STATE OF CONNECTICUT *v.* MANUEL T.*
(AC 40656)

Alvord, Bright and Bear, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, risk of injury to a child, sexual assault in the second degree and sexual assault in the fourth degree in connection with his alleged sexual abuse of the minor victim, the defendant appealed. Before trial, the trial court held a hearing on the admissibility of a video recording of a diagnostic interview of the minor victim by a clinical services coordinator, M, and ruled that certain statements made during that interview were admissible pursuant to the medical diagnosis or treatment exception to the hearsay rule. Thereafter, during the course of trial, the defendant sought to admit into evidence, over the state's objection, two screenshots from a cell phone that depicted text messages purportedly sent by the minor victim to her stepcousin, R, in which the author of the text messages discussed the minor victim's life and the minor victim's relationship with the defendant. Following a hearing held outside the presence of the jury, at which R testified as an offer of proof, the court ruled that the defendant had failed to properly authenticate the screenshots as being authored by the minor victim and excluded them from evidence. *Held*:

1. The trial court properly determined that the minor victim's statements made during the diagnostic interview fell within the medical diagnosis or treatment exception to the hearsay rule, and, thus, did not abuse its discretion in admitting the video recording of the diagnostic interview into evidence: the defendant's reliance on the primary purpose standard for determining the admissibility of the minor victim's statements under the medical diagnosis or treatment exception to the hearsay rule was misplaced, as statements made during a forensic interview by a minor that are offered solely under the medical diagnosis or treatment exception are admissible if such statements are reasonably pertinent to obtaining medical diagnosis or treatment, even if the primary purpose of the declarant's statements was not to obtain medical diagnosis and treatment, if it may be reasonably inferred from the circumstances that the declarant understands that the interview has a medical purpose, and in the present case there was sufficient evidence in the record to demonstrate that it reasonably could be inferred from the circumstances that the minor victim understood the interview to have a medical purpose

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

to satisfy the requirement of that exception to the hearsay rule given that the interview took place in a medical facility, M's statements and questions to the minor victim during the interview, including M's statement that the interview was being recorded by the medical facility for future use, and the fact that the minor victim was told that she would be introduced to a medical provider and referred for counseling; furthermore, although certain questions posed by M were directed at uncovering facts that may have been immaterial to medical treatment or diagnosis, that did not preclude the minor victim's statements from falling within the medical diagnosis or treatment exception to the hearsay rule, as case law is clear that statements made in a diagnostic interview are admissible even when medical treatment or diagnosis is not the primary purpose of the inquiry.

2. The trial court did not abuse its discretion by excluding from evidence the two cell phone screenshots of certain text messages purportedly sent by the minor victim to R; the defendant failed to satisfy his burden of authenticating both screenshots because he failed to present sufficient evidence to make a prima facie showing that the minor victim was the author of the text messages, as both screenshots were incomplete and contained only partial messages, the screenshots did not indicate the date and time they were sent by the author or received by R, there was no evidence that the messages were part of a longer or ongoing conversation between the minor victim and R, the messages did not contain language or content sufficiently distinctive to establish the minor victim as the author, the screenshots were not corroborated by other forensic computer evidence, and the minor victim denied authoring the text messages displayed in the screenshots.

Argued September 7—officially released November 13, 2018

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child, three counts of the crime of sexual assault in the first degree, and two counts of the crime of sexual assault in the second degree, and with the crimes of sexual assault in the fourth degree and tampering with a witness, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty of four counts of risk of injury to a child, three counts of sexual assault in the first degree, and two counts of sexual assault in

the second degree, and of sexual assault in the fourth degree, from which the defendant appealed. *Affirmed.*

Hubert J. Santos, with whom was *Trent A. LaLima*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Elizabeth Tanaka*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Manuel T., appeals[1] from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (E).[2] On appeal, the defendant claims that the trial court improperly (1) admitted into evidence a video recording of the diagnostic interview between the minor victim and a clinical services coordinator, and (2) excluded from evidence two screenshots of text messages purportedly sent by the minor victim to her stepcousin. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On

[1] The defendant originally appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). The appeal subsequently was transferred to this court pursuant to Practice Book § 65-1.

[2] The defendant also was charged with one count of tampering with a witness in violation of General Statutes § 53a-151. The state, however, entered a nolle prosequi after the jury was unable to reach a verdict on that count.

March 28, 2014, the minor victim, age seventeen at the time, reported to her family and the police that she had been sexually abused by the defendant, her stepfather. In accordance with police protocol, the minor victim was referred to the Greater Hartford Children's Advocacy Center (advocacy center) at Saint Francis Hospital and Medical Center for a diagnostic interview. On April 1, 2014, the minor victim participated in a diagnostic interview conducted by Lisa Murphy-Cipolla, the clinical services coordinator at the advocacy center. Although Murphy-Cipolla interviewed the minor victim alone, their conversation was observed through a "one-way mirror" by Detective Claire Hearn and Audrey Courtney, a pediatric nurse practitioner at the advocacy center.[3] In conformance with the ordinary practice of the advocacy center, the interview was video recorded.

During the interview, the minor victim disclosed, in precise detail, that the defendant sexually abused her over an approximate seven year period. The minor victim told Murphy-Cipolla, in relevant part, that beginning when she was eight or nine years old, until she was fifteen years old, the defendant, on numerous occasions, touched her inappropriately underneath her clothes. The minor victim also disclosed that, when she turned fifteen years old, the defendant "would force [her] to have sex with him." She further indicated that the defendant's actions would cause her to suffer physical pain, that she does not feel comfortable with her body, and that she regrets not disclosing the sexual abuse sooner. The defendant subsequently was arrested and charged with, inter alia, six counts of sexual assault and four counts of risk of injury to a child.

[3] Courtney was not present at the inception of the interview because she was speaking with the minor victim's parent. At the June 6, 2016 pretrial hearing, Murphy-Cipolla testified that Melanie Rudnick, a medical resident, also observed the interview behind the one-way mirror. Subsequently at trial, however, Murphy-Cipolla did not testify that Rudnick observed the interview.

On June 6, 2016, the court held a pretrial hearing to determine whether the video recording of the diagnostic interview would be admissible at trial. As an offer of proof, the state presented the testimony of Murphy-Cipolla and played a partially redacted version[4] of the video recording. Murphy-Cipolla testified regarding her background and the purposes and process of conducting diagnostic interviews, as well as the circumstances of her interview of the minor victim. The state argued that the video recording was admissible pursuant to the medical diagnosis and treatment exception to the hearsay rule, which is codified in § 8-3 (5) of the Connecticut Code of Evidence.[5] The defendant objected to the admission of the video recording on the ground that the minor victim's statements made during the interview constituted inadmissible hearsay because the minor victim was not seeking medical diagnosis or treatment.[6]

At the conclusion of the hearing, the court, in an oral decision, overruled the defendant's objection and held that the video recording was admissible pursuant to the medical diagnosis and treatment exception to the

[4] The defendant and the state agreed to omit certain portions of the video that contain personally identifying information or that otherwise would be inadmissible pursuant to General Statutes § 54-86f, commonly known as the rape shield statute. Accordingly, the state presented a partially redacted version of the video recording at the pretrial hearing and subsequently at the trial.

[5] Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) . . . [a] statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment."

[6] The defendant made one exception to his objection: "[T]he [c]ourt certainly can let in [the] inquiry—or [the minor victim's] complaint in seeking medical treatment and diagnosis to make her feel better about her body, for example, wearing of the bathing suits, seeking help with checking her out for disease, but other than those two portions, I would object . . . ."

hearsay rule. In particular, the court concluded that the hearsay exception applied because the minor victim's reports of "physical symptoms," "body image mental health issues," and "medical concerns" were reasonably pertinent to obtaining medical diagnosis and treatment.

Thereafter, the defendant's case proceeded to a jury trial, at which the state presented the testimony of several witnesses, including Murphy-Cipolla. During the state's direct examination of Murphy-Cipolla, the state requested that the video recording be admitted into evidence. Notwithstanding the defendant's renewed objection, the court admitted into evidence the video recording as a full exhibit, and the state proceeded to play the video recording for the jury.

In the course of the defendant's rebuttal evidence at trial, the defendant sought to introduce two cell phone screenshots depicting text messages purportedly sent by the minor victim to her stepcousin, R, who is the defendant's niece.[7] Accordingly, the court held a hearing

[7] The two full messages contained within the first screenshot provide: "I didn't forget lol and yes he got himself a new car in a week then sold it for another car in less than a day but when it comes to me he can't get one. Smh his excuse is I don't deserve one cus of my attitude. He broke his promise to me about getting me that's why I don't talk to him anymore he doesn't deserve my kindness I'm sick and tired of BROKEN promises! But it is what it is. I'll just buy my own damn car since I buy everything else myself. But what's new with you? Why you all of a sudden hit me up. Lol." The first screenshot includes only a portion of R's text message, which provides: "[T]ime but idk from his perspective is."

The two partial messages contained within the second screenshot provide in relevant part: "[A]nd out there on my own. I turn 18 this year . . . I should be happy but I'm scared. And [m]y job is so stressful. This year hasn't been good for me at all it's always something everyday nothing good happens to me anymore the ONLY going good right now is my relationship with [T] and my bf. That's it. And same my dad keeps breaking his promises along with my step dad well manny. We don't even talk anymore it's like neither of my fathers are there for me . . . so my mom is all I got. It really hurts to say it but it is what it is. And on top of this I've been looking for another job and saving up for a car cus manny is selfish and won't buy me one." R testified that all of the text messages she received were part of a single conversation in response to a text message sent by R.

outside the presence of the jury to determine the admissibility of these screenshots. As an offer of proof, the defendant conducted a direct examination of R and produced both screenshots. R testified that, inter alia, both screenshots depict text message responses that she received from the minor victim in February or March, 2014. Both screenshots appear to display the minor victim's first name as the sender; neither screenshot, however, contains an indication as to the date or time that the messages were received. After conducting a cross-examination of R, the state objected to the admission of both screenshots arguing that they had not been authenticated properly because they were incomplete and devoid of necessary distinctive characteristics. The defendant countered that the screenshots were admissible because R sufficiently identified the messages as being authored by the minor victim.

At the conclusion of the hearing, the court issued an oral decision sustaining the state's objection and deciding that both screenshots had not been authenticated sufficiently pursuant to § 9-1 (a) of the Connecticut Code of Evidence.[8] Specifically, the court determined that the defendant failed to make a prima facie case that the minor victim authored the text messages exhibited by the screenshots because, among other things, the messages were incomplete, lacking temporal indicators, and devoid of distinctive characteristics. Accordingly, the court excluded from evidence both screenshots.

The jury subsequently found the defendant guilty of six counts of sexual assault and four counts of risk of injury to a child. The court rendered judgment in accordance with the jury's verdict and imposed a total

[8] Section 9-1 (a) of the Connecticut Code of Evidence provides: "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be."

effective sentence of forty years incarceration, execution suspended after thirty years, with thirty-five years probation and lifetime sex offender registration. This appeal followed. Additional facts will be set forth as necessary.

Before turning to the merits of the defendant's claims, we briefly set forth the applicable standard of review. "It is well settled that [w]e review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . Under the abuse of discretion standard, [w]e [must] make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 119, 124 A.3d 501 (2015).[9]

I

The defendant claims that the court improperly admitted into evidence a video recording of the diagnostic interview between the minor victim and Murphy-Cipolla. More specifically, the defendant argues that

[9] During appellate oral argument, defense counsel took the position, without citing any authority, that a trial court should consider the seriousness of the charged crime when making its evidentiary determinations. In addition, defense counsel advocated that, because the crimes at issue in the present case were punishable by life in prison, this court should conduct a more probing review of the trial court's exercise of its discretion. We reject these contentions as unsupported by Connecticut jurisprudence. Furthermore, we find the notion that some defendants, because of the seriousness of the charges against them, are entitled to greater leeway under the rules of evidence and a heightened standard of review by this court antithetical to the principle that all defendants can expect a consistent application of the law to their cases. Finally, the defendant's suggestions, if followed, would create confusion and uncertainty among parties, attorneys, and the trial court as to how our rules of evidence are to be applied.

the court abused its discretion in determining that the video recording met the requirements of the medical diagnosis and treatment exception to the hearsay rule because "[t]he circumstances of this case make clear that criminal investigation and prosecution was not only the primary purpose of the interview, but was the overarching and singular purpose." We disagree.

The following additional facts are relevant to our resolution of the defendant's first claim on appeal. The diagnostic interview was held in the adolescent interview room at the advocacy center at Saint Francis Hospital and Medical Center, which is an institution capable of providing medical services. At the outset of the interview, Murphy-Cipolla indicated to the minor victim that there were "a couple of ladies . . . that [she] work[ed] with" behind the one-way mirror that were observing their discussion, but she did not identify them or state their occupations to the minor victim. Murphy-Cipolla also informed the minor victim that their conversation was being recorded so that the video could be reviewed, and so that the minor victim would not "have to keep talking over and over and over again."

After several prefatory inquiries and the disclosure by the minor victim that the defendant had sexually abused her, Murphy-Cipolla then asked a series of questions to ascertain when and where the abuse occurred, as well as the manner in which the defendant had sexually assaulted her. More specifically, Murphy-Cipolla asked the minor victim to clarify which part of the defendant's body he used to touch her because it would be "helpful for our nurse . . . ." Murphy-Cipolla subsequently posed a similar question, stating that it "would be helpful . . . for our medical provider" to confirm the parts of the minor victim's body that the defendant had touched. Moreover, when asked what the abuse felt like, the minor victim responded that it was physically painful. Immediately thereafter, Murphy-Cipolla

informed the minor victim that "when we're done today I'm going to introduce you to our medical provider and any questions that you have or any concerns you can talk with her."

Murphy-Cipolla also inquired as to whether the defendant always had used a condom, to which the minor victim responded that he did not. Later, when asked whether she had "any questions or concerns right now for the medical provider," the minor victim responded that she goes "to the OBGYN" but that she "want[ed] to make sure that [she did not] have any disease." Murphy-Cipolla then assured the minor victim that "when we're done, I'll introduce you to our medical provider and she'd be happy to talk with you about any concerns that you have." Additionally, the minor victim expressed some psychological concerns, stating, inter alia: "I just I hate feeling uncomfortable. And hating myself because . . . I hate that I waited so long to say something because if I was to say something earlier then—sooner than I would eventually be happy . . . ." In response, Murphy-Cipolla informed the minor victim that "we could help to make a referral for counseling just so you have somebody to talk with about all those issues."

"It is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014). The medical diagnosis and treatment exception to the hearsay rule is codified in § 8-3 (5) of the Connecticut Code of Evidence. See footnote 5 of this opinion. "The legal principles relating to the medical treatment exception are well settled. Admissibility of out-of-court statements made by a patient to a medical care provider depends on whether the statements were made for the purposes of obtaining medical

diagnosis or treatment . . . and on whether the declarant's statements reasonably were related to achieving those ends. . . . The term medical encompasses psychological as well as somatic illnesses and conditions. . . . Furthermore, statements made by a sexual assault complainant to a social worker may fall within the exception if the social worker is found to have been acting within the chain of medical care. . . .

"[S]tatements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal motivation behind their expression. . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Abraham*, 181 Conn. App. 703, 711, 187 A.3d 445, cert. denied, 329 Conn. 908, 186 A.3d 12 (2018); see *State* v. *Griswold*, 160 Conn. App. 528, 555–56, 127 A.3d 189 (rationale underlying medical treatment exception is that patient is incentivized to be truthful to obtain proper diagnosis and treatment), cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

This court recently distilled several decisions,[10] which apply the medical treatment exception to a diagnostic interview, into a lodestar test for admissibility based on reasonable inferences: "[T]he statements of a declarant

[10] *State* v. *Estrella J.C.*, 169 Conn. App. 56, 74–80, 148 A.3d 594 (2016); *State* v. *Griswold*, supra, 160 Conn. App. 552–57; *State* v. *Giovanni P.*,155 Conn. App. 322, 331–32, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015); *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266, cert. denied, 291 Conn. 910, 969 A.2d 174 (2009); *State* v. *Telford*, 108 Conn. App. 435, 440–43, 948 A.2d 350, cert. denied, 289 Conn. 905, 957 A.2d 875 (2008).

may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has *a* medical purpose. Statements of others, including the interviewers, may be relevant to show the circumstances."[11] (Emphasis in original.) *State* v. *Abraham*, supra, 181 Conn. App. 713; see, e.g., *State* v. *Ezequiel R.*, 184 Conn. App. 55, 68–71, A.3d (2018) (video recording of interview admissible under medical treatment exception based on, inter alia, circumstances leading up to interview, location where interview took place, and interviewer's statements to victim during interview). Because the focus of the medical treatment exception is the declarant's understanding of the purpose of the interview, the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to the declarant.[12]

Applying these principles to the present case, we conclude that the trial court did not abuse its discretion in determining that the video recording was admissible

[11] Although there is "no requirement of direct evidence of the declarant's state of mind at the time of the statement . . . [t]his is not to say that direct evidence would not be useful in the inquiry." *State* v. *Abraham*, supra, 181 Conn. App. 711–12 n.6. We observe that in some cases, including the present one, where the minor victim was seventeen years old at the time of the interview, the defendant could have sought such direct evidence by asking to voir dire the declarant outside the presence of the jury and before the interview was admitted into evidence, as to her understanding of the purpose of the interview.

[12] For instance, statements made by a declarant at an interview intended by the interviewer to be for medical diagnosis and treatment would not be admissible under the exception if it reasonably could not be inferred that the declarant understood that the interview had a medical purpose. Conversely, the fact that the interviewer or others suggested that the interview take place for some other purpose; i.e., the gathering of evidence; is of little or no significance if it reasonably could be inferred that the declarant understood that a purpose of the interview was medical diagnosis or treatment.

under the medical diagnosis and treatment exception to the hearsay rule because it reasonably can be inferred from the circumstances apparent to the minor victim that she understood the interview had a medical purpose. First, the interview took place at a medical facility, and the minor victim knew that the interview was being recorded by the medical facility for future use. Further, we can ascertain no reason for the minor victim to have thought that one of the observers was a police detective because the minor victim was informed only that there were "a couple of ladies . . . that [she] work[ed] with" behind the one-way mirror. Even if the minor victim was aware of the presence of a police officer behind the mirror, however, this fact alone would not eradicate the medical purpose of the interview. See *State* v. *Miller*, 121 Conn. App. 775, 783, 998 A.2d 170 (purpose of interview was for medical treatment even though victim knew that police officers were present during interview), cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). Murphy-Cipolla also asked several direct questions, including whether the defendant used a condom, which could assist a prospective medical provider to identify whether the minor victim contracted any sexually transmitted diseases. Likewise, the minor victim was asked to confirm the nature of the defendant's sexual abuse for the explicit reason that it would be helpful to the nurse and the medical provider. Finally, when the minor victim expressed concerns about her physical and psychological well-being, Murphy-Cipolla informed the minor victim that she would be introduced to a medical provider and referred to counseling. All of these facts lead to the reasonable inference that the interview had a medical purpose.

Although certain questions posed by Murphy-Cipolla were directed at uncovering facts that may be immaterial to the medical treatment or diagnosis of the minor

victim,[13] our case law is clear that the statements made in a diagnostic interview are admissible even when medical treatment or diagnosis is not the primary purpose of the inquiry.[14] *State* v. *Griswold*, supra, 160 Conn. App. 552–53; see *State* v. *Estrella J.C.*, 169 Conn. App. 56, 77–78, 148 A.3d 594 (2016). Indeed, the defendant, by exempting from his objection the minor victim's complaints seeking medical treatment; see footnote 6 of this opinion; recognizes that the interview had a medical purpose.[15]

Therefore, we conclude that the court did not abuse its discretion when it determined that the minor victim's statements made during the diagnostic interview were

[13] For example, Murphy-Cipolla asked the minor victim about the location where the sexual abuse occurred, the description of the condoms the defendant used, the whereabouts of her family during the encounters, and whether the defendant took pictures of her body.

[14] The defendant argues, alternatively, that this court should overrule *State* v. *Griswold*, supra, 160 Conn. App. 528, as well as its progeny, and impose a rule requiring that, to be admissible, medical treatment must be the "primary purpose" of the diagnostic interview. It is axiomatic that we cannot overrule the decision made by another panel of this court absent en banc consideration. *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018). Although the defendant filed a motion for en banc consideration of this appeal, it was denied on May 23, 2018. Therefore, assuming, without deciding, that this claim was preserved or is reviewable under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), we decline the defendant's invitation to revisit our precedent.

[15] The defendant also argues that the interview should not have been admitted because the underlying premise of the hearsay exception—that the declarant will tell the truth when seeking a medical diagnosis or treatment—was undermined by the victim's failure to be completely honest and candid during the interview. We are not persuaded. This argument was raised for the first time on appeal, so it was not properly preserved. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597–98, 188 A.3d 702 (2018). In addition, whether the information provided by the declarant ultimately is determined to be true, false, or inconsistent has never been the test to determine whether the statement should be admitted in the first place. Again, the test focuses on the declarant's understanding of the purpose for the interview, not the adverse party's attacks on the veracity of the statements made during the interview.

admissible pursuant to the medical diagnosis and treatment exception to the hearsay rule, and admitted into evidence the video recording of the diagnostic interview.

II

The defendant also claims that the court improperly excluded from evidence two cell phone screenshots of text messages purportedly sent by the minor victim to R. More specifically, the defendant argues that the court abused its discretion in determining that the defendant failed to authenticate sufficiently the two screenshots because he provided evidence that "met the requirements of a prima facie case of authenticity by presenting both a witness with personal knowledge of the conversation and [the minor victim's] phone number and that witness' description of identifying distinctive characteristics in the evidence." We disagree.

The following additional facts are relevant to our resolution of the defendant's second claim on appeal. Each of the two exhibits is a screenshot that depicts text messages that were received by a cell phone. The first screenshot portrays two text messages that were received by the cell phone, displays only the bottom half of the name of the sender, which appears to be the first name of the minor victim, does not include the phone number of the sender, and is devoid of any time or date reference. It also contains a portion of a text message to which the two text messages shown purportedly respond. The second screenshot evinces two partial text messages that were received by the cell phone, displays the entirety of the first name of the sender, which is the first name of the minor victim, does not include the phone number of the sender, displays 1:08 p.m. as the time that the screenshot was taken, but is devoid of any other time or date reference. As for the content of the messages contained in both

screenshots; see footnote 7 of this opinion; the author expresses discontent for her current life situation except for her relationship with "[T]" and her "bf." The author also utilizes the terms "SMH" and "hit me up," and complains that "[M]anny" failed to fulfill his promise to purchase the author a car.

When defense counsel showed these two screenshots to the minor victim on cross-examination during the state's case-in-chief, the minor victim denied ever sending R any text messages and denied that she was the "sender" of the text messages displayed in the screenshots. At the hearing conducted outside the presence of the jury, R testified that she is the stepcousin of the minor victim and that the minor victim provided her cell phone number to R at a family gathering. R testified that, in February or March, 2014, despite the fact that she was "not really" "in touch" with the minor victim, R sent the minor victim a text message "to see how she was doing." R testified that the minor victim responded to her message and that the two exhibits evincing the two screenshots were a fair and accurate representation of the minor victim's responses. R also attested to her cell phone number as well as the minor victim's cell phone number.

On cross-examination, R testified that the screenshots do not represent the entire conversation and, although she could not recollect the date of the conversation "clearly," she did know that it was "a couple of months before everything happened." R further testified that she manually input the minor victim's name into her cell phone, she was not with the minor victim at the time she received the messages from her, she never spoke to the minor victim in person about the conversation, and she did not know whether the minor victim's phone was password protected. When asked if she knew whether the minor victim had sent the text messages, R responded that members of the minor victim's

family were referenced in the text. R also testified that the time displayed at the top of the second screenshot represents the time when the screenshot was taken, and not when the conversation occurred. Although R testified that the minor victim previously had utilized the acronym "SMH," which means shaking my head, and the phrase "why you hittin' me up" in the past, R also testified that these sayings are not particular to the minor victim, but, rather, that they are utilized by their entire generation. R further testified that she no longer has the cell phone that took the screenshots and that her cellular provider's records of text messages from the relevant period no longer exist.

"Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. Conn. Code Evid. § 1-3 (a). The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. Conn. Code Evid. § 9-1 (a). The official commentary to § 9-1 (a) of the Code of Evidence provides in relevant part: The requirement of authentication applies to all types of evidence, including . . . writings . . . [and] electronically stored information . . . . The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and chat room content, computer stored records and data, and computer generated or enhanced animations and simulations." (Internal quotation marks omitted.) *State* v. *Smith*, 179 Conn. App. 734, 761–62, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

"[T]he bar for authentication of evidence is not particularly high. . . . [T]he proponent need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it

purports to be . . . .'' (Internal quotation marks omitted.) Id., 762–63. ''[T]he showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity.'' (Internal quotation marks omitted.) Id., 762.

''[A]n electronic document may . . . be authenticated by traditional means such as direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author.'' (Emphasis omitted; internal quotation marks omitted.) Id., 763. ''Among the examples of methods of authenticating evidence set forth in the official commentary to § 9-1 (a) of the Code of Evidence is that [a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be, and [t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity. Conn. Code Evid. § 9-1 (a), commentary.'' (Internal quotation marks omitted.) Id. ''[B]ecause an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender . . . proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship.'' (Internal quotation marks omitted.) Id., 763–64.

In support of their arguments, each of the parties relies on *State* v. *Eleck*, 130 Conn. App. 632, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014),

which is our seminal decision on the authentication of electronic evidence. In *Eleck*, we held that the trial court did not abuse its discretion in excluding from evidence a printout comprising Facebook messages sent by an individual to the defendant. Id., 634–44. When presented with the printout on cross-examination, the individual identified the "user name" as her own, denied sending the messages to the defendant, and testified that her account had been hacked. Id., 635. The following day, defense counsel offered the printout into evidence. The defendant testified that he had downloaded and printed the messages from his own computer, that he recognized the purported author's name and pictures on the Facebook account, and that the purported author removed him as a "friend" immediately after she testified on the previous day. Id., 636. Thereafter, the trial court sustained the state's authenticity objection "on the ground that the defendant had not authenticated that the messages were written by [the purported author] herself." Id. On appeal, this court affirmed the trial court's conclusion that the defendant failed to authenticate sufficiently that the individual was the author of the messages because, inter alia, of the conflicting testimony regarding the authorship and the unresolved issue of whether a third party may have sent the messages. Id., 641–42. We reached this conclusion even though the purported author's claim of hacking was "dubious . . . given that the messages were sent before the alleged hacking of the account took place . . . ." Id., 642. We further concluded that the contents of the messages did not "[provide] distinctive evidence" that the messages were written by the purported author. Id. In particular, we recognized that the exchange did "not reflect distinct information that only [the purported author] would have possessed regarding the defendant or the character of their relationship." Id. We contrasted the facts in *Eleck* to other cases in

which "the identifying characteristics have been much more distinctive of the purported author and often have been corroborated by other evidence or with forensic computer evidence." Id., 643.

Since *Eleck*, this court has considered, on several occasions, whether electronic messages had been sufficiently authenticated. In *State* v. *Papineau*, 182 Conn. App. 756, 790–92, 190 A.3d 913, cert. denied, 330 Conn. 916, A.3d (2018), this court held that the state sufficiently had authenticated a series of text messages between the defendant and his former wife through the testimony of the former wife. This testimony included that they were in an ongoing relationship, that the messages were part of an ongoing conversation between them, that the messages prompted them to speak on the telephone, and that she was " 'very positive' " that the messages were from the defendant. Id., 791. In *State* v. *Smith*, supra, 179 Conn. App. 759–66, this court held that the state sufficiently had authenticated a Facebook message sent by the defendant to an individual through the testimony of the individual that she had received the message bearing the defendant's name only after she agreed to be part of the defendant's criminal plan, that the message was part of a larger series of messages, that the content of the messages made sense and revealed things the defendant would know, that the message contained a "unique speaking style" and content, and that the message definitively was from the defendant.

Applying these principles, we conclude that the trial court did not abuse its discretion in concluding that the defendant failed to meet his burden of authenticating both screenshots because he failed to present sufficient evidence to make a prima facie showing that the minor victim was the author of the text messages therein displayed. Both screenshots are devoid of any extra-textual identifying characteristics that would

evince the date and time the messages were sent by the author, or received by R. R could only say that she received them in February or March, 2014. Not only does the second screenshot contain a partial message, but R testified that both screenshots are an incomplete representation of the conversation. R did not testify as to what she had transcribed in the text messages she sent to the minor victim, and the screenshots display only a partial message that was sent by R. In the present case, unlike *Papineau* and *Smith*, there was insufficient corroborating evidence that these messages were part of some longer conversation or the content of such conversation.

Moreover, the content of the messages, as corroborated by R's testimony, also failed to provide sufficient authentication that the minor victim was the author. R was neither asked, nor did she testify, as to the general content of the messages. Rather, R testified that the author utilized two specific phrases, namely "SMH" and "hit me up." Although she testified that these phrases had been used by the minor victim in the past, she also stated that these phrases are not particular to the minor victim and are used by her entire generation. Additionally, although the messages allude to members of the minor victim's family and the status of various relationships, this fact is insufficient to support a finding that the minor victim was the author. It is likely that many persons, including members of the minor victim's family, would possess the knowledge of these facts. Thus, contrary to *Papineau* and *Smith*, R's testimony combined with the content of the messages was not sufficiently distinctive to establish that the minor plaintiff was the author.

In addition, unlike the identifying witnesses in *Papineau* and *Smith*, R did not have a current relationship with the purported author of the text messages that would suggest a reliable basis for identifying the author.

In fact, R testified that she did not have a close relationship with the minor victim at the time of the exchange as they "kind of split off as [they] got older."

Nor were the screenshots corroborated by other events or forensic computer evidence. The only witness the defendant offered regarding the purported text conversation was R, and she could not provide further corroborative details, testifying that she was not with the minor victim when she received the messages, and that she had never spoken with the minor victim over the phone or in person about the conversation. Nor could R say if the minor victim's cell phone was password protected such that others could not easily gain access to it. In addition, R's cell phone was not available to be examined, and information was not offered from her cell phone provider to confirm the purported exchange with the minor victim. Similarly, neither the minor victim's cell phone nor cell phone records were offered to confirm that the minor victim was the author of the messages.

Finally, the entirety of the text message exchange was categorically contradicted by the direct testimony of the minor victim. During the state's case-in-chief, the minor victim *denied ever sending R any text messages* and denied that she was the "sender" of the texts displayed in the screenshots. This testimony, like in *Eleck*, creates further uncertainty as to the authorship of the messages, particularly given the failure of the defendant to offer other corroborating evidence.

Therefore, we conclude that the court acted well within its discretion when it determined that the defendant failed to present sufficient evidence to support a finding that the minor victim was the author of the text messages, and excluded from evidence both screenshots of those messages.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FRANCIS ANDERSON (AC 39794)

Lavine, Keller and Elgo, Js.

Syllabus

Convicted of the crimes of assault in the second degree and reckless endangerment in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident that occurred in the psychiatric unit of a hospital at which he was a patient, during which the defendant entered a small employee break room where four other forensic treatment specialists, including W, were seated around two tables. The defendant yelled profanities and threatening language at the treatment specialists in the room, stated that a patient down the hallway woke him up and that the treatment specialists were not doing their jobs, threw two duffel bags that were on the tables and grabbed a metal food cart by the handle and flung it into the air. The cart struck W in the chest and propelled her backward into nearby cabinets, causing her serious injuries. Soon thereafter, the defendant entered a conference room, sat down and recounted his version of the events to M, a forensic nurse, in a concise, logical manner, explaining that he had lost his temper and was frustrated by being in the hospital unit. The defendant subsequently was arrested and charged with one count of assault in the second degree for flinging the metal cart that hit and seriously injured W and with four counts of reckless endangerment in the second degree for throwing the two duffel bags and creating a risk of injury to each of the treatment specialists. Following a trial to the court, the court found the defendant guilty on all counts, concluding that the defendant's conduct both before and following W's assault demonstrated his awareness, and conscious disregard, of the substantial risk that his conduct would result in serious injury, and that the defendant possessed the mental capacity to understand and to appreciate the gravity of the risk in violently throwing a metal cart toward W and the ability to consciously choose to disregard that risk. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that there was insufficient evidence to convict him of assault in the second degree because no reasonable finder of fact could have concluded beyond a reasonable doubt that, in light of his claimed mental disease or defect, he acted with the requisite recklessness and had the capacity to be aware of and to disregard the substantial risk of serious physical injury to W by his flinging the metal cart at W: notwithstanding the defendant's significant psychiatric and behavioral issues, there was sufficient evidence for the trial court to conclude that he possessed the mental capacity to control his conduct and to understand and appreciate the risk resulting from

his actions, as there was testimony from a professor of psychiatry, as well as a clinical and forensic psychologist, indicating that the defendant had the capacity to understand his conduct at the time of the incident and had the ability to control it, and that his recognition of A, a forensic treatment specialist, and the patient who woke him in the hallway, and his decision to not engage with them, indicated that he was not dissociated from the situation but, rather, was acting volitionally, and the evidence showed that the defendant walked approximately eighty-two feet from his bedroom to the break room to confront the treatment specialists when A and the patient were only approximately thirty feet away, all of which supported the trial court's finding that the defendant consciously made a decision to confront the individuals he felt were actually to blame for the commotion; moreover, although the defendant claimed that he was not aware of W's preexisting medical condition and thus could not be aware of the risk of serious injury to her from flinging the cart in her direction, he conceded at oral argument before this court that his awareness of her condition was not necessary for a finding of recklessness.

2. There was sufficient evidence of the defendant's mental state to sustain his conviction of four counts of reckless endangerment in the second degree: the testimony presented at trial indicated that the defendant grabbed and threw in the small break room two duffel bags that were unzipped and contained personal items, that there was a shelf in the room containing boxes and other items in close proximity to the tables around which the treatment specialists were standing, and that the defendant threw the bags toward the right rear corner of the room near where the shelves were located, all of which supported the trial court's finding beyond a reasonable doubt that the treatment specialists were at risk of physical injury from the duffel bags, their contents, or items knocked off the shelf as the defendant threw the bags in a small room full of people and furniture; moreover, there was sufficient evidence in the record to sustain the trial court's finding that the defendant had the mental capacity to comprehend and to be aware of the risks associated with throwing the duffel bags.

Argued September 14—officially released November 13, 2018

Procedural History

Substitute information charging the defendant with the crime of assault in the second degree and with four counts of the crime of reckless endangerment in the second degree, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Vitale, J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Richard E. Condon, Jr., senior assistant public defender, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Peter McShane*, former state's attorney, and *Jeffrey Doskos*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Francis Anderson, appeals from the judgment of conviction, rendered after a trial to the court, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3) and four counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64 (a). On appeal, the defendant claims that there was insufficient evidence of the requisite mental state necessary for the trial court to have concluded that he acted recklessly. We affirm the judgment of the trial court.

On April 29, 2016, the trial court issued a memorandum of decision in which it found the following relevant facts. On August 24, 2014, Joanne Aldrich was working at the Whiting Forensic Division of Connecticut Valley Hospital (Whiting) as a forensic treatment specialist and was assigned to unit rounds during which she checked every fifteen minutes to see that the patients were in their rooms. Sometime after 10 p.m., a patient was out of his room, standing by the exit door near the defendant's bedroom. This patient was confused and making noise. While Aldrich was attempting to calm the patient, the defendant[1] exited his bedroom, which was located near

[1] At the time of the incident, the defendant was confined to Whiting, having been found not guilty by reason of mental disease or defect on charges relating to an assault on a correctional officer. Although the defense expert, Andrew Meisler, a clinical and forensic psychologist, and the state's expert, Catherine Lewis, a professor of psychiatry, disagreed in some respects, they both documented the defendant's cognitive and mental health problems, history of childhood abuse, impulsivity, and low functioning.

where Aldrich and the patient were standing. The defendant did not approach or speak to Aldrich or the patient but, instead, proceeded down the hallway.

Meanwhile, four other forensic treatment specialists (treatment specialists), David Latronica, Iris Fuqua, William Hewitt, and Darla White, were in the employee break room. Inside the small, approximately thirteen foot by thirteen foot break room, the treatment specialists were seated around two tables that were placed together to form a larger table. Two duffel bags rested on the tables and contained various personal items. There was a shelf in close proximity to the tables that contained boxes and other items. A large metal food cart, which was approximately three inches taller than the tables, was nearby.

The defendant appeared at the open door of the break room, which was approximately eighty-two feet from his bedroom, and began to yell profanities and threatening language. He stated that he had been awakened by a patient down the hallway and that the treatment specialists in the break room were not doing their jobs, and asked why they were not helping the "old woman," in reference to Aldrich. The defendant entered the room, and the four treatment specialists stood up. The defendant appeared to be addressing Latronica, with whom he did not have a good relationship. The defendant threw the two duffel bags that were on the table and grabbed one of the tables. The treatment specialists placed their hands on the table to prevent the defendant from lifting or flipping it. The defendant then grabbed the metal food cart by the handle and flung it so that it became airborne. The cart struck White in the chest and propelled her backward into nearby cabinets. The defendant then left the room.

Lance Mack, a forensic nurse, went to the break room after learning about the incident. Mack saw the defendant in the hallway entering a bathroom. Mack entered

a conference room directly across from the bathroom as he thought that the defendant, with whom he had a good rapport, would follow him into the room because it was the "logical thing to do." Just as Mack anticipated, the defendant entered the room and sat down. The defendant recounted his version of the events in a concise manner, following logical thought patterns, explaining that he lost his temper and was frustrated by being in the unit.

As a result of being hit by the metal cart, White experienced substantial pain in her chest, neck, and shoulder, and suffered headaches. After seeking treatment that failed to alleviate her symptoms, White underwent magnetic resonance imaging that revealed a herniated cervical disc requiring surgery. Following the surgery, White experienced numbness in her hands and was unable to turn her head to the right, engage in activities with her children, or return to work.

The defendant was arrested and charged with one count of assault in the second degree in violation of § 53a-60 (a) (3) for flinging the metal cart that hit White and caused her serious injury. The defendant was also charged with four counts of reckless endangerment in the second degree in violation of § 53a-64 (a), each count identifying one of the treatment specialists, for throwing the two duffel bags and creating a risk of injury to them. Following a trial, the court found the defendant guilty on all counts. This appeal followed.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded

that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences by the evidence it deems to be reasonable and logical. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 402–403, 902 A.2d 1044 (2006).

I

The defendant first claims that there was insufficient evidence to sustain his conviction of assault in the second degree. Specifically, he argues that there was insufficient evidence to allow a reasonable finder of fact to conclude beyond a reasonable doubt that, in light of his claimed mental disease or defect, he had the capacity to be aware of and to disregard the substantial and

unjustifiable risk of serious physical injury to another person posed by the flinging of the cart.[2] He further argues that because White's injury was caused by her fall, the cart itself did not cause the injury,[3] and, in any event, because he was unaware of White's preexisting condition,[4] he did not know that there was a risk of serious injury that could result from flinging the cart in her direction. We are unpersuaded.

Section 53a-60 (a) provides in relevant part that "[a] person is guilty of assault in the second degree when . . . (3) the actor recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument . . . ." "According to General Statutes § 53a-3 (13), [a] person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk . . . . The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ." (Internal quotation marks omitted.) *State* v. *Carter*, 141 Conn. App. 377, 393, 61 A.3d 1103 (2013), aff'd, 317 Conn. 845, 120 A.3d 1229 (2015); see also *State* v. *Douglas*, 126 Conn. App. 192, 207–208, 11 A.3d 699, cert. denied, 300 Conn. 926, 15 A.3d 628 (2011).

[2] The defendant also claims that the trial court erred in relying on Catherine Lewis' testimony in regard to the defendant's diminished capacity defense, as he argues that she did not offer an opinion on whether he was acting recklessly and that her testimony was limited to her opinions on his mental disease or defect defense. We reject this argument. As Lewis provided testimony as to the defendant's mental state, this testimony is relevant as to whether the defendant had the capacity to engage in reckless conduct. We note that Lewis was not permitted to testify as to the ultimate question.

[3] Evidence shows, and the trial court found, that White had suffered a previous injury to her cervical spine, but that the injury was to a different area of her spine and had been stabilized prior to the present incident.

[4] At oral argument before this court, defense counsel stated that the defendant does not argue that his conduct was not the cause of White's injury but claims that there was insufficient evidence of the requisite mental state of being aware of the risk of injury to her as it was her reaction to being hit by the cart, and not the cart itself, that injured her.

"Recklessness involves a subjective realization of that risk and a conscious decision to ignore it. . . . It does not involve intentional conduct because one who acts recklessly does not have a conscious objective to cause a particular result. . . . Because it is difficult to prove this through direct evidence, the state of mind amounting to recklessness may be inferred from conduct." (Internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 756, 961 A.2d 322 (2008). "In determining whether a defendant has acted recklessly for . . . [s]ubjective realization of a risk may be inferred from [the defendant's] words and conduct when viewed in the light of the surrounding circumstances." (Internal quotation marks omitted.) *State* v. *Carter*, supra, 141 Conn. App. 393.

The court concluded that "the defendant's conduct both before and following White's assault demonstrates his awareness of, and conscious disregard of, the substantial risk that his conduct would result in serious injury" and "that the defendant possessed the mental capacity to understand and to appreciate the gravity of the risk in violently throwing a metal cart toward White, and the ability to consciously choose to disregard such risk." We disagree with the defendant's claim that there was insufficient evidence for the trial court to draw these conclusions.

There was testimony from Catherine Lewis, a professor of psychiatry, indicating that the defendant had the capacity to understand his conduct at the time of the incident and had the ability to control it. There was also testimony from both Andrew Meisler, a clinical and forensic psychologist who testified for the defense, and Lewis that the defendant's recognition of Aldrich and the patient in the hallway, and his decision to not engage with them, indicated that the defendant was not dissociated from the situation but, rather, was acting

volitionally. Lewis' testimony indicated that the defendant had told her that he liked Aldrich, whom he described as a "nice," "old lady," that the patient was "crazy" and that he is "not going to hit people like that." Instead, the defendant stated that he walked down the hallway and heard laughter from Latronica, with whom he was upset. The defendant was angry that the treatment specialists were not doing their jobs, and walked to the break room. The evidence showed that the defendant walked approximately eighty-two feet to the break room to confront the treatment specialists when Aldrich and the patient who woke the defendant were only approximately thirty feet away. This evidence supports the trial court's finding that "the defendant consciously made a decision to confront the individuals he felt were actually to blame for the commotion . . . ."

After the incident, the defendant followed Mack into the conference room, which was the "logical thing to do," spoke to Mack in a concise logical manner, and stated that he did not intend to hurt anyone. Lewis testified, and the trial court agreed, that this statement showed awareness of conduct and intent. Lewis stated: "[S]omeone who is in a dissociative state or doesn't know what they're doing, it would be unusual to talk about their level of intent. And . . . he's calm. . . . [I]t's significant because there have been other times when he's tearing things off the walls and yelling at people. This was not like that. . . . His account—he describes being angry at people, walking down, cursing them out, pushing a cart, leaving, telling someone I have to get off this unit, I didn't intend to hurt anyone. That's pretty clear thinking." Lewis further testified that in the defendant's own version of the events, he pushed a cart in a "well thought out" manner out of frustration, not impulsivity.

Meisler concluded that the defendant showed some conscious awareness of events at the time given that

he engaged those in the break room because he was upset that they were not helping Aldrich. Additionally, Meisler testified that the defendant had a reason and intent to go to the break room and to confront the treatment specialists, and chose to leave the break room after flinging the cart. Thus, notwithstanding his significant psychiatric and behavioral issues, there was sufficient evidence for the trial court to conclude that the defendant possessed the mental capacity to control his conduct and understand and to appreciate the risk resulting from his actions.

Although the defendant argues that he was not aware of White's preexisting condition and thus could not be aware of the risk of serious injury to her, he conceded at oral argument before this court that his awareness of her condition is not necessary for a finding of recklessness. The issue before us, however, is not whether the defendant was aware of White's preexisting condition, but whether the defendant should have recognized that flinging the large metal cart in a small room with others in close proximity could cause serious injury. We, therefore, conclude that the evidence was sufficient to support the defendant's conviction of assault in the second degree.

II

The defendant finally claims that there was insufficient evidence to sustain his conviction of four counts of reckless endangerment in the second degree. Again, the defendant's arguments rest on his claim that he was not aware of the likelihood of injury. The defendant argues (1) that the court erred by relying on its analysis of recklessness in regard to the assault charge when the conduct underlying the reckless endangerment counts differed and (2) that risk of injury to the treatment specialists was speculative. We disagree.

Section 53a-64 (a) provides that "[a] person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person." Here, testimony indicated that the defendant grabbed and threw two duffel bags that were unzipped and contained personal items such as a wallet, keys, a cup, a lunchbox, a notebook, and clothes. In the small break room, there was a shelf containing boxes and other items in close proximity to the tables around which the treatment specialists were standing. Fuqua testified that the defendant threw the bags toward the right rear corner near where the shelves were located. There was thus sufficient evidence for the trial court to find beyond a reasonable doubt that the treatment specialists were at risk of physical injury from the bags, their contents, or items knocked off the shelf, as the defendant threw the bags in a small room full of people and furniture.

As there was sufficient evidence to find that the defendant was capable of understanding and appreciating the risk of his actions, as previously discussed, there is sufficient evidence in the record to sustain the court's finding that the defendant had the mental capacity to comprehend and to be aware of the risks associated with throwing the duffel bags.[5] We therefore conclude that there was sufficient evidence of the defendant's mental state to convict him of four counts of reckless endangerment in the second degree.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] Even if, as the defendant argued, he had no knowledge of the contents of the duffel bags, or that they were unzipped, his lack of knowledge is not relevant to a lack of awareness of a risk or conscious disregard of a substantial risk that the bags or their contents could injure someone.

STATE OF CONNECTICUT *v.* ANTHONY ADAMS (AC 40946)

Elgo, Bright and Sullivan, Js.

Syllabus

The defendant, who had been convicted, on a guilty plea, of two counts of the crime of hindering prosecution in the second degree, appealed to this court from the trial court's denial of his motions to correct an illegal sentence and for procedural default. *Held:*

1. The defendant waived his claim that his sentence on the two hindering prosecution counts violated the prohibition against double jeopardy, as he pleaded guilty to both counts of hindering prosecution and did not dispute that his plea was made voluntarily and intelligently, which operated as a waiver of all nonjurisdictional defects and a relinquishment of his double jeopardy claim, especially given that the charging documents revealed no facial violation of the prohibition against double jeopardy.
2. The defendant's claim that the trial court improperly concluded that his sentence did not exceed the statutory maximum was unavailing; the defendant's sentence plainly comported with maximum terms specified in the relevant statutes (§§ 53a-35a [7] and 53a-29 [e]), and the trial court properly concluded that a period of probation is not part of the calculation of a maximum definite sentence under § 53a-35a.
3. The trial court properly denied the defendant's motion for procedural default; the defendant provided no authority to substantiate his claim that the state was obligated to respond in writing to his motion to correct, as nothing in the rules of practice or decisional law required the state to file a written response to the defendant's motion to correct an illegal sentence, and the rule of practice (§ 66-2) relied on by the defendant in his motion for procedural default applies to appellate motions practice and was inapplicable to the defendant's motion to correct an illegal sentence.
4. The defendant could not prevail on his unpreserved claim of judicial bias; absent plain error, a claim of judicial bias cannot be reviewed on appeal unless preserved in the trial court, the defendant neither requested review nor briefed a claim pursuant to the plain error doctrine, and even if he had sought review pursuant to the plain error doctrine, he could not prevail under that doctrine because the record demonstrated that his allegation was wholly unfounded, as the defendant, at a hearing on his motions to correct and for procedural default, made multiple misstatements of law, and the trial court's explanations in response to the defendant's misstatements were entirely proper and did not evince any impartiality on the part of the court.

Argued September 24—officially released November 13, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder and attempt to commit robbery in the first degree, and with two counts of the crime of hindering prosecution in the second degree, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant was presented to the court, *Iannotti*, *J.*, on a guilty plea to two counts of hindering proseuction in the second degree; judgment of guilty in accordance with the plea; subsequently, the court denied the defendant's motions to correct an illegal sentence and for procedural default, and the defendant appealed to this court. *Affirmed.*

Anthony Adams, self-represented, the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Cornelius P. Kelly*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The self-represented defendant, Anthony Adams, appeals from the judgment of the trial court denying his postsentencing motions to correct an illegal sentence and for procedural default. On appeal, the defendant claims that the court improperly (1) rejected his double jeopardy challenge to his sentence for two counts of hindering prosecution in the second degree in violation of General Statutes § 53a-166, (2) concluded that his sentence did not exceed the statutory maximum, (3) denied his motion for procedural default, and (4) advocated on behalf of the state at the hearing on his motions. We affirm the judgment of the trial court.

On October 28, 2012, Daquane Adams and Eugene Walker were involved in a drug deal that culminated with the fatal shooting of the victim, Neville Malacai

Registe. See *State* v. *Walker*, 180 Conn. App. 291, 296–97, 183 A.3d 1, cert. granted, 328 Conn. 934, 183 A.3d 634 (2018). After fleeing the scene, Adams and Walker telephoned the defendant. The defendant then placed a telephone call to a friend and had her pick up Adams and Walker from their location in New Haven.

On August 18, 2016, the defendant was charged, by substitute information, with one count of felony murder in violation of General Statutes § 53a-54c, one count of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-8, 53a-49 (a) (2) and 53a-134 (a) (2), and two counts of hindering prosecution in the second degree in violation of § 53a-166. The defendant thereafter entered a guilty plea to two counts of hindering prosecution in the second degree.[1] In accordance with the terms of that plea, the court sentenced the defendant to consecutive terms of seven and one-half years incarceration, execution suspended after five years, with five years of probation. His total effective sentence on the two hindering prosecution counts was fifteen years incarceration, execution suspended after ten years, with five years of probation.

Months later, the defendant filed a motion to correct an illegal sentence, claiming that his sentence exceeded the statutory maximum and violated the prohibition against double jeopardy.[2] The defendant later filed a motion for procedural default predicated on the state's failure to file a written response to his motion to correct.

[1] On appeal, the defendant raises no issue with respect to the validity of his guilty plea. As the defendant states in his appellate brief: "[T]here is no pending appeal challenging the [hindering prosecution] convictions themselves. My appeal here attacks the actions of the sentencing court and not the underlying conviction."

[2] The gist of the defendant's double jeopardy claim was that he could not be convicted of rendering criminal assistance to *both* Adams and Walker by placing a single telephone call to assist them on the night of the shooting. As he argued in his motion to correct, his sentence involved two counts that allegedly derived from a single act in placing that telephone call.

The court held a hearing on the defendant's motions on July 26, 2017, at which it denied both motions. From that judgment, the defendant now appeals.

I

The defendant first claims that the court improperly rejected his double jeopardy challenge to his sentence on the two hindering prosecution counts. In response, the state argues that the defendant waived that claim by pleading guilty to those counts. We agree with the state.

The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[3] That constitutional provision is applicable to the states through the due process clause of the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). An alleged double jeopardy violation is a proper basis for a motion to correct an illegal sentence. See *State* v. *Wade*, 178 Conn. App. 459, 466, 175 A.3d 1284 (2017), cert. denied, 327 Conn. 1002, 176 A.3d 1194 (2018).

It nevertheless remains that the defendant pleaded guilty to the two counts in question and in this appeal does not dispute that his plea was voluntarily and intelligently made. See footnote 1 of this opinion. Our Supreme Court has observed that "[a]s a general rule, an unconditional plea of guilty . . . intelligently and voluntarily made, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. . . . Therefore, only those issues fully disclosed in the

[3] The defendant's double jeopardy claim also was brought pursuant to the protection afforded under our state constitution. That protection "is coextensive with that provided by the constitution of the United States." (Internal quotation marks omitted.) *State* v. *Drakes*, 321 Conn. 857, 865, 146 A.3d 21, cert. denied, U.S. , 137 S. Ct. 321, 196 L. Ed. 2d 234 (2016).

record which relate either to the exercise of jurisdiction . . . by the court or to the voluntary and intelligent nature of the plea are ordinarily appealable after a plea of guilty . . . .'' (Citations omitted; emphasis omitted; footnotes omitted.) *State* v. *Madera*, 198 Conn. 92, 97–98, 503 A.2d 136 (1985).

The United States Supreme Court, in addressing the viability of a double jeopardy challenge following a guilty plea, has explained that ''[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.'' *United States* v. *Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). In that case, the court emphasized that the defendants ''had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments . . . . They chose not to, and hence relinquished that entitlement.'' Id., 571. Relinquishment of a double jeopardy claim, the court continued, ''derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty.'' Id., 573–74; accord *United States* v. *Burroughs*, 691 Fed. Appx. 31, 33 (2d Cir. 2017) (defendant's ''valid guilty plea . . . constitutes a waiver of his double jeopardy claim''). The Supreme Court thus held that, unless a double jeopardy violation is apparent on the face of the charging documents, a defendant's ability to raise such a challenge ''is foreclosed by the admissions inherent'' in his or her guilty plea. *United States* v. *Broce*, supra, 575–76.

Examination of the operative charging document in the present case reveals no facial violation of the prohibition against double jeopardy. The August 18, 2016 substitute information contains four counts, the latter

two of which allege hindering prosecution in the second degree in violation of § 53a-166.[4] The third count alleges in relevant part that the defendant "rendered criminal assistance to [Adams], by way of providing him with transportation and . . . [Adams] had committed a Class B felony . . . ." The fourth count alleged in relevant part that the defendant "rendered criminal assistance to [Walker], by way of providing him with transportation and . . . [Walker] had committed a Class A felony . . . ." Judged solely on its face, as our law requires; *United States* v. *Broce*, supra, 488 U.S. 575–76; we perceive no double jeopardy violation. Accordingly, the defendant waived his double jeopardy claim by entering his guilty plea in the present case.

II

The defendant next claims that the court improperly concluded that his sentence did not exceed the statutory maximum. That contention is a proper basis for a motion to correct an illegal sentence pursuant to Practice Book § 43-22; see *State* v. *Lawrence*, 281 Conn. 147, 155–56, 913 A.2d 428 (2007); and one over which our review is plenary. *State* v. *Mungroo*, 104 Conn. App. 668, 684, 935 A.2d 229 (2007), cert. denied, 285 Conn. 908, 942 A.2d 415 (2008).

The offense in question, hindering prosecution in the second degree, is a class C felony. General Statutes § 53a-166 (b). The maximum term of imprisonment for a class C felony is ten years. General Statutes § 53a-35a (7). Likewise, the maximum period of probation

[4] General Statutes § 53a-166 provides: "(a) A person is guilty of hindering prosecution in the second degree when such person *renders criminal assistance to another person* who has committed a class A or class B felony or an unclassified felony for which the maximum penalty is imprisonment for more than ten years.

"(b) Hindering prosecution in the second degree is a class C felony." (Emphasis added.)

for a class C felony is five years. General Statutes § 53a-29 (e). In the present case, the court sentenced the defendant to consecutive terms of seven and one-half years incarceration, execution suspended after five years, with five years of probation for each hindering prosecution count, which resulted in a total effective sentence of fifteen years incarceration, execution suspended after ten years, with five years of probation. That sentence plainly comports with the maximum terms specified in §§ 53a-35a (7) and 53a-29 (e).

The defendant nonetheless posits that his period of probation must be included in the calculation of his maximum definite sentence under § 53a-35a. He has provided no legal authority to support that assertion. Moreover, this court recently rejected an identical claim. In *State* v. *Lugojanu*, 184 Conn. App. 576, 580, A.3d (2018), the defendant argued "that his sentence was illegal because it exceeded the statutory limit for a class B felony. Specifically, the defendant claim[ed] that a twenty year sentence of imprisonment followed by a five year term of probation effectively constitutes a twenty-five year sentence [and] thus exceeds" the statutory maximum set forth in § 53a-35a. This court disagreed, stating: "Absent a statutory prohibition, a term of imprisonment with the execution of such sentence of imprisonment suspended after a period set by the court and a period of probation is an authorized sentence. . . . The plain language of the statute concerning authorized sentences . . . specifies that a defendant can be sentenced to a term of imprisonment, but have that sentence suspended while he serves a period of probation. . . . In the present case, the defendant's maximum exposure to imprisonment under such a sentence is twenty, not twenty-five, years. Moreover, § 53a-35a expressly states that the *sentence of imprisonment* shall be a definite sentence and . . . the term shall be . . . (1) [f]or a class B felony other

than manslaughter in the first degree with a firearm . . . a term not less than one year nor more than twenty years . . . . Furthermore, the statute concerning periods of probation, [§] 53a-29 (d), expressly states that the *period of probation* . . . (1) [f]or a class B felony, [shall be] not more than five years. . . . The defendant's sentence does not violate any of these provisions." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 580–81. The court thus held that a period of probation is not part of the calculation of a maximum definite sentence under § 53a-35a. Id.

That precedent is dispositive of the defendant's claim. The trial court, therefore, properly denied the defendant's motion to correct an illegal sentence.

III

The defendant contends that the court improperly denied his motion for procedural default. We disagree.

The following additional facts are relevant to this claim. The defendant was sentenced in accordance with the terms of his guilty plea on February 7, 2017. On May 17, 2017, he filed a motion to correct an illegal sentence with the trial court. When the state did not file a written response to that motion, the defendant filed a motion for procedural default on June 27, 2017. In that motion, the defendant alleged that the state had failed to comply with Practice Book §§ "10, 11, and 66." The defendant then quoted from Practice Book § 66-2, which provides that "[a] party intending to oppose a motion, petition or application shall file a brief statement clearly setting forth in separate paragraphs appropriately captioned the factual and legal grounds for opposition within ten days after the filing of the motion . . . ." (Emphasis omitted.) Because the state had not filed a written response to his motion to correct, the

defendant claimed that the state had "waived and forfeited [its] right be heard . . . in this matter." The defendant thus submitted that "[t]he [s]tate's acquiescence permits my arguments and claims to proceed unopposed, nullifying any objections."

The court held a hearing on the defendant's motion on July 26, 2017. When the defendant indicated that he was relying on the requirements of Practice Book §§ "10, 11 and 66," the court inquired: "When you say 10 and 11, what do you mean . . . ?" The defendant responded, "Section 10, 11. More specifically, section 66-2." The court at that time apprised the defendant that § 66-2 was a rule "of appellate procedure" and explained that the present proceeding was "not an appellate matter." The court further explained that chapters 10 and 11 of the rules of practice pertained to civil matters. The following colloquy then transpired:

"The Court: [What] you're referring to, Mr. Adams, are procedures in civil matters. This is not a civil matter, sir. . . .

"The Defendant: In civil matters?

"The Court: Yes, sir.

"The Defendant: It's the Connecticut Practice Book. I thought it was all matters—

"The Court: Yes, it is, but there are civil and criminal and appellate [chapters], and you referred to the appellate and to the civil [chapters]; this [proceeding] is neither.

"The Defendant: So it doesn't apply to criminal?

"The Court: Correct.

"The Defendant: All right. So, basically, I file a motion and the state . . . doesn't have to, like, respond to my motion at all?

"The Court: In writing?

"The Defendant: Yeah.

"The Court: No, they are not required to.

"The Defendant: They don't have to acknowledge the motion at all? They can just come in and oppose it?

"The Court: The motion, of course, will be acknowledged in court today. . . . [The state] is prepared to argue your motion.

"The Defendant: All right."

The court then denied the defendant's motion for procedural default, noting that the Practice Book sections relied upon by the defendant did not apply to the present proceeding.

On appeal, the defendant has provided this court with no authority to substantiate his bald assertion that the state was obligated to respond in writing to his motion to correct. Nothing in either our rules of practice or our decisional law requires the state to file a written response to a defendant's motion to correct an illegal sentence. See, e.g., *State* v. *Martin M.*, 143 Conn. App. 140, 151–52, 70 A.3d 135 (reviewing claim raised by state on appeal despite fact that state did not file written response to motion to correct illegal sentence), cert. denied, 309 Conn. 919, 70 A.3d 41 (2013). Moreover, this court recently held that Practice Book § 66-2 "applies to appellate motions practice" and thus is inapplicable to a motion to correct an illegal sentence. *State* v. *Holmes*, 182 Conn. App. 124, 129 n.7, 189 A.3d 151, cert. denied, 330 Conn. 913, A.3d (2018). This court further noted that "[t]he Practice Book sections that govern procedure in criminal matters do not contain any time requirements with respect to objections to motions to correct." Id. We reiterate that those sections also do not obligate the state to file a written response to

a motion to correct an illegal sentence. The defendant's claim thus fails.

IV

The defendant also assails the court's conduct during the July 26, 2017 hearing on his postsentencing motions. He alleges that the court improperly engaged in advocacy on behalf of the state and "assumed the role of the prosecutor" in responding to his arguments. In so doing, the defendant argues that the court "abused [its] discretion which prejudiced [the defendant] and created an atmosphere of injustice and discouragement."

At no time did the defendant raise those allegations of judicial bias before the trial court. "[I]t is well settled that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court through a motion for disqualification or a motion for mistrial. . . . Absent plain error, a claim of judicial bias cannot be reviewed on appeal unless preserved in the trial court." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 486, 144 A.3d 447 (2016). On appeal, the defendant has neither requested review nor briefed a claim pursuant to the plain error doctrine. See *Michael G.* v. *Commissioner of Correction*, 153 Conn. App. 556, 562, 102 A.3d 132 (2014) (noting that this court normally declines "to review claims of alleged judicial bias if no claim of plain error was made by a party on appeal"), cert. denied, 315 Conn. 916, 107 A.3d 412 (2015); *State* v. *James R.*, 138 Conn. App. 181, 202, 50 A.3d 936 ("[t]he defendant does not argue that plain error exists and, thus, we do not engage in plain error review"), cert. denied, 307 Conn. 940, 56 A.3d 949 (2012).

Even if the defendant had sought review pursuant to the plain error doctrine, he could not prevail. Our review of the record reveals that the defendant's allegation is wholly unfounded. The transcript of the July 26, 2017

hearing is twenty-eight pages in length and is punctuated by multiple misstatements of law by the defendant. For example, the defendant incorrectly insisted that the offense of hindering prosecution in the second degree was a class D felony, when § 53a-166 plainly specifies that it is a class C felony.[5] The defendant also incorrectly argued that the calculation of his maximum definite sentence under § 53a-35a must include his period of probation and that our rules of practice obligated the state to file a written response to his motion to correct an illegal sentence. In each instance, the court responded in a measured and respectful manner and carefully explained to the defendant why his assertions were untenable under Connecticut law. Those explanations were entirely proper and do not evince any impartiality on the part of the court. See, e.g., *State* v. *Kelly*, 256 Conn. 23, 70–71, 770 A.2d 908 (2001) ("the trial court did not become an advocate for one of the parties in the case [when it] properly commented on the evidence before it in an attempt to simplify the proceedings"); *Mercer* v. *Cosley*, 110 Conn. App. 283, 293, 955 A.2d 550 (2008) (trial court's statements "merely served to explain the [legal] basis for the court's ruling and [are] not demonstrative of any bias"). The defendant therefore cannot prevail on his unpreserved claim of judicial bias pursuant to the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] The defendant presumably was confused by the designation of that offense as a class D felony prior to the revision of § 53a-166 in 2003. At the July 26, 2017 hearing, the court explained to the defendant that "[t]he statute changed in 2003. It used to be a class D felony. The Legislature changed it in 2003, and made it . . . a class C felony. Your offense occurred after 2003, and the statute [at that time defined] hindering prosecution in the second degree [as] a class C felony."

IN RE LILYANA L. ET AL.*
(AC 41451)

Sheldon, Moll and Mihalakos, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, L. The trial court also terminated the mother's parental rights with respect to her minor child A, but the mother did not appeal from that judgment. The court had determined, pursuant to statute (§ 17a-112 [j] [3] [F]), that the mother had committed an assault of A, through a deliberate, nonaccidental act that resulted in serious bodily injury to A. The court found that on the day of the incident at issue, the mother, who was A's primary caretaker, had noted bruises on A's head before she left for work. About one hour later, A's father, W, who was watching A, called 911 and stated, inter alia, that A was not breathing and could not move her legs. W told the police that he had left A on a bed and went to use a bathroom, and then found A on the floor when he returned. The mother told the police that W could have caused A's injuries. The court determined that the mother could not be excluded as the source of certain of A's injuries and that the mother was in close physical proximity to A when A sustained the injuries. On appeal, the mother claimed that the trial court improperly applied § 17a-112 (j) (3) (F) in terminating her parental rights and that because the court was unable to determine whether she or W was responsible for A's injuries, the evidence was insufficient for the court to have found that she committed a deliberate, nonaccidental assault that resulted in the injury of A. *Held* that the trial court properly terminated the mother's parental rights as to L, as that court properly applied the law, and its legal conclusion that the elements of § 17a-112 (j) (3) (F) were established was supported by clear and convincing evidence; that court found that the mother and W had engaged in a course of conduct that made them both the direct cause of A's injuries, and the evidence was sufficient to establish that the mother committed a deliberate, nonaccidental assault on A, as there was extensive evidence on which the court could have based its finding that the mother was not just a party who simply stood by and watched A suffer serious injuries, but that she was an active participant with regard to those injuries, and evidence demonstrating that the mother

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

had once thrown A onto a couch comported with credible medical testimony and certain other evidence, which showed that the incident at issue on which the termination petition was based was not the only time that A had been abused.

Argued September 11—officially released November 7, 2018**

Procedural History

Coterminous petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected and to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and tried to the court, *Ginocchio*, *J.*; thereafter, the court amended the petition to terminate the parental rights of the respondent mother as to the minor child Lilyana L.; judgments adjudicating the minor children neglected and terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Karen Oliver Damboise, assigned counsel, for the appellant (respondent mother).

John E. Tucker, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon* and *Mildred Bauza*, assistant attorneys general, for the appellee (petitioner).

Rebecca A. Rebollo, for the minor child.

Opinion

MIHALAKOS, J. The respondent, Britney N., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect

** November 7, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to her minor child, Lilyana L.[1] On appeal, the respondent claims that the trial court erred when it determined, pursuant to General Statutes § 17a-112 (j) (3) (F), that the respondent committed an assault, through a deliberate, nonaccidental act that resulted in serious bodily injury to another child of the parent.[2] We affirm the judgment of the trial court.

The facts of this case involve the termination of the respondent's parental rights as to her daughter, Lilyana, which was based on the respondent's abuse of another child, Avah L. The following facts and procedural history are relevant to this appeal. This appeal arises from coterminous neglect and termination of parental rights petitions filed with respect to the respondent's minor children, Lilyana (born in May, 2015) and Avah (born in March, 2016).[3] On October 21, 2016, the petitioner filed petitions for the termination of the respondent's

[1] The respondent's parental rights were also terminated as to her minor child, Avah L. The respondent has not appealed from the trial court's judgment with respect to Avah. The parental rights of the respondent father were terminated only as to Avah. Because the father has not appealed from that judgment, we refer in this opinion to Britney N. as the respondent.

[2] The respondent also claims, on appeal, that the trial court abused its discretion in amending the termination of parental rights petition as to Lilyana to include § 17a-112 (j) (3) (C) as a basis for the termination of parental rights, and that the trial court erred when it determined, pursuant to that ground, that Lilyana had been denied, by reason of an act of commission or omission by the respondent, the care, guidance, or control necessary for the child's physical, educational, moral, or emotional well-being. The petitioner needed to prove only one of the grounds in § 17a-112 (j) (3) by clear and convincing evidence for the trial court to terminate the respondent's parental rights as to Lilyana. *See In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner of Children & Families* (U.S. October 1, 2018) (No. 17-1549). This court's holding that the trial court correctly determined that the petitioner satisfied § 17a-112 (j) (3) (F) as to the respondent is sufficient to uphold the termination of the respondent's parental rights as to Lilyana. We, therefore, decline to review the respondent's additional claims with regard to § 17a-112 (j) (3) (C).

[3] The respondent has a third minor child, Amelia B., whose father is Ruben B. Amelia lives with Ruben, and neither was involved in the underlying petitions.

parental rights as to Avah[4] and Lilyana. The termination petition as to Lilyana alleged, pursuant to § 17a-112 (j) (3) (F), that the respondent committed an assault, through a deliberate, nonaccidental act, that resulted in the serious bodily injury of another child of the parent.

Until October 7, 2016, the children resided with the respondent and Avah's father, William L., in an apartment on the second floor of a three-family house. The respondent and William were the children's primary caretakers, although outside health care professionals came to the apartment on a regular basis to help with the care of Avah, who suffered from small gestational age, acid reflux, and torticollis.

The petitioner filed the underlying petition following Avah's hospitalization on October 14, 2016. In its memorandum of decision, the trial court found the following facts regarding the events that transpired on that date: "[A]t approximately 5:40 p.m., police and emergency personnel responded to a 911 call . . . . The caller, who was [Avah's] father, [William], stated that he needed help, his baby was not breathing. Those who initially arrived at the scene described the infant, [Avah], as being nonreactive and nonresponsive. Her body was limp, and she was not able to move her arms or legs. . . . The child was taken to a nearby hospital. [Officer Mark Blackwell of the Bridgeport Police Department] spoke to the baby's father, [William], and asked [him] what happened. [William] responded that he was watching the baby after her mother, [the respondent], had left for work. He stated that he had to use the bathroom and, while in the bathroom, he left the baby on the bed in their bedroom. When he returned

[4] Avah's father, William L., was also named in the petition as to Avah, and his parental rights as to Avah ultimately were terminated. William's parental rights were not terminated as to Lilyana because, on May 18, 2017, the trial court found that William was not Lilyana's biological father.

he found the baby, lying on her back, on the floor. He proceeded to call for help."

At Yale New Haven Children's Hospital, doctors diagnosed Avah with a head trauma, which resulted in a subdural hemorrhage and retinal hemorrhages. Avah also had three leg fractures, which included two healing fractures and one acute fracture, and facial bruising. Three days after her admission to the hospital, Avah experienced seizures related to her head injury. Lisa R. Pavlovic, a pediatrician and child abuse specialist at Yale New Haven Children's Hospital, examined Avah after she was admitted to the hospital. The trial court credited Pavlovic's opinion "that Avah's injuries [were] due to severe physical abuse" and that "more than one episode of abuse took place."

On October 17, 2016, the petitioner invoked a ninety-six hour hold on behalf of Avah and Lilyana. See General Statutes § 17a-101g (f). On October 21, 2016, the petitioner filed ex parte motions for orders of temporary custody and neglect petitions on behalf of the children. On the same day, the court granted the petitioner's ex parte motions on the basis of its findings that the children were in immediate physical danger from their surroundings and that their continuing to remain in the home was contrary to the welfare of the minor children, and vested temporary custody of the children in the petitioner.

Christopher Loesche, an investigator from the Department of Children and Families, testified on behalf of the petitioner at trial. Loesche interviewed the respondent on October 14, 2016, while Avah was in the pediatric intensive care unit. The respondent told Loesche that she had noticed bruises on Avah during the last few months and that she believed the bruising was due to Nexium, a medication Avah was prescribed for acid reflux. The respondent also speculated that

Avah's bruising could have been caused by the child hitting her face against plastic toys attached to a swing in which she sometimes sat. The respondent told Loesche that she had reported Avah's bruising to Michelle Macchio, a visiting nurse who came to the apartment regularly, and that Macchio had consulted with Avah's pediatrician about the injuries.

Macchio, who treated Avah from April to October, 2016, testified about the bruising Avah experienced prior to her hospitalization. On October 3, 2016, Macchio observed a bruise on the top inner part of Avah's ear and the respondent informed her that Avah had a nosebleed. On October 6, 2016, the respondent sent Macchio a photograph of Avah with substantial bruising on her face. Macchio said the bruising could be a rare side effect of Nexium, but that she had "never seen anything like that . . . ." Concerned because of Avah's bruising, Macchio called Avah's pediatrician and scheduled an appointment for Avah the next morning. The respondent told Macchio that she had attended the appointment and that the doctor told her to discontinue the Nexium. Later, Macchio discovered that the respondent had not attended the appointment.

Detective Albert Palatiello of the Bridgeport Police Department testified on behalf of the petitioner about interviews he conducted with the respondent on October 24 and November 10, 2016. During the October 24 interview, the respondent said that she believed William could have caused Avah's injuries. She also told Palatiello that she believed Avah's injuries could have been caused by the Nexium and the toys attached to Avah's swing. During the November 10 interview, the respondent told Palatiello that she and William had been involved in one domestic violence incident in the past, and that William smoked marijuana on a daily basis

and had used heroin. The respondent described an incident in which Avah was crying and William yelled something to the effect of "will you shut the baby . . . up . . . ." The respondent also spoke of a time when William helped Avah blow her nose and, afterward, the respondent noticed that Avah's nose was bright red, which she thought was strange.

The court also heard testimony at trial from medical professionals who treated Avah or were familiar with her medical record. Six physicians, all of whom treated Avah at the time of her injuries or shortly thereafter, testified on behalf of the petitioner.[5] These witnesses provided substantial evidence that Avah's injuries were nonaccidental. Two physicians testified on behalf of the respondent: Joseph M. Scheller, a board certified pediatrician and child neurologist, and Jack Levenbrown, an expert in pediatric radiology. Scheller and Levenbrown testified that, based on Avah's medical records, her injuries were accidental or the result of a preexisting medical condition. The court found Scheller and Levenbrown's testimony unpersuasive[6] and after "carefully review[ing] and assess[ing] all the medical testimony presented during the trial . . . conclude[d] . . . that Avah was the victim of child abuse."

[5] The following physicians testified on behalf of the petitioner: Erin Bowen, Avah's pediatrician; Pavlovic, the pediatrician and child abuse expert at Yale New Haven Children's Hospital; Brendon Graeber, an expert in pediatric radiology; Michael L. DiLuna, chief of pediatric neurosurgery at Yale New Haven Hospital; Brian Smith, a pediatric orthopedic surgeon at Yale New Haven Hospital; and Kathleen Stoessel, an ophthalmologist at Yale New Haven Hospital.

[6] The trial court explained that it did not find Scheller and Levenbrown's testimony persuasive because they "never examined Avah, never consulted with the treating physicians, and never interviewed the respondent [or William] regarding Avah's injuries." The trial court went on to find: "[Scheller and Levenbrown] presented a piecemeal analysis of Avah's injuries that supported an agenda rather than a credible assessment of the totality of Avah's injuries. The more credible testimony presented at trial was by Dr. Bowen, Dr. Pavlovic, Dr. DiLuna, Dr. Stoessel, Dr. Smith and Dr. Graeber."

The court also heard testimony from those acquainted with the respondent and William, including their landlord, Allen Brooks, and Brooks' daughter. The court credited Brooks' testimony that the respondent and William were using drugs, and that Brooks constantly smelled marijuana in the hallway. Brooks also testified that he was concerned that the respondent and William were selling drugs from their apartment. Brooks' daughter testified that the respondent and William fought constantly, and that both could be aggressive at times. She also testified that, during the week before Avah's hospitalization, there were three consecutive nights that she heard Avah cry so hard that she thought the baby might hurt herself.

On November 15, 2017, after the close of evidence, the court, on its own motion, pursuant to Practice Book § 34a-1 (d), sought to amend the respondent's termination petition to include § 17a-112 (j) (3) (C) as a ground for termination as to Lilyana. The respondent objected to the motion and was given an opportunity to be heard on the issue. Ultimately, the court overruled the respondent's objection and amended the petition.

The court issued a thorough and thoughtful memorandum of decision on February 1, 2018, in which it found that the petitioner had proved, by clear and convincing evidence, grounds (C) and (F) of § 17a-112 (j) (3) as to Lilyana and ground (C) as to Avah. The trial court, therefore, terminated the respondent's parental rights as to Lilyana and Avah. The respondent appealed from the decision as to Lilyana only. Additional facts and procedural history will be set forth as necessary.

The respondent's first claim on appeal is that the trial court erred when it terminated her parental rights pursuant to § 17a-112 (j) (3) (F). Specifically, the respondent argues that the trial court improperly applied ground (F) and, alternatively, that there was

insufficient evidence for the court to find, pursuant to that ground, that she committed a deliberate, nonaccidental assault that resulted in the injury of Avah. We disagree.

We begin by setting forth the applicable standards of review. "Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of § 17a-112 (j) (3) [(F)] or its applicability to the facts of this case, however, our review is plenary." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner of Children & Families* (U.S. October 1, 2018) (No. 17-1549).

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the

statutory grounds." (Citation omitted; internal quotation marks omitted.) Id., 526.

One such statutory ground is set forth in § 17a-112 (j) (3) (F), which provides that a trial court may grant a petition for termination of parental rights if it finds by clear and convincing evidence that "the parent has killed through deliberate, nonaccidental act another child of the parent or has requested, commanded, importuned, attempted, conspired or solicited such killing or has committed an assault, through deliberate, nonaccidental act that resulted in serious bodily injury of another child of the parent . . . ."

The trial court terminated the respondent's parental rights as to Lilyana pursuant to § 17a-112 (j) (3) (F). The respondent first argues that the trial court could not have found that she committed a deliberate, nonaccidental assault on Avah because it was unable to determine whether she or William was responsible for Avah's injuries. This argument hinges on the trial court's statement that the respondent "[could not] be excluded as the source of any of the other injuries Avah sustained." The respondent cites *In re Brianna T.*, Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Docket Nos. U06-CP-05-005012A, U06-CP-05-005015A, U06-CP-05-005013A and U06-CP-05-005014A, 2009 WL 659196 (February 10, 2009), and *In re Egypt E.*, Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Docket Nos. H14-CP-13-010981A and H14-CP-13-010982A, 2015 WL 4005340 (June 1, 2015), rev'd, *In re Egypt E.*, 322 Conn. 231, 140 A.3d 210 (2016), in support of the proposition that § 17a-112 (j) (3) (F) cannot be satisfied when the court is unable to determine which of two parents abused a child. In *In re Brianna T.*, supra, 2009 WL 659196, *22, the court was unable to "determine from the evidence which of the two [parents] inflicted the fatal blow to [the child's] head" and, therefore, declined

to find that the child's father killed her through a deliberate, nonaccidental act. In *In re Egypt E.*, supra, 2015 WL 4005340, *18, the trial court found that § 17a-112 (j) (3) (F) was not satisfied as to the father because "clear and convincing evidence on the issue of the identity of the perpetrator [was] lacking." These cases, however, are distinguishable from the present case. In *both In re Brianna T.* and *In re Egypt E.*, the trial court was unable to determine whether one of two parents had any role in the child's abuse. In contrast, the court in the present case found that "[the respondent] and [William] . . . engaged in a course of conduct that makes them both the direct cause for Avah's serious bodily injuries."

The respondent argues that even if the trial court did not misinterpret § 17a-112 (j) (3) (F), there was insufficient evidence to establish that she committed a deliberate, nonaccidental assault on Avah. The trial court heard extensive evidence on which it based its finding that the respondent "was not just a party who simply stood by and watched her infant suffer serious injuries, but, rather, she was an active participant with regard to those injuries." The trial court relied on the following evidence in support of its determination that the respondent participated in Avah's abuse: "[The respondent's] deceptive behavior, coupled with the fact that there was medical testimony that the bruising on Avah's face was consistent with a slap mark made by a hand similar in size to that of [the respondent] . . . ." In addition to this evidence, the trial court heard a recording from a phone conversation William had with his sister, during which he said that the respondent once threw Avah onto a couch.[7] This evidence comports with credible medical testimony and other evidence

[7] William was incarcerated during this time, and his phone conversations were recorded by the Department of Correction.

that October 14, 2016, was not the only time that Avah was abused.

Moreover, the trial court was not convinced that the respondent was wholly uninvolved in the October 14, 2016 episode, stating: "[T]he court is troubled by the testimony that when [the respondent] left for work that day, she noted bruises on Avah's cheeks in the morning and a bruise on her forehead right before she left for work in the early evening. Within an hour the child was rushed to the hospital. There was testimony that [the respondent] was the primary caregiver for Avah. She was in close physical proximity to Avah when she sustained her serious physical injuries."

On the basis of the foregoing, we conclude that the trial court properly applied the law, and that its legal conclusion that the petitioner established the elements of § 17a-112 (j) (3) (F) is supported by clear and convincing evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

ALEXIS SANTOS *v.* COMMISSIONER OF CORRECTION (AC 40427)

Lavine, Sheldon and Bishop, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, sexual assault in the first degree and risk of injury to a child, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing to retain an expert witness to assist in his defense and by failing to present the testimony of certain fact witnesses. The habeas court rendered judgment denying the petition, concluding, inter alia, that the petitioner had failed to prove that his trial counsel's representation of him was deficient or that he was prejudiced by any aspect of her allegedly deficient performance. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court.

Held that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; the habeas court having thoroughly addressed the arguments raised in this appeal, this court adopted the habeas court's well reasoned decision as a statement of the facts and the applicable law on the issues.

Argued September 25—officially released November 13, 2018

Procedural History

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

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Alexis Santos, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that his trial counsel did not provide ineffective assistance by failing to retain an expert witness to assist in his defense and by failing to present the testimony of certain fact witnesses. We affirm the judgment of the habeas court.

The following procedural history, as set forth by the habeas court, is relevant to this appeal. "On September 24, 2012, in the Waterbury judicial district, in the matter of *State* v. *Santos*, Docket No. CR-11-401131, following a jury trial, the petitioner was convicted of four counts

of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) and one count of risk of injury to a child in violation of § 53-21 (a) (1). In docket number CR-11-402391, the petitioner was convicted of one count of sexual assault in the first degree, one count of risk of injury to a child in violation of § 53-21 (a) (2), one count of risk of injury to a child in violation of § 53-21 (a) (1) and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A). On November 30, 2012, the trial court, *Crawford*, *J.*, sentenced the petitioner to a total effective term of twenty years of incarceration followed by twenty years of special parole." This court affirmed the petitioner's conviction. See *State* v. *Santos*, 148 Conn. App. 907, 86 A.3d 1099, cert. denied, 311 Conn. 944, 89 A.3d 351 (2014).

The petitioner thereafter initiated this matter by the filing of his petition for a writ of habeas corpus. In his operative petition, he claimed that his trial counsel, Tashun Bowden-Lewis, rendered ineffective assistance. Following an evidentiary hearing, the habeas court rejected the petitioner's claims by way of a memorandum of decision filed April 5, 2017. The habeas court concluded that the petitioner had failed to prove that Bowden-Lewis' representation of him was deficient or that he was prejudiced by any aspect of her allegedly deficient performance, and thus denied his petition for a writ of habeas corpus. On April 21, 2017, the habeas court granted the petitioner's petition for certification to appeal.

On appeal, the petitioner claims that the habeas court erred in rejecting his claims of ineffective assistance of counsel. We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the habeas court should be affirmed. Because the habeas court thoroughly addressed the

arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issues. See *Santos* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-14-4005961-S, (April 5, 2017) (reprinted at 186 Conn. App. 110, A.3d). Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Brander* v. *Stoddard*, 173 Conn. App. 730, 732, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017).

The judgment is affirmed.

APPENDIX

ALEXIS SANTOS *v.* COMMISSIONER OF CORRECTION*

Superior Court, Judicial District of Tolland
File No. CV-14-4005961-S

Memorandum filed April 5, 2017

Proceedings

Memorandum of decision after completed habeas corpus trial to court. *Judgment for respondent.*

James E. Mortimer, assigned counsel, for the petitioner.

Eva B. Lenczewski, supervisory assistant state's attorney, for the respondent.

Opinion

OLIVER, J. The petitioner, Alexis Santos, brings this petition for a writ of habeas corpus, claiming that his criminal defense attorney provided him ineffective

* Affirmed. *Santos* v. *Commissioner of Correction*, 186 Conn. App. 107, A.3d (2018).

assistance in violation of the state and federal constitutions, and seeking to have his convictions vacated. Specifically, the petitioner claims, in his amended petition filed July 22, 2016, that his right to effective legal representation was denied in that his counsel, Attorney Tashun Bowden-Lewis, committed a number of errors at trial.

The petitioner claims that his right to effective legal representation at trial was denied in that his underlying trial counsel was constitutionally deficient in the following ways:

a. She did not retain, consult with and present the testimony of a mental health professional with an expertise in investigating and evaluating child sexual abuse allegations in order to:

1. Call into question the reliability of victim M.H.'s disclosures;

2. Call into question the reliability of victim Y.H.'s disclosure;

3. Rebut the testimony of prosecution witness Theresa Montelli concerning "common characteristics and behaviors" of sexually abused children;

4. Rebut the testimony of prosecution expert witness Theresa Montelli concerning the statistical probabilities of children and recantation;

5. Provide a consultation source to counsel so as to avoid eliciting damaging information on cross-examination concerning recantations;

6. Provide an alternative innocent explanation for false allegations; and

7. Rebut the credibility of the forensic interviewer re: failing to explore alternative innocent explanations.

b. She failed to adequately cross-examine, impeach and otherwise challenge the testimony of the victim M.H., concerning her motive, interest and bias against the petitioner;

c. She failed to adequately object to the introduction of M.H.'s forensic interview based on hearsay grounds;

d. She failed to adequately challenge the testimony of Y.H. concerning her motive, interest and bias against the petitioner;

e. She failed to adequately object to the introduction of Theresa Montelli's expert testimony;

f. She failed to adequately object, based on relevancy, to the testimony of Theresa Montelli concerning common characteristics and behaviors of sexually abused children;

g. She failed to adequately challenge the testimony of Theresa Montelli concerning her knowledge of statistical data in the field of child sexual abuse;

h. She failed to adequately challenge the testimony of O.S., the mother of the complaining witnesses;

i. She failed to investigate and introduce evidence of the petitioner's work history to challenge the victims' testimony as well as to challenge the notion of the petitioner's access to the victims;

j. She failed to properly object to prosecution witness Donna Meyer's testimony characterizing M.H.'s testimony as credible;

k. She failed to call Daisy Cruz as a witness in the defense case-in-chief;

l. She failed to call Claribel Santos, Carlos Santos and Tanya Wilcher–Lombardo as witnesses in the defense case-in-chief to challenge:

1. The victims' testimony re: exterior door locks on their bedroom doors;

2. The petitioner's access to the victims;

3. O.S.'s testimony re: her work history; and

4. The time frame during which the petitioner resided with the victims; and

m. She failed to present the trial court with supporting information as to the unavailability of Daisy Cruz so as to cause the trial court to allow the testimony of Ms. Cruz by either videoconference or deposition.

The respondent, the Commissioner of Correction, denies the allegations. The court heard the trial of this matter on the merits on September 13, October 24 and December 21, 2016. The petitioner called eight witnesses: himself, Attorney Bowden-Lewis, Tanya Lombardo, Jeffrey Cianciolo, Claribel Santos, Dayanara Santos, expert mental health witness David Mantell and expert legal witness Kenneth Simon. Despite repeated diligent attempts, the petitioner was unable to secure the testimony of Daisy Cruz. The petitioner entered into evidence a number of exhibits. The respondent called no witnesses and offered three exhibits. Based upon the credible evidence presented, the court finds the issues for the respondent and denies the petition.

I

PROCEDURAL HISTORY

On September 24, 2012, in the Waterbury judicial district, in the matter of *State* v. *Santos*, Docket No. CR-11-401131, following a jury trial, the petitioner was convicted of four counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) and one count of risk of injury to a child in violation of § 53-21 (a) (1). In

docket number CR-11-402391, the petitioner was convicted of one count of sexual assault in the first degree, one count of risk of injury to a child in violation of § 53-21 (a) (2), one count of risk of injury to a child in violation of § 53-21 (a) (1) and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A). On November 30, 2012, the trial court, *Crawford*, *J.*, sentenced the petitioner to a total effective term of twenty years of incarceration followed by twenty years of special parole.

The petitioner appealed from the underlying criminal judgment, and on March 24, 2014, the Appellate Court affirmed the conviction per curiam. *State* v. *Santos*, 148 Conn. App. 907, 86 A.3d 1099, cert. denied, 311 Conn. 944, 89 A.3d 351 (2014). On February 7, 2014, the petitioner initiated this matter by the filing of his petition for a writ of habeas corpus. The petitioner was assisted at trial by a Spanish language interpreter.

The allegations against the petitioner by victim M.H. include sexual contact by digital penetration on one occasion as well as nonsexual physical abuse. The allegations against the petitioner by Y.H. include repeated penile-vaginal, penile-anal and penile-oral sexual abuse.

II

LAW/DISCUSSION

A

Civil Matters—Generally
Standard of Proof

The standard of proof in civil actions, a fair preponderance of the evidence, is "properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind." (Internal quotation marks omitted.) *Cross* v. *Huttenlocher*, 185 Conn. 390, 394, 440 A.2d 952 (1981).

Burden of Proof

While the "plaintiff is entitled to every favorable inference that may be legitimately drawn from the evidence; and a party has the same right to submit a weak case as he has to submit a strong one . . . the plaintiff [must still sustain] his burden of proof on the contested issues of his complaint," and the defendant need not present any evidence to contradict it." (Citations omitted.) *Lukas* v. *New Haven*, 184 Conn. 205, 211, 439 A.2d 949 (1981). The general burden of proof in civil actions is on the plaintiff, who must prove all the essential elements of the cause of action by a fair preponderance of the evidence. *Gulycz* v. *Stop & Shop Cos.*, 29 Conn. App. 519, 523, 615 A.2d 1087, cert. denied, 224 Conn. 923, 618 A.2d 527 (1982). Failure to do so results in judgment for the defendant. Id.

Proceedings

"The [fact-finding] function is vested in the trial court with its 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 . . . ." (Internal quotation marks omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony. . . . It is the quintessential function of the fact finder to reject or accept certain evidence . . . ." (Internal quotation marks omitted.) *In re Antonio M.*, 56 Conn. App. 534, 540, 744 A.2d 915 (2000). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact]." *Smith* v. *Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981). "[N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of

witnesses and of the weight to be accorded [to] the testimony." (Internal quotation marks omitted.) *Toffolon* v. *Avon*, 173 Conn. 525, 530, 378 A.2d 580 (1977). "The trier is free to accept or reject, in whole or in part, the testimony offered by either party." *Smith* v. *Smith*, supra, 123. "The determination of credibility is a function of the trial court." *Heritage Square, LLC* v. *Eoanou*, 61 Conn. App. 329, 333, 764 A.2d 199 (2001).

Credibility

It is well established that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 155, 920 A.2d 236 (2007); see also *Dadio* v. *Dadio*, 123 Conn. 88, 92–93, 192 A. 557 (1937). Such observation may include all genuine and spontaneous reactions of the witness in the courtroom, whether or not on the witness stand, but only to the extent that they bear on the witness' credibility. *State* v. *McLaughlin*, 126 Conn. 257, 264–65, 10 A.2d 758 (1939). It is generally inappropriate for the trier of fact to assess the witness' credibility without having watched the witness testify under oath. *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111, 890 A.2d 104 (2006).

B

Habeas Corpus Matters

"The right to petition for a writ of habeas corpus is enshrined in both the United States constitution and the Connecticut constitution. See U.S. Const., art. I, § 9; Conn. Const., art. I, § 12. Indeed, it has been observed that the writ of habeas corpus holds an honored position in our jurisprudence. . . . The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . The writ has been described as a unique and extraordinary legal remedy. . . . It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." (Citations omitted; internal quotation marks omitted.) *Fine* v. *Commissioner of Correction*, 147 Conn. App. 136, 142–43, 81 A.3d 1209 (2013).

"A criminal defendant's right to the effective assistance of counsel . . . is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." (Citations omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). The petitioner has the burden to establish that "(1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Emphasis in original.) *Johnson* v. *Commissioner of*

Correction, 285 Conn. 556, 575, 941 A.2d 248 (2008), citing *Strickland* v. *Washington*, supra, 694. "A reasonable probability is one which is sufficient to undermine confidence in the result." (Internal quotation marks omitted.) *Vasquez* v. *Commissioner of Correction*, 111 Conn. App. 282, 286, 959 A.2d 10, cert. denied, 289 Conn. 958, 961 A.2d 424 (2008).

"To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), quoting *Strickland* v. *Washington*, supra, 466 U.S. 687. It is not enough for the petitioner to simply prove the underlying facts that show that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial. *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 845–46, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

Under the second prong of the test, the prejudice prong, the petitioner must show that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012).

When assessing trial counsel's performance, the habeas court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal

quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689. The United States Supreme Court explained: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id.

"In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Martin* v. *Commissioner of Correction*, 155 Conn. App. 223, 227, 108 A.3d 1174, cert. denied, 316 Conn. 910, 111 A.3d 885 (2015).

Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result." *Strickland* v. *Washington*, supra, 466 U.S. 686.

Evidence and Examination of Witnesses

"An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." (Internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). Similarly, "the presentation of testimonial evidence is a matter of trial strategy . . . ." (Citation omitted; internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 744, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

"The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." *Velasco* v. *Commissioner of Correction*, supra, 119 Conn. App. 172.

Pretrial Investigation

"The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when [s]he was conducting it. . . . The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." (Citations omitted; internal quotation marks omitted.) *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 858–59, 33 A.3d 819, cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

Retaining an Expert

The Appellate Court has recently reiterated "that there is no per se rule that requires a trial attorney to

seek out an expert witness." *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 811, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). "In *Peruccio* v. *Commissioner of Correction*, 107 Conn. App. 66, 943 A.2d 1148, cert. denied, 287 Conn. 920, 951 A.2d 569 (2008), however, [the Appellate Court] noted that in some cases, 'the failure to use any expert can result in a determination that a criminal defendant was denied the effective assistance of counsel.' Id., 76." *Stephen S.* v. *Commissioner of Correction*, supra, 811. However, the decision not to call any witness, including an expert witness, "does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Eastwood* v. *Commissioner of Correction*, 114 Conn. App. 471, 481, 969 A.2d 860, cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009); see also *Harris* v. *Commissioner of Correction*, 134 Conn. App. 44, 57–58, 37 A.3d 802 (failure to call expert regarding a child's competency to testify not error where no evidence expert testimony would have weakened the child's testimony), cert. denied, 304 Conn. 919, 41 A.3d 306 (2012).

1

Attorney Tashun Bowden-Lewis

Attorney Bowden-Lewis testified to her training and experience as a criminal defense attorney in the state of Connecticut, including her continuing annual and semiannual training in defending against criminal sexual abuse allegations. Specifically, counsel testified to "many different trainings" at the Office of the Public Defender, including protocols, forensic interviews and expert witnesses. She further testified to prior representation of defendants accused of similar offenses with multiple victims. The court found Ms. Bowden-Lewis to be a credible witness, both in terms of her manner

of testifying as well as the substance of her testimony and its factual foundation. Counsel testified to having received all discovery in the case, including witness statements. She further testified to utilizing the services of Tony Smith, the public defender's office investigator to perform several tasks, including interviewing potential witnesses Daisy Cruz, Tanya Lombardo and Carlos, Claribel and Dayanara Santos. Underlying counsel also interviewed a number of these witnesses. Counsel testified to unsuccessful attempts to speak with the victims and their mother.

Counsel interviewed Daisy Cruz, who was willing to testify. Ms. Cruz did not believe the allegations of sexual assault; however, she disclosed to underlying counsel that the petitioner sexually assaulted her when she was six years old. Counsel could not recall whether Ms. Cruz told her she overheard Y.H. recant the allegations against the petitioner; however, counsel did testify that she considered Ms. Cruz to be a "crucial" defense witness and told her as much. Despite accurately describing calling Daisy Cruz as a defense witness as "risky," underlying counsel and the petitioner made great efforts to have her testify at trial.

Shortly after the witness interview, Ms. Cruz relocated to Florida. Prior thereto, counsel served Ms. Cruz with a subpoena and asked her to remain in Connecticut to testify at trial. After Ms. Cruz left Connecticut, Attorney Bowden-Lewis testified, she stayed in "constant contact" with the witness through e-mail and had plans to fly Ms. Cruz and her children back to Connecticut so that she could testify.

Counsel testified that Ms. Cruz informed her that a "high-risk pregnancy" prevented her from traveling to Connecticut to testify at trial. Counsel testified to having arranged for the testimony of Ms. Cruz by audiovisual device from Florida and filing a motion to present

that testimony with the trial court. The motion was denied.

Counsel testified to reviewing the evidence with the petitioner, including witness statements. She further testified to viewing the forensic interview of M.H. Counsel discussed with the petitioner additional information regarding M.H., including her sexual activity with a boyfriend. The petitioner had no difficulties understanding counsel during their meetings, even without an interpreter.

Counsel described the theory of defense as "attack[ing] the elements of the crime." In that regard, the defense called as witnesses the petitioner and his wife. Counsel further anticipated cross-examination of the victims. Counsel made the strategic decision, after interviewing them, not to call the petitioner's family members as witnesses as they had "nothing concrete to add" to the defense case. Specifically as to Tanya Lombardo, counsel testified to the strategic decision not to call Tanya Lombardo as a witness, as she had no "relevant" or "material" information to aid the defense case. As to Claribel Santos, counsel testified that she did not call her as a trial witness, as the only information Ms. Santos had to contribute was that she did not believe the allegations. This is not the type of evidence that would be relevant at trial. Counsel recognized that the case would hinge on witness credibility based on the lack of physical evidence.

Attorney Bowden-Lewis testified credibly to having consulted in the past with mental health professionals with an expertise in child sexual abuse issues. Counsel testified that she did not consult an expert in the underlying matter based on her prior trial experience, consultations and familiarity with the prosecution's expert witness, Theresa Montelli, from prior cases. Counsel testified credibly that she reviewed a transcript of the

state's expert witness' trial testimony. As to Ms. Montelli, counsel testified credibly to a strategic decision not to object to her "general testimony," as it only applied broadly to the case. She further testified that Ms. Montelli's statistical testimony as to recantation rates comported with her own understanding derived from independent research. As to Donna Meyer, counsel testified that she did not feel that Ms. Meyer's testimony was improper "bolstering" of M.H., otherwise she would have objected. Counsel further testified to familiarity with the protocols of a forensic interview and saw nothing suggestive or coercive in the video interview.

Regarding the entry of the forensic interview into evidence, counsel testified credibly to the strategic decision to allow the entire video into evidence, as M.H., in the video, brought out evidence that she felt would be helpful to the defense, specifically an alternative source of sexual knowledge and actual prior sexual activity with her boyfriend. Counsel testified credibly and realistically that, although she did not want the entire forensic video entered into evidence, there did not exist the option to "pick and choose bits and pieces" of the video to enter into evidence. Counsel testified to balancing the damaging evidence in the video with the evidence favorable to the defense. The record shows that M.H. had to acknowledge lying to the jury in prior testimony when she was recalled to the witness stand. As to other potential areas of cross-examination of M.H., counsel testified to wanting to cross-examine sexual assault victims on the "root" of the sexual assault case only, and not "frivolous" issues, as challenging a witness on every conceivable inconsistency could diminish the defense case and distract from the larger inconsistencies. Additionally, counsel testified to a strategic decision not to cross-examine M.H. on her hospitalization and suicide attempt, as it is "very risky," and could "elicit sympathy" from the jury. Counsel testified

credibly and accurately that a less vigorous, "delicate" examination of child/teen sexual assault victims is often necessary, as it could alienate the jury.

Regarding the petitioner's "work history," counsel testified credibly that the petitioner described to her his work history during the relevant time period as working "under the table" and working "inconsistently." Counsel further testified that, although the petitioner's wife brought her some documents associated with the petitioner's work history, the petitioner provided no documentation to support a claim of consistent, full-time work during the relevant time period. Regardless, counsel testified, that, as the petitioner lived in the home with the victims and the prosecuting authority asserted broad divers dates as to the crimes, it was "tough to pin down" or alibi a time frame to dispute the petitioner's access to the victims. Counsel testified to relying on the petitioner's trial testimony in support of his denials and claimed lack of access due to a busy work schedule.

2

Tanya Lombardo

Ms. Lombardo, the petitioner's niece, testified for the petitioner. Admittedly, Ms. Lombardo testified that when she spoke to underlying counsel in a telephone interview from Georgia, she told counsel that she "didn't really know much" about the case. Though generally credible, she had no independent knowledge about the case and had no information that this court finds would affect the jury's assessment of the elements of the several charges in the two cases or impact the credibility of the prosecution witnesses. For example, she had no information as to the victims' upset after the petitioner moved out of the home and no information, other than simply not believing the allegations,

which might persuade a fact finder. Ms. Lombardo testified that she never saw exterior chain locks on the victims' bedroom doors.

3

Jeffrey Cianciolo

Mr. Cianciolo, who owned a painting company, was the petitioner's employer for a number of years, from approximately spring of 2004 or 2005 through 2009. The witness could not quite specify the years of employment, resulting in a three- to five-year employment range. The witness testified that the petitioner worked "full-time" hours with the exception of the "slow" winter months and a "really slow" period in 2007–2008. Mr. Cianciolo, who has a 2010 felony conviction, testified that he has no employment records available for the years 2004–2008. He further testified that he has had no access to the potentially relevant records since 2010. As to the year 2004, Mr. Cianciolo can only say that the petitioner worked for him for approximately four to five years and that he had no recollection of the precise years of the petitioner's employment. The witness brought no documents with him, and the petitioner offered no employment records during the habeas trial. Mr. Cianciolo, as the best witness presented at the habeas trial in support of a defense theory of limited access to the victims, presented loose and unconvincing testimony for the petitioner. The evidence on this subject was not sufficiently bolstered by either Claribel Santos or Tanya Lombardo. This court finds that the petitioner has failed to establish the existence of convincing evidence to disprove consistent and sufficient access to perpetrate these sexual assaults over the course of years.

4

Claribel Santos

Claribel Santos, the petitioner's sister, testified at the habeas trial. She testified to being interviewed by under-

lying counsel and being told that she would not testify, as her testimony was not especially helpful. Ms. Santos testified that she saw no chain locks on the victims' bedroom doors. Much like Tanya Lombardo, Claribel Santos had no information that this court finds would have been especially probative of either the credibility of the state's witnesses or the elements of the several offenses. Ms. Santos had general information on the petitioner's work schedule, but also potentially harmful information on domestic violence between the victims' mother and the petitioner.

5

Dayanara Santos

The petitioner's wife, Dayanara Santos, testified at the habeas trial. She testified to having contact with underlying counsel throughout the course of the litigation. She testified to providing certain work-related documentation to counsel as well as information about alleged threats to the petitioner from the victims' mother. She also claims to have been made aware of the specific allegations against the petitioner by being present at court appearances and having been provided with copies of witness statements by the petitioner. She further testified in a somewhat contradictory fashion that she was not made aware of the details of the allegations until after trial. Mrs. Santos failed to provide this court with relevant or probative information as to the claims asserted in the petition.

6

Petitioner

The petitioner testified at the habeas trial. He testified that there was nothing unusual in his most recent prearrest contacts with the victims or their mother. He testified that, postarrest, he was made aware of the claims against him by reviewing the victims' statements with

underlying counsel. He was also made aware of the content of M.H.'s forensic interview, as he was provided a transcript by counsel. The petitioner testified to appropriate preparation, interaction and discussion with Attorney Bowden-Lewis, including reviewing potential trial witnesses.

Unlike Tanya Lombardo and Claribel Santos, the petitioner, who lived in the home, testified that he installed chain locks on the exterior of the victims' bedroom doors, although he testified that he did so on "orders" from the victims' mother. The petitioner testified that the chain locks were on the doors for only two days as part of a pattern of abuse (described by the petitioner as "spankings") visited upon the victims and him by their mother. The petitioner positioned himself as the victims' protector in this regard.

Based on the whole of his habeas trial testimony, the petitioner failed to demonstrate a clear recollection of his criminal trial, including the witnesses and their testimony. The petitioner also clearly lacked a command of the anticipated testimony of potential witnesses, including Daisy Cruz, who he testified would supply the jury with information about the petitioner's "problems" with the victims' mother, as opposed to a recantation by Y.H. More specifically as to Ms. Cruz, the petitioner had no idea how her testimony would assist in the defense against the sexual assault allegations, testifying: "That's a question I ask myself." Oddly, the petitioner acknowledged memory problems, testifying that they arose for the first time during the criminal litigation.

Regarding his work history, the petitioner testified that he worked under the table for Jeffrey Cianciolo. He further acknowledged that there would be no employment records of his undocumented work, with the possible exception of checks, the means by which

he was occasionally paid. The petitioner attributed any discrepancy between his habeas trial testimony and the information he reported to the Office of Adult Probation in his presentence investigation to the absence of a Spanish language interpreter at the interview. The petitioner's testimony contradicted that of his former employer when he testified that he was never unemployed for long periods of time. There was nothing in the testimony of the petitioner that called into question the level of legal representation he received from underlying counsel.

7

David Mantell, Ph.D.

Doctor Mantell is a clinical psychologist specializing in child abuse and neglect issues. The doctor testified to his excellent credentials and extensive experience in the area of child abuse and neglect investigations and forensic interviews. The witness was accepted by the court as an expert in the assessment and investigation of child sexual abuse.

The doctor's testimony consisted mainly of a discussion of the reasons children report or fail to report sexual abuse. In sum, although Dr. Mantell's testimony was somewhat interesting, this court finds that in this particular case, it did not add much probative value for the fact finder.

Dr. Mantell testified to having viewed the forensic interview of Donna Meyer. He testified that the interview was "rushed," which, according to the witness, was her usual style. He further testified that Ms. Meyer's interview had a very short "rapport building phase." Although he testified that the interview omitted two phases from the interview that, although they are part of best practices, are not part of the RATAC protocol: conversational rule review and narrative training. The

witness testified that the aforementioned steps can be "skipped" with "older witnesses"; there was no clarification as to the age range for "older" witnesses.

The doctor was complimentary of the interview in several respects, testifying that "many" of Ms. Meyer's questions were appropriate and that Ms. Meyer's interview style was also appropriate, described by him as "calm" and "welcoming," showing interest in the witness and asking open-ended questions which invited narrative responses. This court disagrees with the witness' characterizations of Ms. Meyer's questions on the "core issues" relating to the sexual assault as leading or a "forced choice." The court does not find the offer of two opposing possibilities to an interview subject to be leading in that it does not suggest an answer. On the other hand, this court does question an interview style that might actively and directly suggest that an interview subject might be "wrong" about a response, if he or she is "really sure" about a response or if he or she has a "grudge" against the claimed abuser.

To the extent this court agrees with the witness that a "positive duty" of forensic interviewers exists to explore possible alternative explanations for the sexual abuse allegations, including an inquiry as to whether the subject has not disclosed all sexual touching, clarifying the accuracy of the material provided and exploring other potential sources of the subject's sexual knowledge, Dr. Mantell testified that Ms. Meyer "seemed to consider" that M.H. may have been seeking to divert attention from her sexual behavior with her boyfriend.

As to the testimony of Theresa Montelli, Dr. Mantell's testimony of the various motives for children to both report abuse when it did not occur and deny abuse when it did occur may have been as harmful as it was helpful to the defense. This court finds noteworthy and probative of the credibility of this witness the extent

to which he was willing to engage in speculation and surmise on direct examination, while refusing to speculate and insisting that an issue be "well investigated" before he could offer a response on cross-examination. "Mere conjecture and speculation are not enough to support a showing of prejudice." (Internal quotation marks omitted.) *Hamlin* v. *Commissioner of Correction*, 113 Conn. App. 586, 596, 967 A.2d 525, cert. denied, 291 Conn. 917, 970 A.2d 728 (2009). An expert's opinion may not be based on surmise or conjecture. *State* v. *Nunes*, 260 Conn. 649, 672–74, 800 A.2d 1160 (2002). Finally, his description and explanation of the data relating to percentages of false allegations and recantation rates, if allowed to come before the jury, could easily have been turned to the prosecuting authority's advantage.

Taken as a whole and placed in the context of the entirety of the evidence adduced at the habeas trial, this court finds that the petitioner has failed to establish the constitutionally deficient performance of underlying counsel in not consulting with a mental health expert. Additionally, this court does not find deficient performance surrounding the testimony of Theresa Montelli or Donna Meyer. Even if the response provided to a question is damaging to the defense, the court must assess the performance of counsel as a whole. The in-trial decision of a criminal defense attorney cross-examining a witness to ask or not ask one particular question should be subject to analysis in the habeas context only in the rarest of circumstances. *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 132, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Accordingly, these claims fail.

8

Attorney Kenneth Simon

Ken Simon, an extremely well-qualified and experienced criminal defense attorney, testified as an expert

in criminal defense for the petitioner. He testified to extensive experience in the litigation of child sexual abuse cases. Although Attorney Simon had some quibbles with certain areas of the representation of underlying counsel and was very "troubled" by one question in particular, it is the duty of this court to assess the level of representation as a whole. Taking counsel's representation as a whole, this court does not find it constitutionally deficient. This court also finds it troubling and probative of the lack of foundation for the opinion of the witness that he was not supplied with the entire transcript of the habeas trial testimony of Claribel Santos during the preparation for his testimony. His opinion on the impact of her testimony, therefore, is not fully informed. Cf. *State* v. *John*, 210 Conn. 652, 677, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989).

During closing arguments, the petitioner withdrew several claims: C, E, F, J, K and M of the amended petition. The court will only note, therefore, that having considered the merits of those claims in the preparation of this decision, the court finds that the petitioner has failed to establish both deficient performance and prejudice. As these claims have been withdrawn, no further explication from this court is necessary. As to the portion of claim L that references the failure to call Carlos Santos, Mr. Santos having failed to testify in this matter and there being insufficient evidence to discern what he would have added to the criminal defense case, this claim fails.

Regarding the cross-examination of the victims in this case, the court does not find deficient performance. The petitioner has failed to demonstrate the reasonable probability that doing so would have resulted in a more favorable outcome, rather than alienating the jury by evoking additional sympathy for the complainants. "[C]ross-examination is a sharp two-edged sword and

more criminal cases are won by not cross-examining adverse witnesses, or by a very selective and limited cross-examination of such witnesses, than are ever won by demolishing a witness on cross-examination." (Internal quotation marks omitted.) *State* v. *Clark*, 170 Conn. 273, 287–88, 365 A.2d 1167, cert. denied, 425 U.S. 962, 96 S. Ct. 1748, 48 L. Ed. 2d 208 (1976). As to M.H., counsel's examination and strategic decision not to object to the entry of the forensic video resulted in the jury being made aware of the untruthfulness of some of her testimony as well as her sexual activity.

Counsel's strategic decision not to challenge the victim's testimony on every potential inconsistency on cross-examination is a sound one. "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." (Internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, supra, 119 Conn. App. 172. It can be considered a valid strategy in the context of this case not to prolong the testimony of potentially sympathetic witnesses with lengthier cross-examination when counsel has determined that there is little to be gained from additional questioning. There is insufficient probative or persuasive evidence of motive, interest or bias against the petitioner by the victims, other than that properly occasioned by being sexually assaulted.

Additionally, as to O.S., the mother of the victims, the petitioner has failed to demonstrate both deficient performance and prejudice. The petitioner has failed to adduce credible evidence of bias, motive or interest against the petitioner, other than that occasioned by being the mother of two children sexually and physically abused by him, especially in the context of the long delay between the separation and disclosures. The petitioner presented contradictory and equivocal evidence as to the collateral issue of O.S.'s work history. Further, this court does not find that the potentially devastating evidence of painting the petitioner as a

hard-drinking philanderer who does not meet his child support obligations in an effort to manufacture a defense of animosity would have been helpful to the defense. Finally, the evidence makes clear that the petitioner had sufficient access to the victims to commit these offenses several times over. Accordingly, these claims fail.

III

CONCLUSION

Based upon a review of the entire record, this court finds that the petitioner has failed to demonstrate constitutional deficiencies in the investigation, preparation and trial of the underlying matter. It is not the case that every criminal conviction is due to ineffective legal representation. The petitioner has also failed to demonstrate counsel's deficiencies in the examination of the several named witnesses. The petitioner has failed to demonstrate a reasonable probability that inquiry of those witnesses into areas not covered during the underlying evidentiary proceedings would have yielded a different, more favorable, result for him. "Mere conjecture and speculation are not enough to support a showing of prejudice." (Internal quotation marks omitted.) *Hamlin* v. *Commissioner of Correction*, supra, 113 Conn. App. 596. Additionally, the petitioner has failed to demonstrate both deficient performance and prejudice by the absence of the listed potential defense witnesses. The petitioner has also failed to establish the need for counsel to retain, consult with, or retain a mental health professional as part of trial preparation. There has been no showing as to what additional benefit would have been derived from such efforts.

Considering the foregoing, the court finds that the petitioner has failed to rebut the presumption of competence in the circumstances of this case. The court denies the petition for a writ of habeas corpus. Judgment shall enter for the respondent.

FRANK P. CANNATELLI *v.* STATEWIDE GRIEVANCE COMMITTEE (AC 39703)

Elgo, Bright and Flynn, Js.

Syllabus

The plaintiff attorney appealed to the trial court from the decision of the reviewing committee of the defendant Statewide Grievance Committee directing the disciplinary counsel to file a presentment against the plaintiff for his alleged violation of certain Rules of Professional Conduct. The trial court granted the defendant's motion to dismiss the appeal and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion to dismiss and determined that it lacked subject matter jurisdiction over the appeal; this court has determined previously that an order of presentment is an initial step in disciplinary proceedings against an attorney and that the committee's decision directing that a presentment be filed in Superior Court is interlocutory in nature and not a final judgment from which an appeal to the Superior Court may be filed, the plaintiff's claim that he was aggrieved by the order of presentment implicated the issue of standing and had no bearing as to whether the order of presentment constituted a final judgment for purposes of appeal, and the plaintiff's reliance on federal case law for the proposition that federal law permits his interlocutory appeal because it arises out of a violation of his constitutional rights was unavailing, as the case law was inapposite in that it had no import on the issue of whether a party properly can take an interlocutory appeal to the Superior Court from an order of presentment.

Argued October 11—officially released November 13, 2018

Procedural History

Appeal from the decision of the defendant's reviewing committee directing the disciplinary counsel to file a presentment against the plaintiff, brought to the Superior Court in the judicial district of New Haven, where the court, *Miller*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Frank P. Cannatelli, self-represented, the appellant (plaintiff).

Brian B. Staines, chief disciplinary counsel, with whom, on the brief, was *Beth L. Baldwin*, assistant chief disciplinary counsel, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, Frank P. Cannatelli, appeals from the judgment of the Superior Court dismissing his appeal from a decision of the defendant, Statewide Grievance Committee, and from the court's subsequent denial of his motion to reargue the judgment of dismissal. On appeal, the plaintiff claims that the court improperly determined that it lacked subject matter jurisdiction over his appeal for lack of an appealable final judgment. We affirm the judgment of the Superior Court.

The following procedural history is relevant to this appeal.[1] The statewide bar counsel filed a grievance complaint, dated July 28, 2014, against the plaintiff, an attorney, alleging that he overdrafted funds from his IOLTA account.[2] After an audit and a full hearing, the reviewing committee found by clear and convincing

[1] Although the appendix of the defendant's appellate brief substantially is comprised of documents purportedly evincing the grievance proceedings, those documents were not before the Superior Court and, thus, are not part of the Superior Court record. Nevertheless, because the underlying procedural history is uncontested, we take judicial notice of the disciplinary proceeding, which stems from the grievance proceedings, brought against the plaintiff in the Superior Court; see *Disciplinary Counsel* v. *Cannatelli*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060188-S; and the filings therein contained. See *Lyons* v. *Citron*, 182 Conn. App. 725, 728 n.4, 191 A.3d 239 (2018) (Appellate Court may take judicial notice of files of Superior Court in any case).

[2] Rule 1.15 (a) (5) of the Rules of Professional Conduct provides in relevant part: " 'IOLTA account' means an interest—or dividend—bearing account, established by a lawyer or law firm for clients' funds at an eligible institution from which funds may be withdrawn upon request by the depositor without delay. . . ."

evidence that the plaintiff committed unethical conduct and violated rules 1.15, 1.3, and 8.4 of the Rules of Professional Conduct, as well as Practice Book § 2-27. On November 20, 2015, the reviewing committee, pursuant to Practice Book § 2-35 (i), ordered that the plaintiff be presented to the Superior Court. On February 3, 2016, the Chief Disciplinary Counsel filed a presentment against the plaintiff. See *Disciplinary Counsel* v. *Cannatelli*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060188-S.[3]

On February 1, 2016, the plaintiff filed an appeal to the Superior Court from the decision of the reviewing committee that ordered presentment, claiming, among other things, violations of his constitutional rights. On February 16, 2016, the defendant filed a motion to dismiss the plaintiff's appeal on the ground that the Superior Court lacked subject matter jurisdiction because the order of presentment is not an appealable final judgment. On March 28, 2016, the plaintiff filed an objection arguing that the court had jurisdiction, pursuant to 42 U.S.C. § 1983, because the order of presentment was being challenged on constitutional grounds.

On June 20, 2016, the court concurrently granted the defendant's motion to dismiss and overruled the plaintiff's objection. The court, relying upon *Miniter* v. *Statewide Grievance Committee*, 122 Conn. App. 410, 998 A.2d 268, cert. denied, 298 Conn. 923, 4 A.3d 1228 (2010), and *Rozbicki* v. *Statewide Grievance Committee*, 157 Conn. App. 613, 115 A.3d 532 (2015), concluded that an "order of a presentment has been clearly found to be wholly interlocutory and it cannot properly be the basis of an appeal." The court also concluded that the "[p]laintiff has not presented the court with any

[3] As of the date of oral argument before this court, the hearing on the merits of the presentment against the plaintiff had not occurred. See *Disciplinary Counsel* v. *Cannatelli*, supra, Superior Court, Docket No. CV-16-6060188-S.

persuasive authority that [42 U.S.C. § 1983] controls the attorney grievance process in any way." On July 6, 2016, the plaintiff filed a motion to reargue the judgment of dismissal, renewing his argument posited in his March 28, 2016 objection. On September 22, 2016, the court summarily denied the plaintiff's motion to reargue. This appeal followed.

On appeal, the plaintiff argues that the court improperly determined that it lacked subject matter jurisdiction over his appeal for lack of an appealable final judgment. We disagree.

This court's decisions in *Miniter* and *Rozbicki* are dispositive of the plaintiff's appeal to this court. In both cases, this court, in holding that an order of presentment is not a final judgment for the purposes of appeal, stated: "An order of presentment is an initial step in disciplinary proceedings against an attorney. Following the filing of a presentment complaint, a hearing on the merits is held after which the court renders judgment on the presentment complaint. See Practice Book § 2-47 (a). The committee's decision directing that a presentment be filed in Superior Court is interlocutory in nature and not a final judgment from which an appeal to the Superior Court lies.

"[The] interlocutory order is not immediately appealable under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), because it neither terminates a separate and distinct proceeding, nor so concludes the rights of the parties that further proceedings cannot affect them. Following an order of presentment by the committee, a presentment complaint is filed, and the matter continues in the Superior Court until judgment is rendered on the presentment complaint." (Internal quotation marks omitted.) *Rozbicki* v. *Statewide Grievance Committee*, supra, 157 Conn. App. 616–17; see *Miniter* v. *Statewide Grievance Committee*, supra, 122 Conn. App. 413–14.

On the basis of the foregoing, we conclude that the Superior Court in the present case properly determined that it lacked subject matter jurisdiction over an appeal from the order of presentment because such an order is not a final judgment for the purposes of appeal. Although the plaintiff in his brief on appeal to this court attempts to distinguish the holdings of *Miniter* and *Rozbicki* from the present case, we are unpersuaded. First, the plaintiff argues that he has been aggrieved by the order of presentment because the publication of the notice of presentment damages his reputation. Even if we assume this to be true, it does not change our analysis. The determination as to whether the plaintiff has been aggrieved by a judgment is an issue of standing; see *Arciniega* v. *Feliciano*, 329 Conn. 293, 301, 184 A.3d 1202 (2018); which is entirely distinct from the determination as to whether a judgment is final for the purposes of appeal.[4] See *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 83–84, 191 A.3d 983 (2018).

Second, the plaintiff, relying upon *Miller* v. *Washington State Bar Assn.*, 679 F.2d 1313 (9th Cir. 1982), argues that 42 U.S.C. § 1983 permits the present interlocutory appeal because it arises out of a violation of his constitutional rights. In *Miller*, the court principally held that a federal court has jurisdiction to entertain a § 1983 claim that alleges a constitutional challenge stemming from a disciplinary action taken by a state bar association where no such review is available as of right in the state courts. Id., 1314–18. We hold that *Miller* is inapposite because it has no import on whether a party properly can take an interlocutory appeal from an order of presentment to the Superior Court. Accordingly, we

[4] The plaintiff likewise argues on appeal that the court erred by not affording him an evidentiary hearing on the disputed issue as to whether he was aggrieved. We reject this argument because, as previously outlined, standing is an issue collateral to the determination as to the existence of a final judgment.

reject the plaintiff's attempt to distinguish the present case from *Miniter* and *Rozbicki*.

Therefore, we conclude that the Superior Court did not err by dismissing the plaintiff's appeal and did not abuse its discretion when it denied his subsequent motion to reargue because it properly determined that it lacked subject matter jurisdiction over the appeal.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* DARIUS ARMADORE (AC 40481)

Lavine, Sheldon and Harper, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting of the victim, the defendant appealed, claiming, inter alia, that the trial court abused its discretion in granting the state's motion to join his case for trial with that of T, who also was involved in the shooting. The defendant and T had driven to a café, where T fatally shot the victim several weeks after a drive-by shooting during which the victim had shot and wounded T. C, the mother of T's son, went to the hospital where T had been taken and saw the defendant, who she had never seen or met, and heard him make statements that she interpreted as a vow to get back at the people who had shot T. C later learned the defendant's identity and identified him at trial as the man she overheard at the hospital. A few hours after the shooting of the victim, T dropped the defendant off at the apartment that the defendant shared with his then girlfriend, E, where the defendant told E that he had shot someone. *Held*:

1. This court declined to review the defendant's unpreserved claim that the trial court committed plain error in granting the state's motion to join his and T's cases for trial, which was based on the defendant's assertion that the joinder of the cases substantially prejudiced him because the jury had heard certain evidence that was allegedly inadmissible as to the defendant; the defendant's claim, which differed from his claim at trial that his defenses and that of T were antagonistic because each had made statements that could prove harmful to the other, did not present an extraordinary situation in which the alleged error was so obvious as to affect the fairness and integrity of and public confidence in the judicial proceedings, as both the defendant's and T's cases arose from the same incident, virtually all of the state's testimonial, documentary, physical and scientific evidence would have been admissible against

the defendant and T if they were tried separately, and their defenses were not antagonistic.

2. The defendant could not prevail on his claim that the trial court violated his right to confrontation when it permitted testimony by a state's firearms examiner about his examination of and conclusions as to certain firearms evidence that previously had been examined by another state's examiner who died prior to the trial, and, thus, was not available for cross-examination; the only inculpatory conclusions or statements regarding the firearms evidence were made in court by the firearms examiner, who did not rely on the deceased examiner's report, which was not admitted into evidence, but conducted his own physical examination of and formulated his own conclusions about the evidence, and was cross-examined extensively by the defendant.

3. The defendant could not prevail on his unpreserved claim that the trial court improperly permitted C to make an in-court identification of him in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him; although C's identification of the defendant was improper under the recent requirement by our Supreme Court in *State* v. *Dickson* (322 Conn. 410) that first time in-court identifications implicate due process protections and must be prescreened by the trial court, the admission of C's identification was harmless beyond a reasonable doubt in light of the entire record, including the strength of the state's case against the defendant, without the evidence of C's identification, and the trial court's instruction to the jury as to how it should weigh identification evidence.

4. The defendant's claim that the trial court improperly admitted into evidence testimony as to a certain phone conversation was unavailing, the defendant's bald objection to the testimony, absent any articulation of the basis for his objection, having been insufficient to preserve his claim for review.

5. The defendant could not prevail on his claim that the trial court improperly admitted as a prior consistent statement certain testimony from the mother of E, about his alleged confession to E; the defendant's claim, which was based on his assertion that there was no context to E's statement that he had confessed to her and no indication of what caused her to reach that conclusion, ignored the question that immediately followed the challenged portion of the mother's testimony, which provided the context that the defendant claimed was missing.

Argued May 15—officially released November 13, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed*, *J.*, granted

the defendant's motion to dismiss the charge of conspiracy to commit murder and granted the state's motion to consolidate the case for trial with that of another defendant; thereafter, the matter was tried to the jury before *A. Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

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

Opinion

SHELDON, J. The defendant, Darius Armadore, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims (1) that the trial court abused its discretion in granting the state's motion to join his case with the case of his codefendant, Gerjuan Rainer Tyus; (2) that he was deprived of his constitutional right to confrontation when the state's firearms examiner was permitted to testify regarding the findings of another firearms examiner, who was deceased and thus unavailable to testify at trial; (3) that he was deprived of a fair trial when he was identified for the first time in court by Cindalee Torres without a prior nonsuggestive identification; and (4) that the court abused its discretion by admitting certain hearsay statements into evidence.[1] We affirm the judgment of the trial court.

[1] The defendant also claims that the court erred when it admitted testimony and documentary evidence of cell phone data, absent any objection by the defendant or Tyus, without qualifying the witness as an expert or holding a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), to determine its reliability. Because this claim is evidentiary in nature, and the defendant failed to preserve it at trial, we decline to review it. See *State* v.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In early December, 2006, Tyus was involved in an ongoing dispute with Todd Thomas regarding a piece of jewelry that Thomas' brother had given to Tyus. Thomas demanded that Tyus give him the jewelry, but Tyus refused to do so unless Thomas paid him $10,000.

On December 3, 2006, there was a drive-by shooting near Tyus' residence on Willetts Avenue in New London. In that incident, Thomas, who was a passenger in a white Lexus that was registered to his wife, fired several gunshots at Tyus with a .38 caliber firearm, striking him in the leg and the back. Tyus returned fire at Thomas, firing five gunshots with a nine millimeter firearm. Four .38 caliber cartridge casings and five nine millimeter cartridge casings were recovered from the scene of the shooting on Willetts Avenue. Later that day, while Tyus was at a hospital being treated for his wounds, the defendant, who was a close friend of Tyus, was at the hospital waiting for news of Tyus' condition, and was overheard to say, "we're gonna get them niggas . . . ."

At approximately 7 p.m. on December 22, 2006, the defendant and Tyus went to Boston to visit family and pick up three girls in a silver Chevrolet Impala that Tyus had rented on December 15, 2006. When one of the three girls refused to return to Connecticut with them, the defendant and Tyus returned to Connecticut with the other two girls.

Later that evening, at approximately 11 p.m. on December 22, 2006, Thomas arrived at Ernie's Café on Bank Street in New London. Shortly after midnight on that evening, while Thomas was outside Ernie's smoking a cigarette, he was shot in the head. A light skinned African-American male was observed fleeing from the

Turner, 181 Conn. App. 535, 549–55, 187 A.3d 454, cert. granted on other grounds, 330 Conn. 909, A.3d (2018).

place where Thomas fell, running first down Bank Street toward the corner of Golden Street, then up Golden Street to a municipal parking lot, where he entered the passenger's side of a silver car that had been waiting there with its motor running. As soon as the fleeing man entered the waiting vehicle, it sped away. Thomas was transported to Lawrence + Memorial Hospital, where he was pronounced dead on arrival.

Later, at approximately 12:45 a.m., the defendant and Tyus arrived at Bella Notte, a nightclub in Norwich. Tracking information on records produced by their cell service providers established that their three cell phones—Tyus had two cell phones in his possession and the defendant had one—had been brought from Boston to New London at approximately 11:45 p.m. All three phones activated cell towers in New London, in the vicinity of Ernie's, minutes before a 911 call was received reporting the shooting outside of Ernie's. Thereafter, between 12:30 and 12:42 a.m., the three cell phones were taken from New London to Norwich, where they activated a cell tower in close proximity to Bella Notte.[2] A few hours later, at approximately 4 a.m., Tyus dropped the defendant off at the apartment that he shared with his then girlfriend, Ritchae Ebrahimi. After arriving at the apartment, the defendant told Ebrahimi that he had shot someone that night.

One nine millimeter cartridge casing was recovered from the scene of Thomas' December 23, 2006 shooting outside of Ernie's. A comparison of that cartridge casing to the five nine millimeter cartridge casings recovered from the scene of the defendant's December 3, 2006 shooting on Willetts Avenue revealed that all six had been fired from the same firearm.

On November 20, 2012, the defendant and Tyus were both arrested in connection with the shooting death of

[2] The defendant and Tyus claimed that they had been at Bella Notte when Thomas was shot and killed in New London.

Thomas on charges of murder in violation of § 53a-54a, and conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a. The conspiracy charges against both defendants were later dismissed on the ground that they were barred by the statute of limitations. The state thereafter filed long form informations charging the defendant and Tyus with murder, both as a principal and as an accessory, in violation of General Statutes §§ 53a-8 and 53a-54a (a). The cases were subsequently joined for trial, then tried together before a single jury, which returned guilty verdicts as to both defendants without specifying whether such verdicts were based on principal or accessorial liability. The court sentenced the defendant to a term of sixty years of incarceration. This appeal followed.[3]

I

The defendant first claims that the court abused its discretion in granting the state's motion to join his case with Tyus' case for trial.[4] We disagree.

On April 7, 2015, the state filed a motion, pursuant to Practice Book § 41-19, for joinder of the defendant's and Tyus' cases for trial. The state argued that joinder of the two cases would promote judicial economy because, as the court ruled, "virtually all of the witnesses [it] would call in [the defendant]'s trial would be called in the trial of [Tyus]," and the physical and scientific evidence that it would seek to introduce in both cases would be identical. The state further argued that the respective defenses of the defendant and Tyus

[3] Tyus also challenged his conviction. We addressed Tyus' appeal in a separate opinion. See *State* v. *Tyus*, 184 Conn. App. 669, A.3d (2018).

[4] The defendant also claims that the court erred in failing to sever the two cases as the trial progressed and that the spillover effect of the evidence clearly prejudiced the defendant. The defendant did not object to any of the evidence that he now claims prejudiced him, nor did he request a limiting instruction regarding that evidence. His claim in this regard is therefore not preserved and we decline to review it.

were not antagonistic, and thus that neither would suffer substantial injustice if their cases were tried together.

The defendant objected to the state's motion for joinder on the ground that the defenses of the defendant and Tyus were antagonistic because "there are several statements made by each defendant, each of which in itself could prove harmful to the other defendant at a trial" and that he would "try to throw Mr. Tyus under the rhetorical bus as often as possible . . . ."

On October 6, 2015, the court orally granted the motion, explaining its ruling as follows: "The court finds that joinder of the cases will clearly advance judicial economy in this case. Virtually all of the witnesses called in one trial would be called in the trial of the other. The physical and the scientific evidence would also be virtually identical. Moreover, joinder would not substantially prejudice the rights of the defendants. Based on the court's review of the statements of the defendants as set forth by the state in its memorandum, it appears that the defenses are not irreconcilable or antagonistic. Both have admitted being with the other on the night in question, and the statements of each do not implicate the other." The court thus found that a joint trial would not be unfairly prejudicial, and so it granted the state's motion for joinder.

The defendant claims that the joinder of his case with Tyus' case was substantially prejudicial to him because the jury heard evidence of "the long-established feud and previous incidents of gun violence between Tyus and Thomas," which he claimed "was inadmissible as it pertained to [him] because there was no evidence that the defendant was at all inculpated in either the feud or previous shootings." Because the defendant did

not assert these arguments at trial,[5] his claim is not preserved. He nevertheless argues that his claim should be reviewed for plain error.[6]

"It is well established that the plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that . . . requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"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. . . .

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed

[5] In fact, contrary to his argument opposing joinder, the defendant did not point the finger at Tyus as being the perpetrator of the crime for which they were both on trial. As noted herein, they both maintained that they were together at Bella Notte in Norwich when Thomas was shot and killed in New London.

[6] It is noteworthy that the defendant did not object to the admission of the evidence of the feud and the December 3, 2006 shooting.

error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 199–200 n.2, 180 A.3d 595 (2018).

Because this case does not present a truly extraordinary situation in which the alleged error is so obvious that it would affect the fairness and integrity of and public confidence in the judicial proceedings, we decline to afford the defendant relief under the plain error doctrine.

II

The defendant next claims that the court erred in admitting the testimony of the state's firearms examiner, James Stephenson, because Stephenson's opinions regarding the firearms evidence in this case were assertedly based on the findings and conclusions of the primary examiner of the evidence in this case, Gerald Petillo, who died before trial. The defendant claims that Stephenson did not conduct "his own truly independent evaluation of the evidence," but, rather that he relied on Petillo's findings and conclusions in formulating his conclusions. The defendant argues that because Stephenson's testimony was based on Petillo's findings and conclusions, and Petillo was unavailable for cross-examination, Petillo's findings and conclusions constituted testimonial hearsay, and the admission of evidence on the basis of that hearsay, specifically, Stephenson's testimony, violated his constitutional right to confrontation. We disagree.

In *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. Id., 68. The

United States Supreme Court's subsequent decisions in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), extended the holding in *Crawford* to apply the confrontation clause in the specific context of scientific evidence.

In *Melendez-Diaz* the court held that certificates signed and sworn to by state forensics analysts, which set forth laboratory results of drug tests that were done by those analysts and which were admitted into evidence in lieu of live testimony from the analysts themselves, were testimonial within the meaning of *Crawford*, and thus that they were improperly admitted because the defendant did not have an opportunity to cross-examine those analysts. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 311.

In *Bullcoming*, the court held that the confrontation clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying to the results of a blood alcohol concentration test he performed, through the in-court testimony of another scientist "who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming* v. *New Mexico*, supra, 564 U.S. 652. In short, an accused has the right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Id.

Thus, in *Crawford*, *Melendez-Diaz* and *Bullcoming*, the trial court's violation of the defendant's confrontation rights occurred because it admitted certain inculpatory statements that were testimonial in nature and were made against the defendant by an individual who

was not subject to cross-examination. See *State* v. *Buckland*, 313 Conn. 205, 215–16, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). Those circumstances are not present in this case.

Here, the defendant and Tyus filed a joint motion in limine to preclude Stephenson's testimony on the ground that his testimony would not be based on his own independent examination of the firearms evidence in this case, but, rather, would be based on the examination of that evidence by Petillo, who was not available for cross-examination by the defendant, and thus that his constitutional right to confrontation would be violated if Stephenson were permitted to so testify. The court held a hearing outside of the presence of the jury on the defendants' motion to preclude Stephenson's testimony. Stephenson testified that when firearms comparisons are made, the technical reviewer would "go in, using the comparison microscope, look at the comparisons himself to make a determination as to whether the conclusions were correct that were going to be issued in the report." The technical reviewer would make an independent determination concerning the comparisons that were made. Stephenson acted as the technical reviewer of Petillo's conclusions in this case. In that capacity, Stephenson examined the firearms evidence himself and formulated his own opinions as to the evidence he was examining. In this case, Petillo had performed various tests on the firearms evidence that had been collected, and authored a report containing his findings and analysis. Stephenson physically examined the cartridge cases in this case and in the incident on December 3, 2006. He did not merely verify what Petillo had concluded, but came to his own conclusions on the basis of his examination of the evidence before him.

The trial court concluded that "this case is in stark contrast to [*Melendez-Diaz* and *Bullcoming*]. This is not a situation in which the state attempts to elicit testimony from the deceased examiner. . . . [Stephenson] conducted his own independent examination and reached his own independent conclusions. He is clearly entitled to testify as to those findings because he is available and he made conclusions and he will be cross-examined." On that basis, the court concluded that Stephenson's testimony was admissible. We agree.

Here, the only inculpatory conclusions or statements regarding the firearms evidence that were presented to the jury were made by Stephenson in court. Stephenson did not rely on Petillo's report in formulating his own conclusions, nor was Petillo's report admitted into evidence. Although Stephenson reviewed Petillo's report, he conducted his own physical examination of the evidence in this case and came to his own conclusions, which happened to be consistent with Petillo's conclusions. The defendant cross-examined Stephenson extensively. Because the defendant was afforded a full opportunity to confront Stephenson regarding his examination of, and conclusions regarding, the firearms evidence in this case, his claim that he was denied his constitutional right to confrontation is without merit.

III

The defendant next claims that he was deprived of a fair trial when he was identified for the first time in court by Cindalee Torres, in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him. We are not persuaded.

The state called Torres, who is the mother of Tyus' son, to testify in this case. She testified that she received a telephone call on the afternoon of December 3, 2006, telling her that Tyus had been shot. Torres went to Lawrence + Memorial Hospital to see if Tyus was okay,

but she was not permitted to see him right away. While she was waiting in the hospital lobby, Torres saw the defendant, whom she had never seen or met, and heard him say, "we're gonna get them niggas, or, I'm gonna get them niggas." Observing that the defendant was excited and upset, Torres interpreted the defendant's statement to be a vow to get back at the people who had just shot Tyus. She later learned the defendant's identity and identified him at trial as the man she saw and overheard at the hospital.

The defendant claims that the court improperly permitted Torres to make an in-court identification of him in the absence of a showing that she previously had made a nonsuggestive out-of-court identification of him. The defendant did not object to Torres' identification of him at trial, and thus he requests review of this claim under the doctrine set forth in *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), the *Golding* doctrine provides that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The defendant bears the responsibility for providing a record that is adequate for review

of his claim of constitutional error. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. . . . Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation . . . exists and whether it . . . deprived the defendant of a fair trial." (Citations omitted.) Id., 240–41.

We find that this claim is reviewable under *Golding* because the record before us is adequate to review it and the claim is of constitutional magnitude. We conclude, however, that the defendant cannot prevail under *Golding* because he is unable to demonstrate that a constitutional violation exists and that it deprived him of a fair trial.

In arguing that his due process rights were violated, the defendant relies on *State* v. *Dickson*, 322 Conn. 410, 426, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), in which our Supreme Court held that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." The court explained: "[A]ny first time in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation . . . . Although we recognize that, when the witness could have identified the defendant in a nonsuggestive procedure, a first time in-court identification does not constitute an actual violation of due process principles, this court has an obligation to adopt procedures that will eliminate the risk that the defendant will be deprived of a constitutionally protected right by being identified in court by a witness who could not have identified the defendant in a fair

proceeding. Indeed, it is well established that courts have the duty not only to craft remedies for actual constitutional violations, but also to craft prophylactic constitutional rules to prevent the significant risk of a constitutional violation." (Emphasis omitted.) Id., 426 n.11.

Our Supreme Court went on to explain that certain in-court identifications were not subject to the prophylactic rules set forth in *Dickson*. The court stated: "In cases in which there has been no pretrial identification . . . and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court . . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue. . . . For example, in cases in which the trial court determines that the only issue in dispute is whether the acts that the defendant admittedly performed constituted a crime, the court should permit a first time in-court identification. In cases in which the defendant concedes that identity or the ability of a particular witness to identify the defendant as the perpetrator is not in dispute, the state may satisfy the prescreening requirement by giving written or oral notice to that effect on the record.

"If the trial court determines that the state will not be allowed to conduct a first time identification in court, the state may request permission to conduct a nonsuggestive identification procedure, namely, at the state's option, an out-of-court lineup or photographic array, and the trial court ordinarily should grant the state's request. . . . If the witness previously has been unable to identify the defendant in a nonsuggestive identification procedure, however, the court should not allow a second nonsuggestive identification procedure unless the state can provide a good reason why a second bite

at the apple is warranted. If the eyewitness is able to identify the defendant in a nonsuggestive out-of-court procedure, the state may then ask the eyewitness to identify the defendant in court. . . .

"If the trial court denies a request for a nonsuggestive procedure, the state declines to conduct one, or the eyewitness is unable to identify the defendant in such a procedure, a one-on-one in-court identification should not be allowed. The prosecutor may still examine the witness, however, about his or her observations of the perpetrator at the time of the crime, but the prosecutor should avoid asking the witness if the defendant resembles the perpetrator." (Citations omitted; footnote omitted.) Id., 445–47. The court clarified that, if a defendant did not dispute a witness' ability to identify him, but merely disputed such witness' testimony on other grounds, the witness would be "properly permitted to make a first time in-court identification of the defendant" without violating due process. Id., 446 n.28.

With respect to the applicability of the procedural rules announced in *Dickson*, our Supreme Court stated that they applied "to the parties to the present case and to all pending cases. It is important to point out, however, that, in pending *appeals* involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances . . . . If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis in original; footnote omitted.) Id., 451–52.

Here, although Torres did not identify the defendant as the individual who shot and killed Thomas, the crime with which the defendant was charged and on which he was being tried, she identified him as the person she saw at the hospital on December 3, 2006, and whom she overheard saying, "we're gonna get them niggas, or, I'm gonna get them niggas." Torres believed that the defendant was referring to getting revenge on the ones who had shot Tyus earlier that day. The defendant contends that Torres' identification of him was unreliable because she had never met him or spoken to him before she claimed to have seen him at the hospital on the night of December 3, 2006. The defendant, however, testified that he was in fact present in the hospital lobby on the evening of December 3, 2006, because Tyus, to whom he referred as "his brother," had been shot earlier that day. The defendant was not asked directly whether he made the statement attributed to him by Torres, but he admitted that he had been upset that night and testified: "Everybody's gonna be upset if your family member gets injured; of course you're going to be upset at that time." Despite the facts that the defendant acknowledged that he was present at the hospital on the night that Tyus was shot, and that he was admittedly upset by the attack on his "brother," there was no showing that Torres had identified him in a nonsuggestive procedure prior to identifying him in court, and, therefore, Torres' identification runs afoul of *Dickson*. We thus turn to an examination of the strength of the state's case against the defendant, in the absence of the allegedly improper identification of him by Torres, to determine if that identification was harmless beyond a reasonable doubt.

It is undisputed that the defendant and Tyus were together on the night that Thomas was shot and killed. Thomas had shot Tyus just three weeks prior to his own death. Even without hearing Torres' account of

the defendant's expressed desire to get back at Thomas, the jury could have inferred such an animus based simply on the fact that Thomas had attacked the defendant's close friend and "brother," Tyus. The police spoke to the defendant several times about the December, 2006 incidents prior to his arrest. During one of those discussions, the defendant told the police that he and Tyus went to Boston on the night of December 23, 2006, in a silver Impala that Tyus had previously rented. The state presented evidence that, later that night, a man fitting the defendant's description ran from the scene of Thomas' shooting to a nearby municipal parking lot and got into the passenger's side of a silver vehicle that was there waiting for him. The description of that vehicle matched the Impala that had been previously rented by Tyus. Although the defendant denied, at trial, ever having been in the Impala, his DNA was retrieved from the passenger side of that vehicle.

The state also presented evidence undermining the defendant's alibi. Although the defendant and Tyus insisted that they were at Bella Notte in Norwich when Thomas was shot and killed in New London, the cell phone location data contradicted their claim. According to that data, the defendant's cell phone and Tyus' two cell phones were in New London, where and when Thomas was shot, and then were taken to Norwich thereafter, arriving at Bella Notte at approximately 12:45 a.m. That information is consistent with the testimony of Eduardo Guilbert that the defendant and Tyus did not arrive at Bella Notte that night until after he had received word that Thomas had been shot and killed. A few hours after Thomas was shot and killed, the defendant told Ebrahimi that he had shot someone earlier that morning.

The firearms evidence presented by the state showed that the gun that Tyus used to fire back at Thomas on December 3, 2006, was the same weapon used to shoot

and kill Thomas just three weeks later. On the basis of the defendants' insistence that they were together on the night Thomas was shot and killed, the jury could have inferred that the defendant was involved, as either the principal or an accessory, in the shooting death of Thomas.

In light of our review of the entire record, including the strength of the state's case against the defendant, without the evidence of Torres' in-court identification of the defendant, and the trial court's detailed instruction to the jury as to how it should weigh the identification evidence, we conclude that the admission of that identification into evidence was harmless beyond a reasonable doubt, and thus that the defendant's claim fails under the fourth prong of *Golding*.[7]

IV

The defendant next claims that the court erred in admitting into evidence certain hearsay statements by two of the state's witnesses. "A trial court's decision to admit evidence, if premised on a correct view of the law . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; emphasis omitted; internal quotation

[7] The defendant claims that the admission of Torres' in-court identification of him violated his right to due process under both the federal and state constitutions. In the recently released decision in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018), our Supreme Court held that our state constitution affords greater protection than the federal constitution with respect to the admissibility of eyewitness identifications. Because we conclude that the identification of the defendant by Torres should have been excluded, but that the admission of that identification was harmless, our analysis of the defendant's claim is not impacted by *Harris*.

marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653, 137 A.3d 1 (2016). With this in mind, we address the defendant's hearsay claims in turn.

A

The defendant first challenges the propriety of the admission into evidence of the testimony of Guilbert, who was called to testify by the state. Guilbert testified that, on the night of December 22, 2006, he had been at Bella Notte. At some point that night, Guilbert received a phone call from Charlene Thomas.[8] When the state asked Guilbert what Charlene Thomas told him during that phone call, counsel for the defendant objected. Although the basis for the objection was not stated, the state told the court: "I'm going to claim it on the effect of the hear—and will explain what Mr. Guilbert then did." The court ruled: "Given that claim, I'm going to overrule the objections and allow the testimony." Guilbert then testified that Charlene Thomas told him that Todd Thomas, Guilbert's childhood friend, had just been shot. Charlene Thomas suggested that Guilbert call Todd Thomas' wife if he knew her phone number. Guilbert called Todd Thomas' wife and told her to get to the hospital. Approximately fifteen or twenty minutes after Guilbert made that phone call, he saw the defendant enter Bella Notte with another man. He had not seen them at Bella Notte before that time. The defendant greeted Guilbert and offered to buy him a drink. Guilbert declined because he was getting ready to leave. Upon finishing his drink, Guilbert left Bella Notte and drove to Lawrence + Memorial Hospital, where he paid his respects to Todd Thomas' family, and then left.

On appeal, the defendant claims that he objected at trial on the ground that Guilbert's testimony as to what

[8] Charlene Thomas is not related to Todd Thomas.

Charlene Thomas told him over the phone on the night in question was hearsay, and that "her testimony was admitted specifically for the truth of Charlene Thomas' statement as a means to discredit the defendants' alibis and not to show its effect on Guilbert . . . ." In other words, Guilbert's testimony proved that the defendant and Tyus did not arrive at Bella Notte until after Thomas was shot. Although the defendant objected to Guilbert's testimony as to what he was told during the phone call that he allegedly received before the defendant and Tyus arrived at Bella Notte, he did not state the basis for that objection. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of an objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Bell*, 113 Conn. App. 25, 40, 964 A.2d 568, cert. denied, 291 Conn. 914, 969 A.2d 175 (2009).

Here, the defendant's bald objection to Guilbert's testimony, absent any articulation of the basis for his objection, was insufficient to preserve his claim for review. We thus decline to review it.

B

The defendant also claims that the court erred in admitting into evidence the testimony of Ebrahimi's mother, Robin Deetz, as a prior consistent statement. We disagree.

During the defendants' cross-examination of Ebrahimi, she testified that she did not tell the police detectives that the defendant told her during the early morning hours of December 23, 2006, that he had shot someone earlier that night until they threatened her with imprisonment or the removal of her children from her care. In eliciting that testimony, the defendant suggested that Ebrahimi's disclosure of the defendant's alleged confession to her was coerced, and therefore fabricated.

After Ebrahimi testified, the state called Deetz to the witness stand. The state asked Deetz about a conversation she had had with Ebrahimi at the end of 2006, and asked if Ebrahimi ever "relay[ed] to you any information concerning [the defendant] making a statement about somebody being shot." The defendant then objected to the state's next question, which asked Deetz what Ebrahimi had told her in the earlier conversation, on the ground that Deetz' response would be hearsay. The state argued that it was not offering the testimony for the truth of the matter asserted, but, rather, "as a prior consistent statement to rehabilitate a witness after there's been a claim of recent fabrication." The court overruled the defendant's objection, and Deetz responded that Ebrahimi "was a mess" at the end of 2006 because Armadore had shot someone. Neither the defendant nor Tyus cross-examined Deetz.

On appeal, the defendant claims that the court erred in admitting Deetz' testimony into evidence on the ground that it constituted a prior consistent statement.

"Prior consistent statements of a witness are generally regarded as hearsay and are not admissible at trial, either for their truth or for the purpose of rehabilitating a witness' damaged credibility. . . . This rule, however, is not absolute. The trial court, within its discretion, may admit a prior consistent statement if offered to rehabilitate a witness who has been impeached . . . by a claim of recent fabrication . . . . When a prior consistent statement is admitted under [that exception], it is admitted to affect credibility only and not to establish the truth of the statement."[9] (Citations omitted; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 803–804, 709 A.2d 522 (1998).

Here, the state offered Deetz' testimony, and the court admitted that testimony, as a prior consistent statement to rebut the defendant's suggestion that Ebrahimi fabricated the defendant's alleged confession to her because she was threatened by the police. The defendant claims that Deetz' testimony was not consistent with Ebrahimi's because "Deetz testified to a conclusion apparently reached by her daughter that the defendant had shot someone," whereas Ebrahimi testified that the defendant *told her* that he had shot someone. The defendant argues that "there is no context to the comment and no indication of what caused Ebrahimi to reach [the] conclusion" to which Deetz testified—that the defendant had shot someone. In so arguing, the defendant ignores the question that immediately preceded the challenged portion of Deetz' testimony, which provides the context that the defendant claims to be missing. The state asked Deetz: "[W]hat did [Ebrahimi] tell you that [the defendant] had told her?" The defendant's argument that Deetz' testimony was not consistent with Ebrahimi's due to a lack of context is without merit, and,

[9] We note that the court correctly instructed the jury on the limited purpose of a prior consistent statement. That instruction has not been challenged on appeal.

therefore, his claim that the court erred in admitting it as a prior consistent statement must fail.

The judgment is affirmed.

In this opinion the other judges concurred.