CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DARRYL FLETCHER (AC 39358)

Lavine, Alvord, and Keller, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction for eighteen months. The defendant was charged with violating his probation after he failed to verify his employment with his probation officers, to complete a domestic violence treatment program and to submit to a drug treatment program, and tested positive for marijuana and cocaine use. On appeal, he claimed that, in the dispositional phase of the hearing, the trial court improperly inferred from the evidence that, for nearly a year, he had eluded service of the warrant charging him with violation of his probation, and that the court, in imposing the sentence, substantially relied on its faulty determination that he had avoided being arrested. *Held:*

1. The state could not prevail on its claim that the appeal had become moot because there was no practical relief that could be afforded to the defendant, who had completed his sentence for violating his probation and had been released from the custody of the Department of Correction, as the appeal qualified for an exception to the mootness doctrine; despite the expiration of the defendant's sentence, there was a reasonable possibility that, in the event that the defendant were to face a sentencing court in the future, the court's determination revoking his probation and sentencing him to a period of incarceration could subject him to prejudicial collateral consequences, and there was also a reasonable possibility that the presence of the sentence on his criminal record could subject him to prejudicial collateral consequences affecting his employment opportunities and his standing in the community generally,

and this court had the ability to provide the defendant practical relief by granting him a new dispositional hearing that could result in a more favorable outcome.

2. The defendant's unpreserved claim that the trial court improperly relied on a fact that was not part of the record when it found that he had tried to elude law enforcement in their efforts to serve the violation of probation warrant was unavailing; the information on which the court relied satisfied the requisite standard of reliability, as the court reasonably inferred from the facts that the warrant officer had made reasonable efforts to locate the defendant but was unable to find him and that, as a consequence, law enforcement took almost a year to serve the warrant, and there was evidence in the record that the defendant's whereabouts were not readily ascertainable and that during the defendant's probationary period, he moved frequently, did not keep probation informed of his whereabouts and did not take any steps to make his whereabouts known or to turn himself in with respect to the warrant, and the defendant did not demonstrate that the inference drawn by the court was unreasonable or unjustifiable, as the court's inference from the warrant officer's testimony that the warrant officer was unable to locate the defendant for nearly a year was a logical conclusion based on the evidence and was not the product of speculation or conjecture.

Argued March 12—officially released June 26, 2018

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *B. Fischer*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Jennifer W. Cooper, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Darryl Fletcher, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32 and sentencing him to a term of incarceration of eighteen months.

The defendant claims that he is entitled to a new sentencing hearing because the court improperly relied on a fact that was not part of the record. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our analysis. In 1999, the defendant was convicted of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), possession of narcotics with intent to sell within 1500 feet of a public school in violation of General Statutes § 21a-278a (b), possession of marijuana in violation of General Statutes § 21a-279 (c), and three counts of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c. The defendant received a total effective sentence of twenty years, execution suspended after thirteen years, followed by five years of probation. This court affirmed the judgment of conviction. *State* v. *Fletcher*, 63 Conn. App. 476, 777 A.2d 691, cert. denied, 257 Conn. 902, 776 A.2d 1152 (2001).

The defendant's probationary period commenced when he was released from incarceration on November 17, 2011.[1] Among the court-ordered special conditions of the defendant's probation[2] was that he submit to drug screening, evaluation, and treatment and that he obtain full-time verifiable employment.

[1] The defendant acknowledges that he also was placed on probation as a result of his conviction in a separate criminal matter. In a separate probation revocation proceeding that occurred on May 13, 2016, which took place following the hearing at issue in the present case, his probation in that matter was terminated after he admitted that he had violated his conditions of probation.

[2] Prior to his probationary period, the defendant signed a written "conditions of probation" form that set forth standard conditions of probation as well as the court-ordered special conditions of probation, thereby representing that his probation officer had reviewed the conditions with him, that he understood the conditions, and that he would abide by the conditions.

In 2015, the defendant was arrested and charged with violating his probation in violation of General Statutes § 53a-32. The defendant denied the charge. The matter was tried before the court on May 2, 2016. At the conclusion of the adjudicatory phase of the hearing, the court found that the state had proven that the defendant had violated several of the conditions of his probation. Specifically, the court found that the defendant did not verify his employment with his probation officers, failed to complete a domestic violence treatment program, failed to submit to a drug treatment program, and tested positive for marijuana and cocaine use. At the conclusion of the dispositional phase of the hearing, the court terminated the defendant's probationary status and sentenced him to serve a term of incarceration of eighteen months.[3]

On June 28, 2016, the defendant filed the present appeal. The defendant does not claim that the court erroneously determined, in the adjudicative phase of the hearing, that he violated his probation. The defendant claims that, in the dispositional phase of the hearing, the court improperly inferred from the evidence that, for nearly a year, he eluded service of the warrant charging him with violating his probation.[4] Moreover, the defendant argues that, in imposing its sentence, the court "substantially relied upon its faulty determination that the defendant was avoiding being arrested . . . ." The remedy that he seeks from this court is a new sentencing hearing.

[3] The defendant, exercising his right of allocution, admitted that he had used marijuana during his probationary period, stated that he was trying to comply with his probation requirements, and asked the court for "a little leniency."

[4] In his principal brief, the defendant also argued that the court erroneously found and relied on the fact that he had failed to keep probation informed of his address. In his reply brief, the defendant expressly abandoned this aspect of his claim.

On August 31, 2017, after the defendant filed his principal brief, the state filed a motion to dismiss the appeal on the ground that it became moot when the defendant was released from the custody of the Department of Correction (department) on August 22, 2017. The state argued that this court could no longer afford the defendant, who was challenging only the manner in which the court imposed its sentence and not the finding that he had violated his probation, any practical relief. In his objection to the motion to dismiss, the defendant acknowledged that he had been released from custody on August 22, 2017, but argued that exceptions to the mootness doctrine applied and that this court should not dismiss the appeal. This court denied the state's motion without prejudice to the state, and permitted the state to address the mootness issue in its brief and the defendant to address the issue in his reply brief. They have done so. Additional facts will be set forth as necessary.

I

First, we address the state's argument that the appeal is moot because the defendant has completed his sentence. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . It is well settled that [a]n issue is moot when the court can no longer grant any practical relief." (Citation omitted; internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 53–54, 161 A.3d 537 (2017). "Under such circumstances, the court would merely be rendering an advisory opinion, instead of adjudicating an actual, justiciable controversy." *State* v. *Jerzy G.*, 326 Conn. 206, 213, 162 A.3d 692 (2017). "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . .

Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 333, 179 A.3d 201 (2018). "[A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 205, 802 A.2d 74 (2002). "If there is no longer an actual controversy in which [this court] can afford practical relief to the parties, we must dismiss the appeal. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citation omitted; internal quotation marks omitted.) *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 196, 167 A.3d 967 (2017).

The parties do not dispute that because the defendant has completed his sentence, this court no longer has the ability to reduce the number of days he must remain incarcerated. On this ground, the state argues that this court may not grant any practical relief and that the appeal should be dismissed. In reply, the defendant argues that this appeal falls within two well settled exceptions to the mootness doctrine, namely, the collateral consequences exception as well as the exception for appeals involving issues that are capable of repetition yet evade review.

"[T]he court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . [T]o

invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Internal quotation marks omitted.) *State* v. *Reddy*, 135 Conn. App. 65, 69–70, 42 A.3d 406 (2012); see also *Williams* v. *Ragaglia*, 261 Conn. 219, 226, 802 A.2d 778 (2002) (litigant bears burden of demonstrating reasonable possibility that prejudicial consequences will occur); *State* v. *McElveen*, supra, 261 Conn. 205 (same).

The defendant argues: "The record of jail in his criminal history will stigmatize him in the community for the rest of his life and hinder his efforts to obtain meaningful employment. And if he is ever charged with another crime, judges and prosecutors will factor in the defendant's incarceration when determining a sentence." Also, the defendant argues: "Although our citizens suffer greatly from the collateral consequences of convictions, it is simply not the case that all collateral consequences arise from the conviction alone. Any potential employer or school admissions office would know from the defendant's record that he has served time in prison. They would understand that during that time the defendant was not learning new skills and was not making connections within the community that would benefit future employment. Just the fact that the defendant's transgressions had earned him the most

severe punishment possible in our criminal justice system, rather than a fine or more probation, will hurt him because the stigma of incarceration is much heavier than other, lesser sentences. . . . To suggest otherwise ignores the very real barriers that former inmates contend with every day after they are released from jail and return to their communities." (Footnote omitted.)

Essentially, the defendant's appeal is based on what he claims to be error in the court's determination to revoke his probation. "Our Supreme Court has recognized that revocation of probation hearings, pursuant to [General Statutes] § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Altajir*, 123 Conn. App. 674, 680–81, 2 A.3d 1024 (2010), aff'd, 303 Conn. 304, 33 A.3d 193 (2012). The defendant argues that the court's allegedly erroneous finding in the dispositional phase led it to revoke his probation and order him to serve a substantial portion of his unexecuted prison sentence. He argues that, in the absence of the court's error, it may have imposed a lesser form of punishment, including permitting him to remain on probation.

With respect to employment and his standing in the community generally, the defendant has identified what he believes to be a reasonable probability of prejudicial collateral consequences that do not arise from the court's finding that he violated his probation, but the fact that, in the dispositional phase of the proceeding, the court revoked his probation and sentenced him to

a term of incarceration.[5] Also, the defendant argues that there is a reasonable probability that, if he were to be convicted of a crime in the future, the court's sentence could result in his receiving greater punishment by a future sentencing court. The defendant argues that a future sentencing court could learn from his criminal record that he had been sentenced to serve time in prison for violating his probation and use this information to his detriment. The defendant argues: "A jail sentence reveals to future sentencing courts that the defendant failed to demonstrate [that a lesser form of punishment was appropriate] . . . and that the beneficial aspects of [the defendant's] probation could [not] continue to be served by allowing the defendant to remain on probation. . . . Such information signals to the court that the defendant's violations were serious and that he was wilful, uncooperative, unable to submit to authority, and averse to being rehabilitated." (Internal quotation marks omitted.)

In evaluating the defendant's arguments, we look for guidance in relevant appellate case law. In *State* v. *McElveen*, supra, 261 Conn. 214–15, our Supreme Court concluded that, despite the fact that the sentence imposed upon a defendant following his probation violation had expired, it was reasonably possible that collateral consequences flowed from the fact that his probation had been revoked. The court concluded that his appeal from the judgment of the trial court revoking his probation was not rendered moot due to the expiration of his sentence, and stated: "We appreciate that there is something unsettling about looking to future involvement

[5] We note that the defendant already has suffered from what he believes to be the negative effects of incarceration as a result of his being sentenced in 1999 to a term of incarceration for his commission of the underlying crimes. We interpret his argument to mean that the *additional* sentence of incarceration that resulted from the present probation revocation hearing caused him further prejudice with respect to employment and his standing in the community generally.

with the criminal justice system as a predicate for our determination that a case such as the present one is not moot. Even under its more narrow application of the collateral consequences doctrine, however, the United States Supreme Court has relied upon collateral consequences that would arise in the event of future criminal behavior to conclude that an otherwise moot judgment of conviction merits review." Id.

In *State* v. *Preston*, 286 Conn. 367, 369, 944 A.2d 276 (2008), a defendant appealed from the judgment rendered following a probation revocation proceeding and claimed that the trial court (1) improperly found that he had violated his probation and (2) abused its discretion in revoking his probation. Relying on the fact that the defendant had pleaded guilty to the underlying offenses, thereby eliminating any live controversy about his conduct, this court dismissed his first claim as moot. Id. This court dismissed the second claim as moot for lack of a live controversy because it determined that the defendant failed to demonstrate that prejudicial consequences flowed from the revocation of his probation. Id., 369–70. Following a grant of certification to appeal, our Supreme Court reversed the judgment of this court with respect to the defendant's claim that the trial court had abused its discretion when it revoked his probation. Id., 370–71.

In *Preston*, our Supreme Court determined, initially, that a circumstance that renders moot a claim arising from the evidentiary phase of a revocation of probation hearing does not necessarily render moot a claim arising from the dispositional phase of the hearing. Id., 380. Thereafter, the court determined that it was reasonably possible that the defendant would suffer collateral consequences as a result of the revocation of his probation. Id., 382–84. Relying on *McElveen* and other relevant authority, the court reasoned that prejudice flowed from the revocation of probation. Id., 383. The court,

quoting this court's decision in *State* v. *Johnson*, 11 Conn. App. 251, 256, 527 A.2d 250 (1987), stated: " '[P]robation revocation is a blemish on [the defendant's] prison record which will affect his job opportunities and his standing in the community because it connotes wrongdoing and intractability and is a burden analogous and in addition to his criminal stigma.' " *State* v. *Preston*, supra, 383.

Finally, in *State* v. *Natal*, 113 Conn. App. 278, 280, 966 A.2d 331 (2009), the defendant appealed from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction for two years. He raised a claim related to the adjudicative phase of the probation revocation hearing and a claim related to the dispositional phase of the hearing. Id. Despite the fact that the defendant's sentence expired during the pendency of the appeal, this court explained that the appeal was not moot, stating: "Although the defendant's two year sentence appears to have expired . . . the present appeal is not moot due to the collateral consequences doctrine. In *State* v. *McElveen*, [supra, 261 Conn. 198], our Supreme Court determined that subject matter jurisdiction existed over an appeal from the revocation of probation even though the probationer subsequently completed his term of incarceration [during the pendency of the appeal]. The court reasoned that there were collateral consequences that reasonably could ensue as a result of a probation revocation, such as a negative impact on a defendant's standing in the community and the ability to secure employment. . . . Because there is a reasonable possibility that those collateral consequences will attach in the present case, the appeal is not moot." Id., 282 n.1.

We observe that "[i]t is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited

either as to the kind of information he may consider or the source from which it may come. . . . The trial court's discretion, however, is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability." (Citation omitted; internal quotation marks omitted.) *State* v. *Huey*, 199 Conn. 121, 127, 505 A.2d 1242 (1986). A defendant's criminal record may shed light on his willingness to conform to socially acceptable behavior and, thus, is a relevant factor to consider at the time of sentencing. See General Statutes § 54-91a (c) (presentence investigation report shall include information regarding defendant's criminal history); *State* v. *Garvin*, 43 Conn. App. 142, 152, 682 A.2d 562 1996) ("[f]or the determination of sentences, justice generally requires consideration of more than the particular acts for which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender" [internal quotation marks omitted]), aff'd, 242 Conn. 296, 699 A.2d 921 (1997).

A record that reflects that a defendant has violated his probation and that probation has been revoked sheds light on his criminal character because, as the defendant argues, such information reflects that the defendant's violations were serious enough to warrant a finding that the beneficial aspects of probation were no longer being served. As our case law reflects, the court's disposition gave rise to a reasonable possibility of prejudicial consequences for the defendant. See, e.g., *State* v. *Smith*, 207 Conn. 152, 161, 540 A.2d 679 (1988) ("[i]f the revocation of the defendant's probation stands, it may not only have an effect on his ability to obtain probation in the future but also affect his standing in the community in its connotation of wrongdoing, job opportunities and is a blemish on his record").

In the present case, the defendant challenges the court's exercise of discretion in the dispositional phase of the revocation of probation hearing. See *State* v. *Faraday*, 268 Conn. 174, 185–86, 842 A.2d 567 (2004) (abuse of discretion standard of review applies to court's determination in dispositional phase). On the basis of the foregoing authority, we are persuaded that, despite the expiration of the defendant's sentence, there is a reasonable possibility that, in the event that the defendant were to face a sentencing court in the future, the court's determination in revoking probation and sentencing the defendant to a period of incarceration may subject him to prejudicial collateral consequences. Additionally, we are persuaded that there is a reasonable possibility that, despite the expiration of the defendant's sentence, its presence on the defendant's criminal record could subject him to prejudicial consequences affecting not merely his employment opportunities, but his standing in the community generally.

If the court made improper findings in the dispositional phase of the hearing and relied on such findings in sentencing the defendant, this court has the ability to provide the defendant practical relief by granting the defendant a new dispositional hearing that could result in a more favorable outcome. In light of the prejudicial collateral consequences we have discussed, we retain jurisdiction over the appeal despite the fact that the defendant has completed serving his sentence. Accordingly, we reject the state's argument that the present appeal should be dismissed on mootness grounds.[6]

II

Next, we address the defendant's claim that the court improperly relied on a fact that was not part of the record. We disagree.

[6] In light of our conclusion that the present appeal falls within the collateral consequences exception to the mootness doctrine, we need not consider the defendant's reliance on the exception for appeals involving issues that are capable of repetition yet evade review.

The following additional information is relevant to the present claim. During the dispositional phase of the hearing, the court heard testimony from Yvonne Lee, the defendant's probation officer; Matthew Steinfeld, a psychologist who provided substance abuse treatment to the defendant following his arrest for violating his probation; and Clint Cave, the defendant's cousin who had employed the defendant following his release from prison.

In its oral ruling in the dispositional phase of the hearing, which later became the court's signed, written memorandum of decision in accordance with Practice Book § 64-1 (a), the court found in relevant part: "[Y]ou had seven years hanging over your head. The thing that is just surprising to me is how [flippant] you seem to be with probation. . . . You . . . missed countless meetings with them. You never kept them posted on your address here in Connecticut. You kept moving along. You were very evasive with them. You went out of state without their permission. You had violations where you didn't follow through with [a program offered by] Catholic Charities. . . .

"[There were problems with the] nonviolence program where . . . you were given two opportunities. You didn't follow through. You had positive marijuana use in September and October in 2014. . . . Again, this is when you're meeting with probation. . . .

"[I]t shouldn't have taken you all these opportunities to finally, quote, unquote, get it. And there's a price to be paid for that. Again . . . anybody who is on probation is on thin ice. You know, in many ways, you were fortunate they didn't violate you, and I know they filed a warrant or one was signed in November of 2014, and they couldn't find you, and it took them a year to eventually serve the warrant on it. You had multiple

arrests while on probation, and you had domestic matters, violation of protective orders. You had driving suspensions. So you [engaged in] numerous [types of] criminal activity during your course of probation. Listen, to your credit, the testimony from Dr. Steinfeld was positive for you. He did indicate that you were a good part of the group, that you graduated from the group, that your testing for the drugs [had] been going down, and he felt that . . . his plan and their treatment of you has [had] a positive effect on you. But as you heard earlier, you're in violation. There's many violations here. . . .

"And you heard the probation officers. They don't want to . . . put you back on probation because you never showed up at half the meetings. You never followed through with what you were supposed to do. I mean, you dropped the ball countless, countless times. So there's a penalty to be paid for that. So I feel out of all the facts I heard at this hearing, the arguments of the attorneys, and your comments, that a degree of incarceration is appropriate." The court then revoked probation and imposed a sentence of eighteen months of incarceration.

The defendant argues that the court improperly found that a warrant officer, or members of law enforcement generally, had looked for him for a year to serve the violation of probation warrant on him. He argues that the court substantially relied on this improper finding in reaching its disposition. The defendant argues that "the record reflects that the warrant was not served for nearly a year after it was signed, [but] there was no evidence that the authorities ever searched for the defendant. Moreover, there was no evidence that the defendant tried to elude capture during this period."[7]

[7] As reflected in our discussion of the defendant's argument, part of his argument is that the court found and relied on the fact that he had "tried to elude capture." The court did not expressly find that the defendant attempted to elude capture. The court found that the warrant officer was

The defendant correctly acknowledges that he did not object to the court's reliance on its findings at the time of trial. He seeks review of this unpreserved claim under the bypass rule set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[8] We will review the claim under *Golding* because the record is adequate for review and the claim implicates the defendant's due process right not to be sentenced on the basis of improper factors or erroneous information. See *State* v. *Thompson*, 197 Conn. 67, 77, 495 A.2d 1054 (1985).

"The standard of review of the trial court's decision at the [dispositional] phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only

unable to find the defendant and that this had resulted in a lengthy delay in serving the warrant on him.

[8] As modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), the *Golding* doctrine provides that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. "The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. . . . Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation . . . exists and whether it . . . deprived the defendant of a fair trial." (Citations omitted.) Id., 240–41.

where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In this exercise of broad discretion, however, the trial court must continue to comport with the requirements of due process. The United States Supreme Court has recognized that [b]oth the probationer . . . and the [s]tate have interests in the accurate finding of fact and the informed use of discretion—the probationer . . . to insure that his liberty is not unjustifiably taken away and the [s]tate to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community. . . . Our review of whether the trial court engaged in such an informed use of discretion . . . is in turn governed by the well established standards for reviewing a trial court's exercise of similarly broad discretion at sentencing in a criminal trial.

"It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. . . . In keeping with this principle, we have recognized that [a] sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . Generally, due process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial. Rather, judges may consider a wide variety of information. . . .

"We have cautioned, however, that [t]he trial court's discretion . . . is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability. . . . As we have long recognized,

in keeping with due process, a defendant may not be sentenced on the basis of improper factors or erroneous information. . . . Further, courts must be concerned not merely when a sentencing judge has relied on demonstrably false information, but [also] when the sentencing process created a significant possibility that misinformation infected the decision. . . . Nonetheless, [a]s long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion. . . .

"In considering a claim that the trial court relied on unreliable information at sentencing, we therefore conduct a two-pronged inquiry: first, did the information at issue contain some minimal indicium of reliability; second, if it did not, did the trial court substantially rely on this improper information in fashioning its ultimate sentence? . . .

"With respect to the threshold inquiry into reliability, we note that [t]here is no simple formula for determining what information considered by a sentencing judge is sufficiently reliable to meet the requirements of due process. The question must be answered on a case by case basis." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Altajir*, 303 Conn. 304, 315–18, 33 A.3d 193 (2012).

Having set forth applicable principles, we turn to the evidence before the court. At the violation of probation trial, the defendant's probation officer, Lee, testified that prior to drafting an arrest warrant in November, 2014, she warned the defendant that he was in danger of a violation. Lee testified that the warrant was not served on the petitioner until October, 2015. She testified, as well, that, after he was found to be in violation, she told the defendant that, because of his violation, he did not have to "report to probation." Additionally,

Lee testified that the defendant did not make any efforts with her to turn himself in on the violation of probation warrant. The court questioned Lee about the delay in serving the warrant, as follows:

"The Court: Ms. Lee . . . did you file a violation of probation warrant against this defendant in October, 2014?

"[The Witness]: I believe . . . [November 12, 2014] was when we decided to go forward with the violation.

"The Court: So when you say you made a decision to go forward with the violation, do you actually get a warrant and sort of hold it in abeyance to see how the defendant responds? I'm just trying to understand your testimony.

"[The Witness]: Well, we go forward. We write the warrant, and then it goes to the court to get signed off on.

"The Court: All right. So that was in October of 2014?

"[The Witness]: November of 2014.

"The Court: All right. . . . And what happened to the warrant? . . .

"[The Witness]: The warrant will go to our warrant officer. They make attempts to have it served.

"The Court: So you had a warrant signed back in 2014?

"[The Witness]: [It] was signed . . . .

"[The Prosectutor]: Your Honor, I believe the warrant was signed by the court on November 28, 2014. . . . Signed by Judge Clifford.

"The Court: So then what happened to that warrant?

"[The Witness]: The warrant sat, and they made it—

"The Court: Sat where?

"[The Witness]: It sits with our warrant officer. They try to make attempts to get in contact with the defendant to turn himself in, and they also I believe get in contact with the local [police departments] to make attempts to go—

"The Court: But you're now his probation officer at this time?

"[The Witness]: I am. Yes.

"The Court: And you told him, you know, the judge approved the warrant for the violations we've gone through. And . . . that warrant was not served on him . . . for another [twelve] months?

"[The Witness]: That's correct.

"The Court: And is that usual?

"[The Witness]: No. Usually they're served much quicker.

"The Court: Is there a reason why it wasn't served on him for [twelve] months? . . . Did you still hold back on the warrant to see if he would sort of respond to the requests and the conditions of his probation or not?

"[The Witness]: Oh, no, not at all.

"The Court: So it had . . . no connection to that?

"[The Witness]: No.

"The Court: You had a warrant signed in 2014, and it just so happens it just wasn't served on him until 2015?

"[The Witness]: Yes.

"The Court: A year later?

"[The Witness]: Yes.

"The Court: Even though you saw him several times during that time frame?

"[The Witness]: No, I didn't see him several times. No.

"The Court: Okay. Why didn't you see him several times during that time frame?

"[The Witness]: Once the violation is issued . . . his probation is put on pause. . . .

"The Court: Doesn't he have the same conditions of probation even though . . . the warrant is served upon him?

"[The Witness]: Unless it's ordered a supervised violation, which that didn't occur until the warrant was served in October of 2015.

"The Court: So then when . . . it's served upon him, this defendant, like any other defendant, then [he] is obliged to comply with the conditions of probation during the pendency of the violation; is that correct?

"[The Witness]: Yes.

"The Court: So . . . it sort of [is] in limbo . . . from October, 2014, until service about [eleven] months later?

"[The Witness]: Yes."

The evidence supports several conclusions. First, the defendant's arrest warrant was issued on November 28, 2014, but it was not served on him until October, 2015. Second, the defendant was aware that he was at risk of violating his probation, learned that a warrant had been issued, and did not take any steps to turn himself in with respect to the warrant. Third, the usual practice of Lee's office is to forward arrest warrants to a warrant officer who, perhaps in conjunction with local law enforcement, will serve it quickly. Fourth, the lengthy delay in serving the warrant on the defendant was

unusual and not attributable to Lee or her colleagues. Additionally, among the findings made by the court in the dispositional phase of the hearing that the defendant does not challenge are the court's findings that, prior to the time that the violation of probation warrant was issued, he failed to keep probation informed of his whereabouts, he continued to "mov[e] along," and he was "very evasive" with probation.

On the basis of the foregoing facts, we conclude that the information on which the court relied satisfied the requisite standard of reliability. Specifically, the court reasonably inferred from the facts that the warrant officer made reasonable efforts to locate the defendant but was unable to find him and, consequently, it took law enforcement nearly a year to serve the warrant that had been issued in November of 2014. There was evidence that the defendant's whereabouts were not readily ascertainable. Lee testified that the defendant was no longer required to comply with the conditions of his probation between the time that the violation of probation warrant was issued in November, 2014, until the time that the warrant ultimately was served on him in October, 2015. Nonetheless, the evidence supported a finding that, during the defendant's probationary period that commenced in November, 2011, he moved frequently and, contrary to the conditions of his probation, did not keep probation informed of his whereabouts. Moreover, after the defendant learned of the warrant, he did not take any steps to make his whereabouts known or turn himself in with respect to the warrant. "The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Berger*, 249 Conn. 218, 224, 733 A.2d 156 (1999). The defendant has not demonstrated that the inference drawn by the court was unreasonable or unjustifiable. The court's inference, that the warrant

officer was unable to locate the defendant for nearly a year, was not the product of speculation or conjecture; it was a logical conclusion on the basis of the evidence.

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

EMERITUS SENIOR LIVING *v.* DENISE LEPORE (AC 40078)

Sheldon, Keller and Elgo, Js.

Syllabus

The plaintiff, which operates an assisted living facility, brought this action seeking to collect an unpaid balance due for assisted living services it had provided to the defendant's now deceased mother, R. The parties had executed a residency agreement for R's residence and care, with the defendant serving as a representative for R with power of attorney. After the defendant stopped making payments to the plaintiff, the plaintiff served R and the defendant with a notice to quit possession for nonpayment of rent. Thereafter, the plaintiff brought an eviction summary process action, and the trial court rendered a judgment of possession for the plaintiff. The plaintiff, however, did not execute on its right to possession because R suffered from severe dementia and it lacked the authority to place her in a different facility. The plaintiff attempted to contact the defendant to discuss R's relocation, but the defendant did not respond. Subsequently, the plaintiff initiated the present action to recover all sums payable and due under the residency agreement. The plaintiff filed a motion for summary judgment as to liability, and after a hearing the trial court denied the plaintiff's motion and, sua sponte, rendered judgment for the defendant, finding that the agreement was unenforceable because it was unconscionable and against public policy. On the plaintiff's appeal to this court, *held*:

1. The trial court improperly found that the residency agreement was unenforceable: the agreement was not unenforceable due to procedural or substantive flaws, as the record did not reveal that the defendant had no meaningful choice whether to select the plaintiff as the provider of assisted living services for R, the agreement was sufficiently clear as

written to provide reasonable notice to the defendant, as R's representative, that she would be obliged to pay all sums due for services rendered to R if R did not pay for them, and the agreement plainly and unambiguously imposed personal liability on the defendant in a representative capacity for amounts owed to the plaintiff; moreover, the agreement was not substantively unconscionable, as the language of the representative clause was akin to having a cosigner to the agreement, which is a common business practice for residents in assisted living homes, it is also common for residents in assisted living homes to entrust the management of their finances to others, and the guarantee agreement to ensure payment for services rendered was not so unreasonable as to be unconscionable and, therefore, unenforceable.

2. The trial court erred by finding that the residency agreement was unenforceable as a matter of public policy; that court did not identify, and the defendant did not provide, a specific public policy that the agreement purportedly violated, and this court, which did not identify a public policy prohibiting contracts that guarantee payment for assisted living leases, could not conclude on the basis of the limited record that the agreement was unenforceable on public policy grounds when there exists a general policy in favor of freedom to contract.

Argued February 13—officially released June 26, 2018

Procedural History

Action to recover unpaid rent, and for other relief, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Avallone, J.*, denied the plaintiff's motion for summary judgment; thereafter, following a hearing, the court rendered judgment for the defendant; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

K. Scott Griggs, with whom, on the brief, was *Gerardo Schiano*, for the appellant (plaintiff).

Opinion

KELLER, J. The plaintiff, Emeritus Senior Living a/k/a Brookdale Woodbridge,[1] appeals from the judgment

[1] Brookdale Senior Living Solutions purchased the Emeritus Corporation in August, 2014. The plaintiff continued to operate under the name Emeritus Senior Living until June, 2015. At that point the plaintiff changed its name to Brookdale Woodbridge.

of the trial court in favor of the defendant, Denise Lepore, in this action filed by the plaintiff to collect the unpaid balance due for assisted living services it had provided to the defendant's now deceased mother, Louise Rolla. The plaintiff claims that the court erred by finding that the residency agreement, to the extent it holds the defendant personally liable, as Rolla's representative, for unpaid amounts owed by Rolla to the plaintiff, is void and unenforceable because it is (1) unconscionable and (2) against public policy.[2] We agree and, accordingly, we reverse the judgment of the trial court.[3]

[2] The plaintiff has relied on the court's oral ruling of January 17, 2017. The record does not contain a signed transcript of the court's decision, as is required by Practice Book § 64-1 (a), and the plaintiff did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the plaintiff take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a). In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised on the present appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceeding. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006).

[3] The court rendered judgment on grounds that neither party raised below. Although the plaintiff does not claim in this appeal that the court lacked the authority to render judgment on grounds never raised, we note that "[t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . F. James, G. Hazard & J. Leubsdorf, Civil Procedure (5th Ed. 2001) § 1.2, p. 4. The parties, may, under our rules of practice, challenge the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. Practice Book § 10-39. Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Practice Book §§ 17-44 and 17-49. In both instances, the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law. The rules of practice do not provide the trial court with authority to determine dispositive questions of law in

The following factual allegations and procedural history are relevant to this appeal. The plaintiff operates an assisted living facility in Woodbridge. On December 21, 2014, the defendant executed a residency agreement (agreement) with the plaintiff for the residence and care of her mother, Rolla.[4] The defendant signed the agreement on behalf of her mother as a representative and with power of attorney for her mother. The agreement provides in relevant part: "If this agreement is signed by a representative on your behalf, you and the representative shall be jointly and severally obligated to the community for payment of any fees or costs owing by you pursuant to this agreement. The community reserves the right to charge you, or your representative if not paid by you, for such fees and costs. If we take action to collect past due fees and costs, you and your representative will be liable for our costs of collection, including but not limited to the cost of demand letters, attorneys fees and court costs."

Initially, the defendant made regular payments to the plaintiff for her mother's care and residence. After

the absence of such a motion." (Emphasis in original; internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 564–65, 898 A.2d 178 (2006); see also *Greene* v. *Keating*, 156 Conn. App. 854, 860–61, 115 A.3d 512 (2015) (court erred in rendering summary judgment on ground not claimed or briefed by parties' cross motions for summary judgment).

"A court may not grant summary judgment sua sponte. . . . The issue first must be raised by the motion of a party and supported by affidavits, documents or other forms of proof." (Internal quotation marks omitted.) *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 798, A.3d (2018). "When a rule of practice requires a written motion, a memorandum of law and supporting documentation, it is because the issue to be decided is of considerable importance. In the case of summary judgment, which results in a swift, concise end to often complex litigation without benefit of a full trial, the parties and the court need to be as well informed as possible on the applicable law and facts." Id., 797.

In the present case, the court, sua sponte, rendered judgment for the defendant on grounds not raised by the parties. Accordingly, we observe that the court acted in excess of its authority when it rendered judgment for the defendant.

[4] Rolla passed away on January 24, 2017.

March 11, 2016, however, the defendant stopped making payments to the plaintiff. In response, the plaintiff served Rolla and the defendant, in her capacity as Rolla's representative, with a notice to quit possession for nonpayment of rent on July 28, 2016. The plaintiff commenced an eviction summary process action against Rolla and the defendant on August 8, 2016, in the New Haven Superior Court, Housing Session. Rolla and the defendant did not appear in that action or file responsive pleadings therein. On August 31, 2016, the court rendered a judgment of possession for the plaintiff and on September 8, 2016, the court issued an execution to enforce that judgment. The plaintiff, however, did not execute on its right to possession because Rolla suffered from severe dementia and the plaintiff lacked the authority to place her in a different facility. As the defendant had power of attorney, she was the person with the authority to move her mother to a different facility. The plaintiff attempted to contact the defendant to discuss Rolla's relocation, but the defendant did not respond.

On October 24, 2016, the plaintiff filed a complaint in the present action, seeking to recover "all sums payable and due" under the residency agreement, which the plaintiff claimed to amount to $47,310.02 at the time. The defendant, appearing without counsel, filed an answer on November 15, 2016, in which she referred to purported defects in the service of process. On December 9, 2016, the plaintiff filed a motion for summary judgment as to liability, arguing that there was no genuine issue of material fact as to whether the defendant must pay all unpaid sums owed for the residence and care services provided to her mother. The defendant did not file a memorandum in opposition to the plaintiff's motion for summary judgment or a countermotion for summary judgment in her favor.

The court, *Avallone*, *J.*, held a hearing on the plaintiff's motion for summary judgment on January 17, 2017.

At the hearing, the court denied the plaintiff's motion for summary judgment and, sua sponte, rendered judgment for the defendant, finding that the agreement was unenforceable because it was unconscionable and against public policy. The court, ruling from the bench, stated in relevant part: "I find it unconscionable to accept [the plaintiff's] position that you have . . . a multipage complicated agreement which starts off naming who the parties are, and then in one paragraph entitled payment, your client establishes joint and several liability on [the defendant]. And I'm telling you I find that unconscionable. I find it against the public policy of the state of Connecticut that it isn't delineated specifically that the representative . . . is paying for this. This is the only paragraph in which . . . financial responsibility falls on the representative." The court reiterated: "This [agreement is] against public policy of the state of Connecticut. It is unconscionable that this language is intended to hold this person responsible." On January 27, 2017, the plaintiff filed a motion to reargue and to open or set aside the judgment, which the court denied on January 30, 2017. This appeal followed.

I

The plaintiff claims that the court erred in finding that the residency agreement is unenforceable due to unconscionability.

We first set forth our standard of review of a claim that a contract is unenforceable due to unconscionability. "The question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . Thus, our review on appeal is unlimited by the clearly erroneous standard. . . . This means that the ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and that the trial court's determination on that issue is subject to a plenary review on appeal. . . . The determination of unconscionability is to be made on a case-by-case basis, taking

into account all of the relevant facts and circumstances." (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87–89, 612 A.2d 1130 (1992).

"The classic definition of an unconscionable contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. . . . In practice, we have come to divide this definition into two aspects of unconscionability, one procedural and the other substantive, the first intended to prevent unfair surprise and the other intended to prevent oppression." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 719, 846 A.2d 862 (2004).

On the basis of the limited record in the present appeal, in which the defendant did not present any evidence in opposition to the plaintiff's motion for summary judgment, we are not persuaded that the agreement is unenforceable due to procedural or substantive flaws. With respect to the formation of the agreement, the record does not reveal that the defendant had no meaningful choice whether to select the plaintiff as the provider of assisted living services for her mother. The agreement is sufficiently clear, as written, to provide reasonable notice to the defendant, as her mother's representative, that she would be obliged to pay all sums due for services rendered to her mother if her mother did not pay for them. See *Sturman* v. *Socha*, 191 Conn. 1, 9, 12, 463 A.2d 527 (1983) (son who

signed nursing care agreement as "Responsible Party" for his father was "unambiguously" personally liable for amounts owed to nursing home). The portion of the agreement at issue plainly and unambiguously imposes personal liability on persons signing in a representative capacity for amounts owed to the plaintiff.[5]

Additionally, for the reasons identified by the plaintiff, the agreement is not substantively unconscionable. The plaintiff argues that the agreement is not substantively unconscionable because "[t]he language of [the representative clause] is akin to having a [cosigner] to an agreement, which is a common business practice." The plaintiff also argues that the agreement is not substantively unconscionable because, as it is common for residents in assisted living homes to entrust the management of their finances to others, personal liability is typically imposed on the individual entrusted to incentivize that person to pay the facility for its services. Thus, a guarantee agreement to ensure payment for services rendered is not so unreasonable as to be unconscionable and lead us to conclude that it is unenforceable.

II

The plaintiff also claims that the court erred by finding that the residency agreement is unenforceable as a matter of public policy. We agree with the plaintiff.

We begin our analysis of this claim by setting forth the standard of review governing a claim that a contract

[5] At the January 17, 2017 hearing, the defendant argued to the court that she was unaware that, by signing the agreement as a representative, she would be personally liable for the amount owed to the plaintiff. The defendant's purported ignorance, however, does not lead us to conclude that the formation of the agreement was procedurally unconscionable. The defendant had an obligation to read the agreement; *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 351–52; and understand it before signing. See *Friezo* v. *Friezo*, 281 Conn. 166, 199, 914 A.2d 533 (2007). The defendant has not presented any evidence that demonstrated that the plaintiff prevented her from doing so.

is unenforceable as a matter of public policy. "Although it is well established that parties are free to contract for whatever terms on which they may agree . . . it is equally well established that contracts that violate public policy are unenforceable. . . . [T]he question [of] whether a contract is against public policy is [a] question of law dependent on the circumstances of the particular case, over which an appellate court has unlimited review. . . .

"There is a strong public policy in Connecticut favoring freedom of contract . . . . This freedom includes the right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability. . . . If a contract violates public policy, this would be a ground to not enforce the contract. . . . A contract . . . however, does not violate public policy just because the contract was made unwisely. . . . [C]ourts do not unmake bargains unwisely made. Absent other infirmities, bargains moved on calculated considerations, and whether provident or improvident, are entitled nevertheless to sanctions of the law. . . . Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement; contracts voluntarily and fairly made should be held valid and enforced in the courts." (Citations omitted; internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392–93, 142 A.3d 227 (2016).

The court did not identify and the defendant did not provide a specific public policy that the agreement pur-

portedly violates.[6] As we do not identify a public policy prohibiting contracts that guarantee payment for assisted living leases, and we are mindful of the general policy in favor of freedom to contract, we do not conclude, on the basis of the limited record before us, that the agreement is unenforceable on public policy grounds.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MORICE W.*
(AC 38776)

Sheldon, Keller and Elgo, Js.

Syllabus

Convicted of the crimes of risk of injury to a child and assault in the third degree in connection with serious physical injuries that were sustained by his infant daughter, the defendant appealed to this court. The victim had suffered six different fractures at different times in the first four months of her life. The defendant and the victim's mother, both of whom denied having any knowledge of the cause of the victim's injuries, were tried together before a jury, which found the mother not guilty. The

[6] Pursuant to 42 C.F.R. § 483.15 and General Statutes § 19a-550 (b), nursing home facilities are prohibited from requiring patients, as a condition of admission, to have a third-party guarantor. These laws, however, do not prohibit a third party from voluntarily entering into a contractual obligation with a nursing home to guarantee payment for debts incurred by a patient. See *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 199–201, 90 A.3d 219 (2014). In the present case, the limited record does not reveal that the plaintiff required the defendant to sign the agreement as a third-party guarantor as a condition of her mother's admittance to the plaintiff's facility, nor did the defendant argue to the court that a voluntary agreement to serve as her mother's guarantor is unenforceable on public policy grounds. On the basis of this limited record, we decline to conclude that such an agreement violates public policy.

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

defendant claimed that he was denied his due process right to a fair trial when the prosecutor appealed to the jurors' sympathy for the victim when she asked the jurors during closing argument to consider how much pain the victim had suffered in the first four months of her life and commented that, during voir dire, a member of the venire panel from which the jury had been chosen had described the victim as voiceless. *Held*:

1. The prosecutor's remarks about the victim's pain were not improper; the prosecutor's references to the victim's pain were supported by the evidence, and the remarks supported the state's theory that the defendant had notice of the victim's injuries and urged the jury to draw the permissible inference that he knew or should have known that the victim was frequently in pain and had exhibited pain, and because the prosecutor properly invited the jury to draw appropriate inferences on a material issue in the case, there was no need to consider whether the remarks deprived the defendant of his due process right to a fair trial.
2. The defendant was not deprived of a fair trial as a result of the prosecutor's remark that an unidentified venireperson had described the victim as voiceless; although the prosecutor improperly relied on nonrecord evidence when she invoked the reaction of a venireperson to the victim's plight, the prosecutor's remark, when viewed in the context of the entire trial, was isolated and not severe, the defendant did not object at the time of the prosecutor's argument or seek a curative instruction from the trial court, the court's general instructions that the jury must not decide the case on the basis of sympathy or emotion were sufficient to cure any harm, the remark was not central to the critical issues in the case, and the state's case was strong.

Argued February 13—officially released June 26, 2018

Procedural History

Substitute information charging the defendant with the crimes of risk of injury to a child, assault in the third degree and reckless endangerment in the first degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kahn*, *J.*; verdict and judgment of guilty of risk of injury to a child and assault in the third degree, from which the defendant appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom were *Megan L. Wade*, assigned counsel, and, on the brief, *Marina L. Green*, assigned counsel, *Michael S. Taylor*,

assigned counsel, *Matthew C. Eagen*, assigned counsel, and *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Margaret E. Kelley*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Morice W., appeals from the judgment of conviction, rendered against him after a jury trial, on charges of risk of injury to a child in violation of General Statutes § 53-21 (a) (1)[1] and assault in the third degree in violation of General Statutes § 53a-61 (a) (2).[2] On appeal, the defendant claims that he was deprived of a fair trial on those charges due to improper remarks by the prosecutor in her rebuttal closing argument. Although we agree that one of the prosecutor's challenged remarks was improper, we do not conclude that that remark deprived the defendant of a fair trial. We therefore affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the morning of December 14, 2012, the defendant's mother took the victim, the defendant's four and one-half month old daughter, to her house. The defendant's mother customarily watched the victim while the

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[2] General Statutes § 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when . . . (2) he recklessly causes serious physical injury to another person . . . ."

The jury found the defendant not guilty of reckless endangerment in the first degree in violation of General Statutes § 53a-63.

defendant and the victim's mother were at work. While she was changing the victim's diaper, the defendant's mother noticed that the victim's leg was swollen and appeared to be causing her pain. She thus called the defendant at work to inform him of what she had observed, to which he responded that he would "get [the victim's] leg checked out . . . ."

The defendant's mother returned the victim to the defendant's and the victim's mother's home sometime after 4 p.m. Thereafter, at approximately 6 p.m. that evening, the defendant and the victim's mother took the victim to Pediatric Healthcare Associates, where she was seen by Dr. Richard Freedman. Freedman noticed that the victim's right thigh was "noticeably swollen," four centimeters larger in circumference than her left thigh, and that it was very firm to the touch. He thus instructed the defendant and the victim's mother to take her for an X-ray the next morning, which they did.

Dr. Mark Rosovsky, who examined the X-ray, found that the victim had fractures of her right femur and her left femur, both around the knee. Because of the types and the locations of these fractures, Rosovsky believed that they were nonaccidental in origin, thus causing him to suspect child abuse. Accordingly, Rosovsky recommended that the victim undergo a full body X-ray to detect and document other fractures she might have suffered. The victim's mother thus took her to the Bridgeport Hospital emergency department, where Dr. Justin Cahill examined her. Upon reviewing the victim's X-ray records, Cahill determined that the fracture of her right femur was not of a common type and could not be explained by any known injury. He therefore reported the fracture to the Department of Children and Families (department). The victim was then transferred to Yale-New Haven Hospital for a full body X-ray because the pediatric floor at Bridgeport Hospital was full.

On December 16, 2012, shortly after midnight, Officer Paul Cari of the Bridgeport Police Department was dispatched to the emergency department of Yale-New Haven Hospital to respond to a call about a "child incident . . . ." When he arrived, he found department social worker Sandra Liquindoli interviewing the victim's mother in the victim's hospital room. Cari and Liquindoli were approached by members of the hospital medical staff, who took them outside of the room after the full body X-ray was taken and informed them that the victim had "approximately" six different fractures in various stages of healing. Liquindoli thus conferred with her supervisor and program manager, who decided to take the victim into custody for her safety by placing her under a ninety-six hour hold. See General Statutes § 17a-101g.

Cari and Liquindoli returned to the victim's room with medical staff and hospital security, and the victim was separated from her mother. The victim's mother was ending a cell phone call as they entered, and she informed them that she had been speaking with the defendant. Cari and Liquindoli asked the victim's mother how the victim had sustained her present injuries. She stated that during her conversation with the defendant, he told her that the victim's injuries were his fault,[3] but she would not respond to their requests for more information on what she meant by that statement. The victim's mother stated that she did not know how the victim had been injured, but she suggested that the injuries could be related to a shot the victim had received, or that they might have occurred when the victim fell from or lunged out of her car seat a week and one-half to two weeks earlier. The victim's mother stated that the victim had fallen in this way on two

[3] At trial, she testified that he had told her, "[t]his is my fault, I'm gonna take the blame."

occasions, both times when her car seat was on a carpeted floor.

After interviewing the victim's mother, Cari and Liquindoli drove to Bridgeport Hospital, where the defendant was working that evening, to interview him. When they initially questioned him about the cause of the victim's injuries, he stated that he had no idea how she had been injured. Thereafter, however, when they informed him that the hospital had found that the victim had several different fractures, his story began to change. First, he told the investigators that he thought that the swelling of the victim's thigh had been caused by vaccinations she had been given on November 21, 2012. Then he told them that there had been "a few times" when he had rolled over on the victim while they were sleeping together in the same bed. After making that statement, the defendant expressly admitted that he had caused the victim's injuries, and stated that he "should just go to jail . . . ." The defendant was not arrested that evening, however.

On the evening of the following day, December 17, 2012, department investigative social worker Miguel Teixeira met with the defendant and the victim's mother. In that meeting, when Teixeira asked them once again how the victim had been injured, they told him of a time in October, 2012, after the victim had become very congested and stopped breathing, when the defendant had performed cardiopulmonary resuscitation on her. They also suggested that the victim might have been injured when she underwent a lumbar puncture,[4] when she fell out of a car seat, or when the defendant rolled over on her in bed.

[4] Dr. John Leventhal testified that when the victim was less than four weeks old, she presented to the emergency department with a fever, and that it is standard procedure to administer a lumbar puncture to such patients. Dr. Freedman testified that the purpose of a lumbar puncture is to look for infections.

Several months later, while the victim was still in the department's custody, the department contracted with counselor Gary Vertula and social worker Cindy Perjon to perform an assessment "regarding reunification"[5] of the defendant and the victim's mother with the victim. In the course of that assessment, which was performed in late April and early May, 2013, the defendant and the victim's mother suggested once again that the victim might have suffered her injuries when she underwent a lumbar puncture on August 24, 2012.

Dr. John Leventhal, a pediatrician who works at Yale Medical School and serves as the director of the child abuse program at Yale-New Haven Children's Hospital, was later called in to determine if the victim's fractures had resulted from acts of abuse. Leventhal first confirmed, upon reviewing the victim's full body X-rays from Yale-New Haven Hospital, that the victim had six fractures: one of each of her upper arms, near the shoulder; one of each of her femurs, near the knee; and two of her ribs, both under her left arm.[6] Leventhal concluded that the two rib fractures, which were a couple of weeks old at the time the X-rays were taken, had most likely been caused by acts of abuse, particularly the squeezing of the victim's chest from front to back. The fractures of the victim's arms and legs were all of a type known as "corner" or "bucket handle" fractures because of their distinctive appearance. Such fractures, which are caused by the forceful jerking of the limbs, are uncommon in children. They are believed to link very strongly with a diagnosis of child abuse.

[5] Prior to the start of trial, the defendant filed a motion in limine to preclude any testimony relating to a previous trial terminating his parental rights with respect to the victim. The state made it clear that it did not plan to elicit such testimony, and the court did not rule on the motion at that time but stated that it would deal with any such issues as they arose during trial.

[6] Leventhal initially testified that the rib fractures were under the victim's right arm. He later corrected himself on the basis of the victim's medical records.

In Leventhal's opinion, none of the victim's limb or rib fractures could have been caused by falling from a car seat onto a carpeted floor or being rolled over on by an adult while in bed. Nor, in his opinion, could any such injury have been caused by a lumbar puncture. Finally, Leventhal ordered that tests be conducted on the victim to evaluate the structural integrity of her bones, more particularly by determining if she had rickets[7] or a genetic condition commonly known as brittle bone disease,[8] either of which might have made her prone to suffering bone fractures without abuse. The tests revealed that there was nothing wrong with the victim's bones that would have made her susceptible to sustaining fractures without abuse. On the basis of his knowledge and experience, Leventhal determined that all six of the victim's fractures had resulted from acts of abuse.

Dr. Amanda Rodriguez-Murphy, the pediatrician who had administered vaccines to the victim on November 21, 2012, testified that, according to her medical records, the victim had suffered from subconjunctival hemorrhages, or visible blood under the whites of her eyes, when she was approximately one month old. Leventhal testified that subconjunctival hemorrhages are "sentinel[s]" for child abuse.

The defendant was arrested on May 7, 2013, under a warrant charging him with risk of injury to a child, assault in the third degree and reckless endangerment in the first degree. The victim's mother was arrested on that same day, under a warrant charging her with risk of injury to a child.

[7] Leventhal testified that rickets is a vitamin D deficiency that can cause fragility in bones.

[8] Leventhal testified that brittle bone disease, the scientific name for which is osteogenesis imperfecta, results in bone fragility and causes bones to have a tendency to fracture.

A joint trial on all charges against the defendant and the victim's mother began on May 4, 2015. The state presented evidence at trial that included all of the victim's above-referenced medical records as well as testimony from several witnesses, including the expert medical professionals who had examined, cared for and treated her in the relevant time frame,[9] department employees and law enforcement personnel who had investigated her injuries,[10] and the victim's grandmother and stepgrandmother. At the end of the state's case, the defendant and the victim's mother both moved unsuccessfully for a judgment of acquittal on all charges.

Both the defendant and the victim's mother then testified in their own defense. The defendant testified that, although he remembered telling Officer Cari that he may have rolled over on the victim, he could not think of anything that would have caused the victim's injuries. He denied that either he or the victim's mother had caused the injuries.[11] The victim's mother testified that she did not believe that the defendant would ever hurt the victim, that she had never had reason to question the victim's safety when the victim was with the defendant, and that she herself had never knowingly placed or allowed the victim to remain in a harmful situation. The jury thereafter found the defendant guilty of risk of injury to a child and assault in the third degree, but

[9] These experts included Drs. Melinda Sharkey, a pediatric orthopedic surgeon who treated the victim for her fractures; Freedman; Rodriguez-Murphy; Cahill; Kenneth Baker, a pediatric radiologist who reviewed the victim's X-rays in December, 2012; Leventhal; and Rosovsky.

[10] These investigators included Officer Cari and Detective Jessi Pizarro of the Bridgeport Police Department, Vertula, Perjon and Teixeira.

[11] The defendant also presented testimony from Dr. Jennifer Galvin, a pediatric ophthalmologist who conducted an eye examination on the victim on December 16, 2012. The examination was conducted in conjunction with the medical findings of nonaccidental causes of the victim's fractures. Her findings were normal in all respects.

not guilty of reckless endangerment in the first degree. The jury found the victim's mother not guilty of risk of injury to a child. On June 24, 2015, the court sentenced the defendant on his conviction of risk of injury to a child to a term of ten years imprisonment, execution suspended after eight years, with five years probation, and on his conviction of assault in the third degree to a concurrent term of one year imprisonment. This appeal followed.

The sole issue on appeal is whether the defendant was denied his due process right to a fair trial by one or more alleged improprieties in the prosecutor's rebuttal closing argument. The defendant bases his claim on two alleged improprieties near the end of the prosecutor's rebuttal closing argument. Then, after reviewing and challenging each of the defendant's and the victim's mother's several exculpatory suggestions as to how the victim may have suffered her injuries by accidental means, without notice to either of them of the victim's need for protection, care and treatment, the prosecutor addressed the jury as follows: "But I ask you, ladies and gentlemen, *how much pain* did [the victim] suffer in her short, short four and a half months of life at that point. *How much pain*. And when the state is selecting—when we were in the process of jury selection, obviously you recall you didn't know anything about the case. . . . But the attorneys; the defense attorneys and the state were permitted to tell you that this involved a four month old, injuries to a four month old. And what struck me back then—and *I don't know whether or not it's one of you, or whether or not it was another venireperson, but someone said during voir dire*, but a four month old is voiceless, and she is. [The victim] was voiceless." (Emphasis added.)

The defendant claims that these remarks, which were assertedly unrelated to any issue the jury had to decide in the course of its deliberations, were improper, and

thus violated his due process right to a fair trial, in two ways. First, he claims that the prosecutor violated the "golden rule" by asking the jurors to consider how much pain the victim had suffered in the first four months of her life. Second, he claims that the prosecutor improperly appealed to the jury's sympathy on the basis of nonrecord facts by remarking that a member of the jury panel from which jurors had been chosen had described the victim as "voiceless" during voir dire. The state responds that the challenged remarks were not improper, but argues that even if they were improper, they did not so prejudice the defendant as to violate his due process right to a fair trial. We agree with the state that the prosecutor's references to the victim's pain were not improper. We further conclude that, although there was impropriety in the prosecutor's attribution to a venireperson of the description of the victim as "voiceless," that impropriety did not violate the defendant's right to a fair trial under the multifactor analysis prescribed by our Supreme Court in *State* v. *Williams*, 204 Conn. 523, 539–40, 529 A.2d 653 (1987).

We begin by setting forth the applicable law governing our review of claims of prosecutorial impropriety. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"Prosecutorial impropriety can occur . . . in the course of closing or rebuttal argument. . . . In the event that such impropriety does occur, it warrants the

remedy of a new trial only when the defendant can show that the impropriety was so egregious that it served to deny him his constitutional right to a fair trial. . . . To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 36–37, 975 A.2d 660 (2009).[12] With these principles in mind, we turn to an examination of the remarks challenged in this case.

I

We first examine the propriety of the prosecutor's rhetorical inquiry to the jury, near the end of her rebuttal closing argument: "But I ask you, ladies and gentlemen,

[12] "Although the defense counsel did not object to the prosecutor's statements at the time of her summation and rebuttal, we may still review these claims. [I]n cases involving incidents of prosecutorial [impropriety] that were not objected to at trial . . . it is unnecessary for the defendant to seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . The object of the inquiry before a reviewing court in claims involving prosecutorial [impropriety], therefore, is always and only the fairness of the entire trial, and not the specific incidents of [impropriety] themselves. Application of the . . . factors [in *State* v. *Williams*, supra, 204 Conn. 540] provides for such an analysis, and the specific *Golding* test, therefore, is superfluous." (Citation omitted; internal quotation marks omitted.) *State* v. *Campbell*, 141 Conn. App. 55, 60–61 n.3, 60 A.3d 967, cert. denied, 308 Conn. 933, 64 A.3d 331 (2013).

how much pain did [the victim] suffer in her short, short four and a half months of life at that point. How much pain." The defendant claims that this remark was an improper golden rule argument, presented solely as an emotional appeal to evoke the jurors' sympathy for the infant victim rather than to support a rational inference as to any fact or issue they might have to decide in the course of their deliberations. Accordingly, he argues, the prosecutor's argument gave rise to an undue risk that the jurors would find him guilty on the basis of their understandable sympathy for the victim rather than a clear-eyed assessment of the evidence claimed to establish his guilt. We disagree.

"A golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. . . . They have also been equated to a request for sympathy. . . . [In *State* v. *Bell*, 283 Conn. 748, 771, 931 A.2d 198 (2007), our Supreme Court] noted that golden rule claims arise in the criminal context when the prosecutor ask[s] the jury to put itself in the place of the victim, the victim's family, or a potential victim of the defendant. . . . The danger of these types of arguments lies in their [tendency] to pressure the jury to decide the issue of guilt or innocence on considerations apart from the evidence of the defendant's culpability." (Citations omitted; internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 605–606, 72 A.3d 379 (2013); see also *State* v. *Ciullo*, 314 Conn. 28, 56, 100 A.3d 779 (2014); *State* v. *Campbell*, 141 Conn. App. 55, 63, 60 A.3d 967, cert. denied, 308 Conn. 933, 64 A.3d 331 (2013).

"The prosecutor, however, is not barred from commenting on the evidence presented at trial or urging

the jury to draw reasonable inferences from the evidence that support the state's theory of the case, including the defendant's guilt. It is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the [jury] might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that [she] is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 38–39.

Our analysis of whether the prosecutor here employed an improper golden rule argument causes us to examine the record for connections between the prosecutor's references to the amount of pain that the victim suffered and reasonable inferences the jury could draw from the evidence as to material facts. In making this determination, we look both to the evidence presented at trial and the closing arguments made by the state, the defendant and the victim's mother.

On appeal, the state argues that the prosecutor's allusion to the victim's pain in the first four months of her life was not improper because the state had presented both direct and circumstantial evidence that the victim had suffered pain in that time frame, and such pain was relevant to an essential element of assault in the third degree, to wit: that the victim had suffered a serious physical injury. The defendant responds by noting that pain is not an essential element of assault in the third degree under § 53a-61 (a) (2) because, under our Supreme Court's decision in *State* v. *Milum*, 197 Conn. 602, 619, 500 A.2d 555 (1985), pain is not a concept

embedded in the statutory definition of serious physical injury. Although we are not persuaded by this aspect of the state's argument on appeal,[13] our review of the record leads us to conclude that the prosecutor's remarks were not improper because the victim's pain was relevant to the theory of the state's case against both defendants on the charge of risk of injury to a child, to wit: that the defendants wilfully or unlawfully caused or permitted the victim to be placed in such a situation that her life or limb was endangered or her health was endangered, or they did acts likely to impair the health of the victim.

The references in the prosecutor's rebuttal to the victim's pain were not only supported by the evidence, but addressed the arguments of the defendant and the victim's mother that the victim had suffered her injuries without notice to them, because they supported the state's theory that the defendants did indeed have such notice. At trial, both the defendant and the victim's mother denied having any knowledge of the cause of the victim's injuries. The defendant acknowledged that he had told Cari and Liquindoli that he had rolled over on the victim multiple times and that her injuries were

[13] A person is guilty of assault in the third degree under § 53a-61 (a) (2) when he "recklessly causes serious physical injury to another person . . . ." An essential element of that offense is that the defendant recklessly caused the alleged victim to suffer a *serious physical injury*. General Statutes § 53a-3 (4) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (3), in turn, defines "physical injury" as "impairment of physical condition or pain . . . ."

Reading the foregoing definitions together, we note that although physical injury constitutes either pain or impairment of physical condition, each definition of serious physical injury is defined as an aggravated form of impairment of physical condition rather than an aggravated form of pain. Therefore, while evidence of pain may indeed be relevant to proving the infliction or occurrence of a serious physical injury, pain itself, however aggravated, does not itself constitute serious physical injury.

his fault. He testified, however, that he had felt pressured by Liquindoli's questioning to say that he somehow had hurt the victim. He also testified that he had never seen the victim's mother do anything that might have caused the victim's injuries and that he had not caused those injuries himself. During closing argument, the defendant's counsel emphasized that there was no evidence that the defendant had caused the victim's injuries, and that there was a "lack of testimony from any witness that [the victim] was placed in any kind of situation that was even questionable, much less wilfully and deliberately putting her at risk."

The victim's mother, in turn, testified that she recognized the victim's crying as a sign of pain, and that "when [the victim] did cry, she was screaming." However, she denied ever having any reason to question the victim's well-being. In her closing argument, counsel for the victim's mother argued that her client "did not and could not have known that [the victim] was subjected to some sort of mechanism or act that brought about some very serious injuries." The mother's counsel further argued that "until [the victim] was hospitalized . . . on December 15, [2012], there was not one troubling or discerning event that triggered [the victim's pediatrician's] responsibility to report any concerns to the authorities" and that "if [the doctor] as a medical expert could not determine there was something seriously wrong with [the victim]," the victim's mother certainly could not have known something was wrong.

The prosecutor's rebuttal argument referencing the victim's pain impliedly urged the jury to reject the defendants' testimony and arguments that they had no notice of the victim's serious injuries. Prior to her challenged remarks, the prosecutor noted that the victim's mother was presumably with the victim often and thus would have known when the victim cried or exhibited pain.

She also referred the jury to the testimony of the defendant's mother, who had seen the victim's swollen leg and realized at once that it was causing her pain. By making those arguments, together with her challenged rhetorical inquiry as to how much pain the victim must have suffered in her short life, the prosecutor effectively urged the jury to draw the permissible inference that the defendant and the victim's mother both knew or should have known that the victim—who had exhibited obvious pain when her right femur was fractured, and had suffered six different fractures at different times in her life—was frequently in, and no doubt exhibited, great pain. Such an inference directly supported one of the state's theories of the case against both defendants on the charges of risk of injury to a child. This court previously has held that "arguments inviting the jury to draw reasonable inferences from the evidence adduced at trial . . . patently are proper." *State* v. *Dawes*, 122 Conn. App. 303, 313–14, 999 A.2d 794, cert. denied, 298 Conn. 912, 4 A.3d 834 (2010). Because we conclude that, in referencing the victim's pain, the prosecutor properly invited the jury to draw appropriate inferences on a material issue in the case, we need not consider the second step in our analysis of these remarks, namely, whether the alleged impropriety deprived the defendant of his due process right to a fair trial. See *State* v. *Hickey*, 135 Conn. App. 532, 554, 43 A.3d 701 (if impropriety is not identified, then prejudice need not be considered), cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

II

We next consider the propriety of the prosecutor's remarks attributing a description of the infant victim as "voiceless" to an otherwise unidentified venireperson in the context of this trial. The defendant claims that this remark was improper because it personalized an appeal to the jurors' sympathy by "suggesting that one

of their own, a jury member or a member of the venire panel, had commented that [the victim] was 'voiceless.' " He argues that this emotional appeal was unrelated to any facts on which the jury permissibly could rely in reaching a verdict. The state argues that the prosecutor's remark about the victim's voicelessness was fair rebuttal because it was made in response to defense counsel's comments concerning the lack of direct evidence to establish when and how the victim had suffered her injuries. The state contends that the remark about the victim being "voiceless" noted the practical impossibility of presenting direct evidence through the victim due to her age and developmental limitations. We agree with the state that the prosecutor's argument concerning the victim's voicelessness was proper rebuttal, as it was directly responsive to the defendant's argument about the lack of direct evidence of his guilt. We conclude, however, that insofar as the argument invoked the reaction of another venireperson to the victim's plight, it improperly relied on nonrecord evidence.

"A prosecutor, in fulfilling [her] duties, must confine [herself] to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 717, 793 A.2d 226 (2002). That a venireperson made such a comment during voir dire was not in evidence; it was thus improper for the prosecutor to allude to that comment in her rebuttal closing argument.Having found that the prosecutor's remark alluding to the comments of a venireperson was improper, we turn to the question of whether that remark deprived the defendant of a fair trial. The defendant argues that he was substantially prejudiced by the remark, "considering the sensitive nature of the case

and the almost certain fact that jurors would instinctively sympathize with an infant . . . .'' We disagree.

''To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This inquiry is guided by an examination of the following factors [set forth in *State* v. *Williams*, supra, 204 Conn. 540]: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case.'' (Internal quotation marks omitted.) *State* v. *Jose G.*, 102 Conn. App. 748, 766, 929 A.2d 324 (2007), aff'd, 290 Conn. 331, 963 A.2d 42 (2009). ''[The] burden properly lies with the defendant to prove substantial prejudice.'' (Internal quotation marks omitted.) *State* v. *Campbell*, supra, 141 Conn. App. 69.

Applying the first *Williams* factor, we conclude, to reiterate, that the prosecutor's impropriety was not invited by defense counsel. The state argues that defense counsel invited the prosecutor's remark that the victim was voiceless by addressing the circumstantial nature of the evidence and lack of witnesses to the victim's abuse. Defense counsel stated, in relevant part: ''[W]hat we don't know is the how and when these fractures may have occurred, and the state's evidence regarding the how and when is in the form of opinion. It's in the form of this is my best estimate, this is my

expert opinion as to how these may have occurred. There's no actual witnesses to those events, okay. There's no video, there's no nanny cam like we see on a lot of the . . . news reports." The state appropriately argued, in response to this argument, that there was indeed a witness—the victim herself—but that she was incapable of testifying. Defense counsel's statement did not, however, invite the prosecutor to reference the comments of a venireperson during voir dire.

Next, we consider the frequency and severity of the impropriety under the second and third *Williams* factors. This remark was made on one occasion only, as an isolated appeal to the emotions of the jurors that was based on the observations of a fellow venireperson. See *State* v. *Quint*, 97 Conn. App. 72, 93, 904 A.2d 216 (concluding impropriety had not been severe where "it was confined to only a portion of the closing argument"), cert. denied, 280 Conn. 924, 908 A.2d 1089 (2006). The content of the remark was not objectionable in substance, for it was supported by the evidence and responded directly to defense counsel's arguments. In determining the severity of improper remarks, moreover, our Supreme Court has noted that it considers it "highly significant [when] defense counsel fail[s] to object to any of the improper remarks, request curative instructions, or move for a mistrial." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 443, 902 A.2d 636 (2006). Only misconduct that is "blatantly egregious or inexcusable" will be severe enough to mandate reversal. Id., citing *State* v. *Thompson*, 266 Conn. 440, 480, 832 A.2d 626 (2003). Here, defense counsel did not object to the prosecutor's remark about the venireperson's comments, much less ask for a curative instruction as to the remark or move for a mistrial. Following our Supreme Court's reasoning in *Thompson*, defense counsel's lack of objection to the challenged remark demonstrates that it was not so severe as to

prompt him to move for a mistrial instead of allowing the case to continue on to verdict, or thus to mandate reversal of his conviction and the ordering of a new trial after that verdict was returned.

Turning to the fifth *Williams* factor, the court took curative measures that would have prevented the jury from being unduly swayed by nonrecord facts or appeals to their emotions. The court first instructed the jury, in general terms: "[I]t is improper for any counsel to appeal to your emotions . . . ." Thereafter it reiterated: "It is not proper for the attorneys to . . . appeal to your emotions." The court further instructed the jurors, more specifically, as follows, that they must not decide the case on the basis of sympathy: "In sitting on this case, there may be time—a time where you have feelings of sympathy or compassion, which is only natural. However, in deliberating on this case and in coming to an ultimate verdict, you must be willing and able to put aside feelings of sympathy and compassion, and emotion and judge this case on the evidence you hear in the courtroom." Thus, although the court did not specifically mention the prosecutor's challenged remark about the comment of a venireperson, it provided the jury with clear direction to treat the remark as improper, and thus to ignore it when conducting their deliberations.

Finally, we turn to the remaining *Williams* factors, the centrality of the misconduct to the critical issues in the case and the strength of the state's case. The prosecutor's reference to a venireperson's comment about the victim's voicelessness was not central to the most critical issue in this case, which was whether the defendant caused the victim's injuries. The strength of the state's case also outweighed any possible prejudice the prosecutor's inappropriate comment may have caused. The state presented the victim's medical records and extensive expert testimony to establish the

nonaccidental nature of the victim's injuries, fractures of her arms, legs and ribs inflicted at different times, and the abusive conduct that must have caused them. The state also presented the testimony of multiple witnesses who stated that the defendant had admitted to causing the victim's injuries. The strength of the state's case thus substantially outweighed any possible prejudice arising from the prosecutor's attribution to a venireperson of the description of the victim as one who was voiceless because she could not be heard on her own behalf.

"In determining whether the defendant was denied a fair trial [by virtue of the prosecutor's impropriety] we must view the prosecutor's comments in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 287, 973 A.2d 1207 (2009). "[A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the misconduct is viewed in light of the entire trial." *State* v. *Spencer*, 275 Conn. 171, 178, 881 A.2d 209 (2005). Viewing the improper remark in the context of the entire trial, we conclude that it did not deprive the defendant of a fair trial. Although defense counsel did not invite the remark, it was isolated and not severe. The defendant did not object to the remark at the time of the prosecutor's argument, nor did he seek specific curative instructions with respect to it. The court's general instructions that the jury must not decide the case on the basis of sympathy or emotion instead of properly admitted evidence were sufficient to cure any harm potentially arising from the remark. The remark was not central to any of the critical issues in the case, and the state's expert-supported, admission-based case against the defendant was strong.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JACQUI SMITH (AC 39744)

Lavine, Bright and Bishop, Js.

Syllabus

Convicted of the crimes of criminal possession of a firearm, possession of a weapon in a motor vehicle, and carrying a pistol or revolver without a permit, the defendant appealed to this court. The defendant, J and C had met to work out an argument between the defendant and J, both of whom had brought guns to the scene that were placed in the trunk of C's vehicle. The defendant, J and C were in the defendant's vehicle, which was parked near C's unoccupied vehicle on the right side of a street, when a police officer, P, drove along the left side of the defendant's vehicle. When the defendant attempted to drive off, P pulled in front of the defendant's vehicle in order to block it and approached the vehicle. After the defendant failed to produce his operator's license, registration or insurance card, P arrested him and drove him to the police department. During the drive, the defendant made an unsolicited statement that he had brought a gun in order to settle a score with J. One of the police officers that remained at the scene opened the trunk of C's vehicle, where he saw the two handguns. *Held* that the evidence was sufficient to support the defendant's conviction of criminal possession of a firearm, possession of a weapon in a motor vehicle, and carrying a pistol or revolver without a permit; the jury reasonably could have found that the defendant, a convicted felon, had a handgun in his vehicle for which he did not have a permit and was guilty as charged, as C testified that the defendant arrived at the scene with a gun, the jury reasonably could have inferred from P's testimony regarding the defendant's unsolicited statement that the defendant drove to the scene with a handgun in his vehicle, and although the defendant challenged the reliability of the testimony of C and P, as well as the testimony of other state witnesses, that claim failed because it was predicated on credibility determinations made by the jury.

Argued April 18—officially released June 26, 2018

Procedural History

Substitute information charging the defendant with the crimes of criminal possession of a firearm, possession of a weapon in a motor vehicle, and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; thereafter, the court

denied the defendant's motion to dismiss; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Mary Boehlert, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *John C. Smriga*, state's attorney, and, on the brief, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Jacqui Smith, appeals from the judgment of conviction, rendered after a trial to a jury, of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1),[1] possession of a weapon in a motor vehicle in violation of General Statutes § 29-38 (a), and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a).[2] On appeal, the defendant claims that there was insufficient evidence from which the jury reasonably could have found him guilty of the three crimes. We affirm the judgment of the trial court.

On the basis of the evidence before it, the jury reasonably could have found the following facts beyond a reasonable doubt. On July 28, 2014, Keith Johnson was living near the intersection of Indian Place and Indian Avenue in Bridgeport. Tonahja Cohen and Johnson are cousins. At approximately 5:30 p.m. on that date, the defendant called Cohen and asked him to come to the

[1] Although § 53a-217 (a) (1) was the subject of a technical amendment in 2015; see Public Acts, Spec. Sess., June, 2015, No. 15-2, § 6; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] Although § 29-35 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-193, § 9; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

place where Johnson was living. Cohen drove to the location in his Chevrolet Monte Carlo automobile and parked behind the defendant's Chevrolet Malibu automobile. He met the defendant, who was angry, but Cohen did not know why. The defendant had a handgun, which Cohen took from him and put in the trunk of the Monte Carlo. Cohen wanted to ensure that nothing happened. He then went into the house and asked Johnson to come outside. When Johnson came out, he too had a gun, which was put in the trunk of the Monte Carlo. The defendant, Johnson, and Cohen got into the Malibu, which the defendant drove around while they tried to work things out. According to Cohen, Johnson and the defendant were arguing about "some bullshit."

At about that time, Officer Brian Pisanelli of the Bridgeport Police Department received a radio communication from Officer Bruno Rodrigues that prompted Pisanelli to drive to Indian Avenue. Detective Martinez was in a car directly behind Pisanelli. As Pisanelli drove north on Indian Avenue, approaching its intersection with Indian Place, he saw a Malibu with three occupants and an unoccupied Monte Carlo parked on the right side of the street. He drove along the left side of the Malibu. The defendant attempted to drive off at a high rate of speed but Pisanelli was able to pull in front of the Malibu and block it.

Pisanelli approached the Malibu and asked the defendant for his operator's license, registration, and insurance card, which the defendant was unable to produce. Pisanelli issued a motor vehicle summons to the defendant, who gave his address as 190 Denver Avenue in Bridgeport. Pisanelli arrested the defendant, placed him in the rear seat of his patrol car and drove him to the police department on Congress Street. During the drive, Pisanelli did not question the defendant but the defendant spontaneously stated, "I brought that gun over to settle the score with [Johnson]."

Other Bridgeport police officers arrived on the scene: Rodrigues, Officer Ilidio Pereira, Detective Borrico and Detective John Tenn. Those officers interacted with Cohen and Johnson. Rodrigues asked Cohen if he could search the Monte Carlo. Cohen agreed, gave Rodrigues the keys, and stated that whatever is in there was not his. Rodrigues used the keys to open the trunk of the Monte Carlo, where he saw two handguns. Cohen was placed under arrest and later was charged with possession of firearms in a motor vehicle.

In May, 2016, the defendant was charged in a substitute information with criminal possession of a firearm by a person previously convicted of a felony in violation of § 53a-217 (a) (1),[3] possession of a weapon in a motor vehicle in violation of § 29-38 (a),[4] and carrying a pistol or revolver without a permit in violation of § 29-35 (a).[5] At trial, he stipulated that he was a convicted felon.

Cohen testified at trial that he was charged with two counts of possession of weapons in a motor vehicle and that he pleaded guilty to those charges and could be sentenced to ten years incarceration, execution suspended after five years in prison, with the right to argue for less. He, however, expected that the sentencing judge would be informed of his testimony in the present

[3] General Statutes § 53a-217 (a) provides in relevant part that "[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm, ammunition . . . and (1) has been convicted of a felony committed prior to, on or after October 1, 2013 . . . ." Pursuant to General Statutes § 53a-3 (19) a "pistol . . . whether loaded or unloaded from which a shot may be discharged" is a firearm.

[4] General Statutes § 29-38 (a) provides in relevant part that "[a]ny person who knowingly has, in any vehicle owned, operated or occupied by such person . . . any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 . . . shall be guilty of a class D felony . . . ."

[5] General Statutes § 29-35 (a) provides in relevant part that "[n]o person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

matter and that he would receive a sentence of probation only. Cohen also testified that he was convicted of two felonies in 2013, was sentenced to probation, and that he had violated his probation. Given his two prior felony convictions, Cohen knew that being charged in the present matter was a federal crime. In addition, Cohen had new charges pending against him in New Haven.

Marshal Robinson, a firearms examiner, testified that the Ruger handgun and the Smith & Wesson semi-automatic weapon retrieved from the trunk of the Monte Carlo were operable. Vincent Imbimbo, an employee of the state police firearms unit, testified that he was unable to locate a pistol permit issued to the defendant.

At the conclusion of the state's case-in-chief, counsel for the defendant orally moved that the charges against the defendant be dismissed on the ground that the state's key witness, Cohen, lacked credibility given his criminal record and the consideration he expected at his pending sentence. Cohen was the only person who testified that he saw the defendant with a gun. The court noted that Pisanelli testified that the defendant made an unsolicited statement that he had brought a gun with him. The court stated that the question of credibility was for the jury to determine and found, therefore, that there was sufficient evidence from which the jury reasonably could find the defendant guilty beyond a reasonable doubt. The court, therefore, denied the defendant's motion to dismiss the charges.

The jury found the defendant guilty of all charges. On September 9, 2016, the court sentenced the defendant to ten years incarceration, two of which are mandatory, to be served concurrently with an unrelated conviction.[6] The defendant appealed.

[6] The court also imposed a $5000 mandatory fine on the defendant, but remitted it because the court did not believe that the defendant had the ability to pay it.

The defendant claims on appeal that there was insufficient evidence to establish his conviction of criminal possession of a firearm in violation of § 53a-217 (a) (1),[7] possession of a weapon in a motor vehicle in violation of § 29-38 (a)[8] and carrying a pistol without a permit in violation of § 29-35 (a)[9] because there is insufficient evidence that he possessed a handgun in his motor vehicle for which he did not have a permit. The defendant's claim basically challenges the jury's credibility determinations and, therefore, fails.

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on the basis of] the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the

[7] To prove that the defendant was in criminal possession of a firearm, the state must prove that the defendant unlawfully possessed a firearm and previously had been convicted of a felony prior to, on or after October 1, 2013. See *State* v. *Franklin*, 175 Conn. App. 22, 38–39, 166 A.3d 24, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

[8] To prove that the defendant unlawfully possessed a weapon in a motor vehicle in violation of § 29-38 (a), the state "must prove that the defendant: (1) owned, operated or occupied the vehicle; (2) had a weapon in the vehicle; (3) knew the weapon was in the vehicle; and (4) had no permit or registration for the weapon." *State* v. *Davis*, 324 Conn. 782, 794–95, 155 A.3d 221 (2017).

[9] "To establish that a defendant is guilty of carrying a pistol without a permit in violation of § 29-35 (a), the state must prove that the defendant: (1) carried a pistol or revolver upon his or her person; (2) did so without the proper permit; and (3) was not within his or her dwelling house or place of business." *State* v. *Davis*, 324 Conn. 782, 794, 155 A.3d 221 (2017).

evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State* v. *Robert S.*, 179 Conn. App. 831, 835, 181 A.3d 568, cert. denied, 328 Conn. 933, A.3d (2018).

"In reviewing the sufficiency of the evidence, a court considers whether there is a reasonable view of the evidence that would support a *guilty* verdict. . . . In doing so, the court does not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . [It] cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Thus, a court will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 746–47, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

The defendant claims that the state failed to prove beyond a reasonable doubt that he possessed an operable handgun in a motor vehicle because the state's case primarily relied on Cohen's testimony. The defendant argues that Cohen was not a credible witness because he is a convicted felon, who testified that one of the handguns belonged to the defendant in order to avoid being sentenced to prison and to protect Johnson, his cousin. In asserting this claim, the defendant has ignored Pisanelli's testimony that the defendant spontaneously admitted to him that he "brought the gun over to settle the score with" Johnson. The defendant, however, claims that the testimony "just does not make sense" given the defendant's experience in the criminal justice system and the circumstances surrounding his arrest.

The defendant claims as well that the testimony of other state witnesses was unpersuasive, particularly the testimony regarding the defendant's place of residence and whether he had a permit for a handgun. The defendant's claim, therefore, is predicated on a credibility determination made by the jury. The record discloses that during its deliberations, the jury focused on the testimony of both Cohen and Pisanelli and asked to rehear their respective testimonies. The testimony of both witnesses reasonably supported the jury's determination that the defendant brought a handgun near the intersection of Indian Avenue and Indian Place on July 28, 2014. Cohen testified that the defendant arrived at the scene with a gun, and the jury reasonably could have inferred from Pisanelli's testimony that the defendant drove to the scene with a handgun in his Malibu. "Insofar as this is a pure credibility determination, it is unassailable." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017).

"Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because the demeanor, conduct and other factors are not fully reflected in the cold, printed record. . . . We, therefore, defer to the [trier of fact's] credibility assessments . . . ." (Internal quotation marks omitted.) *State* v. *Crespo*, 145 Conn. App. 547, 571–72, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015).

On the basis of our review of the evidence presented, we conclude the jury reasonably could have found that on July 28, 2014, the defendant, a convicted felon, had a handgun in his motor vehicle for which he did not have a permit and was guilty as charged. The defendant's claim on appeal, therefore, fails.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* WALKER WILNER DUBUISSON (AC 39685)

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

Syllabus

Convicted of the crime of strangulation in the second degree in connection with a dispute with the victim, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction. Following a dispute with the victim, the defendant pushed her against a wall, put his fingers into her trachea and his entire hand around her neck, and began strangling her. The victim was unable to breathe for thirty seconds to one minute, her body became limp and she urinated herself. About one hour after the incident, while the defendant was outside of the home, the victim telephoned her friend, P. The victim told P that she was hurt and that the defendant had strangled her. P testified that the victim sounded fearful and very anxious, and that her voice was raspy. On appeal, the defendant claimed that the evidence was insufficient to prove that he had the intent to impede the victim's ability to breathe or to restrict her blood circulation, or that, while acting with that intent, he actually impeded her ability to breathe or restricted her circulation. *Held*:

1. The evidence was sufficient for the jury to have found beyond a reasonable doubt that the defendant committed strangulation in the second degree, as the jury reasonably and logically could have concluded that the defendant put his hand around the victim's neck with the intent to render her unable to breathe and, while acting under that intent, squeezed her neck with his fingers and rendered her unable to breathe; the victim testified that, as a result of the defendant's conduct, she was unable to breathe for between thirty and sixty seconds, she saw black, her body became totally lifeless and she urinated herself, P testified that the victim's voice sounded raspy during their telephone call, that when P arrived at the victim's home, the victim told her that she was having a

difficult time swallowing and that her throat hurt too badly for her to drink water, and both P and a state police trooper who responded to the victim's home saw red marks that appeared to be consistent with fingerprints on the victim's neck.

2. The trial court did not abuse its discretion by admitting into evidence, under the spontaneous utterance exception to the hearsay rule, P's testimony regarding the victim's statements to her during their telephone conversation; P testified that the victim sounded fearful, anxious and in pain, and although the victim had called another individual before she called P and there was a break in time between when the defendant strangled the victim and when the victim called P, the court reasonably could have determined that the victim was still under the stress of the situation and was experiencing such shock from being strangled by the defendant and such fear due to his continued presence outside her home, as to deprive her of the opportunity to collect her thoughts or to reflect on the incident with the defendant before she made the statements to P.

Argued March 12—officially released June 26, 2018

Procedural History

Substitute information charging the defendant with the crime of strangulation in the second degree, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Seeley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Peter Tsimbidaros, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom were *Anne F. Mahoney*, state's attorney, and *Mark A. Stabile*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Walker Wilner Dubuisson, appeals from the judgment of conviction rendered by the trial court, following a jury trial, on the charge of strangulation in the second degree in violation of General Statutes § 53a-64bb. The defendant claims that

(1) the evidence was insufficient to support his conviction and (2) the trial court erred in admitting certain out-of-court statements by the victim[1] under the spontaneous utterance exception to the hearsay rule. We affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. The victim testified that she met the defendant while he was an employee at a Walmart store in Massachusetts and she was participating in a manager training program at that store. Thereafter, they engaged in a six to eight month intimate relationship, during which he moved into her home in Connecticut. On the evening of February 22, 2015, the victim returned home after work to find that it had snowed in her absence, but the driveway was shoveled inadequately. She thus brought her things inside the house, then returned outside to finish shoveling the driveway. The defendant, who was home when the victim arrived, opened the door and began "yelling at" her for shoveling, insisting that he had shoveled already. When she ignored him and continued to shovel, the defendant opened the door once again and threw[2] the couple's dog outside. The victim ran into the street to retrieve the dog, which she brought inside to its crate in the bedroom.

Finding the defendant in the bedroom when she brought the dog inside, the victim began to yell at him for throwing the dog. According to the victim's testimony, he responded by approaching her, "push[ing] [her] left shoulder against the wall," "turn[ing her]

[1] In accordance with our policy of protecting the privacy interests of a person protected under a standing criminal protective order, we decline to identify the protected person or others through whom the protected person's identity may be ascertained.

[2] At trial, the victim testified that the defendant had thrown the dog. In the report she gave to the police that night, the victim said the defendant let the dog out, but did not indicate that he had thrown the dog.

around and . . . lock[ing] his fingers into [her] trachea, then . . . tak[ing] his whole hand around [her] neck and strangl[ing] [her].'' The victim further testified that, while the defendant was holding her in this manner, she ''couldn't breathe,'' she remembered ''everything going black'' and her body ''go[ing] totally limp,'' and she ''urinated [her]self . . . .'' After he released her, she ''told him to get his belongings and that the cops were coming and [to] leave [her] home.'' Although the defendant gathered up his belongings and carried them outside to his car, he did not drive away, but instead began to walk back and forth in the driveway. Because the victim, observing this behavior, felt ''fearful that he was going to try to break a window or break [her] door,'' she called her son's friend, Dean Mayo, in an unsuccessful effort to contact her son, then called her own friend, Michelle Perez. Both Mayo and Perez responded to these calls by driving immediately to the victim's house.

Mayo arrived first. He testified at trial that he had decided to come over upon realizing that something was wrong because the victim sounded ''frantic'' and told him that she had gotten into a fight with the defendant. When he arrived, he saw the victim inside the house and the defendant outside in the driveway. The victim, he recalled, was ''very emotional,'' crying and shaking, and her face and neck were ''very red.'' Mayo was not asked by the police to give them a statement.

Perez testified that the victim sounded ''fearful, very anxious'' on the phone, and that her voice was ''raspy . . . .'' During the call, the victim described to Perez the events of the evening, starting from the time she had arrived home from work. Among other things, the victim told Perez that ''she was hurt, [and] that [the defendant] had strangled her.'' When the victim told Perez that the defendant was still outside her home, Perez, who lived a twenty minute drive away from the

victim, drove directly to the victim's house at the conclusion of the call. When she arrived, she noticed the defendant, whom she described at trial as "very tense and agitated," standing in the driveway outside of his car, which had a flat tire. When Perez asked the defendant what had happened, he responded first by "rambling" about the dog and the snow shoveling, then by calling the victim various "derogatory names." When she asked him whether he had put his hands on the victim and hurt her, he responded that he "put [his] hands on her. She's a crazy 'b' and she upset [him]." Perez told the defendant to leave because she would be calling the police, then went inside to check on the victim.

Perez described the victim's face and neck as red and stated that the victim had "clearly visible" finger marks around her neck. The victim told Perez that she was having a very hard time swallowing. After they discussed "the extent or the severity of [the victim's] possible injuries," Perez called the police. At 8:43 p.m., Connecticut State Police Trooper Trisha Marcaccio was dispatched to the victim's house. Trooper Joseph Marsh also was dispatched, separately. Marcaccio spoke to the defendant, who admitted that he had been in an argument with the victim and that he had pushed her, but denied that he had strangled her. Marcaccio then left Marsh outside with the defendant[3] while she went inside to speak with the victim and Perez. Marcaccio observed that the victim had "fresh red marks" on her neck, "consistent with fingerprints from a hand." The victim told Marcaccio that the defendant had strangled her, rendering her unable to breathe for thirty to sixty seconds.[4] Marcaccio photographed the injuries and

[3] Trooper Kenneth Poplawski also responded and stood in the driveway with Marsh and the defendant.

[4] The victim did not tell Marcaccio that she had blacked out or urinated herself during the incident.

took statements from the victim and Perez. After Marcaccio finished taking statements and photographs, she went outside and instructed Marsh to arrest the defendant[5] and to transport him to the state police barracks for processing. Marcaccio also called an ambulance, but the victim refused transport. Perez later drove the victim to the Backus Plainfield Emergency Care Center, where she was admitted at 10:32 p.m.

In the emergency department, the victim received a visual physical examination, computerized axial tomography (CT) scans, and X-rays. Her X-rays were entirely normal, and her CT scans revealed normal glands and lungs, no bruising, no fluid collection or swelling, and no compromise of her airway. She reported tenderness and was prescribed an anti-inflammatory. In a follow-up appointment on February 24, 2015, with her primary care physician, Dr. Walter McPhee, the victim was diagnosed with inflammation of the trachea and anxiety, and prescribed an anti-inflammatory and a tranquilizer. She did not have bruising on her neck at the time, but McPhee did not find that unusual because she had indicated that she had been strangled two days prior to the examination.

In a substitute information, the defendant was charged with strangulation in the second degree. The jury found the defendant guilty. Following the verdict, on May 2, 2016, the defendant filed a motion for a judgment of acquittal, or, in the alternative, for a new trial in the interest of justice. The court denied that motion in its entirety. The defendant later was sentenced on his conviction of strangulation in the second degree to five years incarceration, execution suspended

[5] The defendant originally was charged with disorderly conduct in violation of General Statutes § 53a-182 (a), assault in the third degree in violation of General Statutes § 53a-61 and strangulation in the second degree in violation of § 53a-64bb.

after fifteen months, followed by three years of probation with special conditions. The defendant then filed this appeal. Additional facts will be set forth as necessary.

I

We begin with the defendant's first claim, which challenges the sufficiency of the evidence to support his conviction.

"The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Morel*, 172 Conn. App. 202, 214, 158 A.3d 848, cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017).

"As we have often noted, however, proof beyond a reasonable doubt does not mean proof beyond all

possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 136–37, 156 A.3d 506 (2017).

Section 53a-64bb (a) provides: "A person is guilty of strangulation in the second degree when such person restrains another person by the neck or throat with the intent to impede the ability of such other person to breathe or restrict blood circulation of such other person and such person impedes the ability of such other person to breathe or restricts blood circulation of such other person." Accordingly, "[t]o establish strangulation in the second degree, the state must show that the defendant restrained the victim by the neck or throat with the intent to impede her ability to breathe, and such impediment must have occurred." *State* v. *Linder*, 172 Conn. App. 231, 239, 159 A.3d 697, cert. denied, 326 Conn. 902, 162 A.3d 724 (2017). The defendant argues that the evidence was insufficient to prove either that he had the intent to impede the victim's ability to breathe or to restrict her blood circulation, or that, while acting with that intent, he actually impeded her ability to breathe or restricted her circulation. We disagree.

The jury heard evidence that the defendant locked his fingers into the victim's trachea, and put his entire hand around her neck and strangled her. The victim also testified that, as a result of the defendant's conduct,

she saw black, her body became totally lifeless and she urinated herself. The victim stated that once the defendant began to strangle her, she was unable to breathe for between thirty and sixty seconds. As a result, when the victim called Perez one hour later, her voice sounded raspy. Later still, when Perez arrived at the victim's house, the victim told her that she was having a very difficult time swallowing and that her throat hurt too badly for her even to drink water. Both Perez and Marcaccio saw red marks that appeared to be consistent with fingerprints on the victim's neck. At the hospital, medical staff did not find crepitus,[6] swelling, or difficulty breathing; the victim's voice was fine and her chest and neck X-rays were entirely normal; and CT scans of her neck and chest revealed no bruising, normal glands and lungs, no fluid collection or swelling, and no compromise of her airway. Even so, the victim's primary care physician testified that negative findings on the examinations performed at the emergency department are not unusual a couple of hours after strangulation, depending on its severity.

Notwithstanding this evidence, the defendant claims that "[m]edical and physical factors which have been commonly used to sustain a conviction of strangulation were not present" in this case. The defendant further argues that he was "convicted on what amounts to a modicum of evidence—essentially the [victim's] testimony and hearsay statements to Perez." He claims that the victim was not credible because there were discrepancies between her testimony at trial and the statement that she made to the police on the night of the incident, and she had both a demonstrable bias against him and "a motive to fabricate the incident."[7] The state counters

[6] Dr. McPhee testified that crepitus is a "rupture or . . . an air leak under the tissues" and that it is tested for by putting pressure on the area to move air bubbles around, which makes a distinctive noise.

[7] Specifically, the defendant argues that the victim's motive was demonstrated by text messages introduced at trial that the victim sent to the defendant. The victim testified that the defendant went to Massachusetts

that argument by suggesting that the defendant "confuses sufficiency with credibility." We agree with the state. "The arguments raised by the defendant on appeal with regard to [the victim's] credibility are arguments that the defendant properly raised at trial. They were for the [jury's] consideration in determining what weight to afford the [victim's] credibility. . . . The [jury] found the victim's testimony credible . . . . Because questions of whether to believe or to disbelieve a competent witness are beyond our review, we reject the defendant's argument." (Internal quotation marks omitted.) *State* v. *Liborio A.*, 93 Conn. App. 279, 285, 889 A.2d 821 (2006).

On the basis of the evidence presented, construed in the light most favorable to sustaining the verdict, the jury reasonably and logically could have concluded that the defendant put his hand around the victim's neck, with the intent to render her unable to breathe, and, while acting under that intent, squeezed her neck with his fingers, thereby rendering her unable to breathe. On that basis, we conclude that sufficient evidence existed from which the jury could have found that the defendant committed strangulation in the second degree beyond a reasonable doubt.

II

We next turn to the defendant's second claim challenging the trial court's admission of the victim's out-of-court statements under the spontaneous utterance

on February 18, 2015, and did not return to her house at the time he had indicated to her that he would. The defendant argues on appeal that the series of text messages shown to the victim on cross-examination, including: "You took all you needed in your sleepover bag, didn't tell me either, so that is [four] lies!!!" "You got [your] sleepover bag, your taxes, your bitch, have a great life," and, "You have done me wrong for the very last time. I promise you that. . . . [Y]ou are not able to come by or have any contact with me or anything that pertains to me, surrounds me. I have the state police restraining order on you," were all sent on February 18, 2015, and indicate that "the [victim] forged a plan to have the defendant arrested four days prior to the incident . . . ."

exception to the rule against hearsay. Specifically, the defendant challenges the testimony of Perez, who testified over objection that the victim stated, during the victim's telephone call to her on the evening of February 22, 2015, that "she was hurt, that [the defendant] had strangled her." The defendant argues that those statements, allegedly made approximately one hour after the incident, were not made under circumstances that negated the opportunity for deliberation and fabrication by the declarant.[8] We disagree.

The following additional facts and procedural history are relevant to the resolution of the defendant's claim. On the evening of February 22, 2015, as noted previously, the victim placed a call to Perez, her friend of twenty-six years. At trial, the state called Perez to testify regarding the statements the victim had made to her during that call. In the presence of the jury, the following colloquy occurred:

"[The Prosecutor]: Drawing your attention to February 22 of 2015, did you or did you not get a telephone call from [the victim] on that day?

"[Perez]: Yes, I did.

"[The Prosecutor]: Without getting into the content of the phone call, how would you describe her during the conversation?

"[Perez]: Her voice sounded and the content of what she was describing to me, she sounded fearful, very anxious, her voice was raspy and as if—you can tell when a person's been through something or crying for a bit, and she sounded like she was in pain, but she sounded scared most of all.

"[The Prosecutor]: Upset?

"[Perez]: Very upset.

[8] The defendant also argues that the admittance of the statements was harmful error of a constitutional magnitude. Because we find no error, we decline to address the defendant's claim.

"[The Prosecutor]: Distraught?

"[Perez]: Very distraught.

"[The Prosecutor]: Did she describe to you something that had just recently happened?

"[Perez]: Yes, she did.

"[The Prosecutor]: Did she indicate when it had happened?

"[Perez]: Yes, she did.

"[The Prosecutor]: And when had it happened?

"[Perez]: It happened earlier—February 22, that same day that I received the phone call, earlier that afternoon when she arrived home from work, after she arrived from work.

"[The Prosecutor]: What did she say had happened to her?

"[Perez]: She—

"[Defense Counsel]: Your Honor, we would object to that pending—

"The Court: All right.

"[Defense Counsel]: —the—the answer.

"The Court: On grounds?

"[Defense Counsel]: Hearsay.

"[The Prosecutor]: It's a spontaneous utterance, Your Honor. I think from both this witness and the first witness, we've established the basis for that.

"The Court: All right. Overruled. . . .

"[Perez]: She stated to me—she started retelling of the incident earlier that—late afternoon after she had arrived home from work at approximately, I would put it at about 6, 6:30ish, that she had arrived home and

she had to shovel the driveway because no one had done it, so she couldn't pull in. And then she was also retelling the story of the dog being thrown outside and running out into the street almost getting hit by a car. She stated that—even before all of that, she stated to me that she was hurt, that [the defendant] had strangled her. And she went on to explaining the details of what was occurring, what had occurred."

"Before we address the defendant's claim, we set forth the applicable legal principles. An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies. . . . Among the recognized exceptions to the hearsay rule is the spontaneous utterance exception, which applies to an utterance or declaration that: (1) follows some startling occurrence; (2) refers to the occurrence; (3) is made by one having the opportunity to observe the occurrence; and (4) is made in such close connection to the occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication by the declarant. . . . [T]he ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate the absence of opportunity for contrivance and misrepresentation. . . . Whether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided by the trial judge. . . . The trial judge exercises broad discretion in deciding this preliminary question, and that decision will not be reversed on appeal absent an unreasonable exercise of discretion. . . .

"To be admissible as a spontaneous utterance, [t]he event or condition must be sufficiently startling so as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and

unreflective. . . . In reviewing the defendant's claim, we bear in mind that whether a statement is truly spontaneous as to fall within the spontaneous utterance exception [is] . . . reviewed with the utmost deference to the trial court's determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Pugh*, 176 Conn. App. 518, 523–24, 170 A.3d 710, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017).

The defendant argues that the victim's challenged statements to Perez were not made under circumstances that negated the opportunity for deliberation and fabrication because the victim "purportedly made the statement[s] . . . as much as an hour after the incident," during which time she could have reflected on the event. In making his argument, the defendant refers us to a number of cases in which statements admitted as spontaneous utterances were made within one-half hour of the occurrences to which they referred[9] and urges us to draw the conclusion that one hour in this case was too long a period for the utterances to be spontaneous. The defendant's reliance on those cases for that purpose is misplaced.

"In determining whether a declaration is admissible as a spontaneous utterance, the court should look at various factors, including [t]he element of time, the circumstances and manner of the [occurrence], the mental and physical condition of the declarant, the

[9] See *State* v. *Kirby*, 280 Conn. 361, 377, 908 A.2d 506 (2006) ("[m]oreover, all of the statements at issue were made within one-half hour of the complainant having arrived home from her multihour altercation with the defendant, which our cases indicate is not an excessive time lapse for purposes of avoiding contrivance or fabrication by an alleged victim"); *State* v. *Stange*, 212 Conn. 612, 620, 563 A.2d 681 (1989) ("In the present case, the record indicates that the victim's statements were made approximately fifteen to thirty minutes after a shooting that inflicted serious wounds. . . . There is nothing in the record to suggest that the victim, at the time he made the statements, was no longer under the influence of the stress and excitement of being shot."); and *State* v. *Arluk*, 75 Conn. App. 181, 190, 815 A.2d 694 (2003) ("it was not an abuse of discretion for the court to admit the . . . statement, which was made twenty to thirty minutes after the events that had occurred").

shock produced, the nature of the utterance, whether against the interest of the declarant or not, or made in response to question, or involuntary, and any other material facts in the surrounding circumstances . . . .'' (Internal quotation marks omitted.) *State* v. *Daley*, 161 Conn. App. 861, 884, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016). ''The relation of the utterance in point of time to the . . . occurrence, while an important element to be considered in determining whether there has been opportunity for reflection, is not decisive. . . . Instead, [t]he overarching consideration is whether the declarant made the statement before he or she had the opportunity to undertake a reasoned reflection of the event described therein.'' (Citation omitted; internal quotation marks omitted.) Id. ''[W]e follow the rule embraced by the majority of jurisdictions that have addressed the issue of the effect of the time interval between the startling occurrence and the making of the spontaneous utterance, and conclude that there is no identifiable discrete time interval within which an utterance becomes spontaneous; [e]ach case must be decided on its particular circumstances.'' (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 375, 908 A.2d 506 (2006).

Here, although there was a break in time between when the defendant strangled the victim and when the victim placed a call to Perez, she made the call after she had ordered the defendant to leave but he was still standing in her driveway, ''going back and forth . . . .'' Perez testified that during the call the victim sounded fearful, anxious and in pain. The trial court did not abuse its discretion in concluding that the victim was still under the stress of the situation to which her statements related when she placed the call and made the statements, and thus that the statements were admissible as spontaneous utterances.

The defendant also argues that the statements should not have been admitted as spontaneous utterances because the victim spoke to Mayo on the phone before

calling Perez. He cites to *State* v. *Gregory C.*, 94 Conn. App. 759, 771–72, 893 A.2d 912 (2006), for the proposition that a statement is not admissible as a spontaneous utterance when the declarant spoke at length with a third party before making the statement. In *Gregory C.*, the defendant claimed that the trial court erred in admitting, as spontaneous utterances, certain statements the victim made to a police officer the day after she claimed to have been sexually assaulted. Id., 769. The defendant argued that both the length of the delay between the alleged assault and the making of the challenged statements, and the fact that the victim had discussed the alleged assault with a close friend in the interim, made the statements inadmissible under the spontaneous utterance exception to the hearsay rule. Id., 771. This court agreed with the defendant, holding that the trial court erred in admitting the statements as spontaneous utterances because "more than fifteen hours had passed between the time of the alleged sexual assault and the victim's statement to [the police] . . . [and] the victim discussed her alleged assault at length with [her friend] prior to giving her statement." Id., 771–72. The exception did not apply to the victim's statements because the victim had "had considerable time and opportunity to collect her thoughts and reflect on what had occurred the night before." Id., 772. *Gregory C.* is readily distinguishable from this case. Here, although the victim called Mayo before she called Perez, she did so within one hour of her alleged strangulation while the defendant was still outside her home. Under those circumstances, the court reasonably could have determined that, during her conversation with Perez, the victim was still experiencing such shock from being strangled by the defendant and such fear due to his continuing presence outside her home, as to deprive her of the opportunity to collect her thoughts or reflect on the incident before making the challenged statements.

Accordingly, we conclude that the trial court's admission, under the spontaneous utterance exception to the

hearsay rule, of Perez' testimony regarding the victim's out-of-court statements to her about her strangulation by the defendant was not "an unreasonable exercise of discretion." (Internal quotation marks omitted.) *State* v. *Pugh*, supra, 176 Conn. App. 524.

The judgment is affirmed.

In this opinion the other judges concurred.

ALOYSIUS KARGUL ET AL. *v.* MIKA-ELA SMITH ET AL.
(AC 40196)

Sheldon, Elgo and Bright, Js.

Syllabus

The plaintiff landlords sought, by way of a summary process action, to regain possession of certain premises that they had rented to the defendant tenants. The plaintiffs served a notice to quit for nonpayment of rent on the defendants and filed a summary process action. Thereafter, the plaintiffs withdrew the complaint. Subsequently, the plaintiffs filed a second notice to quit and commenced a new summary process action. The trial court granted the parties' motion for a stipulated judgment and rendered judgment thereon. Subsequently, the plaintiffs requested an order of execution for possession on the ground that the defendants had failed to comply with the terms of the stipulated judgment, which the trial court granted following a hearing, and the defendants appealed to this court. On appeal, they claimed that the trial court lacked subject matter jurisdiction over the present summary process action, which was based on their claim that the plaintiffs had terminated the lease agreement between the parties by serving the initial notice to quit possession, and thereby deprived the court of jurisdiction to entertain the second summary process action. *Held* that the trial court did not lack subject matter jurisdiction over the plaintiffs' subsequent summary process action; the continuation of the lease agreement between the parties was restored when the plaintiffs withdrew the first action against the defendants prior to the commencement of a hearing on its merits, which had the effect of wiping the slate clean as though the eviction predicated on the prior notice to quit possession had never been commenced.

Argued March 6—officially released June 26, 2018

Procedural History

Summary process action brought to the Superior Court in the judicial district of New London at Norwich,

Housing Session, where the court, *Newson*, *J.*, granted the parties' motion for a stipulated judgment for possession in favor of the plaintiffs subject to a stay of execution, and rendered judgment thereon; thereafter, the court granted the plaintiffs' motion for execution and denied the defendants' objection to the execution, and the defendants appealed to this court. *Affirmed.*

Mark DeGale, self-represented, with whom, on the brief, was *Mika-Ela Smith*, self-represented, the appellants (defendants).

Bryan P. Fiengo, for the appellees (plaintiffs).

Opinion

PER CURIAM. The self-represented defendants, Mika-Ela Smith and Mark DeGale, appeal from the judgment of the trial court rendered in favor of the plaintiffs, Aloysius Kargul and Barbara Greczkowski. On appeal, the defendants claim that the trial court lacked subject matter jurisdiction over this summary process action. We affirm the judgment of the trial court.

The relevant facts are not in dispute. On August 29, 2016, the plaintiffs served on the defendants a notice to quit possession of real property known as 38 Williams Street in Jewett City due to nonpayment of rent. On October 5, 2016, the plaintiffs commenced a summary process action against the defendants (first action), alleging that they had failed to make payments in accordance with an oral lease agreement (agreement) between the parties. In response, the defendants filed a motion to dismiss the action. Before that motion was acted upon by the court, the plaintiffs on November 8, 2016, filed a withdrawal of the first action.

The plaintiffs served a second notice to quit possession on the defendants on November 14, 2016. The plaintiffs then commenced the present summary process action against the defendants, alleging that the agreement between the parties had terminated by lapse of

time. The parties thereafter filed a motion for judgment by stipulation with the court.[1] By order dated January 11, 2017, the court granted that motion and rendered judgment in accordance with the stipulation of the parties.

Approximately one month later, the plaintiffs filed an affidavit of noncompliance with the court, in which they averred that the defendants had failed to comply with the terms of that judgment. The plaintiffs thus requested that an execution for possession issue. The defendants objected to that request, and the court held an evidentiary hearing on the matter. At the conclusion of that hearing, the court found that the defendants had violated the terms of the stipulated judgment.[2] Accordingly, the court ordered that the summary process execution "may be issued immediately." This appeal followed.

On appeal, the defendants claim that the trial court lacked subject matter jurisdiction over this summary process action. They contend that the plaintiffs, in serving the initial notice to quit possession in August, 2016, "terminated the agreement between the parties without equivocation or reservation," and thereby deprived the

[1] That stipulation was signed by the parties and states in relevant part: "By agreement of the parties, judgment for possession will enter in favor of the [plaintiffs] with a final stay of execution through/until June 30, 2017, based on the following conditions . . . .

"1. Defendants to pay use and occupancy of $950, beginning January 11, 2017.

"2. Defendants to allow realtor to show premises for sale, including access to all buildings on the property.

"3. Defendants to clean up premises to prepare for showing after February 1, 2017 premises for sale, including repairs to any holes in the wall.

"4. Defendants to leave premises clean [and] in broom swept condition.

"5. All keys to be returned to landlord on June 30, 2017.

"6. Defendants to put toilet and sink back in upstairs bathroom.

"7. Defendants to leave all fixtures in the home upon leaving.

"8. Both parties agree to waive canvass."

[2] In its corresponding order, the court found that "[t]he defendants failed to make the requisite use and occupancy payments as agreed to in their stipulation. The defendants failed to cooperate with the realtor as agreed to in their stipulation. The defendants failed to clean up the premises as agreed to in their stipulation."

court of jurisdiction to entertain the summary process action commenced by the plaintiffs four months later. The defendants are mistaken.

It is true that "[s]ervice of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease." *Housing Authority* v. *Hird*, 13 Conn. App. 150, 155, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988). As this court has recognized, however, a plaintiff possesses an "absolute and unconditional" statutory right to withdraw its summary process action prior to the commencement of a hearing thereon. Id., 157; see General Statutes § 52-80 ("[t]he plaintiff may withdraw any action . . . before the commencement of a hearing on [its] merits"). When a plaintiff exercises that statutory right, its withdrawal of the action "effectively erase[s] the court slate clean as though the eviction predicated on [an earlier] notice to quit possession had never been commenced." *Housing Authority* v. *Hird*, supra, 157. In such instances, the plaintiff and the defendant to the summary process action are " 'back to square one,' and *the continuation of their lease . . . [is] restored.*" (Emphasis added.) Id. For that reason, our Supreme Court has held that "after withdrawing [an] initial summary process action, the plaintiffs, as landlords, [are] required to serve a new notice to quit prior to commencing a new summary process action." *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 474, 974 A.2d 626 (2009).

Guided by that precedent, we conclude that when the plaintiffs withdrew the first action against the defendants prior to the commencement of a hearing on its merits, the continuation of the agreement between the parties was restored. *Housing Authority* v. *Hird*, supra, 13 Conn. App. 157. The trial court, therefore, did not lack subject matter jurisdiction over the plaintiffs' subsequent summary process action.

The judgment is affirmed.