutor also is not permitted "to comment unfairly on the evidence adduced at trial so as to mislead the jury. . . . We certainly do not condone paraphrasing or embellishing on a witness' testimony, but we also recognize that the parties are allowed a certain degree of latitude to express their views of what evidence was presented at trial." (Internal quotation marks omitted.) *State* v. *D'Haity*, 99 Conn. App. 375, 388, 914 A.2d 570, cert. denied, 282 Conn. 912, 924 A.2d 137 (2007).

Defense counsel directed the jury to the defendant's interview with Verrengia, claiming that the defendant denied the allegations in that interview. He argued that "if you didn't do something, you say you didn't do it, this is false, and that's what he did." In reiterating the defense's theory of the case, he argued: "[I]t happened four or five years ago, but fifty-three days . . . after [the defendant] hits [M] the allegations come out. After the allegations come out, the cat's out of the bag, you can't uncork that genie, it's out there."

In response, the prosecutor challenged the defendant's theory by also directing the jury to the defendant's interview with Verrengia. The prosecutor invited the jury to draw a reasonable inference from the defendant's failure to mention the domestic violence incident to Verrengia, and his inability to provide a reason to explain A's allegations. That inference was that because he did not tell Verrengia about M's motive to encourage the girls to make the allegations, the defendant never said to Verrengia: "[M] made these kids make this up because I hit her."

Here, the prosecutor's comments regarding what the defendant did not say during the interview with Verrengia did not "invite sheer speculation unconnected to the evidence." (Internal quotation marks omitted.) *State*

v. *Fasanelli*, supra, 163 Conn. App. 189. The jury heard evidence from Verrengia that the defendant was unable to provide a reason to Verrengia for A's accusations. Additionally, the defendant testified that he did not tell Verrengia that he had been arrested for hitting the girls' mother. The prosecutor argued that if the defendant believed that M encouraged the girls to fabricate the allegations of abuse as a response to the domestic violence incident, then he would have told Verrengia about the incident and he would have offered that explanation for the allegations during that initial interview. His own acknowledgement that he did not tell Verrengia about hitting M, and that he was unable to provide an explanation for why A would make up these allegations, support the inference that he did not say to Verrengia that these allegations are made up because he hit M.

Our review of the trial transcript convinces us that the prosecutor's remarks were not improper. Presumably, defense counsel did not believe the remarks were improper because he did not object at the time that the remarks were made. See *State* v. *Carlos E.*, supra, 158 Conn. App. 660 ("failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time" [internal quotation marks omitted]). The defendant focuses on portions of the prosecutor's comments in isolation. When the closing arguments are examined in full, however, it is clear that the prosecutor's remarks simply invited the jury to draw a reasonable inference from the evidence presented at trial. Specifically, the prosecutor sought to have the jury infer from the defendant's failure to tell Verrengia about the girls' motive to falsely accuse him, that defense counsel's argument that M encouraged the girls to make these accusations was not the truth. Rather, it was simply a trial strategy developed by the defendant. Just as defense counsel offered his view of the

testimony regarding the defendant's interview with Verrengia, so too did the prosecutor. Accordingly, we conclude that the prosecutor did not improperly refer to facts not in evidence during rebuttal argument.

C

The defendant next claims that the prosecutor appealed "to the prejudices of the jurors against non-English speaking persons and persons of a different ethnicity through her gratuitous questioning of [the] defendant." He argues that the prosecutor's questioning "injected [the] defendant's ethnicity into the case and used it in an attempt to inflame the jurors against him . . . ." The defendant's claim refers to two separate portions of the prosecutor's cross-examination of the defendant, and a portion of the prosecutor's closing rebuttal argument. We address each in turn.[8]

1

First, the defendant argues that the prosecutor's question regarding Puerto Rico, and subsequent reference to Puerto Rico during rebuttal argument, improperly appealed to the jury's racial prejudices. Specifically,

[8] The state argues that the defendant's claim is an unreviewable evidentiary claim because "defense counsel either failed to object, or objected on purely evidentiary grounds, and the trial court issued a ruling that he does not challenge on appeal." We disagree.

In *State* v. *Andrews*, 313 Conn. 266, 96 A.3d 1199 (2014), our Supreme Court reviewed a defendant's claim of prosecutorial impropriety premised on a prosecutor's denigration of the defendant "through frequent and gratuitous use of sarcasm" during cross-examination. Id., 283. By reviewing the defendant's claim, the court implicitly rejected the state's argument that "the defendant has merely lumped together a number of unpreserved evidentiary challenges and labeled them as prosecutorial improprieties for the purpose of obtaining appellate review that otherwise would be unavailable." Id. Similarly, in the present case, the defendant claims that the prosecutor appealed to the passions and prejudices of the jury through her "gratuitous questioning of [the] defendant." Accordingly, we conclude that the defendant's claim is not purely evidentiary, and "we consider each alleged impropriety in the context in which it occurred . . . ." Id., 284.

he argues that "[i]t was particularly offensive that the prosecutor asked [the] defendant if he had been taught in Puerto Rico that it was [alright] to sexually assault a young girl and [then argued in closing] 'that even he recognized' it was inappropriate." We disagree.

The following additional facts are relevant to this aspect of the defendant's claim. During the prosecutor's cross-examination of the defendant, with the assistance of a Spanish interpreter, the following colloquy occurred:

"[The Prosecutor]: You are originally from Puerto Rico?

"[The Defendant]: Yes.

"[The Prosecutor]: And you are not say[ing] that in Puerto Rico that behavior of licking a girl's breasts or genitals would be considered okay?"

At this point, defense counsel objected claiming that the question is prejudicial, and the court instructed the prosecutor that the question should be rephrased. The prosecutor then continued:

"[The Prosecutor]: Where you [are] originally from, were you taught that it was okay for a male to lick [the] breasts or genitals of a twelve year old girl?

"[The Defendant]: Can the question be repeated?

"[The Prosecutor]: Sure. Where you are originally from, you were not taught that it is okay for an adult male to lick the genitals or the breasts of a twelve year old girl?

"[The Defendant]: They told me that that was legal.

"[The Prosecutor]: They told you that was legal?

"[The Defendant]: Yes."

Defense counsel objected, arguing that the defendant's answer was not translated properly. The court instructed the prosecutor to ask the question again.

"[The Prosecutor]: Where you were from originally, were you taught that it was okay for an adult male to lick the breasts or genitals of a twelve year old girl?

"[The Defendant]: No."

The prosecutor returned to this exchange during rebuttal argument, explaining to the jury that she "was trying to elicit from the defendant . . . that in any culture where [he has] been, it hasn't been okay for an adult to do that. That even he recognizes that it's not okay for an adult to basically have this kind of sexual contact with a minor."

In evaluating the defendant's claim, we are mindful that "the line between comments that risk invoking the passions and prejudices of the jurors and those that are permissible rhetorical flourishes is not always easy to draw. The more closely the comments are connected to relevant facts disclosed by the evidence, however, the more likely they will be deemed permissible." *State* v. *Albino*, 312 Conn. 763, 773, 97 A.3d 478 (2014).

Contrary to the defendant's contention, the prosecutor's questions did not improperly inject the defendant's ethnicity into the trial. Although we recognize, as did the trial court, that the prosecutor's question could have been asked without the reference to Puerto Rico, we do not conclude that such a reference indicates an improper appeal to the passions or prejudices of the jury. The defendant testified on direct examination that he was born and raised in Puerto Rico and lived there until 1990, when he was approximately twenty-one years old. Thus, there was evidence that the defendant was born and raised in Puerto Rico, which the prosecutor was permitted to reference while exploring the

defendant's background and his views on relationships with minors. The prosecutor was not focused on Puerto Rico; she merely was making the point that having sexual relations with a twelve year old girl is impermissible in all of the United States. Again, the prosecutor certainly did not have to reference Puerto Rico in order to make this point, and, although the reference may even have been ill-advised, "[w]e cannot . . . place the weight of unconstitutionality on [this reference], taken in [its] proper context . . . ." *State* v. *Heredia*, 253 Conn. 543, 560, 754 A.2d 114 (2000). Moreover, "[w]e do not assume that every statement made by the prosecutor was intended to have its most damaging meaning." (Internal quotation marks omitted.) *State* v. *James E.*, 154 Conn. App. 795, 821, 112 A.3d 791 (2015), aff'd, 327 Conn. 212, 173 A.3d 380 (2017).

For similar reasons, the prosecutor's subsequent reference to this line of questioning during closing argument was not improper. "[B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury . . . . [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Elias V.*, 168 Conn. App. 321, 347, 147 A.3d 1102, cert. denied, 323 Conn. 938, 151 A.3d 386 (2016). Accordingly, we conclude that the prosecutor's remark, which was designed to elicit from the defendant that "even he recognizes that it's not okay for an adult to do that" does not rise to the level of prosecutorial impropriety.[9] It was a rhetorical flourish, expressed in

[9] Even assuming, arguendo, that the prosecutor's comments were improper, we are not persuaded that the *Williams* factors weigh in the defendant's favor. Although the comments were not invited by defense counsel, the question and subsequent comment about the question, did not amount to severe impropriety. Defense counsel did object to the question

the heat of argument. Cf. *State* v. *Warholic*, 278 Conn. 354, 374–75, 897 A.2d 569 (2006) (concluding that Appellate Court properly determined prosecutor's comments that characterized defendant as child molester and appeals to jury's fears that child molesters are " 'out there' " and " 'among us' " were improper).

2

The defendant also claims that the prosecutor appealed to the passions and prejudices of the jury against non-English speaking persons. Specifically, the defendant argues that his ability to speak English was not at issue in this case and, therefore, "the prosecutor's persistent cross-examination and closing argument [on his English speaking ability] was an implicit appeal to the racial prejudices and emotions of the jurors." The defendant contends that the prosecutor effectively diverted the jurors' attention away from the relevant issues and invited the jury to decide the case based on their prejudices and emotions. We disagree.

The following additional facts are relevant to the defendant's claim. From his initial court appearance, the defendant required the services of an interpreter. On direct-examination, defense counsel asked the defendant where he was born and whether he spoke English. The defendant responded that he was born in Puerto Rico and that he does not speak English. The defendant also testified that at the time that the victim claimed the sexual assault occurred, he would not have been home because he was working a second job. There

referencing Puerto Rico, but he did not object to the subsequent reference in closing argument. Moreover, defense counsel did not seek any curative instruction. Additionally, these comments were not frequent and the defendant's ethnicity was not central to his credibility, the critical issue in this case. Finally, the state's case was strong in that the victim's allegations were corroborated by three constancy of accusation witnesses, and A's testimony. Accordingly, we could not conclude that the defendant was deprived of the right to a fair trial, even if we were to assume that the comments were improper.

is nothing in the record that suggests that the defendant had claimed this alibi prior to his testimony at trial.

During cross-examination, the prosecutor questioned the defendant regarding his ability to speak English. The prosecutor asked the defendant approximately fourteen distinct questions concerning his ability to speak and understand English.[10]

[10] The following are the relevant portions of the prosecutor's cross-examination of the defendant:

"[The Prosecutor]: And the children spoke to you in English?"

"[The Defendant]: They understand Spanish.

"[The Prosecutor]: But they spoke to you in English?"

"[The Defendant]: A little bit because I don't know a lot . . . .

"[The Prosecutor]: Well you spoke to them in English?"

Defense counsel objected, claiming the question was argumentative, and the court overruled the objection. The colloquy continued:

"[The Prosecutor]: You spoke to them in English?

"[The Defendant]: [A] little bit. I wanted to learn, and I had to practice.

"[The Prosecutor]: Right. And your bosses . . . spoke to you in English?

"[The Defendant]: Yes.

"[The Prosecutor]: And you spoke to the police about this case in English?

"[The Defendant]: Yes.

"[The Prosecutor]: And the first time you heard about these allegations was from the [department] worker . . . right?

"[The Defendant]: Yes. . . .

"[The Prosecutor]: And he spoke to you in English?

"[The Defendant]: Yes. . . .

"[The Prosecutor]: And [the police] spoke to you in English?

* * *

"[The Prosecutor]: So the police spoke to you, the police officer, Detective Verrengia, he spoke to you in English, right?

"[The Defendant]: Yes.

"[The Prosecutor]: And you did not have [a] translator in the room?

"[The Defendant]: There were things I couldn't answer because I didn't know what he was saying because my English is not that good. . . .

"[The Prosecutor]: Okay. You didn't ask the police for a translator?

"[The Defendant]: We didn't have long conversations.

"[The Prosecutor]: When the police were talking to you in your lawyer's office, you did not ask the police to provide a translator, did you?

"[The Defendant]: No.

"[The Prosecutor]: And you did not ask the [department] worker for a translator, did you?

"[The Defendant]: He looked Hispanic so if I did not understand; I could ask him a question. . . .

"[The Prosecutor]: He never actually ever spoke to you in Spanish?"

Defense counsel objected and the court stated, "I think we have explored the bilingual nature enough; let's move on."

Our review of the record reveals that the prosecutor's questions, when viewed in the context of the defendant's entire testimony, were not improper. On direct examination, defense counsel asked the defendant if he speaks English. The defendant answered that he did not and the prosecutor explored this answer during cross-examination. During closing argument, the prosecutor relied on the defendant's subsequent admission that he, in fact, spoke some English in order to argue that he was capable of denying the allegations and claiming that M put the girls up to making the allegations against him at the beginning of the investigation, as opposed to offering this explanation for the first time at trial.

We agree with the trial court's conclusion that the prosecutor's inquiry was relevant and appropriate. Although the prosecutor asked several questions regarding the defendant's ability to speak English, we note that the court overruled several of defense counsel's objections during cross-examination.[11] When

[11] The court effectively overruled two of defense counsel's three objections during the prosecutor's cross-examination regarding the defendant's ability to speak English.

"[Defense Counsel]: Objection, Your Honor.

"The Court: What's the nature of the objection?

"[Defense Counsel]: Argumentative. . . .

"[Defense Counsel]: Arguing with the witness.

"The Court: No. You can answer that if you know.

* * *

"[Defense Counsel]: Objection, Your Honor, relevance. . . .

"[The Prosecutor]: Well he's testified about certain things. He's claimed he said certain things, Your Honor, I'm simply moving toward what he disclosed and what he didn't disclose to the police and he claimed for the first time today and he can walk through how that took place.

"[Defense Counsel]: Your Honor, the one question by sister counsel implies that [the defendant] is fluent in the English language. I don't believe it's germane to this case, which is sexual abuse.

"[The Prosecutor]: The state is not claiming he's fluent in English, Your Honor. The state is not making a claim against him in using a translator so he can understand everything he's being asked now. I'm simply pointing out that the interview conducted by the police was in English and his responses were in English.

"The Court: You can inquire about that.

defense counsel objected on the basis of relevance, the prosecutor explained that her inquiry was directed at the nature of the interview in order to address what the defendant told Verrengia during that initial interview; the court agreed, and overruled the objection.

Our resolution of this claim is informed by our Supreme Court's decision in *State* v. *Heredia*, supra, 253 Conn. 543. In *Heredia*, our Supreme Court concluded that the prosecutor's references to the defendant's ethnicity and ability to speak English did not constitute prosecutorial impropriety. Id., 559–60, 562–63. The assailant spoke English during the commission of the crime and the defendant claimed that he did not speak English and, therefore, he was not the assailant. Id., 555–56. The court reasoned that the prosecutor's comments were "appropriately based on the evidence regarding a contested issue in the case . . . ." Id., 563. The court, however, cautioned that a prosecutor is not "free to focus on [the defendant's use of an interpreter] in a manner that was irrelevant to the issues in the case . . . ." Id., 560.

The defendant's attempt to distinguish the present case from *State* v. *Heredia*, supra, 253 Conn. 543, is unavailing. The defendant argues that, unlike in *Heredia*, his ethnicity and ability to speak English were not issues in the present case. According to the defendant, his ability to speak English was not relevant because he did not claim that he could not understand the officer's questions or that he was unable to answer questions

* * *

"[Defense Counsel]: Objection, Your Honor. Facts not in evidence about a conversation. Facts not in evidence, she's talking about a [department] conversation, the nature of it.

"The Court: You put the [department] worker on the stand.

"[The Prosecutor]: He's previously testified the worker spoke in English, Your Honor.

"The Court: All right. I think we've explored the bilingual nature enough; let's move on."

due to his inability to speak English. Our review of the record contradicts the defendant's claims.

Although the defendant argues that his ability to speak English was not an issue in this case, his ability to communicate with Verrengia was relevant to several of his claims at trial. First, the defendant testified that he did not speak English. In fact, he claimed to have difficulty answering all of Verrengia's questions, stating: "There were things I couldn't answer because I didn't know what he was saying because my English is not that good." Second, he attempted to establish an alibi for the first time at trial, testifying that he was working two jobs at the time the alleged abuse occurred, despite never revealing this to Verrengia during the initial investigation. Finally, despite his failure to mention the domestic violence incident to Verrengia, the defense's theory of the case was that these allegations simply were retaliation for that incident. Thus, the prosecutor's questions regarding the defendant's ability to speak English were relevant to her argument that he was perfectly capable of telling Verrengia these details during the initial interview. In other words, the prosecutor sought to establish that the defendant spoke and understood English well enough to have informed Verrengia about his alibi, and that the girls had a motive for accusing him of sexual abuse.

Under these circumstances, we do not agree that the prosecutor's questions were improper. The questions, although numerous, were not "irrelevant to the issues in the case" and there is no indication that prosecutor attempted to challenge the defendant's need for the services of an interpreter.

D

Having concluded in part II A of this opinion that the prosecutor's questions that required the defendant to comment on the veracity of other witnesses' testimony

were improper, we now must determine whether the impropriety deprived the defendant of his due process right to a fair trial.

"An appellate court's determination of whether any improper conduct by the prosecutor violated the defendant's right to a fair trial is predicated on the factors established in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). Those factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Carlos E.*, supra, 158 Conn. App. 660.

As our Supreme Court recognized in *State* v. *Jones*, 320 Conn. 22, 128 A.3d 431 (2015), "the risk that a defendant will be prejudiced by a *Singh* violation may be especially acute when the state's case is founded on the credibility of its witnesses. . . . As the present case demonstrates, however, that general proposition is not a universal truth. In a case that pits the testimony of the defendant against that of the victim, such that the victim's version of events is directly at odds with the defendant's account of the facts, and there is no way to reconcile their conflicting testimony except to conclude that one of them is lying, it is unlikely that asking the defendant directly whether the victim is lying ever could be so prejudicial as to amount to a denial of due process. Cf. *State* v. *Fauci*, 282 Conn. 23, 39, 917 A.2d 978 (2007) (in a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and thus to argue, that one of the two sides is lying . . .). To be sure, as we explained in *State* v. *Singh*, supra, 259 Conn. 707–10, such questioning is never appropriate, and we consistently have declined the

state's invitation to carve out an exception to the prohibition against[questions such as] are they lying . . . in cases involving pure credibility contests. We have done so, however, not because we disagreed with the underlying rationale for such an exception but, rather, because of the difficulty of determining, in the midst of trial, whether the case presents a pure credibility contest or whether the testimonial discrepancies between the two witnesses may be explained by reasons other than perjury or deceit. . . .

"[B]ecause *Williams* requires that we determine whether the prosecutorial impropriety prejudiced the defendant by evaluating the impropriety in the context of the entire trial, we must consider whether it was possible for the jury to reconcile the testimony of the defendant and [the witness on whose credibility the defendant was asked to comment] without concluding that one of them was lying. When, as in the present case, it is not possible to do so, there is no reasonable possibility that asking the defendant whether the victim testified truthfully would render the trial so unfair as to rise to the level of a due process violation because, in such circumstances, the risks that ordinarily attend such a question simply are not present." (Citations omitted; internal quotation marks omitted.) *State* v. *Jones*, supra, 320 Conn. 45-46.

In the present case, it was not possible for the jury to reconcile the testimony of the defendant and the girls. The defendant denied ever touching the girls inappropriately and defense counsel argued that the girls fabricated the allegations. Thus, the defendant's position was that the abuse never occurred. In contrast, the victim and A testified that the defendant inappropriately touched them in a sexual manner. There was no forensic evidence in this case. Therefore, with these two diametrically opposed positions, just as in *Jones*, the jury was required to determine which of these two conflicting

stories was the truth and which was a lie. "Thus, the answer that the defendant gave in response to the prosecutor's improper . . . question, although irrelevant, could not have caused the defendant undue harm." Id., 47. Accordingly, we conclude that the *Singh* violation did not deprive the defendant of his due process right to a fair trial.

III

The defendant's final claim is that the trial court improperly increased his sentence in order to penalize him for invoking his fifth amendment privilege against self-incrimination when he refused to apologize to the victims at the sentencing.[12] The defendant argues that the court violated his right to due process by penalizing him for remaining silent at sentencing. We disagree.

The following additional facts are relevant to this claim. At the sentencing hearing, the state did not provide a specific recommendation for a sentence. The state simply requested a "significant sentence" for the defendant, while making clear that there was a mandatory minimum for the charged offenses. The state also noted that the defendant's "unwillingness to participate in any sex offender treatment programs or to acknowledge any criminal behavior . . . puts him at a much higher risk" to reoffend.

The defendant was afforded an opportunity to address the court and present additional mitigating evidence. The court heard from several individuals in support of the defendant's good character. One such

[12] The defendant also asks this court, if we conclude that there was not a constitutional violation, to invoke its supervisory powers to vacate his sentence and remand the case for resentencing before a different judge. We decline to do so because our supervisory authority is intended to be utilized sparingly and only in extraordinary circumstances, which are not present here. See *State* v. *Collymore*, 168 Conn. App. 847, 898 n.27, 148 A.3d 1059 (2016), cert. granted on other grounds, 324 Conn. 913, 153 A.3d 1288 (2017).

individual was the defendant's current romantic partner, who has a teenage daughter, with whom the defendant had been residing during the proceedings.

Before being sentenced, the defendant engaged in the following colloquy with the court:

"[The Defendant]: The jurors found me guilty. I am innocent of these charges presented against me, and I want to appeal this case.

"The Court: Well I appreciate your position, but in a case like this, the lifetime effects on the victims can be lessened if the person who committed these acts, particularly in a familial relationship, whether father or stepfather, takes responsibility. I know you wish to appeal and that does create a dilemma.

"[The Court Interpreter]: Your Honor, may that be repeated for the interpreter?

"The Court: Well apologizing, admitting what he did, taking responsibility will help the victims enormously at least that has been my experience over four decades in this business. However it puts a crimp in your ability to appeal, do you understand that?

"[The Defendant]: I did understand. But how would I say sorry for something that I did not do, these are just allegations? I love my daughter; I worked really hard for them. This was hard for me. And I work hard to support this family, two, three jobs to have our home and to lose everything because of these allegations it's not fair.

"The Court: Well that's your decision, sir. If you wish to continue to deny it, that's your absolute right. *The court will not punish you for that*; however, *you do not get any extra credit*. Do you have anything else you wish to say?

"[The Defendant]: No. That's it for now." (Emphasis added.)

Thereafter, the court addressed the defendant and explained that "sentencings have to do with [the] four following considerations: rehabilitation, deterrence, protection of society, and punishment." The court acknowledged that the defendant had a positive presentence investigation report and that several people spoke on his behalf. The court considered the defendant's demeanor during the trial and his successful completion of a family violence education program. The court, however, repeated that "in this type of case, it is most helpful to the victims to have an admission or an apology." Importantly, the court expressed concern that the defendant was currently living with another woman and her teenage daughter. After noting that it had "taken all these things into account and . . . tried to balance the seriousness of this offense," the court sentenced the defendant to a total effective sentence of forty-five years imprisonment, execution suspended after thirty-three years, to be followed by twenty-five years of probation.

We begin by noting that the defendant did not object to the claimed violation of his fifth amendment rights at the sentencing hearing. Therefore, this claim is unpreserved. The defendant's claim, however, is reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, because the record is adequate for review and the claim that the defendant was punished for exercising his fifth amendment right is of constitutional magnitude. Therefore, we proceed to the third prong of *Golding* to determine whether a constitutional violation exists, thereby depriving the defendant of a fair trial. See id., as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

We recognize that "it is clearly improper to increase a defendant's sentence based on [his or her] decision

to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty . . . . Nevertheless, a defendant's general lack of remorse . . . and refusal to accept responsibility . . . for crimes of which he was convicted are legitimate sentencing considerations . . . . [R]eview of claims that a trial court lengthened a defendant's sentence as a punishment for exercising his or her constitutional right to a jury trial should be based on the totality of the circumstances. . . . [T]he burden of proof in such cases rests with the defendant." (Citations omitted; internal quotation marks omitted.) *State* v. *Collymore*, 168 Conn. App. 847, 897, 148 A.3d 1059 (2016), cert. granted on other grounds, 324 Conn. 913, 153 A.3d 1288 (2017).

"[A]lthough a court may deny leniency to an accused who . . . elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 762, 91 A.3d 862 (2014).

In the present case, the defendant argues that "the court never once mentioned [his] prospects for rehabilitation or that the lack of an admission of guilt somehow showed he had no such prospects. . . . Rather, the court's sole concern was how his refusal to admit guilt would impact [A and the victim]." We disagree.

In *State* v. *Huey*, 199 Conn. 121, 128, 505 A.2d 1242 (1986), our Supreme Court held that the sentencing judge was "justified in considering the defendant's denial in evaluating his prospects for rehabilitation, as one consideration among many, in fashioning the sentence imposed." The defendant attempts to distinguish the present case from *Huey* by arguing that the court did not state specifically that it considered his refusal to admit guilt as indicative of his lack of rehabilitative

prospects. Although the defendant is correct that the court did not state this explicitly, the court did acknowledge that rehabilitation is one of the factors to be considered in fashioning an appropriate sentence.[13]

Indeed, a review of the sentencing transcript demonstrates that the court considered legitimate sentencing factors in determining the length of the sentence. "The defendant's demeanor, criminal history, presentence investigation report, prospect for rehabilitation and general lack of remorse for the crimes of which he has been convicted remain legitimate sentencing considerations." (Internal quotation marks omitted.) *State* v. *Elson*, supra, 311 Conn. 782. The court outlined the factors that it considered in arriving at the sentence, focusing particularly on the defendant's failure to accept responsibility and his failure to apologize to the victims.[14] See, e.g., *State* v. *Barnes*, 33 Conn. App. 603, 610, 637 A.2d 398 ("sentencing judge properly related the defendant's refusal to admit responsibility and claims of innocence to the likelihood of his rehabilitation"), aff'd, 232 Conn. 740, 657 A.2d 611 (1995).

Moreover, the court expressly stated that it would not punish the defendant for exercising his "absolute

[13] Because we conclude that our decision is controlled by our Supreme Court's decision in *State* v. *Huey*, supra, 199 Conn. 121, we are not persuaded by the defendant's citation to cases from other jurisdictions for the proposition that a court may not consider a defendant's silence at sentencing as an indication of a lack of remorse.

[14] Although the defendant was not convicted on any charges related to A, it is well settled that the sentencing court may consider any relevant information at sentencing, so long as it exhibits some "indicium of reliability." See *State* v. *Ruffin*, 144 Conn. App. 387, 395, 71 A.3d 695 (2013) ("[t]o arrive at a just sentence, a sentencing judge may consider . . . evidence of crimes for which the defendant was indicted but neither tried nor convicted . . . evidence bearing on charges for which the defendant was acquitted . . . and evidence of counts of an indictment which has been dismissed by the government" [internal quotation marks omitted]), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015). Moreover, the defendant has not claimed, in this appeal, that the trial court inappropriately considered information relating to A in fashioning the sentence.

right" to not admit guilt and appeal his judgment of conviction, but it would not give him any "extra credit." The court's statements comport with the principle that a court may deny leniency to a defendant for exercising a constitutional right, but it may not punish him or her for exercising such a right. See *State* v. *Elson*, supra, 311 Conn. 762. The defendant has provided no reason for this court to doubt the trial court's representation that it was not going to punish the defendant for exercising his "absolute right." See *State* v. *Dickman*, 119 Conn. App. 581, 599, 989 A.2d 613 ("The court, however, specifically stated that it had not taken those charges into consideration in sentencing the defendant. We have no reason to doubt the court's representation, and the defendant has provided none."), cert. denied, 295 Conn. 923, 991 A.2d 569 (2010).

Accordingly, we conclude that the trial court did not penalize the defendant for exercising his fifth amendment privilege against self-incrimination. Therefore, the court did not violate the defendant's right to due process of law.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EUGENE L. WALKER (AC 39797)

Alvord, Kahn and Bear, Js.

Syllabus

Convicted of the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree and criminal possession of a pistol or revolver, the defendant appealed. The defendant's conviction stemmed from his alleged involvement with that of his codefendant, A, in the shooting death of the victim during an attempted robbery in a parking lot. The defendant, who was wearing a bandana and carrying a revolver, and A's cousin, D, had approached the victim's

Acura, and a struggle ensued during which the victim was shot. A bandana that the police recovered from the Acura, the victim's bloodstain, and known samples that included buccal swabs from the defendant, A and D were sent to a state laboratory, where they were analyzed by a supervisory forensics examiner, H, and the laboratory's known processing group. H determined that the defendant's DNA profile matched the DNA found on the bandana. H testified about her findings and the DNA profile that another analyst in the laboratory had generated from the defendant's buccal swab. M, who knew the defendant only by a nickname, identified the defendant during her testimony, which occurred after she previously had met with the prosecutor in his office. During a discussion about the defendant in the prosecutor's office, M had identified the defendant by his nickname from a photograph that was on the prosecutor's desk. On appeal, the defendant claimed, inter alia, that the trial court violated his right to confrontation by permitting H to testify about a DNA sample that had been processed by a different analyst. The defendant also claimed that the trial court improperly denied his motion to sever his trial from that of A after the trial court had admitted into evidence certain statements of A under the coconspirator exception to the rule against hearsay. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court violated his right to confrontation by allowing H to testify about a DNA sample that was processed by another analyst in the same laboratory without requiring that analyst to testify; H, who had conducted the critical analysis and made the findings that connected the defendant's DNA to the DNA found on the bandana, testified about the standard operating procedures of the laboratory, including the manner in which the known samples were processed and verified, she relied on her personal knowledge of the procedures performed by the analysts in the known processing group in reaching her own conclusions, her analysis was reviewed by another analyst at the laboratory who signed her report, and even if H's testimony about the processing of the defendant's known profile was considered a critical stage of the analysis or chain of custody, it did not implicate the confrontation clause because H was available and testified extensively on cross-examination.

2. The defendant's claim that the trial court violated his right to a fair trial by declining to grant his motion for a mistrial or to strike M's in-court identification of him was unavailing:

   a. M's pretrial identification of the defendant in the prosecutor's office did not result from an unnecessarily suggestive identification procedure and, thus, her subsequent in-court identification of the defendant did not violate his due process rights; M was not an eyewitness to the crimes at issue, she identified the defendant in the prosecutor's office, and then in court, as the person she knew by a certain nickname, and the prosecutor did not ask M to identify the individual in the defendant's photograph, but instead, M's identification occurred spontaneously as

a result of her familiarity with the individual she knew by the nickname, and not as the result of an arranged procedure by law enforcement.

b. The trial court did not abuse its discretion in declining to strike M's in-court identification of the defendant or to declare a mistrial as sanctions for the state's failure to disclose M's pretrial identification of the defendant's photograph in the prosecutor's office: the defendant did not demonstrate that the prosecutor violated the rule of practice (§ 40-13A) that requires the prosecuting authority, upon written request of a defendant, to provide photocopies of all statements, law enforcement reports and affidavits within its possession concerning the offense charged, as the record did not indicate that the defendant made a written request as required by § 40-13A, and M's comment to the prosecutor made prior to trial identifying the defendant was not a discoverable statement pursuant to § 40-13A because M's comment to the prosecutor was oral and the record did not contain evidence that it had been recorded, and even if the prosecutor improperly withheld M's statement from defense counsel, the defendant did not show any prejudice, as the jury reasonably could have found that M knew the defendant prior to the victim's murder.

3. The defendant could not prevail on his claim that the trial court erred in admitting certain hearsay testimony under the coconspirator exception to the hearsay rule, which was based on his claim that the court improperly concluded that a conspiracy existed when it admitted that testimony under the coconspirator exception; that court did not err in its preliminary determination that a conspiracy existed, as the court admitted the hearsay testimony subject to the state's later admission of sufficient foundational evidence and the state later introduced the necessary connecting facts, the record did not indicate that the court improperly considered the hearsay statements in its analysis, and although the court mentioned coconspirator hearsay statements in addition to independent evidence when it discussed whether the state had established the existence of a conspiracy by a preponderance of the evidence, the court based its ruling only on independent evidence.

4. The defendant could not prevail on his unpreserved claim that the trial court improperly denied his motion to sever his trial from that of A, which was based on his assertion that evidence was admitted that would not have been admissible against him at a separate trial; although the trial court clearly raised potential joint trial issues with counsel, defense counsel reassured the trial court that such problems would not arise, the defendant was not substantially prejudiced by the admission of A's statements so as to require a separate trial, as certain of A's statements were admissible against the defendant under the coconspirator exception to the hearsay rule, and the court's curative instructions to the jury did not identify the defendant but were directed toward A.

5. The trial court did not abuse its discretion in admitting into evidence a photograph of the bandana, the bandana and the DNA evidence that

was derived from it; the police officer who testified that the photograph was a fair and accurate representation of what she personally had observed in the Acura was a competent witness, as her testimony provided a proper foundation for the admission of the photograph, and there was a sufficient chain of custody for the admission of the bandana and, by extension, the DNA evidence derived from the bandana.

6. The defendant's conviction of felony murder and manslaughter in the first degree violated the constitutional provision against double jeopardy, as the conviction of both charges arose from the single act of killing the victim; accordingly, the conviction of manslaughter in the first degree was vacated and the case was remanded to resentence the defendant.

Argued September 7, 2017—officially released March 20, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder, manslaughter in the first degree with a firearm, manslaughter in the first degree, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Iannotti*, *J.*, granted the state's motion to consolidate the case with the case of a codefendant; thereafter, the state filed a substitute information charging the defendant with the crimes of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit and criminal possession of a pistol or revolver; subsequently, the matter was tried to the jury before *Markle*, *J.*; thereafter, the court, *Markle*, *J.*, denied the defendant's motions to sever and for a mistrial; subsequently, the court, *Markle*, *J.*, granted the defendant's motion for a judgment of acquittal as to the charge of carrying a pistol without a permit; verdict of guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree and criminal possession of a pistol or revolver; thereafter, the court, *Markle*, *J.*, denied the defendant's

motions for a judgment of acquittal and a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed. *Reversed in part; judgment directed; further proceedings.*

Damian K. Gunningsmith, with whom were *John L. Cordani, Jr.*, and, on the brief, *Moira L. Buckley*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Cornelius P. Kelly*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Eugene L. Walker, appeals from the judgment of conviction, rendered following a jury trial, of felony murder in violation of General Statutes § 53a-54c; manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a); attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2); and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). The defendant claims that the trial court (1) violated his right to confrontation by permitting a laboratory analyst to testify regarding a known DNA sample processed by another analyst in the same laboratory; (2) violated his right to due process when it declined to either strike certain testimony or grant the defendant's motion for a mistrial; (3) erred in admitting certain testimony under the coconspirator exception to the hearsay rule; (4) erred in denying his motion to sever his trial from that of his codefendant; (5) erred in admitting certain evidence at trial; and (6) violated double jeopardy by convicting him of both manslaughter and felony murder. We affirm the judgment in part, and we reverse the judgment in part.

The following facts and procedural history are relevant to our resolution of this appeal. On the night of October 28, 2012, Anthony Adams, the codefendant in this consolidated trial, telephoned Alexis Morrison to ask if she knew "somebody that could sell him some weed." Morrison called Neville Malacai Registe, the victim, to arrange for him to meet with Adams in the parking lot of her West Haven residence. When the victim received Morrison's telephone call, he was with his friend, Stephon Green, at his mother's home in New Haven. After some time, the victim and Green left in the victim's Acura. As they approached the designated parking lot, the victim called Morrison. Morrison then telephoned Adams to tell him that the victim "was there." Adams replied that he had already left because the victim "took too long . . . and that Day-Day and GZ [were] going to get the weed." "Day-Day" and "GZ" were nicknames for Daquane Adams, who is Anthony Adams' cousin, and the defendant, respectively, both of whom Morrison knew.

When the victim and Green arrived in the parking lot, the victim backed his car into a parking space. Green, who was rolling a marijuana joint in the front passenger seat, looked up and noticed two men approaching the Acura. He returned his attention to his task, and the victim opened the driver's door to talk to one of the men. The man, who was wearing a black bandana and who was later identified as the defendant, held a revolver inside the car and said, "run it," meaning, "give me it. It's a robbery . . . ." A physical altercation ensued. The second man, later identified as Daquane Adams, stepped away from the Acura and placed a cell phone call to someone. A Toyota arrived, and a third man exited that car and asked the defendant for the gun.[1] The struggle over the gun continued inside the

[1] The Toyota was discovered to belong to Ronja Daniels, Daquane Adams' girlfriend. Daniels testified that earlier that night, Daquane Adams had dropped her off at work and borrowed her car.

victim's Acura, and someone knocked Green into the backseat. Daquane Adams and the third man pulled the defendant out of the car and, as Green was climbing back into the front passenger seat, a shot was fired. Green heard the victim say, "oh, shit," and then heard a second shot.

The defendant, Daquane Adams, and the third man got in the Toyota and drove toward the parking lot exit. With the victim slumped over in the driver's seat, Green pursued the Toyota. He caught up to it at the end of the street and rammed the Acura into the back of the Toyota. The victim's Acura was disabled, but the Toyota was able to be driven away. The victim died of a gunshot wound to his head.

The defendant's case was consolidated for trial with that of his codefendant, Anthony Adams.[2] Following trial, the jury found the defendant guilty of felony murder, manslaughter in the first degree with a firearm, attempt to commit robbery in the first degree, and criminal possession of a pistol or revolver. The jury found him not guilty of the charge of conspiracy to commit robbery. The court imposed a total effective sentence of forty-five years incarceration followed by ten years special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that he was deprived of his right to confrontation under the federal constitution when the court permitted a forensic science examiner to testify about the results of a comparison she made

[2] Anthony Adams was charged with felony murder in violation of § 53a-54c; manslaughter in the first degree with a firearm in violation of § 53a-55a (a); attempt to commit robbery in the first degree in violation of §§ 53a-49 (a) (2), 53a-134 (a) (2); and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a). Daquane Adams was also a codefendant but was tried separately.

between (1) a DNA profile she generated from crime scene evidence and (2) a DNA profile another analyst in the laboratory generated from the defendant's buccal swab, without requiring the other analyst to testify.[3] We disagree.

The following additional facts that the jury reasonably could have found are relevant to this claim. The police recovered a black bandana from the Acura and sent the bandana and the victim's bloodstain to the state's Division of Scientific Services laboratory for analysis. The police also obtained and sent additional known samples to the laboratory, including buccal swabs from the defendant, his codefendant and Daquane Adams. Although Heather Degnan, a supervisory forensics examiner, visually inspected all of the samples, including the buccal swab obtained from the defendant, per standard laboratory procedure the known samples were processed by the laboratory's "known processing group" (group). Degnan processed the bandana using the standard forensic DNA typing techniques used in the laboratory. She isolated DNA from two sites on the bandana and generated DNA profiles (evidentiary profiles) that contained a mixture of DNA from at least two contributors, one of which was deemed a major contributor and the other, a minor contributor. An analyst in the group generated DNA profiles from the known samples (known profiles) and sent them to Degnan. Degnan compared the evidentiary profiles she had extracted from the DNA on the bandana with the known profiles. Degnan's analysis determined

[3] The defendant mentions in his brief that the court also violated his right under article first, § 8, of the Connecticut constitution; however, he fails to provide an independent analysis of his state constitutional claim. We, accordingly, deem his state constitutional claim abandoned. See *State* v. *Pierre*, 277 Conn. 42, 74 n.12, 890 A.2d 474 ("[w]ithout a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim" [internal quotation marks omitted]), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

that the defendant was included as a major contributor to the DNA that was on the bandana.[4] She also entered the evidentiary profile of the major contributor to the DNA found on the bandana into the Connecticut and national DNA databases[5] and obtained a "hit" for the defendant because his DNA profile had been entered due to a prior felony conviction. Degnan prepared a report summarizing her findings.[6]

At trial, Tammy Murray, the detective who took the buccal swab from the defendant, testified that she obtained a subpoena for nontestimonial evidence and testified about the established procedure she followed to take the sample from the defendant. The buccal swab itself was introduced into evidence along with the bandana. After Murray's testimony, the state called Degnan to testify about her analysis and findings. She first testified about the procedures she followed when analyzing the DNA found on the bandana. Degnan explained that she swabbed the bandana and generated an evidentiary profile from each side of the bandana, and that the group processed and generated the known profiles from the defendant's buccal swab and the victim's bloodstain. According to Degnan, this division of tasks took place according to "standard operating procedure." The group then provided the known profiles to Degnan for comparison with the evidentiary profiles.

Prior to the admission of Degnan's findings, defense counsel objected to Degnan's testimony and the admission of her report on the grounds that Degnan was not competent to testify about the known profiles and that

[4] According to Degnan's findings, the expected statistical frequency that an individual could be a contributor to the DNA profile found on the bandana was less than one in seven billion in a random population.

[5] Degnan testified that she did not enter the profile of the minor contributor into the databases because it did not meet the guidelines to qualify for entry.

[6] Anthony Adams and Daquane Adams were eliminated as contributors to the DNA extracted from the bandana.

there was a lack of foundation for this evidence. Specifically, the defendant's counsel objected because Degnan had not been formally qualified as an expert. Counsel for Anthony Adams objected on the ground that Degnan did not process the known samples herself but, rather, obtained the results "second hand."[7] The court, *Markle*, *J.*, overruled the objections and allowed Degnan to testify as to the results of her analysis.

Degnan testified that, on the basis of her analysis and comparison, the defendant was a major contributor to the DNA found on both sides of the bandana. On cross-examination, Degnan elaborated that she had "examined the known samples and then sent those samples to the known processing group for extraction and amplification," but had not been present for that stage of the process. She was, however, familiar with the group's functions. She noted that the laboratory's use of known control samples ensured that the machines used in the testing processes were working properly. She further explained that whenever a DNA profile is generated, including a known profile, it is analyzed independently by a second analyst, who also reviews the paperwork associated with that analysis to determine if the initial analyst generated the profile properly. Degnan's analysis of both the evidentiary and known profiles was independently reviewed by Dahong Sun, another DNA analyst at the laboratory, who cosigned Degnan's report. The court admitted Degnan's report[8] containing her findings but redacted it to eliminate references to the known samples of the other defendants, Anthony Adams and Daquane Adams.

On appeal, the defendant claims that he was deprived of his right to confrontation under the sixth amendment

[7] Neither counsel raised a *Crawford* v. *Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), or a confrontation issue.

[8] On appeal, the defendant does not argue that admitting Degnan's report violated his right to confrontation.

to the federal constitution when the court permitted Degnan to testify about the results of her comparison of the DNA profiles, without requiring an analyst from the known processing group to testify. The state argues that the defendant's confrontation claim was not preserved because it was not raised at trial and was not subsumed within the defendant's evidentiary objections regarding lack of competence and foundation.[9] The state further claims that had the defendant properly presented his claim as one of confrontation that was based on testimonial hearsay, as opposed to a challenge to Degnan's competence to render an opinion regarding the known profile, the state may have chosen to call the known processing group analyst, assuming he or she was available to testify.[10] The state argues that raising the confrontation issue for the first time on appeal amounts to an ambush on the state and the trial court. Nonetheless, as the state concedes, our Supreme Court has reviewed a confrontation claim under the bypass rule of *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), even when there was a claim of waiver. *State* v. *Smith*, 289 Conn. 598, 619, 960 A.2d 993 (2008); see also *State* v. *Holley*, 327 Conn. 576, 590, 175 A.3d 514 (2018). We will, therefore, review this unpreserved

[9] Because confrontation claims that involve testimonial hearsay raise due process concerns, and because those claims are not determined on the basis of the rules of evidence after *Crawford* v. *Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), it is particularly important that trial counsel articulate whether they are raising a constitutional due process claim or an evidentiary issue. See, e.g., *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) ("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 or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party" [internal quotation marks omitted]); *State* v. *Hilton*, 45 Conn. App. 207, 222, 694 A.2d 830 ("[w]e are not bound to consider claims of law not properly raised at trial"), cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

[10] There is no evidence in the record to suggest that the analyst was not available to be called to testify by either the state or the defendant.

claim pursuant to *Golding*, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

"[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. The defendant claims that the court violated his right to confrontation by allowing Degnan to testify about the results of the comparison she made, without anyone from the known processing group being called to testify. Because Degnan, the analyst who conducted the critical analysis and made the resulting findings, testified and was subject to cross-examination, we conclude that there was no confrontation clause violation, and thus this claim fails under the third prong of *Golding*. See id., 240.

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." The sixth amendment right of confrontation extends to the states through the due process clause of the fourteenth amendment. *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

"In *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant

at trial only if the defendant had a prior opportunity [to cross-examine the witness who is otherwise] unavailable to testify at trial. Id., 68. In adopting this categorical approach, the court overturned existing precedent that had applied an open-ended balancing [test] . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore adequate indicia of reliability. . . . Although *Crawford*'s revision of the court's confrontation clause jurisprudence is significant, its rules govern the admissibility only of certain classes of statements, namely, testimonial hearsay." (Citations omitted; internal quotation marks omitted.) *State* v. *Buckland*, 313 Conn. 205, 212–13, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). Even where the subject statement is testimonial hearsay, "[t]he [confrontation] [c]lause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford* v. *Washington*, supra, 60 n.9.

In the context of laboratory tests, "the analysts who write reports that the prosecution introduces must be made available for confrontation . . . ." *Bullcoming* v. *New Mexico*, 564 U.S. 647, 661, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). Nevertheless, "it is not the case . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 311 n.1, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Although "[i]t is the obligation of the prosecution to establish the chain of custody . . . this does not mean that everyone who laid hands on the evidence must be called. . . . [G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." (Citations omitted; internal quotation marks omitted.) Id. As the

United States Court of Appeals for the Second Circuit recently noted, "the Supreme Court has never held that the [c]onfrontation [c]lause requires an opportunity to cross-examine each lab analyst involved in the process of generating a DNA profile and comparing it with another . . . ." *Washington* v. *Griffin*, 876 F.3d 395, 407 (2d Cir. 2017); see also *State* v. *Buckland*, supra, 313 Conn. 214 ("neither *Melendez-Diaz* nor *Bullcoming* require every witness in the chain of custody to testify"). Generally, the "rules of evidence . . . permit experts to express opinions based on facts about which they lack personal knowledge . . . ." *Williams* v. *Illinois*, 567 U.S. 50, 69, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012).[11]

In the present case, Degnan, the analyst who conducted the critical analysis and made the findings that connected the defendant's DNA to the DNA found on the bandana, testified and was subject to cross-examination. Degnan explained the procedures she followed in processing the DNA found on the bandana and comparing it to the known profiles. It was Degnan, and not the analyst from the group, who conducted the forensic analysis of the known profiles and the evidentiary profile and determined that the defendant's DNA profile matched the DNA found on the bandana. See *People* v. *Corey*, 52 Misc. 3d 987, 992, 36 N.Y.S.3d 354 (2016) ("Nothing . . . supports the conclusion that the analysts involved in the preliminary testing stages, specifically, the extraction, quantification or amplification stages, are necessary witnesses . . . . Rather, it is the generated numerical identifiers and the calling of the alleles at the final stage of DNA typing that effectively accuses defendant of his role in the crime charged

[11] Similarly, under the Connecticut Code of Evidence, "[t]he facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. . . ." Conn. Code Evid. § 7-4 (b).

. . . .” [Citations omitted; internal quotation marks omitted.]). Although Degnan did not run the machines that extracted the DNA profiles from the known samples, she was fully aware of, and testified to, the standard operating procedures of the laboratory, including the manner in which the known samples are processed and verified. The defendant's known profile was not inherently inculpatory. It was the forensic analysis conducted by Degnan that made it so. Degnan was extensively cross-examined about her analysis and findings. She was specifically questioned about the processing of the known samples and her lack of participation in the generation of the known profiles. She was the primary analyst who made the findings and prepared the report, and was available to defend and explain her conclusion that the two DNA profiles matched.

Nevertheless, in support of his contention that his right to confrontation was violated, the defendant cites *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 305. This case, however, can be readily distinguished. In *Melendez-Diaz*, the Supreme Court addressed the issue of whether a petitioner's right of confrontation was violated when the trial court admitted certificates of analysis reporting the results of a laboratory test, without the analysts who had prepared and signed the certificates appearing to testify. Id., 308–309. The court held that the notarized certificates were “a solemn declaration or affirmation made for the purpose of establishing or proving some fact”; (internal quotation marks omitted) id., 310; and thus, “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them,” the petitioner's right to confrontation had been violated. (Internal quotation marks omitted.) Id., 311. In the present case, unlike in *Melendez-Diaz*, the analyst who conducted the analysis to establish “some fact” and who prepared and signed the report, testified at

trial and was therefore available for cross-examination. See *Washington* v. *Griffin*, supra, 876 F.3d 401, 405 (similarly distinguishing *Melendez-Diaz* in case where analyst who testified had conducted DNA extraction of evidentiary samples but not DNA extraction of defendant's buccal swab, which she utilized in her analysis and conclusions).

Even if we assume, arguendo, that the processing of the defendant's known profile was considered a critical stage of the analysis or chain of custody, the admission of Degnan's testimony referencing it did not implicate the confrontation clause because Degnan was available and testified extensively on cross-examination. This is particularly important where, as here, the laboratory testing functions are allocated among multiple employees. Although not determinative of the outcome of this case, *Williams* v. *Illinois*, supra, 567 U.S. 50, informs our opinion. See *State* v. *Lebrick*, 179 Conn. App. 221, 244, A.3d ("[g]iven that no readily applicable rationale for the court's holding in *Williams* obtained the approval of a majority of the justices, its precedential value seems, at best, to be confined to the distinct factual scenario at issue in that case"), cert. granted on other grounds, 328 Conn. 912, A.3d (2018). "When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both." *Williams* v. *Illinois*, supra, 85. Here, only one of the three known profiles matched the crime scene evidence; the known profiles

of Anthony Adams and Daquane Adams were eliminated. "When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." Id.

Courts have consistently held that experts may rely on other experts' findings in reaching their own independent conclusions. See *State* v. *Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016) (applying *Williams* to admission of autopsy report prepared by nontestifying medical examiner); see also *Washington* v. *Griffin*, supra, 876 F.3d 395 (testifying analyst who conducted comparisons of DNA profiles may rely on extractions conducted by other analysts without violating confrontation clause). "When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the [c]onfrontation [c]lause." *Williams* v. *Illinois*, supra, 567 U.S. 58. That is precisely what occurred in this case when Degnan relied on her personal knowledge of the procedures performed by the analysts in the group in comparing the known profiles to the evidentiary profile and reaching her own conclusions. As she noted, all DNA profiles generated by each analyst are independently reviewed by a second analyst. "[T]he knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard." Id., 85. We conclude, therefore, that the defendant's right to confrontation was not violated because Degnan, the primary analyst who performed and supervised the generation and analysis of the DNA profiles and resulting findings, testified and was available for cross-examination. Accordingly, the defendant's claim fails under the third prong of *Golding*.

II

The defendant next claims that the court erred by declining either to strike Morrison's in-court identification of the defendant or to grant the defendant's motion for a mistrial. The defendant primarily argues that Morrison's identification of him was based on an unnecessarily suggestive procedure and, thus, by declining to strike Morrison's testimony or to declare a mistrial, the court violated his due process right to a fair trial pursuant to the fifth and fourteenth amendments to the United States constitution, and article first, § 8, of the Connecticut constitution.[12] Additionally, the defendant argues that the court erred by declining to strike Morrison's testimony or order a mistrial as a sanction pursuant to Practice Book § 40-5, for the state's failure to disclose that Morrison had previously identified the defendant in a photograph. We disagree.

We employ a plenary standard of review when analyzing whether a defendant was deprived of his right to due process. *State* v. *Dickson*, 322 Conn. 410, 423, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). We review the court's decision to refuse to impose sanctions for abuse of discretion. *State* v. *Respass*, 256 Conn. 164, 184, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

The following additional facts are relevant. Morrison testified that Anthony Adams informed her that the victim was taking too long to arrive at the parking lot, so he was leaving and "Day-Day and GZ" would instead purchase the marijuana. Morrison knew that Day-Day was Daquane Adams, although she did not know his

[12] Although the defendant raises this claim under the Connecticut constitution, he does not provide a separate analysis of the claim under the Connecticut constitution and, accordingly, we deem that claim abandoned. See footnote 3 of this opinion.

last name, and that GZ was Daquane Adams' friend, whom she knew only by his nickname. She testified that, at the time of the incident, she had known Daquane Adams for a year or two, and had known the defendant for "a couple of years" and saw him "once in a blue moon." The prosecutor asked her to identify GZ in the courtroom, and Morrison identified the defendant.

Following a discussion outside the presence of the jury, defense counsel made a motion for a mistrial and a motion for severance on the grounds that Morrison's in-court identification of the defendant was inherently suggestive due to the courtroom setting and that it was a surprise, in that the state had never disclosed that Morrison would identify the defendant. The court denied the motions, reasoning that Morrison's in-court identification of the defendant was based on prior knowledge and not based on any suggestive identification procedure. With respect to Morrison's ability to identify the defendant, the prosecutor elaborated that "[l]ast week when [Morrison] was in my office . . . I had photos on my desk of all the defendants . . . . [W]e were talking about [the defendant], and there was a photo on the side of . . . where she was sitting, of [the defendant], she goes, 'yeah, that's GZ.' " Defense counsel then asked that Morrison's in-court identification be stricken on the ground of late disclosure by the state of Morrison's ability to identify the defendant in court. The court declined to strike Morrison's testimony.

A

On appeal, the defendant argues that Morrison's in-court identification of him was tainted by an unnecessarily suggestive identification procedure in the prosecutor's office prior to trial. He argues that the procedure was unnecessarily suggestive because the photographs on the prosecutor's desk were of the defendants, and

that because Anthony Adams and Daquane Adams were well known to Morrison, "it would have been easy for her to determine that the photograph of the person she did not know was GZ. The nature and extent of [her] prior knowledge of GZ was questionable."[13] We are not persuaded.

In the context of eyewitness identifications, when a defendant claims "that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor . . . both the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification. . . . In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . . If the trial court determines that there was no unduly suggestive identification procedure, that is the end of the analysis, and the identification evidence is admissible." (Citations omitted; internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 420–21.

On the basis of our plenary review, we conclude that the defendant cannot prevail on his claim that Morrison identified the defendant in the prosecutor's office as a result of an unnecessarily suggestive identification procedure. Morrison was not an eyewitness to the crime; instead, she identified the defendant from a photograph in the prosecutor's office, and then in court,

[13] On appeal, unlike at trial, the defendant does not argue that Morrison's in-court identification of him was the product of an inherently suggestive procedure due to the courtroom setting but, instead, focuses on the out-of-court identification procedure's effect on the in-court identification.

as the person she knew as GZ. Although the only photographs in the prosecutor's office were those of the defendants, and although Morrison only saw the defendant "once in a blue moon," Morrison testified that at the time of the incident, she had known the defendant for, "[l]ike, a couple of years." The prosecutor did not ask Morrison to identify the individual in the defendant's photograph. Instead, she saw the photograph during her discussion with the prosecutor about the defendant, and told the prosecutor that it was a photograph of GZ. Morrison's identification of the defendant occurred spontaneously as a result of her familiarity with GZ, and not as the result of an arranged procedure by law enforcement. See *State* v. *Jones*, 59 Conn. App. 762, 766, 757 A.2d 689 (2000) ("[i]f an identification of a defendant is done spontaneously and is not arranged by the police, the identification is not tainted by state action and due process rights are not violated"), cert. denied, 255 Conn. 924, 767 A.2d 99 (2001). Because the pretrial identification occurrence was not unduly suggestive, Morrison's in-court identification of the defendant did not violate the defendant's due process rights, and the court did not err in allowing that identification to stand.

B

The defendant also argues that the court erred in declining to strike Morrison's identification testimony or to declare a mistrial because of the prosecutor's violation of Practice Book § 40-13A,[14] by failing to disclose Morrison's identification of the defendant's photograph prior to trial. We are not persuaded.

[14] Practice Book § 40-13A provides that "[u]pon written request by a defendant and without requiring any order of the judicial authority, the prosecuting authority shall, no later than forty-five days from receiving the request, provide photocopies of all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents, including state and local law enforcement officers, which statements, reports and affidavits were prepared concerning the offense charged . . . ."

Citing Practice Book § 40-5,[15] the defendant argues that if a party fails to comply with the rules of discovery, the court may preclude the evidence at issue. Section 40-5 "gives broad discretion to the trial judge to fashion an appropriate remedy for non-compliance with discovery. . . . Generally, [t]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." (Internal quotation marks omitted.) *State* v. *Hamlett*, 105 Conn. App. 862, 873, 939 A.2d 1256, cert. denied, 287 Conn. 901, 947 A.2d 343 (2008). In the present case, the defendant has not demonstrated that the court abused its discretion by declining to strike Morrison's testimony or to declare a mistrial as a remedy for noncompliance with the discovery rules. First, the defendant has not demonstrated that the prosecutor violated Practice Book § 40-13A. As the state notes in its brief, the record does not indicate that the defendant made the written request required by § 40-13A. Additionally, Morrison's comment to the prosecutor, made prior to trial, identifying the defendant, was not a discoverable "statement" pursuant to § 40-13A. The term "statement," as used in that section, is defined as "(1) A written statement made by a person and signed or

[15] Practice Book § 40-5 provides in relevant part that "[i]f a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order" and sets forth a nonexhaustive list of sanctions to be imposed "as it deems appropriate . . . ."

otherwise adopted or approved by such person; or (2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a person and recorded contemporaneously with the making of such oral statement." Practice Book § 40-15. Morrison's comment to the prosecutor was oral, and the record does not contain any evidence that it had been recorded.

Moreover, even if we assume that the prosecutor improperly withheld Morrison's statement from defense counsel, the court did not abuse its broad discretion in declining to impose sanctions under these circumstances. At trial, the prosecutor explained that he had not disclosed the identification because "it wasn't a situation where [Morrison] was identifying [the defendant] other than a situation that she had known [him] for a period of time. It wasn't implicating him in the crime or anything along those lines. It was more of a situation of, yeah, I know who he is because I've been with him and I've been in his company for a number of years." Further, although "the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . In [its] review of the denial of a motion for mistrial, [our Supreme Court has] recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Hamlett*, supra, 105 Conn. App. 872. Because the jury reasonably could have found that Morrison knew the defendant prior to the incident that resulted in the victim's murder, the defendant did not show that he was

prejudiced by Morrison's identification of him. Under these circumstances, the court did not abuse its discretion by declining to strike Morrison's identification testimony or to declare a mistrial as sanctions against the state.

III

The defendant next claims that the court erred in admitting certain hearsay testimony under the coconspirator exception to the hearsay rule.[16] Specifically, the defendant argues that the court improperly concluded that a conspiracy existed when determining whether to admit the testimony of Morrison, Daniels, Green, and Jamila Bello, an acquaintance of Anthony Adams, under the coconspirator exception to the hearsay rule. We disagree.[17]

"Statements made by coconspirators are recognized in Connecticut as an exception to the general prohibition against hearsay. See *State* v. *Vessichio*, 197 Conn. 644, 653–60, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986). However, [b]efore such statements may be admitted, the trial judge must make a preliminary determination that there is sufficient independent evidence to establish the following: (1) that a conspiracy existed . . . (2) that the

[16] The defendant also argues that the admission of this evidence violated his right to confrontation under the federal and state constitutions. We conclude that the court properly admitted the statements because coconspirator statements, "by their nature [are] not testimonial." *Crawford* v. *Washington*, supra, 541 U.S. 56. As *Crawford* acknowledged, "generally speaking, the admission of out-of-court statements for purposes other than their truth, such as statements in furtherance of a conspiracy, do not raise confrontation clause issues." *State* v. *Azevedo*, 178 Conn. App. 671, 679, A.3d (2017), cert. denied, 328 Conn. 908, A.3d (2018).

[17] Insofar as the defendant argues that the court erroneously found that these statements were reliable, we hold that the court did not abuse its discretion in deciding to admit these statements. See, e.g., *State* v. *Camacho*, 282 Conn. 328, 363, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

conspiracy was still in existence at the time the statement was made . . . (3) that the declarations were made in furtherance of the conspiracy . . . and (4) that both the declarant and the defendant participated in the conspiracy . . . . The court must make its preliminary determination by a fair preponderance of the evidence independent of the hearsay utterances . . . a standard which is lower than the standard of evidence required to submit a charge of conspiracy to the jury. . . . Once the threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant . . . the conspirators' statements are admissible and they might tip the scale in favor of the defendant's guilt . . . ." (Internal quotation marks omitted.) *State* v. *Haggood*, 36 Conn. App. 753, 766–68, 653 A.2d 216, cert. denied, 233 Conn. 904, 657 A.2d 644 (1995).

The following facts and procedural history are necessary for the resolution of the defendant's claim. Morrison testified that Anthony Adams asked her to arrange a marijuana purchase and that he later informed her that Daquane Adams and the defendant would be making the purchase. The defendant did not object to this testimony. The defendant only later argued that the state had failed to satisfy the foundational requirements of *State* v. *Vessichio*, supra, 197 Conn. 653–60, for the admission of Morrison's statements under the coconspirator exception to the hearsay rule. According to the defendant, Morrison's statements could not be used as evidence of a conspiracy for purposes of establishing a foundation for Daniels' testimony because Morrison's statements were also inadmissible.

During the state's offer of proof outside the presence of the jury, Daniels testified that when Daquane Adams came to see her at work at approximately midnight on October 29, 2012, he informed her that her car had been stolen and that she should report her car as having been

stolen, implying that he had been robbed. The defendant objected on the ground that there was insufficient independent evidence to establish the existence of a conspiracy. The defendant argued that the only potential evidence of a conspiracy was Morrison's testimony regarding what Anthony Adams had told her about the marijuana purchase, which, likewise, was improperly admitted under the coconspirator exception. The court sustained the objection to Daniels' testimony, reasoning that the state had not met its burden, at that time, of demonstrating that her statements were admissible under the coconspirator exception. Later in the trial, the state recalled Daniels to testify. The defendant again raised a *Vessichio* issue with respect to Daquane Adams' statements to Daniels. The court ruled that it would allow the statements into evidence but the state would "have to tie it in at some point and . . . it's subject to the tie-in." Daniels then testified in front of the jury that Daquane Adams had told her that he had been robbed and to report her car as stolen.

The defendant also objected to two portions of Green's testimony on the ground that a conspiracy had not been established pursuant to *Vessichio*. First, the defendant objected to Green's testimony that, while the victim and the individual with the bandana struggled over the gun, a third individual approached and said, "just give us the gun . . . ." The court overruled the objection, finding that the statement was admissible both under the coconspirator exception and to show the effect of the statement on Green. Second, the defendant objected to Green's testimony that the individual with the bandana said, "run it," which Green understood to mean that this was a robbery. The court also overruled the second objection.

Later, Bello testified that after midnight on October 29, 2012, Anthony Adams telephoned her and asked her for a favor. The defendant objected on *Vessichio*

grounds. The court overruled the objection, subject to the state "linking it in . . . ." Bello proceeded to testify that Anthony Adams had telephoned her and asked her to "pick [Daquane Adams] up and bring him to the hospital" because he "had to pick keys up from the hospital." She stated that when she arrived to pick up Daquane Adams, the defendant was also present, and he sat in the backseat while she drove Daquane Adams to the hospital. En route to the hospital, she heard the defendant exclaim, "[o]h, shit. Fuck." The defendant objected to this testimony, and the court overruled the objection. Bello testified that later that night, Anthony Adams telephoned her to thank her and said that "some wild shit happened," but that "we didn't go into details about what the wild shit [that] had happened was." After the state rested, the defendant renewed his objection to the hearsay statements by Morrison and Daniels regarding what Anthony Adams and Daquane Adams had said to them, respectively, and argued that the state had not proven the existence of a conspiracy sufficiently for the court to admit the coconspirator hearsay statements under the exception. The court stated that it had reserved judgment on Morrison's statements and that it had let other statements in under the coconspirator exception. The court then ruled that the statements were admissible under the coconspirator exception.

The defendant primarily challenges the sufficiency of the state's evidence admitted to establish by a fair preponderance that a conspiracy to commit robbery existed. The defendant further contends that even assuming a conspiracy existed, there was no evidence that the defendant was a participant in that conspiracy. We conclude that the court did not err in its preliminary determination that a conspiracy existed.

"The standard of proof of a fact by a fair preponderance has been met when all the evidence considered fairly and impartially evinces a reasonable belief that

it is more probable than not that the fact is true. . . . In reviewing a claim that the state failed to meet the threshold of proof regarding the existence of a conspiracy with the defendant as a participant to permit evidence of out-of-court statements by coconspirators, we must construe the evidence in a way most favorable to sustaining the preliminary determinations of the trial court; its conclusions will not be disturbed on appeal unless found to be clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Haggood*, supra, 36 Conn. App. 767–68; see also *State* v. *Peeler*, 267 Conn. 611, 628, 841 A.2d 181 (2004).

The defendant argues that the court erred in conditionally admitting into evidence hearsay testimony from Morrison and Daniels under the coconspirator exception, subject to the state satisfying the foundational requirements of *Vessichio* at a later point in the trial. He contends that the court was required to make a determination regarding the admissibility of the testimony under the coconspirator exception based only on the evidence elicited at trial prior, and not subsequent, to the admission of the testimony. We disagree, as *Vessichio* contains no such requirement. The court's conditional admission of the hearsay testimony subject to the state's later admission of the sufficient foundational evidence is permitted under § 1-3 (b) of the Connecticut Code of Evidence, which provides: "When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts." In such an instance, "there can be no prejudice where . . . the necessary foundation is finally established." *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 725, 463 A.2d 533 (1983).

In the present case, the state later introduced the necessary connecting facts. During their investigation,

the police found a black bandana containing the defendant's DNA in the victim's Acura. The center console of the Acura contained a bullet hole, and the interior frame on the driver's side door had a ricochet mark from a bullet. The police discovered Daniels' Toyota, which had been used in the robbery and which Daquane Adams had used to drive Daniels to work earlier that night, abandoned on a street near the West Haven parking lot in which the incident had occurred.

Bello testified that she picked up the defendant and Daquane Adams on the night of October 28, 2012, at a nearby location in West Haven. On November 1, 2012, the defendant met with his probation officer, and when his probation officer asked him to remove his sunglasses, he noticed that the defendant's eyes were "a deep red." Cell phone records showed calls between Anthony Adams and Daquane Adams during the time of the incident that utilized cell phone towers in West Haven. The cell phone records also showed calls that evening, at the times in question, between Anthony Adams and Morrison, between Anthony Adams and Daquane Adams, and between Anthony Adams and Bello.

The defendant also argues that the court erred in relying on coconspirator hearsay testimony in reaching its determination that the hearsay testimony that it had conditionally admitted into evidence was supported by the necessary foundational evidence of a conspiracy. He contends that the court improperly failed to rely exclusively on independent evidence. We disagree. There is no indication from the record that the court improperly considered the hearsay statements in its analysis. The court mentioned coconspirator hearsay statements in addition to independent evidence when discussing whether the state had established the existence of a conspiracy by a preponderance of the evidence. Defense counsel, however, asked the court to

clarify its basis, arguing that it could not "take [into account] the coconspirator hearsay declaration statements themselves." The court responded by specifying that it had relied on "the other independent evidence that was established." Defense counsel asked the court to clarify whether this independent evidence included Morrison's and Daniels' hearsay statements, and the court confirmed that it did not. It is clear from this colloquy that the court based its ruling only on independent evidence.

Because *Vessichio* does not require the court to determine the admissibility of the testimony under the coconspirator exception based only on the evidence elicited at trial prior, and not subsequent, to the admission of the statement, and because the court considered independent evidence that could establish by a preponderance of the evidence that a conspiracy to rob the victim existed and that the defendant was a participant in that conspiracy, the court's admission of the challenged statements was not improper.[18]

IV

The defendant next claims that the court erred in denying his motion to sever his trial from that of his codefendant, Anthony Adams. We disagree.

[18] Furthermore, as the state suggests in its brief, Green's testimony that he heard the man with the bandana say, "just give us the gun," and, "run it," as well as Bello's testimony that she heard the defendant exclaim, "[o]h, shit. Fuck," as she drove him to the hospital were also admissible as to the defendant as statements by a party opponent. Conn. Code Evid. § 8-3 (1). Section 8-3 of the Connecticut Code of Evidence provides in relevant part that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness (1) . . . [a] statement that is being offered against a party and is . . . the party's own statement, in either an individual or a representative capacity . . . ."

These statements were offered against the defendant and were the defendant's own statements. The statements were both relevant and material, providing inculpatory evidence against the defendant, and thus, were admissible under this exception to the hearsay rule, in addition to the coconspirator exception. See *State* v. *Ferguson*, 260 Conn. 339, 357–58, 796 A.2d 1118 (2002) ("[s]tatements made out of court by a party-opponent are universally

The following procedural history is relevant to this claim. Prior to the start of trial, the court, *Iannotti*, *J.*, granted the state's motion to consolidate the trials of the defendant and Anthony Adams. At a hearing on the motion, defense counsel stated that he was not objecting to consolidation. Prior to jury selection, the court, *Markle*, *J.*, questioned counsel regarding whether the joinder of the trials presented any issues under *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).[19] The court expressed concern that Anthony Adams' testimony could place the defendant at the scene of the crime. Anthony Adams' counsel stated that defense counsel "freely admits that his client was in the vicinity around the time of the shooting and is . . . claiming mere presence." Both counsel for the defendant and Anthony Adams stated that there were no *Bruton* issues, and that they did not object to the state's motion to consolidate.[20] The cases remained consolidated.

During Morrison's direct examination, and after she testified that she knew the defendant by his nickname, defense counsel moved for severance. Defense counsel argued that Morrison testified that Anthony Adams

deemed admissible when offered against him . . . so long as they are relevant and material to issues in the case" [citation omitted; internal quotation marks omitted]).

[19] "[I]n *Bruton*, the United States Supreme Court held that a defendant is deprived of his rights under the confrontation clause when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. . . . In *Bruton*, however, the court emphasized that it was dealing with a case in which the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence. . . . Several lower courts have thus concluded that *Bruton* has no application when the statements of a codefendant are otherwise admissible against the defendant." (Citations omitted; internal quotation marks omitted.) *State* v. *Robertson*, 254 Conn. 739, 765, 760 A.2d 82 (2000).

[20] At oral argument before this court, the state maintained that there was no *Bruton* violation or evidence that triggered *Bruton*.

stated that "Day-Day and GZ" would purchase the marijuana, identifying "Day-Day" as Daquane Adams, and, to counsel's surprise, "GZ" as the defendant. Defense counsel contended that he did not know that Morrison would identify the defendant as GZ, that her identification of GZ was a result of a suggestive pretrial procedure; see part II of this opinion; and that her testimony as to Daquane Adams arguably placed the defendant at the scene of the crime. The court denied the motion for severance.

Later, Danielle Zakar, an acquaintance of Anthony Adams, testified that on December 27, 2012, while Anthony Adams and another man were at her New York residence, the police arrived, causing the two men to flee. On direct examination, Zakar denied hearing Anthony Adams say why he was in New York. Joseph Thomas, a detective with the Fugitive Task Force Marshal Service, then testified, under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986),[21] that he took Zakar's statement, in which she indicated that she had overheard Anthony Adams state that he had killed a man in Connecticut and was now on the run from the Connecticut police.

On appeal, the defendant argues that severance was necessary because evidence was admitted at the joint trial that would not have been admissible against him at a separate trial. The evidence the defendant identifies as being inadmissible against him in a separate trial is as follows: hearsay statements Anthony Adams made to Morrison and Bello, which the defendant argues were inadmissible under the coconspirator exception to the hearsay rule; see part III of this opinion; and Zakar's

[21] *State* v. *Whelan*, supra, 200 Conn. 753, established a hearsay exception that allows "the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination."

statement to the police that she had heard Anthony Adams say that he was on the run because he had killed someone in Connecticut. Although the defendant argues that this issue is reviewable, he did not move for severance on the basis of this evidence and, as such, his claim is unpreserved. In the alternative, the defendant seeks review under the bypass rule of *State* v. *Golding*, supra, 213 Conn. 239–40, but he has not demonstrated that a constitutional violation exists and, therefore, has not satisfied the third prong of *Golding*.

The court clearly raised potential joint trial issues, specifying what types of evidence would create a *Bruton* issue.[22] Defense counsel reassured the court that such problems would not arise. As we concluded in part III of this opinion, Anthony Adams' statements to Morrison and Bello were admissible against the defendant under the coconspirator exception to the hearsay rule. Thus, the introduction of those statements did not create a *Bruton* issue. See *State* v. *Robertson*, 254 Conn. 739, 765, 760 A.2d 82 (2000). As to Zakar's *Whelan* statement, a *Bruton* issue "does not occur if the codefendant's confession is redacted to omit any reference to the defendant, and a proper limiting instruction is given by the trial court." *State* v. *Edwards*, 39 Conn. App. 242, 245, 665 A.2d 611, cert. denied, 235 Conn. 924, 925, 666 A.2d 1186 (1995). Zakar's *Whelan* statement did not identify the defendant, and the court gave curative instructions, reminding the jury that Thomas' testimony concerning his interview of Zakar was "directed toward the [codefendant] Anthony Adams." "Accordingly, the defendant did not suffer substantial prejudice by the

[22] The court explained that "the legal issues that are addressed under the *Bruton* issue that would prohibit joinder [are] whether or not there are any postarrest statements made by codefendants and/or confessions that can be used to prejudice another codefendant. And if those statements or confessions are entered into during the course of the evidence, *Bruton* says clearly that there is a conflict and the codefendant can't be prejudiced by that, and therefore you can't join the cases together; you have to have separate trials."

admission of the codefendant's statement so as to require a separate trial." *State* v. *Edwards*, supra, 246. Because the defendant has not demonstrated that a constitutional violation exists, he cannot prevail under the third prong of *Golding*.[23]

V

The defendant next claims that the court erred in admitting into evidence (1) a photograph depicting a black bandana on the floor of the front passenger side of the Acura, and (2) a black bandana and the DNA evidence derived therefrom. We disagree.

The following additional procedural history is relevant. Murray testified that as part of the investigation, the police seized both the Acura and the Toyota, and that a black bandana was seized from the front passenger seat floor of the Acura. The prosecutor showed Murray a photograph and asked if it was an accurate representation of what the bandana looked like and where it was located before it was seized. Murray responded affirmatively. The prosecutor then sought to offer the photograph as an exhibit, and defense counsel objected. During voir dire, Murray stated that she did not remember who took the photograph or whether it was taken at the scene or at the West Haven Police Department. The court admitted the photograph as a full exhibit on the basis of Murray's testimony that it was a fair and accurate representation of what she observed at the West Haven Police Department.

[23] The reason stated by the defendant for moving for severance was Morrison's identification of the defendant as "GZ." This identification was based on Morrison's prior knowledge of the defendant and would have been admissible against the defendant in a separate trial. See part II of this opinion; see also *State* v. *Johnson*, 29 Conn. App. 394, 396, 615 A.2d 512 (1992) (defendant withdrew motion to suppress upon learning that witness' identification of him was based, "in part, on her prior knowledge of and contact with him"), appeal dismissed, 227 Conn. 611, 630 A.2d 69 (1993).

Murray further testified on direct examination that she recognized the black bandana as being the one recovered from the Acura, that the bandana was taken into police custody, and that it remained in the possession of the West Haven Police Department prior to being sent to a laboratory for analysis. When the state sought to admit the bandana into evidence, defense counsel objected on the ground that Murray did not know the bandana's location prior to seeing it at the West Haven Police Department after the Acura had been towed to that location and, therefore, a chain of custody had not been established. The court overruled the objection, and the bandana was admitted as a full exhibit.

The defendant argues that the state failed to lay a proper foundation for the admission of the photograph, the bandana, and the DNA evidence. With respect to the photograph of the bandana, the defendant contends that the state failed to establish its authenticity because Murray could not identify who took it or where it had been taken. Regarding the bandana itself and the DNA evidence derived from the bandana, the defendant argues that the state failed to establish a sufficient chain of custody because the state "could not demonstrate that the bandana was originally in the Acura at the scene, and had not been moved or tampered with in any respect before it was seized at the police department." In making this argument, the defendant contends that Green had not seen the shooter without the bandana, the first officer to arrive at the scene did not see the bandana in the Acura after conducting a plain view search of the vehicle, and an inventory listed the black bandana as having been seized from the Toyota rather than from the Acura. The defendant argues that the only evidence linking the bandana to the Acura was Murray's testimony, which related to the bandana's location at the police department, not at the scene.

We first address the defendant's claim with respect to the photograph and conclude that the court did not abuse its discretion in admitting the photograph into evidence. "Under [the foundational] standard [for photographs], all that is required is that a photograph be introduced through a witness competent to verify it as a fair and accurate representation of what it depicts." *State* v. *Swinton*, 268 Conn. 781, 802, 847 A.2d 921 (2004). "[T]he testimony of the photographer is not essential for the authentication of a photograph, as long as other evidence is produced that satisfies the court." *Gioielli* v. *Mallard Cove Condominium Assn., Inc.*, 37 Conn. App. 822, 834, 658 A.2d 134 (1995). "Verification of a photograph is a preliminary question of fact to be determined by the trial court. . . . Whether a photograph shows a situation with sufficient accuracy to render it admissible, is a preliminary question for the court . . . . [T]he trial court has wide discretion in admitting photographic evidence and its determination will stand unless there has been a clear abuse of that discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Walker*, 215 Conn. 1, 6, 574 A.2d 188 (1990). Although the photographer did not testify, Murray's testimony that the photograph was a fair and accurate representation of what the bandana looked like before it was seized satisfied the court as to the photograph's authenticity. See *State* v. *Swinton*, supra, 802; *Gioielli* v. *Mallard Cove Condominium Assn., Inc.*, supra, 834. Regardless of whether Murray remembered who took the photograph or knew whether the photograph was taken at the scene or at the police department, the court did not clearly abuse its discretion in finding that Murray was a competent witness to testify that the photograph was a fair and accurate representation of what she personally observed in the car. See *State* v. *Walker*, supra, 6. Thus, Murray's testimony provided a proper foundation for the admission of the photograph.

We next address the defendant's argument regarding the admissibility of the bandana, and the DNA evidence derived therefrom. "Appellate courts grant great deference to a trial court's ruling on the admissibility of evidence . . . and will not disturb such rulings absent a clear abuse of the trial court's discretion. . . . As a general rule, it may be said that the prosecution is not required or compelled to prove each and every circumstance in the chain of custody beyond a reasonable doubt . . . . It is not necessary for every person who handled the item to testify in order to establish the chain of custody. It is sufficient if the chain of custody is established with reasonable certainty to eliminate the likelihood of mistake or alteration." (Internal quotation marks omitted.) *State* v. *Lowe*, 61 Conn. App. 291, 303, 763 A.2d 680 (2001).

"The state's burden with respect to chain of custody is met by a showing that there is a reasonable probability that the substance has not been changed in important respects. . . . The court must consider the nature of the article, the circumstances surrounding its preservation and custody and the likelihood of intermeddlers tampering with it . . . . Thus, this court has found sufficient evidence to establish an adequate chain of custody where there is testimony that evidence was transferred between law enforcement personnel, delivered and received by the state toxicology laboratory and was identified at trial as the same evidence in an unchanged condition with no indication of tampering." (Citation omitted; internal quotation marks omitted.) Id. "An object connected with the commission of a crime must be shown to be in substantially the same condition as when the crime was committed before it can be properly admitted into evidence. . . . There is no hard and fast rule that the prosecution must exclude or disprove all possibility that the article or substance has been tampered with; in each case the trial court

must satisfy itself in reasonable probability that the substance had not been changed in important respects." (Internal quotation marks omitted.) *State* v. *Pollitt*, 205 Conn. 61, 88, 530 A.2d 155 (1987).

The court reasonably could have concluded that the bandana had not been tampered with. Following the incident, Green, who was driving the Acura, followed the Toyota. The Acura became disabled after hitting the Toyota in the vicinity of Glade Street and Terrance Street in West Haven. Seth Twohill, an officer with the West Haven Police Department, arrived on the scene at approximately midnight, and saw the Acura at that location and Green attempting to revive the victim. Twohill blocked off the area with crime scene tape. Joseph D'Amato, another responding officer, testified that Green and the victim were in the Acura when he arrived, and that he did not see anyone disturbing the integrity of the crime scene. Murray testified that the Acura was later towed from its location in West Haven to the West Haven Police Department. Robert Fazzino, a detective with the West Haven Police Department, and Murray testified that the black bandana was removed from the Acura. Murray further testified that the black bandana was in police custody prior to being sent to the laboratory. At trial, Murray recognized her initials on the packaging containing the bandana. Degnan testified that she received the bandana from the West Haven Police Department, designated the front and back side of the bandana with numbers, placed her initials on the barcode and sealed it with evidence tape that also had her initials on it.

The defendant's argument that the bandana could have been tampered with between the time of the commission of the crime and the time the bandana was recovered by police is pure speculation. *State* v. *Estrada*, 71 Conn. App. 344, 354, 802 A.2d 873 (mere speculation of tampering insufficient to show break in

chain of custody), cert. denied, 261 Conn. 934, 806 A.2d 1068 (2002). There is no evidence to support the defendant's claim that the bandana could have been tampered with between the time Green followed the Toyota, hit the Toyota, and tried to revive the victim, and when the Acura was towed to the West Haven Police Department. The defendant incorrectly suggests that an absence of evidence of tampering weighs in his favor. In the absence of "an affirmative showing that the evidence was in some way tampered with, misplaced, mislabeled or otherwise mishandled"; (internal quotation marks omitted) *State* v. *Lowe*, supra, 61 Conn. App. 304; we cannot conclude that the court abused its discretion in admitting the bandana into evidence. See *State* v. *Johnson*, 162 Conn. 215, 233, 292 A.2d 903 (1972) (where there was no affirmative showing that evidence was tampered with, it cannot be said that court abused discretion in admitting evidence).[24] Because there was a sufficient chain of custody for the admission of the bandana and, by extension, the DNA evidence derived from the bandana, we conclude that the court did not abuse its discretion in admitting these two items into evidence.

VI

The defendant last claims that his conviction of both felony murder and manslaughter in the first degree with

[24] Evidence that an inventory listed the bandana as having been recovered from the Toyota, instead of the Acura, does not render the bandana inadmissible. Fazzino testified that, as the lead investigator, he signed an inventory mistakenly indicating that the black bandana had been recovered from the Toyota. He testified that he personally saw the black bandana in the Acura and that it was recovered from the Acura, not the Toyota. That an inventory sheet listed the bandana as having been seized from the Toyota goes to the weight of the evidence, not its admissibility. See, e.g., *State* v. *John*, 210 Conn. 652, 678, 557 A.2d 93 ("fact that there was conflicting evidence regarding the [fact] in question would go to the weight of [witness'] opinion and not to its admissibility"), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989).

a firearm, which arose from the act of killing the victim, violates his right against double jeopardy and, accordingly, his manslaughter conviction should be vacated. The state agrees that the manslaughter conviction should be vacated.

The defendant seeks review of his unpreserved double jeopardy claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. We review this claim because the record is adequate for review and the claim is of constitutional magnitude. See *State* v. *Barber*, 64 Conn. App. 659, 671, 781 A.2d 464 ("[i]f double jeopardy claims arising in the context of a single trial are raised for the first time on appeal, these claims are reviewable" [internal quotation marks omitted]), cert. denied, 258 Conn. 925, 783 A.2d 1030 (2001).

"The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. . . . Double jeopardy prohibits . . . multiple punishments for the same offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 537, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017). In *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), our Supreme Court held that if a defendant is convicted of greater and lesser included offenses, the trial court must vacate the conviction of the lesser offense. Our Supreme Court in *State* v. *Miranda*, 317 Conn. 741, 751, 120 A.3d 490 (2015), extended the rule of vacatur in *Polanco* for double jeopardy claims to apply in a situation such as this, where there are multiple homicide convictions that are based on a single act. In the present case, the defendant's conviction of felony murder and manslaughter violate his constitutional protections

against double jeopardy. Accordingly, the third prong of *Golding* is met, and the defendant prevails on his claim. See *State* v. *Biggs*, 176 Conn. App. 687, 714, 171 A.3d 457, cert. denied, 327 Conn. 975, 174 A.3d 193 (2017).

The judgment is reversed only as to the defendant's conviction of manslaughter in the first degree and the case is remanded with direction to vacate that conviction and to resentence the defendant consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANDREW BASSFORD ET AL. *v.* FRANCES Z. BASSFORD ET AL.
(AC 39087)

Lavine, Alvord and Bear, Js.

Syllabus

The plaintiffs, the children of the decedent, appealed to the trial court from the orders issued by the Probate Court admitting the decedent's will and determining, inter alia, that he was competent to revoke and to receive certain property from a trust he had settled. The plaintiffs claimed, inter alia, that the trial court improperly concluded that the decedent, an involuntarily conserved person, had the testamentary capacity to execute the will and that the defendant B, the decedent's widow, had not exercised undue influence over the decedent in securing the execution of his will. The trial court rendered judgments dismissing the plaintiffs' appeals, from which the plaintiffs appealed to this court. *Held* that the trial court properly found in favor of B on all of the issues and rendered judgments dismissing the plaintiffs' appeals; because the trial court's memorandum of decision thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a proper statement of the facts and the applicable law on the issues.

Argued December 4, 2017—officially released March 20, 2018

Procedural History

Two appeals from the orders of the Probate Court for the district of Middletown admitting a certain will and determining, inter alia, the revocability of a certain trust, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the plaintiffs' motion to consolidate; thereafter, the matter was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgments dismissing the appeals, from which the plaintiffs appealed to this court. *Affirmed.*

Carmine Perri, for the appellants (plaintiffs).

Joseph A. Hourihan, with whom, on the brief, were *Teresa Capalbo* and *Annette Smith*, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiffs, Andrew Bassford, Zelda W.B. Alibozek, and Jonathan Bassford, appeal from the judgments of the trial court, dismissing their consolidated appeals from the Court of Probate for the district of Middletown. On appeal, the plaintiffs claim that the trial court erred as a matter of law by concluding that the decedent, William W. Bassford, an involuntarily conserved person, (1) was competent (a) to revoke a certain trust he had settled and (b) to receive and retain interest in real property, (2) had the testamentary capacity to execute a will, and (3) was not under the undue influence of the defendant Frances Z. Bassford.[1] We affirm the judgments of the trial court.

The following procedural history underlies the appeal to this court. The decedent, a physician and World War II veteran, died on February 19, 2014. The plaintiffs are children of the decedent and his first wife, who

[1] The defendants at trial were Frances Z. Bassford, the decedent's widow; Theodore V. Raczka, an attorney, temporary administrator of the estate of the decedent; and Henry L. Long, Jr., and William Long, trustees of the William W. Bassford Irrevocable Trust. Frances Z. Bassford is the only

predeceased him. The defendant is the decedent's third wife and, at the time of his death, had been married to him for more than thirty years.

Prior to his death, the decedent suffered increasingly from physical and psychiatric ailments, which required hospitalizations in the Institute of Living in Hartford, where he responded well to medical treatment. In October, 2011, the defendant filed an application for the appointment of a conservator of the decedent's person and estate. Although the plaintiffs agreed that a conservator should be appointed for the decedent, they disagreed that the defendant should be his conservator. On November 14, 2011, following a hearing, the Probate Court appointed the defendant to be the decedent's conservator. Conflict between the parties continued.

Although the decedent had executed a last will and testament many years prior to his death, he executed a new will on May 7, 2012 (2012 will). In his 2012 will, the decedent distributed various items of personal property to Andrew Bassford, Zelda W.B. Alibozek, and certain of his grandchildren, and $1 to Jonathan Bassford. The remainder of his estate he left to the defendant. The plaintiffs contested the admission of the will to probate and challenged its validity on the basis of the decedent's alleged lack of testamentary capacity and the alleged exercise of undue influence on the part of the defendant. Following a two day hearing, the Probate Court found that the 2012 will had been executed properly, that the plaintiffs had failed to prove by clear and convincing evidence that the defendant had exercised undue influence over the decedent in executing the 2012 will, and that the decedent had the testamentary capacity to execute the 2012 will. The Probate Court admitted the 2012 will to probate and named the defendant executrix of the decedent's estate.

defendant who is a party to this appeal, and in this opinion, we refer to her as the defendant.

On July 7, 2006, the decedent settled the William W. Bassford Irrevocable Trust (trust) that held title to the home in which he and the defendant resided and to an individual retirement account, but on June 25, 2012, the trustees reconveyed the property in the trust to the decedent. Following the decedent's death, the plaintiffs asked the Probate Court to determine title to the trust's holdings. Specifically, the Probate Court was asked to determine whether the trust was irrevocable, thus invalidating the trustees' conveyance of the real property back to the decedent, and whether the decedent had the capacity to revoke the trust and receive property from it. The Probate Court found, pursuant to the articles of the trust, as opposed to the title of the trust instrument, that the trust was revocable and that the decedent, despite being a conserved person, was capable of receiving the property in the trust.

On December 22, 2014, the plaintiffs commenced an appeal from the Probate Court's decision regarding the trust, in part claiming that the court erred in failing to find that the trust was unambiguously irrevocable. On March 31, 2015, the plaintiffs commenced an appeal from the Probate Court's decision regarding the 2012 will, in part claiming that the court erred in admitting the will to probate. Thereafter, the plaintiffs filed a motion to consolidate the probate appeals, which was granted by the court, *Domnarski, J.*

The court, *Hon. Barbara M. Quinn*, judge trial referee, tried the probate appeals in December, 2015. The issues before the court were (1) whether the decedent lacked testamentary capacity to execute the 2012 will, (2) whether the trust was irrevocable and therefore its revocation was improper, (3) whether the decedent lacked the capacity to accept the deed for the property held by the trust, and (4) whether the defendant had exercised undue influence in securing the execution of the 2012 will. The court issued a memorandum of decision on March 24, 2016, in which it found in favor

of the defendant on all of the issues and dismissed the appeals. The plaintiffs appealed to this court.

The claims raised by the plaintiffs in this court are the same claims they raised in the trial court. We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgments of the trial court should be affirmed. Because the trial court's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the facts and the applicable law on the issues. *Bassford* v. *Bassford*, Superior Court, judicial district of Middlesex, Docket Nos. CV-15-6012903-S and CV-15-6013338-S (March 24, 2016) (reprinted at 180 Conn. App. 335). 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); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgments are affirmed.

APPENDIX

ANDREW BASSFORD ET AL. *v.* FRANCES Z. BASSFORD*

Superior Court, Judicial District of Middlesex
File Nos. CV-15-6012903-S and CV-15-6013338-S

Memorandum filed March 24, 2016

Proceedings

Memorandum of decision on plaintiffs' appeals from orders of Probate Court for district of Middletown determining revocability of decedent's trust, title to cer-

* Affirmed. *Bassford* v. *Bassford*, 180 Conn. App. 331, A.3d (2018).

tain real property and admitting decedent's will. *Appeals dismissed.*

Carmine Perri and *Taylor J. Equi*, for the plaintiffs.

Joseph A. Hourihan, for the defendant.

Opinion

HONORABLE BARBARA M. QUINN, JUDGE TRIAL REFEREE. In these two consolidated cases, the plaintiffs, Andrew and Jonathan Bassford and Zelda Alibzek, have appealed from the admission of their father's will to probate and from the revocation of a trust as well as the validity of a quitclaim deed thereafter executed by the trustees, all in furtherance of their father's estate plan. They claim that they are aggrieved parties and that: (1) the decedent, their father, Dr. William W. Bassford, lacked testamentary capacity at the time of the execution of his last will and testament; (2) a trust Dr. Bassford had earlier established was irrevocable, and therefore, its revocation was improper and of no effect. The trust assets could therefore not properly be conveyed and become part of the decedent's estate; (3) that the decedent lacked the capacity to accept the deed for property held in the purportedly irrevocable trust; (4) and there was undue influence exerted by the defendant, his surviving widow and their stepmother, in securing the execution of the new will. For the reasons set forth in detail below, the court finds all issues in favor of the defendant and dismisses these appeals.

I

BACKGROUND

From the reliable, probative and credible evidence, the court finds the following facts. The defendant, Dr. Bassford's widow, is his third wife and at the time of his death on February 19, 2014, Dr. and Mrs. Bassford had been married for thirty-three years. The defendant, Frances Bassford, became Dr. Bassford's conservatrix when he was involuntarily conserved in November

2011. Dr. Bassford's three children are his children from his first marriage, and by their conduct at trial, were not close to their stepmother. Dr. Bassford executed a will in 2006 in which the bulk of his estate was left to his three children. On May 7, 2012, he executed a new will in which he changed his estate plan to leave the bulk of his estate to his wife, with certain articles of personal property to two of his three children and some of his grandchildren, and one dollar to his son, Jonathan. The will of May 7, 2012, was duly admitted to probate, after findings made by Judge Marino that Dr. Bassford possessed sufficient testamentary capacity to execute the new will. He also found that the will was executed with the necessary statutory formalities. In addition, he determined that there was no evidence of undue influence by Frances Bassford, as claimed by Dr. Bassford's children. This appeal ensued.

Additionally, Dr. Bassford's children challenged the revocation of the trust established by Dr. Bassford as well as his acceptance of a deed to real estate from the trustees. Judge Marino held the trust to be revocable and that Dr. Bassford could receive the deed to the real estate in Cromwell on which his home was located and in which he resided. An appeal was taken to the Superior Court and the two appeals are now consolidated.

II

JURISDICTION AND AGRRIEVEMENT

When considering an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. "In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Internal quotation marks omitted.) *State* v. *Gordon*, 45 Conn. App. 490, 494, 696 A.2d 1034, cert. granted on other grounds, 243 Conn. 911, 701 A.2d 336 (1997) (appeal dismissed October 27, 1998).

The trial court does not have "subject matter jurisdiction to hear an appeal from probate unless the person seeking to be heard has standing. . . . In order for an appellant to have standing to appeal from an order or decree of the Probate Court, the appellant must be aggrieved by the court's decision. General Statutes § 45a-186 . . . . Aggrievement falls within two categories, classical and statutory. . . . Classical aggrievement exists where there is a possibility, as distinguished from a certainty, that a Probate Court decision has adversely affected a legally protected interest of the appellant in the estate. . . . Statutory aggrievement exists by legislative fiat which grants an appellant standing by virtue of particular legislation, rather than by judicial analysis of the particular facts of the case. . . . It merely requires a claim of injury to an interest that is protected by statute." (Citations omitted; internal quotation marks omitted.) *Kucej* v. *Kucej*, 34 Conn. App. 579, 581–82, 642 A.2d 81 (1994), overruled in part on other grounds by *Heussner* v. *Hayes*, 289 Conn. 795, 807, 961 A.2d 365 (2008); see also *Marchentini* v. *Brittany Farms Health Center, Inc.*, 84 Conn. App. 486, 490, 854 A.2d 40 (2004).

In this instance, Dr. Bassford's three children would have received a different and greater portion of their father's estate had the Probate Court ruled in their favor. By its contrary ruling, each of Dr. Bassford's children is classically aggrieved. They each have standing to prosecute these appeals and the court has jurisdiction to hear these appeals.

III

FACTS AND DISCUSSION

A

Burdens of Proof, Due Execution of Will And Testamentary Capacity

Our law provides that "[a]n appeal from probate is not so much an appeal as a trial de novo with the

Superior Court sitting as a Probate Court and restricted by a Probate Court's jurisdictional limitations. . . . At the trial de novo, a will's proponent retains the burden of proving, by a preponderance of the evidence, that the will was executed in the manner required by statute. . . . The proponent must prove anew that the will's execution was in compliance with the statute in effect at the time it was executed. . . . To be valid, [a] will must comply strictly with the requirements of [the] statute. . . . Because the offer for probate of a putative will is in essence a proceeding *in rem* the object of which is a decree establishing a will's validity against all the world . . . the proponent must at least make out a *prima facie* case that all statutory criteria have been satisfied even when compliance with those criteria has not been contested." (Citations omitted; emphasis added; internal quotation marks omitted.) *Gardner* v. *Balboni*, 218 Conn. 220, 225–26, 588 A.2d 634 (1991).

In this case, the proponent of the will is the defendant, Mrs. Bassford. Connecticut General Statutes § 45a-251 governs the proper execution of a will and provides in pertinent part: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence . . . ." The facts demonstrate unequivocally that Dr. Bassford's attorney, Attorney Annette V. Willis, brought two witnesses into the home and Dr. Bassford signed the will in their presence. While on some points the witnesses' subsequent testimony by way of deposition transcripts reflects their lack of detailed recall, such testimony is inadequate to overcome both Attorney Willis' direct testimony to the events of that day as well as the contents of their sworn affidavit on the bottom of the will that they state under oath that they: "attested the within and foregoing Will . . . and subscribed the same in his presence and at his request and in the presence of each other; that the

said Testator signed, published and declare the said Instrument as and for his Last Will and Testament in our presence on this 7th day of May, 2012; and at the time of the execution of said Will said Testator was more than eighteen years of age, was able to understand the nature and consequences of the document and was under no improper influence or restraint to the best of our knowledge and belief . . . .[1]

Contrary to Plaintiffs' arguments, the will was properly executed in accordance with the statutory requirements. The court finds, from the relevant and probative evidence, that the defendant has met her burden of proof of the due execution of the will.

The proper execution of Dr. Bassford's will is only the first of the plaintiffs' several challenges to the will's effectiveness and admission to probate. The major issue in this appeal is Dr. Bassford's capacity to make a will. General Statutes § 45a-250 provides that: "Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will." "The burden of proof in disputes over testamentary capacity is on the party claiming under the will." *Stanton* v. *Grigley*, 177 Conn. 558, 564, 418 A.2d 923 (1979). The defendant in this case has this burden as well.

"What constitutes testamentary capacity is a question of law. . . . To make a valid will, the testatrix must have had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will, at the very time she executed it. . . . Whether she measured up to this test is a question of fact for the trier." (Citations omitted.) *City National Bank Trust Co.'s Appeal*, 145 Conn. 518, 521, 144 A.2d 338 (1958).

[1] Exhibit A and Exhibit 71, copies of Dr. Bassford's Last Will and Testament, dated May 7, 2012.

Our law provides that it is a testator's capacity at the time of the will execution that is relevant. "The fundamental test of the testatrix's capacity to make a will is her condition of mind and memory at the very time when she executed the instrument. . . . While in determining the question as to the mental capacity of a testator evidence is received of his conduct and condition prior and subsequent to the point of time when it is executed, it is so admitted solely for such light as it may afford as to his capacity at that point of time and diminishes in weight as time lengthens in each direction from that point." (Citations omitted.) *Jackson* v. *Waller*, 126 Conn. 294, 301, 10 A.2d 763 (1940).[2]

The decedent, Dr. Bassford, as the medical evidence and other testimony demonstrates, was a person who suffered from severe anxiety and depression as well as post-traumatic stress disorder from his service in World War II. None of the parties dispute that he suffered from some mild to moderate dementia, had impaired hearing and was susceptible to frequent urinary tract infections from his Foley catheter, which had been in place for over nineteen years at the time of his death. Due to the drug treatment Dr. Bassford received for anxiety, he became dependent on benzodiazepine, specifically Lorazepam.[3] The use of this drug is known to cause some impairment of general cognitive function, as well. When he suffered from urinary tract infections, he would become delirious and require hospitalization.

[2] It is for these legal reasons, that most of Dr. Bassford's medical records dating from 2006 through 2011 are not highly relevant to the issue of his testamentary capacity on May 7, 2012. They are all simply too remote in time.

[3] Many exhibits concerning Dr. Bassford's medical condition were introduced, which detailed his various conditions including his medication history, starting from 2006 forward. Those records reflect that on a number of occasions, his doctors attempted to reduce his Lorazepam dosage and dependence, with resulting significant increases in his anxiety levels. Each such attempt ended when his treaters reluctantly acquiesced in his use of this drug at the dosages required to keep him calm and stable.

Treatment with antibiotics stabilized him quickly and he returned to his former functioning state.

Dr. Bassford became concerned about the distribution of his monthly Veterans Administration pension payments and his estate in 2011. The defendant in these appeals, Mrs. Bassford, then commenced an involuntary conservatorship proceeding to have Dr. Bassford conserved. Attorney Willis was appointed to represent Dr. Bassford in October, 2011, by the Probate Court. She had not met him prior to her appointment by the court.

From Attorney Willis' testimony, the court finds that in October of 2011, when she met him, Dr. Bassford was eloquent, well-spoken and coherent. He was oriented as to place and time. He was upset that his pension payments were going to his children. He was able to ask relevant and reasonable questions about the conservatorship. The court finds that Dr. Bassford was informed about the types of conservatorship possible, voluntary and involuntary. His counsel affirmed she was aware that he had memory deficits and anxiety and did not like to leave his home. Nonetheless, he was clear he wanted his wife to have full authority over his affairs and to help him secure his pension payments. When his counsel met with Dr. Bassford, after the preliminary social niceties, she met alone with Dr. Bassford. The defendant did not participate in the discussions and was not in the room when Attorney Willis and Dr. Bassford discussed his legal affairs and his pension payments.

Andrew Bassford testified to the fact that his father, at the time the veteran's pension benefits had earlier commenced, wanted his children to receive those benefits as they came from a time when he had not yet married the present Mrs. Bassford. There was some indication that at the commencement of the payments, they were deposited into Dr. Bassford's bank accounts

and then distributed to his children. By 2011, these benefits were being deposited into accounts no longer under Dr. Bassford's control.

At the time of the conservatorship, the court finds, such distributions were no longer what he desired. Even if, as the plaintiffs claim, there was tension between the family members and between Dr. Bassford and his wife,[4] there was ample opportunity for him to request different actions from his attorney, during their private meetings. He never did so, despite having multiple appointments with her. He emphasized how upset he was with his son, Jonathan, and his conduct. From this, the court finds, that his wishes at the time in question were as stated to his attorney. He wanted his veteran's pension to be paid into his own accounts for his use. In due course, the pension payments were rerouted from Dr. Bassford's children to Dr. Bassford's accounts.

During the time of the proceedings leading up to the conservatorship, Dr. Bassford informed Attorney Willis about his desire to change his will and the distribution of his estate. Once the conservatorship was completed, and over the course of the next several months after the conservatorship was granted, Attorney Willis began her work to carry out his wishes. There were at least three meetings for his lawyer to go over his estate plan and conduct a detailed review of his assets with him. It was during this time that Attorney Willis came to understand that there was a trust containing his interest

[4] The plaintiffs point to multiple medical records documenting such tension during times of medical stress, delirium and disorientation, as though such reports were the only correct and "true" evidence of Dr. Bassford's desires. They ignore and choose to discount all independent evidence of Dr. Bassford's expression of his desires on multiple occasions when he was alert and functioning well. Logically, they cannot have the evidence to support two such inconsistent notions, correct for purposes of demonstrating undue influence and that his "true desires" were not to benefit his wife, and on the other hand, that such delirium and reduced functioning is evidence of his lack of testamentary capacity and capacity to revoke his trust.

in the home in which the Bassfords resided in addition to a retirement account. Dr. Bassford's statements of his wishes regarding his estate remained consistent over these months and at each meeting with Attorney Willis. He never wavered or was confused about his desires. He was focused on adequately providing for his wife.

Dr. Bassford and Attorney Willis had a meeting in March, 2012, in his home. She spoke with him in detail about his assets and what he wanted to happen in his will and his general estate plan. At that time and earlier, he was and had been insistent that his son Jonathan only receive one dollar. Dr. Bassford wanted his treasured antiques to go to his other two children and some of his grandchildren. Subsequently, after the March appointment, Dr. Bassford and Mrs. Bassford prepared a list of those items of personal property, as Dr. Bassford's handwriting was a bit shaky. Attorney Willis reviewed that list with him in detail and had him sign it at their next meeting on April 26, 2012. The list[5] clearly specifies what is to be distributed and to whom and the last page is in his handwriting. In addition, on that day Dr. Bassford wrote out and signed a note indicating he only wished his son Jonathan to receive one dollar upon his death.[6] The court finds that the list and note represented Dr. Bassford's personal wishes.

Next, Dr. Bassford's general mental condition was evaluated, at Attorney Willis' request, by a psychiatrist, Dr. Jay A. Lasser, who subsequently issued a report and testified at the probate hearing as well as at trial. Dr. Lasser met with Dr. Bassford on April 26, 2012, and conducted a formal clinical interview. He previously had access to and had reviewed Dr. Bassford's extensive medical history. He confirmed that Dr. Bassford

[5] See Exhibit 34, signed on April 26, 2012.

[6] Exhibit 62, dated April 26, 2012.

had dementia, which was a slowly progressive and ongoing condition. He found Dr. Bassford to have memory deficits and, determined from recent medical records, that he had had episodes of delirium when he had urinary tract infections.[7] Dr. Lasser found that when Dr. Bassford's infections were treated, he returned to lucidity quickly. He found the episodes of infection-induced delirium had no residual impact on his baseline cognitive level, which he admitted was impaired. He agreed that Dr. Bassford's functioning fluctuated significantly from time to time, but that when he was well and not in the throes of an infection, he functioned at a stable level. In his professional psychiatric opinion, Dr. Bassford possessed the cognitive ability to know the nature and extent of his assets and what he wanted to have done with them.

On May 7, 2012, Dr. Bassford met with his counsel, Attorney Willis, and reviewed his will, the list of personal property contained within the will, his decision to leave his son Jonathan only one dollar and the other details of his will. He also reviewed his health care directive and independently noted some errors when it was presented to him. He corrected those errors himself, and initialed them. He then signed his will and the directive in front of two witnesses and Attorney Willis took his acknowledgment and signed the self-proving affidavit of the witnesses. From Attorney Willis' testimony, the court finds that he was functioning at his normal level on that day, that he was well-spoken, lucid and aware of the time and place. He understood her questions and directions. He knew the nature and extent

[7] While plaintiffs make much of the differences of opinion between the two experts, Dr. Jay A. Lasser and Dr. Harry E. Morgan, about the meaning of the word "pseudo-dementia," the court finds the insistence on one expert's definition over the other to have no particular weight in these proceedings. An expert is entitled to his definition as he uses it and it is that expert's use of the term that controls.

of his estate and how he wanted it distributed. Those statements and wishes were consistent with those he had expressed in the months leading up to the execution of his last will and testament.

Plaintiffs called a psychiatric expert, Dr. Harry E. Morgan, who reviewed Dr. Bassford's extensive multiyear medical records, but did not meet with him personally. In general, his opinion was that Dr. Bassford did not have sufficient capacity to execute a will. He particularly focused on the impairments to his executive functions and the tests which demonstrated his deficits. Dr. Morgan's expert testimony, despite his evident expertise, is not persuasive on this conclusion, the court finds, based both on his lack of opportunity to personally observe Dr. Bassford and his testimony about the actions Dr. Bassford took on the day of the will execution. Dr. Morgan admitted that, if Dr. Bassford was able to make independent, unsolicited corrections to a legal document on the day of his will execution, then at that time, he possessed sufficient mental capacity to execute his will. The court has specifically found that he made such independent corrections to his health care directive on that day. Attorney Willis' testimony and the document reflect those independently made corrections.[8] Dr. Morgan's admissions are further evidence and support for the conclusion that Dr. Bassford knew and understood what he was about at the time he signed the will on May 7, 2012. The court finds, from all of the evidence, that Dr. Bassford, on May 7, 2012, had the requisite mental capacity to understand what he was signing. He knew the nature and extent of his estate and how he wanted his last will and testament to distribute that estate upon his death.

[8] See notations on Exhibit D, with Dr. Bassford's initials on all the corrections.

B

Nature of Trust and Its Revocation, Mental Capacity to Revoke

1

Nature of Trust and Revocation

The next legal task to be completed on Dr. Bassford's behalf was the revocation of the trust Dr. Bassford had established, so that terms of his estate plan, as he had outlined those wishes to Attorney Willis, could be accomplished. Plaintiffs first claim that it was not a revocable trust. Dr. Bassford established a trust on July 7, 2006 labeled the "William W. Bassford Irrevocable Trust." That trust, however, contained an Article Two, which specifically states that: "[n]otwithstanding anything herein contained, the Settlor explicitly reserves the following powers . . . 5. [t]o revoke this trust . . . ." While the plaintiffs argue that the title of the trust should control, rules of the construction of contracts indicate otherwise.

In general, it is hornbook law that where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. "[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000). "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not

torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) Id., 498.

In this trust, there is a conflict between the label used in the title "Irrevocable" and the direct provisions in Article Two. The rule has long been established that: "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." (Internal quotation marks omitted.) *Wilson* v. *Towers*, 55 F.2d 199, 200 (4th Cir. 1932).

The plaintiffs argue that the recital, that is to say the word "Irrevocable" in the title of this trust, should control. Such a construction would defeat the more detailed and operative terms of Article Two and therefore, the court finds, that the more detailed provisions more consistently carry out the settlor's intent and wishes, namely that he should be able to revoke the trust at his discretion. The court interprets and construes the trust to effectuate that intent and finds that it is a revocable trust.[9]

2

Mental Capacity to Revoke Trust

Next, plaintiffs challenge Dr. Bassford's mental capacity to revoke the trust. While separate from the

[9] The court has reviewed and notes the cases and statutes on which the plaintiffs rely in support of their argument that this is an irrevocable trust. Having determined the trust is revocable, the court does not review such cases and law further.

issue of testamentary capacity, these claims raise similar issues, although on such claims the plaintiffs have the burden of proof. The law on taking any action with respect to a trust requires the individual taking such action to have the mental capacity to undertake business. Such action requires a greater capacity than the ability to make a will. As noted in *Kunz* v. *Sylvain*, 159 Conn. App. 730, 123 A.3d 1267 (2015), a case with many similarities to the present case, there were two different standards for signing a will and taking action with respect to a trust. *Kunz* quoted *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 127, 129, 43 A.3d 759 (2012), that a person may have the mental capacity necessary to make a will although incapable of transacting business generally. See also *Turner's Appeal*, 72 Conn. 305, 44 A. 310 (1899). In *Kunz*, the court reviewed the task required of the settlor of the trust in amending it and found it was a simple matter. It held that the requisite mental capacity under the higher standard had been established.

A review of the relevant facts reveals that on June 14, 2012, Dr. Bassford was psychiatrically hospitalized at the Institute of Living. He was feeling more "anxious and more depressed over the past few weeks prior to admission" and "stated he was experiencing suicidal ideations."[10] The discharge note goes on to say that during the course of his stay, "[t]he patient was alert and oriented x3, but sometimes would become easily confused with multiple stressors and multiple parts of information."[11]

When Attorney Willis came to visit Dr. Bassford at the Institute, she brought her husband with her as a witness. She testified that, on that day, she had a question and answer session with Dr. Bassford that lasted

[10] Exhibit 93, Discharge Summary, Institute of Living, July 3, 2012, page 1.

[11] Ibid., page 2.

approximately twenty minutes. He was alert and not confused. She had advised Dr. Bassford that execution of the trust revocation awaited his discharge. Nonetheless, Dr. Bassford wanted to proceed and put the whole matter behind him as he knew that the will would not have the effect he intended without the revocation. He instructed her to proceed, despite her cautions. She recalled that she had reviewed the trust terms with him from memory and certainly the right to revoke the trust. On June 20, 2012, Dr. Bassford signed the revocation as well as his wife, Frances Bassford. Attorney Willis took their acknowledgments. Mrs. Bassford also testified to his functioning on that day and confirmed Attorney Willis' account of Dr. Bassford's lucidity.

The court finds that Dr. Bassford was functioning at his normal level on that day, and understood what he was about. The plaintiffs argue and stress that Dr. Bassford was not capable of making such a decision with the level of cognition and understanding required. Dr. Morgan, the plaintiffs' expert had testified that Dr. Bassford had ever increasing dementia and impairment of his executive functions, as well as acalculia, the inability to deal with numbers involving even a moderate level of complexity. And the Institute of Living discharge note of July 3, 2012, also talks about Dr. Bassford's rising levels of confusion with "multiple stressors and multiple parts of information."[12]

Nonetheless, the court finds that the task required of Dr. Bassford on that day in June, 2012, had been discussed and contemplated by him over the course of more than three months and his desire to complete his estate plan had not wavered or changed in any way. There were not "multiple stressors or multiple parts of information" for him to process with respect to the revocation of his trust. This was a simple task which

[12] Exhibit 93, Discharge note of July 3, 2012, Institute of Living, page 1.

did not require complex or interrelated decisions or numerical calculations. He simply needed to indicate his desire to revoke his trust. There were no facts in support of a finding that Dr. Bassford was confused about what was happening.

Plaintiffs stress that Attorney Willis failed to review with Dr. Bassford all relevant terms of the trust or bring the trust with her on that day. Specifically, they cite the need to review with him Articles Two, Three, Four and Thirteen.[13] The court begs to differ. All Dr. Bassford needed to know was his lawyer's opinion and her basis for concluding that the trust was revocable and what was necessary for him to do; that is as settlor, state his reasons for revoking the trust, revoke the trust and also request that his trustees take such action. As *Kunz* v. *Sylvain*, supra, 159 Conn. App. 730, suggests, the complexity of the task at hand is of relevance in the determination about a person's required level of functioning. On June 20, 2012, it is apparent, and the court finds, that Dr. Bassford clearly understood what was required and what task he was undertaking. It was a simple matter. He was not confused or uncertain but had been independently determined, even while so hospitalized, to proceed with this action and complete his estate plan. The court finds he had the greater mental capacity legally required to undertake this transaction.

The last steps to complete the transaction were required of Dr. Bassford's trustees. His trustees, William Long and Henry L. Long, Jr., were two longtime friends of Dr. Bassford's from his childhood.[14] Dr. Bassford had earlier requested that his counsel contact them about his wishes. This Attorney Willis accomplished by letter and the Long brothers visited Dr. Bassford while he

[13] See Exhibit 10 and the relevant articles set forth therein.

[14] Each of them testified that they had known Dr. Bassford for more than eighty years.

remained at the Institute of Living. Each of them stated that Dr. Bassford appeared his normal self and was able to carry on a conversation with them. According to Henry Long, Jr., when Dr. Bassford said what he wanted, he was going to do it, as this was his best friend. William Long testified, when questioned about the detailed recitals in the revocation instrument, he did not now recall, but that he would not have signed the document if the statements were not true. The recitals in the instrument are that Dr. Bassford requested the revocation of the trust, that he wished the real property contained in the trust to be reconveyed to him, that the Longs had personally conferred with Dr. Bassford and that they had read Dr. Lasser's report concerning Dr. Bassford's capacity to make a new will.[15] At trial in December, 2015, Henry Long recalled the letter sent to him by Attorney Willis and that it contained other information which he believed he must have read.[16] They subsequently signed the trust revocation some days after their visit with Dr. Bassford.

From the testimony of the Long brothers, Attorney Willis' testimony, the simple nature of the actions required, Dr. Bassford's awareness of the important connection of this document to his estate, as well as his sense of urgency on June 20, 2012, the court finds that Dr. Bassford had the requisite mental capacity to properly revoke the trust he had established in 2006. The plaintiffs' claims must fail, as they have not met their burden of proof.

C

Ability to Accept Deed

There remains the issue of Dr. Bassford's status as a conserved person, which implicates his ability to accept

[15] See Exhibit 89, signed by the Longs on June 25, 2012, before a notary.

[16] Exhibit 75, Letter dated May 18, 2012, which contains the information referenced sent by Attorney Willis to Henry and William Long.

the deed from his trustees conveying the revoked trust's interest in the real estate to him. As a preliminary matter, it is interesting to note that the probate decision by Judge Marino of November 21, 2014, holds that the involuntary conservatorship did not remove Dr. Bassford's right to take action with respect to his trust or to accept title to real estate.[17] Specifically, he stated that the issue of "Dr. Bassford's capacity to authorize revocation of the Trust and to accept a conveyance of property from the Trust is covered by [§] 45a-650 [(c)] of the Connecticut General Statutes. 'A conserved person shall retain all rights and authority not expressly assigned to the conservator.' " Those rights, he notes, were not specifically assigned to the conservator. The court agrees and finds that Dr. Bassford retained such rights and could, despite being a conserved person, request that the trustees revoke the trust and revoke it himself. Further, he could request they convey real estate to him.

Plaintiffs cite Connecticut General Statutes § 45a-653 in support of their proposition that Dr. Bassford could not accept the real property conveyed to him. The court finds this statutory section to be inapposite since it concerns conveyances of property by the proposed conserved or conserved person, not the situation before the court. The public policy of this statute is to protect a conserved person from depleting his or her assets, not adding to them, as results from the acceptance of a deed to property. Certainly, the specific right for trustees to convey property is set forth in the Connecticut Fiduciary Powers Act, General Statutes § 45a-234 (2). The court concludes there is no prohibition against a conserved person receiving title to real property from another source. Plaintiffs have not prevailed on this claim.

[17] Both Probate Court decisions are attached to the respective complaints filed by the plaintiffs in these appeals, and as such, are judicial admissions.

4

Undue Influence

Plaintiffs also claim that the defendant exerted undue influence in getting Dr. Bassford to sign a will leaving the bulk of his estate to her. The burden of proof on this issue remains with the plaintiffs. The law provides that:

"Undue influence is the exercise of sufficient control over a person, whose acts are brought into question, in an attempt to destroy his [or her] free agency and constrain him [or her] to do something other than he [or she] would do under normal control. . . . It is stated generally that there are four elements of undue influence:

"(1) a person who is subject to influence;

"(2) an opportunity to exert undue influence;

"(3) a disposition to exert undue influence; and

"(4) a result indicating undue influence. . . .

"Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction . . . consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [other] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth . . . failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties." (Citations omitted; internal quotation marks omitted.) *Pickman* v. *Pickman*, 6 Conn. App. 271, 275–76, 505 A.2d 4 (1986). See also *Lee* v. *Horrigan*, 140 Conn. 232, 237, 98 A.2d 909 (1953).

While it is true that Mrs. Bassford was Dr. Bassford's conservatrix, it has not been demonstrated that Dr. Bassford was a person subject to such influence nor susceptible to it. While Mrs. Bassford was in a position to exert such influence, the testimony of Attorney Willis and her independent observations of Dr. Bassford demonstrate that such influence was not exerted. Dr. Lasser also testified to the fact that Dr. Bassford was aware of his situation and clear about his wishes. There is no direct evidence of undue influence, and to the extent it may exist, it is inferential in nature; merely by the position of these parties as husband and wife in the twilight of their lives.

Direct evidence of undue influence is often not available and is not indispensable. See *Salvatore* v. *Hayden*, 144 Conn. 437, 440, 133 A.2d 622 (1957). But the mere opportunity to exert undue influence is not alone sufficient. There must be proof not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires. *Hills* v. *Hart*, 88 Conn. 394, 402, 91 A. 257 (1914). On all these points, the plaintiffs have failed to meet their burden of proof. There simply is no evidence. Their suspicions alone are not enough. On this claim, the court also finds for the defendant.

ORDERS

For all of the foregoing reasons, the plaintiffs' claims fail and the appeals are dismissed.

VICTOR MELENDEZ, JR. *v.* FRESH START GENERAL REMODELING AND CONTRACTING, LLC, ET AL.
(AC 39373)

Prescott, Bright and Eveleigh, Js.

Syllabus

The respondent G appealed to this court from the decision of the Workers' Compensation Review Board affirming the decision of the Workers'

Compensation Commissioner ordering G to pay workers' compensation benefits to the claimant, who allegedly had sustained injuries in a motor vehicle accident. Specifically, the motor vehicle accident occurred while the claimant was being driven by G's girlfriend to G's home where, for approximately eleven weeks, the claimant had performed certain work for G, including, inter alia, helping G move his residence, painting, cutting down trees, splitting and stacking wood, putting up Sheetrock, assisting with plumbing and laying tile. On appeal, G claimed that the board erred in concluding that the claimant was an employee of G and entitled to bring a claim against him individually under the Workers' Compensation Act (act) (§ 31-275 et seq.) and that G was afforded sufficient due process to hold him personally liable. *Held*:

1. G could not prevail on his claim that the board erred in affirming the commissioner's finding that the claimant was an employee of G under the act, which was based on his claim that because the claimant was not regularly employed for over twenty-six hours per week, he was excluded from coverage pursuant to § 31-275 (9) (B) (iv), and that the commissioner should have examined the hours worked by the claimant over a fifty-two week applicable period; because the claimant worked for G for approximately eleven weeks at the time of his injury, using a fifty-two week period was not a reasonable period of time to determine if the claimant was regularly employed by G, and, therefore, the commissioner properly examined the eleven week period of employment to determine what the usual practice was between the claimant and G, and found that the claimant had a consistent schedule over the eleven week period, working four to five days per week for approximately six to ten hours per day, for an average of thirty-eight and one-half hours per week, which supported the conclusion that the claimant, who was regularly employed during the applicable time period for more than twenty-six hours per week, was an employee of G entitled to benefits under the act.
2. This court declined to consider G's claim that the claimant was a casual laborer who was excluded from coverage under § 31-275 (9) (B) (ii), which provides that an employee entitled to benefits under the act shall not be construed to include any person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business; although G claimed that the commissioner improperly concluded that the claimant was not a casual laborer in light of the findings that the work at G's house had run its course and that the working arrangement between G and the claimant was intended to be short-term, a party seeking to challenge a finding of the commissioner as incorrect must do so by filing a motion to correct the challenged finding, and because G did not file a motion to correct any of the commissioner's findings following the operative finding and award, nor did he show good cause for failing to file such a motion, the commissioner was deprived of the opportunity to correct the findings or to

supply omitted facts to those conclusions that G claimed were incorrect or inconsistent.

3. G could not prevail on his claim that he was deprived of due process because he was not given reasonable notice that the claimant sought to hold him personally liable and because he was not mailed a notice of the pro forma formal hearing and the deadline to submit a brief and proposed findings on the issue of personal liability; upon receipt of a form 30C that listed G as the claimant's employer, G was put on notice that he, as an individual, was potentially liable to be found as the employer of the claimant, and even if G was deprived of due process prior to a 2013 finding and award because he was not afforded notice of the pro forma formal hearing and an opportunity to file a brief and proposed findings on the issue of personal liability, G was not entitled to relief in this appeal because the 2013 finding and award was vacated and was not the operative award in this appeal, and G suffered no due process deprivation with regard to a 2015 finding and award that he challenged in this appeal, as he had a full and fair opportunity to be heard on the issue of personal liability when he was given an opportunity to submit a brief and proposed findings to the commissioner prior to the 2015 finding and award.

Argued November 30, 2017—officially released March 20, 2018

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Eighth District ordering the respondent Michael Gramegna to pay workers' compensation benefits to the claimant, brought to the Workers' Compensation Review Board, which affirmed the commissioner's decision, and the respondent Michael Gramegna appealed to this court. *Affirmed.*

John L. Laudati, with whom, on the brief, was *P. Jo Anne Burgh*, for the appellant (respondent Michael Gramegna).

Jon D. Golas, for the appellee (claimant).

Opinion

EVELEIGH, J. The respondent, Michael Gramegna[1] appeals from the decision of the Workers' Compensation Review Board (board), affirming the decision of the

[1] Fresh Start General Remodeling & Contracting, LLC, and the Second Injury Fund are also named as respondents in this appeal. For the purposes of this opinion, any reference to the respondent is to Michael Gramegna only. No finding and award was entered with respect to Fresh Start Realty,

Workers' Compensation Commissioner for the Eighth District (commissioner) ordering the respondent to pay workers' compensation benefits to the claimant, Victor Melendez, Jr. The respondent claims that the board erred in concluding that (1) the claimant was an employee of the respondent and entitled to bring a claim against him individually under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., and (2) the respondent was afforded sufficient due process to hold him personally liable. We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. The claimant met the respondent in the fall of 2011. The claimant worked as a self-employed window washer, as well as a laborer, performing tasks such as roofing, siding and landscaping. At that time, the claimant and his girlfriend were expecting a child and the claimant was looking for additional work. The respondent owned several rental properties in the Manchester area and worked as a remodeling contractor. The respondent was the principal and sole member of two domestic limited liability companies, Fresh Start General Remodeling & Contracting, LLC (Fresh Start), and Fresh Start Realty, LLC, both of which list their business address at 122 Oakland Street in Manchester.

Around the end of October, 2011, the respondent hired the claimant to assist him in moving from his house in Manchester to a new house in Bolton. The claimant helped the respondent pack up items in the Manchester house and helped get the Bolton house

LLC. Any references to "Fresh Start" in this opinion are to Fresh Start General Remodeling & Contracting, LLC, which is not participating in this appeal.

Because neither the respondent nor Fresh Start possessed workers' compensation insurance coverage, the Second Injury Fund was added as an interested party to the matter. See General Statutes § 31-355 (h). The Second Injury Fund is not participating in this appeal.

ready for the move by cleaning up, painting and making the bathrooms functional. The respondent paid the claimant $8 an hour in cash for his labor because he did not have his own tools and required transportation to and from work each day. For a period of less than two weeks, the claimant assisted the respondent at a Fresh Start remodeling job in Avon. The Avon job was completed by November 17, 2011, and, thereafter, the claimant went back to helping the respondent with the residential move. The respondent and his girlfriend moved into the Bolton house at the end of November, but he continued to employ the claimant to help make the house livable. The claimant performed tasks such as cutting down trees, splitting and stacking firewood, painting, putting up Sheetrock, and assisting with plumbing and laying tile. For a period of approximately eleven weeks, the claimant generally worked four to five days a week for the respondent and earned an average of $300 a week.

On January 23, 2012, the claimant filed workers' compensation claims, pursuant to the act, which stemmed from injuries that he had sustained in a car accident that occurred on January 13, 2012, while he was being driven by the respondent's girlfriend to the respondent's Bolton home where he worked. In accordance with General Statutes § 31-294c (a), the claimant filed three form 30Cs[2] in order to commence the present action: the first directed to the respondent; the second directed to Fresh Start General Remodeling & Contracting, LLC; and the third directed to Fresh Start Realty, LLC.

On September 14, 2012, a formal hearing was held before the commissioner on the issue of compensability of the injuries sustained by the claimant as a result of

[2] "The workers' compensation commission created the form 30C for use in complying with § 31-294c (a)." *Mehan* v. *Stamford*, 127 Conn. App. 619, 626, 15 A.3d 1122, cert. denied, 301 Conn. 911, 19 A.3d 180 (2011).

the motor vehicle accident. Both the claimant and the respondent appeared at the contested hearing and testified as to the nature of the employment relationship, specifically, whether there was an employer-employee relationship between the claimant and Fresh Start on the date of the accident.[3] The record closed on November 26, 2012, with the claimant having submitted a brief. The respondent, however, did not submit a brief. On March 26, 2013, the commissioner issued a finding and award determining that both the respondent and Fresh Start were liable for the claimant's medical bills and certain benefits (2013 finding and award). On October 29, 2013, Fresh Start filed a motion to open the 2013 finding and award on the grounds that notice to it was sent to the incorrect address, and that the respondent was incorrectly named as a respondent. The respondent subsequently filed a brief in support of the motion to open, which claimed that, as a result of this clerical error, he did not understand that the claimant was pursuing the respondent in his personal capacity, he was never afforded the opportunity to fully respond to the claimant's claim and evidence, and he was not notified of the date to submit a brief and proposed findings. On March 18, 2015, the same commissioner, then acting for the eighth district, granted the motion to open, and

[3] For example, the following exchange occurred between the claimant and his attorney during direct examination:

"[The Claimant's Counsel]: [H]ow did you become employed by Fresh Start General Remodeling & Contracting?

"[The Claimant]: Mike, Michael Gramegna. . . .

"[The Claimant's Counsel]: And starting in October of 2011, did you start going to work for Fresh Start . . . General Remodeling & Contracting?

"[The Claimant]: Yes. . . .

"[The Claimant's Counsel]: How much was Mr. Gramegna or Fresh Start . . . going to pay you?

"[The Claimant]: $8 an hour.

"[The Claimant's Counsel]: And did they . . . actually pay you that amount of money?

"[The Claimant]: Yeah, he was paying me $8 an hour."

vacated the 2013 finding and award, which had determined that the respondent was personally liable for the claimant's medical bills and certain benefits.

On April 30, 2015, the respondent submitted proposed findings and a brief on the merits of the personal liability claim. The claimant elected to stand on his prior filings. On that same date, the commissioner deemed the record of the formal hearing closed and the matter submitted to the commissioner for a decision. The commissioner issued a finding and award on June 2, 2015, determining that the respondent was personally liable as the employer for the claimant's medical bills and payment of benefits under the act (2015 finding and award).

On June 22, 2015, the respondent appealed the commissioner's 2015 finding and award to the board. On June 10, 2016, the board affirmed the 2015 finding and award entered by the commissioner. This appeal followed. Additional facts will be set forth as necessary.

On appeal to this court, the respondent asserts that the claimant failed to prove that he was an employee of the respondent and subject to coverage under the act, and that the respondent was not afforded reasonable due process regarding any notice that he was potentially liable as an individual. In response, the claimant argues that the commissioner correctly found that the claimant was an employee within the meaning of the act, and that the respondent was afforded due process sufficient to hold him personally liable as the employer. We agree with the claimant and, accordingly, affirm the judgment of the board.

I

The respondent first claims that the board erred in affirming the commissioner's finding that the claimant was the respondent's "employee" under the act for two

reasons: (1) the claimant did not qualify for compensation under the act because § 31-275 (9) (B) (iv) excludes from the definition of employee any person engaged in any type of service in or about a private dwelling provided he is not "regularly employed" by the owner or occupier over twenty-six hours per week; and (2) the claimant was a casual laborer excluded from compensation by § 31-275 (9) (B) (ii).

As a threshold matter, we note that "[t]he principles that govern our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review . . . of an appeal from the commissioner is not a de novo hearing of the facts. . . . [T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of decisions of the board is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Passalugo* v. *Guida-Seibert Dairy Co.*,

149 Conn. App. 478, 482–83, 91 A.3d 475 (2014). "[Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board." (Internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 550, 108 A.3d 1110 (2015).

"The entire statutory scheme of the [act] is directed toward those who are in the employer-employee relationship as those terms are defined in the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act; a claimant . . . who is not an employee has no right under this statute to claim for and be awarded benefits." (Internal quotation marks omitted.) *Vanzant* v. *Hall*, 219 Conn. 674, 678, 594 A.2d 967 (1991). Section 31-275 (9) (A) defines "employee" as "any person who . . . (i) [h]as entered into or works under any contract of service or apprenticeship with an employer . . . ." Section 31-275 (9) (B) expressly excludes from this definition in subparagraph (ii) "[o]ne whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business," and in subparagraph (iv) "[a]ny person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week."

A

With this background, we first address the respondent's claim that the claimant was not regularly employed for over twenty-six hours per week and, thus, was excluded from coverage under the act pursuant to § 31-275 (9) (B) (iv). The respondent argues that the commissioner should have examined the hours worked by the claimant over a fifty-two week applicable period

as set forth in *Smith* v. *Yurkovsky*, 265 Conn. 816, 830 A.2d 743 (2003).

In *Smith*, our Supreme Court interpreted the phrase "regularly employed" in § 31-275 (9) (B) (iv), and rejected the use of averaging the hours per week worked by the claimant as a means to determine regular employment. Id., 821. "Instead of employing averaging, the commissioner should examine the number of hours actually worked by the [claimant]. We conclude that regular employment is to be determined by the employer's usual practice in using an employee for a majority of the applicable time period. We look to the practice during the majority of the applicable period because we have construed regular employment to be that which is done most of the time. When it is said that an employer regularly employs an employee, *it is meant that he usually does so, or that he does so most of the time, so that such employment becomes the rule and not the exception*." (Emphasis in original; internal quotation marks omitted.) Id., 826–27. The court also held that fifty-two weeks, or one full year, was the time period that was reasonable for determining whether the claimant in that case was "regularly employed" under the act. Id., 821.

The present case, however, is distinguishable from *Smith* because of the difference in the length of employment between the claimant in *Smith* and the claimant in the present case. The claimant in *Smith* had worked for the respondents as a part-time home health aide from July 1, 1995, through April 16, 1998; initially, the claimant worked between four to nine hours per week, but her hours increased substantially during tax preparation season each year. Id., 818. The court utilized a fifty-two week period in order to "moderate the effect of seasonal and temporary impacts on employment status." Id., 827. By contrast, the claimant in the present

case had only worked for the respondent for approximately eleven weeks at the time of his injury. The holding in *Smith* requires the commissioner to determine what the "usual practice" was or what was done "most of the time." Id. The fifty-two week period used in *Smith* is not a reasonable time period to determine if the claimant in the present case was regularly employed by the respondent. The commissioner, therefore, properly examined the eleven week period of employment to determine what the usual practice was between the respondent and the claimant.

The commissioner found that the claimant had a consistent schedule over the eleven week period, worked an average of thirty-eight and one-half hours per week, and that his average weekly wage was $310. The commissioner also found that the claimant worked four to five days each week for approximately six to ten hours per day. These facts support the commissioner's conclusion that the claimant was an employee of the respondent entitled to benefits under the act. Although the commissioner found that "most of the claimant's work was performed for purposes not associated with [the respondent's] trade or business," he was regularly employed during that time for more than twenty-six hours per week. We already have concluded that the commissioner's decision did not result from an incorrect application of the law to the subordinate facts, and we now conclude that the decisions did not result from an inference illegally or unreasonably drawn from them.[4] Therefore, the commissioner's conclusions on this issue must stand.

B

We next address the respondent's claim that the claimant was a casual laborer who was excluded from

[4] See, e.g., *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 276–77, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012) (commissioner's conclusions must stand where burden of proof for affirmative defense correctly

coverage under the act pursuant to § 31-275 (9) (B) (ii). In challenging the board's decision, the respondent argues that the commissioner's finding that the claimant was not a casual laborer is not supported by the evidence. An employee is barred from compensation under the act if the employment is both casual in nature and not for the purposes of the employer's trade or business. *Vanzant* v. *Hall*, supra, 219 Conn. 678; see also *Thompson* v. *Twiss*, 90 Conn. 444, 452, 97 A. 328 (1916). Under the act, casual employment means "the occasional or incidental employment, the employment which comes without regularity." *Thompson* v. *Twiss*, supra, 451. "Ordinarily . . . where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of continuing for a reasonable time, the employment is not casual." (Internal quotation marks omitted.) *Pallanck* v. *Donovan*, 105 Conn. 591, 594, 136 A. 471 (1927).

The respondent specifically challenges as incorrect the commissioner's conclusion that the claimant was not a casual laborer in light of the findings that the work at the respondent's house "had pretty much run its course" and that the arrangement between the respondent and the claimant "was intended to be short-term." The respondent argues that there are no findings as to the parties' expectations as to how long the working relationship would have continued if the accident had not occurred to support the conclusion that the claimant was not a casual laborer.[5] Thus, the respondent

placed on respondent, and facts supported conclusion that respondent had not met either prong of intoxication affirmative defense).

[5] The board also noted the incomplete record on this issue, stating: "We concede that the record is devoid of testimony which would illuminate the parties' expectations regarding how long the employment relationship might have continued had it not been terminated by the motor vehicle accident of January 13, 2012." Nevertheless, the board concluded that the commissioner's finding that the claimant was not a casual laborer was adequately supported by the record.

urges this court to remand the matter to the commissioner with direction to decide the issues in the respondent's favor. We disagree.

A party seeking to challenge a finding of the commissioner as incorrect or incomplete must first do so by filing a motion to correct the challenged findings. "A motion to correct the commissioner's finding, as provided in § 31-301-4[6] of the Regulations of Connecticut State Agencies, is the proper vehicle to be used when an appellant claims that the commissioner's finding is incorrect or incomplete. We have long held that this motion is not merely a technical requirement and that the failure to file this motion justifies dismissal of an appeal, for if an appellant claims that the finding is incorrect, the matter should first be called to the attention of the commissioner that he may have an opportunity to supply omitted facts or restate findings in view of the claims made in the motion." (Footnote altered; internal quotation marks omitted.) *Vanzant* v. *Hall*, supra, 219 Conn. 679; see also *Guerrera* v. *W. J. Megin, Inc.*, 130 Conn. 423, 425, 34 A.2d 873 (1943) (failure to file motion to correct finding of commissioner would, in itself, justify dismissal of appeal).

The respondent did not file a motion to correct any of the commissioner's findings following the 2015 finding and award, nor has he shown good cause for failing to file such a motion. The respondent has not availed himself of the opportunity to have the commissioner's finding and award corrected prior to his appeal of the board's affirmance of that award. He has thereby

[6] Section 31-301-4 of the Regulations of Connecticut State Agencies provides in relevant part: "If the appellant desires to have the finding of the commissioner corrected he must, within two weeks after such finding has been filed, unless the time is extended for cause by the commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for . . . ."

deprived the commissioner of the opportunity to correct the findings or supply omitted facts to those conclusions that the respondent claims are incorrect or inconsistent. See *Vanzant* v. *Hall*, supra, 219 Conn. 681. We, therefore, decline to consider the respondent's claim that the board improperly affirmed the commissioner's finding that the claimant was an employee under the act based on the exclusion in § 31-275 (9) (B) (ii) of casual laborers from the act's definition of employee.

II

The respondent also claims that he was deprived of due process because he was not given reasonable notice that the claimant sought to hold him personally liable and was not mailed a notice of the pro forma formal hearing[7] and the deadline to submit a brief and proposed findings on the issue of personal liability. In response, the claimant argues that the respondent was afforded due process because the claimant filed a form 30C that identified the respondent individually as the claimant's employer, and the respondent was afforded additional due process because the commissioner granted his motion to open and vacated the 2013 finding and award to allow him to file a brief and proposed findings. We agree with the claimant.

We now set forth the applicable standard of review and legal principles. "The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections. . . . The scope of the right to fundamental fairness in administrative proceedings, like the scope of the constitutional right to due process that it resembles, is a question of law over which our

[7] A pro forma hearing is one where a hearing is noticed for the submission of briefs and proposed findings of fact, but no party need appear. See, e.g., *Merenski* v. *Greenwich Hospital Assn., Inc.*, No. 5076, CRB 7-06-4 (June 18, 2007).

review is plenary." (Internal quotation marks omitted.) *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 149, A.3d (2018), citing *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 711, 99 A.3d 1038 (2014).

"Workers' compensation hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process. . . . A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Bidoae* v. *Hartford Golf Club*, 91 Conn. App. 470, 477, 881 A.2d 418, cert. denied, 276 Conn. 921, 888 A.2d 87 (2005), cert. denied, 547 U.S. 1112, 126 S. Ct. 1916, 164 L. Ed. 2d 665 (2006). "Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." (Internal quotation marks omitted.) *Bryan* v. *Sheraton-Hartford Hotel*, 62 Conn. App. 733, 740, 774 A.2d 1009 (2001). "An integral premise of due process is that a matter cannot be properly adjudicated unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . ." (Internal quotation marks omitted.) Id., 741.

The following additional facts are relevant to our disposition of this issue on appeal. In commencing the workers' compensation action, the claimant mailed three form 30Cs, one each to the respondent, Fresh Start, and Fresh Start Realty, LLC, all addressed to 122 Oakland Street in Manchester. The respondent resided at 65 Shoddy Mill Road in Bolton. Nevertheless, there is no dispute that the respondent received all three forms. Upon receipt of the form 30C that listed "Michael Gramegna" as the employer, the respondent was put

on notice that he, as an individual, was one of three respondents potentially liable to be found as the employer of the claimant. The respondent appeared and represented Fresh Start at the first formal hearing on September 14, 2012. At that hearing, the commissioner heard testimony from the claimant, the respondent, and several witnesses.

When the pro forma formal hearing for submission of briefs and proposed findings was scheduled for November 26, 2012, however, notice of the hearing was only sent to Fresh Start's business address, 122 Oakland Street in Manchester, rather than the respondent's residential address, 65 Shoddy Mill Road in Bolton. It is undisputed, and was a matter of public record, that the respondent had moved to Bolton with his family prior to the date of the claimant's injury, as the claimant helped the respondent move as part of his employment. The notice of the pro forma formal hearing lists "Mr. Michael Gramegna" as "Not Notified" under "Other(s)," and he is not listed as a respondent. On March 26, 2013, the commissioner issued the 2013 finding and award, which inconsistently referred to Michael Gramegna as "the respondent," or, alternatively, "the respondent's principal." The respondent received the 2013 finding and award at his Bolton address on April 8, 2013, and argues that this is the first time he understood that he could be held personally liable for the claimant's injuries.

Even if we assume, without deciding, that the respondent was deprived of due process prior to the 2013 finding and award because he was not afforded notice of the pro forma formal hearing and an opportunity to file a brief and proposed findings on the issue of personal liability, we conclude that the respondent is not entitled to relief in this appeal.[8] The 2013 finding and

[8] The commissioner reached the same conclusion in his March 18, 2015 written memorandum of decision, stating: "On the existing record, there are sufficient grounds to conclude that [the respondent] did not receive

award is not the operative award in this appeal, and, in fact, that decision was vacated. The respondent suffered no due process deprivation with regard to the 2015 finding and award that he now challenges. The respondent had a full and fair opportunity to be heard on the issue of personal liability when he was given an opportunity to submit a brief and proposed findings to the commissioner prior to the 2015 finding and award. The respondent submitted proposed findings and a brief to the commissioner on April 30, 2015. The respondent was also on notice from the 2013 finding and award that the claimant sought to hold him personally liable for the claimant's injuries.

On the basis of the forgoing, we conclude that the board properly concluded that the claimant was an employee subject to coverage under the act, and that the procedures used by the commissioner prior to the 2015 finding and award afforded the respondent sufficient due process to be held personally liable.

The decision of the Workers' Compensation Review Board is affirmed.

In this opinion the other judges concurred.

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notice of the pro forma formal hearing for submission of briefs and/or proposed findings." The commissioner then granted the motion to open and vacated the 2013 finding and award as to the respondent's personal liability to the claimant.