CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JOESENIER RUIZ-PACHECO (AC 39605)

Prescott, Elgo and Harper, Js.

Syllabus

Convicted of the crimes of assault in the first degree, attempt to commit murder and conspiracy to commit assault in the first degree in connection with the stabbing of the victims, T and R, the defendant appealed. He claimed, inter alia, that his conviction of two counts of assault in the first degree as an accessory violated the double jeopardy clause and that certain of the trial court's jury instructions were improper. The defendant and his brother, E, had left a nightclub and gone to an adjacent parking lot, where the defendant punched his former girlfriend, M, in the face and put her in a headlock. Thereafter, T punched the defendant, who then released M from the headlock, and the defendant, E, T and R began to fight. The defendant and E stabbed T multiple times, and the defendant stabbed R two or three times. The defendant and E then ran after R, and E stabbed R, who tumbled down a portion of grass. The defendant then approached R and stabbed him. The state charged the defendant with, inter alia, one count each of assault in the first degree as a principal and an accessory as to the stabbings of T, and one count each of assault in the first degree as a principal and an accessory as to the stabbings of R. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction of two counts each of assault in the first degree as a principal and as an accessory violated his right against double jeopardy, and, thus, that his conviction of the accessory counts should be vacated:

a. The acts of stabbing as to R were susceptible of separation into distinct criminal acts for which the defendant could be punished without

offending principles of double jeopardy, as the jury reasonably could have predicated its finding that the defendant committed assault as a principal on the basis of the first or third of the stabbing incidents involving R, each of which was completed by the defendant, there was no doubt that the defendant's stabbing of R after R left the initial brawl was a criminal act that was distinct and separate from the stabbings that the defendant and E initially inflicted on R, and the jury's finding that the defendant engaged in an assault as an accessory could have been predicated on his having aided E in the second act of stabbing R; moreover, the information contained four separate and distinct counts for each assault charge, the state did not suggest to the jury that the assault charges were alternative theories of liability, but presented evidence that the defendant and E stabbed each victim, and the state argued that the evidence supported a finding that the defendant acted as an accessory by being there with a knife.

b. The jury reasonably could have determined that the defendant was guilty as a principal actor for the stab or stabs that he personally inflicted on T and as an accessorial actor for intentionally aiding in the nearly simultaneous stab or stabs that E inflicted on T; the jury was free to resolve conflicting evidence by concluding that the defendant and E stabbed T, and that the defendant was liable for assault in the first degree on the basis of his stabbing of T and as an accessory for E's stabbing of T, which was a contemporaneous yet separate assault with independent legal significance because the defendant had engaged in conduct with the intent to aid E's assault, and because the defendant's multiple punishments for assault as to each victim were not premised on a single criminal act, but were based on distinct repetitions of the same crime, the trial court was not constitutionally required to vacate the defendant's conviction of two counts of assault in the first degree as an accessory.

2. The defendant could not prevail on his unpreserved claim that he was deprived of a fair trial as a result of the trial court's jury instructions on attempted murder, which was based on his assertion that the court misled the jury when it utilized the phrase, "engaged in anything," in three instances, read the full statutory definition of general and specific intent, and failed to adequately define the substantial step element for attempt: it was not reasonably possible that the instructions, when viewed as a whole, misled the jury, as they adequately conveyed to the jury that to find the defendant guilty, it must find that he had the specific intent to cause death, the words, "engaged in anything," as used by the court did not affect the specific intent requirement in the applicable statute (§ 53a-3 [11]) but, rather, referred to conduct that constituted a substantial step toward the commission of the crime, and the court explained that the jury did not need to concern itself with what general intent meant; moreover, the court instructed the jury that a person acts intentionally with respect to a result when his conscious objective is

to cause such a result, and, to the extent that the defendant claimed that separate claims of error taken together deprived him of a fair trial, our Supreme Court previously has rejected the cumulative error approach regarding claims of instructional error.

3. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury on the defenses of self-defense and defense of others, and on the lesser included offenses of assault in the second degree and assault in the third degree, which was based on his assertion that the court's instructions on self-defense permitted the jury to consider the lesser included offenses if the state failed to disprove self-defense beyond a reasonable doubt: the defendant waived his right to challenge the instructions, as he had a meaningful opportunity at trial to review them, and he assented to them and expressed no concerns regarding revisions to the charge or to the charge as given to the jury; moreover, even if the instructions constituted obvious and undebatable error, the defendant could not establish manifest injustice or fundamental unfairness pursuant to the plain error doctrine because the jury returned a verdict of guilty on the charged offenses and not on any of the lesser included offenses.

4. The defendant's claim that multiple instances of prosecutorial impropriety during closing arguments deprived him of a fair trial because they negatively impacted his claims of self-defense and third-party culpability was unavailing:

a. The prosecutor's argument that the defendant was the initial aggressor due to his assault of S was based on the facts in evidence and, thus, was not improper; the court instructed the jury regarding the state's burden to prove that the defendant was the initial aggressor in the encounter with R and T, and the defendant failed to cite any law to support his claim that he could be the initial aggressor only if he was the first person to threaten or use force against T or R.

b. The prosecutor did not directly urge the jury to draw an adverse inference by virtue of E's absence or suggest that the defendant had the burden to produce evidence in support of his defense; the prosecutor's reference to the lack of evidence for the defendant's theory of the case, which was that E was the initial aggressor, was not improper.

c. The prosecutor did not improperly appeal to the emotions of the jurors when he referred to R and T as good Samaritans; the prosecutor's comments were based on reasonable inferences from the facts in evidence, and he utilized his closing arguments to explain the motivations of R and T for approaching the defendant, and argued that the defendant was the initial aggressor.

d. The prosecutor did not improperly make arguments based on facts that were not in evidence when he argued that two witnesses saw the defendant stab T, when he stated that the defendant was the brother of a certain person who was referred to by a nickname, or when he discussed the testimony of two police officers who had witnessed the

fight; the prosecutor's statements were supported by testimony and evidence, or were proper inferences drawn from the evidence, and even if the prosecutor's argument about the testimony of two police officers who witnessed the fight was improper, the court's cautionary instructions to the jury were sufficient to cure any harm to the defendant.

Argued November 28, 2017—officially released September 25, 2018

Procedural History

Substitute information charging the defendant with four counts of the crime of assault in the first degree, and two counts each of the crimes of attempt to commit murder and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Eschuk*, *J.*; verdict of guilty of four counts of assault in the first degree, two counts of conspiracy to commit assault in the first degree and one count of attempt to commit murder; thereafter, the court vacated the verdict as to one count of conspiracy to commit assault in the first degree and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

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

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, *Warren C. Murray*, supervisory assistant state's attorney, and *Laurie N. Feldman*, special deputy assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Joesenier Ruiz-Pacheco, appeals from the judgment of conviction, rendered after a jury trial, of two counts of assault in the first degree as a principal in violation of General Statutes § 53a-59 (a) (1), two counts of assault in the first degree as an accessory in violation of General Statutes §§ 53a-59 (a) (1) and 53a-8, one count of attempt to commit murder

in violation of General Statutes § 53a-54, and one count of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48.[1] On appeal, the defendant claims that (1) his conviction of the assault counts violates the double jeopardy clause; (2) the jury instructions on attempted murder were improper; (3) the court's repeated instruction that the jury should consider the lesser included offenses even if the state failed to disprove self-defense on the greater offenses misled the jury; and (4) he was deprived of a fair trial due to prosecutorial improprieties that affected the critical issues of self-defense and third-party culpability. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to the defendant's appeal. On November 30, 2012, the defendant went to El Milenio, a nightclub in Danbury, with his brother, Eliezer, and his friends, Raymond Martinez and Eiliana Martinez. A group of women, Dumilka Adames, Samantha Medina, Petra Mendez, Carina Amaro, and Rita Santos, also attended the nightclub. At approximately 2 a.m. on December 1, 2012, the nightclub closed and the group of women walked to their cars, which were parked in the adjacent C-Town grocery store parking lot. Kenneth Tucker, who had attended a different nightclub, was waiting in the parking lot to meet up with the group of women. The defendant and his associates also walked to the C-Town grocery store parking lot. Adames got into Santos' car with Tucker. Medina and Mendez got into Amaro's car.

At some point, the defendant and Eliezer approached Amaro's car. Eliezer and Mendez exchanged words.

[1] The defendant was also charged with and found not guilty of an additional count of attempted murder in violation of § 53a-54, and he was convicted of an additional count of conspiracy to commit first degree assault in violation of §§ 53a-59 (a) (1) and 53a-48 that was vacated by the trial court.

Medina, the defendant's former girlfriend, got out of the car and argued with him. The defendant then punched Medina in the face and put her in a headlock. Other people in the parking lot, including Tucker and Luis Rodriguez, another bystander, saw the defendant put Medina in a headlock. Medina yelled at the defendant to let her go. Tucker punched the defendant, and the defendant released Medina from the headlock. Tucker, the defendant and Eliezer then immediately began to fight with their fists. Rodriguez also entered the fray after he saw the defendant hit Medina. At some point during the fight, the defendant and Eliezer went to their car to arm themselves; Eliezer obtained a knife for himself from the car and handed a knife to the defendant. Tucker and Rodriguez were unarmed. Throughout the course of the fight in the parking lot, the defendant and Eliezer stabbed Tucker multiple times. The defendant also stabbed Rodriguez two or three times. When the defendant and Eliezer walked away, Rodriguez said something to the brothers. In response, the defendant and Eliezer ran after Rodriguez, and Eliezer stabbed Rodriguez in the back. After Eliezer stabbed him, Rodriguez tumbled down a portion of grass between the parking lot and the sidewalk. The defendant then approached Rodriguez, who was in the street unable to move as a result of his injuries, stabbed him in the left side of the chest and said: "This is for hitting my brother." The defendant and Eliezer thereafter fled the scene together in a vehicle. Two off-duty police officers witnessed a portion of the fight and rendered medical assistance to Rodriguez after he was stabbed. Rodriguez sustained five stab wounds and Tucker sustained three stab wounds.

The defendant was arrested later that night. The police took the defendant's statement in which the defendant admitted that he "stabbed a person in self-defense . . . ." The state charged the defendant with

two counts of assault in the first degree as a principal in violation of § 53a-59 (a) (1), two counts of assault in the first degree as an accessory in violation of §§ 53a-59 (a) (1) and 53a-8, two counts of attempted murder in violation of § 53a-54, and two counts of conspiracy to commit first degree assault in violation of §§ 53a-59 (a) (1) and 53a-48. At trial, the state presented eyewitness testimony, including that of Mendez, Adames, Tucker, Rodriguez, Liybin Fernandez, Officer Kristin Lindstrom, and Officer David Dubord. Following a jury trial, the defendant was found guilty on all counts except for one count of attempted murder (count five), and the jury's guilty verdict on one count of conspiracy to commit assault in the first degree (count eight) was vacated at sentencing.[2] This appeal followed.

I

The defendant first claims that his conviction of assault in the first degree as a principal pursuant to counts two and six of the information, and assault in the first degree as an accessory pursuant to counts three and seven of the information, violates his fifth and fourteenth amendment right against double jeopardy. Accordingly, he contends that his conviction of the two counts of assault as an accessory should be vacated. The state argues that because the defendant's conviction of the four counts was based on different acts, his double jeopardy rights were not violated. We agree with the state.

The following additional facts are relevant to our resolution of the defendant's claim. The information in the present case charged the defendant with four

[2] The defendant was sentenced to a term of sixteen years of imprisonment on count one to be served concurrently with counts two through four. As to count six, the defendant was sentenced to six years to serve and five years of special parole, concurrent with count seven and consecutive to counts one through four. The total effective sentence is twenty-two years to serve, followed by five years of special parole.

separate counts of first degree assault. In relevant part, the information contained one count each of assault in the first degree as a principal and assault in the first degree as an accessory with respect to the stabbing injuries suffered by Rodriguez,[3] and separate counts of assault in the first degree as a principal and assault in the first degree as an accessory with respect to the stabbing injuries sustained by Tucker.[4] The defendant never sought a bill of particulars.

In discussing the nature of the charges in its closing argument, the state argued that there were many possible combinations whenever there are at least two persons stabbing two victims and that multiple counts were appropriate in this case "to accommodate all those situations." The state argued that there was evidence that both the defendant and his brother, Eliezer, armed

[3] Count two alleged that the defendant, "with the intent to cause serious physical injury to another person or to a third person by means of a dangerous instrument, to wit: a knife, caused such injury to Luis Rodriguez. This crime occurred on December 1, 2012 at approximately 2:17 a.m. in the vicinity of 45 North Street, Danbury, CT in violation of [§] 53a-59 (a) (1)."

Count three alleged that the defendant, "acting with the mental state required for the offense charged, did solicit or request or command or intentionally aid another person or persons in the assault upon Luis Rodriguez and that during the commission of said assault, Luis Rodriguez suffered serious physical injury with a dangerous instrument, to wit: a knife. This crime occurred on December 1, 2012 at approximately 2:17 a.m. in the vicinity of 45 North Street, Danbury, CT in violation of [§] 53a-8 and § 53a-59 (a) (1)."

[4] Count six alleged that the defendant, "with the intent to cause serious physical injury to another person or to a third person by means of a dangerous instrument, to wit: a knife, caused such injury to Kenneth Tucker. This crime occurred on December 1, 2012 at approximately 2:17 a.m. in the vicinity of 45 North Street, Danbury, CT in violation of [§] 53a-59 (a) (1)."

Count seven alleged that the defendant, "acting with the mental state required for the offense charged, did solicit or request or command or intentionally aid another person or persons in the assault upon Kenneth Tucker and that during the commission of said assault, Kenneth Tucker suffered serious physical injury with a dangerous instrument, to wit: a knife. This crime occurred on December 1, 2012 at approximately 2:17 a.m. in the vicinity of 45 North Street, Danbury, CT in violation of [§] 53a-8 and § 53a-59 (a) (1)."

themselves with knives during the conflict and that both victims were stabbed multiple times. According to the prosecutor, the jury had the obligation of sorting out the conflicting evidence presented and to determine whether the defendant himself had stabbed both victims or had helped his brother stab the victims "just by being there with the knife himself." The state did not expressly rule out that some combination was also possible. In fact, at no time did the state suggest to the jury that it was proceeding on a theory of alternative liability or that the jury was limited to finding the defendant guilty either solely as a principal or solely as an accessory with respect to the two victims.

In her closing argument, defense counsel also noted the conflicting evidence that existed with respect to who had stabbed each of the victims and argued that it was the jury's duty to reach a determination on the basis of the evidence before it. The defense theory was that it was Eliezer who stabbed the victims, not the defendant, but that if the jury found otherwise, it should still find the defendant not guilty because he had acted in self-defense or in defense of others. At no point did the defense argue to the jury that if it found the defendant guilty of assaulting the victims as a principal, it could not also find him guilty of acting as an accessory.

In its instructions to the jury regarding the charges against the defendant, the court told the jury that the defendant was "entitled to and must be given by you a separate and independent determination of whether he's guilty or not guilty as to each of the counts" charged, and that "[e]ach of the counts charged is a separate crime." The defendant did not object to the instruction given by the court or ask for clarification about whether he potentially could be found guilty on all counts or whether certain counts were pleaded only in the alternative.

With that background in mind, we address the reviewability of the defendant's claim. The defendant acknowledges that he failed to raise any double jeopardy claim before the trial court and, thus, seeks review of his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). *Golding* 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." (Emphasis omitted; footnote omitted.) Id., 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). We conclude that the first two prongs of the *Golding* test have been met because the record before us is adequate to review the defendant's claim and a double jeopardy claim raises an issue of constitutional magnitude. See *State* v. *Estrada*, 71 Conn. App. 344, 357, 802 A.2d 873, cert. denied, 261 Conn. 934, 806 A.2d 1068 (2002). We, thus, direct our attention to the third prong and whether the defendant's claimed double jeopardy violation exists.

Before turning to our discussion of the law relative to the defendant's double jeopardy claim, it is important to emphasize what the defendant is not claiming. He is not claiming that there was insufficient evidence from which the jury could find him guilty, either as a principal or as an accessory, of assaulting the two victims with the intent to cause serious bodily injury. In other words, he has not argued that there was insufficient evidence from which the jury could conclude that he stabbed

the two victims *and* that he engaged in conduct with the intent to aid Eliezer in Eliezer's assault of each of the victims. The claim he makes on appeal is simply that it is constitutionally impermissible under the facts of this case to allow his conviction of multiple counts of assault as to each victim to stand because, in his view, doing so would result in his being punished twice for the same act.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 654–55, 182 A.3d 625 (2018).[5]

In analyzing a double jeopardy claim arising in the context of a single trial, we apply a well established two step process. "First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013).

[5] Although our state constitution does not include a similar double jeopardy provision, our Supreme Court has held that the due process guarantees found in article first, § 8, of the Connecticut constitution embody the protection afforded under the federal constitution. See *State* v. *Michael J.*, 274 Conn. 321, 350–51, 875 A.2d 510 (2005).

In *State* v. *Porter*, supra, 328 Conn. 648, our Supreme Court clarified the type of evidence an appellate court should consider in applying this two step process. In evaluating the first step, i.e., whether the charges arise out of the same act or transaction, "we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . [In considering the] second step . . . we look only to the information and bill of particulars—as opposed to the evidence presented at trial . . . . Because double jeopardy attaches only if both steps are satisfied . . . *a determination that the offenses did not stem from the same act or transaction renders analysis under the second step unnecessary.* (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 662. Because we conclude in the present case that the defendant's double jeopardy claim founders on the first step of the analysis, it is unnecessary to consider whether the charged crimes are the same offense under the rubric set forth in *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

"[D]istinct repetitions of a prohibited act, *however closely they may follow each other* . . . may be punished as separate crimes without offending the double jeopardy clause. . . . The same transaction, in other words, may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. . . . [*T*]*he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made*

punishable by the [*statute*]." (Emphasis altered; internal quotation marks omitted.) *State* v. *Brown*, 299 Conn. 640, 652, 11 A.3d 663 (2011). Accordingly, although the counts in an information may rely on factual allegations arising from one overarching criminal event, if it is possible to isolate distinct acts that occurred during that event that constitute separate and severable criminal offenses, prosecution of those offenses will not implicate double jeopardy. "[A]n appellate court reviewing an unpreserved claim of double jeopardy must examine the evidence to determine whether the alleged transaction logically can encompass separate acts, which in turn form the basis of separate convictions." *State* v. *Porter*, 167 Conn. App. 281, 290–91, 142 A.3d 1216 (2016), aff'd, 328 Conn. 648, 182 A.3d 625 (2018).

By way of example, in *Brown*, the defendant and several coconspirators participated in a scheme to rob a suspected drug dealer that ended with that dealer being killed by the defendant. *State* v. *Brown*, supra, 299 Conn. 644–46. The defendant was convicted of felony murder and murder, which were merged prior to sentencing, and robbery in the first degree, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and other crimes related to the use of a firearm. Id., 646. On appeal, the defendant raised an unpreserved double jeopardy claim, arguing that his conviction of both robbery and attempted robbery arose out of the same transaction, and, therefore, his sentence for attempted robbery should be vacated. Id., 650. The court disagreed because the evidence presented at trial showed that acts constituting an attempted robbery reasonably could be isolated from other acts constituting a separate robbery and, therefore, punishing the defendant for both crimes did not violate the constitution. Id., 654.

Specifically, the court concluded that the jury reasonably could have found, on the basis of the evidence

presented, that the attempted robbery had occurred when the victim was first confronted in his car by the defendant's three coconspirators, one of whom pointed a gun at his head. Id., 653. Following a struggle for control of the gun, the victim escaped and began to run down the street. Id. The court found that the actions up to that point constituted a completed attempted robbery. Id. The defendant, who had run after the victim when he escaped from the car, was able to catch him when the victim tripped and fell. The defendant then shot the victim in the head and went through the victim's pockets, which the court viewed as constituting a separate and distinct act of robbery. Thus, the court concluded that in the course of the single criminal conspiracy, the defendant had participated in two separate and severable crimes that happened close together in both time and physical proximity—an attempted robbery as an accessory and a robbery acting as the principal. Id., 653–54.

The double jeopardy analysis in the present case is, at least at first blush, complicated by the fact that all the stabbing injuries to the victims occurred within a very short duration of each other, and that the defendant was charged with having committed an assault of each of the victims and as an accessory to an assault of each of the victims by Eliezer. It is true that "[t]his state . . . long ago adopted the rule that there is no practical significance in being labeled an accessory or a principal for the purpose of determining criminal responsibility. . . . Under the modern approach, a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime. . . . [T]here is no such crime as being an accessory . . . . The accessory statute merely provides alternate means by which a substantive crime may be committed." (Citations omitted; internal

quotation marks omitted.) *State* v. *Correa*, 241 Conn. 322, 340–41, 696 A.2d 944 (1997).

Section 53a-8 (a) provides in relevant part that "[a] person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct . . . ." To intentionally aid someone means to be "more than a mere inactive companion"; (internal quotation marks omitted) *State* v. *Harris*, 32 Conn. App. 831, 841, 632 A.2d 50 (1993), appeal dismissed, 230 Conn. 347, 644 A.2d 911 (1994); but "to do something purposely" in order to "support, help, assist or strengthen" them. (Internal quotation marks omitted.) Id., 841 n.10. Although accessorial liability for an assault cannot be based solely on a person's presence at the scene, if there is evidence that the person was not merely a witness but also participated in the assault, a reasonable inference may be drawn that the participation aided the principal assailant by, for example, preventing the victim from more easily escaping the fight or by making the victim more vulnerable to the principal assailant's assault. See *State* v. *Raynor*, 175 Conn. App. 409, 431, 167 A.3d 1076 (in challenge by defendant to sufficiency of evidence supporting conviction of first degree assault as accessory, court concluded jury reasonably could have inferred from evidence of defendant's presence at brawl with gun and participation in physical beating of victim prior to his shooting that defendant aided principal by preventing victim from leaving area and helping immobile victim before he was shot), cert. granted on other grounds, 327 Conn. 969, 173 A.3d 952 (2017).

Although it is indisputable that a defendant could not be punished for acting as both a principal and accessory in the commission of a single criminal act, the prohibition against double jeopardy is not always automatically

violated simply because of contemporaneous convictions of the same offense as both a principal and as an accessory. If, for example, a jury reasonably could find on the basis of the evidence presented that each charged offense was the result of a distinct act of independent legal significance—one committed as a principal and another as an accessory—double jeopardy is not implicated. Because the defendant in the present case was convicted on separate counts of assaulting each of the victims both as a principal and as an accessory, we look to the evidence and the state's theory of the case to determine whether the jury could have reasonably concluded that separate acts underlie each conviction or whether the defendant is being twice punished for the same act.

A

We first consider whether, with respect to the convictions arising out of the stabbing injuries to Rodriguez, the defendant has demonstrated that the jury could not reasonably have concluded that two distinct acts of criminal conduct were committed that would support its findings of guilt on separate counts alleging first degree assault as a principal and first degree assault as an accessory. We conclude that the defendant has failed to meet this burden.

The evidence at trial reasonably can be construed as establishing at least three separate stabbing incidents involving Rodriguez. First, during the fracas that ensued after Rodriguez intervened to stop the altercation between the defendant and Medina, the defendant stabbed Rodriguez. Second, Eliezer, who also was armed with a knife, then stabbed Rodriguez in the back. Third, after Rodriguez tried to leave the initial skirmish, the defendant pursued Rodriguez into the street and stabbed him again.

The jury, thus, reasonably could have predicated its finding that the defendant committed assault in the first degree as a principal either on the basis of the first or third of these stabbing incidents, each of which was completed by the defendant himself. Even if the defendant were able to convince us that the relatively simultaneous stabbings of Rodriguez by the defendant and Eliezer during the initial outbreak of violence should be treated a single act for purposes of double jeopardy, an argument that we reject for reasons we discuss in addressing the injuries to Tucker, there is no doubt that the subsequent stabbing of Rodriguez by the defendant that occurred after Rodriguez left the initial brawl was a criminal act distinct and separate from the stabbings initially inflicted on Rodriguez by the defendant and his brother.

Furthermore, the jury's finding that the defendant engaged in an assault in the first degree as an accessory could have been predicated on his having aided Eliezer in the second act of stabbing Rodriguez. The jury reasonably could have concluded that the defendant aided and encouraged Eliezer's assault of Rodriguez in any number of ways, including by helping Eliezer to arm himself with a knife and through his own participation in the fight, making it easier for Eliezer to wound Rodriguez.[6] See id. (defendant's participation in fight evinces intent to aid perpetrator in assault and supports jury's finding of accessorial liability).

Moreover, as we previously stated, we consider the state's theory of the case in our analysis of whether the

[6] We reiterate that the defendant has not argued that there was insufficient evidence to conclude that he acted as an accessory, and, therefore, it is unnecessary for us to marshal all of the evidence that would support the jury's finding of accessorial liability in this case. Furthermore, our resolution of this matter should not be interpreted as holding that the defendant's own act of stabbing Rodriguez would, without more, be sufficient to demonstrate an intention to aid, thereby warranting accessorial liability. Rather, it was the totality of the defendant's actions, including helping to arm Eliezer and his active participation in the brawl, that demonstrate his intent to aid.

alleged transaction logically can encompass separate acts. See *State* v. *Porter*, supra, 328 Conn. 661. To the extent that the defendant contends that the state presented the two charges of assault in the first degree as a principal and an accessory as alternative theories of liability, we reject that claim. The state argued that both victims were stabbed multiple times and presented evidence of both assailants stabbing each victim. The state also argued that the evidence supported a finding that the defendant acted as an accessory "just by being there with the knife himself." From the very beginning of trial, the information contained four separate and distinct counts for each charge. At no time did the state suggest to the jury that the charges were alternative theories of liability. Furthermore, the court's jury instruction regarding the four charges reiterated that each charge was separate and distinct, rather than charges in the alternative. Although the trial court did not specifically articulate that the jury could deliver a guilty verdict as to each of the charges, it did not preclude the jury from making such a finding. See *State* v. *King*, 321 Conn. 135, 154, 136 A.3d 1210 (2016) ("[a]lthough . . . the trial court never explicitly informed the jury that it could deliver a guilty verdict on both charges, it also never instructed the jury that it could find the defendant guilty only on one charge but not the other").

In sum, we conclude with respect to the injuries inflicted on Rodriguez that the acts of stabbing were susceptible of separation into distinct criminal acts for which the defendant could be punished without offending principles of double jeopardy. See *State* v. *Brown*, supra, 299 Conn. 654. Furthermore, such theory comports with the state's theory presented at trial. The defendant has presented no legal precedent that would compel an opposite conclusion. Accordingly, we reject the defendant's claim that his conviction of assault in

the first degree as an accessory, as charged in count three of the information, should have been vacated by the trial court because it violated double jeopardy principles.

B

We turn next to the evidence pertaining to the stabbing injuries inflicted on Tucker, which we acknowledge presents a closer case from a double jeopardy perspective than the assault on Rodriguez because, unlike Rodriguez, all three stabs inflicted on Tucker occurred closer in both proximity and time. Nevertheless, on the basis of our review of the available evidence, we conclude that the jury reasonably could have determined that the defendant was guilty both as a principal actor for the stab or stabs that he personally inflicted on Tucker and as an accessorial actor for intentionally aiding the nearly simultaneous stab or stabs that Eliezer directly inflicted on Tucker.

The defendant argues that if he had acted alone, he could not have been convicted of separate counts of assault on Tucker on the basis of each individual stab that he inflicted during the short duration of the fight, and that the same rationale should bar his conviction for multiple stabs that were inflicted by himself and by an accomplice. In making this argument, the defendant relies on this court's decision in *State* v. *Nixon*, 92 Conn. App. 586, 597, 886 A.2d 475 (2005), in which we held that the conviction of two counts of assault in the second degree arising out of multiple stab wounds inflicted on a single victim during a continuous and uninterrupted attack violated the prohibition against double jeopardy. *Nixon* did not address, however, the scenario at issue here, in which more than one perpetrator each assaulted a victim within close proximity in time and space. We conclude that *Nixon* is not applicable to the scenario presented in the present case.

The defendant argues that *Nixon* is still controlling despite the fact that it involved only one criminal perpetrator. He does so by relying on the notion that courts generally make no legal distinction between accessorial liability and liability as a principal. See *State* v. *Gamble*, 119 Conn. App. 287, 297, 987 A.2d 1049, cert. denied, 295 Conn. 915, 950 A.2d 867 (2010). From that doctrinal basis, he asserts that the presence of multiple assailants should have no effect on the application of *Nixon*. This argument, however, fails to recognize that multiple convictions for the same crime are permitted if they are based on distinct acts that may be performed by more than one person rather than the type of rapid succession of multiple blows by a single perpetrator, on which *Nixon* was decided.

It is particularly noteworthy that the defendant does not argue that double jeopardy bars his conviction as a principal for the stabbing of Tucker and as an accessory to the stabbing of Rodriguez, despite those stabbings also having quickly occurred within the context of the same melee. The defendant thus seems tacitly to acknowledge that he properly may be held criminally liable for the actions of his accomplice against a separate victim. It would be illogical to conclude that he would not be liable to the same degree simply on the happenstance that his accomplice targets the same victim that he himself has just assaulted or is simultaneously assaulting. In short, we find the defendant's argument, which is based on his interpretation and conflation of *Nixon* and *Gamble*, unpersuasive.

This court having resolved that argument, the evidence before the jury was that Tucker was stabbed multiple times during the initial fray. There was evidence that both the defendant and Eliezer were armed with knives. The jury was free to resolve conflicting evidence by concluding that Tucker's injuries were not

inflicted by a single assailant, and that both the defendant and Eliezer stabbed Tucker. Under such a scenario, the jury reasonably could have found the defendant liable for assault in the first degree on the basis of his own stabbing of Tucker. Moreover, as it did with Rodriguez, the jury also could have found the defendant liable as an accessory for Eliezer's stabbing of Tucker, a contemporaneous yet separate assault with independent legal significance because the defendant engaged in conduct with the intent to aid Eliezer's assault.[7] In sum, because the defendant's multiple punishments for assault as to each victim were premised not on a single criminal act but distinct repetitions of the same crime, the court was not constitutionally required to vacate his conviction of two counts of assault in the first degree as an accessory. Because the defendant has not demonstrated that a double jeopardy violation exists, he cannot prevail under the third prong of *Golding*.

II

The defendant next claims that the court improperly instructed the jury on attempted murder and consequently deprived him of a fair trial. The defendant contends that the court's instructions on attempted murder improperly permitted the jury to find him guilty if it found that he had the general intent to fight with a knife without also finding that he had the specific intent to cause death. Specifically, the defendant argues that the court misled the jury by utilizing the phrase "engaged in anything" in three instances, reading the full statutory definition of general and specific intent, and failing to adequately define the substantial step element.

The defendant acknowledges that he did not file a request to charge on attempted murder. Furthermore,

[7] As we noted in part I A of this opinion, the state's theory of the case comports with a finding of two separate and distinct charges of assault in the first degree.

the defendant did not take exception to the trial court's instructions as given. Nevertheless, the defendant argues that the unpreserved claim of instructional error is reviewable under *Golding* because it implicates his constitutional right to have the jury properly instructed on all elements of an offense and the record is adequate for review. See part I of this opinion. The state does not dispute that the first two prongs of *Golding* have been satisfied with respect to this claim, and the state did not assert a waiver pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). We agree because the record is adequate for review, and, when intent is an element of a crime, a trial court's failure to instruct the jury properly with respect to intent implicates the due process rights of the accused. See, e.g., *State* v. *DeJesus*, 260 Conn. 466, 472–73, 797 A.2d 1101 (2002). We conclude, however, that the defendant cannot prevail under *Golding*'s third prong.

"Our standard of review for claims of instructional impropriety is well established. The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which they might find to be established . . . . When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety . . . and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party . . . . In this inquiry we focus on the substance of the charge rather than the form of what was said not only in light of the entire charge, but also within the context of the entire trial. . . . Moreover, as to unpreserved claims of constitutional error in jury instructions, we have stated that under the third prong of *Golding*, [a] defendant may prevail . . . only if . . . it is reasonably possible that the jury was misled . . . ."

(Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 179, 920 A.2d 236 (2007). "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 452–53, 988 A.2d 167 (2009).

It is well established that the charge of attempted murder requires the state to prove beyond a reasonable doubt that the defendant had the specific intent to cause the death of another person.[8] *State* v. *Griggs*, 288 Conn. 116, 130–31, 951 A.2d 531 (2008). We turn to a review of the challenged jury instruction to determine whether it is reasonably possible that the jury was misled.

The trial court instructed the jury on intent as follows: "The question of intent: Intent relates to the condition of the mind of the person who commits the act, his or

[8] General Statutes § 53a-54a (a), defining murder, provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

General Statutes § 53a-49 (a), defining criminal attempt, provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

her purpose in doing it. The law recognizes two types of intent; general intent and specific intent, but each of the crimes charged here are crimes of specific intent, so you do not need to concern yourself with what general intent means.

"Specific intent is the intent to achieve a specific result. A person acts intentionally, with respect to a result, when his or her conscious objective is to cause such result. What the defendant intended is a question of fact for you to determine.

"A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his conscious objective is to cause such a result or . . . *engage in such conduct.*

"In this case, you will note that there is in each count an element which requires you to find that the state has proven beyond a reasonable doubt that . . . the defendant had the specific intent to do the thing charged. . . .

"The evidence of intent: What a person's intention was is usually a matter to be determined by inference. No person is able to testify that he or she looked into another's mind and saw therein certain knowledge or a certain purpose or intention to do harm to another.

"Because direct evidence of the . . . defendant's state of mind is rarely available, intent is generally proved by circumstantial evidence. The only way a jury can ordinarily determine what a person's intention was, at any give[n] time, is by determining what the person's conduct was and what the circumstances were surrounding that conduct and from that infer what his or her intention was." (Emphasis added.)

The defendant claims that the court erred in using the phrase "engage in anything" when it read the attempt statute to the jury. The court instructed the jury as

follows: "The defendant is charged with two counts of attempt to commit murder.

"The mental state required for the commission of the crime of murder is that the defendant specifically intended to cause the death of another person.

"The statute defining attempt reads in pertinent part as follows: A person is guilty of an attempt to commit a crime if, acting with the mental state required for the commission of the crime, he intentionally *engaged in anything*, which, under the circumstances, as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: Element number one, intent . . . the first element is that the defendant had the kind of mental intent required for the commission of the crime of murder. The mental state required for the commission of murder is that the defendant specifically intended to cause the death of another person. There is no particular length of time necessary for the defendant to have formed the specific intent to kill. And, a person acts intentionally with respect to a result, when his conscious objective is to cause such a result." (Emphasis added.)

In defining the second element of attempt, the court instructed the jury using the contested language as follows: "Element number two . . . the second element is that the defendant intentionally *engaged in anything*, which, under the circumstances, as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. In other words, the state must prove both intent and conduct beyond a reasonable doubt to obtain a conviction." (Emphasis added.) Finally, the

court summarized the elements utilizing the "engaged in" phrase as follows: "So, to sum up, the charge of attempt to commit murder, the state has to prove beyond a reasonable doubt that the defendant had the necessary . . . intent to commit the crime and that he intentionally *engaged in anything* which constituted a substantial step in the course of conduct planned to culminate in his commission of the crime under the circumstances, as he believed them to be." (Emphasis added.)

On appeal, the defendant claims that the court improperly comingled the language from both sections of the attempt statute by utilizing the phrase "engaged in" and not the phrase "did or omitted doing" from the other subsection of the attempt statute. In the challenged jury instruction, the court utilized the "engaged in anything" language, which the defendant claims is related to the impermissible definition of general intent found in § 53a-3 (11). In addition, the defendant claims that the trial court's recitation of the full definition of intent in § 53a-3 (11) misled the jury. We disagree.

"It is axiomatic that the definition of intent as provided in § 53a-3 (11)[9] embraces both the specific intent to cause a result and the general intent to engage in proscribed conduct. It has become axiomatic, through decisional law, that it is improper for a court to refer in its instruction to the entire definitional language of § 53a-3 (11), including the intent to engage in conduct, when the charge relates to a crime requiring only the intent to cause a specific result." (Footnote added.) *State* v. *Sivak*, 84 Conn. App. 105, 110–11, 852 A.2d 812, cert. denied, 271 Conn. 916, 859 A.2d 573 (2004). In *State* v. *Rivet*, 99 Conn. App. 230, 232–33, 912 A.2d 1103,

[9] General Statutes § 53a-3 (11) provides: "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

cert. denied, 281 Conn. 923, 918 A.2d 274 (2007), this court stated: "[I]n cases in which the entire definition of intent was improperly read to the jury, the conviction of the crime requiring specific intent almost always has been upheld because a proper intent instruction was also given. The erroneous instruction, therefore, was not harmful beyond a reasonable doubt [in those cases]." (Internal quotation marks omitted.) Compare *State* v. *Austin*, 244 Conn. 226, 236, 710 A.2d 732 (1998) (no reversible error when improper intent instruction followed by numerous proper instructions on elements of murder), and *Moody* v. *Commissioner of Correction*, 127 Conn. App. 293, 306, 14 A.3d 408 (no reversible error when improper intent instruction followed by repetition of specific intent element of murder and assault), cert. denied, 300 Conn. 943, 17 A.3d 478 (2011), with *State* v. *Lopes*, 78 Conn. App. 264, 271–72, 826 A.2d 1238 (reversible error when improper intent instruction given directly in regard to elements of attempt to commit murder and not followed by numerous proper instructions), cert. denied, 266 Conn. 902, 832 A.2d 66 (2003), and *State* v. *DeBarros*, 58 Conn. App. 673, 683, 755 A.2d 303 (reversible error when improper intent instruction not only given in initial and two supplemental charges but also referred to seven additional times), cert. denied, 254 Conn. 931, 761 A.2d 756 (2000).

The defendant contends that the attempt instruction failed to guide the jury on what constituted a substantial step, and the omission of the language found in the model jury instruction on the Judicial Branch website,[10]

[10] The defendant claims that the trial court erred by failing to include the following language from the Connecticut Criminal Jury Instructions: "To be a substantial step, the conduct must be strongly corroborative of the defendant's criminal purpose. The act or acts must constitute more than mere preparation. The defendant's conduct must be at least the start of a line of conduct that will lead naturally to the commission of a crime. In other words, it must appear to the defendant that it was at least possible that the crime could be committed if (he/she) continued on (his/her) course of conduct." (Footnote omitted.) Connecticut Judicial Branch Criminal Jury Instructions 3.2-2, Attempt—§ 53a-49 (a) (2) (element 2) (revised to Decem-

coupled with the other improper instructions, seriously misled the jurors because it allowed them to find the defendant guilty of attempted murder on the basis of his act of fighting with a knife, without determining his true purpose. The state argues that the model jury instruction language was not necessary in guiding the jury, and that the instructions that the court gave properly required it to find that the defendant intended to cause death and whether he intentionally engaged in conduct that constituted a substantial step planned to culminate in his commission of murder. We agree with the state.

After reviewing the instructions in their entirety, we are persuaded that the instructions adequately conveyed to the jury that to find the defendant guilty of attempted murder, the jury must find that he had the specific intent to cause death. Although the court gave the full definition of intent as provided in § 53a-3 (11) and used the phrase, "engage in anything," at three points in the charge, our review of the entire instruction reveals that it is not reasonably possible that the instructions misled the jury. The words, "engaged in anything," as used by the trial court in the charge on attempt to commit murder did not affect the specific intent requirement; rather, the language referred to conduct constituting a substantial step toward the commission of the crime. See *State* v. *Pires*, 122 Conn. App. 729, 745, 2 A.3d 914 (2010) ("the words 'engage in conduct' refer not to the required intent but rather explain that the person being aided by the accessory must be doing the action that constitutes the crime, as opposed to simply thinking about the criminal act or perhaps engaging in conduct other than the criminal act"), aff'd, 310 Conn. 222, 77 A.3d 87 (2013).

ber 1, 2007), available at https://www.jud.ct.gov/ji/Criminal/Criminal.pdf (last visited September 20, 2018).

Indeed, the trial court repeatedly told the jury that, in order to find the defendant guilty, it must find that he had the specific intent to cause death[11] and explained that the jury "[did] not need to concern [itself] with what general intent means." The court instructed the jury twice that "[t]he mental state required for the commission of murder is that the defendant specifically intended to cause the death of another person." Moreover, the court instructed that "a person acts intentionally with respect to a result when his conscious objective is to cause such result." Additionally, to the extent that the defendant claims that the separate claims of error taken together deprived him of a fair trial, we note that our Supreme Court has rejected the cumulative error approach regarding claims of instructional error. *State* v. *Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991) ("[w]e decline to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts"), cert. denied, 505 U.S. 1207, 112 S. Ct. 3000, 120 L. Ed. 2d 876 (1992).

Viewing the instructions as a whole, we conclude that the defendant cannot prevail on his claim of instructional impropriety with regard to his conviction of attempted murder. Accordingly, the defendant's claim fails to satisfy the third prong of *Golding*, as he has not established the existence of a constitutional violation that deprived him of a fair trial.

III

The defendant also claims that the court misled the jury by instructing the jurors on the defenses of self-defense and defense of others, as well as on the lesser

[11] As previously stated, the court instructed the jury that "there is in each count an element which requires you to find that the state has proven beyond a reasonable doubt that the . . . defendant had the specific intent to do the thing charged."

included offenses of assault in the second degree and assault in the third degree. More specifically, the defendant claims that the court committed reversible error because its instructions on self-defense permitted the jury to consider lesser included offenses if the state failed to disprove self-defense beyond a reasonable doubt. We disagree.

The defendant failed to preserve this claim at trial and now seeks *Golding* review. See part I of this opinion. Unlike the prior claim of instructional error, however, the state argues that the defendant waived this claim, pursuant to *State* v. *Kitchens*, supra, 299 Conn. 482–83, and, thus, is not entitled to review under *Golding*. We agree.

The following facts are necessary for the resolution of this claim. The trial court provided a thirty-one page draft of the proposed jury instructions to the defendant and the state prior to the charging conference on July 29, 2015. Although the record does not identify the exact date that the parties received the draft, the record is clear that the parties had the draft overnight from July 29 to July 30, 2015. During the charging conference the court discussed with counsel how to guide the jury regarding the consideration of the numerous charges and the lesser included offenses. The court's proposed instructions included explaining to the jury that it is the jury's choice as to what order it deliberates the charges, except for the lesser included offenses, and the court, during the charging conference, specifically stated to the parties, "I am going to ask you to review that, particularly." The court also discussed with counsel the instructions on defense of others and self-defense. The court stated that "[t]he self-defense and defense of others, the draft . . . proposed by [the state] . . . is tracked by the recommendation of the proposed charges filed by the defense." The discussion included a suggestion about whether the court should

utilize "and/or," or, "or," or, "and," in its instruction. The defense suggested "and/or" and did not raise any exceptions to the charge as proposed. At the end of the charging conference, the court specifically addressed the self-defense charge and inquired as to whether the evidence indicated that the defendant attacked in defense of another person.

The record indicates that the following morning, the trial court gave a revised copy of the charge to counsel and stated that "counsel and I had a charging conference here in this courtroom, and I had promised that I would give to each attorney a copy of a revised charge, following our discussions . . . . While the charges remain very much the same in . . . substance, as the ones that I previously presented to defense counsel and the state, there have been some amendments and alterations, and, obviously I will give you, each of you, more time to consider the charges that I've proposed to the jury, if you wish to do that. I anticipate that you will take most of the morning to do the arguments; however, you will have the luncheon recess and as much time thereafter as you wish to review the charges." The court then reviewed the proposed changes with counsel on the record. The court reviewed how to guide the jury to consider the numerous charges and the lesser included offenses. stating: "I've suggested effectively that they should start on . . . count five, go through that, consider whether the elements are . . . proven; if they find that is the case, consider whether the defense [of] self-defense applies and then continue. In relation to the . . . other charges, I've added that they must consider or can consider lesser included offenses. So, I would appreciate it if . . . you let me know if you need any time on that." The jury was subsequently brought into the court, and the parties conducted closing arguments.

After the jury was dismissed for the luncheon recess, the defense expressed an issue with one of the state's comments in the closing argument and requested a curative instruction. After the luncheon recess, the parties confirmed that they had no other concerns regarding the revised instructions, and the court discussed the curative instruction requested by defense counsel. The jury was summoned into the courtroom, and the court read the instructions to the jury. The court specifically asked if the parties had any exceptions to the charge, and defense counsel specifically stated, "I don't have any exceptions."

"It is well established in Connecticut that unpreserved claims of improper jury instructions are reviewable under *Golding* unless they have been induced or implicitly waived. . . . The mechanism by which a right may be waived . . . varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be affected by action of counsel . . . [including] the right of a defendant to proper jury instructions. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim [under *Golding*]. . . . [W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. . . . [C]ounsel's discussion of unrelated parts of the jury charge at an on-the-record charge conference . . .

demonstrate[s] that counsel was sufficiently familiar with the instructions to identify those portions of the instructions with which [she] disagreed. [T]o the extent that [she] selectively discussed certain portions of the instructions but not others, one may presume that [she] had knowledge of the portions that [she] did not discuss and found them to be proper, thus waiving the defendant's right to challenge them on direct appeal. . . . Our Supreme Court has stated that it is sufficient to show that defense counsel had a meaningful opportunity to review the proposed instructions if she was given the opportunity to review them overnight." (Citations omitted; internal quotation marks omitted.) *State* v. *Hall-Davis*, 177 Conn. App. 211, 240–41, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017); see also *State* v. *Kitchens*, supra, 299 Conn. 482–83.

Here, the defendant had a meaningful opportunity to review the proposed jury instructions at issue and assented to the instructions. The defendant had the proposed instructions overnight on July 29, 2015, and discussed the challenged instructions at length with the court at the charging conference and in the morning after the charging conference on July 30, 2015. The court reviewed the revisions with counsel and specifically requested that the parties review the revisions related to the instructions challenged on appeal. The defendant expressed no concerns regarding the revisions or the charge as given to the jury.

Accordingly, we conclude that, under the present circumstances, the defendant had a meaningful opportunity to review the jury instruction challenged on appeal and waived his right to challenge the instruction on appeal.

Alternatively, the defendant argues that this court should review his waived claim under the plain error doctrine. In *State* v. *McClain*, 324 Conn. 802, 812–15,

155 A.3d 209 (2017), our Supreme Court held that a *Kitchens* waiver does not preclude appellate relief under the plain error doctrine. See *State* v. *Torres*, 325 Conn. 919, 163 A.3d 618 (2017). Accordingly, we review whether the defendant's claim of instructional impropriety constitutes plain error requiring reversal of the judgment.

A review of the record reveals the following additional relevant facts. The trial court instructed the jury on the defense of self-defense and defense of others as follows: "The evidence in this case raises the issues of self-defense . . . and/or the defense of others. Self-defense and/or the defense of others, applies to all of the charges before you, as well as to lesser included offenses of assault in the second degree, assault in the third degree. . . . After you've considered all of the evidence in this case, if you find that the state has proven beyond a reasonable doubt each element of the crime, you must go on to consider whether or not the defendant acted in self-defense or defense of others. In this case, you must consider self-defense or defense of others in connection with—with each count of the information and the lesser included offenses you may consider." Later in the charge, the court repeated the instructions as to self-defense and suggested a way for the jury to consider the charges.

Following the repetition of the self-defense and defense of others instruction, the court instructed: "If . . . you . . . find that the state has not . . . disproved beyond a reasonable doubt at least one of the elements of the defense or has not proven one of the statutory disqualifications, then on the strength of that defense alone, you must find the defendant not guilty, despite the fact that you have found the elements of the crime proved beyond a reasonable doubt." The court continued to summarize an example for how to consider the lesser charges: "In other words, you consider, for

example, assault in the first degree, only if you acquit the defendant of that charge, either because you do not find the state has proven the elements of that charge beyond a reasonable doubt or you find the state has failed to . . . disprove . . . the defenses of self-defense and/or defense of others, and so that you acquit the defendant on that charge, then you may consider assault in the second degree; you're going to go through the same analysis for that lesser included offense, if you acquit the defendant of that charge . . . you then shall consider the charge of assault in the third degree."

The next day, the court reinstructed the jury about how to deliberate and stated that "while I anticipate that [your] findings in relation to self-defense and/or the defense of others, will probably be the same in both the substantive and the lesser included offenses, you must include . . . that issue in your consideration of each charge, if appropriate."

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party

cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

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

The defendant claims that by its instructions, the court expressly precluded the jury from considering the defenses of defense of others and self-defense. The defendant cites *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985), and argues that the trial court's error was "an example of an extraordinary [situation] where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings."[12] The defendant also

[12] The defendant also claims that the court's instructions in response to a jury question about third-party culpability also contributed to the court's error. On the second day of deliberations, the jury had a question on the third-party culpability instructions, and the court discussed with counsel a proposed instruction in response to the question. The court, the state, and defense counsel collaborated and agreed on an appropriate instruction to answer the jury's question. After discussing the instruction off the record, the court went back on the record to state the complete proposed instruction. The defendant and the state assented to the proposed instruction. We reject the defendant's argument, as it has no merit.

argues that it was plain error for the trial court to misstate the effect of the governing statute by telling the jurors that acquittal on the basis of self-defense was not a true acquittal.[13] The state argues that it is not reasonably possible that the instruction misled the jury, and that any error did not result in manifest injustice and is harmless beyond a reasonable doubt because the defendant was convicted of the charged offenses. We agree with the state.

Even if we assume arguendo that the instruction constituted obvious and undebatable error, the record does not demonstrate manifest injustice and therefore does not satisfy the second prong required for reversal of the judgment pursuant to the plain error doctrine. See *State* v. *Blaine*, 179 Conn. App. 499, 510, 180 A.3d 622, cert. granted on other grounds, 328 Conn. 917, 181 A.3d 566 (2018). "Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust." (Citation omitted; internal quotation marks omitted.) *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009).

Because the jury returned a verdict of guilty on the charged offenses and not on any of the lesser included offenses, the defendant cannot establish manifest injustice or fundamental unfairness.[14]

[13] As we stated in part II of this opinion, to the extent that the defendant claims the cumulative effect of the instructional improprieties constituted plain error, we reject such an argument. See *State* v. *Tillman* supra, 220 Conn. 505.

[14] Our Supreme Court in *State* v. *Hall*, 213 Conn. 579, 589, 569 A.2d 534 (1990), determined that a defendant was entitled to a jury instruction on self-defense for the lesser included offense of manslaughter in the second degree. There, the trial court had instructed the jury that the defense of self-defense was applicable to only murder and intentional manslaughter in the first degree. Id., 583–84. Our Supreme Court held, however, that even

IV

The defendant's final claim is that prosecutorial impropriety deprived him of a fair trial because it negatively impacted his self-defense claim, as well as his claim of third-party culpability. Specifically, the defendant alleges that the prosecutor improperly (1) misstated the law to the jurors; (2) distorted the burden of proof; (3) appealed to the jurors' emotions; and (4) commented on facts not in evidence. With one minor exception, we conclude that the prosecutor's remarks were not improper, and, thus, the defendant was not deprived of a fair trial.

As a preliminary matter, we set forth the general principles under which we review claims of prosecutorial impropriety. "In cases of unpreserved claims of prosecutorial [impropriety] . . . it is unnecessary for the defendant to seek to prevail under the specific requirements of . . . *Golding* and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Bermudez*, 274 Conn. 581, 586–87, 876 A.2d 1162 (2005). Our Supreme Court has articulated that "following a determination that prosecutorial [impropriety] has occurred, regardless of whether it was objected to, an appellate court must apply the [*State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)] factors to the entire trial." *State* v. *Bermudez*, supra, 587. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the

though the trial court failed to give the self-defense instruction for manslaughter in the second degree, it was not reasonably possible that the jury was misled and stated that "the jury's verdict of guilty on the offense of manslaughter in the first degree was necessarily a rejection of the defense of self-defense. Since the elements of self-defense as applied to manslaughter in the second degree would have been the same as those applied to manslaughter in the first degree, the defendant would not have benefited by an instruction that the defense was applicable to manslaughter in the second degree." Id., 589.

defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . In analyzing whether the prosecutor's comments deprived the defendant of a fair trial, we generally determine, first, whether the [prosecutor] committed any impropriety and, second, whether the impropriety or improprieties deprived the defendant of a fair trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 8–9, 124 A.3d 871 (2015).

When reviewing the propriety of a prosecutor's statements, "we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) Id., 9. "[Impropriety] is [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 is a separate and distinct question . . . ." (Internal quotation marks omitted.) *State* v. *James E.*, 154 Conn. App. 795, 816, 112 A.3d 791 (2015).

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . [A]s the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument

that strays from the evidence or diverts the jury's attention from the facts of the case. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 76–77, 43 A.3d 629 (2012).

We address each of the defendant's claims of prosecutorial impropriety in turn.

A

The defendant first asserts that the prosecutor improperly stated that the defendant was the initial aggressor due to his assault of Medina. We are not persuaded.

During closing argument the prosecutor made the following statement: "The first aggressive act was his. When he first thrust his face into [Medina's]—his hand into [Medina's] face, he started [the] brawl. Many witnesses described it as pushing her face, some of them described it as punching her. Now, he was the catalyst of the whole event, once he was the first to take physical action against her. . . . The state's point of view is that [the] original act of aggression, by the defendant, caused a chain of events, which resulted in these stabbings. And, now he comes before you and he's, sort of, just making the argument that he has the right to use deadly force, in a situation that he caused to occur; it doesn't seem to be reasonable, and I'm arguing that he was the initial aggressor."

Although "prosecutors are not permitted to misstate the law . . . because such statements are likely to improperly mislead the jury"; (citations omitted) *State* v. *Otto*, supra, 305 Conn. 77; the prosecutor, however,

may argue the state's case forcefully, provided that the argument is fair, and based on the facts in evidence and reasonable inferences drawn from that evidence. *State* v. *Bardliving*, 109 Conn. App. 238, 253, 951 A.2d 615, cert. denied, 289 Conn. 924, 958 A.2d 153 (2008).

The defendant fails to cite any law that supports his claim that the prosecutor's argument was improper.[15] The defendant claims that he could be the initial aggressor only if he was the first person to threaten or use force against Tucker or Rodriguez and thus the prosecutor's argument that he could be an initial aggressor from his actions toward Medina was a misstatement of the law.

At trial, the court instructed the jury regarding the state's burden to prove that the defendant was the initial aggressor in the encounter with Rodriguez and Tucker.[16] The state claims that the arguments at trial centered around when the encounter began and that the defendant's argument in closing arguments to the jury was that Eliezer was the initial aggressor when he confronted Mendez. The state claims that its argument was proper because "if a jury reasonably can find that a defendant began a brawl by attacking one person, he

[15] The defendant cites *State* v. *Singleton*, 292 Conn. 734, 763, 974 A.2d 679 (2009), for the proposition that he could not be the initial aggressor by his act of hitting Medina. In *Singleton*, our Supreme Court concluded that "the trial court's instructions that '[t]he initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person' and that '[t]he first person to use physical force is not necessarily the initial aggressor' were entirely consistent with the law and thus were proper." Id. Our Supreme Court's holding in *Singleton* did not restrict the prosecutor in the present case from arguing that the defendant was the initial aggressor.

[16] The court instructed the jury with respect to initial aggressor as follows: "Another circumstance in which a person is not justified in using any degree of physical force in . . . self-defense against another is when he is the initial aggressor in the encounter with the other person and does not both withdraw from the encounter and effectively communicate his intent to do so, before using the physical force at issue in this case."

cannot claim that he was not the initial aggressor with respect to other people swept into the brawl in defense of that person." We agree with the state.

In the absence of any law to the contrary, the prosecutor's argument that the defendant was the initial aggressor was based on the facts in evidence and thus, was not improper. The defendant has failed to establish that the prosecutor's remarks were improper, let alone establish that such statements were so egregious that they amounted to a denial of due process.

B

The defendant's next claim of prosecutorial impropriety is that the prosecutor distorted the burden of proof in his closing argument by suggesting to the jury that a defendant has the burden to produce evidence in support of his defense. In addition, the defendant claims that the prosecutor's argument violated our Supreme Court's holding in *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000). We disagree.

"In *Malave*, our Supreme Court abandoned the rule enunciated in *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960), which had permitted trial courts to instruct the jury that [t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause. . . . Although the [c]ourt in *Malave* abandoned the *Secondino* rule, it did not prohibit counsel from making appropriate comment, in closing arguments, about the absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case. . . . The court did, however, prohibit counsel from directly urging the jury to draw an adverse

inference by virtue of the witness' absence. . . . Additionally, the court stated that [f]airness, however, dictates that a party who intends to comment on the opposing party's failure to call a certain witness must so notify the court and the opposing party in advance of closing arguments. Advance notice of such comment is necessary because comment on the opposing party's failure to call a particular witness would be improper if that witness were unavailable due to death, disappearance or otherwise. That notice will ensure that an opposing party is afforded a fair opportunity to challenge the propriety of the missing witness comment in light of the particular circumstances and factual record of the case." (Internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 325–26, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

Defense counsel argued during her closing argument that Eliezer was the initial aggressor when he confronted Mendez: "That's the initial aggressor, not [the defendant]; the initial aggressor in this case was Eliezer, Eliezer coming over and confronting, leaving his car and coming over to where the girls were and confronting either all the girls or [Mendez]. He's the initial aggressor." During his rebuttal, the prosecutor stated: "You know, there was some talk about the initial aggressor, that Eliezer was the initial aggressor; there is no testimony in this case that Eliezer ever struck [Mendez], from no witness, anywhere. And, you remember [the defendant's] own expert testified yesterday, that words are okay, words don't require defense or force. So, that altercation between Eliezer and [Mendez] was not a physical altercation, so he couldn't be the initial aggressor. The first one to be the initial aggressor is the one to use force . . . . A lot of stuff or testimony or evidence was attributed to Eliezer in this case and what he may have been doing or thinking. *He never testified*

in this case. I don't know that all the evidence attributed to Eliezer during the rebuttal actually has a basis in the facts." (Emphasis added.)

The state argues that *Malave* does not apply because the prosecutor did not make a missing witness argument and the prosecutor properly focused the jury on a weakness in the defendant's theory of the case. The state contends that the prosecutor properly responded to the defendant's argument that Eliezer had been the initial aggressor by pointing out the absence of evidence that Eliezer had engaged in anything other than a verbal altercation with Mendez.

Under the present circumstances, we conclude that the prosecutor did not directly urge the jury to draw an adverse inference by virtue of Eliezer's absence, thereby distorting the burden of proof, but argued instead that there was no evidence to support defense counsel's claim that Eliezer was the initial aggressor. See *State* v. *Andrews*, 313 Conn. 266, 307, 96 A.3d 1199 (2014) (holding that prosecutor's comment, "[t]hey have access to the state forensic lab, they can put on witnesses if they want to from the lab," was not improper missing witness argument because prosecutor argued no evidence supported defendant's claim [emphasis omitted]). In *Malave*, our Supreme Court held that "we do not prohibit counsel from making appropriate comment, in closing arguments, about the absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case. . . . [Such comment is allowed as] long as counsel does not directly exhort the jury to draw an adverse inference by virtue of the witness' absence . . . ." *State* v. *Malave*, supra, 250 Conn. 739. Accordingly, the prosecutor's reference during rebuttal argument to the lack of evidence for the defendant's theory of the case, i.e., that Eliezer was the initial aggressor, was not improper.

C

The defendant also claims that the prosecutor improperly appealed to the emotions of the jurors by referring to Tucker and Rodriguez as "good Samaritans." We disagree. In closing arguments, the prosecutor stated that Tucker and Rodriguez "had the right to come to [Medina's] aid, they were merely defending a third person, they merely used physical force, not deadly force, they were acting as good Samaritans." The prosecutor then stated that Rodriguez "was a good Samaritan" and then asked the jury: "Isn't that what you want to see in a young man?"

"It has long been held that [a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal. . . . Therefore, a prosecutor may argue the state's case forcefully, [but] such argument must be fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Nonetheless, closing arguments often have a rough and tumble quality about them, [and] some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 794, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017).

Here, the prosecutor's comments were based on reasonable inferences from facts in evidence and did not

invite the jury to decide the case on the basis of sympathy for Rodriguez and Tucker. The prosecutor utilized his opportunity in closing arguments to explain the motivations of Rodriguez and Tucker for approaching the defendant and further argued that the defendant was the initial aggressor. Accordingly, we conclude that the prosecutor's comments referring to the victims as "good Samaritans" were not improper.

D

The defendant's final claim is that on three occasions the prosecutor made arguments that were based on facts not in evidence to suggest that the defendant stabbed Tucker. We do not agree.

Before turning to a discussion of each of the alleged improprieties, we first set forth the applicable law. "[T]he prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek[s] impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [over] jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules [that] the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury

ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *James E.*, supra, 154 Conn. App. 817.

"In fulfilling his duties, a prosecutor must confine the arguments to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony that is not the subject of proper closing argument. . . . Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 170 Conn. App. 789.

1

The defendant first contends that, during closing argument, the prosecutor improperly argued that two witnesses, Mendez and Adames, saw the defendant stab Tucker, but the facts in evidence did not support that statement. Specifically, the prosecutor argued: "[Mendez]: Eliezer started giving her a hard time. A lot of the women that were in that group say it was Eliezer that started first to be aggressive, verbally. [The defendant] mushed her in the face and had her in a headlock. [The defendant] struck [Medina] and she was two feet away. She signed three statements that night, indicating that [the defendant] stabbed [Tucker]. She can confirm that [the defendant] stabbed [Tucker]. You can listen to the testimony of witnesses; her testimony was short, give a listen to her testimony if you so desire. It was very crisp and, sort of, very confidently stated about what she knows.

"[Adames]: It started with Eliezer and [Mendez]. She was present at the scene. She knows [Tucker] and [the defendant], signed three statements that very night identifying [the defendant] as the person who . . . stabbed [Tucker], that very night. . . .

"In court, she said she did not see the stabbing; however, she's right there. She would know what occurred. These girls know what occurred here."

Additionally, on rebuttal, the prosecutor read from Adames' testimony and stated: "So, there is some evidence, in which you can infer that [the defendant] stabbed [Tucker]."

The defendant argues that this argument was improper because there was no evidence in the record about the content of Mendez' three signed statements and no evidence that Mendez saw the defendant stab Tucker. Further, the defendant argues that the prosecutor improperly argued that Adames knew what happened, when she explicitly denied seeing anything. In response, the state argues that the prosecutor properly summarized the testimony of each witness. The state further argues that the prosecutor presented fair inferences that could be drawn from Adames and Mendez' testimony.

We look to the testimony to determine whether the prosecutor properly referred to facts in evidence. At trial, Mendez testified that she provided three signed statements to the police in which she described what she observed on the night of the altercation.[17] Mendez also provided the following testimony about what she saw when the defendant and Tucker interacted during

[17] The following colloquy occurred between Mendez and the prosecutor:

"[Mendez]: . . . Um, so we, like, everybody was, like, trying to separate the fight and then, I guess, that's when [Tucker], like, he was preparing himself to fight, because he was going to defend [Medina]. And at that moment, I saw a quick movement, between [Tucker] and [the defendant], I wasn't too sure and then [Tucker] told me that he got stabbed. . . .

"[The Prosecutor]: Okay. How far away were you from [Tucker] when that happened?

"[Mendez]: Maybe, like, two feet away.

"[The Prosecutor]: And, did you indicate that in all of your statements, that you saw that?

"[Mendez]: Yes, sir."

the fight: "I saw quick contact, I'm not able to say that I saw the knife in [the defendant's] hand, but I did see, like, because we were, like, two feet away from each other, and then [Tucker] picked up his pants to, like, square up to fight, and [the defendant] came quick (demonstrating), boom, but I didn't see anything in his hand because it was so fast. . . . I don't think he really felt it, until afterward and that's when he said, sis, I think, he's stabbing me, and then I picked up his sweater and then I saw the blood . . . ." When asked if she saw the defendant with a knife, Mendez responded, "I didn't see him with it in his hand, but I can confirm that it was for sure him that stabbed [Tucker] because I was two feet away from him and when I saw this fast movement, that's approximately two minutes later, [Tucker] told me that he got stabbed."

Adames also testified that she had given three statements to the police. Adames acknowledged that in all three of her statements she indicated that the defendant stabbed Tucker. On cross-examination, Adames testified that she did not see the defendant stab Tucker.[18] When the prosecutor inquired on redirect if it was still her position that the defendant stabbed Tucker, she replied, "[y]eah."

A review of the record plainly shows that the prosecutor did not comment on, or suggest an inference from, facts not in evidence, or present matters that the jury had no right to consider. Accordingly, the defendant has failed to establish that the prosecutor's comments were improper.

2

The defendant contends that the prosecutor argued facts not in evidence when he stated: "Junito's brother

[18] The following colloquy occurred between Adames and defense counsel:

"[Defense Counsel]: Okay. But you didn't actually see [Tucker] get stabbed, did you?

"[Adames]: No, I didn't see him get stabbed."

is Joesenier." The state argues that the comment was made in the context of making an inference drawn from other evidence. We agree with the state.

The prosecutor argued in closing argument: "Liybin Fernandez, Liybin's a tricky witness . . . . Both brothers had knives. Knives were retrieved from the motor vehicle. There's the Junito issue. Listen to the testimony again from Liybin, if you so desire, and ask yourself: did he just get the name inverted? . . . Eliezer, Junito, remember, three of the girls say Eliezer was arguing, they all say Eliezer started the verbal argument. Well, if Eliezer is Junito, it would be accurate for Liybin to say, well, yeah, Eliezer was arguing with the girls. Who stabbed the black individual, he was asked that question, he said, Junito's brother. Junito's brother stabbed the black individual, Junito's brother is Joesenier. . . . So, you may want to relisten to his testimony again."

On the basis of our review of the record, there is evidence that could give rise to a reasonable inference that Junito's brother is Joesenier. During Fernandez' testimony, he was asked if Junito was in the courtroom. In response, Fernandez stated, "[t]hat guy looks like him," and identified the defendant. Fernandez also testified, after refreshing his recollection with his prior statement, that "Junito's brother" stabbed Tucker.

Although there is conflicting evidence that Eliezer was also nicknamed Junito,[19] because there is sufficient evidence in the record that could give rise to a reasonable inference that Junito is Eliezer and that, therefore, Junito's brother is the defendant, the prosecutor's statement in his closing argument was proper.

3

The defendant last argues that the prosecutor referred to facts not in evidence when discussing the

[19] Contrary to Fernandez' testimony, the defendant's father, Eliezer Ruiz, Sr., testified that his son, Eliezer, had a nickname of Junito.

testimony of two police officers who witnessed the fight and called 911. During rebuttal, the prosecutor stated, "[y]ou know, the indication was that we can rely on the testimony of the trained police officers that saw it. I would argue to you that those trained police officers did not believe that this was a self-defense situation." The defense objected to this portion of the state's closing argument, and the court issued a curative instruction. The state does not contest that the statement was improper, but argues that there is no prejudice from this comment because the defense objected to this portion of the state's closing argument and, after consulting with both parties, the trial court issued a curative instruction.

Even if we assume arguendo that the prosecutor's argument was improper, it is the defendant's burden to establish that the impropriety violated his due process right to a fair trial.[20] See *State* v. *Jones*, 320 Conn. 22, 37, 128 A.3d 431 (2015) ("when a defendant raises on appeal a claim that improper remarks by the prosecutor deprived [him] of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process" [internal quotation marks omitted]). As our Supreme Court has articulated, the "determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540], with due consideration of whether that

[20] Absent this final claim of the prosecutor's improper reference to facts not in evidence, namely, the fact that the police officers did not believe this was a self-defense situation, all of the prosecutor's comments were proper. The due process analysis need not consider the comments which we have already determined were proper. See *State* v. *Luster*, 279 Conn. 414, 442, 902 A.2d 636 (2006).

[impropriety] was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument, the severity of the [impropriety], the frequency of the [impropriety], the centrality of the [impropriety] to the critical issues in the case, the strength of the curative measures adopted, and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Grant*, 286 Conn. 499, 536–37, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008).

In applying the *Williams* factors, we determine whether the claimed impropriety, the prosecutor's statement that the trained police officers "did not believe that this was a self-defense situation," violated the defendant's right to a fair trial. On the one hand, there is no indication in the record that the claimed impropriety was invited by either defense counsel or his argument, and the statement directly implicates the issue of self-defense. On the other hand, in light of the remaining *Williams* factors, the defendant's claim must fail. The alleged impropriety occurred during only one portion of the prosecutor's rebuttal and cannot be characterized as frequent. Upon objection by defense counsel, most notably, the court promptly issued a cautionary instruction, which specifically identified the prosecutor's remarks about the police officers' beliefs and stated that there was no evidence to that effect.[21]

[21] The court issued the following cautionary instruction: "Before I start, however, you heard the final arguments of counsel, and I had advised you earlier on that that's not evidence and that insofar as any inferences counsel requests you to draw, they must be based on the evidence that you've heard. . . . So, for example, [the prosecutor] indicated [his] opinion that he could argue to you that the police officers didn't believe this was a self-defense issue. There was no evidence as to what the officers believed, as far as that particular issue is concerned. It may be that if you were to hear the whole of the evidence, you could draw the inference, but it is not for counsel to draw that for you.

"So, with that having been said, please, understand the limitations on final argument; it's not evidence, it should not include the opinions of the attorneys, and it should . . . only be based on evidence, and you are the finders of fact and the only finders of fact, in this case."

It is well established that "a prompt cautionary instruction to the jury regarding improper prosecutorial remarks obviates any possible harm to the defendant." *State* v. *Ubaldi*, 190 Conn. 559, 563, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983). "In the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 762, 850 A.2d 199 (2004). The curative instructions make it unlikely that the prosecutor's comments were so prejudicial as to affect the outcome of the trial. Furthermore, pursuant to the final *Williams* factor, the state's case against the defendant was strong, including the testimony of several eyewitnesses describing the assault, and the defendant's statement to the police admitting that he stabbed someone and that he was present at the time of the stabbing. In addition, the evidence included a video of the fight in the parking lot in which several eyewitnesses identified the defendant.

Upon consideration of the *Williams* factors, we conclude that the court's instructions were sufficient to cure any harm to the defendant and, accordingly, that the defendant has failed to establish that the improper comment deprived him of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID DUBINSKY *v.* KEVIN M. BLACK
(AC 40203)

Elgo, Bright and Mihalakos, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney for legal malpractice in connection with the defendant's representation of the plaintiff in a criminal proceeding and his alleged failure to advise

the plaintiff that his acceptance of a plea offer in the criminal proceeding would preclude him from subsequently pursuing an action for malicious prosecution. In the underlying criminal proceeding, the plaintiff had been charged with, inter alia, risk of injury to a child in violation of statute (§ 53-21) in connection with an incident at the defendant's home where he repeatedly struck his seven year old son with a belt in the presence of his stepdaughter. The plaintiff had entered into a conditional guilty plea in that case, which resulted in all charges being vacated and dismissed because the plaintiff complied with all the conditions of the plea agreement. The trial court in the present case granted the defendant's motion for summary judgment on the ground that the plaintiff, as a matter of law, could not prevail on the malpractice action, as probable cause existed to charge the defendant with the crime of risk of injury to a child. From the judgment rendered thereon, the plaintiff appealed to this court. *Held:*

1. The trial court did not err in granting the defendant's motion for summary judgment; the plaintiff bore the burden of establishing not only negligence on the part of the defendant in apprising him of the consequences of his guilty plea in the underlying criminal proceeding, but also that he would have prevailed in his malicious prosecution claim against the arresting officers, and the plaintiff could not meet that burden at trial, as the documentation submitted in connection with the motion for summary judgment demonstrated that no genuine issue of material fact existed as to whether, on the basis of the totality of the circumstances and facts known to them at the time, the arresting officers possessed an objectively reasonable basis to believe that the plaintiff's conduct placed both his son and stepdaughter in a situation that was likely to be psychologically injurious to them and, thus, that the plaintiff had violated § 53-21 (a), and, therefore, the plaintiff could not establish the lack of probable cause as required for a malicious prosecution action.
2. The plaintiff's claim that the arresting officers lacked probable cause in light of the parental justification defense afforded to parents under statute (§ 53a-18 [1]) was unavailing; the ultimate determination of whether the particular conduct of a parent is reasonable and, thus, entitled to protection under § 53a-18 (1) is a factual determination to be made by a trier of fact, which could not have been made by the arresting officers or the prosecutor in this case, as the arresting officers performed a preliminary and fundamentally distinct function, specifically, the determination of whether the facts then known were sufficient to justify a reasonable person to believe that reasonable grounds for prosecuting an action existed, proof of probable cause requires less than proof by a preponderance of the evidence, and, thus, because the arresting officers were not the finders of fact tasked with making a final determination as to the reasonableness of the plaintiff's conduct after an evidentiary proceeding, the parental justification defense had little

bearing on the preliminary determination of probable cause made by the arresting officers who had responded to the 911 call in this case.

3. The plaintiff could not prevail on his claim that summary judgment was inappropriate because the arresting officers allegedly fabricated the claim that he had left red welts on his son's backside: the fact that there was conflicting evidence as to whether the marks existed was not material to the question of whether the arresting officers possessed probable cause to charge the plaintiff with risk of injury to a child, as actual physical injury is not a prerequisite to a conviction under the situation prong of § 53-21, and even if such evidence was discounted, no genuine issue of material fact existed as to whether the arresting officers possessed an objectively reasonable basis to believe that the plaintiff, through his conduct, placed both minor children in a situation that was likely to be injurious to their mental health and well-being in violation of § 53-21 (a) (1); moreover, because the existence of probable cause is an absolute protection against an action for malicious prosecution, the plaintiff could not demonstrate, as he was required, that he would have been entitled to judgment in a malicious prosecution action against the arresting officers but for the defendant's professional negligence, and, therefore, the plaintiff cannot prevail on his legal malpractice claim against the defendant.

Argued May 21—officially released September 25, 2018

Procedural History

Action to recover damages sustained as a result of the defendant's alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Krumeich*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Bridgitte E. Mott, with whom, on the brief, was *Thomas P. O'Dea*, *Jr.*, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, David Dubinsky, appeals from the summary judgment rendered in favor of the defendant, Kevin M. Black, in this legal malpractice action predicated on the defendant's alleged failure to advise the plaintiff that his acceptance of a plea offer in a

criminal proceeding would preclude him from subsequently pursuing an action for malicious prosecution. In rendering summary judgment, the court concluded, as a matter of law, that the plaintiff could not prevail on such an action, as probable cause existed to charge him with the crime of risk of injury to a child in violation of General Statutes § 53-21. The plaintiff now challenges the propriety of that determination. We affirm the judgment of the trial court.

Mindful of the procedural posture of the case, we set forth the following facts as gleaned from the pleadings, affidavits and other proof submitted, viewed in a light most favorable to the plaintiff. See *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009). On the morning of Saturday, June 23, 2012, officers from the Fairfield Police Department (department) responded to a 911 call from the plaintiff's then wife, Miriam Dubinsky,[1] regarding an incident at their home in which the plaintiff shoved her onto a bed and repeatedly struck their minor son, Jake, with a belt in the presence of the plaintiff's minor stepdaughter, Abigail.[2] The plaintiff, at that time, was arrested and charged with one count of risk of injury to a child in violation of § 53-21, one count of assault in the third degree in violation of General Statutes § 53a-61, and three counts of disorderly conduct in violation of General Statutes § 53a-182.[3]

Later that day, department officials filed a request for a probable cause determination with the Superior Court. Accompanying that request were copies of the police incident report, an arrest affidavit signed by Officer John Tyler, a family violence offense report, and a

[1] We note that the plaintiff's former spouse is identified as Miriam Edelson in certain documents in the record before us. For convenience, we refer to her as Miriam in this opinion.

[2] The police incident report indicates that Jake was seven years old and Abigail was fifteen years old on June 23, 2012.

[3] At oral argument before this court, the plaintiff's counsel confirmed that this appeal pertains only to the risk of injury charge.

written statement by Miriam regarding the incident. After reviewing those materials that evening, the court, *Bellis*, *J.*, concluded that probable cause existed and signed the request. The plaintiff was arraigned on Monday, June 25, 2012.

Following his arraignment, the plaintiff retained the services of the defendant, an attorney licensed to practice law in this state, who represented the plaintiff in connection with the aforementioned criminal charges. Plea negotiations with the state followed. The state ultimately made an offer, pursuant to which the plaintiff would enter a conditional plea of guilty to the charges of breach of peace and disorderly conduct. The plea offer further provided that, if the plaintiff complied with the terms of a protective order issued by the court and completed a family violence education program, all charges would be vacated and dismissed. The defendant encouraged the plaintiff to accept that conditional guilty plea offer and, on August 30, 2012, the plaintiff so pleaded before the court. The plaintiff thereafter complied with the terms of the plea agreement and all charges against him were dismissed.

On August 14, 2014, the plaintiff commenced the present legal malpractice action, claiming that the defendant failed to advise him that acceptance of the plea offer would preclude him from instituting a malicious prosecution action against the arresting officers.[4] In his

[4] Although his complaint also alleged an impairment of his ability to pursue an action for false arrest, the plaintiff has pursued no such claim in this case. For example, in his memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff acknowledged that Judge Bellis had made a finding that probable cause existed at the time of his arrest. The plaintiff nonetheless stated: "While that finding might be relevant if the plaintiff were suing for false arrest, it is meaningless in an action for malicious prosecution . . . ." The plaintiff likewise has advanced no claim on appeal regarding an action for false arrest, and instead has focused entirely on the impairment of his ability to pursue a malicious prosecution action. In his appellate brief, the plaintiff notes that he "had informed [the defendant] of his desire to sue . . . for malicious prosecution" and there-

answer, the defendant denied the substance of that allegation. The defendant also raised the special defenses of accord and satisfaction, waiver, laches, and comparative negligence, all of which the plaintiff denied.

The defendant filed a motion for summary judgment on January 3, 2017, in which he argued that the plaintiff could not establish the causation element of his legal malpractice action. More specifically, the defendant claimed that no genuine issue of material fact existed as to whether the arresting officers possessed probable cause to institute the underlying criminal action. The defendant's motion was accompanied by seventeen exhibits, including copies of the police incident report and Miriam's signed statement to the police made on the date of the incident, transcripts from the underlying criminal proceedings, and deposition transcripts of various individuals. In opposing that motion for summary judgment, the plaintiff submitted only one exhibit—a copy of the January 28, 2013 decision, issued following an evidentiary hearing, of the administrative hearings

after discusses certain legal principles related thereto. He has not provided any citation to, or discussion of, legal authority regarding actions for false arrest. See *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008). Accordingly, we confine our review to the plaintiff's claims regarding the impairment of his ability to initiate a malicious prosecution action.

We further note that the plaintiff, in his complaint, averred that he had "explained to the defendant from the outset that . . . he wished not only to be vindicated of the said allegations [in the underlying criminal proceeding] but to sue *the person who had accused him*, *and the arresting officers* . . . ." (Emphasis added.) In his appellate brief, the plaintiff reiterated that he had informed the defendant "of his desire to sue the arresting officers and [Miriam] for malicious prosecution." At oral argument before this court, the plaintiff's counsel abandoned any such claim with respect to Miriam, conceding that it was not a "viable lawsuit" and stating that the plaintiff was not pursuing a claim against Miriam. The present appeal, therefore, concerns the viability of a malicious prosecution action against the arresting officers.

unit of the Department of Children and Families on the issue of the plaintiff's physical neglect of Jake.[5]

The court rendered summary judgment in favor of the defendant on February 21, 2017. In its memorandum of decision, the court stated in relevant part that the plaintiff "would not have prevailed in any action alleging . . . malicious prosecution . . . because he could not prove want of probable cause . . . . Therefore, [the plaintiff] would not have been able to prove that [the defendant's] failure to advise him of the consequences of the plea agreement caused him harm when he lost his right to recover in a civil litigation for . . . malicious prosecution." (Citations omitted.) From that judgment, the plaintiff now appeals.

I

As a preliminary matter, we note the well established standard that governs our review of the trial court's decision to grant summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts. . . . When documents submitted in

[5] Although it reversed an earlier substantiation of physical neglect, that administrative decision also noted that the June 23, 2012 incident "was no doubt an ugly scene, and one which likely will have a lasting impact on the family." It also noted that, when the police arrived at the residence that day, the plaintiff "became flippant and belligerent with the responding officers. His behavior appeared erratic at that time." The plaintiff's belligerent behavior toward law enforcement responding to a 911 call also is documented in the police incident report, which provides necessary context for the probable cause determination made by the arresting officers.

support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

The present action is one sounding in legal malpractice. As our Supreme Court has explained, "[i]n legal malpractice actions, the plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the 'case-within-a-case.' " *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 775 n.9, 882 A.2d 653 (2005). To prevail, "the plaintiff must prove that, in the absence of the alleged breach of duty by [his] attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment." (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 284, 147 A.3d 1023 (2016); see also *Grimm* v. *Fox*, 303 Conn. 322, 352, 33 A.3d 205 (2012) (*Palmer*, *J.*, concurring) ("[T]o prevail on his claim against the defendants, the plaintiff [must] prove not only that the defendants were negligent in their handling of his [action], but also that [the action] would have been successful if the defendants had represented him competently. In the absence of such proof, the plaintiff could not establish that his

alleged damages . . . were the result of the defendants' negligence . . . ."). Accordingly, the plaintiff in the present case bore the burden of establishing not only negligence on the part of the defendant in apprising him of the consequences of his guilty plea in the underlying criminal proceeding, but also that he would have prevailed in his malicious prosecution claim against the arresting officers. We therefore focus our attention on that cause of action.

"Malicious prosecution is a tort arising out of a criminal complaint that is intended to protect an individual's interest in freedom from unjustifiable and unreasonable litigation . . . ." (Internal quotation marks omitted.) *Lefebvre* v. *Zarka*, 106 Conn. App. 30, 35, 940 A.2d 911 (2008). An essential element of that action is proof that the defendant acted without probable cause; see *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007); as "[t]he existence of probable cause is an absolute protection against an action for malicious prosecution . . . ." *Brodrib* v. *Doberstein*, 107 Conn. 294, 296, 140 A. 483 (1928). Our Supreme Court has defined probable cause in this context as "the knowledge of facts sufficient to justify a reasonable [person] in the belief that he has reasonable grounds for prosecuting an action. . . . Mere conjecture or suspicion is insufficient. . . . Moreover, belief alone, no matter how sincere it may be, is not enough, since it must be based on circumstances which make it reasonable. . . . Although want of probable cause is negative in character, the burden is [on] the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." (Citation omitted; internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 211, 9 A.3d 347 (2010). We agree with the trial court that, even when construing the pleadings, affidavits, and other proof submitted in a light most

favorable to him, the plaintiff cannot meet that burden at trial.

As the Supreme Court has observed, "[i]t is clear that [t]he general purpose of § 53-21 is to protect the physical *and* psychological well-being of children from the potentially harmful conduct of [others] . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Nathan J.*, 294 Conn. 243, 251, 982 A.2d 1067 (2009). That statute "comprise[s] . . . two distinct prongs, the situation prong and act prong . . . ." (Internal quotation marks omitted.) *State* v. *Owens*, 100 Conn. App. 619, 635, 918 A.2d 1041, cert. denied, 282 Conn. 927, 926 A.2d 668 (2007). Section 53-21 (a) "prohibits two different types of behavior: (1) deliberate indifference to, acquiescence in, or the creation of *situations* inimical to the [child's] moral or physical welfare . . . and (2) *acts* directly perpetrated on the person of the [child] and injurious to his [or her] moral or physical well-being." (Emphasis in original; citations omitted; internal quotation marks omitted.) *State* v. *Robert H.*, 273 Conn. 56, 65, 866 A.2d 1255 (2005). "Cases construing § 53-21 have emphasized this clear separation between the two parts of the statute . . . ." (Internal quotation marks omitted.) Id.

Under the situation prong, the state is not required to prove that the child in question sustained an actual injury. See *State* v. *Gewily*, 280 Conn. 660, 669, 911 A.2d 293 (2006) ("actual injury is not an element of the 'situation' prong of § 53-21 [a] [1]"), and cases cited therein. With particular respect to the potential for harm to the mental health of a child, "the fact finder is not required to make a determination as to the precise nature or severity of the injury . . . rather, the fact finder need only decide whether the accused placed the child in a situation that was likely to be psychologically injurious to that child." (Citation omitted; internal quotation marks omitted.) Id. The pleadings, affidavits and

other proof submitted in the present case confirm that no genuine issue of material fact exists as to whether the arresting officers possessed probable cause to believe that the plaintiff's conduct on June 23, 2012, placed both Jake and Abigail in such a situation.[6]

The police incident report, which was submitted as an exhibit to the defendant's motion for summary judgment, indicates that when the arresting officers arrived at the scene, they were "met at the door by Miriam and [Abigail] and both were crying, shaking, and visibly upset." In his deposition testimony, which also was submitted as an exhibit to the motion for summary judgment, Officer Tyler stated that Miriam and Abigail had "a hard time talking" and appeared "as if [they] witnessed a horrible accident . . . ." Both Miriam and Abigail had witnessed the plaintiff spanking his son Jake, who was seven years old at the time, with a folded belt.

Abigail described the spanking to officers as "very disturbing," stating that the plaintiff had "wound up his arm and hit him hard, several times." Miriam likewise informed the officers that, after placing the boy over his knee, the plaintiff hit him "hard several times. I thought he was way out of line and I tried to stop it but he pushed me hard [three] or [four] times in the chest, until I fell on the bed." The officers, at that time, observed redness on the upper chest area of Miriam's body.

In the written statement that she provided to the police on the day of the incident, which was submitted as an exhibit to the summary judgment motion, Miriam indicated that Jake was "screaming" as the plaintiff repeatedly struck him with the belt. She further stated:

[6] During his deposition testimony, Officer Tyler indicated that the risk of injury charge was premised on the "dangerous situation" created by the plaintiff's conduct.

"I will not have my children subject to or witness to violence. [The plaintiff] scared me and [Abigail]. There has been [an] increase in underlying anxiety and anger with [the plaintiff] and this was the worst he has ever exhibited." Abigail similarly reported to the officers that the plaintiff "raises his voice all the time and we are on edge all the time. He has never hit me but I fear he would." In making their probable cause determination, the arresting officers properly could rely on the statements made by Miriam and Abigail. See *State* v. *Colon*, 272 Conn. 106, 152 n.15, 864 A.2d 666 (2004) ("the police had probable cause to arrest the defendant as a result of the statement of the victim's sister" who witnessed the crime), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); see also *Iocovello* v. *City of New York*, 701 Fed. Appx. 71, 72 (2d Cir. 2017) ("[a] police officer may rely on the statements of a putative victim or witness to determine if probable cause exists for an arrest, unless the officer is presented with a reason to doubt the witness' veracity").

As Tyler noted during his deposition, the plaintiff is "a big guy"; the plaintiff acknowledged in his deposition testimony, which also was before the court, that he was 6'3" tall and weighed approximately 235 pounds. The police incident report also indicates that when the officers spoke with the plaintiff, he acknowledged striking Jake with the belt and pushing Miriam onto the bed. The plaintiff at that time cautioned: "Look, you or any other [department] officer [are] not going to tell me how to discipline my son. There is nothing wrong with using a belt. Put this on [the] record, OK—I will use the belt again and I will spank my son again."

The police incident report also notes that Tyler spoke with Jake and asked him if he was okay. In response, the boy began to cry and then stated, "[m]y butt really hurts. It hurts sitting here."

"Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action." *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94. "[T]he probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 523, 903 A.2d 169 (2006). For that reason, probable cause "is a flexible common sense standard that does not require the police officer's belief to be correct or more likely true than false. . . . [W]hile probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken *of all the circumstances*. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence." (Citations omitted; emphasis added; internal quotation marks omitted.) *Washington* v. *Blackmore*, 119 Conn. App. 218, 221–22, 986 A.2d 356, cert. denied, 296 Conn. 903, 991 A.2d 1104 (2010). In the context of the motion for summary judgment filed by the defendant in the present case, the critical question is whether the plaintiff can demonstrate that the officers had no objectively reasonable basis to believe that an offense has been committed.

The documentation submitted in connection with that motion convinces us that no genuine issue of material fact exists as to whether the arresting officers possessed an objectively reasonable basis to believe that the plaintiff's conduct on June 23, 2012, placed both Jake and Abigail in a situation that was likely to be psychologically injurious to them. Abigail watched as

the plaintiff wound up his arm and then struck Jake with the belt several times, which reduced her to tears and left her shaking and visibly upset when officers arrived at the residence soon thereafter. Abigail, at that time, described the incident as "very disturbing" and informed officers that she was fearful that the plaintiff would hit her in the future. Seven year old Jake not only bore the brunt of the plaintiff's blows with the belt, but also watched the plaintiff shove his mother to the bed when she attempted to intervene on his behalf. When the officers spoke with Jake and asked if he was okay, the boy began to cry and then confessed that his "butt really hurts," so much so that it pained him to be seated. In her written statement, Miriam informed the officers that Jake was screaming as the plaintiff struck him and that the plaintiff's behavior had frightened Abigail. Miriam also indicated in that statement that she "will not have my children subject to or witness to violence." Furthermore, the officers in the present case were summoned to the residence by a 911 call that included a report of domestic violence,[7] and the plaintiff thereafter responded to the officer's questions in a defiant manner, insisting that they could not "tell [him] how to discipline [his] son" and imploring them to "[p]ut this on the record . . . I will use the belt again and I will spank my son again."

Viewing the record before us in a light most favorable to the plaintiff, we conclude that the plaintiff has not demonstrated the existence of a genuine issue of material fact as to whether, on the totality of the circumstances and the facts known to them at the time, the arresting officers lacked an objectively reasonable basis to believe that he had violated the situational prong of § 53-21 (a). The plaintiff, therefore, cannot establish the

[7] The police incident report states in relevant part that Miriam "called 911 to report that her husband . . . is beating [their] seven year old son . . . with a belt."

probable cause element of an action for malicious prosecution.

II

The plaintiff nonetheless argues that the arresting officers lacked probable cause in light of the protection afforded parents under General Statutes § 53a-18 (1). That statute provides in relevant part that "[t]he use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances . . . (1) A parent, guardian or other person entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor or incompetent person. . . ."

It is well established that § 53a-18 (1) functions as a defense under our law. Commonly known as "the parental justification defense"; *State* v. *Nathan J.*, supra, 294 Conn. 253; § 53a-18 (1) operates as a "shield" in certain circumstances in recognition of "the parental right to punish children for their own welfare." *State* v. *Leavitt*, 8 Conn. App. 517, 522, 513 A.2d 744, cert. denied, 201 Conn. 810, 516 A.2d 886 (1986). The statute "enumerates circumstances in which physical force, which would otherwise constitute an offense, is justifiable and thus not criminal." *State* v. *Nathan J.*, supra, 253. As our Supreme Court has explained: "The parental justification defense . . . provides that [physical] force is not criminal, as long as it is reasonable, when directed by a parent, or someone standing in loco parentis, against a child for disciplinary purposes. If the force is unreasonable . . . however, the parental justification [defense] does not apply and the force may constitute risk of injury." Id., 260.

Significantly, the ultimate determination of whether the particular conduct of a parent is reasonable, and thus entitled to the protection of § 53a-18 (1), "is a factual determination to be made by the trier of fact." *State* v. *Brocuglio*, 56 Conn. App. 514, 518, 744 A.2d 448, cert. denied, 252 Conn. 950, 748 A.2d 874 (2000); *State* v. *Leavitt*, supra, 8 Conn. App. 522. Because "the defense only applies to '*reasonable* physical force' to the extent '*reasonably* . . . necessary to maintain discipline or to promote the welfare' of the child"; *State* v. *Nathan J.*, supra, 294 Conn. 255 (emphasis in original); the factual question of reasonableness cannot be determined by the arresting officers or the prosecutor in a given case, but rather remains exclusively the domain of the trier of fact. Id., 259.

Indeed, the arresting officers in the present case performed a preliminary, and fundamentally distinct, function—namely, the determination of whether the facts then known were sufficient to justify a reasonable person to believe that reasonable grounds for prosecuting an action existed. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94. For that reason, our Supreme Court has recognized that "[t]he existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence"; *State* v. *Trine*, 236 Conn. 216, 237, 673 A.2d 1098 (1996); particularly because "proof of probable cause requires less than proof by a preponderance of the evidence." *State* v. *Munoz*, 233 Conn. 106, 135, 659 A.2d 683 (1995). As the United States Court of Appeals for the Second Circuit has noted, "[i]t would be unreasonable and impractical to require that every innocent explanation for activity that suggests criminal behavior be proved wrong, or even contradicted, before an arrest warrant could be issued with impunity. . . . It is up to the factfinder to determine whether a defendant's story holds water, not the arresting officer. . . .

Once officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." (Citations omitted.) *Krause* v. *Bennett*, 887 F.2d 362, 372 (2d Cir. 1989).

Had the plaintiff elected to proceed to trial in the underlying criminal proceeding, the finder of fact ultimately may have found his conduct on June 23, 2012, to be reasonable, and thus subject to the protection of the parental justification defense contained in § 53-18 (1). That defense has little bearing, however, on the preliminary determination of probable cause made by the arresting officers who responded to the 911 call in the present case.

III

Also misplaced is the plaintiff's reliance on this court's decision in *Lovan C.* v. *Dept. of Children & Families*, 86 Conn. App. 290, 860 A.2d 1283 (2004). Unlike the present case, which involves a probable cause determination made soon after the incident in question, *Lovan C.* involved a decision of the administrative hearings unit of the Department of Children and Families substantiating an allegation of physical abuse by a parent who had engaged in corporal punishment of her child. Id., 292–93. In concluding that "substantiation must be reversed for lack of substantial evidence that the plaintiff's discipline was unreasonable"; id., 301; this court emphasized that the hearing officer improperly "failed to hold a hearing regarding the reasonableness of the plaintiff's discipline of the child before substantiating the allegation of physical abuse." Id., 297. In such proceedings, the hearing officer of the administrative hearings unit of the Department of Children and Families is the finder of fact that makes that reasonableness

determination as part of its final decision following a hearing. See id., 299–300; *State* v. *Nathan J.*, supra, 294 Conn. 259. We reiterate that, in the present case, the arresting officers were *not* the finders of fact tasked with making a final determination as to the reasonableness of the plaintiff's conduct after an evidentiary proceeding. *Lovan C.*, therefore, is inapposite to the present case.

IV

As a final matter, we note that the plaintiff also argues that summary judgment was inappropriate because the arresting officers allegedly "fabricated the claim [in the police incident report] that he had left red welts on his son's backside . . . ."[8] That contention is unavailing. In its memorandum of decision, the trial court acknowledged that, although the record contained documentation substantiating the existence of such marks,[9] the plaintiff disputed their existence. The court nevertheless found that the "differences in the various accounts [as to whether the marks existed] are not material" to the question of whether the arresting officers possessed probable cause to charge the plaintiff with risk of injury to a child. We concur. Actual physical injury is not a

[8] The police incident report states in relevant part that Miriam and Sergeant Edward Weihe "inspected Jake's buttocks and they were cherry red, with welts. . . ." In his deposition, the plaintiff testified: "I don't believe there [were] any marks [on Jake's body]. I don't see how there could have been. . . . [T]here wasn't any marks . . . the police lied, lied, and . . . there were no marks on Jake, on Jake's butt." In his appellate brief, the plaintiff alleges that the arresting officers "lied about the alleged 'red welts' " in the police incident report.

[9] In her deposition testimony, which was submitted in support of the defendant's motion for summary judgment, Miriam stated that she inspected Jake's buttocks soon after the incident and observed red marks on his buttocks. Miriam further testified that she observed "black and blue marks" on her son's body a day or two after the incident transpired. In response, she took him to department headquarters, where an officer took photographs of his body. Three photographs depicting bruising on Jake's buttocks were submitted to the court in support of the defendant's motion for summary judgment, and are contained in the record before us.

prerequisite to a conviction under the situation prong of § 53-21. *State* v. *Gewily*, supra, 280 Conn. 669. In reviewing the defendant's motion for summary judgment, we view the pleadings, affidavits and other proof submitted in a light most favorable to the plaintiff, and, therefore, have not considered the presence of red welts or bruising on Jake's buttocks in our analysis of whether the arresting officers possessed probable cause. Even discounting such evidence, we nonetheless are convinced that no genuine issue of material fact exists as to whether the arresting officers possessed an objectively reasonable basis to believe that the plaintiff, through his conduct on June 23, 2012, placed both Jake and Abigail in a situation that was likely to be injurious to their mental health and well-being in violation of § 53-21 (a) (1). Because the existence of probable cause is an absolute protection against an action for malicious prosecution; *Bhatia* v. *Debek*, 287 Conn. 397, 411, 948 A.2d 1009 (2008); the plaintiff cannot demonstrate, as he must, that he would have been entitled to judgment in a malicious prosecution action against the arresting officers but for the defendant's professional negligence. See *Bozelko* v. *Papastavros*, supra, 323 Conn. 284. The plaintiff therefore cannot prevail on his legal malpractice claim against the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

BARBARA DAHLE *v.* THE STOP AND SHOP SUPERMARKET COMPANY, LLC, ET AL.
(AC 39528)

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

Syllabus

The plaintiff, who was injured while she was employed by the defendant company, appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation

Commissioner dismissing the plaintiff's claim that she was entitled to temporary total disability benefits without a social security offset pursuant to statute ([Rev. to 2003] § 31-307 [e]). Prior to the hearings regarding the plaintiff's claim that she was entitled to disability benefits without an offset, the commissioner issued a decision in 2008 in which he granted the plaintiff's request for certain benefits but denied her request for additional medical treatment, which the board affirmed on appeal in 2009. The plaintiff did not appeal from that decision of the board. On appeal before this court, the plaintiff claimed, inter alia, that she should have been awarded benefits without the social security offset because errors and delays by the commissioner in 2008 and the board in 2009 resulted in a delay in obtaining compensation, which made her subject to the offset. *Held*:

1. The board did not err by refusing to address the plaintiff's attempt to correct past incorrect evidence and to introduce new evidence to prove that delays beyond her control made her subject to the social security offset: that evidence pertained to factual findings and issues related to the 2008 decision of a commissioner that had become final when the plaintiff failed to appeal the board's decision affirming that commissioner's decision, and the board properly determined that it did not have the authority to correct findings from the commissioner's 2008 decision; moreover, the board did not err by failing to address the commissioner's alleged statement that the plaintiff's medical treatment was delayed, as the commissioner neither found nor opined that the plaintiff's treatment was delayed and, instead, was simply paraphrasing what the plaintiff might include in the proposed findings that she was required to draft.
2. The board did not err in affirming the commissioner's denial of the plaintiff's request for financial compensation without the social security offset: although § 31-307 (e) was repealed, the offset applied to the plaintiff's claim because it was in effect on the date of the plaintiff's injury, the board did not err in stating that the plaintiff was requesting a waiver of the social security offset, as her request for benefits without the offset was the functional equivalent of requesting a waiver of the offset, and the plaintiff could not prevail on her claim that she was entitled to a waiver of the offset due to the alleged negligence and carelessness of the commissioner in 2008 and the board in 2009, as the commissioner and the board properly determined that there was no authority for the commissioner to waive the statutorily required social security offset.

Argued April 16—officially released September 25, 2018

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Sixth District dismissing the plaintiff's claim that she was entitled to temporary total

disability benefits without a social security offset, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Barbara Dahle, self-represented, the appellant (plaintiff).

Jane M. Carlozzi, for the appellee (named defendant).

Francis C. Vignati, Jr., assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

HARPER, J. The plaintiff, Barbara Dahle, appeals from the decision of the Compensation Review Board (board), which affirmed the decision of the Workers' Compensation Commissioner for the Sixth District[1] dismissing the plaintiff's claim that she was entitled to temporary total disability benefits without a social security offset. On appeal, the plaintiff claims[2] that the board erred by: (1) not addressing past incorrect evidence, not

[1] The plaintiff appeals from the decision of the board, dated August 8, 2016, which affirmed the decision of Commissioner Stephen B. Delaney, dated September 28, 2015. Also related to this appeal is a decision of the board, dated June 5, 2009, which affirmed a decision of Commissioner Ernie R. Walker, dated June 4, 2008. For clarity, in this opinion, we refer to the commissioners by name, and to the decisions of the commissioners and the board by date.

[2] The plaintiff also claims on appeal that the court erred by not finding negligence and carelessness in the commissioner's and the board's handling of her case. The plaintiff argues that the commissioner and the board failed to adhere to the Code of Ethics for Workers' Compensation Commissioners. The plaintiff, however, has not commenced an action against the commissioner and the board, and they are not parties to this case. Accordingly, we decline to address the argument as a separate claim. To the extent that this claim of negligence necessarily is intertwined with the plaintiff's argument that the board erred in denying her requested financial compensation, we address it in greater detail in part II of this opinion.

finding her new evidence credible, and not addressing a statement from Commissioner Stephen B. Delaney about delayed medical care; and (2) denying her request for financial compensation without a social security offset pursuant to General Statutes (Rev. to 2003) § 31-307 (e).[3] We disagree and, accordingly, affirm the decision of the board.

The following facts and procedural history are relevant to our resolution of this appeal. On August 8, 2003, the plaintiff suffered a compensable injury to her right shoulder and left hip after she fell during and in the course of her employment with the defendant The Stop & Shop Supermarket Company, LLC.[4] Following treatment, Scott Organ, a physician, issued a 5 percent permanent partial disability rating as to the plaintiff's right upper extremity by report dated March 17, 2006. By voluntary agreement of the parties, dated September 5, 2006, the plaintiff was paid a 5 percent permanent partial disability[5] of the right shoulder with a maximum medical improvement date of September 5, 2006. No

[3] General Statutes (Rev. to 2003) § 31-307 (e) provides: "Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits." All references to § 31-307 (e) herein, unless otherwise stated, refer to the 2003 revision of the statute.

[4] MAC Risk Management, Inc., and the Second Injury Fund are also defendants in this action. For convenience, we refer in this opinion to The Stop & Shop Supermarket Company, LLC, as the defendant.

[5] "Compensation for loss of earning power takes the form of partial or total incapacity benefits. . . . Incapacity . . . means incapacity to work . . . . Partial incapacity benefits are available when the employee is able to perform some employment, but [is] unable fully to perform his or her customary work . . . . The duration of partial incapacity benefits is limited by statute. . . . Conversely . . . [t]otal incapacity benefits, unlike partial incapacity benefits, are unrestricted as to duration." (Citations omitted; internal quotation marks omitted.) *Starks* v. *University of Connecticut*, 270 Conn. 1, 9, 850 A.2d 1013 (2004).

permanency rating was ever issued as to the plaintiff's left hip.

A formal hearing took place before Commissioner Ernie R. Walker on June 3, 2008. The issues addressed at the hearing included the plaintiff's claim for wage differential benefits pursuant to General Statutes § 31-308a[6] and her claim for additional medical treatment pursuant to General Statutes (Rev. to 2003) § 31-294d.[7] On June 4, 2008, Commissioner Walker issued a decision (2008 commissioner's decision) in which he granted the plaintiff's request for § 31-308a benefits but denied her request for additional medical treatment pursuant to § 31-294d. Regarding the denial of additional medical treatment, the commissioner noted that he found credible the testimony of the plaintiff's treating physician, Organ, who testified at the hearing that it was his opinion that additional treatment would be palliative and not curative.

On June 18, 2008, the plaintiff filed a motion to correct the 2008 commissioner's decision, which was denied on June 19, 2008. On June 27, 2008, the plaintiff filed a

[6] General Statutes § 31-308a provides in relevant part: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability . . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

[7] General Statutes (Rev. to 2003) § 31-294d (a) (1) provides in relevant part that "[t]he employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary." Hereinafter, unless otherwise indicated, all references to § 31-294d in this opinion are to the 2003 revision of the statute.

petition for review of the 2008 commissioner's decision denying her request for additional medical treatment.

The petition for review was heard before the board on December 12, 2008. On June 5, 2009, the board affirmed the 2008 commissioner's decision, finding no error. Specifically, the board concluded, inter alia, that "the medical opinions in the . . . record provide ample support for the determination by the . . . commissioner that a pain management regimen would be palliative rather than curative and, thus, would not constitute reasonable or necessary treatment."[8] The plaintiff did not appeal the June 5, 2009 decision of the board (2009 board decision).[9]

On April 18, 2011, the plaintiff requested approval from the Workers' Compensation Commission (commission) for surgery on her right shoulder. The request initially was denied. The plaintiff then underwent surgery on her right shoulder on September 17, 2014, for which she received total incapacity benefits pursuant to § 31-307, with an offset for social security benefits, as required by subsection (e) of that statute.

Formal hearings took place before Commissioner Delaney on April 27, May 8, and June 16, 2015, to address the plaintiff's claim that she was entitled to compensation without a social security offset, and that the 2008 commissioner's decision and the 2009 board decision

[8] As the board noted in its decision: "[W]hether or not medical care satisfies the reasonable and necessary standard of § 31-294d is a factual issue to be decided by the . . . commissioner . . . . Reasonable or necessary medical care is that which is curative or remedial. Curative or remedial care is that which seeks to repair the damage to health caused by the job even if not enough health is restored to enable the employee to return to work." (Citations omitted; internal quotation marks omitted.)

[9] During the proceedings before the commissioner and the board from 2003 to 2013, the plaintiff was represented by counsel. Thereafter, she became self-represented.

were incorrect.[10] Specifically, the plaintiff "assert[ed] that delays in her requested medical treatment [had] caused her to be subject to the social security offset and, as a result of these delays, [the commissioner] may order [the defendant] to pay temporary total [disability] benefits at the full rate without regard to the [§] 31-307 (e) offset." On September 28, 2015, Commissioner Delaney dismissed the plaintiff's claim, having found that the plaintiff had failed to sustain her burden of proof that she was entitled to benefits without the offset. In his finding and dismissal (2015 commissioner's decision), the commissioner noted that from August, 2008, to May, 2013, approximately fifteen hearings took place regarding medical treatment and benefits, and the plaintiff was represented by counsel during these proceedings. Commissioner Delaney also noted that "[t]he . . . commission authorized various physicians to treat/evaluate the [plaintiff] through this time period." On the basis of these findings, the commissioner rejected the plaintiff's equitable claim that, due to alleged negligence and errors in the handling of her case, her case was delayed and, thus, she was entitled to temporary total disability benefits without the social security offset.

On October 13, 2015, the plaintiff filed a petition for review of the 2015 commissioner's decision denying her request for benefits without the social security offset. On November 23, 2015, the plaintiff filed a motion to correct, which was denied on December 3, 2015.

The petition for review was heard before the board on April 29, 2016. On August 8, 2016, the board affirmed the 2015 commissioner's decision and rejected the plaintiff's equitable argument that a waiver of the offset

[10] Commissioner Delaney took administrative notice of the plaintiff's file with the commission, the 2008 commissioner's decision, and the 2009 board decision.

should be granted (2016 board decision). The board noted that the commissioner had no authority to waive the offset. The board also noted that, "even if this tribunal could consider this case on the merits, we would find that many of the arguments raised by the [plaintiff] on appeal go to factual issues which an appellate panel such as ours cannot retry . . . . Moreover, many of the issues [the plaintiff] has raised go to the handling of her claim during the period prior to June 4, 2008, when Commissioner Walker issued a finding that the [plaintiff] subsequently appealed. We affirmed that [2008 commissioner's] decision. The [plaintiff] did not appeal our decision to the Appellate Court. We must now treat [the 2009 board] decision as final and as being the law of the case . . . ." (Citation omitted; internal quotation marks omitted.) This appeal followed.

We begin by setting forth our standard of review. "The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 17–18, 151 A.3d 367 (2016).

I

The plaintiff first claims that the board erred in not addressing past incorrect evidence and not finding her

new evidence credible.[11] Specifically, the plaintiff argues that "new (facts) evidence in the record . . . establishes that the negligent and careless handling of her case since 2005 is the main factor in the years of waiting for her medical treatments and her return to full employment. The . . . [b]oard erred by failing to acknowledge the new (facts) evidence that [the] plaintiff has submitted." The plaintiff further claims that the board erred in not addressing Commissioner Delaney's statement about delayed medical treatment. We disagree.

Because the plaintiff's claims relate to factual findings by the commissioner, we begin our analysis by reiterating that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Internal quotation marks omitted.) *Pasquariello* v. *Stop & Shop Cos.*, 281 Conn. 656, 663, 916 A.2d 803 (2007). "Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Rodriguez* v. *E.D. Construction, Inc.*, 126 Conn. App. 717, 726, 12 A.3d 603, cert. denied, 301 Conn. 904, 17 A.3d 1046 (2011).

As to the plaintiff's argument regarding "past incorrect evidence" and "new evidence," the board properly refused to address it in the 2016 board decision.[12] The

[11] The defendant asserts that the plaintiff has included documents in her appendix on appeal that are not part of the administrative record. It claims that the plaintiff's "[a]ppendix contents starting on pages A14, A17, A18, A19, A20, A29, A66, A72, A73, A107, and A110 were not included in the record below. Only pages 7, 18 and 24 of the [d]eposition of Scott Organ, M.D., were included in the record below; the entire deposition is included in the [plaintiff's] [a]ppendix." Having confirmed that these portions of the appendix were not included in the administrative record and, therefore, are not properly before us, we do not consider them.

[12] To support her claim that the board should have addressed her new evidence, which she argues demonstrates negligence on the part of the commissioner and the board, the plaintiff cites to cases in which the commission was a party to the action. See, e.g., *Gyadu* v. *Workers' Compensation Commission*, 930 F. Supp. 738 (D. Conn. 1996), aff'd, Docket Nos. 96-7950,

evidence that the plaintiff references pertains to factual findings and issues related to the 2008 commissioner's decision. As the board noted in its decision, "many of the arguments raised by the [plaintiff] on appeal go to factual issues which an appellate panel such as ours cannot retry . . . ." It is well established that "[n]either the . . . board nor this court has the power to retry facts. . . . [O]n review of the commissioner's findings, the [board] does not retry the facts nor hear evidence. It considers no evidence other than that certified to it by the commissioner, and then for the limited purpose of determining whether or not the finding should be corrected, or whether there was any evidence to support in law the conclusions reached." (Internal quotation marks omitted.) *Hummel* v. *Marten Transport, Ltd.*, 114 Conn. App. 822, 842–43, 970 A.2d 834, cert. denied, 293 Conn. 907, 978 A.2d 1109 (2009). The board properly determined that it did not have the authority to "correct" findings from the 2008 commissioner's decision—a decision that had become final when the plaintiff did not appeal the 2009 board decision affirming the 2008 commissioner's decision—as the plaintiff requested that it do. Accordingly, we cannot conclude that the board erred in refusing to address the plaintiff's new evidence.[13]

96-9616, 1997 WL 716128, *1–2 (2d Cir. November 17, 1997) (decision without published opinion, 129 F.3d 113 [2d Cir. 1997]), cert. denied, 525 U.S. 814, 119 S. Ct. 49, 142 L. Ed. 2d 38 (1998); see also *Warren* v. *Mississippi Workers' Compensation Commission*, 700 So. 2d 608, 609, 615 (Miss. 1997) (plaintiffs failed to show deprivation of due process rights due to delays in workers' compensation system). We reiterate that the present action is not against the commission. See footnote 2 of this opinion.

[13] The plaintiff also states in her principal brief that she provides new evidence in this appeal that demonstrates that, since 2005, neither the board nor the commissioner has handled her case properly. It is not our function to engage in fact-finding. See *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 830, 138 A.3d 935 (2016) ("[I]t is axiomatic that this appellate body does not engage in fact-finding. Connecticut's appellate courts cannot find facts . . . ." [Internal quotation marks omitted.]). We are bound by the record before us, which does not contain the facts that the plaintiff attempts to introduce on appeal. To the extent that there is material before us that was

As to the plaintiff's claim regarding the commissioner's alleged statement about delayed medical care, our review of the transcript demonstrates that the plaintiff quotes Commissioner Delaney out of context. The plaintiff argues that the "commissioner himself acknowledges [that the] plaintiff's medical treatment was delayed." Contrary to her position, Commissioner Delaney was simply paraphrasing what the plaintiff might include in the proposed findings that she was required to draft. Commissioner Delaney stated during the April 27, 2015 hearing: "Okay, I'm going to give you an opportunity to give me what we call [p]roposed [f]indings, and you can ask . . . my paralegal [about the format] . . . . [Y]ou want me to take your evidence in the best light for you and [tell me] why I should find a, what's the word, I don't want to use the word because you don't like it, you don't like the word exception . . . . [So], why [§ 31-307 (e)] is not applicable to you . . . delay of medical treatment . . . . Somebody delayed your medical treatment and the system. I'm not going to ask you to write a [b]rief unless you'd like to . . . ." The plaintiff then stated that she would talk to the commissioner's paralegal about how to format the proposed findings. Commissioner Delaney, however, neither found nor opined that the plaintiff's treatment was delayed. Accordingly, we cannot conclude that the board erred by not acknowledging such a statement in its 2016 decision.

On the basis of the foregoing, we conclude that the board did not err by refusing to address the plaintiff's attempt to correct "past incorrect evidence" and introduce "new evidence" to prove that delays beyond her control made her subject to the offset.

not included in the record, we decline to review it. See footnote 11 of this opinion.

II

The plaintiff next claims that the board erred in affirming the commissioner's denial of her request for financial compensation without the social security offset. Specifically, the plaintiff argues that she should have been awarded benefits without the social security offset set forth in § 31-307 (e) because errors and delays by the commissioner in 2008 and the board in 2009 resulted in a delay in obtaining compensation, which made her subject to the offset. The plaintiff essentially argues that, if not for the negligence of the commissioner and the board, she would have received her compensation benefits before she started receiving social security, and she, therefore, would not have been subject to the offset. The plaintiff further argues that the board erred in stating that she requested a waiver of the offset. We disagree.

Section 31-307 (e) provides: "Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits." In 2006, the legislature, through "Public Acts 2006, No. 06-84, removed subsection (e) from § 31-307." *Hummel* v. *Marten Transport, Ltd.*, supra, 114 Conn. App. 826 n.2. Although the offset was repealed, "[w]e look to the statute in effect at the date of injury to determine the rights and obligations between the parties." Id. Because the offset was in effect on August 8, 2003, the date of injury, the offset applies to the plaintiff's claim.

On appeal, the plaintiff does not contest that her age makes her subject to the social security offset. She also

does not argue that the repeal of the offset applies retroactively. In fact, in her reply brief, the plaintiff clarifies that she "is not asking this court to ignore [§] 31-307 (e) and waive it. [She] did not request [that] the . . . board . . . waive . . . the offset." Instead, the plaintiff argues that negligence in the handling of her case resulted in delays in treatment that made her subject to the offset, and that, as a result, she is entitled to financial compensation without the offset because it is not her fault that she is subject to the offset. Despite the plaintiff's argument to the contrary, her request for benefits without the offset is the functional equivalent of requesting a waiver of the offset. Accordingly, we reject her argument that the board erred in stating that she was requesting a waiver of the offset because she did, in effect, request a waiver even if that was not the exact language that she used.

As to her argument in favor of a waiver, a significant portion of the plaintiff's appellate briefs are dedicated to her claim that, due to the alleged negligence and carelessness of the commissioner in 2008 and the board in 2009, she is entitled to a waiver of the offset. To the extent that the plaintiff argues that her new evidence established negligence on the part of the commission that entitled her to a waiver of the offset, we reject that argument. As we previously concluded in this opinion, the board properly refused to address the plaintiff's new evidence in its 2016 decision. See part I of this opinion.

More importantly, the plaintiff has provided no authority, and we have found none, that permits the commissioner to waive the statutorily required social security offset. "The powers and duties of workers' compensation commissioners are conferred upon them for the purposes of carrying out the stated provisions of the Workers' Compensation Act. . . . It is well settled that the commissioner's jurisdiction is confined by the . . . act and limited by its provisions." (Internal

quotation marks omitted.) *Frantzen* v. *Davenport Electric*, 179 Conn. App. 846, 851, 181 A.3d 578, cert. denied, 328 Conn. 928, 182 A.3d 637 (2018). The plaintiff essentially concedes that nothing gives the commissioner the authority to waive the offset for her requested reasons, by stating in her principal brief that "[t]his appeal must set a precedent for the negligence and carelessness in the mishandling of [the] plaintiff's case." She further states in her reply brief to this court that she "is not suggesting that the commissioner has the power to order an employer to compensate a [plaintiff] for errors made by the commission."

On the basis of the foregoing, the plaintiff's claim must fail. Because both the commissioner and the board properly determined that there was no authority for the commissioner to waive the offset, we cannot say the board erred in denying the plaintiff's request for financial compensation without the offset.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

LALE VAROGLU *v.* JOSEPH SCIARRINO
(AC 39345)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant and making certain financial orders. She claimed that certain of the trial court's factual findings were clearly erroneous and that certain of its financial orders were improper. *Held*:

1. The plaintiff's claim that the trial court improperly found that she had purchased a condominium by using funds from a loan that was secured by the marital home was unavailing, as that court's finding was supported by the evidence and the defendant's testimony that the plaintiff had done so.

2. The plaintiff could not prevail on her claim that the trial court improperly failed to award her more than 40 percent of the net proceeds from the sale of the marital home, which was based on her assertion that the court failed to adequately take into account her role in preserving the marital property; that court properly considered the appropriate statutory factors, and its award concerning the distribution of the equity in the marital home was supported by the evidence and within the court's discretion, as there was no indication that the court failed to take into account the plaintiff's contribution to the preservation of the marital home, and the court's property distribution could be considered favorable to the plaintiff, who had contributed 22 percent toward the purchase of the marital home and was responsible for only one third of the expenses to maintain the property when the parties lived together in the home.

Argued April 16—officially released September 25, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Michael E. Shay*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Kevin F. Collins, for the appellant (plaintiff).

Norman A. Pattis, with whom, on the brief, was *Joseph Sciarrino*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Lale Varoglu, appeals from the judgment of the trial court dissolving her marriage to the defendant, Joseph Sciarrino. The plaintiff claims that the court erred in finding certain facts and in fashioning its orders pertaining to the distribution of the equity in the marital home by failing to apply the "preservation" criteria in General Statutes § 46b-81 (c). We affirm the judgment of the trial court.[1]

[1] The plaintiff also lists a claim pertaining to the defendant being bound by representations he made to a Bankruptcy Court. As the plaintiff fails to adequately brief this claim, we decline to review it. See *Keating* v. *Ferrandino*, 125 Conn. App. 601, 604, 10 A.3d 59 (2010).

The plaintiff brought this proceeding to dissolve her marriage to the defendant. Following a trial, the court found the following relevant facts as set forth in its May 17, 2016 memorandum of decision. The court stated: "The plaintiff . . . and the defendant . . . were married in Westport . . . on August 5, 2012. This is a second marriage for the [defendant]. No children have been born to the [plaintiff] since the date of this marriage . . . . The parties have lived separate and apart since April 5, 2014, when the [defendant] left the marital home . . . in Westport, which the [plaintiff] continues to occupy. The [defendant] currently occupies a two bedroom apartment in Stamford. . . .

"The principal bone of contention is the equitable distribution of the marital home at 2 Ledgemoor Lane in Westport, which was purchased by the parties [on] March 1, 2010, prior to their marriage for $1,950,000. . . . The [defendant] contributed the sum of $1,535,670 toward the purchase price, which sum represented his share of the net proceeds from the sale [of] some Nantucket property, which was part of a previous divorce settlement. The [plaintiff] contributed approximately $418,000. Title to the property was taken in the name of 2 Ledgemoor Lane, LLC, in which the [defendant] held a 65 percent interest and the [plaintiff] held a 35 percent interest, which was intended to be a rough approximation of their respective monetary contributions to the purchase. In point of fact, the actual ratio was approximately 78 percent to 22 percent. The fact that title is held in the name of a limited liability corporation is a complicating factor. The [defendant] testified that the purpose of taking title in the name of the LLC was to insulate him from any claims arising out of his dental practice. On questioning by the [plaintiff's] counsel, he also admitted that another purpose was to insulate him from outstanding claims by the [Internal Revenue Service, the Department of Revenue Services],

and First County Bank. The parties worked out an arrangement to maintain the property, whereby the [defendant] would contribute $4000 per month and the [plaintiff] would contribute $2000. This arrangement continued until April, 2014, when the [defendant] left the marital home. . . .

"On June 3, 2010, with the agreement of the [defendant], the [plaintiff], borrowed $350,000. . . . at which time . . . the bank insisted for security that she have an 'overwhelming percentage interest' in the LLC, before it would advance the funds. Ownership of the LLC was then changed to 75 percent in favor of the [plaintiff] and 25 percent in favor of the [defendant], which is the situation as of trial. . . . This change was clearly done for convenience, in order to obtain the loan, and the amended ratio bore no relation to the actual monetary contributions of the respective parties. The underlying operative agreement was not amended except as to ownership. . . . The [defendant] testified that the parties had an agreement that $100,000 of the loan proceeds would be used to fund the post-high school education of his children from his first marriage, with the balance used for home improvements. Instead . . . the [plaintiff] gave the [defendant] $12,000 in cash, to replace that sum he claimed was stolen by a household employee, but more important[ly], she purchased a condominium [in] Crested Butte, Colorado, which she has valued at $162,000 the price that she originally paid for it. Title was taken in the name of LV Solutions, LLC, of which she is the sole member. . . .

"As to the cause of the breakdown of the marriage, the [defendant] told the [plaintiff] that he had begun an extramarital affair . . . approximately seven months after their marriage . . . . He told the court that 'things were not working out for him.' In fact, at one point, he suggested to [the plaintiff] that the girlfriend could move into the marital residence with them.

. . . [H]e testified that the [plaintiff] had 'aggressively interjected herself in his finances,' and that had 'made him nervous.' The [defendant's] claim simply does not hold water. For one thing, the [defendant's] finances were in shambles long before the marriage, and for another, even while they were living together before marriage, they had substantial financial dealings together. The [defendant] fails to see the irony in his position, where, in essence, the [plaintiff] literally rode to his rescue with her earnings from employment and her excellent credit. But for her, the car he drives and some of the equipment in his dental practice would not have happened . . . . Moreover, the fact that his investment in the marital home has been largely shielded from the taxing authorities due to her cooperation is not fully appreciated by him." As a result, the court found that "the marriage of the parties has broken down irretrievably, and . . . the [defendant] is primarily at fault for said breakdown."

The court ordered that "[t]he entity know as LV Solutions, LLC, of which the [plaintiff] is the sole member, and which, in turn, is the owner of real estate [in] Crested Butte, Colorado, shall remain the property of the [plaintiff], subject to any existing liens or other indebtedness, free and clear of any claims by the [defendant]. . . . The [plaintiff] shall have exclusive possession of the real estate located at 2 Ledgemoor Lane, Westport, Connecticut, subject to any existing indebtedness, and she shall be responsible for the payment of all mortgages, liens, taxes, and insurance, and shall indemnify and hold the [defendant] harmless from any further liability thereunder. As to said real estate, the parties shall list [the home] for sale no later than July 1, 2016, with a mutually acceptable broker . . . . Unless the parties shall otherwise agree, they shall accept any bona fide offer without unusual conditions, which is within 5 percent of the listing price. Upon sale

of the property, from the proceeds shall be paid the customary and ordinary costs associated with a sale of real estate, including broker and attorney fees, conveyance taxes, and any mortgages and liens. After the payment of these sums, the net proceeds shall be divided 60 percent to the [defendant] and 40 percent to the [plaintiff]. In addition, in order to effectuate the foregoing, the parties are hereby ordered to cooperate in the preparation and filing of any necessary documentation, including any amendments to or termination of the operating agreement . . . or amended operating agreement . . . or other related paperwork, for 2 Ledgemoor Lane, LLC."[2] (Citations omitted; emphasis omitted.)

I

The plaintiff claims that the court made clearly erroneous factual findings. Specifically, the plaintiff argues that the court erred when it found that she purchased her condominium in Crested Butte using funds from the loan secured by the marital home.

The following evidence was presented to the court. The defendant testified that the plaintiff purchased the Crested Butte property using money "from the original loan of the [$350,000], which she borrowed for 2 Ledgemoor Lane."

"A dissolution action is essentially equitable in nature. . . . The trial court's equity powers are essential to the task of fashioning relief out of the infinite variety of factual situations presented in family cases. . . . Decision making in family cases requires flexible, individualized adjudication of the particular facts of each case. This court will not substitute its own opinion for the factual findings of the trial court. . . . The trial

[2] The court also awarded periodic alimony to the plaintiff of $3000 per month for a period of one year.

court has a distinct advantage over a reviewing court in determinations of fact in domestic relations matters because all of the surrounding circumstances, including the appearance and attitude of the parties, are so important. . . . The trial court has the unique opportunity to view the evidence presented in a totality of the circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold printed record which is available to the reviewing court." (Internal quotation marks omitted.) *Solomon* v. *Solomon*, 67 Conn. App. 91, 91–92, 787 A.2d 4 (2001).

"The trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence." (Internal quotation marks omitted.) *Marinos* v. *Building Rehabilitations, LLC*, 67 Conn. App. 86, 89, 787 A.2d 46 (2001). "A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *DiVito* v. *DiVito*, 77 Conn. App. 124, 137, 822 A.2d 294, cert. denied, 264 Conn. 921, 828 A.2d 617 (2003).

We do not agree with the plaintiff's assertions that the court made improper findings pertaining to the plaintiff using proceeds from a loan secured by the marital home to purchase property in Crested Butte. This finding was supported by the evidence because the defendant testified that the plaintiff did so and, upon review of the record, we are not left with a firm conviction that a mistake has been made. Furthermore, despite the plaintiff's use of a portion of the loan proceeds in a manner

that the defendant claims he did not intend, the court awarded her the Colorado property free and clear of any claims by the defendant.

II

The plaintiff's second claim is that the court erred in fashioning its orders pertaining to the distribution of the equity in the marital home by failing to apply the "preservation" criteria in § 46b-81 (c). The plaintiff asserts that the court should have awarded her more than 40 percent of the net proceeds from the court-ordered sale of the home. In support of her position, the plaintiff argues that the court, when making property distributions, failed to adequately take into account her role in preserving the marital property and that, instead, the court improperly relied on the parties' premarital contributions to the acquisition of the marital home.

"A fundamental principle in dissolution actions is that a trial court may exercise broad discretion in awarding alimony and dividing property as long as it considers all relevant statutory criteria." (Internal quotation marks omitted.) *Boyne* v. *Boyne*, 112 Conn. App. 279, 282, 962 A.2d 818 (2009). "Our standard of review in domestic relations cases is very narrow, and we will afford great deference to a trial court's rulings." *Sheikh* v. *Sheikh*, 33 Conn. App. 927, 927, 636 A.2d 866 (1994). "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . This standard of review reflects the sound policy that the trial court has the opportunity to view the parties first hand and is therefore in the best position to assess all of the circumstances surrounding

a dissolution action, in which such personal factors such as the demeanor and the attitude of the parties are so significant. . . .

"Importantly, [a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant . . . criteria [in § 46b-81 (c)]. . . .[3] While the trial court must consider the delineated statutory criteria [when allocating property], *no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case.* . . . In dividing up property, the court must take many factors into account. . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Emphasis added; footnote added; internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

Our review of the record leads us to conclude that the court properly considered the appropriate statutory factors and that the award made by the court concerning the distribution of the equity in the marital home was both supported by the evidence and within the parameters of the court's discretion. As previously stated, the court found that the plaintiff's majority ownership in 2 Ledgemoor Lane, LLC, prevented the defendant's creditors from levying on the marital home and

[3] General Statutes § 46b-81 (c) provides: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

stated that the plaintiff's "contribution to the preservation of . . . the real estate, was substantial." There is no indication that the court failed to take into account her contribution to the preservation of the marital home when making its distribution of the equity in the marital home. Moreover, we note that, despite the plaintiff's protests, the court's property distribution can be considered favorable to her. Despite the plaintiff's having contributed 22 percent toward the purchase of the marital home and only being responsible for one third of the expenses to maintain the property when the parties lived together in the home, the court awarded the plaintiff 40 percent of the net proceeds from the sale of the home. For these reasons, we will not disturb the court's orders.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* NICHOLAS J. PAPANTONIOU
(AC 40554)

Lavine, Elgo and Bright, Js.

Syllabus

Convicted of the crimes of felony murder, burglary in the first degree and criminal possession of a firearm in connection with the death of the victim, the defendant appealed. He claimed, inter alia, that his rights under article first, § 8, of the Connecticut constitution to be present at trial and to confront the witnesses against him were violated when the prosecutor made a generic tailoring argument during her closing argument to the jury. The defendant and his accomplice, C, had driven to the victim's apartment with the intent to rob him. A physical struggle ensued, during which the victim was shot, cut and stabbed with a knife. Investigators recovered a sweatshirt and a hat near the victim's body. DNA evidence that was taken from the sweatshirt matched the defendant's DNA profile, and the defendant's DNA and that of the victim were found on the hat. The defendant was the final witness called by the defense to testify at trial. His testimony conflicted in certain respects with that of C, who had testified previously. The prosecutor stated during her closing argument that the defendant had listened and had

access to all of the evidence that was presented to the jury, and that he had attempted to create a story of his version of the events at issue that fit all of the evidence. *Held*:

1. The defendant could not prevail on his unpreserved claim that the prosecutor's alleged generic tailoring argument violated his rights under article first, § 8, of the Connecticut constitution; the strength of the state's case, standing alone, rendered the alleged error harmless beyond a reasonable doubt, as the state presented an overwhelming case that included, inter alia, DNA evidence, and testimony from C and the defendant that the defendant was involved in the victim's death, the defendant conceded on appeal that the evidence supported a conclusion that he had held a pistol when it fired twice during the struggle with the victim, and even if the prosecutor's remarks violated the defendant's state constitutional rights, they did not influence the outcome of the trial.
2. The defendant failed to prove that certain of the prosecutor's remarks during closing argument to the jury violated his rights to due process and a fair trial; although the defendant did not invite the prosecutor's comments suggesting that the firearm in the defendant's possession could not have fired accidentally twice during the struggle with the victim and that the defendant called his lawyer instead of calling 911 immediately after the shooting, defense counsel did not object to either set of remarks, which were isolated, not egregious and did not concern critical issues in the case, and the evidence of the defendant's guilt was overwhelming, and even if the prosecutor's remarks were improper, they were not so serious as to deprive the defendant of his rights to due process and a fair trial.
3. The defendant could not prevail on his claim that the prosecutor's alleged generic tailoring remarks deprived him of his general due process right to a fair trial, as the strength of the state's case, standing alone, demonstrated that the remarks, even if improper, were not so serious as to deprive the defendant of his rights to due process and a fair trial; moreover, defense counsel did not object to the prosecutor's remarks, defense counsel's remarks to the jury invited the prosecutor to respond by arguing that the defendant might have been trying to save himself by concocting his story to the jury, the prosecutor's comments on the defendant's presence at trial were limited to two brief instances during her rebuttal argument and were not severe, the trial court instructed the jury that arguments of counsel were not evidence, and the state's case did not hinge on a credibility contest between C and the defendant, as the jury reasonably could have inferred from the evidence, without regard to C's testimony, that the defendant unlawfully had entered or remained in the victim's apartment with the intent to rob him.

Argued April 10—officially released September 25, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder, burglary in the first degree

and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

Robert J. Scheinblum, senior assistant state's attorney, with whom were *Stacey M. Miranda*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Nicholas J. Papantoniou, appeals from the judgment of conviction, rendered following a jury trial, of felony murder in violation of General Statutes § 53a-54c, burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). On appeal, the defendant claims that the state (1) violated his rights to be present at trial and to confront the witnesses against him under article first, § 8, of the Connecticut constitution[1] when the prosecutor made a "generic tailoring" argument during closing remarks, and (2) violated his constitutional rights to due process and a fair trial by committing prosecutorial improprieties. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this

[1] Article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of . . . liberty . . . without due process of law . . . ."

appeal. At approximately 12:30 p.m. on October 19, 2014, William Coutermash[2] drove to 397 Circular Avenue in Hamden; the defendant accompanied him. Larry Dildy, the victim, lived in the second floor apartment of a multifamily house located at 397 Circular Avenue with his wife, Vivian Dildy (Vivian), and their daughter, Ashante Dildy (Ashante). The victim was a known drug dealer, and according to Coutermash, he and the defendant went to the victim's apartment with the intent to rob him.[3] More specifically, Coutermash said the plan was to "flash a gun in the [victim's] face" in an attempt to "get either drugs or money" from him.

When Coutermash and the defendant arrived, Coutermash parked his vehicle—a black Jeep with New York license plates—near the victim's driveway and handed the defendant gloves and a handgun. According to Coutermash, the defendant then exited the vehicle "to get drugs or money" and also was armed with a knife.[4] The defendant, who was wearing a gray sweatshirt, a tan hat, and sunglasses, then proceeded to the back door of the victim's apartment. Coutermash testified that he stayed in his Jeep.

Vivian was home at the time, and according to her, one "intruder" entered the apartment through the apart-

[2] The state charged Coutermash with various crimes in connection with the victim's death. Prior to the defendant's trial, Coutermash pleaded guilty to accessory to manslaughter in the first degree and accessory to burglary in the first degree. He testified on behalf of the state pursuant to a cooperation agreement.

[3] During direct examination, the defendant testified that, on October 19, 2014, Coutermash told him to "[t]ake a ride with me; I gotta go collect some money" but that Coutermash did not say from whom he was going to be collecting money. On cross-examination, the defendant also testified that "[Coutermash] told me [that] he had to collect some money and if he got it he would throw me a few bucks," and agreed that he "was looking to get a few bucks" when he went to the victim's apartment. Coutermash denied going to the victim's apartment "to collect a $400 debt" and testified that the victim did not owe him money.

[4] James Samperi, Jr., a witness for the state who was familiar with the defendant, also testified that the defendant occasionally carried a knife.

ment's locked back door after the force of his knocking opened it. She described the intruder as wearing a grey "sweat jacket" and a yellow or beige hat. Shortly thereafter, Vivian saw the lone intruder pointing a gun at the victim, heard him say something that "sounded like give it up," and called 911 at her husband's request. Ashante, who was hiding in her room when the intruder entered the apartment, also heard a single, "raspy" male voice say that "he needed the $400 and the pill," and overheard her father respond that "[he] didn't have it." After the victim and the intruder argued for a period of time, a physical fight ensued, and the two men struggled over the intruder's gun. During the struggle, the victim pulled off the intruder's sweatshirt, and Vivian struck the intruder over the head with a broom handle before she ran to a separate room. Vivian then heard two gunshots,[5] and the intruder quickly fled the apartment.

Minutes after the defendant had exited the Jeep, Coutermash observed emergency personnel arriving and decided to drive away from the area. As he did so, he encountered the defendant on a nearby street, picked him up, and the two left the scene. The victim had been shot, cut, and stabbed multiple times during the altercation; he was taken to a hospital and died from his injuries.

During the ensuing police investigation, investigators recovered various items located on the floor near the victim's body, including a grey hooded sweatshirt, a tan hat, sunglasses, and a knife. Subsequent scientific testing revealed that DNA[6] evidence taken from the grey sweatshirt matched the defendant's DNA profile, which

[5] During direct examination, the defendant admitted to struggling with the victim over the gun in his possession and that the gun "went off" twice during the struggle.

[6] "DNA stands for deoxyribonucleic acid and comprises a person's inherited genetic material." *State* v. *Aviles*, 154 Conn. App. 470, 483 n.4, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015).

was contained in a national database of DNA.[7] That same testing eliminated Coutermash as a source of the DNA found on the grey sweatshirt. Scientific testing of the tan hat also revealed the presence of both the defendant's and the victim's DNA.[8] Finally, surveillance cameras near the victim's apartment captured the defendant discarding gloves and a handgun shortly after the shooting.[9]

By way of an amended long form information, the state charged the defendant with felony murder, burglary in the first degree, and criminal possession of a firearm.[10] Following the jury's verdict of guilty on all counts, the trial court rendered judgment and sentenced the defendant to a term of imprisonment of forty-five years on the felony murder conviction, a concurrent sentence of twenty years imprisonment on the burglary conviction, and a concurrent sentence of ten years imprisonment on the criminal possession of a firearm conviction, for a total effective sentence of forty-five years imprisonment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[7] Investigators cross-referenced the DNA retrieved from the grey sweatshirt with DNA contained in the CODIS database, a national repository of DNA for convicted felons. See, e.g., *State* v. *Webb*, 128 Conn. App. 846, 852–83 n.3, 19 A.3d 678 (generally describing national CODIS database), cert. denied, 303 Conn. 907, 32 A.3d 961 (2011).

[8] Lana Ramos, an employee of the state forensics laboratory, testified that testing the evidence from the tan hat revealed a mixture of DNA in which the victim and the defendant "are included as contributors to the DNA profile [from the second swab of the tan hat]." According to Ramos, "[t]he expected frequency of individuals who could be a contributor to the DNA profile from [the second swab of the tan hat] is approximately 1 in 4.6 million in the African-American population; approximately 1 in 2.6 million in the Caucasian population; and approximately 1 in 3.8 million in the Hispanic population."

[9] At trial, both Samperi and Jason Marini, who also was familiar with the defendant and testified on behalf of the state, identified the defendant as the individual observed in the surveillance footage.

[10] During closing argument, trial counsel for the defendant conceded that the defendant was guilty of criminal possession of a firearm.

I

We first address the defendant's claim that the state violated his rights to be present at trial and to confront the witnesses against him. He argues that the state violated these *specific* constitutional rights when the prosecutor made a "generic tailoring"[11] argument during closing remarks to the jury. He concedes that the state is permitted to make such an argument under the federal constitution,[12] but according to him, the state may not do so in accordance with article first, § 8, of the Connecticut constitution.[13] He did not assert this claim at trial and therefore raises it under the familiar rubric of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). In response, the state contends that the defendant's unpreserved constitutional claim fails to satisfy both the third and fourth prongs of *Golding*. Because we conclude that the alleged constitutional violation, if any, was harmless beyond a reasonable doubt, we agree that the defendant's claim fails to satisfy *Golding*'s fourth prong.[14]

[11] "Generic tailoring arguments occur when the prosecution attacks the defendant's credibility by simply drawing the jury's attention to the defendant's presence at trial and his resultant opportunity to tailor his testimony." *Martinez* v. *People*, 244 P.3d 135, 141 (Colo. 2010).

[12] Our Supreme Court previously held that such arguments violated a defendant's sixth amendment rights under the federal constitution. See *State* v. *Cassidy*, 236 Conn. 112, 127–28, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part by *State* v. *Alexander*, 254 Conn. 290, 299–300, 755 A.2d 868 (2000). Following the decision by the United States Supreme Court in *Portuondo* v. *Agard*, 529 U.S. 61, 67–69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), however, our Supreme Court reversed its holding in *Cassidy*. See *State* v. *Alexander*, 254 Conn. 290, 296, 755 A.2d 868 (2000).

[13] The defendant argues, in accordance with *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), that the Connecticut constitution provides greater protection than the federal constitution with respect to "generic tailoring" arguments. See id., 684–86 (setting forth six factors courts consider when determining whether state constitution provides greater protection than federal constitution).

[14] Both parties address this claim under the framework of *Golding*, so we follow their lead. We note, however, that a defendant generally does not

The following additional facts and procedural history are relevant to this claim. The defendant testified at trial and was the final witness called by the defense. His testimony, in certain respects, conflicted with Coutermash's testimony. According to Coutermash, the victim did not owe him money, and he remained in his Jeep when the defendant went to the victim's apartment. The defendant testified that, on October 19, 2014, Coutermash told him that he needed to "collect some money" from someone. See footnote 3 of this opinion. In contrast to Coutermash, the defendant claimed that when he and Coutermash arrived at 397 Circular Avenue, both of them entered the victim's apartment, and Coutermash demanded $400 from the victim. The defendant testified that he entered the victim's apartment only after Coutermash and the victim began fighting and when things were "getting out of control . . . ." Upon entering the apartment, the defendant told the victim: "[L]isten, just give [Coutermash] his money—

need to satisfy the four-pronged *Golding* test to prevail on a prosecutorial impropriety claim. See *State* v. *A. M.*, 324 Conn. 190, 198 n.2, 152 A.3d 49 (2016); *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012). Where a defendant claims that prosecutorial impropriety infringed a specifically enumerated constitutional right, "the defendant initially has the burden to establish that a constitutional right was violated. . . . If the defendant establishes the violation, however, the burden shifts to the state to prove that the violation was harmless beyond a reasonable doubt." (Citation omitted.) *State* v. *A. M.*, supra, 199. The test is the functional equivalent of applying *Golding*'s third and fourth prongs. We do not decide whether the defendant has demonstrated that a constitutional violation exists on this record. We assume, simply for the sake of argument, that the defendant met his burden and conclude that the state has demonstrated that the alleged violation was harmless beyond a reasonable doubt. Furthermore, because we assume, without deciding, that the state's alleged "generic tailoring" argument violated the defendant's rights under the state constitution, we do not address the *Geisler* factors.

Additionally, we note that, on June 21, 2018, *State* v. *Weatherspoon*, AC 40651, was transferred to our Supreme Court. The defendant in *Weatherspoon* also raises the issue of whether article first, § 8, of the Connecticut constitution prohibits "generic tailoring" arguments. See *State* v. *Weatherspoon*, SC 20134.

you know—let me get the hell out of here, just give him what you owe him, it's gone far enough, it's out of control, just give him his money, you know." The defendant further testified that, immediately after he told the victim to give Coutermash money, Coutermash fled the apartment. At that point, the defendant claimed that the victim charged at him, the two began to struggle over the gun in his hand, and the gun "went off" twice during the struggle.

During closing argument, counsel for the defendant began by stating that "this case . . . comes down to two witnesses, really, [the defendant] and [Coutermash]. They told two divergent stories, and the state told you that they're relying on . . . Coutermash." Counsel for the defendant also argued in relevant part: "Now, we talked a little about this a little while ago, that is, that the state goes second. I have to do my best to anticipate their arguments. The state is very creative; I'm sure I will not think of everything they're going to think of. So, here's some food for thought. They may argue that [the defendant] is trying to save himself by concocting this story. My response to that is, refer back to the undisputed evidence. Which version is a concoction, and which one is closer to reality, based on the evidence?"

The prosecutor then opened her rebuttal argument by stating in relevant part: "So, the defendant wants you to believe—or disbelieve every single thing you heard, except the defendant. Disbelieve all of it, and certainly ignore the actual eyewitness to this because her version doesn't fit what we're trying to do here. Her version doesn't fit what we're trying to tell you.

"*Keep in mind, the defendant has had access to all of the evidence, all of the testimony, all of the photographs, every single piece of information that was*

presented to you, [*and*] *the defendant was able to sit there and listen to and come up with his version.*

"The defense attorney asked all of you on voir dire, and he just asked you again, whether you believe that someone can lie to gain a benefit. Do you? You all said yes. Who has the biggest benefit to gain here at this moment? Don't you find it very convenient that the defendant's story is that he was just a mere bystander in all of this? He was forced to come up by [Coutermash], his friend, who just wanted him to have his back, so he did. . . .

"He attempts to create a story that fits all of the evidence, and his attempts at that you can't deny is flawed. He gets an A for effort, but it's not going to work because the evidence shows you that this version makes zero sense." (Emphasis added.)

The defendant contends that the prosecutor's remarks during rebuttal amounted to a "generic tailoring" argument that violated his state constitutional rights. He seeks review of his unpreserved state constitutional claim under *State* v. *Golding*, supra, 213 Conn. 233. "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* 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 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 in original; footnote omitted.) Id., 239–40.

Even if we assume, without deciding, that the defendant could meet the factors set forth in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), to demonstrate that the alleged constitutional violation occurred; see footnote 13 of this opinion; we nevertheless conclude that the state has proved that the alleged constitutional violation was harmless beyond a reasonable doubt. "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the [f]ederal [and state] [c]onstitution[s], be deemed harmless, not requiring the automatic reversal of the conviction. . . . The state has the burden to prove that this error was harmless beyond a reasonable doubt. . . . The focus of our harmless error inquiry is whether the state has demonstrated that the otherwise improper comments did not influence the outcome of the trial." (Citations omitted; internal quotation marks omitted.) *State* v. *A. M.*, 324 Conn. 190, 204, 152 A.3d 49 (2016); see also *State* v. *Cassidy*, 236 Conn. 112, 129, 672 A.2d 899 (impermissible "generic tailoring" argument subject to harmless error), cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part on other grounds by *State* v. *Alexander*, 254 Conn. 290, 299–300, 755 A.2d 868 (2000).

The state argues that the alleged violation was harmless because the "overwhelming evidence of guilt [demonstrates] there is no reasonable doubt that the jury would have convicted the defendant of all three offenses—felony murder, burglary, and criminal possession of a firearm—with or without the prosecution's [generic] tailoring argument during rebuttal." We agree

that the strength of the state's case against the defendant, standing alone, renders the alleged error harmless beyond a reasonable doubt.[15]

Having thoroughly reviewed the record, we do not believe that the prosecutor's alleged "generic tailoring" argument had any discernible effect on the outcome of the trial. The state presented an overwhelming case against the defendant.[16] The DNA evidence and testi-

[15] We limit our analysis to the state's argument that the overwhelming evidence of guilt renders the constitutional violation, if any, harmless beyond a reasonable doubt. In similar circumstances, after concluding that the prosecutor, during rebuttal, violated a defendant's rights under the fifth amendment to the federal constitution, our Supreme Court applied the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), to determine whether the state proved that such violation was harmless beyond a reasonable doubt. See *State* v. *A. M.*, supra, 324 Conn. 205. Nonetheless, the court noted that "[it was] *not* required to do a complete *Williams* analysis *due to the nature of the right infringed*"; (emphasis added) id.; and that "the *Williams* standard applies only when a defendant claims that a prosecutor's conduct did not infringe on a specific constitutional right, but nevertheless deprived the defendant of his general due process right to a fair trial." Id., 199, citing *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

[16] With respect to the felony murder charge, "[f]elony murder occurs when, in the course of and in furtherance of another crime, one of the participants in that crime causes the death of a person who is not a participant in the crime. . . . The two phrases, in the course of and in furtherance of, limit the applicability of the statute with respect to time and causation. . . . The phrase in the course of focuses on the temporal relationship between the murder and the underlying felony. . . . We previously have defined the phrase in the course of for purposes of § 53a-54c to include the period immediately before or after the actual commission of the crime . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 290–91, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); see also General Statutes § 53a-54c. The state accused the defendant of committing burglary as the underlying felony for this charge, and alleged that "in the course of and in furtherance of such crime, he or another participant caused the death of [the victim] . . . ."

With respect to the burglary in the first degree charge, "[a] person is guilty of burglary in the first degree when . . . such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with . . . a deadly weapon . . . ." General Statutes § 53a-101 (a) (1).

mony from both Coutermash and the defendant demonstrate that the defendant was involved in the victim's death. In fact, the defendant concedes on appeal that "[t]he evidence supports a conclusion that [he] was in the apartment and held the pistol while struggling with [the victim] when it fired twice."

According to Coutermash, on October 19, 2014, the two men intended to rob the victim of either drugs or money by flashing a gun in his face. The defendant also testified that he "was looking to get a few bucks" when he traveled with Coutermash to the victim's apartment. See footnote 3 of this opinion. The defendant's testimony regarding what occurred on October 19, 2014, differed from Coutermash's account, as the defendant said that *both* he and Coutermash entered the victim's apartment. Nevertheless, the defendant testified that he told the victim to "just give [Coutermash] his money . . . just give him what you owe him . . . ." after the defendant had entered the victim's apartment with a gun in his hand. Under either version of events—the defendant's or Coutermash's—the jury reasonably could have concluded that the defendant entered the victim's apartment with the intent to commit a forceful taking; see General Statutes § 53a-133; and that the victim was shot during the ensuing struggle.

Additionally, Vivian and Ashante both testified that a lone intruder demanded money and pills from the victim before struggling with and shooting him. According to Vivian, the intruder wore a grey "sweat

Finally, § 53a-217 provides in relevant part: "(a) A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of a felony committed prior to, on or after October 1, 2013, or of a violation of section 21a-279, 53a-58, 53a-61, 53a-61a, 53a-62, 53a-63, 53a-96, 53a-175, 53a-176, 53a-178 or 53a-181d committed on or after October 1, 2013 . . . ." As previously stated, counsel for the defendant conceded during closing argument that the defendant was guilty of criminal possession of a firearm. See footnote 10 of this opinion.

jacket" and a yellow or beige hat. DNA evidence found on the grey sweatshirt and tan hat found next to the victim's body directly connected the defendant to the shooting, and he even testified at trial that the gun discharged while he struggled with the victim. Vivian also testified that the lone intruder entered through the locked back door after he forcefully banged on it, and that she heard him say something that "sounded like give it up," and attacked him with a broom handle and called 911. All of this is compelling evidence that the defendant was armed with a gun when he unlawfully entered the victim's apartment with the intent to rob the victim and that the victim died as a result of the incident. The state therefore presented a very strong case against the defendant. See footnote 16 of this opinion. Moreover, Vivian and Ashante corroborated Coutermash's testimony that the defendant entered the victim's apartment alone with the intent to take either drugs or money from the victim at gunpoint. Cf. *State* v. *Cassidy*, supra, 236 Conn. 131 (state failed to prove that improper remarks were harmless because, inter alia, "the state's case rested entirely upon the uncorroborated testimony of the victim"); *State* v. *Carter*, 47 Conn. App. 632, 648, 708 A.2d 213 (even assuming that prosecutor's remarks were improper under *Cassidy*, they were harmless beyond reasonable doubt because "the state's case did not rest entirely on the uncorroborated testimony of a single victim"), cert. denied, 244 Conn. 909, 713 A.2d 828 (1998).

Even if we assume solely for the sake of argument that the prosecutor's remarks during rebuttal violated the defendant's rights under article first, § 8, of the Connecticut constitution, we do not believe that they influenced the outcome of the trial. The state has proved that the error, if any, was harmless beyond a reasonable

doubt. Accordingly, the defendant's claim fails under the fourth prong of *Golding*.[17]

II

The defendant's second claim is that the state violated his rights to due process and a fair trial when the prosecutor committed three separate improprieties during

[17] The defendant alternatively argues that we should "prohibit generic tailoring" arguments under our supervisory authority "and . . . apply that ruling to [the present] case." "[A]n appellate court may invoke its supervisory authority [over the administration of justice] to reverse a criminal conviction when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper. . . . Such a sanction generally is appropriate, however, only when the [prosecutor's] conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 485, 832 A.2d 626 (2003). We conclude that this is not an appropriate case for our supervisory authority because we do not believe that the prosecutor's arguments in the present case, even if assumed for the sake of argument to have been improper, were so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal. Cf. *State* v. *Payne*, 260 Conn. 446, 463, 797 A.2d 1088 (2002); id., 466 (reversing conviction under supervisory authority where prosecutor committed numerous improprieties, which were part of pattern of misconduct throughout closing argument, in disregard of trial court rulings; "[m]erely to reprimand a prosecutor [under such circumstances] would not sufficiently convey our strong disapproval of such tactics").

We also conclude that the defendant cannot prevail on his claim of plain error. The defendant concedes that his fully briefed state constitutional claim "is an issue of first impression" and that the prosecutor's "generic tailoring" argument is permissible under the federal constitution. See *State* v. *Alexander*, supra, 254 Conn. 299–300. The alleged error therefore is not "plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016); see also *State* v. *Fagan*, 280 Conn. 69, 88, 905 A.2d 1101 (2006) (defendant's plain error claim addressing sentence enhancement under General Statutes § 53a-40b presented issue of first impression and, therefore, Supreme Court "[could not] conclude that the trial court committed a clear and obvious error by exercising its discretion under the express provisions of a presumptively valid statute"), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Nor is the alleged error "so harmful or prejudicial that it resulted in manifest injustice." *State* v. *Jamison*, supra, 599. This is especially so where the state presented

her closing remarks to the jury.[18] He argues that the prosecutor asserted facts not in evidence, misstated the evidence that was actually introduced, and improperly undermined his credibility. He contends that his credibility was "the central issue in this case," and that such improprieties were harmful because they undermined his credibility and suggested that he possessed a guilty conscience. The state, on the other hand, argues that the arguments by the prosecutor were not improper and, even if they were improper, they did not deprive the defendant of his rights to due process and a fair trial. We conclude that, even if we were to assume, without deciding, that the challenged comments were improper, the defendant failed to prove that they deprived him of his rights to due process and a fair trial.

The following additional procedural history is relevant to this claim. During the state's rebuttal argument, the prosecutor made three sets of comments that the defendant claims amounted to prosecutorial impropriety. The first set of comments relates to the prosecutor's characterization of the testimony from Douglas Fox, a firearms expert who testified on behalf of the state, and how the defendant must have chambered two rounds in the gun in his possession before intentionally pulling the trigger. During her rebuttal, the prosecutor argued in relevant part: "[Fox] . . . explained to you how [the handgun used to shoot the victim] works, which is

overwhelming evidence of guilt, and its case did not hinge on a credibility contest between the defendant and Coutermash. See *State* v. *Sanchez*, 308 Conn. 64, 84, 60 A.3d 271 (2013) ("[t]o find plain error without regard to the evidence in the case would be inconsistent with the requirement of showing manifest injustice").

[18] The defendant generally asserts that "[i]f this court concludes that the state committed improprieties in its closing argument, it then considers whether the defendant was deprived of his federal *and state* rights to due process and [a fair trial]." (Emphasis added.) The defendant does not independently analyze this claim under the state constitution. We therefore deem any state constitutional claim abandoned. See, e.g., *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

extremely important. You will determine that his testimony is important because he told you that firing that weapon takes a purposeful, physical action to make that weapon able to be fired. If you recall, he showed you that weapon, he showed you that you have to pull that slide back. *That doesn't happen by accident. Those are not accidental movements, and it's certainly not accidental twice.*" (Emphasis added.) She also argued: "[While the victim] is attacking [the defendant] . . . and struggling, struggling, struggling, and by accident the gun goes off—twice. [The defendant claims he] [d]idn't pull the trigger intentionally, certainly didn't pull the slide back intentionally, all accidental. Ask yourselves, ladies and gentlemen, does this story make any sense whatsoever?"

The second set of comments relates to the prosecutor's characterization of the defendant's conduct immediately after the victim was shot. During her rebuttal, the prosecutor argued in relevant part: "[The defendant claimed] he was so concerned about all of the injuries, on how bad [the victim] was hurt, and the blood and he felt horrible. What did he do as soon as he left? Did he call 911—this is an accident, according to him. Did he call 911 and get him help? *Do you recall what he said? He called his lawyer.*" (Emphasis added.)

The third and final set of comments are those previously set forth in part I of this opinion concerning the defendant's presence at trial and his corresponding opportunity to generally tailor his testimony.

We now set forth the relevant legal principles governing our review. It is often said that " '[w]hile [the prosecutor] may strike hard blows, [s]he is not at liberty to strike foul ones. It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' " *State* v. *Rowe*, 279 Conn. 139, 159,

900 A.2d 1276 (2006), quoting *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Although the defendant did not object to the remarks he challenges on appeal, we still review his claims because "a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of [*Golding*], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . .

"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. . . .

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . [6] and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 560–61. "The 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." (Internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App. 687, 700, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014). "Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense." *State* v. *A. M.*, supra, 324 Conn. 199.

"The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude that the defendant has failed to establish either prong." *State* v. *Danovan T.*, 176 Conn. App. 637, 644, 170 A.3d 722 (2017), cert. denied, 327 Conn. 992, 175 A.3d 1247 (2018); see also *State* v. *Aviles*, 154 Conn. App. 470, 486, 106 A.3d 309 ("[b]ecause we assume, without deciding, that the challenged comments were improper, we move directly to the second step of the analysis and address whether the prosecutor's remarks were harmful"), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015).

The defendant claims that each of the three separate sets of comments by the prosecutor deprived him of his rights to due process and a fair trial. With respect to the first set of remarks, the defendant argues that the prosecutor improperly suggested that the firearm in his possession could not have fired accidentally twice during his struggle with the victim. According to the defendant, the prosecutor improperly "implie[d] that the defendant had to pull the slide [of the gun] back before each shot, and had to pull the trigger intentionally twice." As to the second set of remarks, the defendant contends that the state improperly argued that, instead of calling 911 immediately after the shooting, he chose to call his lawyer. His argument for this set of remarks is twofold. First, he maintains that the state "implie[d] that [he] had the means to call 911 at or

shortly after leaving [the victim's] house, a fact not in evidence," and second, that "[i]t also implie[d] that [he] called his lawyer as soon as he left." According to him, the state's remarks "both misstated the evidence and implied that only guilty people call their lawyers." Finally, as an alternative to his claim presented in part I of this opinion, the defendant reframes the prosecutor's "generic tailoring" remarks as a *general* prosecutorial impropriety claim. Even if we assume, without deciding, that these remarks were improper, on the basis of our evaluation of the *Williams* factors, we conclude that the defendant has failed to prove that he was deprived of his rights to due process and a fair trial.[19]

A

First and Second Sets of Remarks

With respect to the first and second set of remarks, we initially note that trial counsel for the defendant did not invite either set of remarks by the prosecutor. The first *Williams* factor therefore favors the defendant. At the same time, however, the remarks were not severe enough to influence the jury improperly. Defense counsel did not object to either set of remarks at trial, and "it [is] highly significant that defense counsel failed to object to any of the improper remarks, request curative instructions, or move for a mistrial." *State* v. *Thompson*, 266 Conn. 440, 479, 832 A.2d 626 (2003); see also *State* v. *Payne*, supra, 303 Conn. 568 ("[w]hen no objection is raised at trial, we infer that defense counsel did not regard the remarks as 'seriously prejudicial' at the time

[19] Our opinion should not be understood to suggest in any way that the prosecutor committed impropriety at any time during her rebuttal. We recognize that "[c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 458, 832 A.2d 626 (2003). We simply assume, solely for the sake of argument, that the prosecutor's remarks were improper.

the statements were made"). The second *Williams* factor favors the state.

The allegedly improper remarks were also isolated. The prosecutor's remarks regarding the firearm occurred twice during a lengthy rebuttal argument. See, e.g., *State* v. *Ross*, supra, 151 Conn. App. 701 (frequency factor under *Williams* favored state where "the claimed improprieties were not pervasive throughout the trial, but were confined to, and constituted only a small portion of, closing and rebuttal argument"). As for the remarks on the defendant's call to his lawyer, the prosecutor, during cross-examination, asked a *single*, *follow up* question regarding the defendant's statement that he called his lawyer after he shot the victim;[20] at the end of her closing, the prosecutor made a passing reference to that call. Cf. *State* v. *Angel T.*, 292 Conn. 262, 290–91, 973 A.2d 1207 (2009) (state improperly addressed defendant's decision to seek aid of counsel prior to arrest by eliciting evidence through two witnesses and "then discussed the evidence at length during both its opening and rebuttal summations"). Nor do we view any of these remarks as egregious under the circumstances. See *State* v. *Thompson*, supra, 266 Conn. 480 ("[g]iven the defendant's failure to object, only instances of grossly egregious [impropriety] will be severe enough to mandate reversal"). The third *Williams* factor weighs in favor of the state.

[20] In relevant part, the prosecutor cross-examined the defendant as follows:

"Q. All right. Did you call 911 when you left [the victim's apartment], sir?

"A. No, I called my lawyer.

"Q. You called your lawyer?

"A. Not right afterward, but after I found out about the warrant.

"Q. When—

"A. Not Glenn Conway.

"Q. My question is, when you were so upset about [the victim] being shot, did you call 911?

"A. No."

The prosecutor did not revisit the defendant's call to his lawyer during cross-examination.

It is also significant that neither set of alleged improprieties went to critical issues in the case. Because the defendant was charged with felony murder, his *intent* to shoot or murder the victim was not at issue. See, e.g., *State* v. *Johnson*, 165 Conn. App. 255, 269–70, 138 A.3d 1108 (no requirement under felony murder statute that defendant intend to murder victim; state need only prove death in course of and furtherance of felony), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). The prosecutor's remarks about whether chambering a round in the defendant's handgun or firing it was "accidental" therefore did not go to a critical issue in the case. Nor did the state's case require that it prove that the defendant possessed a guilty conscience. See *State* v. *Montoya*, 110 Conn. App. 97, 109, 954 A.2d 193 (prosecutor's statements were not central to critical issue in case where subject of statements "was not an element of [the charged offense]"), cert. denied, 289 Conn. 941, 959 A.2d 1008 (2008). Moreover, contrary to the defendant's claim on appeal, the state's case against the defendant did not hinge on a credibility contest between him and Coutermash. Cf. *State* v. *Angel T.*, supra, 292 Conn. 290 (state's case "turned largely" on credibility contest between defendant and victim "and the impropriety gave the clear impression that the defendant, who was not speaking to the police and had retained an attorney in connection with the investigation, had something to hide"). The fourth *Williams* factor favors the state.

With respect to the fifth *Williams* factor, the defendant's failure to object at trial deprived the court of the opportunity to adopt tailored curative measures. See, e.g., *State* v. *Ross*, supra, 151 Conn. App. 702 ("by failing to bring [the claimed improprieties] to the attention of the trial court, [the defendant] bears much of the responsibility for the fact that these claimed improprieties went uncured" [internal quotation marks omitted]).

The court, nonetheless, did instruct the jury that arguments of counsel were not evidence. See *State* v. *Montoya*, supra, 110 Conn. App. 110 ("[w]hen [any] impropriety is brief and isolated . . . the court's general instructions to the jury to decide the case on the facts before it and not on the arguments of counsel serve to minimize harm from impropriety"). The fifth *Williams* factor therefore weighs in favor of the state.

Finally, the sixth *Williams* factor weighs heavily in favor of the state. The evidence of guilt was overwhelming. This factor, standing alone, is sufficient to demonstrate that the remarks of the prosecutor, even if we assume for the sake of analysis that they were improper, were not so serious as to deprive the defendant of his rights to due process and a fair trial. See, e.g., *State* v. *Aviles*, supra, 154 Conn. App. 487–88 (strength of state's case against defendant can outweigh other *Williams* factors favoring defendant). Accordingly, we conclude that in the context of the entire trial, the defendant has failed to prove that the first and second sets of challenged remarks deprived him of his rights to due process and a fair trial.

B

"Generic Tailoring" Remarks

As an alternative to his claim presented in part I of this opinion, the defendant reframes his challenge to the prosecutor's "generic tailoring" remarks as a claim that these remarks deprived him of his *general* due process right to a fair trial. See, e.g., *State* v. *A. M.*, supra, 324 Conn. 198–99; *State* v. *Payne*, supra, 303 Conn. 562–63. We initially note that defense counsel did not object to the prosecutor's purported "generic tailoring" remarks. See, e.g., *State* v. *Payne*, supra, 568; cf. *State* v. *Cassidy*, supra, 236 Conn. 122, 132 (defendant moved for mistrial and requested curative instructions in response to prosecutor's generic tailoring argument).

Additionally, in part I of this opinion, we discussed the strength of the state's case against the defendant. See *State* v. *Payne*, supra, 303 Conn. 561 (sixth *Williams* factor is "the strength of the state's case" [internal quotation marks omitted]). This factor, standing alone, demonstrates that the remarks of the prosecutor, even if we assume for the sake of analysis that they were improper, were not so serious as to deprive the defendant of his rights to due process and a fair trial. See, e.g., *State* v. *Aviles*, supra, 154 Conn. App. 487–88.

The other *Williams* factors also weigh in favor of the state. As to the first *Williams* factor, defense counsel stated during closing argument in relevant part: "I have to do my best to anticipate [the state's] arguments. . . . [*The state*] *may argue that* [*the defendant*] *is trying to save himself by concocting this story*. My response to that is, refer back to the undisputed evidence. Which version is a concoction, and which one is closer to reality, based on the evidence?" (Emphasis added.) Defense counsel's remarks, even if to a slight degree, invited the prosecutor to respond by arguing how the defendant might be "trying to save himself by concocting [his] story" to the jury. See, e.g., *State* v. *Payne*, supra, 303 Conn. 567 (defense counsel's comments on defendant's credibility invited state's attack on defense counsel's ethics).

The prosecutor's comments on the defendant's presence at trial—i.e., "to sit there and listen to and come up with his version [of events]"—were limited to two brief instances during her rebuttal[21] and were not severe. Cf. *State* v. *A. M.*, supra, 324 Conn. 206 (remarks

[21] In addition to the remarks referenced in part I of this opinion, the prosecutor, when comparing the testimony of Coutermash and the defendant, also argued in relevant part: "[The defendant] had the opportunity to look at all of this evidence here. . . . Coutermash didn't have that opportunity."

by prosecutor were "particularly severe" because prosecutor violated General Statutes § 54-84 [a] by explicitly commenting on defendant's failure to testify). Additionally, the trial court instructed the jury that arguments of counsel were not evidence. See *State* v. *Payme*, supra, 303 Conn. 567 ("the trial court cured any harm by instructing the jury that the arguments of counsel were not evidence on which the jurors could rely"); see also *State* v. *Collins*, 299 Conn. 567, 590, 10 A.3d 1005 ("[w]e presume the jury . . . followed [the court's instruction] in the absence of any indication to the contrary"), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). Thus, the second, third, and fifth *Williams* factors weigh in favor of the state.

Finally, although the defendant's credibility was important to the jury's resolution of the case, the state's case did not hinge on a credibility contest between Coutermash and the defendant.[22] Cf. *State* v. *A. M.*, supra, 324 Conn. 211–13 (state's case against defendant, accusing him of committing various sexual assault and risk of injury to child offenses, rested entirely on victim's credibility; prosecutor's improper remarks bolstered victim's credibility and diminished defendant's credibility). Coutermash testified that both men went to the victim's home with the intent to rob him. See, e.g., *State* v. *Pranckus*, 75 Conn. App. 80, 87–88, 815 A.2d 678 ("[i]t is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses" [internal quotation marks omitted]), cert.

[22] The defendant argues on appeal that "[t]his case was largely a credibility contest between Coutermash and [him]." According to the defendant, "[he] entered [the victim's] house to stop the fight [between Coutermash and the victim], *without an intent to commit a felony*, and was [therefore] not guilty of burglary or felony murder." (Emphasis added.) In other words, he focuses his argument on what the state needed to prove with respect to the burglary charge by contending that he did not enter or remain in the victim's apartment with *an intent* to commit a crime. See General Statutes § 53a-101 (a) (1).

denied, 263 Conn. 905, 819 A.2d 840 (2003). At the same time, the defendant testified that he went to the victim's apartment "looking to get a few bucks" and, after entering the apartment with a gun in his hand, told the victim to "just give [Coutermash] his money . . . ." According to Vivian and Ashante, a lone intruder entered their apartment and demanded that the victim hand over money and pills. Scientific testing revealed that the defendant's DNA was on both the grey sweatshirt and the tan hat recovered next to the victim's body. On the basis of the defendant's own testimony, the testimony from Vivian and Ashante, and the scientific evidence, the jury reasonably could have inferred—without regard to Coutermash's testimony—that the defendant unlawfully entered or remained in the victim's apartment with the intent to rob him. See, e.g., *State* v. *Thompson*, supra, 266 Conn. 483 (fourth and fifth *Williams* factors weighed in favor of state because "[that case was] not a case that rested solely on the credibility of witnesses"); *State* v. *Carter*, supra, 47 Conn. App. 648 (even if prosecutor's remarks were improper under *Cassidy*, they were harmless beyond reasonable doubt because, inter alia, defendant's credibility "was not critical due to the existence of independent evidence of the crime"). Accordingly, we conclude that in the context of the entire trial, the defendant has failed to prove that the challenged "generic tailoring" remarks deprived him of his rights to due process and a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.