STATE OF CONNECTICUT *v.* MONTRELL BROWN
(AC 40553)

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

Syllabus

Convicted of the crimes of murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed. He claimed, for the first time on appeal, that the trial court committed plain error by providing inadequate jury instructions regarding eyewitness testimony and identification reliability. Specifically, he

claimed that the trial court, sua sponte, should have provided a jury instruction concerning the shortcomings and simple misconceptions about eyewitness testimony, in accordance with certain precedent from our Supreme Court. *Held* that the trial court did not commit plain error by failing to provide, sua sponte, an instruction to the jury concerning the reliability of eyewitness testmony: the defendant failed to explain or to demonstrate how the trial court's alleged error was obvious, readily discernible or resulted in prejudice, or that any manifest injustice occurred as a result of the alleged instructional omission where, as here, a witness was familiar with the defendant and other witnesses had seen the defendant in the neighborhood prior to the shooting and were certain about their identifications of him, as the identification of a person who is well known to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not well known to the eyewitness, and this case did not involve persons who were unfamiliar with each other; moreover, this court declined to exercise its supervisory authority over the administration of justice to review and reverse the defendant's conviction, as the defendant failed to establish a legal requirement for the trial court, in the absence of any expert testimony or a request from the defendant for such an instruction, to provide, sua sponte, an additional instruction about eyewitness testimony reliability, nor did he explain how such an alleged omission resulted in prejudice to him.

Argued January 12—officially released May 22, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, and tried to the jury before *Mullarkey*, *J.*; verdict of guilty; thereafter, the court rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

Robert E. Byron, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, Montrell Brown, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a) (1). The defendant claims that the trial court erred by providing inadequate jury instructions regarding eyewitness testimony and identification reliability, although his counsel did not make any request for such an instruction. Because the issue was not raised or preserved at trial, the defendant requests that this court reverse his convictions either pursuant to the plain error doctrine or by the exercise of our inherent supervisory powers over the administration of justice. We 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. Between 1 and 2 a.m. on July 27, 2013, near the intersection of Albany Avenue and Vine Street in Hartford, a group of people approached the victim, Edmond Johnson, Jr. This group included two individuals who were identified later as the defendant and his brother, Tremaine Jackson. The victim was shot multiple times and subsequently died from his injuries. Although spent shell casings, a bullet projectile, and live rounds were found near the scene, no gun was recovered.

Three eyewitnesses to the shooting identified the defendant as the perpetrator. The victim's mother, Elizabeth Johnson, also identified and placed the defendant near the location of the shooting shortly after it occurred.

Elizabeth Johnson testified that around 2 a.m. on July 27, 2013, she was walking to pick the victim up near the Ave Super Deli store, where he worked. She was

talking to him on her cellphone when she heard gunshots. She testified that as she approached the intersection of Albany Avenue and Burton Street, she saw two people who "looked like [the defendant] and his brother" walking past her on the other side of the street. On cross-examination, she stated that she did not know the defendant's name until after she found out what had happened to the victim.

Valentina Reyes owned the Ave Super Deli store located at the intersection of Albany Avenue and Vine Street. She testified, under subpoena, that around 1 a.m. on July 27, 2013, the victim had injured Jackson with a knife during an altercation. At some point thereafter, Jackson went into her store to wash his hands. The defendant came into the store briefly as well and interacted with Reyes before leaving. She testified that shortly before the shooting, she was in her car about to pick up her mother when she witnessed the defendant, Jackson, and two other individuals approach the victim on the other side of the street from her store. She witnessed the defendant, the only person she saw with a gun, shoot the victim approximately six times. The following day on July 28, 2013, Reyes submitted a written statement to the Hartford Police Department. She also was given separate photographic arrays from which she identified the defendant as the shooter and identified Jackson as being with the defendant when he shot the victim.[1]

[1] Attached to each photographic array is a separate "Hartford Police Department Witness Instructions Identification Procedures" form, which includes, inter alia, instructions on the identification procedure, date, time, and signatory sections, and an "eyewitness statement of confidence" section.

Reyes wrote in the statement of confidence section after identifying Jackson in the photographic array, stating, "[one thousand percent] that [Jackson], he was the one [the victim] sliced with a box cutter on the hand. [Jackson] was with [the defendant] when [the defendant] shot [the victim]." She additionally wrote in the statement of confidence section, after identifying the defendant in the photographic array, stating, "I'm [a thousand, one million percent sure] that [the defendant] is the killer [of the victim]."

Christopher Chaney, the victim's half-brother, testified that he also witnessed the shooting. He was in the parking lot of a store at the intersection of Albany Avenue and Vine Street when he heard and saw two or three individuals approach the victim. He heard someone tell the victim to put down a knife and then saw the defendant shoot the victim five times. Chaney also identified the defendant from a police photographic array approximately one month after the shooting.[2] Chaney testified that he knew the defendant as "Wolf" but was not friendly with him. On cross-examination, Chaney admitted that he was under the influence of marijuana on the night of the shooting. Detective Christopher Reeder testified that, approximately one month after the shooting, he had shown Chaney a photographic array containing Jackson's photograph, but Chaney was unable to identify him.

Lastly, Deneen Johnson also testified that she witnessed the shooting. Immediately prior to the shooting, she saw the victim walking along the other side of the street. She saw the victim get into an argument with two individuals, one with short hair and the other who was bald. The short-haired individual had a gun and used it to shoot the victim. Approximately one month later, Deneen Johnson gave a statement to the police and identified the defendant and his brother in separate police photographic arrays.[3] She also testified that she did not know the defendant and the other individual with him that night, but had seen them around. On cross-examination, she admitted that she had been drinking alcohol that night.

[2] Under the statement of confidence section, Chaney wrote "[t]he man with the gun" and "100 [percent] sure."

[3] In the statement of confidence sections after reviewing the photographic arrays, Deneen Johnson wrote that she was "100 [percent] sure" in identifying the defendant and Jackson.

Following a jury trial, the defendant was sentenced to a total of fifty-nine years incarceration with a twenty-five year mandatory minimum. This appeal followed.

On appeal, the defendant argues that the court committed plain error by not instructing the jury "in conformance with the findings and principles [of eyewitness identification] enunciated in *State* v. *Guilbert*, [306 Conn. 218, 49 A.3d 705 (2012)] . . . ." It is undisputed that the defendant's claim was not raised at trial, although *Guilbert* had been decided prior to the trial in this matter. The defendant requests that this court review his unpreserved claim under the plain error doctrine.[4] "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

[4] Both parties agree that claims of plain error are not precluded by a waiver pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). See *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017).

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 467–69, 93 A.3d 1076 (2014).

"[Our] Supreme Court has described that second prong as a stringent standard that will be met only upon a showing that, as a result of the obvious impropriety, the defendant has suffered harm so grievous that fundamental fairness requires a new trial." (Internal quotation marks omitted.) *State* v. *Jackson*, 178 Conn. App. 16, 21, 173 A.3d 974 (2017), cert. denied, 327 Conn. 998, 176 A.3d 557 (2018).[5] Furthermore, "[t]o prevail on a

[5] The plain error doctrine is an extraordinary remedy. In *State* v. *Jamison*, 320 Conn. 589, 600, 134 A.3d 560 (2016), our Supreme Court held: "[P]rior to the Appellate Court's decision in this case, no court of this state ever

had reversed a criminal conviction under the plain error doctrine on the basis of a trial court's failure to give an accomplice credibility instruction. This is no doubt attributable to the fact that, [i]n order to prevail under the plain error doctrine, the defendant [is] required to establish not only that his conviction . . . affects the fairness and integrity of and public confidence in the judicial proceedings . . . but that it is more probable than not that the jury was misled by the trial court's . . . error into [finding] him [guilty of the charged offenses]." (Internal quotation marks omitted.) Id. The defendant has not cited us to any Connecticut appellate case, other than *Jamison*, which was reversed by the Supreme Court, where the court found plain error as a result of a failure to provide a specific eyewitness instruction.

Moreover, this is not a case where the court made no charge to the jury concerning eyewitness identification. The eyewitness portion of the charge was comprehensive:

"The state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the crimes. In this case, they presented evidence that three eye witnesses identified the defendant in connection with the crimes charged. Identification is a question of fact for you to decide, taking into consideration all the evidence that you have seen and heard in the course of the trial. The identification of the defendant by a single witness as the one involved in the commission of the crime is, in and itself, sufficient to justify a conviction of such person, provided, of course, that you are satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime or crimes. In arriving at the determination as to the matter of identification, you should consider all the facts and circumstances that existed at the time the observation of the perpetrator by each witness. In this regard, the reliability of each witness is of paramount importance, since identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later. It is for you to decide how much weight to place upon such testimony.

"In appraising the identification of the defendant as the perpetrator by any witness, you should take into account whether the witness had adequate opportunity and ability to observe the perpetrator on the date in question. This will be affected by such considerations as the length of time available to make the observation; the distance between the witness and the perpetrator; the lighting conditions at the time of the offense; whether the witness had known or seen the person in the past; the history, if any, between them, including any degree of animosity; and whether anything distracted the attention of the witness during the incident. You should also consider the witness's physical and emotional condition at the time of the incident and the witness's power of observation in general.

"Furthermore, you should consider the length of time that elapsed between the occurrence of the crime and the identification of the defendant by the witness. You may also consider the strength of the identification, including the witness's degree of certainty. Certainty, however, does not mean accuracy. You should also take into account the circumstances under which the witness first viewed and identified the defendant, the suggestibility, if any,

claim of nonconstitutional plain error, the defendant must demonstrate that the trial court's improper action likely affected the result of his trial." (Internal quotation

of the procedure used in that viewing, any physical descriptions that the witness may have given to the police, and all the other factors which you find relating to the reliability or lack of reliability of the identification of the defendant. You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness. You may also take into account whether the identification of the defendant by the witness was a result of photos that were presented to the witness sequentially, one at a time, or whether the photographs of all potential suspects were presented to the witness simultaneously. The law has recently expressed a preference for sequential presentation of photographs but that preference is not binding upon you. Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator, in other words, the police officer showing the photograph, may increase the probability of misidentification. This information is not intended to direct you to give more or less weight to the eye witness identification evidence offered by the state. It's your duty to determine what weight to give to that evidence. You may, however, take into account this information, as just explained to you, in making that determination.

"You may consider whether the witness at any time failed to identify the defendant or made an identification that was inconsistent with the identification testified to at trial.

"Now you will subject the witness's testimony by an identification witness to the same standards of credibility that apply to all witnesses. When assessing the credibility of the testimony as it relates to the issue of identification, keep in mind not sufficient that the witness may be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find him guilty on any charge. In short, you must consider the totality of the circumstances affecting identification. Remember, the state has the burden to not only prove every element of the crime, but also the identity of the defendant as the perpetrator of the crime. You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime or crimes, or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the defendant, you will find the defendant not guilty."

Although not addressed by the state, we note that the court's instruction on this section is nearly identical to the criminal jury instructions found on the Judicial Branch website. See Connecticut Criminal Jury Instructions 2.6-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited May 16, 2018).

marks omitted.) *State* v. *Ortiz*, 71 Conn. App. 865, 872, 804 A.2d 937, cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002).

On appeal, the parties vigorously debate the accuracy of eyewitness testimony by referencing scholarly articles and scientific studies. Although we recognize that in some cases there may be issues regarding eyewitness testimony and identification reliability as discussed in *State* v. *Guilbert*, supra, 306 Conn. 218, the gravamen of the defendant's appeal is that the court erred in its instructions to the jury by failing to provide, despite the absence of a request from the defendant's counsel, an instruction that conformed "with what [our Supreme Court] has ruled about the vicissitudes and shortcomings and simple misconceptions about eyewitness testimony."[6] It is undisputed, however, that neither party offered expert testimony at trial concerning these issues. Nor does the defendant point to, and we have not found, any statute, rule or case law that mandates a trial court to provide, sua sponte, such an instruction to the jury.[7]

The defendant fails to explain or demonstrate how the court's alleged error was obvious or readily discernible. He also does not explain or demonstrate how such error resulted in prejudice given the facts of this case,

[6] The defendant does not claim on appeal that any of the witnesses actually *misidentified* him. The defendant did not provide to the court for inclusion in its charge, and has not provided to us, any specific proposed instructions or language delineating what he asserts was missing from, or is meant by, "the vicissitudes and shortcomings and simple misconceptions about eyewitness testimony" that allegedly was not included in the court's actual instructions. See footnote 5 of this opinion.

[7] *Guilbert* does not require courts to provide any specific jury instruction concerning eyewitness identification reliability; rather it permits the admission of expert testimony to educate jurors about the risks of misidentification. *State* v. *Guilbert*, supra, 306 Conn. 252; see also *State* v. *Williams*, 317 Conn. 691, 703–704, 119 A.3d 1194 (2015); *State* v. *Day*, 171 Conn. App. 784, 836 n.16, 158 A.3d 323 (2017).

where one witness knew him quite well over a two year period of time, allowed him to stay in her home, and interacted with him shortly prior to the shooting, and the others had previously seen him in the neighborhood prior to the shooting, and were certain of their identifications. See, e.g., *State* v. *Faust*, 161 Conn. App. 149, 186–88, 127 A.3d 1028 (2015) (defendant failed to establish prejudice when he argued trial court failed to instruct jury on lack of correlation between certainty and accuracy on eyewitness testimony), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016).

Reyes knew the defendant as "Bush" or "Bully Monster" for a "long time, maybe two years." The defendant had previously lived in her home. She had interacted with the defendant shortly after witnessing the altercation between the defendant's brother and the victim, and she also witnessed the shooting. "[A]lthough there are exceptions, identification of a person who is well known to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not well known to the eyewitness." *State* v. *Guilbert*, supra, 306 Conn. 259–60.

Chaney recognized the defendant as "Wolf," but did not know him personally nor was he friends with him. Although Deneen Johnson did not know the defendant, she saw him earlier "around that night" in the neighborhood before the shooting. This was not a case involving persons who were unfamiliar with each other.

Finally, the defendant did not demonstrate that any manifest injustice occurred as a result of the alleged instructional omission.[8] Because he has failed to demonstrate either a clear or patent error or that such error

[8] For example, in his argument for plain error, the defendant cites in his brief a lengthy section of *State* v. *Guilbert*, supra, 306 Conn. 234–45, and conclusorily states, "[t]hat is the argument for plain error." This provides an additional reason to affirm the judgment. See, e.g., *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124–25, 956 A.2d 1145 (2008) (defendant's claim deemed abandoned through inadequate briefing); *In re Shaun*

resulted in manifest injustice—requirements for the invocation of the plain error doctrine—we cannot conclude that the court committed plain error by failing to include, sua sponte, information on eyewitness testimony reliability, as described in *Guilbert*, in its instructions to the jury.

Alternatively, the defendant requests that this court invoke its inherent supervisory authority over the administration of justice to review and reverse his conviction. "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *Kervick* v. *Silver Hill Hospital*, 309 Conn. 688, 710, 72 A.3d 1044 (2013); see also *State* v. *Reyes*, 325 Conn. 815, 822, 160 A.3d 323 (2017) ("[t]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine" [internal quotation marks omitted]). The defendant has neither established a legal requirement for the court, in the absence of any expert testimony or a request from the defendant for such an instruction, to provide, sua sponte, an additional instruction about eyewitness testimony reliability as supposedly described in *Guilbert*, nor has he explained how such an alleged omission resulted in prejudice to him. We thus decline to exercise our inherent supervisory authority in this case.

The judgment is affirmed.

In this opinion the other judges concurred.

S., 137 Conn. App. 263, 275, 48 A.3d 74 (2012) (claim abandoned because of respondent's failure to analyze and brief claim adequately).

STATE OF CONNECTICUT *v.* EVAN J. HOLMES (AC 40677)

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

Syllabus

The defendant, who had been convicted of the crimes of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a pistol or revolver, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. The defendant's conviction stemmed from an incident in which he and S allegedly had forced their way into the apartment of the victim, and shot and killed the victim. The jury also had found the defendant guilty of manslaughter in the first degree with a firearm and burglary in the first degree, but the trial court vacated the defendant's conviction of those charges so as to avoid violating the double jeopardy protections of the federal and state constitutions. On appeal, the defendant claimed that the trial court erroneously found that his sentence for felony murder was based on the predicate offense of burglary, which the court had vacated. The defendant claimed that when his burglary conviction was vacated, his conviction of home invasion became the predicate offense for felony murder, which violated the federal and state constitutions because at the time he committed the offense of home invasion, it was not defined as a predicate offense for felony murder in the applicable statute (§ 53a-54c). *Held* that the trial court did not abuse its discretion when it denied the defendant's motion to correct an illegal sentence on the basis of its finding that the defendant's sentence for felony murder had been predicated on his conviction of burglary in the first degree; the jury returned a verdict of guilty on the charge of felony murder based on the predicate offense of burglary, as delineated in the long form information and the court's jury instructions, which did not mention home invasion, and even though the trial court later vacated the defendant's burglary conviction on double jeopardy grounds, that did not alter the fact that it remained the predicate offense for the felony murder charge and the defendant was not restored, as he claimed, to his pretrial status of being presumed innocent, as the court could have reinstated the defendant's burglary conviction if it later reversed the defendant's conviction of home invasion and, thus, it properly could rely on the vacated burglary conviction when sentencing the defendant for felony murder, and the fact that the jury returned a verdict of guilty on the charges of burglary in the first degree and felony murder demonstrated that the state had met its burden of proving all of the elements of burglary and that the victim's death was caused in the course of and in furtherance of that felony.

Argued February 8—officially released May 22, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, and of felony murder, home invasion, conspiracy to commit home invasion and burglary in the first degree; thereafter, the charge of criminal possession of a pistol or revolver was tried to the court; judgment of guilty; subsequently, the court vacated the verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a pistol or revolver, from which the defendant appealed; subsequently, the defendant filed a motion to correct illegal sentence while his direct appeal was pending; thereafter, the court, *Jongbloed, J.*, denied the motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Evan J. Holmes, *self-represented*, the appellant (defendant).

Paul J. Narducci, senior assistant state's attorney, with whom were *Sarah Bowman*, assistant state's attorney, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

DEWEY, J. The self-represented defendant, Evan J. Holmes, appeals from the judgment of the trial court

denying his motion to correct an illegal sentence.[1] On appeal, the defendant claims, in essence, that the court erroneously denied his motion to correct by finding that his sentence for felony murder had been based on the predicate offense of burglary, which the court had vacated pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013). We are not persuaded and, accordingly, affirm the judgment of the trial court.

In the defendant's unsuccessful direct appeal from his conviction, this court recited the following facts. See *State* v. *Holmes*, 176 Conn. App. 156, 159–61, 169 A.3d 264, cert. granted, 327 Conn. 984, 175 A.3d 561 (2017). Early in the morning of November 12, 2011, the defendant went to a club with friends, including Davion Smith. Id., 159–60. Outside the club, the defendant was involved in a fight with other party guests, including Todd Silva. Id., 160. After the fight, around 4 a.m. that same day, the defendant and Smith forced entry into the apartment where Silva and the victim, Jorge Rosa, lived. Id. The victim and his girlfriend, Gabriela Gonzales, who had previously been in a romantic relationship with the defendant, were asleep in the victim's bed. Id. "Gonzales awoke to find the defendant and Smith standing at the foot of [the] bed, each pointing a gun at the victim . . . . The defendant then fired ten shots from an automatic pistol at the victim, who died within a few minutes from numerous gunshot wounds . . . . The defendant and Smith subsequently fled the apartment." Id. Gonzales called 911. Id., 161. The police arrived, and Gonzales eventually told them "that the defendant had shot the victim" and described the defendant's car. Id. At about 9:30 a.m., a patrolman saw the defendant's car at a Days Inn. Id. When more police

[1] This was the defendant's second motion to correct. In August, 2014, the defendant had filed his first motion to correct, which the court denied. The defendant appealed, but withdrew his appeal before oral argument. His first motion to correct is not at issue in this appeal.

units arrived, the defendant attempted to flee. Id. A K-9 officer and his K-9, Zeus, assisted in apprehending the defendant in the parking lot. Id.

The defendant was charged in a substitute information with murder in violation of General Statutes § 53a-54a (a); felony murder in violation of General Statutes (Rev. to 2011) § 53a-54c; home invasion in violation of General Statutes § 53a-100aa (a) (2); conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa; and burglary in the first degree in violation of General Statutes § 53a-101 (a) (1).[2] The jury found the defendant not guilty of murder, but returned a verdict of guilty on the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a, and found the defendant guilty of felony murder, home invasion, conspiracy to commit home invasion, and burglary in the first degree. In December, 2013, at the defendant's sentencing hearing, the court vacated the convictions of manslaughter in the first degree with a firearm and burglary in the first degree as lesser included offenses of felony murder and home invasion, respectively, so as to avoid violating the double jeopardy protections of the federal and state constitutions.[3] See *State* v. *Polanco*, 308 Conn. 245 ("when

[2] The defendant also was charged with criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2011) § 53a-217, which count was severed from the other five counts. He waived his right to a jury trial, and the court found the defendant guilty of that charge. The defendant does not challenge his sentence for that conviction in this appeal.

[3] "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omitted.) *State* v. *Polanco*, supra, 308 Conn. 244 n.1.

Although the Connecticut constitution does not contain an express double jeopardy provision, article first, § 8, of the Connecticut constitution "offers double jeopardy protection that mirrors, but does not exceed, that provided

a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions"); see also *State* v. *Miranda*, 317 Conn. 741, 742, 120 A.3d 490 (2015) ("vacatur remedy prescribed in . . . *Polanco* . . . applies to the double jeopardy violation caused by cumulative homicide convictions arising from the killing of a single victim" [citation omitted]). The court sentenced the defendant to a total effective sentence of seventy years incarceration for his convictions of felony murder, home invasion, and conspiracy to commit home invasion.[4]

On March 1, 2017, during the pendency of the defendant's direct appeal from his conviction, the defendant filed a motion to correct pursuant to Practice Book § 43-22, arguing that his sentence for felony murder is illegal. The defendant premised his arguments on his understanding that when the court vacated his conviction of burglary in the first degree, his conviction of home invasion became the predicate offense for his sentence for felony murder. In 2011, when the defendant committed the offenses, the felony murder statute listed burglary, but not home invasion, as a predicate offense for felony murder. General Statutes (Rev. to 2011) § 53a-54c.[5] The defendant argued that, therefore, basing his sentence for felony murder on his home invasion conviction violated the ex post facto provision of the constitution of the United States and his due process rights under the state and federal constitutions. On April 27, 2017, the state filed an opposition to the defendant's

by the federal constitution." *State* v. *Miranda*, 317 Conn. 741, 743 n.1, 120 A.3d 490 (2015).

[4] The court sentenced the defendant to five years in prison on the charge of criminal possession of a pistol or revolver; see footnote 2 of this opinion; to be served concurrently with this sentence.

[5] The statute has since been amended to include home invasion. See Public Acts 2015, No. 15-211, § 3.

motion to correct,[6] arguing that the defendant's sentence for felony murder was not illegal because that conviction and sentence rested on his vacated conviction of burglary in the first degree, not on his home invasion conviction. The court held a hearing on May 4, 2017, and, agreeing with the state's reasoning, denied the defendant's motion to correct. This appeal followed. Additional procedural history will be set forth as necessary.

On appeal, the defendant claims, in essence, that the court erroneously denied his motion to correct by finding that his sentence for felony murder had been based on the predicate offense of burglary, which the court had vacated so as to avoid double jeopardy.[7] In response, the state argues that "[t]he vacatur of the

[6] On April 20, 2017, the defendant had filed a motion for a default judgment, arguing, in essence, that the state had failed to timely oppose his March, 2017 motion to correct. The court denied that motion at the defendant's hearing on his motion to correct, noting that it was "not aware of a particular time frame for these motions in terms of a response by the [s]tate."

[7] The defendant attempts to raise three additional claims in this appeal, the first two of which are nearly identical to those raised in his motion to correct. First, the defendant claims that his conviction and subsequent sentence for felony murder violated the ex post facto provisions of the constitution of the United States; see U.S. Const., art. I, § 9, cl. 3; U.S. Const., art. I, § 10, cl. 1; because home invasion was not a predicate offense for felony murder in 2011, when he committed the offenses. Second, the defendant claims, in essence, that the court violated his due process rights under the state and federal constitutions by depriving him of notice that his conviction of home invasion could serve as the predicate offense for his felony murder sentence. Because we hold that the court properly relied on the defendant's vacated burglary conviction, and not on his home invasion conviction, as the predicate offense for felony murder, we need not address these two claims.

Additionally, the defendant seemingly claims that the court improperly denied his motion for default. See footnote 6 of this opinion. Specifically, the defendant argues that the state failed to file a timely objection to his motion to correct, in violation of Practice Book § 66-2. Practice Book § 66-2, however, applies to appellate motions practice. The Practice Book sections that govern procedure in criminal matters do not contain any time requirements with respect to objections to motions to correct. See, e.g., Practice Book § 43-22 (correction of illegal sentence). Accordingly, this claim fails.

burglary verdict does not erase the fact that the jury found the defendant guilty of burglary and consequently of felony murder," and that thus, "the court's sentence on the [f]elony [m]urder count was valid and the trial court properly denied [the defendant's m]otion to [c]orrect an [i]llegal [s]entence." We agree with the state.

We begin by setting forth the standard of review and relevant law. "We review the [trial] court's denial of [a] defendant's motion to correct [an illegal sentence] under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 287, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These

definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243–44, 170 A.3d 139 (2017). "It is well settled that [t]he purpose of . . . § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition . . . . Thus, [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the [proceedings] leading to the conviction, must be the subject of the attack." (Citations omitted; internal quotation marks omitted.) *State* v. *Cruz*, 155 Conn. App. 644, 651, 110 A.3d 527 (2015).

At the court's hearing on the defendant's motion to correct, the defendant argued that at the sentencing proceeding, at the moment when "[t]he burglary is vacated . . . you rely on home invasion to be the predicate felony of felony murder. The moment you erased the burglary, home invasion became the underlying felony." The court disagreed, reasoning that "the jury found the defendant guilty of burglary in the first degree, as the predicate conviction for the felony murder charge. Simply because the court was required to vacate the conviction on the burglary first charge, pursuant to *State* v. *Polanco*, 308 Conn. 242 (2013), at the time of the sentencing, for double jeopardy purposes, that does not alter the fact that it remained the predicate for the felony murder charge. Under all of these circumstances then, the sentence was not an illegal sentence, and . . . the motion is denied." We now address whether the court abused its discretion when finding that a conviction, which the court had vacated as a lesser included offense of a greater offense pursuant

to *Polanco*, can serve as the predicate offense for felony murder.

In *State* v. *Polanco*, supra, 308 Conn. 263, our Supreme Court held "that a defendant's conviction for a lesser included offense that was previously vacated as violative of double jeopardy may be reinstated if his conviction for the greater offense subsequently is reversed for reasons not related to the viability of the vacated conviction." The court has further noted that, "[g]enerally, we see no substantive obstacle to resurrecting a cumulative conviction that was once vacated on double jeopardy grounds—provided that the reasons for overturning the controlling conviction would not also undermine the vacated conviction. . . . [A] jury necessarily found that all the elements of the cumulative offense were proven beyond a reasonable doubt. Put differently, although the cumulative conviction goes away with vacatur, the jury's verdict does not." *State* v. *Miranda*, supra, 317 Conn. 753–54.

In fact, with respect to felony murder, the state need not charge the defendant with the predicate offense, so long as the state proves all of the elements of that underlying offense. See, e.g., *State* v. *Johnson*, 165 Conn. App. 255, 269, 138 A.3d 1108 (defendant found guilty of felony murder where burglary was predicate offense sustaining felony murder conviction but defendant was not charged with burglary), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016);[8] see also *State* v. *Burgos*, 170 Conn. App. 501, 550–51, 562, 155 A.3d 246 (requiring vacatur of convictions of sexual assault in first degree and risk of injury to child as lesser included offenses of aggravated sexual assault of a minor, where both lesser included offenses had also served as predicate

[8] We note that courts of other jurisdictions have explicitly held that "it is not necessary . . . to charge a defendant separately with the underlying felony in order for a felony-murder instruction to obtain." See, e.g., *Stephens* v. *Borg*, 59 F.3d 932, 935 (9th Cir. 1995) (applying California law).

offenses for greater offense and greater offense remained viable after vacatur of predicate offenses), cert. denied, 325 Conn. 907, 156 A.3d 538 (2017). "The state must simply prove all the elements of the underlying felony and then prove that the deaths were in the course of and in the furtherance of that felony, or that the deaths were caused in flight from the commission of the felony." *State* v. *Johnson*, supra, 165 Conn. App. 269–70; see also *State* v. *Andrews*, 313 Conn. 266, 314, 96 A.3d 1199 (2014) ("[i]n order to sustain the conviction of felony murder, the record must reflect that the state proved beyond a reasonable doubt that the victim's death was caused in the course of and in furtherance of the predicate felony").

In the present case, at the time of the offense, General Statutes (Rev. to 2011) § 53a-54c provided in relevant part that "[a] person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit . . . burglary . . . and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants." Accordingly, in count two of the long form information, the state charged the defendant with felony murder as follows: "[A]nd said [a]ttorney further accuses [the defendant] with the crime of [f]elony [m]urder and charges that . . . [the defendant], acting alone or with another person . . . committed a burglary and in the course of and in furtherance of such crime, he . . . caused the death of another person . . . in violation of Section 53a-54c of said [s]tatutes." In count five, the state charged the defendant with burglary in the first degree. Although the state also charged the defendant with home invasion, count two did not allege that the defendant committed felony murder in the course of and in furtherance of home invasion.

Similarly, the court's instructions to the jury concerning felony murder did not mention home invasion. The court first instructed the jury as to the first count, murder, then stated that "[o]rdinarily, the court would follow the charge on the first count with the charge on the second count, but for reasons which will become obvious to you, I am now going to charge you with regard to the fifth count first and then I will charge you with regard to the second count." After instructing the jury on the fifth count, the court instructed the jury on the second count, in relevant part as follows: "[T]he first element is that the defendant, acting alone or with one or more other persons, committed or attempted to commit the crime of burglary. Proof of this element will depend on your deliberations pertaining to the fifth count on which I have already instructed you. If you find the defendant guilty of burglary in the fifth count, then this element of felony murder will be proven. If you find the defendant either not guilty on the fifth count or guilty of the lesser included offense of criminal trespass, then this element has not been proven and you must find the defendant not guilty on this count."

The jury returned a verdict of guilty on the charge of felony murder based on the predicate offense of burglary, as clearly delineated in the long form information and the court's jury instructions. Although the court later vacated the defendant's burglary conviction on double jeopardy grounds, he was not restored, as he argues in his brief to this court, to his pretrial status, a presumption of innocence. See *State* v. *Polanco*, supra, 308 Conn. 260 n.11 (vacatur does not alter verdict of guilty actually rendered). Because the court could have reinstated the defendant's burglary conviction, had it later reversed the defendant's conviction of home invasion "for reasons not related to the viability of the vacated conviction"; *State* v. *Polanco*, supra, 263; *State* v. *Miranda*, supra, 317 Conn. 754; it follows that the

court could rely on the vacated burglary conviction when sentencing the defendant for felony murder. To convict the defendant of felony murder in this case, the state needed only to "prove all the elements of [burglary] and then prove that the [death was] in the course of and in furtherance of that felony, or that the [death was] caused in flight from the commission of that felony." *State* v. *Johnson*, supra, 165 Conn. App. 269–70. That the jury returned a verdict of guilty on the charges of burglary in the first degree and felony murder demonstrates that the state met that burden. As our Supreme Court stated in *State* v. *Miranda*, supra, 317 Conn. 754, "although the cumulative conviction goes away with vacatur, the jury's verdict does not." Accordingly, the court did not abuse its discretion when it denied the defendant's motion to correct based on its finding that his sentence for felony murder had been predicated on the defendant's vacated conviction of burglary.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GHEORGHE DIJMARESCU
(AC 39745)

Alvord, Prescott and Bear, Js.

Syllabus

Convicted of the crime of breach of the peace in the second degree in connection with an incident in which he struck his wife, L, during an argument, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly admitted certain evidence of prior uncharged misconduct, which pertained to an incident in which he allegedly punched L. The state conceded at oral argument that the trial court abused its discretion in admitting the challenged evidence but claimed that any such error was harmless. *Held*:

1. The trial court did not abuse its discretion in granting the motion filed by the defendant's counsel to withdraw from representation, which was filed the same day as it was argued: the record made clear that the defendant had actual notice of counsel's intention to withdraw, as the defendant indicated in response to a question by the court that he was aware of his counsel's intention to withdraw prior to the court's consideration of the motion, counsel complied with the purpose of the notice provision in the applicable rule of practice (§ 3-10 [a]), the trial court's conclusion that communication had broken down could properly constitute good cause for counsel to withdraw, and to the extent that the court did not sufficiently explain, in detail, why it determined that counsel had demonstrated good cause to withdraw, the failure to do so did not result in an abuse of discretion because the court was entitled to rely on the representations of counsel, who indicated that the defendant had made representation by him unreasonably difficult and that he tried to prepare the defendant for trial but met some resistance and had difficulty getting the defendant to cooperate with him, which supported a conclusion that counsel had good cause to withdraw; moreover, the defendant did not demonstrate any material adverse effect on him related to the timing of counsel's withdrawal, as the motion to withdraw was filed long before trial commenced and did not implicate the defendant's sixth amendment right to counsel.
2. The defendant did not meet his burden to establish that the trial court's admission of the uncharged misconduct evidence substantially affected the verdict, and, therefore, the admission of that evidence was harmless; there was overwhelming evidence to support the defendant's conviction of breach of the peace in the second degree, as L's testimony that he slammed her head into a table was corroborated by medical records, and the testimony of a police officer and a worker at a women's shelter, the defendant's intent to cause L alarm was supported by her testimony that she feared him and did not want to return to the marital home, the court's jury instructions regarding the proper purpose for which the uncharged misconduct could be considered mitigated the risk that the jury would assume that the defendant had a propensity to engage in abusive behavior toward L, defense counsel extensively cross-examined L, the alleged uncharged misconduct was not so much more severe than the charged conduct such that there was a substantial risk that the jury's passions would be unduly aroused, and the state mentioned the prior misconduct only once during its closing argument.
3. The defendant's claim that the trial court's failure to canvass him regarding his decision to testify violated his right against self-incrimination was unavailing; the court was under no obligation to inquire of the defendant whether his decision to testify was intelligent and voluntary, as he was represented by counsel throughout trial, and the circumstances here did not call for the exercise of this court's supervisory authority over the administration of justice.

Argued January 8—officially released May 22, 2018

Procedural History

Substitute information charging the defendant with the crimes of assault in the third degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Johnson*, *J.*, granted the motion to withdraw from representation filed by the defendant's counsel; thereafter, the matter was tried to the jury before *Mullarkey*, *J.*; subsequently, the court, *Mullarkey*, *J.*, denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty of breach of the peace in the second degree, from which the defendant appealed to this court. *Affirmed.*

John L. Cordani, *Jr.*, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and, on the brief, *Michael J. Weber*, *Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Gheorghe Dijmarescu, appeals from the judgment of conviction, rendered after a jury trial, of one count of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (2). On appeal, the defendant claims that the trial court (1) violated his sixth amendment right to counsel by improperly granting his attorney's motion to withdraw, (2) improperly admitted evidence of his uncharged misconduct, and (3) violated his right against self-incrimination by not canvassing him before he elected to testify. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant and the victim, L,[1] both are accomplished mountaineers. In 2000, the two met at a party hosted by the governments of Pakistan and Nepal after L successfully summited Mount Everest. In May, 2002, the couple was married in Connecticut. They have two children.

During their marriage, the defendant and L climbed Mount Everest together several times. The defendant also occasionally went on climbing expeditions by himself, leaving L and the children behind at their home in Connecticut. When he was not away, the defendant managed his own construction company, while L took care of the couple's two children and the defendant's ailing father.

On July 1, 2012, L went grocery shopping and discovered that the family's food stamp card was not working. She called the defendant at work and he became angry. At about 7 or 8 p.m., the defendant arrived home. L was in the kitchen cutting an onion. The two then got into an argument regarding the food stamp card. At one point during the argument L said something in her native language, and the defendant struck her.[2] The defendant then left the house and drove away in his truck.

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

[2] L testified at trial that the defendant grabbed her by her hair and then twice slammed her head into the kitchen table. The jury ultimately found the defendant not guilty of assault in the third degree, which requires that the state prove physical injury. Although L suffered "several scratches to her left forearm," her medical records did not include any medical findings as to any visible injuries to her head, and only noted that she self-reported a headache and right ear pain. Thus, the jury may have declined to find the defendant guilty of the assault charge in the absence of evidence in L's medical records that she sustained physical injury to her head. Regardless, the jury must have found that the defendant struck L because it found him guilty of breach of the peace in the second degree in accordance with the state's allegation in count two of the information that the defendant struck L with the intent to cause alarm. The defendant has not raised a sufficiency of the evidence claim on appeal.

After the defendant left, L called her friend and told her that the defendant hit her. L's friend advised her to call the police. L then spoke with her brother, who called the police on her behalf.

Shortly thereafter, the police arrived and interviewed L. An ambulance and medical personnel also responded to the scene, but L refused to go with them because they would not allow her daughters to ride in the ambulance with her. L then indicated to one of the police officers that she did not feel safe at her home, so an officer took her and her two daughters to a hospital emergency department and arranged for them to stay at a shelter. L's examination at the emergency department revealed that she had suffered no visible injuries to her head, but that she did have several scratches on her left forearm. L did not return to the marital home, and she and the defendant ultimately obtained a divorce.

Shortly after the incident, the defendant was arrested and charged with assault in the third degree and breach of the peace in the second degree. He was subsequently tried before a jury. At trial, the defendant elected to testify in his own defense.[3]

The jury found the defendant not guilty of assault in the third degree but found him guilty of breach of the peace in the second degree. He was sentenced to six months of incarceration, execution suspended, followed by one year of probation. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court violated his sixth amendment right to counsel by granting the

[3] The defendant testified that on July 1, 2012, he and L got into an argument because he asked her to make his father dinner and she became angry and attacked him. He further testified that he did not strike her at any point but had to put his hands up to defend himself.

motion to withdraw filed by his private attorney, Raymond M. Hassett. Specifically, the defendant argues that the court improperly granted the motion to withdraw because the notice and good cause requirements set forth in Practice Book § 3-10 (a) were not met. Because we determine that, under the circumstances presented here, the defendant had no sixth amendment right to be represented by Hassett, our review of the defendant's claim is limited to whether the court abused its discretion in granting the motion to withdraw. We further conclude that the court did not abuse its discretion in granting the motion to withdraw.

The following additional facts are relevant to the resolution of the defendant's claim. On July 17, 2012, the defendant was arraigned. On that day, Hassett filed an appearance on behalf of the defendant.

On July 10, 2013, the defendant and Hassett appeared in court. At that time, Hassett requested that the court, *Johnson, J.*, allow him to withdraw as counsel.[4] Hassett presented the court with a written motion, although he had not yet filed it. Hassett later filed the written motion to withdraw with the clerk's office.

The court then held a hearing on Hassett's motion to withdraw. Hassett told the court that he previously had "numerous discussions with [the defendant]" and that he "believed that there ha[d] been somewhat of a breakdown of communication . . . ." Hassett further stated that the defendant had been adamant "from day one that he want[ed] to proceed to trial," and that Hassett had "tried to prepare [the defendant] for trial and prepare the case for trial" and had "met some resistance."

Hassett also represented that "the major reason why" he was asking to withdraw from the case was that he

[4] Hassett, who also represented the defendant in his dissolution of marriage case, did not seek to withdraw in that matter.

had difficulty getting the defendant to cooperate with him. Hassett told the court that he had advised the defendant that he needed to make a decision regarding whether he wanted to proceed with the family violence education program. See General Statutes § 46b-38c (h) (1). When the defendant elected not to apply for the program, Hassett explained to him the possible ramifications of going to trial. Finally, Hassett stated that, despite the fact that he liked the defendant, he believed that his ability to represent the defendant had been compromised. The court then heard from the state, which asked it to move the case to the trial list if the defendant chose not to apply for the family violence education program.

Next, the court asked the defendant whether he agreed that he could no longer work with Hassett, to which the defendant responded that he did not want Hassett to withdraw because he thought Hassett was an excellent attorney who could provide him with the "best representation . . . ." The defendant further stated that, although he and Hassett had encountered some obstacles, he believed that they could be overcome.

The court then canvassed the defendant regarding his opportunity to apply for the family violence education program and informed the defendant that if he successfully participated in the program he would have his charges dismissed. The defendant responded that Hassett had informed him of the same many times, both verbally and in writing. The court then asked the defendant whether he understood that, if he proceeded to trial and was convicted, he faced the possibility of being sentenced to eighteen months incarceration and $3000 in fines. The defendant replied that he understood but nevertheless wanted to proceed to trial.

After canvassing the defendant, the court concluded that "[b]ased on everything that I have heard, I am

[going to] grant the motion to have counsel withdraw from the case. I agree with you. You have an excellent attorney. Your attorney probably has given you the best advice and has spent a considerable amount of time with you. At this time, he feels, based on his experience, that communication has broken down." The court then continued the case for approximately six weeks to allow the defendant time to hire a new attorney.

On September 12, 2013, the defendant again appeared before the court. At that time, the defendant told the court that he had not yet retained an attorney because he no longer could afford one and wanted to represent himself. The court canvassed the defendant regarding the risks of representing himself and decided to allow the defendant to proceed as a self-represented litigant, with an attorney from the public defender's office acting as standby counsel. On April 9, 2014, however, the defendant was appointed a special public defender, Attorney Robert A. Cushman. Cushman subsequently entered a full appearance on behalf of the defendant and represented him throughout his trial, which began in December, 2015.

A

We first address whether the defendant had a sixth amendment right to counsel of choice that was implicated by the court's decision to grant Hassett's motion to withdraw over the defendant's objection. Whether the defendant's constitutional right to counsel of choice was implicated presents a question of law, over which our review is plenary. See *State* v. *Peeler*, 320 Conn. 567, 578, 133 A.3d 864, cert. denied, U.S. , 137 S. Ct. 110, 196 L. Ed. 2d 89 (2016).

The United States Supreme Court has stated that although "the right to select and be represented by one's preferred attorney is comprehended by the [s]ixth [a]mendment, the essential aim of the [a]mendment is

to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Indeed, "[t]he [s]ixth [a]mendment right to choose one's own counsel is circumscribed in several important respects . . . [including that] a defendant may not insist on representation by an attorney he cannot afford or *who for other reasons declines to represent the defendant*." (Emphasis added.) Id. "[T]he [s]ixth [a]mendment simply does not provide an inexorable right to representation by a criminal defendant's preferred lawyer. . . . [T]here is no constitutional right to representation by a particular attorney." (Citations omitted; internal quotation marks omitted.) *United States* v. *Hughey*, 147 F.3d 423, 428 (5th Cir.), cert. denied, 525 U.S. 1030, 119 S. Ct. 569, 142 L. Ed. 2d 474 (1998); see also *State* v. *Peeler*, supra, 320 Conn. 579; *State* v. *Fernandez*, 254 Conn. 637, 651, 758 A.2d 842 (2000) ("[T]he right to counsel of one's choice is not without limitation. . . . We never have held that the right to counsel necessarily encompasses the right to a specific attorney." [Citation omitted.]), cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001).[5] Accordingly, we reject the defendant's claim that his sixth

[5] Typically, a defendant's right to counsel of choice is implicated in circumstances in which both the defendant and the attorney want the representation to continue, but a third party moves to disqualify the attorney for one or more reasons. See, e.g., *State* v. *Peeler*, 265 Conn. 460, 465–68, 828 A.2d 1216 (2003), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004).

In circumstances in which a defendant's private attorney seeks to withdraw from representing the defendant, however, all the sixth amendment demands is "a reasonable opportunity to retain new counsel . . . ." *State* v. *Fernandez*, supra, 254 Conn. 650. Here, the defendant was permitted six weeks to obtain new private counsel, which was a sufficient period of time for sixth amendment purposes. See id. (two weeks was reasonable opportunity to seek new counsel).

amendment right to counsel of choice was implicated by the motion to withdraw filed by Hassett.

B

Because we conclude that the motion to withdraw did not implicate the defendant's sixth amendment right to counsel, we need only determine whether the court abused its discretion in granting the motion. The defendant argues that the court improperly granted the motion because it failed to ensure that the notice and good cause requirements set forth in Practice Book § 3-10 (a) had been met. We disagree.

We review the trial court's granting of a motion to withdraw pursuant to an abuse of discretion standard. *State* v. *Gamer*, 152 Conn. App. 1, 33, 95 A.3d 1223 (2014). Practice Book § 3-10 (a) provides in relevant part that "[n]o motion for withdrawal of appearance shall be granted unless good cause is shown and until the judicial authority is satisfied that reasonable notice has been given to other attorneys of record and that the party represented by the attorney was served with the motion and the notice required by this section or that the attorney has made reasonable efforts to serve such party. . . ."

The defendant first argues that the court improperly granted Hassett's motion to withdraw because the motion was filed the same day that it was argued and, therefore, did not comply with the notice requirements set forth in Practice Book § 3-10 (a). The defendant further argues that, because of this, he was not allowed an opportunity to repair his relationship with Hassett.

Although it is true that Hassett did not file his written motion to withdraw before the court heard argument, the record makes clear that the defendant had actual notice of Hassett's intention to withdraw. In addressing the defendant, the court asked, "Mr. Dijmarescu, your

attorney has indicated that it is his wish . . . that he no longer work with you on the criminal charge that is pending in this court today," to which the defendant responded, "[*t*]*hat's what I was told*, Your Honor. Yes." (Emphasis added.) It is therefore apparent that the defendant was aware of Hassett's intention to withdraw prior to the court's consideration of the motion. Thus, although Hassett's motion was technically filed the same day it was addressed by the court, he nevertheless complied with the purpose of the notice provision set forth in Practice Book § 3-10 (a), which is "to inform the court, other attorneys of record, and the party represented by the attorney that he or she is seeking permission to withdraw." *State* v. *Gamer*, supra, 152 Conn. App. 34; see *State* v. *Fernandez*, supra, 254 Conn. 650 (court did not abuse discretion in granting defense counsel's oral motion to withdraw where defendant's brother was present in court that day to accept from counsel unearned portion of retainer, making it unlikely that defendant was unaware of counsel's intention); see also *State* v. *Gamer*, supra, 34 (court did not abuse discretion in granting defense counsel's motion to withdraw even though motion did not specify date and time of hearing).

Next, the defendant argues that the court abused its discretion in granting Hassett's motion to withdraw because it failed to make a finding of good cause as required by Practice Book § 3-10 (a). The defendant asserts that the court's conclusion that "communication ha[d] broken down" between Hassett and the defendant was insufficient.

Rule 1.16 (b) of the Rules of Professional Conduct dictates when a lawyer may properly terminate representation, and provides, in relevant part, that "[e]xcept as stated in subsection (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the

interests of the client . . . (6) the representation will result in an unreasonable financial burden on the lawyer or has been *rendered unreasonably difficult by the client*; or (7) other good cause for withdrawal exists." (Emphasis added.)

Thus, in accordance with rule 1.16 (b) (1), withdrawal is appropriate for any reason provided that it will not have a materially adverse effect on the client.[6] Additionally, withdrawal is also appropriate if the representation has been rendered unreasonably difficult by the client. Thus, a breakdown in communication between attorney and client may properly constitute good cause to withdraw as counsel. See *State* v. *Gamer*, supra, 152 Conn. App. 34–35.

Furthermore, to the extent that the court did not sufficiently explain, in detail, why it determined that Hassett had demonstrated good cause to withdraw, we conclude that any failure to do so did not result in an abuse of discretion because the court was entitled to rely on the representations of Hassett, who indicated that the defendant had made representation by him unreasonably difficult. "A trial court is entitled to rely on the representations of counsel, who is an officer of the court. . . . [I]t has long been the practice that a trial court may rely upon certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court." (Citation omitted; internal quotation marks omitted.) Id., 35. Thus, we can assume that, in making its ruling, the court properly considered representations made to it by Hassett that he (1) tried to prepare the

[6] In a related context, our Supreme Court has been mindful of the dangers in forcing an attorney to represent a client in circumstances "devoid of the mutual trust and confidence that is critical to the attorney-client relationship. Such a strained and coerced relationship is inconsistent with the notion of the attorney-client relationship. The court should not perform such a shotgun wedding." *Matza* v. *Matza*, 226 Conn. 166, 184, 627 A.2d 414 (1993).

defendant for trial and met some resistance, and (2) had difficulty getting the defendant to cooperate with him—both of which support the court's conclusion that Hassett had good cause to withdraw as counsel.[7] Moreover, the motion was filed long before trial actually commenced, and the defendant has not demonstrated any material adverse effect on him related to the timing of Hassett's withdrawal. We conclude, therefore, that the court did not abuse its discretion in granting Hassett's motion to withdraw.

II

The defendant next claims that the court improperly admitted evidence of his uncharged misconduct at trial. Specifically, the defendant argues that the evidence should have been excluded because (1) the state's failure to timely disclose it was prejudicial to the defendant, and (2) the evidence was not relevant or material to the defendant's intent, motive, or malice to engage in the charged conduct. For reasons we address fully below, we need not determine whether the court's admission of the uncharged misconduct evidence constituted an abuse of discretion because we conclude that any error was harmless.

The following additional facts and procedural history are relevant to the resolution of this claim. On December 26, 2013, the defense filed a motion for notice of uncharged misconduct. On August 14, 2014, the defense made a request for disclosure regarding any uncharged misconduct that the state intended to offer at trial.

[7] The defendant further argues that even if the court did comply with the provisions set forth in Practice Book § 3-10 (a) in granting Hassett's motion to withdraw as counsel, any such finding of good cause was improper because the sole reason why Hassett wanted to withdraw was that he disagreed with the defendant's decision to go to trial. Hassett, however, represented to the court several valid reasons why he believed that withdrawal was appropriate apart from the defendant's insistence on going to trial. We therefore reject the factual premise of the defendant's argument.

The state did not provide notice of its intent to offer uncharged misconduct evidence at that time.

On December 7, 2015, jury selection began. On that same day, the state notified the defendant, for the first time, of its intent to offer evidence of the defendant's uncharged misconduct. In its notice of intent, the state revealed that the uncharged misconduct evidence would be offered through the testimony of L,[8] although it did not specify the particular acts of uncharged misconduct. The state also argued in its notice of intent that the uncharged misconduct of the defendant was relevant to show the defendant's intent, motive, and malice to engage in the charged conduct, as well as to corroborate crucial prosecution testimony.

On December 10, 2015, the defendant filed a motion in limine, in which he sought to preclude the admission of any uncharged misconduct evidence. The defendant argued that such evidence should be precluded at trial because (1) the state's untimely notice of its intent to offer uncharged misconduct evidence violated the defendant's right to due process, and (2) the prejudicial effect of the evidence outweighed its probative value.

On December 10 and 11, 2015, the court addressed the defendant's motion in limine. On the latter date, the state specified that it intended to offer evidence, through the testimony of L, of an incident that occurred on Mount Everest in 2004 during which the defendant allegedly struck L and knocked her unconscious. The court then issued a "preliminary" ruling denying the defendant's motion but stated that it would reserve the right to make a final judgment until it heard L's prospective testimony.

[8] The state also notified the defendant that it intended to introduce uncharged misconduct evidence through the testimony of one other individual, but no such evidence was presented at trial.

On December 14, 2015, the state made an offer of proof outside the presence of the jury, through the testimony of L, regarding the defendant's uncharged misconduct. L testified that she and the defendant successfully summited Mount Everest in 2004 with a number of other individuals, and that the group stopped at base camp for a period of time during their descent from the mountain. L further testified that, while at base camp, she went into the dining tent to speak with the defendant about his poor treatment of their fellow climbers. L alleged that the defendant then became angry and punched her in her head, causing her to lose consciousness. When she woke up, she temporarily was unable to see through one of her eyes because blood had accumulated in it.

After the state made its offer of proof, the court denied the defendant's motion in limine. With respect to the state's untimely disclosure of its intent to offer such evidence, the court determined that the defendant had not been prejudiced because "while the state was a little tardy in announcing the testimony about this incident, the defense has had it for approximately one year." The court appeared to be referencing the fact that, during the parties' divorce proceedings, L testified about the same alleged incident. The court further concluded that the evidence was more probative than prejudicial, provided that a proper limiting instruction was given to the jury.

At trial, L testified consistent with the state's proffer. Her testimony was followed by a limiting instruction concerning the proper purpose for which the evidence could be considered by the jury.[9] The court gave a similar instruction during its final charge.

[9] The court instructed the jury that "[t]here has been some testimony of acts of prior misconduct on the part of the defendant. Now, this is not being offered to prove bad character, propensity or criminal tendencies. Such evidence is admitted solely to show [that] if it, in your mind, does show the defendant's intent, malice upon the part of the defendant against the

We now turn to the relevant law. Section 4-5 of the Connecticut Code of Evidence governs the admission of uncharged misconduct evidence, and provides that "[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 except as provided in subsection (b)." Conn. Code Evid. § 4-5 (a). Under § 4-5 (c), however, "[e]vidence of other crimes, wrongs or acts of a person is admissible for purposes *other* than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Emphasis added.) Conn. Code Evid. § 4-5 (c).

"To determine whether evidence of . . . [uncharged] misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the . . . [uncharged misconduct] evidence. . . . Since the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every

complainant, and a motive for the commission of the crimes that are alleged in today's information. You're not to consider such evidence as establishing a predisposition on the part of [the] defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may only [consider] such evidence for the three objects I have stated. If it is further found by you that it logically, rationally, and conclusively supports the issues for which it's being offered. If you don't believe it or if you find it does not logically and rationally and conclusively support the issues for which it is offered, that is, intent, malice, and motive, you may not consider it for any other purpose. You may not consider evidence of other misconduct of the defendant for any purposes other than the ones I just told you because it may predispose your mind to believe the defendant may be guilty of the offense here charge[d] or offenses merely because of other misconduct."

reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only when it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 402–403, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

The defendant argues that the court abused its discretion in admitting the uncharged misconduct testimony because (1) the state's failure to timely disclose it was prejudicial to him, and (2) the evidence was not relevant or material to the defendant's intent, motive, or malice in engaging in the charged conduct.

Ordinarily, we would begin with an analysis of whether the court abused its discretion in admitting the uncharged misconduct evidence. See id. At oral argument before this court, however, the state conceded, despite arguing otherwise in its brief, that the trial court abused its discretion in admitting the uncharged misconduct evidence. Instead, the state argued that such error was harmless.[10] Thus, for the purposes of our analysis, we will assume, without deciding, that the court abused its discretion in admitting the uncharged misconduct evidence and, therefore, need only determine whether the admission of the evidence was harmless.

"The defendant bears the burden of showing that a nonconstitutional evidentiary error, such as the improper admission of prior uncharged misconduct . . . was harmful." *State* v. *Martin V.*, 102 Conn. App. 381, 388, 926 A.2d 49, cert. denied, 284 Conn. 911, 931 A.2d 933 (2007). "[W]hether [an improper evidentiary

[10] At oral argument, the court remarked to the assistant state's attorney that "you've essentially acknowledged that it was an abuse of discretion that [the uncharged misconduct evidence] was admitted and you're saying that, despite that, it's harmless," to which the state responded, "[t]hat's right." The court further inquired, "[i]s that correct?" to which the state again responded, "right."

ruling that is not constitutional in nature] is harmless in a particular case depends on a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Urbanowski*, supra, 163 Conn. App. 407.

We begin with the "most relevant factors to be considered," which are "the strength of the state's case and the impact of the improperly admitted evidence on the trier of fact." (Internal quotation marks omitted.) *State* v. *Michael A.*, 99 Conn. App. 251, 270–71, 913 A.2d 1081 (2007). With respect to the strength of the state's case, we conclude that there was overwhelming evidence to support the defendant's conviction of breach of the peace in the second degree.

Section 53a-181 (a) provides in relevant part that "[a] person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) assaults or strikes another . . . ." With respect to the evidence that the defendant struck L, L testified that the defendant grabbed her by her hair and slammed the right hand side of her head into the kitchen table. Her testimony

was strongly corroborated by both Officer Steven Chesworth of the Hartford Police Department, who testified that he found L holding her head when he responded to the scene, as well as Sheila Coleman, who worked at the women's shelter that L and her daughters were subsequently transported to, and similarly testified that L repeatedly touched the side of her head during her intake interview. Moreover, L was consistent in her claim that the defendant had struck her, as evidenced by the medical record of L's trip to the emergency room that night. The report, which was admitted as a full exhibit at trial and read to the jury, revealed that she told her treating physician that she was assaulted by her husband, who grabbed her by her hair and pushed her against a wood table, and that L complained of pain on the right side of her head. Finally, L testified that the defendant "tried to grab [her] and tried to twist [her] like a crocodile," and the medical record noted that she had sustained "scratch marks on her left forearm . . . ."

With respect to the evidence that the defendant intended to cause alarm to L, L testified that, as a result of the defendant's abuse, she feared him and did not want to return to the marital home. This testimony was also strongly corroborated by Chesworth, who testified that, when he arrived on the scene, L was "visibly upset," her hands were shaking, and he could "tell something happened . . . ." He further testified that L made it very clear that she did not feel safe staying at the marital home, and in fact refused to return. Coleman similarly testified that L was visibly shaken when she arrived at the shelter.

Perhaps most notably, L's testimony that she feared the defendant was corroborated by her own actions. Critically, despite the fact that she grew up in a different country, barely spoke English, and did not have a job, L never returned to the marital home after July 1, 2012.

Instead, she and her two daughters lived in a women's shelter for eight months before moving to an apartment in West Hartford. Thus, because the defendant struck L, and because she suffered fear and emotional turmoil as a result of his actions, the jury was free to infer that the defendant intended the natural result of those actions. See *State* v. *Ortiz*, 312 Conn. 551, 565, 93 A.3d 1128 (2014) ("it is a permissible . . . inference that a defendant intended the natural consequences of his voluntary conduct" [emphasis omitted; internal quotation marks omitted]); see also *State* v. *VanDeusen*, 160 Conn. App. 815, 826, 126 A.3d 604 (jury may properly infer that defendant intended natural consequences of his actions), cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

In sum, considering the testimony of L, Chesworth, and Coleman, there was overwhelming evidence that the defendant intended to cause alarm to L by striking her. See *State* v. *Franko*, 142 Conn. App. 451, 470, 64 A.3d 807 (state's case strong in part because "[n]umerous law enforcement officers corroborated the fact that the victim was . . . visibly upset"; physical evidence of victim's scratches consistent with victim being struck), cert. denied, 310 Conn. 901, 75 A.3d 30 (2013).

We next consider the impact of the uncharged misconduct evidence on the trier of fact. The principal issue in this case was whether the defendant did, in fact, strike L. The danger in a court improperly admitting evidence of the defendant's uncharged misconduct is that the jury will hear that evidence and assume that, because the defendant committed similar acts in the past, he or she is guilty of the charged offense. See *State* v. *Bell*, 152 Conn. App. 570, 582, 99 A.3d 1188 (2014). Thus, in the present case, the evidence admitted relating to the 2004 Mount Everest incident carried with it the risk that the jury would simply assume that the

defendant struck L on July 1, 2012, because he had done so in the past.

The risk that the jury would simply assume that the defendant has a general propensity to engage in the abusive behaviors toward L, however, was mitigated in part by the fact that the court issued a limiting instruction immediately following L's testimony and then again during its final charge to the jury regarding the proper purpose for which the uncharged misconduct could be considered. Absent evidence suggesting otherwise, we assume that the jury followed the court's instructions and did not consider the uncharged misconduct evidence for that improper purpose. Id., 583 ("[t]he jury is presumed to follow the instructions in full"). Thus, "any harm caused by the uncharged misconduct testimony was minimized by the court's limiting instruction." Id.

Another factor to consider in determining whether the uncharged misconduct evidence prejudicially impacted the jury is the extent to which cross-examination of L, the state's key witness, was permitted. See *State* v. *Urbanowski*, supra, 163 Conn. App. 407. In this case, defense counsel engaged in an extensive cross-examination of L intended to undermine her credibility and to present her as an instigator of any violence between her and the defendant. For example, with respect to the 2004 Mount Everest incident, defense counsel asked L whether it was true that she had (1) attacked a fellow climber on the trip because she was jealous that the climber had spent time with the defendant, (2) barged into the dining tent screaming at the defendant and asking for a divorce, and (3) told an attorney that an article written about the 2004 Mount Everest incident between her and her husband was fabricated.

Defense counsel also asked L a series of questions relating to the July 1, 2012 incident, which gave rise

to the charges against the defendant, in an effort to challenge her allegations that the defendant had attacked her and to suggest that it was L, in fact, who had attacked him. Specifically, defense counsel asked L whether it was true that, on July 1, 2012, she (1) yelled at the defendant, (2) threw an onion at the defendant, (3) lunged at the defendant, (4) did not call 911, (5) refused medical treatment, and (6) did not sustain any head injuries. In addition, defense counsel cross-examined L regarding a 2009 incident during which she allegedly called 911 because the defendant was about to leave on a climbing expedition and she was worried that he was going to have an extramarital affair. It is clear, therefore, that the defendant had the opportunity to cross-examine L extensively with respect to both the uncharged and charged conduct.

The defendant argues that L's allegations regarding the 2004 Mount Everest incident were far more serious than the charged conduct, therefore strengthening the likelihood that the uncharged misconduct evidence was harmful. The two acts of abuse, however, are fairly similar. With respect to both the uncharged and charged conduct, L alleged that the defendant hit her in the head. We cannot conclude that punching her in the side of the head is more or less severe than repeatedly slamming her head into a wooden table. Certainly, the defendant's alleged conduct in the 2004 incident was not so much more severe than the charged conduct such that there was a substantial risk that the passions of the jury would be unduly aroused or swayed by emotion in assessing the other evidence against the defendant.

The defendant also argues that the uncharged misconduct was harmful because the state mentioned it at the very end of its rebuttal closing argument, making it the last point the jury heard before beginning its

deliberation. That instance, however, was the only mention by the state of the uncharged misconduct during the entirety of its closing and rebuttal arguments. In fact, rather than relying on the uncharged misconduct evidence, the state focused on the evidence relating to the charged offenses. Moreover, the one time the state did mention the uncharged misconduct evidence during its closing argument, it followed the reference with a reminder to the jury that "[t]he 2004 events are both in for a limited purpose. They're in for one purpose, and that is basically to show the defendant's malice, animus toward [L], and his intent to harm her; that's what they're in for." Thus, it is unlikely that the state's reference to the Mount Everest incident during closing argument improperly influenced the jury.

In light of the overwhelming evidence supporting the defendant's conviction of breach of the peace in the second degree, the court's limiting instructions regarding the proper purpose for which the uncharged misconduct evidence could be considered, and the extent to which cross-examination of L was permitted, we are not persuaded that the defendant has met his burden to establish that the court's admission of the uncharged misconduct evidence substantially affected the verdict. We conclude, therefore, that the admission of such evidence was harmless and reject the defendant's claim.

III

Finally, the defendant claims that the court's failure to canvass him regarding his decision to testify violated his right against self-incrimination, as guaranteed by the fifth and fourteenth amendments to the federal constitution. The defendant argues that, in the absence of a canvass, his waiver of that right was not intelligent and voluntary. We disagree.

To begin, we note that "[w]hether the defendant waived . . . fifth amendment privileges is a mixed

question of law and fact over which our review is de novo." *State* v. *Ross*, 269 Conn. 213, 291, 849 A.2d 648 (2004). It is well established that there is no constitutional obligation on the court to canvass the defendant before he or she takes the witness stand and testifies. See *State* v. *Woods*, 297 Conn. 569, 573–77, 4 A.3d 236 (2010). Rather, because "a criminal defendant's decision to testify is often strategic or tactical, and is made only after serious consultation with counsel about the advantages and disadvantages thereof, it is one we are disinclined to second guess . . . . We can only assume, without more than a bare assertion to the contrary, that counsel provided the defendant with the information necessary to make an informed decision whether to testify." (Internal quotation marks omitted.) Id., 576, quoting *State* v. *Castonguay*, 218 Conn. 486, 492 n.2, 590 A.2d 901 (1991). Thus, because the defendant in the present case was represented by counsel throughout his trial, the court was under no obligation to inquire of the defendant whether his decision to testify was intelligent and voluntary.

The defendant argues that even if no such constitutional requirement exists, this court should exercise its supervisory authority over the administration of justice and impose one. Specifically, the defendant argues that requiring a court to canvass a defendant regarding his right against self-incrimination before he testifies would be more impactful than consultation with an attorney.

We decline the defendant's request to exercise our supervisory authority. "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn.

726, 765, 91 A.3d 862 (2014). We remain unpersuaded that the circumstances of the present case call for such an extraordinary remedy. See *In re Daniel N.*, 323 Conn. 640, 647–48, 150 A.3d 657 (2016) ("In almost all cases, [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the [appellant] and the integrity of the judicial system. . . . [O]nly in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts will we exercise our supervisory authority . . . ." [Citation omitted; internal quotation marks omitted.]). Moreover, in light of *State* v. *Woods*, supra, 297 Conn. 569, and *State* v. *Castonguay*, supra, 218 Conn. 486, we conclude that any determination of whether a court should be required to canvass a defendant regarding his right against self-incrimination before he testifies is better left to our Supreme Court.

The judgment is affirmed.

In this opinion the other judges concurred.

MARK R. REYHER *v.* JOHN A. FINKELDEY
(AC 40296)

Alvord, Sheldon and Mihalakos, Js.

Syllabus

The plaintiff, a licensed real estate broker, brought this action against the defendant property owner seeking the payment of a commission allegedly due pursuant to a real estate listing agreement between the parties. The defendant had authorized the plaintiff to offer the defendant's commercial property for sale and agreed to pay the plaintiff a 5 percent commission if the plaintiff procured a buyer who was ready, able and willing to purchase the property for $870,000 or for any other price, or upon such terms as agreed by the seller. During the term of the listing agreement, the plaintiff procured a prospective buyer, V Co., and presented the defendant with a real estate purchase and sales agreement to purchase the property for the listing price of $870,000 contingent on V Co.'s ability to obtain financing and an inspection of the property.

The defendant subsequently rejected the offer, and a binding agreement to purchase the subject property was never reached. Thereafter, the plaintiff brought this action against the defendant alleging that the defendant owed him $43,500, which represented the commission he claimed to have earned by procuring V Co. as a buyer pursuant terms of the listing agreement. At trial, V Co.'s principal testified that V Co. was not ready, willing, and able to close on the property without fulfillment of the financing and inspection contingencies. The trial court rendered judgment in favor of the plaintiff and awarded him damages in the amount of $43,500, from which the defendant appealed to this court. *Held* that the trial court erroneously concluded that the plaintiff had met his burden of proving that he procured a buyer that was ready, willing and able to purchase the defendant's property in accordance with the terms of the listing agreement; it is well established that until a contingency contained in a sales agreement has been met, a prospective buyer cannot be said to be ready, willing, and able to purchase, the evidence here demonstrated that V Co. was not ready, willing or able to purchase the defendant's property unless certain contingencies were fulfilled, and it was undisputed that those contingencies were contained in the counteroffer and rejected by the defendant.

Argued April 11—officially released May 22, 2018

Procedural History

Action to recover damages for, inter alia, alleged breach of real estate listing agreement, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Domnarski, J.*; judgment in favor of the plaintiff, from which the defendant appealed to this court. *Reversed; judgment directed.*

Matthew G. Berger, for the appellant (defendant).

Michael Ruben Peck, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, John A. Finkeldey, appeals from the judgment of the trial court rendered in favor of the plaintiff, Mark R. Reyher, a licensed real estate broker doing business as Reyher Real Estate, requiring payment of his commission. On appeal, the defendant claims that the court improperly concluded

that the plaintiff procured a buyer who was ready, willing and able to purchase the defendant's property under the terms of the listing agreement. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, are relevant to our analysis. On September 14, 2015, the defendant entered into a commercial exclusive agency listing agreement with the plaintiff for the sale of the defendant's property, located at 33 Plains Road in Essex. Under the listing agreement, the defendant authorized the plaintiff to offer the property for sale for the price of $870,000, and agreed to pay the plaintiff a 5 percent commission if he "procure[d] a buyer . . . ready, able and willing to purchase . . . the [property] for [$870,000] . . . or for any other price or upon such terms as may be agreed to by the [seller], as signified by the buyer's . . . execution of a written purchase contract." During the term of the listing agreement,[1] the plaintiff procured a prospective buyer, Valley Railroad Company (Valley), and on October 14, 2015, presented the defendant with a real estate purchase and sales agreement, executed by Valley. Under the purchase and sales agreement, Valley counter offered to purchase the defendant's property for the listing price, $870,000, contingent on (1) its ability to obtain financing, (2) an inspection, and (3) having "120 day[s] to have [the] property reviewed for any environmental considerations." The defendant subsequently rejected Valley's offer, and a binding agreement to purchase the subject property was never reached.

On December 8, 2015, the plaintiff filed this action against the defendant, alleging that he was owed $43,500, a sum representing the commission he claimed to have earned by procuring a ready, willing and able

[1] The agreement commenced on September 14, 2015, and expired on September 14, 2016.

buyer for the defendant's listed property. The case was tried to the court on February 8, 2017. During cross-examination by defendant's counsel, Kevin Dodd, the president of Valley, testified that Valley was not ready, willing and able to close on the property without fulfillment of the financing and inspection contingencies.[2] On March 24, 2017, the court issued a memorandum of decision awarding the plaintiff damages in the amount of $43,500. The trial court found that the "plaintiff . . . satisfied his burden of proving entitlement to a commission under the terms of the listing agreement . . . [having] procured a prospective buyer, who offered to pay the full price stated on the listing agreement. In the listing agreement, the seller did not require any additional terms or conditions to be contained in an offer. [Valley] was ready, willing, and able to close the transaction in accordance with the offer presented to the seller. The defendant, therefore, breached his contract obligations to the plaintiff." This appeal followed.

We turn to our standard of review and the legal principles that guide our resolution of the defendant's claim on appeal. The law is well settled that a real estate broker who procures a buyer ready, willing and able to purchase the subject property on the owner's terms is entitled to a commission pursuant to the provisions of a valid listing agreement. See, e.g., *Vincent Metro, LLC* v. *Ginsberg*, 139 Conn. App. 632, 638–39, 57 A.3d 781 (2012), cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013). "The right of a brokerage firm to recover a commission depends upon the terms of its employment contract with the seller. To be enforceable, this employment contract, often called a listing contract, must be in writing and must contain the information enumerated

[2] We also note that, at trial, the plaintiff offered no evidence of Valley's fulfillment of, or ability to fulfill, those three conditions.

in General Statutes § 20-325a (b).[3] . . . To recover its commission, the brokerage firm ordinarily must show that it has procured a customer who is ready, willing, and able to buy on terms and conditions prescribed or agreed to by the seller. . . . In the alternative, the broker may be entitled to recover if it has brought the buyer and the seller to an enforceable agreement. . . . Our Supreme Court has repeatedly held that a broker who has, in accordance with a listing contract, found a purchaser ready, willing, and able to purchase, on the owner's own terms, is entitled to its commission even though no contract for the sale of the property has ever been executed." (Citations omitted; footnote added; internal quotation marks omitted.) Id.; see also *Dyas* v. *Akston*, 137 Conn. 311, 313, 77 A.2d 79 (1950) ("[t]his rule does not require that the parties enter into an enforceable agreement *but only that the offer of one party fairly meets the terms of the other*" [emphasis added]).

It is well established that until a contingency contained in a sales agreement has been met, a prospective buyer cannot be said to be ready, willing and able to purchase. See *Frumento* v. *Mezzanotte*, 192 Conn. 606,

[3] Section 20-325a (b) establishes the requirements for the maintenance of an action by a broker for a commission. See *Thornton Real Estate, Inc.* v. *Lobdell*, 184 Conn. 228, 229–30, 439 A.2d 946 (1981). In the present case, the parties do not dispute the validity of the listing agreement. General Statutes § 20-325a (b) provides in relevant part: "No person, licensed under the provisions of this chapter, shall commence or bring any action with respect to any acts done or services rendered after October 1, 1995, as set forth in subsection (a), unless the acts or services were rendered pursuant to a contract or authorization from the person for whom the acts were done or services rendered. To satisfy the requirements of this subsection any contract or authorization shall: (1) Be in writing, (2) contain the names and addresses of the real estate broker performing the services and the name of the person or persons for whom the acts were done or services rendered, (3) show the date on which such contract was entered into or such authorization given, (4) contain the conditions of such contract or authorization, (5) be signed by the real estate broker or the real estate broker's authorized agent . . . ."

617, 473 A.2d 1193 (1984) ("[a] proposed purchaser [of land] cannot be said to be able to purchase when he is dependent upon [a purchase price loan from a third party] who [is] in no way bound to furnish the funds" [internal quotation marks omitted]); *Menard* v. *Coronet Motel, Inc.*, 152 Conn. 710, 711–12, 207 A.2d 378 (1965) (broker not entitled to commission under listing agreement where prospective buyers' obligation to purchase was contingent upon their ability to sell their real estate); *Eames* v. *Mayo*, 97 Conn. 725, 727–28, 117 A. 802 (1922) (broker not entitled to commission where sale subject to verification of condition of defendant's business generally satisfactory to prospective buyers); *Kost* v. *Reilly*, 62 Conn. 57, 61–62, 24 A. 519 (1892) (broker not entitled to commission where sale conditioned upon buyer obtaining license).

On appeal, it is the function of this court to determine whether the trial court's finding of fact, that the plaintiff procured a buyer ready, willing and able to purchase the defendant's property, is clearly erroneous. See, e.g., *Revere Real Estate, Inc.* v. *Cerato*, 186 Conn. 74, 78–79, 438 A.2d 1202 (1982); *William Raveis Real Estate, Inc.* v. *Stawski*, 31 Conn. App. 608, 611, 626 A.2d 797 (1993). "This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Frumento* v. *Mezzanotte*, supra, 192 Conn. 617–18; see also *Goldblatt Associates* v. *Panza*, 24 Conn. App. 250, 252, 587 A.2d 433 (1991). "A finding of fact is clearly erroneous when there is no evidence

in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *NRT New England, LLC* v. *Jones*, 162 Conn. App. 840, 853, 134 A.3d 632 (2016).

In the present case, the evidence demonstrated that the prospective buyer was not ready, willing or able to purchase the defendant's property unless certain contingencies were fulfilled. In light of the undisputed fact that those contingencies were contained in the counteroffer and rejected by the defendant, the trial court erroneously concluded that the plaintiff had met his burden of proving that he procured a buyer ready, willing and able to purchase the defendant's property in accordance with the terms of the listing agreement.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

NICHOLAS ADAMS *v.* COMMISSIONER OF MOTOR VEHICLES (AC 40272)

Alvord, Keller and Bishop, Js.

Syllabus

The plaintiff, who had been charged with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of statute (§ 14-227a), appealed to the trial court from the decision by the defendant Commissioner of Motor Vehicles suspending his motor vehicle operator's license for forty-five days, pursuant to statute (§ 14-227b [g]), for his refusal to submit to a urine test to determine his blood alcohol content. The trial court rendered judgment dismissing the appeal, from which the plaintiff appealed to this court, challenging the findings of the hearing officer that there was probable cause for his arrest, that he refused to submit to chemical testing or analysis and that he had been operating a motor vehicle. *Held* that the judgment of the trial court dismissing the plaintiff's appeal was affirmed; the trial court having thoroughly addressed the arguments raised in this

appeal, this court adopted the well reasoned and clearly articulated decision of the trial court as the opinion of this court.

Argued January 22—officially released May 22, 2018

Procedural History

Appeal from the decision by the defendant suspending the plaintiff's motor vehicle operator's license, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Huddleston, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Jonathan Ross Sills, for the appellant (plaintiff).

Christine Jean-Louis, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Nicholas Adams, appeals from the judgment of the trial court rendered in favor of the defendant, the Commissioner of Motor Vehicles (commissioner), dismissing his appeal from the decision of the commissioner to suspend his motor vehicle operator's license, pursuant to General Statutes § 14-227b,[1] for forty-five days and requiring an ignition interlock device in his motor vehicle for one year. On appeal, the plaintiff claims that the court erred in finding that

[1] General Statutes § 14-227b is commonly referred to as the implied consent statute. *Santiago* v. *Commissioner of Motor Vehicles*, 134 Conn. App. 668, 674, 39 A.3d 1224 (2012).

Section § 14-227b provides in relevant part: "(a) Any person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine and, if such person is a minor, such person's parent or parents or guardian shall also be deemed to have given their consent. . . .

"(c) If the person arrested refuses to submit to such test or analysis . . . the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license . . . . The police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. . . .

(1) he was operating a motor vehicle; (2) he refused to submit to chemical testing; and (3) the police had probable cause to arrest him for operating under the influence in violation of General Statutes § 14-227a.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On May 14, 2016, the plaintiff was arrested and charged with operating under the influence of liquor or drugs in violation of § 14-227a.[3] The plaintiff submitted to a Breathalyzer test, but refused a urine test. As a result of this refusal, and in accordance with § 14-227b, the plaintiff's motor vehicle operator's license was suspended by the Department of Motor Vehicles (department) for forty-five days, effective June 13, 2016, and he was required to install and maintain an ignition interlock device in his vehicle for one year thereafter.

"(e) (1) . . . [T]he Commissioner of Motor Vehicles may suspend any operator's license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of such person's arrest by the police officer. Any person whose operator's license or nonresident operating privilege has been suspended in accordance with this subdivision shall automatically be entitled to a hearing before the commissioner to be held in accordance with the provisions of chapter 54 and prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that such person's operator's license or nonresident operating privilege is suspended as of a date certain and that such person is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the Department of Motor Vehicles not later than seven days after the date of mailing of such suspension notice. . . ."

[2] General Statutes § 14-227a (a) provides in relevant part: "No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. . . ."

[3] The plaintiff also was charged with evading responsibility in violation of General Statutes § 14-224 (a) and (b), and failure to drive right in violation of General Statutes § 14-230. Those charges are not at issue in this appeal.

Subsequently, the plaintiff requested, and was granted, an administrative hearing to contest the license suspension. The administrative hearing was held on June 8, 2016, before a department hearing officer, acting on behalf of the commissioner. The hearing officer rendered a decision the same day as the hearing, ordering the suspension of the plaintiff's motor vehicle operator's license or operating privilege for forty-five days and the installation of an ignition interlock device for one year thereafter.

On June 17, 2016, the plaintiff filed an appeal in the Superior Court pursuant to General Statutes § 4-183, challenging the findings of the hearing officer that (1) there was probable cause to arrest him for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) he refused to submit to a chemical testing or analysis; and (3) he was operating the motor vehicle. A one day trial took place before the court on December 1, 2016. On March 7, 2017, the court dismissed the plaintiff's appeal and rendered judgment in favor of the commissioner. This appeal followed.

Having carefully reviewed the record, the briefs submitted by the parties, and applicable law, we find no error in the trial court's determination. Accordingly, we adopt the well reasoned and clearly articulated decision of the trial court, en toto, as the opinion of this court. See *Adams* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-16-6033742-S (March 7, 2017) (reprinted at 182 Conn. App. 169); see also *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

APPENDIX

NICHOLAS ADAMS *v.* COMMISSIONER OF MOTOR VEHICLES*

Superior Court, Judicial District of New Britain
File No. CV-16-6033742-S

Memorandum filed March 7, 2017

Proceedings

Memorandum of decision on plaintiff's appeal from decision by defendant suspending the plaintiff's motor vehicle operator's license. *Appeal dismissed.*

Jonathan Ross Sills, for the plaintiff.

Drew S. Graham, assistant attorney general, for the defendant.

Opinion

HUDDLESTON, J. The plaintiff, Nicholas Adams, appeals from the decision of the defendant Commissioner of Motor Vehicles (commissioner) suspending his driver's license for forty-five days and requiring him to install and maintain an ignition interlock device for one year for operating a motor vehicle under the influence of drugs or alcohol. The plaintiff asserts that the hearing officer violated his right to due process, that the record lacks substantial evidence that he was operating a motor vehicle, that there was no probable cause for his arrest, and that there is insufficient evidence to support the finding that he refused a urine test. Most of these claims were not asserted in the hearing and therefore are not properly before the court. Even if they had been properly preserved, the plaintiff's claims are not supported by the record. The plaintiff's appeal is dismissed.

* Affirmed. *Adams* v. *Commissioner of Motor Vehicles*, 182 Conn. App. 165, A.3d (2018).

FACTS AND PROCEDURAL HISTORY

At about 4:44 a.m. on May 14, 2016, the Stonington police were dispatched to investigate a report that a motor vehicle had struck a telephone pole and then left the scene. Officer Ryan Armstrong immediately responded and began checking the area. He came upon two vehicles on Pawcatuck Avenue. One was a disabled vehicle with significant front end damage consistent with hitting a telephone pole. The other was operated by a witness who had followed the first vehicle after the accident occurred. Armstrong approached the vehicle with front end damage. The plaintiff was standing outside it. Armstrong asked whether he needed medical assistance, and he stated that he did not. When Armstrong asked what had happened, the plaintiff stated that he struck a traffic cone in the roadway when he turned from Mechanic Street onto Clark Street. He denied having hit the telephone pole on Mechanic Street even after Armstrong remarked that a traffic cone would not cause the damage to his vehicle that was evident. Armstrong asked the plaintiff why he had fled the accident scene, and he replied that he had attempted to stop but his brakes had malfunctioned. Armstrong observed that the location of the accident was about a half mile from the location where the plaintiff's car was found with several stretches of uphill grades between the two locations. Armstrong asked the plaintiff when the accident occurred. He replied that it happened at approximately 4:45 a.m. Supp. Return of Record[1] (ROR), A-44, narrative, pp. 1–2.

Armstrong observed that the plaintiff appeared very drowsy, with droopy eyelids. His movements were very slow and he spoke in a low, raspy voice. Armstrong

[1] The record originally filed with the court omitted three pages of the hearing transcript. All references to the record (ROR) in this decision are to the supplemental return of record (# 114), which contains the complete record.

told the plaintiff that he was going to conduct field sobriety tests, and the plaintiff "immediately volunteered" to take a Breathalyzer test. The plaintiff denied having used alcohol or drugs of any kind. ROR, A-44, narrative, p. 2.

Armstrong administered three standardized field sobriety tests. In administering the horizontal gaze nystagmus test, Armstrong noted that the pupils of the plaintiff's eyes were constricted, which Armstrong recognized as a sign of narcotic use. After the plaintiff failed all three sobriety tests, Armstrong placed him under arrest and transported him to the police station. ROR, A-44, narrative, pp. 2–4.

Before leaving the scene, Armstrong spoke with the witness, who said she was sitting in her residence when she heard a loud crash and the power went out. She looked outside her window and saw the plaintiff's vehicle traveling down Pawcatuck Avenue. She followed his vehicle. When it stopped and she made contact with the plaintiff, he asked her not to notify the police. ROR, A-44, narrative, p. 4.

At the police station, the plaintiff was advised of his *Miranda* rights[2] and offered the opportunity to contact an attorney, which he declined. He denied alcohol or drug use and elected to submit to a breath test. The first sample, taken at 5:50 a.m., showed a 0.000 percent blood alcohol content. Armstrong then asked the plaintiff to provide a urine sample. The plaintiff said he wanted to speak with an attorney. After several failed attempts to reach an attorney, he spoke with a family member and then elected to refuse to provide a urine sample. ROR, A-44, narrative, p. 4.

After the breath test, the plaintiff stated that he was having difficulty breathing and complained of chest

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

pains. An ambulance responded to the booking room, examined the plaintiff, and suggested that he be transported to the hospital for further evaluation. He refused transport to the hospital. ROR, A-44, narrative, p. 5.

The plaintiff was charged with operating under the influence of alcohol or drugs in violation of General Statutes § 14-227a and with other motor vehicle violations. Id. The Department of Motor Vehicles (department) thereafter notified the plaintiff that his license would be suspended for forty-five days, and he would be required to install and maintain an ignition interlock device in his vehicle. ROR, Item 1. The plaintiff requested an administrative hearing, which was held on June 8, 2016. The plaintiff appeared with counsel. At the hearing, the A-44 form, with attached reports, was introduced as an exhibit without objection. ROR, transcript, p. 2. The plaintiff's counsel commented that the copy of the A-44 he had received before the hearing had not been notarized, but he acknowledged that the copy introduced into evidence was notarized. ROR, transcript, pp. 3–4. He argued to the hearing officer that "they have not proven operation; number one. And number two, they can't prove the time of operation as to whether it was if in two hours or not." ROR, transcript, p. 4. He argued that his client had been disoriented by the collision and that his client was cooperating with the police. Despite evidence that the plaintiff had refused transport to a hospital, his attorney asserted that the plaintiff had to go to the hospital and commented that there were no hospital records of a "drug tox." ROR, transcript, pp. 4–5. The plaintiff then testified that when he was at the police station, he was not able to reach his lawyer by telephone and did not recall speaking to any family member. ROR, transcript, p. 8. The hearing then concluded.

The hearing officer subsequently found that the police had probable cause to arrest the plaintiff for a

violation specified in General Statutes § 14-227b, the plaintiff was placed under arrest, he refused to submit to a test, and he was operating a motor vehicle. In a subordinate finding, the hearing officer found that "[t]he police report supports an affirmative finding on all four issues of fact." ROR, p. 3. This appeal followed.

ANALYSIS

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[3] Judicial review of the commissioner's action is very restricted. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

[3] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law: (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

"General Statutes § 14-227b, commonly referred to as the implied consent statute, governs license suspension hearings." *Santiago* v. *Commissioner of Motor Vehicles*, 134 Conn. App. 668, 674, 39 A.3d 1224 (2012). Section 14-227b (g) provides in relevant part that "[t]he hearing shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating the motor vehicle. . . ." A license suspension hearing is expressly limited to these four issues. *Buckley* v. *Muzio*, 200 Conn. 1, 7, 509 A.2d 489 (1986). In this case, the hearing officer affirmatively found that each of these requirements was met.

The standard of proof under the UAPA is not so exacting as in a criminal case, where proof beyond a reasonable doubt is required. *O'Rourke* v. *Commissioner of Motor Vehicles*, 33 Conn. App. 501, 508, 636 A.2d 409, cert. denied, 229 Conn. 909, 646 A.2d 1205 (1994). In an administrative hearing, "the agency need only produce probative and reliable evidence to ensure that the proceedings are fundamentally fair." (Internal quotation marks omitted.) Id.

I

The plaintiff first argues that there is insufficient proof that he was operating the vehicle because none of the officers involved in his arrest observed him operating the vehicle at any time and the lay witness

who followed his vehicle did not give a sworn statement. The court disagrees. Even without the statement of the lay witness, the plaintiff's own admissions, as reported by the arresting officer, provide substantial evidence of his operation of the vehicle.

"The absence of witnesses to the plaintiff's operation of the vehicle is not dispositive on the issue of operation." *Murphy* v. *Commissioner of Motor Vehicles*, supra, 254 Conn. 347. In addition, the standard of proof is not so exacting as in a criminal case, where proof beyond a reasonable doubt is required. *O'Rourke* v. *Commissioner of Motor Vehicles*, supra, 33 Conn. App. 508. In an administrative hearing, "the agency need only produce probative and reliable evidence to ensure that the proceedings are fundamentally fair." (Internal quotation marks omitted.) Id.

The narrative portion of the police report indicates that the arresting officer, Armstrong, found the plaintiff standing beside a vehicle with substantial front end damage and asked the plaintiff what had happened. The plaintiff said that he had been traveling south on Mechanic Street, then turned onto Clark Street and struck a traffic cone in the roadway. He denied having hit a telephone pole on Mechanic Street even though a traffic cone could not have caused the damage to his vehicle. When asked why he did not stop when he had the accident, he said that he attempted to stop but his brakes malfunctioned. The plaintiff's own statements to Armstrong are substantial evidence that he was operating his vehicle until it stopped in the location where Armstrong found him.

II

The plaintiff argues that the police lacked probable cause to arrest him for operating under the influence of drugs or alcohol because there was insufficient evidence of intoxication and insufficient evidence of a

temporal nexus between any intoxication and the operation of the vehicle. In support of this argument, the plaintiff claims that Armstrong did not suspect the plaintiff of alcohol use because the report does not mention an odor of alcohol or other typical symptoms of alcohol intoxication, such as slurred speech, confusion, or balancing issues. He argues that Armstrong suspected narcotics use but used field sobriety tests designed solely to test alcohol use. He further argues that there is no evidence that Armstrong was trained in administering the field sobriety tests or administered them properly.

The plaintiff made only one of these arguments to the hearing officer, and then only in an incoherent form. His counsel at the hearing (not the counsel on appeal) argued "they have not proven operation; number one. And number two, they can't prove the time of the operation as to whether it was if in two hours or not." ROR, transcript, p. 4. He did not offer any evidence or make any arguments at the hearing that the tests given were inappropriate.

A plaintiff cannot raise issues on appeal that he failed to present to the hearing officer below. See *Solomon* v. *Connecticut Medical Examining Board*, 85 Conn. App. 854, 862, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005); see also *Valente* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029369-S (October 19, 2015) (*Schuman*, *J.*) (61 Conn. L. Rptr. 138), aff'd, 169 Conn. App. 908, 155 A.3d 328 (2016).

The plaintiff's arguments are unconvincing as well as unpreserved. Under Connecticut law, "[i]t is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion [in determining the issue of probable cause]. . . . The law is also well established that if the decision of the commissioner

is reasonably supported by the evidence it must be sustained." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, supra, 254 Conn. 343–44. "Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . In determining whether there was probable cause to arrest for operating a motor vehicle while under the influence of liquor, the court may consider, just as in an arrest for any other criminal offense, circumstantial as well as direct evidence." (Internal quotation marks omitted.) *Pizzo* v. *Commissioner of Motor Vehicles*, 62 Conn. App. 571, 578, 771 A.2d 273 (2001). "To establish probable cause, it is not necessary to produce a quantum of evidence necessary to convict. . . . The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency, and this court cannot disturb the conclusions reached by the [hearing officer] if there is evidence that reasonably supports his decision." (Internal quotation marks omitted.) Id. "[O]ur case law clearly establishes that sufficient evidence justifying the commissioner's determination of probable cause may be found where the totality of the circumstances existing at the time of the plaintiff's arrest support[s] [such a finding] . . . ." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, supra, 345.

In this case, under "probable cause to arrest" on the A-44 form, Armstrong checked the boxes "motor vehicle crash" and "standardized field sobriety tests." Armstrong's narrative report included evidence that the plaintiff had reportedly struck a telephone pole and his vehicle had sustained major front end damage consistent with striking a telephone pole; the plaintiff insisted that he had hit a traffic cone even though a traffic cone could not have caused the damage to his front end; the

plaintiff said that he tried to stop at the accident scene but his brakes malfunctioned, even though there were several stretches of uphill grade between the location of the accident and the point where his vehicle stopped; the plaintiff appeared very drowsy and moved very slowly; his pupils were constricted, his eyelids were drooping, and the conjunctiva of his eyes were reddened.

The plaintiff relies on *State* v. *Dalzell*, 96 Conn. App. 515, 901 A.2d 706 (2006), rev'd in part, 282 Conn. 709, 924 A.2d 809 (2007), overruled in part by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162 n.34, 84 A.3d 840 (2014), to argue that the symptoms observed by the officer—drowsiness, droopy eyelids, red eyes with constricted pupils—were all consistent with innocent explanations, such as fatigue or shock. In *Dalzell*, the arresting officer saw the defendant driving a 1991 Ford Escort without a shoulder harness type of seatbelt. Id., 518. He followed the defendant for about a mile, during which time the defendant observed all traffic rules. Id. When he stopped the defendant for the seatbelt violation, he noted that the defendant's eyes were contracted and his nose was red and running. Id., 519. The defendant was not wearing sunglasses and it was about noon on a clear, sunny day. Id. The defendant fumbled for a few seconds before retrieving his license and registration information. Id., 519–20. The officer saw a rolled dollar bill in the center console of the defendant's car and suspected him of using narcotics. Id., 520. The defendant refused to submit to field sobriety tests. After arresting the defendant for operating under the influence of narcotics, the officer searched the car, found narcotics, and added drug charges. Id., 520–21. The defendant moved to suppress the evidence of the drugs on the ground that there was not probable cause to arrest him for operating under the influence. Id., 531.

The Appellate Court agreed. It reasoned as follows: "A driver operating a motor vehicle while under the influence of a drug is one whose mental, physical or nervous processes have become so affected that he lacked to an appreciable degree the ability to function properly in the operation of his vehicle. . . . Typical indicia of the inability to function as a driver because of the intoxicating effect of drugs or alcohol include whether a defendant smells of the drug, has slurred speech, fumbles in retrieving paperwork, has glassy and bloodshot eyes, admits that he has, while driving, been using drugs or fails sobriety tests. . . . Most importantly, the main indicia of intoxication relates to the ability to operate the vehicle without committing traffic violations." (Citations omitted.) Id., 528–29. In *Dalzell*, the court observed that the defendant "used his signals correctly and observed all posted signs, speed limits, traffic control signals and markings. . . . To arrive at the conclusion that probable cause existed, one must ignore the fact that, except for the seat belt violation, the defendant operated his motor vehicle in a manner consistent with that of an ordinary, careful and prudent driver over a considerable distance on multiple city roads." Id., 529–30.

The same cannot be said for the plaintiff here. He clearly had not been able to operate his vehicle in a manner consistent with that of an ordinary, careful and prudent driver. Although he denied striking the telephone pole, he had clearly struck something substantial, sustaining major front-end damage to his car, and then left the scene of his accident. Moreover, his eyes were bloodshot and his pupils constricted, not at noon on a sunny day, but before five o'clock in the morning. He failed all three field sobriety tests. He lost his balance while trying to walk, stopped repeatedly to steady himself, was uneasy on his feet, and his legs were shaking. This substantial circumstantial evidence supported the

hearing officer's finding that there was probable cause to arrest the plaintiff for a violation of § 14-227a, as required for a license suspension under § 14-227b.

Nor is there any merit to the plaintiff's claim that there was an insufficient temporal nexus between intoxication and operation. The police received the report of a vehicle crashing into a telephone pole at approximately 4:44 a.m. and Armstrong responded to the dispatch "immediately." ROR, narrative, p. 1. Armstrong located the plaintiff beside his stopped, damaged car, and the plaintiff told Armstrong that his accident had occurred at approximately 4:45 a.m. ROR, narrative, p. 2. Armstrong interviewed the plaintiff, conducted the field tests, and arrested the plaintiff by 5:14 a.m. ROR, narrative, p. 3. The evidence clearly supports a temporal nexus between the operation and the intoxication.

III

The plaintiff argues that there is no substantial evidence that he refused to submit to the second form of chemical testing. His argument is based on three claims: first, that the refusal is inadequately described in the police report; second, that the plaintiff's refusal was not properly witnessed; and third, that there was no reasonable basis for requiring a urine test after the plaintiff passed the breath test. None of these claims were brought to the attention of the hearing officer and therefore are not properly before the court. See *Solomon* v. *Connecticut Medical Examining Board*, supra, 85 Conn. App. 862. Even if these claims had been preserved, the plaintiff has not met his burden of proving that the hearing officer acted arbitrarily, illegally, or in abuse of her discretion in rejecting them.

A

As to the first claim, there is substantial evidence in the record that the plaintiff refused the urine test. The

police report indicates that after Armstrong told the plaintiff he was requesting a urine sample, the plaintiff attempted unsuccessfully to reach an attorney and then "spoke with a family member and elected to refuse a urine sample."

The plaintiff cites *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 714–15, 692 A.2d 834 (1997), for the proposition that a conclusory statement alone is not sufficient to provide substantial evidence of refusal where there is no corroborating evidence, and only contradictory evidence, of refusal. *Bialowas*, however, does not apply here. In *Bialowas*, the police report stated that the accused "was explained all necessary procedures but failed to give a sufficient breath sample on three separate occasions . . . [t]herefore resulting in a refusal of the test." (Internal quotation marks omitted.) Id., 706. The Appellate Court concluded that "where it is undisputed that the motorist submitted to the chemical alcohol test, the fact that he failed to produce an adequate breath sample does not automatically constitute refusal within the meaning of § 14-227b." Id., 714–15. In such a circumstance, additional explanation was needed to support a conclusion that a failure to provide sufficient breath was, in fact, a refusal to take the test. Id., 716–17.

Bialowas thus stands for the proposition that when a person refuses a test by conduct—such as purporting to take the breath test but blowing improperly after repeated instructions—the police must document the conduct that constitutes the refusal. Here, however, the plaintiff expressly refused. Where the refusal is express, as here, no further description of the refusal is required. See *Fonville-Smith* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. 15-6029440-S (October 28, 2015) (*Schuman, J.*).

B

The plaintiff further argues that there is no substantial evidence that the refusal was witnessed by a third party. Section 14-227b (c) provides in relevant part: "If the person arrested refuses to submit to such test or analysis . . . [t]he police officer shall prepare a report of the incident . . . . The report shall contain such information as prescribed by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided by section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of subsection (a) of section 14-227a . . . and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so . . . ."

In *Mailhot* v. *Commissioner of Motor Vehicles*, 54 Conn. App. 62, 66, 733 A.2d 304 (1999), the court held that a refusal requires the presence of three persons: the accused, the arresting officer, and a third-party witness. In *Winsor* v. *Commissioner of Motor Vehicles*, 101 Conn. App. 674, 684–86, 922 A.2d 330 (2007), the court further held that all three persons—the accused, the arresting officer, and the third-party witness—must be physically present in the same room at the time of refusal.

The plaintiff's claim here that the refusal was not properly witnessed is based on the fact that in section F of the A-44 form, "Chemical Alcohol Test Data," the arresting officer wrote the date "5/19/2016" on the line indicating that the second test was a urine test, offered at 7:07 a.m., and the result was "refusal." Because the plaintiff was arrested on May 14, 2016, he argues that

there is no evidence that the refusal was witnessed or that the witness was physically present.

If the plaintiff had raised this claim before the hearing officer, the hearing officer could have continued the hearing to subpoena the officer to explain the discrepancy. See *Prendergast* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029663-S (January 28, 2016) (*Schuman, J.*) (61 Conn. L. Rptr. 733) (rejecting claim that hearing officer abused discretion in continuing hearing to obtain officer's testimony). The plaintiff's failure to raise the claim at the hearing below is a sufficient ground to reject it.

On the merits of the claim, the court is not persuaded that the hearing officer abused her discretion in finding substantial evidence of refusal. It is of course important that police officers complete A-44 forms with sufficient care that the report can be deemed to be reliable. See *Volck* v. *Muzio*, 204 Conn. 507, 518, 529 A.2d 177 (1987) (evident purpose of § 14-227b [c] is to "provide sufficient indicia of reliability so that the report can be introduced in evidence as an exception to the hearsay rule, especially in license suspension proceedings, without the necessity of producing the arresting officer"). In some cases, errors on an A-44 form may be so substantial and irreconcilable as to render the report unreliable, and thus inadmissible, if a proper objection is made at the hearing. See *Do* v. *Commissioner of Motor Vehicles*, 164 Conn. App. 616, 627, 138 A.3d 359, cert. granted, 322 Conn. 901, 138 Conn. 931 (2016). In this case, however, internal evidence in the A-44 form and attached reports indicate that all relevant events, including the refusal, occurred in the early morning hours of May 14, 2016, but that Armstrong, the arresting officer, did not complete the police report until May 19, 2016. The attached report is, by regulation, incorporated into the A-44 form if, as is the case here, it is sworn to

by the arresting officer. See Regs., Conn. State Agencies § 14-227b-10 (b) ("Additional statements or materials necessary to explain any item of information in the report may be attached to the report. Such attachment[s] shall be considered a part of the report having the approval of the commissioner, as provided in subsection [c] of section 14-227b of the Connecticut General Statutes, if sworn to under penalty of false statement.").

In this case, both the A-44 and the attached reports all consistently report the events of the investigation, arrest, breath test, and refusal as occurring as one continuous sequence of events on the same day, May 14, from the initial report of the accident at around 4:44 a.m. to the testing between 5:50 a.m. and 7:07 a.m. Except for the blank next to the word "refusal," which states the date as 5/19/2016, all the dates in the A–44, on the breath test strip attached to the A-44, and the police report refer to the events as occurring on May 14, 2016. The report itself, however, was completed on May 19, 2016, and Armstrong's oath, both on the A-44 and on the narrative police report, was taken on May 19, 2016, by a Sergeant Marley. Section J of the A-44 form, captioned "Chemical Alcohol Test Refusal," was signed by Ryan Rathgaber, badge number 13. Although the plaintiff argues that there is no evidence that Rathgaber was present on the morning of May 14, Rathgaber endorsed the form under the statement: "The operator named above refused to submit to such test or analysis when requested to do so. The refusal occurred in my presence and my endorsement appears below." As required by § 14-227b (c), Armstrong, as the arresting officer, subsequently subscribed and swore to the report of the chemical alcohol test or refusal under penalty of false statement.

A reasonable inference, from the evidence as a whole, is that the plaintiff refused the urine test on May 14,

the morning of his arrest, rather than May 19 as stated on the form. On May 14, the date of the arrest, Armstrong was working the midnight to 8 a.m. shift. ROR, narrative report, p. 1. The narrative portion of his report attests that the breath test was administered at 5:50 a.m. and that he then requested a urine sample. At that point, the plaintiff indicated that he wanted to speak to an attorney and made several attempts to reach one. When he could not reach one, he spoke with a family member and then "elected to refuse a urine sample." The narrative, though not explicit as to the time of refusal, makes it clear that it occurred on the same day as the arrest and breath test. After the breath test, moreover, the plaintiff indicated that he was having chest pains and difficulty breathing, at which point an ambulance was called. The plaintiff refused to go to the hospital and was subsequently released on a $600 nonsurety bond. It is reasonable to infer that by the time the plaintiff was evaluated by ambulance personnel and the processing of his arrest and bond was completed, Armstrong's shift was nearly over and he was unable to complete the arrest report until a few days later, May 19. Based on the consistent references to May 14 as the date of the events in question and the narrative documenting an uninterrupted sequence of events, it is further reasonable to infer that the single reference to "5/19/16" on the A-44 line documenting the refusal is a simple error that occurred when Armstrong completed the form on May 19.

The totality of the evidence, including the narrative report, provides reliable, probative and substantial evidence that the plaintiff refused to submit to a urine test after passing a breath test. The plaintiff has not borne his burden of proving that the hearing officer acted unreasonably, arbitrarily, illegally or in abuse of her discretion in finding sufficient evidence of refusal.

C

The plaintiff's final argument is that there was no reasonable cause to change the testing method. This claim was not raised below, is not preserved for review, and if reviewed, lacks merit.

Section 14-227b (k) states: "The provisions of this section shall apply with the same effect to the refusal by any person to submit to an additional chemical test as provided in subdivision (5) of subsection (b) of section 14-227a." Section 14-227a (b) (5) provides in relevant part that evidence of the amount of alcohol or drug in a defendant's blood or urine, as shown by a chemical analysis, is admissible if "an additional chemical test of the same type was performed at least ten minutes after the initial test was performed or, if requested by the police officer for reasonable cause, an additional chemical test of a different type was performed to detect the presence of a drug or drugs other than or in addition to alcohol . . . ." The plaintiff cites *Saba* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of Tolland, Docket No. CV-97-64786-S (March 17, 1998) (*Klaczak*, *J.*) (21 Conn. L. Rptr. 433), and *Georgino* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-97-0570325 (June 24, 1997) (*Maloney*, *J.*), as instructive on the issue of reasonable cause. The court agrees that *Saba* and *Georgino* are instructive, but they do not help the plaintiff's case.

In *Saba*, the evidence supporting a request for a urine test after the plaintiff passed a breath test was that "the plaintiff was not operating his vehicle while in full control of his faculties. He was operating without headlights at 2 a.m. and entered a parking area through a marked exit lane. He did not satisfactorily perform field sobriety tests. There was marijuana residue in the

vehicle and he admitted being in the company earlier of people who were smoking marijuana. The police officer was not required to accept his statement that the plaintiff had not smoked any himself." *Saba* v. *Commissioner of Motor Vehicles*, supra, 21 Conn. L. Rptr. 434. Based on that evidence, the court found that the request for the urine test was reasonable.

In *Georgino*, the evidence supporting a request for a urine test after the plaintiff passed a breath test was that "the plaintiff was virtually out of control at the time he was arrested. He had just driven his vehicle into a stationary object. He had urinated on himself. He was unable to deal with the task of handing over his license and registration papers . . . much less perform the coordination tests administered by the police officer." *Georgino* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-97-0570325. Based on that evidence, the court concluded that "[w]hen the breath test, which measures only alcohol in the blood, showed a level below intoxication, the police officer had a reasonable basis for requiring a different type of test, one that might detect the presence of some other drug to account for the plaintiff's extreme symptoms." Id.

The plaintiff here claims that such reasonable cause was absent in his case. To the contrary, many of the same facts were present. He had just crashed his car into a stationary object, resulting in substantial front end damage to his car. He left the scene of the accident even though substantial property damage had occurred. He insisted that he had hit a traffic cone even though a traffic cone could not have caused such damage to his car. His eyes were drowsy, droopy-lidded and red-rimmed. His pupils were constricted, which, to the officer, suggested use of narcotics. His movements were very slow. He failed all three field sobriety tests. In attempting the walk and turn and one-leg stand tests,

he could not maintain his balance or follow directions, and he was very uneasy on his feet, with his legs shaking.

The plaintiff claims that the officer had no reason to request a breath test in the first place if he suspected only narcotic use. The plaintiff, however, "immediately volunteered to take a Breathalyzer test" before his arrest. ROR, narrative, p. 2. After his arrest, at the police station, the plaintiff initially declined the officer's offer to contact an attorney and "almost enthusiastically elected to submit to a breath test." The fact that the plaintiff did not smell of alcohol does not mean that it was unreasonable, in the first instance, to start with the breath test. The officer's decision to request a urine test, when the breath test did not indicate any alcohol in the plaintiff's system, was entirely reasonable based on the plaintiff's failure to control his vehicle, his flight from the scene of his accident, his failure of the field sobriety tests, and his apparent inability to understand or explain how he had damaged his car so substantially.

CONCLUSION

The court has carefully considered each of the plaintiff's arguments in light of the evidence in the entire record. The hearing officer's decision is supported by substantial reliable and probative evidence. The appeal is dismissed.

ERIC WHITE *v.* COMMISSIONER OF CORRECTION
(AC 39783)

DiPentima, C. J., and Sheldon and Harper, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea of the crime of felony murder, sought a writ of habeas corpus, claiming that his right to due process was violated because his guilty plea was not made

knowingly, intelligently and voluntarily, and that his trial counsel provided ineffective assistance by failing to adequately research and investigate the issue of his mental state at the time of his guilty plea and to bring that information to the trial court's attention. Specifically, the petitioner claimed that the medication he was taking on the day of his guilty plea substantially impacted his ability to understand the plea agreement and proceedings. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court did not err in failing to find that the petitioner's due process rights were violated; that court found that the petitioner's guilty plea canvass was constitutionally sufficient, as the petitioner had denied taking any drugs, alcohol or medication the day of the plea canvass and indicated that he had discussed his case with his counsel, and that the petitioner had acknowledged at sentencing that he had taken medication for the purpose of falling asleep and gave no indication that he wanted to withdraw his plea, the habeas court's findings were adequately supported by the record, which showed that the petitioner's responses to the trial court's questions during his canvass demonstrated that he fully understood the circumstances, and although the habeas court did not completely discredit the petitioner's testimony at the habeas trial that he had taken medication at the time of his guilty plea, that it made him feel like a zombie and that he lied about not taking medication at the plea hearing because he thought it would help him, it did not specifically credit anything to which he testified, and it was not for this court, in deciding whether the petitioner's guilty plea was made knowingly, intelligently and voluntarily, to discard the habeas court's credibility determination that the evidence bordered on frivolous and was insufficient to prove a due process violation.

2. The habeas court did not err in concluding that the petitioner's trial counsel did not render ineffective assistance: that court credited trial counsel's testimony as to his numerous visits and discussions with the petitioner, that it was clear that the petitioner understood what he was doing, and that he had no concerns regarding the petitioner's mental state, and in light of that testimony and because the record did not evince that the petitioner was actually impaired by the use of any medication, his trial counsel was not deficient for failing to investigate the petitioner's mental health further or to bring his mental state to the attention of the court; moreover, even if trial counsel's performance was deficient, the record did not show a reasonable probability that the petitioner would have chosen to proceed to trial rather than plead guilty if trial counsel had further investigated the petitioner's mental state or brought it to the trial court's attention.

Argued March 19—officially released May 22, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Oliver*, *J.*; judgment denying the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Michael W. Brown, for the appellant (petitioner).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom were *John C. Smriga*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Eric White, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claims that (1) his right to due process was violated because his guilty plea was not made knowingly, intelligently and voluntarily and (2) his right to effective assistance of counsel was violated because his attorney failed to adequately research and investigate the issue of the petitioner's mental state at the time of his guilty plea and to bring information about the petitioner's compromised mental state to the attention of the criminal trial court. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. On August 11, 2004, the petitioner, represented by Attorney Joseph Bruckmann, pleaded guilty under the *Alford*[1] doctrine to one count of felony murder in violation of General Statutes §§ 53a-54c and 53a-54a (a). The trial court indicated that it intended to

[1] *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

sentence the petitioner to fifty years of imprisonment, which it did on November 5, 2004. The petitioner did not appeal from his conviction following his plea and sentencing or file any postjudgment motions.

The petitioner petitioned for a writ of habeas corpus on January 8, 2014. After counsel was appointed, the petitioner filed an amended petition on May 23, 2016, asserting that Bruckmann had provided ineffective assistance of counsel and that the petitioner's due process rights had been violated because his guilty plea was not made knowingly, intelligently and voluntarily. The thrust of his claims was that medication the petitioner was taking on the day of his guilty plea "substantially impacted his ability to understand the plea agreement and the plea proceedings," that he would not have entered a guilty plea had he not been so medicated, and that Bruckmann was ineffective for failing to research and investigate the issue regarding his mental condition or to bring such information to the court's attention. (Internal quotation marks omitted.)

At the habeas trial on September 19, 2016, Bruckmann, the petitioner, and the petitioner's psychiatric expert, James Phillips, testified. The petitioner also entered into evidence the transcripts of his guilty plea and sentencing, and medical records detailing his medication usage around the time of his guilty plea. The respondent, the Commissioner of Correction, offered no evidence.

On September 27, 2016, the habeas court issued its memorandum of decision denying the amended petition for a writ of habeas corpus. The court credited the testimony of Bruckmann and Phillips in determining that the petitioner had failed to establish ineffective assistance of counsel or a due process violation.[2] In

[2] Phillips called the petitioner's dosage of lithium that he took the day of his plea "fairly standard." Additionally, the court noted that "[Phillips] testified that he could not render an expert opinion on the petitioner's ability,

evaluating the transcripts in evidence, the court observed that Bruckmann and the trial court made the petitioner aware "of all necessary information to make an informed decision . . . whether to enter a plea or take his case to trial." In considering the petitioner's own testimony, although the habeas court did not find that testimony completely lacking in credibility, it found that such testimony was "wholly insufficient to prove any of the necessary elements to establish either a due process violation or a claim of ineffective assistance of counsel. Contrasted with the other, more credible evidence adduced at trial, the petitioner's proffered evidence in support of his claims borders on the frivolous."

The petitioner petitioned the habeas court for certification to appeal, which the court granted. This appeal followed.

We begin with generally applicable legal principles. "The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Questions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009). "The application of the habeas court's factual findings to the pertinent legal standard . . . presents a mixed question of law and fact . . . ." *Duperry* v. *Solnit*, 261 Conn. 309, 335, 803 A.2d 287 (2002).

I

The petitioner first claims that the habeas court erred in failing to find that his due process rights were violated

twelve years ago, to enter a voluntary, knowing and intelligent plea, as there were too many unknowns . . . ."

because his underlying guilty plea was not made knowingly, intelligently and voluntarily. Specifically, he argues that the medication he was taking at the time of his guilty plea "completely undermined his ability to meaningfully consider his decision to plead guilty [and] interfered with his ability to understand the plea agreement and the guilty plea proceeding." We disagree.

"[T]he guilty plea and subsequent conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . This constitutional safeguard, which is codified at General Statutes § 54-56d (a), provides that [a] defendant shall not be tried, convicted or sentenced while the defendant is not competent. . . . [A] defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense. . . .

"[T]he test for competency must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him. . . .

"Although § 54-56d (b) presumes the competency of defendants, when a reasonable doubt concerning the defendant's competency is raised, the trial court must order a competency examination. . . . Thus, [a]s a matter of due process, the trial court is required to conduct an independent inquiry into the defendant's competence whenever he makes specific factual allegations that, if true, would constitute substantial evidence of mental impairment. . . . Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . .

"[D]ue process requires that a plea be entered voluntarily and intelligently. . . . Because every valid guilty plea must be demonstrably voluntary, knowing and intelligent, we require the record to disclose an act that represents a knowing choice among available alternative courses of action, an understanding of the law in relation to the facts, and sufficient awareness of the relevant circumstances and likely consequences of the plea. . . . A determination as to whether a plea has been knowingly and voluntarily entered entails an examination of all of the relevant circumstances. . . . A defendant who suffers from a mental or emotional impairment is not necessarily incompetent to enter a guilty plea because [c]ompetence . . . is not defined in terms of mental illness. An accused may be suffering from a mental illness and nonetheless be able to understand the charges against him and to assist in his own defense . . . . Similarly, [t]he fact that the defendant was receiving medication . . . [of itself] does not render him incompetent. . . . The touchstone of competency, rather, is the ability of the defendant to understand the proceedings against him and to assist in his own defense." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 449–52, 936 A.2d 611 (2007).

The habeas court found no due process violation. In its memorandum of decision, the habeas court first found that the petitioner's guilty plea canvass was constitutionally sufficient, noting that the petitioner had denied having taken any drugs, alcohol, or medication that day. The court also noted that the petitioner indicated at his plea proceeding that he and Bruckmann had discussed the case, including the underlying elements of the charges. The habeas court also observed that the trial court had indicated the sentence it intended to impose on a later date. The petitioner reaffirmed his

understanding of the decision to plead guilty and accept a fifty year sentence.

The habeas court also considered the transcript of the petitioner's sentencing, where the petitioner accepted responsibility for his actions and acknowledged that "fifty years is not enough" for his offense. (Internal quotation marks omitted.) The petitioner gave no indication that he wanted to withdraw his plea. The petitioner did acknowledge taking medication at the time, but stated that it was for the purpose of falling asleep.

At the habeas trial, the petitioner testified that he was taking medication at the time of his guilty plea, although he could not recall what he was taking. He also testified that he continued taking medication until about six to eight months after he was sentenced, having taken himself off it because it "made [him] feel like [he] wasn't in the right state of mind half the time" and "a robot, a zombie . . . ." He claimed that these feelings affected his decision-making at and before the time he pleaded guilty because he did not always understand Bruckmann in their conversations before the plea.[3]

When the petitioner was asked why he denied taking any medication on the day of his plea, the petitioner claimed that he did not want to seem "insane" to the trial judge and that answering affirmatively would only have harmed him. Then, in response to a question regarding why he had pleaded guilty, the petitioner stated, "I [pleaded] guilty to benefit my family and to keep any more harm coming upon my family, so I just said, I understand and I [pleaded] guilty. I wanted to plead guilty to get it over with. Those were my exact words to [Attorney] Bruckmann. I want to get it over

[3] Phillips stated that the petitioner's dosage of lithium on the day of his plea was "fairly standard" and testified as to some of lithium's and Remeron's side effects, but offered no opinion as to the petitioner's mental state at the time of his plea.

with to keep my mother from going through what she was going through." The petitioner then claimed that the medication he was taking affected these feelings. Finally, when asked why he was challenging his conviction almost ten years after his plea, he stated, "[w]ell, due to the fact that I've been incarcerated for fourteen years now and . . . I had time to think about everything that happened . . . and due to the fact that I'm older and I just feel like . . . I have nothing to really lose from wanting my freedom back, and also my family." The petitioner then denied having waited ten years for evidence to be destroyed.

On cross-examination, the petitioner was asked again why he waited ten years to challenge his plea. He responded that he was scared and did not understand the law at the time. Counsel for the respondent then asked when the petitioner became aware that his medication was an issue. The petitioner responded that he became aware of that issue after sentencing. Finally, when asked why he had lied about not taking medication at his plea hearing, the petitioner said, "I thought it would help."

We conclude that the habeas court's findings are supported more than adequately by the record. The petitioner's responses to the trial court's questions during his canvass show that he fully understood the circumstances. "A court may properly rely on . . . the responses of the [petitioner] at the time [he] responded to the trial court's plea canvass . . . ." (Internal quotation marks omitted.) *Bigelow* v. *Commissioner of Correction*, 175 Conn. App. 206, 215–16, 167 A.3d 1054, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017). The petitioner's claim that he felt like a "zombie" and not in control of his actions is not borne out by the transcripts of the plea proceeding. Because the petitioner's expert offered no opinion as to the petitioner's mental state at the time of his plea; see footnote 3 of this

opinion; the only evidence that could establish that the petitioner was not lucid at the time of his plea is his own testimony.[4] Although the habeas court did not completely discredit the petitioner's testimony, it did not specifically credit anything to which he testified, stating instead that his evidence "border[ed] on the frivolous," and was insufficient to prove a due process violation.[5] We are not at liberty to discard this credibility determination in deciding whether the petitioner's guilty plea was made knowingly, intelligently and voluntarily. The burden was on the petitioner to establish "a reasonable likelihood that the medication had adversely affected the petitioner's ability to understand the proceedings against him or to assist in his own defense." *Taylor* v. *Commissioner of Correction*, supra, 284 Conn. 453. In the absence of any other convincing evidence to the contrary, we cannot say that the habeas court erred in not finding the relevant facts to establish a due process violation.

II

The petitioner also claims that the habeas court erred in not determining that his trial counsel provided ineffective assistance. Specifically, the petitioner argues that Bruckmann failed to research adequately and to investigate the issue of the petitioner's mental state at the time of his guilty plea, and to bring information about the petitioner's compromised mental state to the attention of the trial court. We are not persuaded.

[4] The petitioner argues that his medication records also are indicative of his mental state at the time of his guilty plea. Without testimony from Phillips that such medication was reasonably likely to have caused negative effects on the petitioner's willpower at the time of the plea, we are not convinced that these medical records have much probative value.

[5] To the extent that his testimony could be credited, the petitioner testified to choosing to plead guilty to avoid problems for his family and not telling the court that he was on medication to avoid appearing "insane," both of which would tend toward the type of lucidity inherent in someone making a knowing, intelligent and voluntary guilty plea.

"To prevail on a constitutional claim of ineffective assistance of counsel resulting from a guilty plea, a petitioner must establish both that his counsel's performance was deficient and that the deficient performance prejudiced him. See *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L .Ed. 2d 674 (1984); *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 721, 789 A.2d 1046 (2002). To satisfy the performance prong, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . To satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . A reviewing court can find against a petitioner on either ground, whichever is easier. . . . The petitioner cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Cox* v. *Commissioner of Correction*, 127 Conn. App. 309, 314, 14 A.3d 421, cert. denied, 301 Conn. 902, 17 A.3d 1043 (2011).

The habeas court, in its memorandum of decision, found that the petitioner failed to establish that Bruckmann rendered ineffective assistance. The court credited Bruckmann's testimony as to his numerous visits and discussions with the petitioner. Bruckmann had also testified that the petitioner wanted to enter the plea and accept his sentence and that it was clear to Bruckmann that the petitioner understood what he was doing, such that Bruckmann perceived no "red flags" concerning the petitioner's mental state. (Internal quotation marks omitted.) In addition, Bruckmann engaged the services of a forensic psychiatrist to evaluate the petitioner for any potential defenses to his murder

charge. Bruckmann indicated that the psychiatrist reported no signs of psychosis or that the petitioner's mental health was an issue.

The petitioner argues that he was prejudiced because he would not have pleaded guilty but for Bruckmann's failure to adequately research and investigate the petitioner's mental state. He also argues that he was prejudiced because the trial court would not have accepted his guilty plea had Bruckmann not failed to bring to the attention of the trial court the petitioner's compromised mental state.[6] His prejudice arguments necessarily depend on his argument that his mental state was compromised at the time of his pleas, which we determined was not borne out by the record in the context of his due process claim. See part I of this opinion. We likewise reject that argument underlying these claims of ineffective assistance. "Because the record before us does not evince that the petitioner was actually impaired by the use of any psychotropic drugs, we cannot conclude that his counsel was deficient in failing to investigate his mental . . . health further." *Hunnicutt* v. *Commissioner of Correction*, 83 Conn. App. 199, 207, 848 A.2d 1229, cert. denied, 270 Conn. 914, 853 A.2d 527 (2004). Given Bruckmann's credited testimony that he perceived no "red flags," we likewise cannot conclude that Bruckmann was deficient for failing to bring the petitioner's mental state to the attention of the court, because such testimony is contraindicative of "a reasonable doubt concerning the [petitioner's] competency . . . ." *Taylor* v. *Commissioner of Correction*, supra, 284 Conn. 450. Even if we assume deficient performance, the record does not show "a

[6] The petitioner argues "that the trial court had an independent duty to assess the petitioner's mental state at the time of his guilty plea," but provides no legal authority to support this proposition. Rather, we consider whether the petitioner would have pleaded guilty but for Bruckmann's failure to notify the court of the petitioner's compromised mental state. See *Cox* v. *Commissioner of Correction*, supra, 127 Conn. App. 314.

reasonable probability that [the petitioner] would have chosen to proceed to trial rather than plead guilty'' if Bruckmann had further investigated the petitioner's mental state or brought it to the trial court's attention. *Hunnicutt* v. *Commissioner of Correction*, supra, 210. Therefore, the habeas court did not err in concluding that Bruckmann did not render ineffective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.