STATE OF CONNECTICUT *v.* JAYEVON BLAINE
(AC 36832)

Sheldon, Prescott and Beach, Js.

Syllabus

Convicted of the crime of conspiracy to commit robbery in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from his involvement in an alleged conspiracy with four other individuals to rob a drug dealer, which resulted in the shooting death of the victim. At trial, the four coconspirators each testified that they, together with the defendant, had devised a plan to rob the drug dealer with a weapon and that the defendant would carry the weapon. In its jury charge, the court instructed on the elements of the substantive crime of robbery in the first degree, including that one or more participants in the robbery be armed with a deadly weapon, and that to find the defendant guilty of conspiracy, the jury had to find that he specifically intended to commit the substantive crime. On appeal, the defendant claimed, inter alia, that the trial court had committed plain error in failing to instruct the jury, in accordance with *State* v. *Pond* (138 Conn.

App. 228), regarding the requisite intent necessary to find him guilty of conspiracy to commit robbery in the first degree. This court affirmed the judgment of the trial court, concluding that the defendant had waived his claim and that relief under the plain error doctrine was unavailable. Thereafter, the defendant filed a petition for certification with our Supreme Court, which granted the petition and remanded the case to this court for consideration of his claim of plain error. On remand, *held* that the defendant could not prevail on his claim that the trial court committed plain error in failing to instruct the jury that to find him guilty of the subject conspiracy, it had to find that he intended and specifically agreed that a participant in the robbery would be armed with a deadly weapon: because the trial court charged the jury that to find the defendant guilty, it had to find that he specifically intended to commit the crime of robbery in the first degree and the armed with a deadly weapon requirement had been included in the definition of the underlying crime given by the trial court, it was at least arguable that the instruction logically required the jury to find that the defendant had agreed that a participant in the robbery be armed with a deadly weapon and, thus, it was fairly debatable whether the court's instruction as to the requisite intent was erroneous; moreover, even if the instruction constituted obvious and debatable error, it did not amount to manifest injustice, as there was ample evidence that the defendant had agreed to the robbery and that one of the participants would use a weapon, and, therefore, this court could not conclude that any error in the subject instruction affected the fairness and integrity of and public confidence in the judicial proceedings so as to necessitate reversal.

Argued October 4, 2017—officially released February 6, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, attempt to commit robbery in the first degree, felony murder and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kahn*, *J.*; verdict and judgment of guilty of conspiracy to commit robbery in the first degree, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the defendant filed a petition for certification to appeal with our Supreme Court, which granted the petition and remanded the case to this court for consideration of the defendant's claim of plain error. *Affirmed*.

Katherine C. Essington, for the appellant (defendant).

Adam E. Mattei, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Howard S. Stein*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. This case returns to us on remand from our Supreme Court with direction to consider the claim of plain error raised by the defendant, Jayevon Blaine, in light of *State* v. *McClain*, 324 Conn. 802, 155 A.3d 209 (2017).[1] The defendant previously appealed from the judgment of conviction of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2).[2] We held in our prior opinion that the waiver of a claim of instructional error pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), precluded review of the claim of plain error. *State* v. *Blaine*, 168 Conn. App. 505, 517–19 and n.5, 147 A.3d 1044 (2016), remanded in part, 325 Conn. 918, 163 A.3d 618 (2017). In *State* v. *McClain*, supra, 815, our Supreme Court held that a *Kitchens* waiver did not preclude a claim of plain error. We now consider the defendant's claim that the trial court committed plain error by incorrectly instructing the jury on the requisite intent to find him guilty of conspiracy to commit robbery in the first degree. We conclude that the record

[1] See *State* v. *Blaine*, 325 Conn. 918, 163 A.3d 618 (2017).

[2] General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ."

General Statutes 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (2) is armed with a deadly weapon . . . ."

does not support the claim that the pertinent instruction constituted plain error. Accordingly, we affirm the judgment of the trial court.

The following facts are relevant to this appeal.[3] After the killing of the victim, Kevin Soler, on Bretton Street in Bridgeport, the defendant was arrested and charged with murder in violation of General Statutes § 53a-54a (a), attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (2), felony murder in violation of General Statutes §53a-54c, and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a) (2). As we stated in our prior opinion: "[F]our people . . . together with the defendant, were charged with, inter alia, conspiracy to commit robbery in the first degree.

"All four of the defendant's coconspirators, [Jihad] Clemons, Craig Waddell, Hank Palmer, and Mike Lomax, who had known each other for several years but had only recently been introduced to the defendant, testified for the state at the defendant's trial. The crux of their testimony, as it related to the charge of conspiracy, was that they and the defendant had entered into an agreement to rob Robert Taylor, a drug dealer.[4]

"Clemons was the first of the conspirators to testify. He testified that on September 6, 2009, he and Waddell visited their friend, Braxton Gardner, and decided to buy some marijuana. To that end, Gardner made a phone call to Taylor, a drug dealer with whom he was familiar. Gardner met Taylor a block or two from his house and completed the purchase. Clemons, Waddell,

[3] See generally *State* v. *Blaine*, supra, 168 Conn. App. 506–507.

[4] Waddell was the only witness who gave a statement prior to the trial that he had seen the defendant shoot the victim. He testified during the trial, however, that he never actually saw the shooting, but that he stood at some distance from the defendant and only heard gunshots. The jury was allowed to hear testimony that Waddell had changed his statement.

and Gardner smoked the marijuana that they had purchased, and then Gardner left to attend his younger brother's football game.

"Shortly thereafter, Clemons and Waddell decided that they wanted more marijuana, so they called Gardner to get Taylor's telephone number. Clemons then called Taylor, who met them near Gardner's house and sold them more marijuana. While Clemons and Waddell were smoking the newly purchased marijuana, they walked to Palmer's house and discussed robbing Taylor. Lomax arrived at Palmer's house, and the four men discussed their plan to rob Taylor.

"Clemons, Waddell, and Lomax left Palmer's house—leaving Palmer behind—and drove Lomax' car, a white Honda, to [DeAndre] Harper's house to ask Harper if he would like to be involved in their planned robbery of Taylor. They found Harper outside on his porch with his cousin, the defendant. Harper and the defendant approached Lomax' vehicle, where they discussed the robbery. Clemons, Waddell, and Lomax first asked Harper if he wanted to participate in the robbery, but Harper declined. They then asked the defendant if he wanted to participate, and he agreed to do so. The defendant got into Lomax' vehicle, and the four men returned to Palmer's house.

"When they arrived at Palmer's house, the five men spent forty-five minutes further discussing their plan to rob Taylor. They agreed that Clemons would call Taylor to set up a meeting and that the defendant would rob him using a nine millimeter handgun, while Waddell stood nearby. Lomax would drive the car to the place of the meeting, and Palmer would stay in the car with Lomax. They agreed that they would steal Taylor's drugs, car, and cell phone.

"At some point after dark, the men went to meet Taylor. Taylor had told Clemons that he was running

late because he had a flat tire. Clemons parted company with the others to go home because he was late for his curfew. Meanwhile . . . Taylor got a ride to the rendezvous with his friend, Soler, and Soler's girlfriend, [Priscilla] LaBoy. Soler parked at the agreed upon location, and a person appeared; Soler and the person conversed because Soler had agreed to conclude the sale on Taylor's behalf. The other person then shot Soler." (Footnote added.) *State* v. *Blaine*, supra, 168 Conn. App. 508–10. Soler was later found dead by the Bridgeport police. Id., 507.

The jury found the defendant guilty of conspiracy to commit robbery in the first degree but not guilty of the other charges. On appeal to this court, the defendant claimed that (1) there was insufficient evidence to sustain his conviction of conspiracy to commit robbery in the first degree,[5] (2) the court erred in denying his request for a jury instruction on third-party culpability, and (3) the court erred in failing to instruct the jury according to the principles set forth in *State* v. *Pond*, 138 Conn. App. 228, 50 A.3d 950 (2012), aff'd, 315 Conn. 451, 108 A.3d 1083 (2015). See *State* v. *Blaine*, supra, 168 Conn. App. 507, 517. In affirming the trial court's judgment, we concluded that there was sufficient evidence to sustain the defendant's conviction and that any error resulting from the court's failure to provide a third-party culpability instruction was harmless. Id., 507, 517. As to the defendant's third claim, that there was plain error under *Pond*, we concluded that plain error relief was unavailable. Id., 518.

[5] The defendant sought to bolster his claim by stressing that the jury found him not guilty of the substantive crimes charged, yet guilty of conspiracy, where the evidence regarding the agreement also suggested that the defendant was the shooter. If the jury did not believe the testimony that he was the shooter, he argued, then it could not believe that he participated in the agreement. We rejected that contention in *State* v. *Blaine*, supra, 168 Conn. App. 512–13. The jury's verdict perhaps can be rationalized, though it need not be, by reference to the fact that no coconspirator testified that he saw the defendant shoot the victim. See footnote 4 of this opinion.

The defendant then sought and was granted certification to appeal by our Supreme Court on his claim of plain error, and the case was remanded to this court with direction to consider the defendant's claim in light of *McClain*. See *State* v. *Blaine*, 325 Conn. 918, 163 A.3d 618 (2017). The only issue before us on remand is whether the trial court's instruction to the jury regarding the requisite intent for conspiracy to commit robbery in the first degree constituted plain error.

Two elements must be satisfied in order to support a conclusion that a judgment must be reversed on the basis of plain error. "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application." (Internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.

"[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . In addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citation omitted; internal quotation marks omitted.) Id.

An appellant "cannot prevail . . . unless he demonstrates that the claimed error is *both* so clear *and* so

harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) Id; see also *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009). "It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 813–14.

"Our standard of review for claims of instructional impropriety is well established. The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which they might find to be established . . . . When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety . . . and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party . . . . In this inquiry we focus on the substance of the charge rather than the form of what was said not only in light of the entire charge, but also within the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 179, 920 A.2d 236 (2007).

The defendant claims that the trial court failed to instruct the jury that in order to find him guilty of the conspiracy with which he was charged, it had to find that he had intended that one or more participants in

the robbery be armed with a deadly weapon and that the failure so to instruct constituted plain error. In *State* v. *Pond*, supra, 138 Conn. App. 233–34, we held that to be convicted of conspiracy, a defendant must have specifically intended that every element of the planned offense be accomplished, including elements of the underlying crime that do not require specific intent.

We turn to an analysis of the court's instructions to the jury in the present case. Two portions are especially pertinent. The court addressed the elements of the substantive crime of robbery in the first degree in violation of § 53a-134 (a) (2). The court instructed that robbery was a larceny committed by the use or threatened use of force. Larceny, in turn, required an intent to deprive another of property. The court then charged that the "third element" was that in "the course of the commission of the robbery or immediate flight from the crime the defendant or another participant in the crime was armed with a deadly weapon."

Later in the charge the court instructed on the elements of the crime of conspiracy to commit robbery in the first degree: "One, there was an agreement between the defendant and one or more persons to engage in conduct constituting the crime of robbery in the first degree; two, there was an overt act in furtherance of the agreement by any one of the persons; and, three, *the defendant specifically intended to commit the crime of robbery in the first degree.*" (Emphasis added.)

The court defined "agreement" and "overt act," and then instructed: "Element three, criminal intent. The third element is that the defendant had the intent to commit robbery in the first degree. The defendant must have had specific intent. The defendant may not be found guilty unless the state has proved beyond a reasonable doubt that he specifically intended to commit robbery in the first degree when he entered into the agreement."

After defining specific intent, the court summarized its charge regarding conspiracy: "[One] the state must prove beyond a reasonable doubt that the defendant had an agreement with one or more persons to commit robbery in the first degree. Two, at least one of the coconspirators did an overt act in furtherance of the conspiracy and, three, the defendant specifically intended to commit robbery in the first degree."

The defendant claims that because the court did not expressly and specifically instruct the jury that, in order to find him guilty, it had to find that he specifically agreed that a participant in the crime would be armed with a deadly weapon, the court committed plain error. He relies primarily on *State* v. *Pond*, supra 138 Conn. App. 228.[6]

In *Pond*, the defendant was charged with attempt to commit robbery in the second degree and conspiracy to commit robbery in the second degree. Id., 232. The substantive crime of robbery in the second degree, as charged, included as an element the display or threatened use of a weapon. This court observed that the instructions in *Pond* were "to the effect that the specific intent required for the conspiracy charge was that as for a charge of larceny." Id., 237. The trial court instructed the jury as to the intent element of the conspiracy charge as follows: "The third element is that the defendant had the intent to commit robbery in the second degree. The intent for that crime is that at the time of the agreement he intended to commit larceny. The defendant may not be found guilty unless the state has proved beyond a reasonable doubt that he specifically intended to commit a larceny when he entered into the agreement." (Internal quotation marks omitted.) Id.

[6] Because the trial in the present case occurred after the Appellate Court's decision in *Pond* but before the Supreme Court's affirmance, we primarily consider the Appellate Court's opinion for the purpose of the plain error analysis.

The court then concluded: "In summary, the state must prove beyond a reasonable doubt that the defendant had an agreement with one or more other persons to commit robbery in the second degree, at least one of the coconspirators did an overt act in furtherance of the conspiracy, and the defendant specifically intended to deprive the owner of his property." (Internal quotation marks omitted.) Id., 237–38.

This court afforded review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), and, relying primarily on *State* v. *Padua*, 273 Conn. 138, 869 A.2d 192 (2005), reversed the judgment, because "[t]he court did not tell the jury that the state was required to prove that the defendant specifically intended that, in the course of the robbery, what was represented to be a deadly weapon or dangerous instrument would be used or displayed. Contrary to the state's argument, there is nothing in the rest of the language of the jury instructions that would render this omission in the instruction harmless." *State* v. *Pond*, supra, 138 Conn. App. 238–39.

There are similarities and distinctions between *Pond* and the present case. It is now well established that a conviction of conspiracy to commit a crime requires proof of specific intent to commit all elements of the underlying crime, even if only general intent or, conceivably, no intent at all is required as to one or more elements necessary for conviction of the underlying substantive crime. See *State* v. *Padua*, supra, 273 Conn. 138; see also *State* v. *Pond*, 315 Conn. 451, 108 A.3d 1083 (2015). In *Pond*, however, the trial court not only failed to instruct the jury that specific intent was required as to the display or threatened use of a weapon, it also expressly stated that the specific intent required to convict was that the defendant intended, at the time of agreement, to commit larceny.[7] Additionally, because

[7] Thus, the jury logically could have concluded that the only specific intent required for conviction was the intent to commit a larceny.

the defendant in *Pond* prevailed pursuant to *Golding*, application of the plain error doctrine was not necessary.

In the present case, the court did not expressly limit the requirement of specific intent to fewer than all the elements of the substantive crime. The court, instead, charged that in order to find the defendant guilty, the jury had to find that he specifically intended to commit the crime of robbery in the first degree; the court previously had included in the definition of that substantive crime the element that one or more participants be armed with a deadly weapon. Because the "armed with a deadly weapon" element had been included in the definition of the underlying crime and the conspiracy charge required for conviction a finding that the defendant intended to commit the substantive crime, it is at least arguable that the instruction logically required the jury to find that the defendant had agreed that a participant would be armed with a deadly weapon. If it is fairly debatable whether an action of the trial court is erroneous, the error, if any, is not plain error, and the judgment should be affirmed. See *State* v. *McClain*, supra, 324 Conn. 812.

Even if the instruction did constitute obvious and undebatable error, however, the record does not satisfy the second prong required for reversal pursuant to the plain error doctrine, because the record does not show manifest injustice. See *State* v. *Coward*, supra, 292 Conn. 307 ("under the second prong of the [plain error doctrine] we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust"). In *State* v. *Padua*, supra, 273 Conn. 164–65, for example, our Supreme Court considered a case in which conspiracy to sell marijuana within 1500 feet of a public housing project was alleged, and the trial court had not instructed that, in order to find the defendant guilty, the jury had to find that he

agreed to commit the crime within 1500 feet of a public housing project.[8] Our Supreme Court held that, although the instruction was improper, the error was harmless in light of overwhelming evidence regarding intent to sell marijuana within 1500 feet of a public housing project.

In the present case, each of the four coconspirators testified that the plan was to rob Taylor with a weapon and that the defendant was to wield the weapon. Every witness who testified that the agreement existed also testified that use of a weapon was contemplated. Although the defendant denied involvement altogether, there was ample evidence that he had agreed to the robbery and that someone would use a weapon. A similar situation in *Padua* led to a conclusion of harmless error; here, we cannot find that a less egregious error, if indeed there was an error, amounted to manifest injustice. See also *State* v. *Lawrence*, supra, 282 Conn. 183 (possible defect in presumption of innocence instruction did not affect fairness of trial when instruction viewed in entirety); *State* v. *LaBrec*, 270 Conn. 548, 560, 854 A.2d 1 (2004) (instruction that original jurors should review their previous deliberations with substituted alternate juror not extraordinary error).

Under these circumstances, we cannot conclude that any error in the court's instructions to the jury affected "the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812. Accordingly, we decline to reverse the trial court's judgment under the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] The correlation between the conspiracy charge and the underlying crime in *Padua* corresponded to the structures of this case and *Pond*, in that proof of intent to sell marijuana within 1500 feet of a public housing project was not required for conviction of the underlying offense.

STATE OF CONNECTICUT *v.* ANTHONY L.* (AC 39200)

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

Syllabus

Convicted of the crimes of sexual assault in the first degree, risk of injury to a child and sexual assault in the third degree in connection with his alleged sexual abuse of the minor complainant, J, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly admitted certain evidence of his alleged uncharged, prior sexual misconduct involving J, which occurred prior to the time period during which the charged crimes allegedly occurred. He also claimed that the evidence was insufficient to support his conviction because J's testimony as to the charged misconduct lacked sufficient specificity to prove beyond a reasonable doubt the elements of the charged offenses. *Held*:

1. The evidence was sufficient to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child: J described the charged misconduct with sufficient specificity to permit the jury reasonably to determine that the unlawful conduct engaged in by the defendant was digital penetration, and she testified that those acts of digital penetration within the charged time period were forceful and occurred more than once, which was sufficient for the jury reasonably to conclude that the state had proven the elements of sexual assault in the first degree and risk of injury to a child beyond a reasonable doubt; moreover, because it was undisputed that the defendant was J's uncle, the evidence was also sufficient to support the defendant's conviction of sexual assault in the third degree, which proscribes sexual intercourse with persons related to the defendant within certain degrees of kindred specified by statute (§ 46b-21), and J was not required to recall specific dates or additional distinguishing features of each incident, it having been sufficient that she provided a general time period.

2. The trial court did not abuse its discretion in permitting the state to introduce certain uncharged, prior sexual misconduct evidence involving the defendant, which was admitted to prove the defendant's motive and intent to sexually abuse J: where, as here, the prior misconduct evidence involved J, was of the same nature as the misconduct with which the defendant was charged, and concerned conduct that occurred

* In accordance with our policy of protecting the privacy interests of complainants who allege that they are the victims of sexual assault and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

before and during the period of time in which the charged crimes allegedly occurred, the materiality of the prior misconduct evidence to prove motive and intent was readily apparent, as it allowed the jury to learn that the defendant had a sexual interest in, and lustful inclinations toward, J; moreover, the challenged evidence was not more prejudicial than probative, as J testified that the acts of abuse during the time period in which the charged crimes occurred were the same as those she suffered before the time period at issue, and, thus, it was unlikely that the uncharged prior misconduct evidence unduly inflamed the jury, and the court gave the jury three cautionary instructions, which the jury was presumed to have followed, that served to overcome the prejudice that attends evidence of uncharged sexual misconduct.

Argued October 16, 2017—officially released February 6, 2018

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, risk of injury to a child and sexual assault in the third degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, where the court, *Graham*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Stephen A. Lebedevitch, assigned counsel, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Elizabeth C. Leaming*, senior assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Anthony L., was convicted, after a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (2). On appeal, the

defendant claims that (1) the trial court abused its direction in admitting evidence of uncharged misconduct and (2) there was insufficient evidence to support his conviction on all three charges. We disagree, and, accordingly, affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. The crimes with which the defendant was charged allegedly occurred between May 23, 2002, and December 31, 2003. At all relevant times, the minor complainant, along with her brother, P, and her parents resided in Massachusetts. The complainant's father was terminally ill. To prevent the complainant and her brother from seeing their father in this condition, their mother arranged for them to spend weekends and other holidays with their paternal uncle, the defendant, who lived in Connecticut. Sometimes, the defendant would pick up the children at their home in Massachusetts. At other times, he would meet their mother midway at a designated point. One day, while the complainant and the defendant were traveling in the defendant's car, and the complainant was sitting in the passenger seat, the defendant reached under the complainant's shirt and commented that "[she] was developing nicely." The complainant was either ten or eleven years old at this time.

In a subsequent visit to the defendant's house, the complainant asked the defendant if they could rent and watch a movie called "American Pie" because the complainant's mother previously had forbidden her from watching it; the defendant agreed. After renting the movie, the defendant and the complainant were driving back to the defendant's house when the defendant told the complainant that "he felt [she] needed an explanation as to body parts and whatnot so that way [she] could have a better understanding of the movie." The defendant then proceeded to put his hand "down [the complainant's] pants and put his fingers inside of

[her],'' and commented, ''this is your cherry,'' and that ''that was the start of intercourse'' and ''something [the complainant] needed to know so [she] understood the movie because the movie was about sex.'' The defendant then kept his fingers inside the complainant's vagina for the duration of the car ride to the defendant's house. Once there, the complainant and the defendant started watching the movie, with the complainant lying on a couch and the defendant sitting at the other end of the same couch. The defendant then ran his hand up the complainant's leg and digitally penetrated her vagina. The defendant repeated this abuse after the complainant went to bed that night and again on the car ride back to the complainant's mother's house. These acts occurred before May, 2002, when the complainant was ten or eleven years old.

After that weekend, the defendant routinely would sexually abuse the complainant. The acts remained the same, i.e., digital penetration, and they would occur during car rides and when the complainant slept at the defendant's house. While there, the complainant and P would sleep in two separate bedrooms on the second floor. The bedroom where the complainant typically slept had a door that could not be locked. Here, after the complainant would fall asleep, the defendant would enter the bedroom and digitally penetrate her vagina. Afterward, he would sometimes whisper, ''[y]ou're welcome,'' or, ''I'm sorry, I can't help myself.''

The defendant continued to sexually abuse the complainant after the death of her father in January, 2002, following which her visits to the defendant's house became less frequent. The final act of sexual abuse occurred in the complainant's home in Massachusetts, in December, 2003. There, the defendant digitally penetrated the complainant's vagina while sharing a blanket with her on a couch. The complainant was fifteen at the time of this last act. On December 4, 2013, the complainant reported her sexual abuse by the defendant to the Connecticut State Police. The defendant

thereafter was arrested and charged with one count of sexual assault in the first degree, one count of risk of injury to a child, and one count of sexual assault in the third degree.

Before trial commenced, the defendant filed a motion in limine to establish fair procedures regarding the admissibility of evidence of uncharged misconduct. At the hearing on his motion in limine, the defendant sought to exclude evidence of acts of sexual abuse committed prior to May 23, 2002, which were not charged in the information.[1] The defendant also sought to exclude evidence of the acts committed in the complainant's home in Massachusetts, as they were outside the jurisdictional limits of Connecticut. After hearing argument, the trial court ruled that it would admit evidence of both sets of uncharged misconduct to prove motive and intent. Subsequently, the court gave the jury a cautionary instruction after the complainant testified as to uncharged misconduct that occurred prior to May 23, 2002.[2] The court gave another cautionary instruction

[1] Previously, complainants of sexual abuse could prosecute their claims until only two years after attaining the age of majority. Effective May 23, 2002, however, they may do so until the age of forty-eight. See General Statutes § 54-193a. The acts of sexual abuse in this case that occurred prior to May 23, 2002, were therefore outside of the statute and not charged in the information.

[2] The court gave the following instruction: "[L]adies and gentlemen, I'm going to give what we call a cautionary instruction to you. You have heard testimony from [the complainant] that the defendant placed his fingers within her vagina and on one occasion touched her on dates before the date set forth in the information. That evidence is being admitted solely to show or establish his motive or purpose in committing the acts alleged in the information. That conduct that—preceding the dates alleged in the information, is not the subject of any criminal charge in this case and is not being admitted to prove the bad character of the defendant or any propensity by him to commit the conduct described in the information or charged in the information. You may not consider that evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charge[d] or to demonstrate a criminal propensity to commit the crimes charged."

after the complainant testified as to uncharged misconduct that occurred outside Connecticut.[3] Finally, the court gave a cautionary instruction as to both sets of uncharged misconduct evidence during its final charge. Following trial, the jury returned a verdict of guilty on all three counts; this appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that there was insufficient evidence to support his conviction of one count of sexual assault in the first degree in violation of § 53a-70 (a) (1), one count of risk of injury to a child in violation of § 53-21 (a) (2), and one count of sexual assault in the third degree in violation of § 53a-72a (a) (2).[4] He argues that although the complainant testified in some detail as to the uncharged misconduct, her testimony as to the charged misconduct lacked sufficient specificity to prove the elements of any of the charged offenses beyond a reasonable doubt. Specifically, relying on our Supreme Court's decision in *State* v. *Stephen J. R.*, 309 Conn. 586, 72 A.3d 379 (2013), the defendant contends

[3] The court gave the following instruction: "Ladies and gentlemen, you recall I gave an instruction a moment ago about any testimony by this witness as to the defendant touching her prior to the dates charged in the information. The information makes reference only to acts in . . . Connecticut. So, you just heard testimony from [the complainant] that the defendant placed his fingers inside her vagina in Massachusetts. That evidence is being admitted solely to show or establish his motive or intent in committing the crimes alleged in the information. That conduct is not the subject of any criminal charge in this case and is not being admitted to prove the bad character of the defendant or any propensity by him to commit the crimes alleged in the information. You may not consider that evidence as establish[-ing] a predisposition on the part of the defendant to commit any of the crimes alleged or to demonstrate a criminal propensity to commit the crimes alleged."

[4] Although this is the second claim in the defendant's appellate brief, we address it first, because "if a defendant prevails on such a claim, the proper remedy is to direct a judgment of acquittal." *State* v. *Ramos*, 178 Conn. App. 400, 404, A.3d (2017).

that the complainant needed to testify to at least one specific instance of sexual misconduct and provide a specific time period between May, 2002, and December, 2003, when the charged misconduct occurred. We disagree.

"The standard of review for claims of evidentiary insufficiency is well established. In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the [jury] if there is sufficient evidence to support [its] verdict. . . . In applying that test, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Carrillo Palencia*, 162 Conn. App. 569, 575–76, 132 A.3d 1097, cert. denied, 320 Conn. 927, 133 A.3d 459 (2016).

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

beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, supra, 309 Conn. 593–94.

Section 53a-70 (a) provides that "[a] person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person . . . or by the threat of use of force against such other person . . . which reasonably causes such person to fear physical injury to such person . . . ." "'Sexual intercourse' means vaginal intercourse. . . . Penetration, however slight, is sufficient to complete vaginal intercourse . . . and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." General Statutes § 53a-65 (2). "[D]igital penetration, however slight, of the genital opening, is sufficient to constitute vaginal intercourse." (Emphasis omitted.) *State* v. *Albert*, 252 Conn. 795, 806–807, 750 A.2d 1037 (2000); see also *State* v. *Antonio A.*, 90 Conn. App. 286, 295, 878 A.2d 358 (digital penetration constitutes sexual intercourse by object manipulated by actor), cert. denied, 275 Conn. 926, 883 A.2d 1246 (2005), cert. denied, 546 U.S. 1189, 126 S. Ct. 1373, 164 L. Ed. 2d 81 (2006); *State* v. *Grant*, 33 Conn. App. 133, 141, 634 A.2d 1181 (1993) (same). Section 53-21 (a) provides that "[a]ny person who (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ." Section 53a-65 (8) provides that " '[i]ntimate parts' means the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts." Section 53a-72a (a) provides in relevant part that "[a] person is guilty of sexual assault

in the third degree when such person (2) engages in sexual intercourse with another person whom the actor knows to be related to him or her within any of the degrees of kindred specified in section 46b-21."[5]

In *State* v. *Stephen J. R.*, supra, 309 Conn. 586, our Supreme Court relied on an opinion of the California Supreme Court, *People* v. *Jones*, 51 Cal. 3d 294, 792 P.2d 643, 270 Cal. Rptr. 611 (1990), which delineated a three factor approach for determining whether generic testimony about sexual abuse can amount to sufficient evidence in a child abuse case. These factors were: (1) the complainant must describe the kind of act or acts committed with sufficient specificity to determine that unlawful conduct has occurred and to differentiate between the different types of proscribed conduct; (2) the complainant must describe the number of acts committed with sufficient certainty to support each of the counts alleged; and (3) the complainant must identify the general time period within which these acts occurred. *People* v. *Jones*, supra, 316. In *Stephen J. R.*, our Supreme Court applied the *Jones* factors. The court concluded that the complainant, by testifying that the defendant had made her put his penis in her mouth and that he had put his tongue in her vagina, described the acts of fellatio and cunnilingus with sufficient specificity to support each of the counts alleged for sexual assault in the first degree and risk of injury to a child. *State* v. *Stephen J. R.*, supra, 594, 599.

In the present case, the complainant, while testifying, first described the acts of abuse she suffered prior to May, 2002, and stated that on multiple occasions the defendant penetrated her vagina with his fingers. The complainant was then questioned as to the nature and

[5] Such degrees of kinship include a "person's parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any marriage within these degrees is void." General Statutes § 46b-21.

frequency of the defendant's misconduct between May, 2002, and December, 2003, the period in connection with which the defendant is charged. With respect to that particular time frame, she testified that the defendant's "acts were all the same." Subsequently, the following exchange occurred between the prosecutor and the complainant:

"[The Prosecutor]: Between May of 2002, specifically, the end of May of 2002 and December of 2003, when you described [the defendant] visiting your home in . . . Massachusetts, during that time frame did [the defendant] penetrate your vagina with his finger while at his home in [Connecticut].

"[The Complainant]: Yes.

"[The Prosecutor]: Can you tell us approximately how many times? Let me ask you this: Was it more than one time?

"[The Complainant]: Yes.

"[The Prosecutor]: Was it forceful or consensual?

"[The Complainant]: It was always forceful, never consensual.

"[The Prosecutor]: And were you between thirteen and fifteen years of age at that time?

"[The Complainant]: Yes."

As our Supreme Court concluded in *Stephen J. R.*, we conclude that the complainant in this case described the charged misconduct with sufficient specificity for the jury to determine that the unlawful conduct engaged in by the defendant was digital penetration. For the purposes of §§ 53a-70 (a) (1) and 53a-72a (a) (2), digital penetration constitutes sexual intercourse. See General Statutes § 53a-65 (2) (penetration may be committed by object); see also *State* v. *Antonio A.*, supra, 90 Conn.

App. 295 (digital penetration constitutes sexual intercourse). The complainant testified that these acts of digital penetration within the charged period were forceful and that the defendant digitally penetrated her vagina more than once. This testimony was sufficient for the jury reasonably to conclude that the state had proven the elements of one count of sexual assault in the first degree and one count of risk of injury to a child, beyond a reasonable doubt. Further, it is undisputed that the defendant is the complainant's paternal uncle. The evidence therefore was also sufficient for the defendant's conviction of one count of sexual assault in the third degree.

The defendant also argues that the complainant did not identify a specific time period between May, 2002, and December, 2003, in which the acts in question occurred. In *Stephen J. R.*, our Supreme Court noted that the requirement as to a time period was met because if the complainant provided a *general* time period. *State* v. *Stephen J. R.*, supra, 309 Conn. 600–601. The complainant in *Stephen J. R.* was not required to "recall specific dates or additional distinguishing features of each incident . . . ." Id., 601. The court clarified that additional details, aside from the general time period, might be relevant in assessing the credibility of the complainant's testimony but would not be essential for a conviction. Id. In the words of the California Supreme Court in *Jones*, "[d]oes the [complainant]'s failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." *People* v. *Jones*, supra, 51 Cal. 3d 315.

Consistent with our Supreme Court's opinion in *Stephen J. R.*, we find that the complainant testified with sufficient specificity for the jury reasonably to find the

defendant guilty of all three charged offenses beyond a reasonable doubt.

II

The defendant next claims that the trial court abused its discretion by admitting evidence of uncharged misconduct because the evidence was more prejudicial than probative. He argues that the complainant testified in great detail as to the defendant's uncharged sexual misconduct that allegedly occurred prior to the period at issue in this case, i.e., May 23, 2002 to December 31, 2003, and as to the uncharged misconduct that allegedly occurred at the complainant's home in Massachusetts. The defendant argues that the complainant's testimony regarding sexual assaults that allegedly occurred within the period charged in the information, by comparison, was bereft of detail, and therefore that the only direct evidence of his guilt was the uncharged misconduct, which should have been excluded because it was more prejudicial than probative.[6] The state argues that the court did not abuse its discretion in admitting the challenged evidence to prove the defendant's motive and intent or in ruling that the probative value of such evidence outweighed its prejudicial effect. We agree with the state.

"As a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty

[6] The state argues that the defendant did not preserve his claim that the uncharged misconduct was the most direct evidence of his guilt because at trial, the defendant objected to that evidence only on the ground that it was more prejudicial than probative. We review the defendant's claim, however, as we understand it to be that the challenged evidence is more prejudicial than probative in part *because* it was the most direct evidence. We note additionally, that although the challenged evidence was admitted to prove motive or intent with a cautionary instruction against its use for propensity, evidence of other sexual misconduct is now admissible to prove propensity for aberrant and compulsive sexual behavior under § 4-5 (b) of the Connecticut Code of Evidence. See *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008).

of the crime of which the defendant is accused. . . . On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, is admissible. The rules of policy have no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial. . . . [Our Supreme Court has] developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (b) of the Connecticut Code of Evidence, now § 4-5 (c)].[7] . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Footnote added; internal quotation marks omitted.) *State* v. *Donald H. G.*, 148 Conn. App. 398, 405, 84 A.3d 1216, cert. denied, 311 Conn. 951, 111 A.3d 881 (2014).

"In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Franko*, 142 Conn. App. 451, 460, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013). "[T]he burden to prove the harmfulness of

[7] Section 4-5 (c) (previously Section 4-5 [b]) of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

an improper evidentiary ruling is borne by the defendant . . . [who] must show that it is more probable than not that the erroneous action of the court affected the result." (Internal quotation marks omitted.) *State* v. *Donald H. G.*, supra, 148 Conn. App. 407.

The challenged evidence in this case was admitted to prove that the defendant had the motive and intent to sexually abuse the complainant. The evidence allowed the jury to learn that the defendant had a sexual interest in the complainant, upon which the defendant acted by sexually abusing the complainant before and during the charged period, and by continuing to do so until the last act of abuse in Massachusetts. "When instances of a criminal defendant's prior misconduct involve the same [complainant] as the crimes for which the defendant presently is being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that [complainant], and, thus, of his intent as to the incident in question." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016). The materiality of the defendant's prior misconduct to prove motive and intent in this case is therefore readily apparent. The act of abuse in Massachusetts is also material to prove motive and intent for the same reasons. The fact that it occurred after the charged misconduct does not render it inadmissible. See *State* v. *Bunker*, 89 Conn. App. 605, 632, 874 A.2d 301 (2005) ("[i]n Connecticut, as in almost all other jurisdictions, [e]vidence of crimes subsequent to the crime charged [is] also admissible for the same purposes as those committed prior to the charge" [internal quotation marks omitted]), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006); see also *State* v. *McFarlane*, 88 Conn. App. 161, 165, 868 A.2d 130 (subsequent burglaries admissible to prove intent because sufficiently similar even though they occurred at malls rather than

freestanding businesses), cert. denied, 273 Conn. 931, 873 A.2d 999 (2005). Because the misconduct in Massachusetts involved the same complainant and was of the same nature as the misconduct charged, it was material to prove the defendant's lustful inclinations toward the complainant.

We turn to the question of whether the challenged evidence was more probative than prejudicial. As a factual matter, we disagree with the defendant that the evidence of the charged conduct lacked specific details. After the complainant described the acts of abuse she suffered prior to May, 2002, she was questioned specifically as to the nature and frequency of the acts between May, 2002, and December, 2003, when the abuse ended. She testified that during this time, the defendant's acts toward her were "the same" as they had been before, all involving forcible digital penetration of her vagina, that they occurred on multiple occasions, and that they took place "in [the defendant's] car, on the couch, in the bedroom . . . ." The complainant further testified that on each such occasion, she would attempt to use her body to protect herself from the defendant by "clench[ing] [her] body," but that she never was successful in stopping him. This testimony does not lack detail in comparison to the testimony pertaining to the defendant's uncharged sexual misconduct in the car after renting the "American Pie" movie, while watching the movie itself, or at the complainant's house in Massachusetts. It is therefore unlikely, contrary to the defendant's claim, that evidence of the uncharged misconduct unduly inflamed the jury. "Although evidence of child sex abuse is undoubtedly harmful to the defendant, that is not the test of whether evidence is unduly prejudicial. Rather, evidence is excluded as unduly prejudicial when it tends to have some adverse effect upon a defendant *beyond tending to prove the fact or issue that justified its admission into evidence*."

(Emphasis in original; internal quotation marks omitted.) *State* v. *Donald H. G.*, supra, 148 Conn. App. 408–409.

In light of these circumstances, we cannot conclude that the trial court abused its discretion in admitting the challenged evidence. The court held a hearing and heard argument on whether the evidence should be excluded. It then analyzed the arguments in light of this court's decision in *Donald H. G.* and decided in favor of admission. Thereafter, the court gave the jury three separate cautionary instructions, twice upon the introduction of particular portions of the challenged evidence and once more during its final charge. This methodical approach negates the defendant's claim that the court abused its discretion by admitting the challenged evidence. The limiting instructions, which the jury presumably followed, also served, in this case, to overcome the prejudice that attends evidence of uncharged sexual misconduct. See *State* v. *Franko*, supra, 142 Conn. App. 467–68. Accordingly, we conclude that the trial court did not err in admitting evidence of the defendant's uncharged misconduct.

The judgment is affirmed.

In this opinion the other judges concurred.

GENERAL LINEN SERVICE COMPANY, INC. *v.* CEDAR PARK INN AND WHIRLPOOL SUITES ET AL.

(AC 39135)

Alvord, Mullins and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendant C Co. and the individual defendant who conducted business on behalf of C Co., for, inter alia, breach of contract. The defendants were defaulted for failure to comply with certain discovery orders, and, following a hearing in

damages, the trial court rendered judgment in favor of the plaintiff. Thereafter, the court denied the defendants' motion to open the judgment, and the defendants appealed to this court. In their motion to open, the defendants claimed that because C Co. was an unincorporated entity owned and controlled by N Co., the failure to serve N Co. deprived the trial court of jurisdiction and the judgment, thus, was void. The trial court found that the defendants had failed to show that a good defense existed at the time the judgment was rendered or that they were prevented from making a defense due to mistake, accident or other reasonable cause, as required under the applicable statute (§ 52-212 [a]) and rule of practice (§ 17-43). On appeal, the defendants claimed that the trial court abused its discretion by not finding that it lacked subject matter jurisdiction due to the failure of the plaintiff to join N Co. in the action. *Held* that the trial court did not abuse its discretion in denying the defendants' motion to open; because the failure to join an indispensable party does not deprive a trial court of subject matter jurisdiction unless a statute mandates the naming and serving of a particular party, even if N Co. was a necessary party, its absence did not affect the court's jurisdiction, as its joinder was not mandated by statute, and, therefore because the motion to open did not present the court with a jurisdictional issue, the court properly reviewed the motion to open under the applicable statute and rule of practice, and determined that no good defense existed at the time the judgment was rendered, as required by § 52-212 (a).

Submitted on briefs September 26, 2017—officially released February 6, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendants were defaulted for failure to comply with certain discovery orders; thereafter, following a hearing in damages, the court, *Hon. Robert C. Leuba*, judge trial referee, rendered judgment for the plaintiff; subsequently, the court denied the defendants' motion to open the judgment, and the defendants appealed to this court. *Affirmed.*

Jon C. Leary filed a brief for the appellants (defendants).

Lawrence G. Rosenthal and *Michael D. Blumberg* filed a brief for the appellee (plaintiff).

Opinion

BEACH, J. The defendants, Cedar Park Inn & Whirlpool Suites (Cedar Park Inn) and John G. Syragakis[1] (collectively "defendants"), appeal from the denial of their motion to open a judgment rendered in favor of the plaintiff, General Linen Service Company, Inc. A default had been ordered as a result of the defendants' failure to comply with a discovery order and the trial court rendered judgment after a hearing in damages. The defendants claim that the trial court abused its discretion by not finding that it had lacked subject matter jurisdiction and by instead denying their motion to open because it did not satisfy the requirements of General Statutes § 52-212 (a) and Practice Book § 17-43.[2] We affirm the judgment of the trial court.

The following facts, as alleged in the complaint, and procedural history are relevant to this appeal. The complaint, the allegations of which are deemed to be true

[1] The summons indicates that John G. Syragakis is also known as John G. Syracuse.

[2] General Statutes § 52-212 (a) provides: "Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

Practice Book § 17-43 provides in pertinent part: "Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. . . ."

because of the default; see Practice Book § 17-34; see also *Torla* v. *Torla*, 152 Conn. App. 241, 246–48, 101 A.3d 275 (2014); stated that the defendant Cedar Park Inn was an "unincorporated, unregistered entity" and that Syragakis "conducted business on behalf of Cedar Park [Inn] under the unregistered trade name 'Cedar Park Inn.' " It alleged that in July, 2013, the parties entered into a contract whereby the plaintiff was to supply the defendants with linens and that the defendants breached the contract in August, 2014. The contract provided for liquidated damages. The second count of the complaint alleged that Syragakis was personally liable for damages because he had provided a "personal guarantee."

Following a hearing in damages, the court, *Hon. Robert C. Leuba*, judge trial referee, rendered a default judgment on February 2, 2016. On March 10, 2016, the defendants filed a motion to open the judgment "on the ground that a necessary party was not served or otherwise made a party to the present action, and therefore the court lacks proper jurisdiction over this matter." The defendants claimed, as subordinate facts, that Cedar Park Inn was an unincorporated entity that was owned and operated by Nautilus Development, Inc. (Nautilus), which had recently filed for bankruptcy.[3] The defendants further claimed that the failure to serve Nautilus "affects the court's jurisdiction and the judgment is, therefore, void."

The plaintiff objected on the ground that the defendants' motion to open failed to satisfy the requirements of § 52-212 (a) and Practice Book § 17-43 in that it failed to state that a good defense existed at the time judgment was rendered and that the defendants were prevented

[3] To establish that Nautilus had been doing business as Cedar Park Inn, the defendants submitted, with their motion to open, a tax bill issued to Nautilus for the property that was used by Cedar Park Inn for business.

from raising that defense due to a mistake, accident, or other reasonable cause. It argued more specifically, inter alia, that the failure to serve a necessary party was not a jurisdictional defect and that the exclusive remedy for such a failure was a motion to strike. There was, then, the plaintiff argued, no viable defense stated in the motion to open. In their reply, the defendants stressed that they were not pursuing a motion to open pursuant to § 52-212 (a) or Practice Book § 17-43; rather, their claim was that the court had the inherent authority to open a judgment rendered without jurisdiction of the parties or the subject matter.

On April 13, 2016, the court denied the defendants' motion to open judgment. Its ruling stated, in its entirety, that "the defendants have not shown that a good defense existed at the time the judgment was rendered or that they were prevented from making a defense because of mistake, accident or other reasonable cause." This appeal followed.

On appeal, the defendants' sole claim is that the trial court abused its discretion by failing to hold that it had lacked jurisdiction to render judgment because Nautilus, a necessary party, had not been served, and therefore improperly denied their motion to open. The plaintiff contends that the trial court properly denied the defendants' motion. We agree with the plaintiff.

"We review a trial court's ruling on motions to open under an abuse of discretion standard. . . . Under this standard, we give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Citations omitted; internal quotation marks omitted.) *GMAC*

Mortgage, LLC v. *Ford*, 178 Conn. App. 287, 294–95, A.3d (2017).

It is well settled that the failure to join an indispensable party does not deprive a trial court of subject matter jurisdiction. See General Statutes § 52-108 and Practice Book §§ 9-18, 9-19 and 11-3; see also *Hilton* v. *New Haven*, 233 Conn. 701, 721, 661 A.2d 973 (1995); *Izzo* v. *Quinn*, 170 Conn. App. 631, 636, 155 A.3d 315 (2017); *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 648–49, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013); *D'Appollonio* v. *Griffo-Brandao*, 138 Conn. App. 304, 313–14, 53 A.3d 1013 (2012); *Sullivan* v. *Thorndike*, 104 Conn. App. 297, 301, 934 A.2d 827 (2007), cert. denied, 285 Conn. 907, 908, 942 A.2d 415, 416 (2008). In *Izzo* v. *Quinn*, supra, 638, this court recently reiterated that the failure to join an indispensable party results in a jurisdictional defect "*only if* a statute mandates the naming and serving of [a particular] party." (Emphasis in original; internal quotation marks omitted.); see, e.g., *R.C. Equity Group, LLC* v. *Zoning Commission*, 285 Conn. 240, 241–43, 939 A.2d 1122 (2008) (failure to serve borough clerk pursuant to zoning appeals statute deprived trial court of subject matter jurisdiction).

"Conversely, when a party is indispensable but is not required by statute to be made a party, the [trial] court's subject matter jurisdiction is not implicated and dismissal is not required." (Internal quotation marks omitted.) *Izzo* v. *Quinn*, supra, 170 Conn. App. 639. Although "a court may refuse to proceed with litigation if a claim cannot properly be adjudicated without the presence of those indispensable persons whose substantive rights and interests will be necessarily and materially affected by its outcome," the absence of such a party does not destroy jurisdiction. *Hilton* v. *New Haven*,

supra, 233 Conn. 721–22. Further, "Practice Book §§ 10-39 and 11-3 . . . provide that a party's *exclusive remedy* for nonjoinder or for misjoinder of parties is by the filing of a motion to strike." (Emphasis in original; footnotes omitted.) *Izzo* v. *Quinn*, supra, 640.

Here, the defendants' motion to open did not present the court with a jurisdictional issue. Even if Nautilus was a necessary party,[4] its joinder was not mandated by statute. Our law is clear that nonjoinder under these circumstances does not create a jurisdictional defect. See id., 639. Accordingly, the trial court properly reviewed the defendants' motion to open under § 52-212 (a) and Practice Book § 17-43, which require a showing that a good cause or defense existed when judgment was rendered which the defendants were prevented from raising due to mistake, accident, or other reasonable cause.

The defendants' purported distinction between a motion to open pursuant to statute and a motion to open based on common-law authority to open judgments rendered without jurisdiction is immaterial in the context of this case. By expressly concluding that no good defense was claimed in the motion to open, the court impliedly rejected the defendants' argument that it had lacked jurisdiction. Because the trial court did not lack jurisdiction to render judgment, the argument based on common law fails, and, similarly, no good defense exists as required by § 52-212 (a). The absence of Nautilus did not affect the court's jurisdiction, and the trial court, therefore, did not abuse its discretion in denying the defendants' motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

[4] The trial court made no finding on this issue and it has no bearing on our analysis. There similarly has been no claim of fraud, mutual mistake, or other recognized ground for opening a judgment.

MICHAEL HAZEL *v.* COMMISSIONER OF CORRECTION
(AC 39289)

Sheldon, Bright and Beach, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder, assault in the first degree, conspiracy to commit assault in the first degree, criminal possession of a firearm, carrying a pistol or revolver without a permit, and criminal possession of a pistol or revolver, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to discover that the petitioner's codefendant, W, had resolved his related criminal case and was available to testify at the petitioner's criminal trial without fear of self-incrimination, and by failing to present W's testimony. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly concluded that the petitioner was not denied the effective assistance of counsel at his criminal trial, as he failed to prove that he was prejudiced by his trial counsel's performance in not presenting W's testimony, there not having been a reasonable probability that, had the petitioner's trial counsel called W to testify, the outcome of the petitioner's trial would have been different; there was considerable evidence against the petitioner, including two witnesses who testified that they saw the petitioner shoot the victim, the habeas court found that W lacked credibility and his testimony would not have been helpful to the petitioner, especially given that W, only months before, had admitted to the judge in his own plea canvass that the petitioner was the shooter and testified, at the habeas trial, to a factual scenario that was completely different from that which served as the basis for his conviction when he entered a straight guilty plea that implicated the petitioner as the shooter.

Argued December 4, 2017—officially released February 6, 2018

Procedural History

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

J., denied the petitioner's motion for articulation. *Affirmed.*

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

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. The petitioner, Michael Hazel, appeals following the granting of his petition for certification to appeal 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 erred when it concluded that his right to the effective assistance of counsel was not violated during his criminal trial. We affirm the judgment of the habeas court.

The following facts, as set forth by this court in the petitioner's direct appeal, reasonably could have been found by the jury at the petitioner's criminal trial. "At approximately 2 a.m. on July 6, 2003, the victim, David Rogers, and his brother, Delton Rogers, went to Horace's Market in Waterbury to purchase beer. The victim had a stick in his hand as he entered the store. Walter Williams asked if the victim planned to hit him with the stick, which the victim denied. Williams, agitated with the victim, exited the store in a hostile mood. After obtaining the beer, the victim left the store and saw his brother, Williams and a third person, later identified as the [petitioner], conversing. The victim explained that he had not threatened Williams with the stick. The victim and his brother shook hands with the [petitioner], while Williams remained unreceptive to the conciliatory efforts. The [petitioner] and Williams then departed.

"After a period of time had elapsed, the victim and his brother were walking to the victim's automobile. A

motor vehicle driven at a high rate of speed approached them. After it came to a stop, the victim observed Williams and the [petitioner] exit from the vehicle. The victim warned his brother that 'they might have guns' as Williams walked toward him. The [petitioner] then pulled a pistol from his waistband and shot the victim several times in the stomach, legs, buttocks and arm. The victim heard Williams instruct the [petitioner] also to shoot Delton Rogers, but the [petitioner] focused his attack solely on the victim. The [petitioner] and Williams then drove off. Delton Rogers transported the victim to a hospital." (Footnotes omitted.) *State* v. *Hazel*, 106 Conn. App. 213, 215–16, 941 A.2d 378, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008).

After a jury trial, the petitioner was convicted of attempt to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-49 (a) (2), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48 (a), criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1), carrying a pistol or revolver without a permit in violation of General Statutes (Rev. to 2003) § 29-35 (a) and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2003) § 53a-217c (a) (1). Id., 214. The court sentenced the petitioner to a total effective sentence of twenty years to serve, followed by five years of special parole.[1] Id., 216. This court affirmed the judgment of conviction on direct appeal. Id., 227.

On April 7, 2015, the petitioner filed an amended petition for a writ of habeas corpus, claiming, in relevant part, that his criminal trial counsel, Attorney Michael

[1] On October 8, 2011, pursuant to a stipulated judgment in the petitioner's previous habeas petition, the habeas court rendered judgment reducing the executed portion of the petitioner's sentence to nineteen years.

Gannon, had provided ineffective assistance during the petitioner's criminal trial. The petitioner alleged, inter alia, that Gannon had been ineffective for failing to discover that Williams, the petitioner's codefendant, had resolved his related criminal case and, therefore, was available to testify at the petitioner's criminal trial without fear of self-incrimination, and, ultimately, that Gannon was ineffective for failing to present Williams' testimony.

The court conducted a habeas trial on January 11, 2016, wherein the petitioner presented witnesses, including Gannon and Williams. The petitioner also testified on his own behalf. The testimony and evidence regarding those witnesses, as it relates to the issue raised on appeal, is summarized as follows.

Gannon testified that when he was involved in matters that were headed to trial, he would have an investigator, either licensed or not, assist with those cases. He also conducted a lot of the investigating himself. Gannon, however, had no specific memory of the investigation that was undertaken in the petitioner's case. When asked whether he remembered not calling any witnesses during the trial, Gannon did not recall specifically; he did recall, however, that he believed there was reasonable doubt in the case. Gannon also agreed that the theory of defense was that, although the petitioner was present at the shooting, he was not the shooter; "he wasn't involved, and he didn't pull the trigger . . . ." When discussing the petitioner's sister,[2] who also had been present at the scene of the shooting but who contended that the petitioner was not the shooter, Gannon explained that he did not call her to testify at trial because she had placed the petitioner at the scene with a gun in his hand, and that such testimony from her "would be devastating." Gannon also agreed that

[2] The petitioner's sister and Williams have children together.

there were other witnesses at the scene of the shooting who also had stated that the petitioner had a gun in his hand.

When specifically asked about whether Williams had been available to testify at the petitioner's trial, Gannon testified that Williams had not been available to testify because he had been charged with a related crime and would plead the fifth amendment if called to testify. Gannon then was asked if that was the reason he did not call Williams to testify, and Gannon stated: "I don't know what the reason was, but that was probably one of the reasons." In response to a question concerning whether there would have been a reason not to present testimony from Williams, who would have stated that someone else had been the shooter, Gannon replied: "Not at all." When asked whether such testimony could have been harmful, Gannon stated: "Depends on if he was believed by the jury or not."

Williams testified that he pleaded guilty to charges related to the petitioner's underlying case in April, 2005. He testified that, on the night of the shooting, he and the petitioner had gone to a store to get medicine for the petitioner's wife, and the petitioner went inside the store. The victim was outside the store "having arguments and fights with different individuals going into the store," and he had a stick in his hand. Williams stated that, after he went into the store, he witnessed the petitioner having words with the victim's brother. When the victim went inside the store, the argument ended; Williams and the petitioner then left to bring the medicine home. Once they arrived at the petitioner's home, however, they realized that there was no medicine inside the package, and they returned to the store. Williams stated that he and the victim, who was swinging a stick or a two-by-four, then had words while the petitioner went into the store to deal with the medicine issue. He then stated that "[w]ithin five minutes or ten

minutes of that, gunfire started going off." Williams did not know what was happening, and he ran toward the petitioner's car. On his right, he saw a man "with dreads that was doing the shooting." The petitioner then joined Williams in the car, and they drove away.

Williams also testified that he was questioned by the police the following day. He stated that the officers told him that he was being arrested in relation to the shooting and that the petitioner had shot the victim. Williams then testified that the petitioner "didn't have a gun. Not one time did he brandish a gun. At the same time we [were] getting inside the car, there was still gunfire going off. So, he didn't have a gun."[3]

The petitioner's attorney asked Williams whether he had spoken to Gannon or an investigator from Gannon's office about this case, and Williams said that he had spoken with Gannon early in the case but that he had never spoken to an investigator. He also testified that he had told Gannon his version of events. Williams acknowledged that, by the time of the petitioner's criminal trial in 2005, his own criminal case had been resolved with a guilty plea to charges of conspiracy to commit assault in the first degree and accessory to commit assault in the first degree; he was living in Manhattan and would have testified for the petitioner if he had been asked. Williams explained that he initially had been offered a twenty-five year prison sentence, but that, after negotiations, it was bargained down to no jail time; "I took an exit and I ran." A transcript of Williams' guilty plea hearing, which was in evidence at the habeas trial, reveals that Williams entered a straight guilty plea in exchange for a total effective sentence of five years incarceration, execution suspended, with five years probation.

[3] Williams also stated that he told the police that the petitioner was not the shooter.

The respondent, the Commissioner of Correction, asked Williams if he was present when the prosecutor related the factual basis for his charges, and he acknowledged that he had been present. When the respondent asked if he recalled the prosecutor indicating "a factual basis that [the petitioner] pulled out a .45 caliber gun and shot [the victim]," Williams responded, "no sir." The respondent also asked Williams if he recalled the court asking if the facts set forth by the prosecutor essentially were correct, and he stated that he could not remember. To refresh his recollection, the respondent provided him with a copy of the transcript of his plea canvass. After reading it, Williams acknowledged that he had confirmed that the facts set forth by the prosecutor essentially were correct, and that he had answered yes when the court had asked him if that was how the crime had been committed.

The petitioner also testified at his habeas trial. He stated that he spoke with Gannon only at his court appearances and that he would write things down so that he could discuss them with Gannon when he went to court. Gannon never discussed trial strategy with him. He also stated that he did not meet with any investigators from Gannon's office and that he was unaware whether an investigator had worked on his case. The petitioner testified that there were many questions that he wanted Gannon to ask of the state's witnesses but that Gannon did not ask them. He stated that Gannon did, however, tell him that those witnesses would be recalled later so that Gannon could "ask them questions from our point of view." The petitioner also stated that he "found out that the guy . . . with the dreads . . . had got[ten] arrested . . . that night or the next day and they found a gun on him matching the one that was used." He testified further that he told Gannon to "call this guy, get the gun or ballistics on it or something," and that Gannon told him "don't worry." As to

Williams, the petitioner testified that Gannon told him that he would talk to Williams. The petitioner was aware that Williams was not incarcerated, but he did not know how Williams' case was proceeding. The petitioner explained that he did not talk to Williams himself because he "didn't want it to be said that [they] rehearsed anything or . . . [that he] told anybody to say anything . . . ." The petitioner, therefore, asked his wife to give Gannon Williams' telephone number. At the time, Williams was living in New York with the petitioner's sister.

During cross examination, the respondent asked the petitioner to clarify whether he had "discuss[ed] potential witnesses with Attorney Gannon." The petitioner responded: "Not before the trial. No." The respondent also asked about witness statements that the petitioner may have seen, and the petitioner stated that he received a copy of all witness statements at trial, as well as all of the police reports.

After trial, the habeas court determined that Gannon's investigation was factually and legally sufficient under constitutional standards. The court also found that the petitioner and Williams were not credible witnesses, and that Williams' testimony would not have been helpful to the petitioner at his criminal trial. The court concluded, therefore, that the petitioner had failed to establish that Gannon's assistance was ineffective, and it denied the petition. The court thereafter granted the petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

The petitioner claims that the habeas court committed error when it concluded that he had failed to establish that his right to the effective assistance of counsel had been violated by Gannon's failure to present the testimony of Williams. We are not persuaded.

We begin by setting forth the applicable standard of review and the law governing ineffective assistance of counsel claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed

only if both prongs are satisfied. . . . *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, U.S. , 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013). Consequently, [i]t is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier. . . . *Valeriano* v. *Bronson*, 209 Conn. 75, 86, 546 A.2d 1380 (1988); see also *Strickland* v. *Washington*, supra, 697 (a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant). . . . *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 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)." (Emphasis omitted; internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 605–606, 103 A.3d 954 (2014).

The petitioner contends that Williams' testimony would have contradicted the testimony of the state's witnesses who had identified the petitioner as the shooter. The petitioner explains: "Trial counsel was deficient because he failed to investigate and determine the status of Walter Williams' case before the petitioner's criminal trial. If counsel had done so, he would have discovered that Williams had resolved his case and that he was available to testify that the petitioner was not the shooter. The petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that—but for [the failure of] the petitioner's [counsel] . . . to present the testimony of Walter Williams—the outcome of the criminal trial would have been different."

In rejecting the petitioner's claim regarding the failure to call Williams as a witness, the habeas court did not explicitly state which prong of the *Strickland* test the petitioner failed to satisfy. Nevertheless, it is clear from the court's discussion of the evidence that the petitioner

failed to prove that the failure to present Williams prejudiced him. The habeas court found that Williams' credibility was lacking, and it opined that the state's cross-examination revealed additional credibility problems Williams would have had as a defense witness had he been called to testify at the petitioner's criminal trial. Specifically, the court explained: "[Williams] entered a 'straight' guilty plea to crimes with a factual basis directly implicating the petitioner as the shooter of [the victim]. Now, a number of years later . . . [Williams] testifies to a factual scenario completely different from that which served as the basis for his conviction. The court does not find that [Williams'] testimony would have been particularly helpful to the petitioner at trial." The court also noted correctly that the failure of defense counsel to call a witness cannot constitute ineffective assistance without, at a minimum, a showing that the witness' testimony would be helpful. The habeas court concluded that the petitioner failed to make such a showing. On the basis of the habeas court's findings, including its credibility determinations, we agree.

"In order to prevail on a claim of ineffectiveness of counsel, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . [T]he question is whether there is a reasonable probability that, absent the [alleged] errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . .

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial

effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The 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." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 688–89.

The case against the petitioner was not weak. During his criminal trial, two witnesses testified that they saw the petitioner shoot the victim. The victim, although being unable to positively identify the petitioner as the shooter, testified that the shooter was the man who was with Williams. Had Williams been called as a witness, he would have been confronted with his guilty plea and the underlying facts he acknowledged as true, which only would have served to corroborate the testimony of these witnesses. Furthermore, we must accept the habeas court's conclusion that Williams' testimony that someone other than the petitioner was the shooter was not credible.

Here, even if we assume, without deciding, that Gannon's performance was deficient for failing to know that Williams had resolved his case and was prepared to testify that the petitioner did not shoot the victim, our standard is clear: "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . To satisfy the second prong of *Strickland* . . . the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in

his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citations omitted; internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 522, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

On the basis of the foregoing, we are not persuaded that there is a reasonable probability that, had Gannon called Williams to testify, the outcome of the petitioner's trial would have been different. There was considerable evidence against the petitioner, and Williams, only months before, had admitted to the judge in his own plea canvass that the petitioner was the shooter. The habeas court also found that Williams lacked credibility. Under the circumstances, we are confident that the outcome of the petitioner's criminal trial would not have been different if Williams had been called to testify. The habeas court, therefore, properly concluded that the petitioner was not denied the effective assistance of counsel at his criminal trial.

The judgment is affirmed.

In this opinion the other judges concurred.

RICHARD MEGOS *v.* KARIN RANTA
(AC 38670)

DiPentima, C. J., and Bright and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, a nonresident, for personal injuries he had sustained in a motor vehicle accident involving the defendant. One day prior to the running of the statute of limitations, the plaintiff served a complaint alleging negligent operation of a motor vehicle against the defendant at her last known address and by leaving a true and attested copy of the writ, summons and complaint

at the office of the Commissioner of Motor Vehicles, as required by statute (§ 52-62 [c]). The trial court granted the defendant's motion to dismiss the action, holding that service had not been effectuated on the defendant at her last known address because the writ, summons and complaint had been mailed to a prior address of the defendant. The plaintiff thereafter filed a new action pursuant to the accidental failure of suit statute (§ 52-592), which permits a plaintiff to bring a new action within one year of the determination of the original action if the original action was commenced within the time limited by law but failed to be tried on the merits due to, inter alia, insufficient service of the writ. The defendant again filed a motion to dismiss the new action on the ground that because she did not receive actual notice of the original action due to insufficient service, the original action had not commenced before the running of the statute of limitations and, therefore, could not be saved under § 52-592. The trial court granted the defendant's motion to dismiss, concluding that the new action was not commenced within the time limited by law because there was no evidence that the defendant was served or saw a copy of the complaint before the statute of limitations expired. From the judgment rendered thereon, the plaintiff appealed to this court. *Held* that the trial court improperly dismissed the action under § 52-592 on the ground that the previous action had not been commenced prior to the running of the statute of limitations: pursuant to the plain language of § 52-62 (a), service on the commissioner has the same validity as service on a nonresident defendant personally, and, thus, by timely serving the original action on the commissioner, the plaintiff served the defendant personally and thereby commenced the original action prior to the running of the statute of limitations; moreover, the defendant's claim that such a conclusion ignores the specific service requirements of subsection (c) of § 52-62 was unavailing because although subsection (c) requires process to be served both by service on the commissioner and by mailing a copy to the defendant at her last known address via certified mail, that subsection addresses the sufficiency of the service rather than commencement of the civil action, and the fact that a defendant could be entitled to a dismissal for insufficient service if a plaintiff fails to comply with subsection (c) does not mean that the action was not commenced under subsection (a) for purposes of a claim brought pursuant to § 52-592.

Argued December 5, 2017—officially released February 6, 2018

Procedural History

Action to recover damages for personal injuries sustained in a motor vehicle accident allegedly caused by the defendant's negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Swienton*, *J.*, granted the

defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Hugh D. Hughes, with whom, on the brief, were *Brian Flood* and *Alexander Bates*, for the appellant (plaintiff).

J. Kevin Golger, with whom was *Todd Lampert*, for the appellee (defendant).

Opinion

BRIGHT, J. In this appeal, we are called upon to answer one very important question, namely, whether an action brought pursuant to General Statutes § 52-62[1] is "commenced" upon service of process on the Commissioner of Motor Vehicles (commissioner). We

[1] General Statutes § 52-62 provides in relevant part: "(a) Any nonresident of this state who causes a motor vehicle to be used or operated upon any public highway or elsewhere in this state shall be deemed to have appointed the Commissioner of Motor Vehicles as his attorney and to have agreed that any process in any civil action brought against him on account of any claim for damages resulting from the alleged negligence of the nonresident or his agent or servant in the use or operation of any motor vehicle upon any public highway or elsewhere in this state may be served upon the commissioner and shall have the same validity as if served upon the nonresident personally. . . .

"(c) Process in such a civil action against a nonresident shall be served by the officer to whom the process is directed upon the Commissioner of Motor Vehicles by leaving with or at the office of the commissioner, at least twelve days before the return day of the process, a true and attested copy thereof, and by sending to the defendant or his administrator, executor or other legal representative, by registered or certified mail, postage prepaid, a like true and attested copy, with an endorsement thereon of the service upon the commissioner, addressed to the defendant or representative at his last-known address. The officer serving the process upon the Commissioner of Motor Vehicles shall leave with the commissioner, at the time of service, a fee of twenty dollars, which fee shall be taxed in favor of the plaintiff in his costs if he prevails in the action. The Commissioner of Motor Vehicles shall keep a record of each such process and the day and hour of service.

"(d) For the purposes of this section, the term 'nonresident' includes a person who is a resident of this state at the time a cause of action arises and who subsequently moves to another jurisdiction."

answer that question in the affirmative. The plaintiff in the present case, Richard Megos, appeals from the judgment of the trial court dismissing his complaint, brought pursuant to the accidental failure of suit statute, General Statutes § 52-592, on the ground that the original § 52-62 action had not been "commenced" because the defendant, Karin Ranta, did not have actual notice of the suit before the running of the applicable statute of limitations. On appeal, the plaintiff claims this was error. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history, as either found by the court or revealed by the record, provide the background necessary for our review. On February 20, 2013, the plaintiff filed an application for prejudgment remedy against the defendant. The plaintiff alleged that, on October 13, 2012, the defendant, who resided in New York, operated her motor vehicle in a careless and negligent manner when she struck the motorcycle that the plaintiff was driving. The court granted an attachment in the amount of $2 million. The plaintiff, however, thereafter failed to serve the writ, summons, and complaint, and return the same to the Superior Court within thirty days in accordance with General Statutes § 52-278j (a).[2] The court, therefore, dismissed the matter on June 10, 2014.

On October 12, 2014, one day prior to the running of the statute of limitations; see General Statutes § 52-584; the plaintiff attempted to serve a complaint alleging negligent operation of a motor vehicle against the defendant. The marshal's return, dated October 21, 2014, provided that service had been effectuated on October

[2] General Statutes § 52-278j (a) provides: "If an application for a prejudgment remedy is granted but the plaintiff, within thirty days thereof, does not serve and return to court the writ, summons and complaint for which the prejudgment remedy was allowed, the court shall dismiss the prejudgment remedy."

12, 2014, by leaving a true and attested copy of the writ, summons, and complaint at the office of the commissioner, and by mailing a copy, certified return receipt, to the defendant at 120 Central Park South, Apt. 4C, New York, New York. The defendant filed a motion to dismiss the complaint on the ground that service had not been effectuated on her at her "last known address" as required under § 52-62, because it had been more than one year since she had lived on Central Park South and she did not receive a copy of the action. On June 23, 2015, the court granted the motion to dismiss holding that service was not in compliance with the statute and that, therefore, the court had no personal jurisdiction over the defendant.

On June 30, 2015, the plaintiff filed the present action under the accidental failure of suit statute, § 52-592. The defendant filed a motion to dismiss the June 30, 2015 complaint on the ground that "she was not properly served pursuant to . . . § 52-62, and since she never received notice of the suit, the action cannot be saved pursuant to . . . § 52-592, and therefore, this court lacks personal jurisdiction over her."[3] In short, the defendant contended in her memorandum in support of her motion to dismiss that the previous action had not been "commenced within the time limited by law" because the writ, summons, and complaint were mailed to her previous address and she did not receive notice of the action prior to the running of the statute of limitations for negligence actions. (Internal quotation marks omitted.)

[3] The court recognized that a motion to dismiss is not the proper procedural vehicle to challenge the application of § 52-592. See *LaBow* v. *LaBow*, 85 Conn. App. 746, 750, 858 A.2d 882 (2004), cert. denied, 273 Conn. 906, 868 A.2d 747 (2005). It explained, however, that because the parties agreed to the court's determination of the issue via the motion to dismiss, the court is permitted to do so. See *Capers* v. *Lee*, 239 Conn. 265, 269–270 n.9, 684 A.2d 696 (1996) (if use of motion to dismiss to challenge applicability of § 52-592 not challenged by party, court may use this procedural vehicle).

In a November 25, 2015 memorandum of decision, the court granted the motion to dismiss, holding that "in order for the action to have 'commenced,' as required by § 52-592, the defendant must receive effective notice of the suit through the attempted service of the writ, summons and complaint by the marshal within the time limit prescribed by law. An action has not been commenced against a defendant where the defendant had not received or seen a copy of the complaint. . . . In this case, there is no evidence that the defendant was ever served or ever saw a copy of the complaint before the statute of limitations expired." This appeal followed.

The plaintiff claims that the court erred in dismissing his complaint. He argues that the previous action was "commenced" when the marshal served the commissioner and that such service was effectuated before the running of the statute of limitations. He further contends that the requirement in § 52-62 (c), that the writ, summons, and complaint be mailed to the defendant, does not affect the commencement of the action. We agree with the plaintiff.

We set forth the standard of review applicable to this appeal. "A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Internal quotation marks omitted.) *Henriquez* v. *Allegre*, 68 Conn. App. 238, 242, 789 A.2d 1142 (2002). "Where the trial court is presented with undisputed facts . . . our review of its conclusions is plenary, as we must determine whether the court's conclusions are legally and logically correct . . . ." (Internal quotation marks omitted.) *Metcalfe* v. *Sandford*, 81 Conn. App. 96, 98–99, 837 A.2d 894, aff'd, 271 Conn. 531, 858 A.2d 757 (2004).

Our resolution of this appeal requires us to construe the language of § 52-62 in the context of an action

brought pursuant to § 52-592. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 633–34, 148 A.3d 1052 (2016). "[W]ith all issues of statutory interpretation, we look first to the language of the statute[s]. . . . In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. . . . Furthermore, [i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Citations omitted; internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 550, 848 A.2d 352 (2004).

Section 52-592 (a) provides in relevant part: "If any action, *commenced within the time limited by law*, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment." (Emphasis added.) As our Supreme Court

has explained, "[this] provision is remedial in its character. It was passed to avoid hardships arising from an unbending enforcement of limitation statutes. . . . As we have also stated, however, the extension of time [in § 52–592 is] in terms made applicable to all cases where a suit seasonably begun [has] failed for the causes stated. . . . Therefore, § 52-592 *applies only when there has been an original action that had been commenced in a timely fashion*." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Capers* v. *Lee*, 239 Conn. 265, 271, 684 A.2d 696 (1996). In this appeal, therefore, we are called upon to determine whether the plaintiff timely commenced an action under § 52-62, thereby making it savable under § 52-592.

Section 52-62 provides in relevant part: "(a) *Any nonresident of this state* who causes a motor vehicle to be used or operated upon any public highway or elsewhere in this state *shall be deemed to have appointed the Commissioner of Motor Vehicles as his attorney and to have agreed that any process in any civil action* brought against him on account of any claim for damages resulting from the alleged negligence of the nonresident or his agent or servant in the use or operation of any motor vehicle upon any public highway or elsewhere in this state *may be served upon the commissioner and shall have the same validity as if served upon the nonresident personally*. . . .

"(c) *Process in such a civil action against a nonresident shall be served* by the officer to whom the process is directed *upon the Commissioner of Motor Vehicles* by leaving with or at the office of the commissioner, at least twelve days before the return day of the process, a true and attested copy thereof, *and by sending to the defendant* or his administrator, executor or other legal representative, *by registered or certified mail, postage prepaid, a like true and attested copy*, with an endorsement thereon of the service upon the commissioner,

addressed to the defendant or representative at his last-known address. . . ." (Emphasis added.)

The plaintiff argues that, under § 52-62 (a), service on the commissioner is the equivalent of personal service on the defendant. Consequently, because personal service on a defendant undoubtedly commences an action, the same must be true of service on the commissioner under § 52-62. The defendant argues that " '[o]ne who is not served with process does not have the status of a party to the proceeding' " and " '[a]n action is commenced not when the writ is returned but when it is served upon the defendant.' " Although the defendant's argument generally is a sound statement of the law, in this particular instance, § 52-62 *expressly provides* that service on the commissioner *has the same validity* as service on the defendant *personally*. We, therefore, agree with the plaintiff's position that, under the plain language of the statute, there can be no doubt that by timely serving the commissioner, the plaintiff served the defendant personally, thereby commencing the civil action on October 12, 2014, prior to the running of the statute of limitations.

The defendant contends that such a conclusion ignores the specific service requirements contained in subsection (c). She argues that subsection (c) requires process to be served *by two methods*: (1) by service on the commissioner *and* (2) by mailing a copy to the defendant at her last known address via certified mail. Although we agree that subsection (c) contains these two requirements, we conclude that this subsection addresses the *sufficiency* of the service of process rather than the *commencement* of the civil action. Thus, as was true with the first case filed by the plaintiff, a defendant may be entitled to a dismissal for insufficiency of service if a plaintiff fails to comply with subsection (c). This, however, does not mean that the action was not "commenced" under subsection (a) for

purposes of a claim brought pursuant to § 52-592. In fact, had the legislature intended such a result, it would have included the requirements of subsection (c) in subsection (a). The fact that it chose not to do so is a clear indication that it intended each subsection to address a different issue.

In conclusion, the plain language of subsection (a) of § 52-62 provides that service on the commissioner *has the same validity as service on the defendant personally*. When the defendant is served personally, the action is commenced. Accordingly, the court improperly dismissed the action under § 52-592 on the ground that the previous action had not been commenced prior to the running of the statute of limitations.

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

In this opinion the other judges concurred.

UNITED AMUSEMENTS AND VENDING COMPANY *v.* DANIEL SABIA
(AC 38233)

Alvord, Prescott and Lavery, Js.

Syllabus

The plaintiff equipment leasing company sought to recover damages from the defendant for breach of a contract the parties had entered into, pursuant to which it would lease equipment, including a video game machine, dart machines, an automated teller machine, pool tables, and a jukebox, to the defendant for use in his bar. After the plaintiff purchased the necessary equipment from third parties, the equipment was never installed at the bar. The plaintiff made multiple failed attempts to contact the defendant and, thereafter, filed the present breach of contract action. Following a trial to the court, the court rendered judgment in favor of the plaintiff, awarding the plaintiff, inter alia, $15,000 in damages and $5000 in attorney's fees, from which the defendant appealed to this court. Subsequently, the trial court vacated the award of attorney's fees. *Held*:

1. The defendant's appeal was taken from a final judgment; even though the issue of contractual attorney's fees remained outstanding, the judgment on the merits of the breach of contract action was a final judgment for purposes of appeal.
2. The defendant's claim that the trial court improperly failed to find that the contract was unenforceable based on the defendant's special defenses of mistake and duress was not reviewable, the defendant having failed to meet his burden of providing this court with an adequate record for review of his claim; even though the defendant pleaded mistake and duress as special defenses in his answer to the complaint and argued those defenses at trial, the trial court made no findings of fact or any rulings regarding those defenses, the court did not file a written memorandum of decision or prepare and sign a transcript of an oral ruling, the defendant did not file a notice with the appellate clerk concerning the trial court's failure to file either a written memorandum or a signed transcript, he did not seek an articulation from the court regarding his special defenses, and although the record before this court included the trial transcript, this court could not identify any portion of the transcript that encompassed the trial court's factual findings or rulings with respect to the defendant's claims of mistake and duress.
3. The record was inadequate to review the defendant's claim that the trial court incorrectly awarded damages based on unconscionable provisions of the contract; the court did not make any findings of fact or rulings regarding unconscionability, file a written memorandum of decision, or prepare and sign a transcript of an oral ruling, and the defendant did not seek an articulation regarding this issue or file with the appellate clerk a notice concerning the trial court's failure to file either a written memorandum or a signed transcript.
4. The trial court's determination of damages was clearly erroneous and not supported by the record; there was no basis in the evidence for the court's award of $10,000 to the plaintiff in damages, based on a 50 percent restocking fee claimed by the plaintiff, nor was there a basis in the evidence for the court's award of $500 per month for ten months as an operator's commission, and, thus, this court was left with the definite and firm conviction that a mistake had been committed in the calculation of damages.

Argued October 25, 2017—officially released February 6, 2018

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Edward F. Stodolink*, judge trial referee; judgment for the plaintiff, from which the defendant appealed

to this court; thereafter, the court, *Hon. Edward F. Stodolink*, judge trial referee, granted the plaintiff's motion to vacate the award of attorney's fees. *Reversed in part; further proceedings.*

Joel Z. Green, with whom, on the brief, was *Linda Pesce Laske*, for the appellant (defendant).

David Eric Ross, for the appellee (plaintiff).

Opinion

LAVERY, J. In this action for breach of contract arising out of a commercial lease, the defendant, Daniel Sabia, appeals, following a trial to the court, from the judgment rendered in favor of the plaintiff, United Amusements & Vending Company, on the plaintiff's single count complaint. The trial court, *Hon. Edward F. Stodolink*, judge trial referee, awarded $15,000 in damages. The defendant claims on appeal that the trial court (1) failed to find the contract unenforceable based on the defendant's special defenses of mistake and duress; (2) awarded damages based on unconscionable provisions of the contract; and (3) awarded damages inconsistent with the contract and evidence. We agree with the defendant's third claim. Accordingly, we reverse in part the judgment of the court and remand the case for a hearing in damages. We otherwise affirm the court's judgment.

The following facts, which the trial court reasonably could have found, and procedural history are pertinent to our decision. Around September, 2012, the plaintiff's president, Jonathan Dentz, contacted the defendant to arrange a meeting to discuss a possible business relationship between the parties. Dentz then met with the defendant on September 9, 2012, at the South Side Café in Torrington (bar), which the defendant owns through a limited liability company. The two discussed the possibility of the plaintiff leasing equipment to the defendant

for use in the bar, including a video game machine, dart machines, an automated teller machine (ATM), pool tables, and a jukebox. The defendant already had similar equipment in the bar, but was not under contract with his then current vendor. Dentz went over the standard contract the plaintiff used, and the two came to an agreement on the terms for revenue sharing. The defendant inquired as to an advance on the commissions that would be due. Upon learning that the defendant was earning about $500 per month from his current vendor, Dentz agreed to advance $6000 to the defendant.

Dentz left the bar and drew up the contract. The next day, one of the plaintiff's other employees went to the bar with the contract and an advance commission check. The defendant signed the contract on September 10, 2012, and accepted the check. The plaintiff then purchased the equipment pursuant to the contract from third parties.

The purchased equipment was never installed at the bar. About three weeks after the contract was signed, Dentz attempted to call the defendant and left multiple messages, but received no response. Then, in October, 2012, the defendant mailed the uncashed commission check to the plaintiff. The plaintiff sent a demand letter on November 2, 2012, informing the defendant that it believed the defendant had breached the contract, and that it would seek damages if the defendant did not settle the matter within seven days.

The plaintiff filed a breach of contract action on December 5, 2012, seeking damages, costs of suit, attorney's fees, and interest. In his answer, the defendant admitted signing the contract, but denied defaulting on the agreement. After a trial on July 22, 2015, the court awarded the plaintiff $15,000 in damages, $5000 in attorney's fees, and $687.48 in costs. At the plaintiff's request, the court vacated the award of attorney's fees on May

10, 2016, because the parties had agreed at trial to address attorney's fees after trial. The defendant appealed. We will set forth additional facts as necessary.

As a threshold issue, we must address whether this appeal was taken from a final judgment, as the award of attorney's fees was vacated and is still pending. In *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988), our Supreme Court promulgated a bright line rule that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." Although *Paranteau* itself concerned statutory attorney's fees under the Connecticut Unfair Trade Practices Act, its holding has been applied to other attorney's fees awards. See *Hylton* v. *Gunter*, 313 Conn. 472, 484–85, 97 A.3d 970 (2014) (applying *Paranteau* rule to punitive damages); *Benvenuto* v. *Mahajan*, 245 Conn. 495, 501, 715 A.2d 743 (1998) (applying *Paranteau* rule to strict foreclosure case).

Although our Supreme Court has not addressed contractual attorney's fees outside of dicta or footnotes, this court applied the *Paranteau* bright line rule in *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 222, 137 A.3d 809, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016), holding that "regardless of whether the issue of . . . contractual attorney's fees remained outstanding, the [trial] court's . . . judgment was final for purposes of appeal." Thus, despite the issue of attorney's fees in the present case being unresolved, the judgment on the breach of contract is a final judgment for purposes of appeal.

I

On appeal, the defendant first claims that the trial court failed to find the contract unenforceable based on

the defendant's special defenses of mistake and duress.[1] We set forth the relevant standard of review regarding equitable claims. "The determination of what equity requires in a particular case . . . is a matter for the discretion of the trial court. . . . This court must make every reasonable presumption in favor of the trial court's decision when reviewing a claim of abuse of discretion. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *People's United Bank* v. *Sarno*, 160 Conn. App. 748, 754, 125 A.3d 1065 (2015).

We must first consider whether we have an adequate record for review of the defendant's claim regarding his special defenses. We conclude that we do not. Although the defendant pleaded mistake and duress as special defenses in his answer to the complaint and argued these defenses at trial, the trial court made no findings of fact or any rulings regarding these defenses, nor did the court file a written memorandum of decision or prepare and sign a transcript of an oral ruling. See Practice Book § 64-1 (a). The defendant did not file, in accordance with our rules of practice, a notice with the appellate clerk of the failure of the trial court to

[1] In his principal brief, the defendant did not raise any claim of error regarding the court's disposition of his special defense of unclean hands. In its brief, the plaintiff addresses an unclean hands claim that the defendant did not brief. In his reply, the defendant then analyzes unclean hands for the first time. It is well established that we do not review claims raised for the first time in a reply brief, because "[o]ur practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief . . . ." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009). The defendant, however, did not frame the issue, so even though the plaintiff addressed unclean hands, it could not fully respond to an argument that did not exist. Accordingly, we decline to review this claim.

file either a written memorandum or a signed transcript. See Practice Book § 64-1 (b). When the defendant later sought an articulation from the court, he only requested articulation regarding damages and attorney's fees, and did not ask the court to address his special defenses. "As the appellant, the defendant has the burden of providing this court with a record from which this court can review any alleged claims of error. . . . It is not an appropriate function of this court, when presented with an inadequate record, to speculate as to the reasoning of the trial court or to presume error from a silent record." (Citation omitted; internal quotation marks omitted.) *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 72, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.3d 205 (2017); see also Practice Book § 61-10 (a) ("[i]t is the responsibility of the appellant to provide an adequate record for review"); *Michaels* v. *Michaels*, 163 Conn. App. 837, 844–45, 136 A.3d 1282 (2016) (record inadequate where there was no memorandum of decision or signed transcript, appellant did not file notice pursuant to Practice Book § 64-1, and appellant did not seek articulation). Although the record before us includes the trial transcript, we cannot readily identify any portion of the transcript that encompasses the court's factual findings or rulings with respect to the defendant's claims of mistake and duress. Additionally, because there is neither a memorandum of decision nor an articulation regarding these claims, the record is inadequate to review the defendant's claim. See *Michaels* v. *Michaels*, supra, 845.

II

The defendant also claims that the court incorrectly awarded damages based on unconscionable provisions of the contract. "Because unconscionability is a matter of law to be decided by the court . . . our review on appeal is not limited by the clearly erroneous standard . . . but is, rather, a plenary review. . . . We defer,

however, to the trial court's factual findings that underlie the determination of unconscionability unless they are clearly erroneous." (Citations omitted.) *Emlee Equipment Leasing Corp.* v. *Waterbury Transmission, Inc.*, 31 Conn. App. 455, 461, 626 A.2d 307 (1993); see also General Statutes § 42a-2A-107 (a).

The defendant argued that the contract provisions were unconscionable at trial, but, like the defendant's special defenses, the trial court did not make any findings of fact or rulings regarding unconscionability, file a written memorandum of decision, or prepare and sign a transcript of an oral ruling, nor did the defendant seek an articulation regarding this issue or file with the appellate clerk a notice of the failure of the trial court to file either a written memorandum or a signed transcript. We likewise conclude that because there were no factual findings regarding unconscionability, either written or oral, the record is inadequate to review the defendant's claim of error. See *Michaels* v. *Michaels*, supra, 163 Conn. App. 845.

III

Finally, the defendant claims that the trial court incorrectly calculated damages. Specifically, he claims that the award was inconsistent with the evidence presented at trial.[2] We agree.

"The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which [it] would have been in had the contract been performed. . . . The determination of

[2] The defendant also claims that the damages award was inconsistent with the liquidated damages provision of the contract. Because we are firmly convinced that the damages award as articulated by the court was incorrectly calculated based on the evidence adduced at trial, we do not address whether the award was consistent with the liquidated damages provision of the contract.

damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 185, 90 A.3d 219 (2014).

The following additional evidence, which was presented at trial, and procedural history are pertinent to our decision. At trial, Dentz testified that the defendant told him that the defendant was receiving approximately $500 per month as his share of revenue under his then current arrangement.[3] Dentz and the defendant used this figure to determine what amount the plaintiff would advance the defendant. Dentz then testified that the plaintiff incurred costs of $19,574.78 in acquiring from third parties the dart machines, jukebox, and ATM for the bar, and presented the invoices to support this claim.

On cross-examination, Dentz admitted that the plaintiff did not return the equipment and that it was still in its warehouse. Dentz stated that he inquired about returning the equipment, but upon finding out that there would be a restocking fee of about 50 percent, he elected not to return the equipment. After the defendant did not accept delivery, the plaintiff leased out other jukeboxes and ATMs, but no other dart machines.[4]

At the conclusion of trial, the court stated: "I've heard the testimony of the parties. I've also reviewed in brief

[3] This is the only evidence of any revenue in the entire record.

[4] The plaintiff made no claim for damages regarding the pool tables or video game machine it purchased, as those were placed in other establishments.

the exhibits. This is sort of a mixed basis for a damage award. We have the fact that the contract calls for some $20,000 in equipment to be reimbursed. It also calls for liquidated damages over a large period of time. On the other hand, the defense has indicated that there are some questions about the accuracy of those claims. . . . [T]he court will enter a judgment in favor of the plaintiff for a principal amount of $15,000 . . . .''

The defendant later moved for an articulation, asking (1) the manner and method by which the court calculated and determined the amount of damages awarded and (2) the evidence and findings of fact relied upon in fashioning the award of damages. In its articulation, the court stated: ''The judgment of $15,000 consists of a $10,000 restocking charge for the equipment purchased, as shown in exhibit 4, and an operator's commission of $500 per month for ten months, a reasonable period of time, in order that the plaintiff can redirect the use of the machines shown in exhibit 4 to other locations.'' As to the basis of its findings, the court directed the defendant to ''[s]ee exhibits 1 and 4 and the testimony of . . . Dentz.''

We conclude that the court's calculation of damages was incorrect. First, the court awarded $10,000 in damages based on a 50 percent restocking fee claimed by the plaintiff. This damages award for a restocking fee finds no basis in the evidence. Although Dentz testified to being quoted a restocking fee of about 50 percent, Dentz also testified that the plaintiff did not return the equipment, and, therefore, did not incur any restocking fee. Moreover, at least one invoice in exhibit 4 belies the 50 percent figure. The second invoice, for the ATM, clearly states that ''all returned merchandise will be subject to a 25 percent restocking fee plus the original shipping cost.'' Thus, the plaintiff would have forfeited the $250 freight cost, and the restocking fee for the

return of the $3698 machine would have been $924.50, not $1849.

Second, the court's award of $500 per month for ten months as an operator's commission finds no basis in the evidence. At trial, Dentz testified that the plaintiff advanced the defendant $6000 because the defendant claimed he had been receiving approximately $500 per month under his then current equipment deal. There is no evidence in the record to support that this arrangement was in any way similar to the revenue sharing agreed to in the parties' contract. In addition, that $500 figure included revenue derived from all equipment in the bar, which would necessarily include any pool tables or video game machines then present. Although the contract included provisions for the lease of two pool tables and a video game machine, the plaintiff did not claim any damages with respect to this equipment, which in turn would have affected the calculation of revenue. Additionally, the $500 per month figure represented the defendant's share of revenue, not his previous lessor's share. Thus, it is inappropriate to equate the parties' shares of revenue under this contract because not all revenue was to be split evenly between the parties. Although evidence showed that some of the leased equipment would have involved a 50-50 split of revenue under the contract, notably, the jukebox and ATM would not.[5]

On the basis of our review of the evidence, we are left with the definite and firm conviction that a mistake has been committed in the calculation of damages; therefore, we cannot uphold it. In light of our conclusion, we do not address whether the plaintiff failed to

[5] The revenue splitting for the ATM was to be: the full surcharge to the plaintiff and $0.50 per transaction to the defendant. The revenue splitting for the jukebox was to be: the first $75 kept each week and then 50 percent of the balance to the plaintiff, and the first $75 deducted each week and then 50 percent to the defendant.

mitigate its damages, as that issue will be addressed on remand.

Finally, we "must observe that this case has been presented with virtually total disregard of the relevant provisions of our statutes, in particular . . . the Uniform Commercial Code . . . . While it is true that the Code incorporates, by reference, supplementary general principles of contract law and of the law merchant . . . such supplemental bodies of law cannot displace those provisions of the Code that are directly applicable." (Citations omitted.) *Bead Chain Mfg. Co.* v. *Saxton Products, Inc.*, 183 Conn. 266, 270, 439 A.2d 314 (1981) (*Peters, J.*). Article 2A of the Uniform Commercial Code "applies to any transaction regardless of form which creates a lease."[6] General Statutes § 42a-2A-103. Therefore, on remand, we direct the parties' attention to the sections of article 2A pertaining to remedies for default, General Statutes § 42a-2A-701 et seq.[7]

[6] We note that, prior to the present case, no appellate court of this state has addressed article 2A since its adoption in this state, although it was used before its adoption for its instructiveness in a claim of unconscionability in a finance lease in *Emlee Equipment Leasing Corp.* v. *Waterbury Transmission, Inc.*, supra, 31 Conn. App. 455.

[7] We particularly direct the parties' attention to General Statutes § 42a-2A-716, which provides in part: "(a) If the lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, the lessee is in default under the lease contract with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired, and the lessor may do one or more of the following:

"(1) Withhold delivery of the goods and take possession of goods previously delivered;

"(2) Stop delivery of the goods by any carrier or bailee under subsection (b) of section 42a-2A-719;

"(3) Proceed under section 42a-2A-718 with respect to goods still unidentified to the lease contract or unfinished;

"(4) Obtain specific performance under section 42a-2A-708 or recover the rent under section 42a-2A-722;

"(5) Dispose of the goods and recover damages under section 42a-2A-720 or retain the goods and recover damages under section 42a-2A-721;

"(6) Recover incidental and consequential damages under sections 42a-

The judgment is reversed with respect to the award of damages and the case is remanded for a hearing in damages in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DONALD FIELDS *v.* COMMISSIONER OF CORRECTION (AC 39674)

Lavine, Sheldon and Harper, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to advise him of a plea offer of the state for the petitioner to resolve the charges against him by pleading guilty to the crime of felony murder in exchange for a recommended sentence of twenty-five years imprisonment. At the habeas trial, the petitioner testified that he would have accepted the plea offer had trial counsel conveyed it to him. The habeas court rendered judgment denying the habeas petition, concluding that, although counsel's performance had been deficient, the petitioner failed to prove that such deficient performance had prejudiced him. In reaching its conclusion, the court first rejected the petitioner's testimony that he would have accepted the plea offer and then specifically found that he would have rejected it had trial counsel conveyed it to him. Thereafter, on the granting of certification, the petitioner appealed to this court, claiming that the habeas court erred in concluding that he had not been

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2A-706 and 42a-2A-707;

"(7) Cancel the lease contract under section 42a-2A-709;

"(8) Recover liquidated damages under section 42a-2A-710;

"(9) Enforce limited remedies under section 42a-2A-711;

"(10) Recover damages under section 42a-2A-705; or

"(11) Exercise any other rights or pursue any other remedies provided in the lease agreement.

"(b) If the lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (a) of this section, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses avoided as a result of the lessee's default. . . ." We note that some of these remedies may be inapplicable to the present case.

prejudiced by trial counsel's deficient performance. *Held* that the habeas court correctly concluded that the petitioner had failed to prove that he was prejudiced by his trial counsel's deficient performance, the petitioner having failed to establish a reasonable probability that, had trial counsel conveyed the subject plea offer to him, he would have accepted it: the habeas court's credibility determination rejecting the petitioner's testimony that he would have accepted the plea offer had counsel conveyed it to him was sufficient to support the court's conclusion that the petitioner had failed to prove prejudice, as the court found that the testimony was self-serving, that it was the only evidence in the record indicating that the petitioner would have accepted the plea offer, and that what the petitioner would do at the time of the hearing, knowing the outcome of his trial, was different from what he would have done at the time of his sentencing, and it was not the role of this court on appeal to second-guess the habeas court's credibility determination; moreover, contrary to the petitioner's assertion, the habeas court's credibility determination was distinct from its affirmative finding that the petitioner would have rejected the plea offer had it been conveyed to him.

Argued November 13, 2017—officially released February 6, 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, *Bright, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Stephen A. Lebedevitch, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, 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

HARPER, J. The petitioner, Donald Fields, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he collaterally challenged his thirty year sentence for felony murder on the ground of ineffective assistance

of counsel. In his petition, the petitioner claimed that his trial counsel, John Paul Carroll, rendered ineffective assistance by failing to advise him before trial of the state's offer that he resolve the charges against him by pleading guilty to felony murder in exchange for a recommended sentence of twenty-five years to serve. The habeas court rejected that claim on the ground that, although Carroll had indeed rendered constitutionally deficient performance by failing to advise the petitioner of the state's twenty-five year plea offer, the petitioner had not been prejudiced by that deficient performance. Specifically, the court concluded that he had not proved, by a fair preponderance of the evidence, that he would have accepted the offer had Carroll conveyed it to him.

On appeal, the petitioner claims that the habeas court erred in concluding that he had not been prejudiced by Carroll's constitutionally deficient performance because there was no evidence in the record tending to show that he would not have accepted the offer, and, thus, the court's finding to that effect was entirely speculative.

Although we are troubled by the facts of this case concerning Carroll's deficient performance, we must keep in mind that, in assessing the habeas court's finding as to prejudice, "[i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court."[1] *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 887, A.3d

[1] The petitioner was sixteen at the time of the crime and seventeen at the time of trial and sentencing. He had never been prosecuted in the adult justice system before; his only experience was in juvenile court. The petitioner was facing a potential sentence of 100 years of imprisonment, and Carroll deprived him of an opportunity to consider a plea offer of twenty-five years of imprisonment. Despite Carroll's deficient performance, we cannot provide a remedy to the petitioner, as the habeas court discredited the petitioner's testimony that he would have accepted the plea offer had Carroll presented it to him, in part because of the petitioner's self-interest in having his sentence reduced.

(2017). Accordingly, on the basis of the court's credibility based rejection of the petitioner's claim that he would have accepted the state's plea offer had it been conveyed to him, we affirm the judgment of the habeas court.

The court's memorandum of decision sets forth the following relevant facts and procedural history. "The petitioner was convicted after a jury trial of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (1), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). The trial court sentenced the petitioner to thirty years in prison, followed by twenty years of special parole. The petitioner was represented before and during trial by . . . Carroll.

"Since *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the United States Supreme Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. . . . Despite the strong interests that support the harmless-error doctrine, the [c]ourt in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. . . . Errors that are not subject to harmless error analysis go to the fundamental fairness of the trial. . . . Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected. . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." (Citations omitted; internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 504–505, 903 A.2d 169 (2006). "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). The circumstances of this case leave us questioning whether this case presents something akin to a structural error. If Carroll had presented the petitioner with the plea offer, there may have been no need for the trial at all.

"The petitioner appealed his convictions to the Supreme Court, which affirmed them. *State* v. *Fields*, 265 Conn. 184, 827 A.2d 690 (2003). . . . The petitioner was sixteen at the time of [the] crime and seventeen at the time of his trial.

"The petitioner's sole claim was tried to the [habeas] court over two days. The court heard the testimony of three witnesses: State's Attorney John Davenport, the petitioner, and [Carroll].[2] The court also received as exhibits the transcripts from the petitioner's criminal trial and sentencing, the presentence investigation report . . . delivered to the court prior to sentencing, the mittimus reflecting the petitioner's sentence, and the Supreme Court's decision from the petitioner's appeal." (Footnote added.)

At the habeas trial, the petitioner testified that he and Carroll never discussed a plea deal from the state, but that the offer of twenty-five years to serve was "something that [the petitioner] would have accepted." Throughout his cross-examination, the petitioner iterated that he never asked Carroll about pleading guilty, but that he did not know he could ask about making an offer. Moreover, in response to a question about whether the petitioner would have accepted responsibility in exchange for the plea offer of twenty-five years,

[2] Throughout Carroll's testimony, he iterated that he had only "some vague recollections of the case." In fact, Carroll testified that he could not recall the details of the plea offer or whether an offer was even made. Specifically, Carroll testified that he had "no independent recollection . . . of any offer being made" and that he did not recall whether the petitioner was interested in pleading guilty or otherwise disposing of the case without a trial. Carroll explained that he tries not to influence his clients one way or another regarding whether to accept a plea offer or go to trial, but that he thought that he had a "workable defense for the petitioner." When asked whether he explained to the petitioner the "charges, the elements, [and] the proceedings that [the petitioner] could anticipate," however, Carroll testified, "I would have to assume I did. Once again, I don't have any independent recollection of it."

the petitioner testified: "If I was offered a—a small amount of time . . . [o]r not a small amount of time, but somethin[g] and that was what I had to do . . . to get the time and accept responsibility, yeah, I would have. If I was offered the offer, I [would have done] that."

On September 6, 2016, following trial, the court denied the petition for a writ of habeas corpus. The court concluded that, although the petitioner had proved that Carroll's performance was deficient, he had not proved that such deficient performance had caused him prejudice. In reaching that conclusion, the court first rejected the petitioner's testimony that he would have accepted the plea offer of twenty-five years to serve for felony murder.[3] The court then specifically found that the petitioner would have rejected that plea offer had Carroll conveyed it to him.[4] The court thereafter granted the petitioner's timely petition for certification to appeal. This appeal followed.

[3] In its memorandum of decision, the court explained that "the petitioner has not proven by a preponderance of the evidence that he would have accepted the state's offer had it been conveyed to him. The only evidence supporting the petitioner's claim is the petitioner's testimony. The court puts little weight in that testimony because of the petitioner's obvious self-interest in having his sentence reduced. In addition, while the petitioner, now over thirty years old, might be inclined to accept a twenty-five year sentence knowing the outcome of the trial, that is a far cry from what he would have thought as a seventeen year old prior to trial."

[4] The court detailed the following five reasons to support its affirmative finding that the petitioner would have rejected the plea offer: "First, the petitioner had every reason to believe that while he was exposed to a potential life sentence, any sentence he would receive, if convicted, would be towards the lower end of the sentencing range. He was not the shooter and had cooperated with police by telling them what happened. In fact, [Davenport] stated at the petitioner's sentencing that until he saw the petitioner's [presentence investigation report] he thought the petitioner's involvement warranted a sentence close to the minimum of twenty-five years.

"Second, [Carroll] advised the petitioner that the case was winnable. Thus, the petitioner, as a seventeen year old, would have had to weigh a certain twenty-five year sentence against the possibility of an acquittal and a likely slightly longer sentence if convicted. The court concludes that under those circumstances the petitioner would have likely rejected the state's offer.

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant because there was a reasonable probability that the outcome of the proceedings

"Third, the petitioner was not new to the criminal justice system. In addition to the charges on which he was convicted, he had two other pending charges, which the state nolled after the petitioner was sentenced. He also had an extensive juvenile [criminal] history including twelve separate dispositions between 1997 and 1999. Given his experience, it is unfathomable that he did not understand that plea negotiations regularly take place in criminal matters. Consequently, his testimony that he did not know he could ask his attorney if the state was willing to make an offer was not credible. His admitted failure to ask [Carroll] about a plea offer only buttresses the court's conclusion that he was not interested in pleading guilty.

"Fourth, while incarcerated pending trial, the petitioner received a number of disciplinary tickets for fighting, giving false information, disorderly conduct, causing a disruption, and disobeying a direct order. Knowing that such conduct would reflect badly on him if convicted, the fact that the petitioner engaged in it nonetheless shows a lack of judgment that would have led him to reject an offer from the state, even if it was in his best interest to accept it.

"Finally, even when given an opportunity at sentencing to take some responsibility for his actions and thereby do himself some good with the court, the petitioner elected not to do so. The court all but pleaded with the petitioner to say something, but the petitioner chose to remain silent. Such a position is inconsistent with the petitioner's claim that he would have willingly pleaded guilty, accepted responsibility for his role in the crimes, and agreed to a sentence of twenty-five years to serve."

would have been different had it not been for the deficient performance. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 883–85.

The sixth and fourteenth amendment right to the effective assistance of competent counsel is "a right that extends to the plea-bargaining process." *Lafler* v. *Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). In cases alleging ineffective assistance during the plea process, our Supreme Court has held that to prove the prejudice prong the petitioner "need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). Whether the court would have accepted the plea agreement is governed by an objective standard. Id., 360; see also *McMillion* v. *Commissioner of Correction*, 151 Conn. App. 861, 872, 97 A.3d 32 (2014) ("determination of prejudice must be made by assessing whether a reasonable trial judge would have accepted the sentence" [internal quotation marks omitted]).

On appeal, the petitioner asserts that the court erred in determining that he would not have accepted the state's plea offer had Carroll conveyed it to him. The petitioner argues that the court's credibility determination, rejecting his testimony that he would have accepted the plea had Carroll conveyed it to him, is

closely intertwined with its affirmative finding that the petitioner would have rejected the plea offer. He further contends that the affirmative finding is based on pure speculation, as there is no evidence in the record to support it, and thus it is clearly erroneous. The respondent, the Commissioner of Correction, asserts that, after rejecting the petitioner's testimony that he would have accepted the plea offer had Carroll conveyed it to him, the court properly concluded that the petitioner failed to prove the prejudice prong of the *Strickland* test.[5] We disagree with the petitioner's argument that the court's affirmative finding is inseparable from its credibility determination, which led it to reject his testimony that he would have accepted the plea offer. We thus agree with the respondent that, on the basis of the court's credibility determination, the court correctly determined that the petitioner had failed to prove the prejudice prong of the *Strickland* test.[6]

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given their testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Citation omitted; internal quotation marks omitted.) *Cole* v. *Commissioner of Correction*, 126 Conn. App. 775, 779, 12 A.3d 1065, cert. denied,

[5] The respondent maintains that the court's affirmative finding is not clearly erroneous, but argues that it is distinct from the court's credibility determination. Therefore, we interpret the respondent's argument to be that on the basis of the court's credibility determination alone, we must affirm the judgment, regardless of what we conclude regarding the affirmative finding.

[6] Our conclusion is based on the court's credibility determination and the reasons provided to support it, specifically, that the petitioner's testimony is the only evidence in the record supporting his claim, the petitioner's testimony is self-serving, and what the petitioner would do now is different from what the petitioner would have done at the time of his sentencing. Because the court's rejection of the petitioner's testimony, and its rationale for doing so, are sufficient to resolve this appeal, we need not decide the viability of the court's affirmative finding and the five reasons detailed to support it.

300 Conn. 937, 17 A.3d 473 (2011). "The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 885–86.

We conclude that the court's credibility determination is distinct from its affirmative finding that the petitioner would have rejected the plea offer for the five reasons detailed in the memorandum of decision. Our reading of the memorandum of decision indicates that the court first rejected the petitioner's testimony that he would have accepted the offer for the following reasons: (1) it was self-serving; (2) it was the only evidence in the record that the petitioner would have accepted the offer; and (3) because what the petitioner would do at the time of the hearing, knowing the outcome of his trial, was different from what he would have done at the time of his sentencing. This was sufficient to support the court's determination that the petitioner had not established prejudice.

A review of the record shows no evidence independent of the petitioner's own testimony that he would have accepted the state's plea offer had Carroll conveyed it to him. In fact, his testimony on that issue was at most equivocal. For example, in response to the court's question on that subject, he testified that if Carroll had explained the maximum penalties he was facing, he thought that he would have "ended up takin[g] the twenty-five [years] rather than . . . go to trial." Because, to reiterate, "[i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court"; *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 887; we conclude that the court properly found that the petitioner did not establish a reasonable probability that, had Carroll conveyed the offer, the petitioner would have accepted it. Thus, the court correctly determined that the petitioner failed to meet the prejudice prong of the *Strickland* test.

The judgment is affirmed.

In this opinion the other judges concurred.

DOCTOR'S ASSOCIATES, INC. *v.* SUSAN E. SEARL ET AL.
(AC 38482)

Alvord, Sheldon and Bishop, Js.

Syllabus

The plaintiff filed an application to confirm an arbitration award issued in its favor in connection with the defendants' alleged breach of a franchise agreement between the parties regarding the defendants' operation of a certain restaurant. The agreement stated that it was governed by Connecticut law except as otherwise provided in the agreement. A provision in the agreement's arbitration clause specified that federal law preempted any state law restrictions on the enforcement of that clause. The defendants filed an objection to the plaintiff's application and subsequently filed an answer and a special defense seeking to vacate

the award, which the parties and the court treated as a motion to vacate. The defendants alleged, inter alia, that they did not receive notice of the arbitration proceeding, and, therefore, the award was not enforceable against them. The trial court, applying Connecticut law, refused to consider the defendants' motion to vacate on the ground that it was untimely and rendered judgment granting the plaintiff's application to confirm the arbitration award. On the defendants' appeal to this court, *held* that the trial court should have applied federal law, instead of Connecticut law, in determining the timeliness of the defendants' motion to vacate the arbitration award: when the franchise agreement's choice of law clause was read in light of the arbitration clause, it was clear that although, generally, Connecticut law governed the terms of the agreement, federal law governed the procedures used to enforce the arbitration clause, as the parties, by agreeing that federal law preempted any state law restrictions on the enforcement of the arbitration clause, made clear that federal law governed the procedures by which the arbitration clause was enforced and, thus, governed the procedure for moving to vacate the arbitration award, and application of Connecticut law would have contradicted the parties contractual intent to use federal law as expressly agreed to in the franchise agreement; accordingly, the defendants were entitled to a hearing to determine whether they timely moved to vacate the arbitration award under the statutory time limit provided for in federal law, and if so, to address the merits of that motion.

Argued October 23, 2017—officially released February 6, 2018

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendants filed an objection; thereafter, the defendants filed an answer and a special defense seeking to vacate the award; subsequently, the court, *Tyma*, *J.*, granted the application to confirm the award and rendered judgment thereon, from which the defendants appealed to this court. *Reversed*; *further proceedings*.

Scott T. Garosshen, with whom were *Karen L. Dowd* and, on the brief, *Kimberly A. Knox* and *Myles H. Alderman*, *Jr.*, for the appellants (defendants).

Frank J. Mottola III, for the appellee (plaintiff).

Opinion

BISHOP, J. The defendants, Susan E. Searl and Randy A. Searl, doing business as Subway store number 34648,[1] appeal from the judgment of the trial court, effectively dismissing their motion to vacate an arbitration award for lack of subject matter jurisdiction and granting the application of the plaintiff, Doctor's Associates, Inc., to confirm that award. On appeal, the defendants claim that the court should have applied federal law, or alternatively New York law, instead of Connecticut law, in determining whether they timely filed their motion to vacate. We conclude that the court should have applied federal law in determining the timeliness of the defendants' motion to vacate and, accordingly, reverse the judgment of the trial court and remand the case for further proceedings.[2]

The following facts and procedural history are relevant to this appeal. The defendants owned and operated three Subway restaurant franchises under separate franchise agreements. Only one of the defendants' stores, store number 34648 (store), and the franchise agreement for that store (franchise agreement), are at issue in this case. In October, 2013, the plaintiff notified the defendants that they were noncompliant with certain requirements of the franchise agreement regarding their operation of the store. In February, 2014, the parties entered into a probationary agreement, which provided that if the defendants were compliant with the franchise agreement for three months, they would be reinstated as franchisees of the store.

[1] We refer in this opinion to the Searls collectively as the defendants and to Susan Searl individually by name where appropriate.

[2] We note that although the defendants now have closed the Subway store at issue, the appeal is not moot because they have incurred approximately $300,000 in fines during this litigation, which the plaintiff is pursuing as a penalty for their continued operation of the store.

On April 3, 2014, the plaintiff filed a demand for arbitration with the American Dispute Resolution Center (center), claiming that the defendants had breached the franchise and probationary agreements. The defendants received notice of the plaintiff's initiation of the arbitration proceeding even though the mailing address on the notice was incorrect. On May 1, 2014, Susan Searl contacted the plaintiff to discuss the arbitration and spoke to Jill Fernandez, a case manager in the plaintiff's office. Fernandez explained that the defendants "would be receiving further information regarding the arbitration process, the selection of an arbitrator, and the scheduling of a hearing date," and that they should "expect to receive further documentation in June or July [2014]." Fernandez also explained that the defendants "did not need to make any further decisions or take any further actions until [they] received the information regarding the process for selecting an arbitrator."

On June 20, 2014, the arbitrator found in favor of the plaintiff and issued an award in its favor. The defendants received notice of the award "as early as June 26, 2014, and no later than July 1, 2014." Along with the notice of the award, the defendants received, *for the first time*, notice regarding the selection of an arbitrator and the deadline for the submission of evidence in the arbitration proceeding. A representative from the center informed Susan Searl that the reason the defendants had not received any communications from the center between April and June, 2014, was that "the *plaintiff* [had] provided the [center] with the wrong address." (Emphasis added.) On June 26, 2014, a representative of the plaintiff informed the defendants that, in light of the arbitrator's award, there was nothing they could do "other than sell or close [the store]."

The plaintiff filed an application to confirm the arbitration award in the Superior Court on August 8, 2014.

On September 4, 2014, the defendants, representing themselves, filed a pleading entitled "Objection to Confirmation Award."[3] This pleading explained that the defendants had never received notice of the arbitration hearing date and included numerous notes detailing arguments the defendants would have made had they been given the opportunity to present their case to the arbitrator. On October 3, 2014, the defendants, having retained counsel, filed an "Answer and Affirmative Defenses" in response to the plaintiff's application to confirm the arbitration award. In that pleading, which the parties treated as a motion to vacate the award, the defendants similarly alleged that they had not received notice of the arbitration proceeding, had not had an opportunity to present evidence, and did not learn that the arbitration hearing had taken place until after the arbitrator had issued the award in favor of the plaintiff.

On October 9, 2014, the plaintiff filed a motion to dismiss the "Objection to Confirmation Award" and the "Answer and Affirmative Defenses," arguing that the court lacked subject matter jurisdiction because the filings had not been made within the thirty day time period for moving to vacate an arbitration award provided by General Statutes § 52-420 (b).[4] The defendants responded that the Federal Arbitration Act (act), 9 U.S.C. § 1 et seq., governed the enforcement of the arbitration award and that their objection to the arbitration award was sufficiently asserted within the three month time period following the issuance of the award prescribed by the act.[5] Alternatively, the defendants

[3] The court did not address this pleading in its memorandum of decision. On remand, however, the court must determine whether this pleading was, in effect, the defendants' first motion to vacate the arbitration award.

[4] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

[5] Under federal law, the statute of limitations for moving to vacate, modify, or correct an arbitration award is set forth in 9 U.S.C. § 12, which provides in relevant part: "Notice of a motion to vacate, modify, or correct an award

argued that, if federal law did not apply, the court should apply New York law.[6] Additionally, the defendants maintained that they "had meritorious defenses to the plaintiff's demand for arbitration, but they were not given notice or an opportunity to be heard."

On September 15, 2015, the trial court issued a memorandum of decision in which it (1) denied the plaintiff's motion to dismiss, (2) refused to consider the defendants' special defense seeking to vacate the arbitration award on the ground that it was untimely, and (3) granted the plaintiff's application to confirm the arbitration award. The court concluded that the act was not controlling in the present case because the general choice of law provision in the parties' franchise agreement established that Connecticut law governed. The court also rejected the defendants' alternative argument that New York law should apply. Instead, the court applied Connecticut law. Reasoning that the defendants did not move to vacate the arbitration award within thirty days of their receipt of the award, as Connecticut law requires; see footnote 4 of this opinion; the court concluded that the defendants' motion was untimely, and thus it granted the plaintiff's application to confirm the arbitration award. This appeal followed.

The defendants claim that the arbitration award in favor of the plaintiff is unenforceable because they did not receive adequate notice of the arbitration proceeding. The defendants assert that, without notice of the proceeding, the arbitration award is not enforceable against them. The defendants maintain that because the

must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . ."

[6] Under New York law, the statute of limitations for moving to vacate or modify an arbitration award is set forth in New York Civil Practice Law and Rules § 7511 (a), which provides in relevant part: "An application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

parties expressly agreed that the act "preempts any state law restrictions . . . on the enforcement of the arbitration clause in [the franchise agreement]," the court should have applied federal law or, alternatively, New York law, when determining whether the defendants timely filed their motion to vacate. In response, the plaintiff argues that the franchise agreement's general choice of law clause clearly requires application of Connecticut law. We agree with the defendants and conclude that the court should have applied federal law.

"We review a [trial] court's decision to confirm or vacate an arbitration award de novo on questions of law and for clear error on findings of fact." *National Football League Management Council* v. *National Football League Players Assn.*, 820 F.3d 527, 536 (2d Cir. 2016); see also *Henry* v. *Imbruce*, 178 Conn. App. 820, 828, A.3d (2017) (same). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . .

"In accordance with this principle, our recent cases have held, in a number of different contexts, that the contract language at issue was so definitive as to make the interpretation of that language a question of law subject to plenary review by this court." (Citations omitted; internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iriquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000). In our view, the terms of the franchise agreement are clear and unambiguous; therefore, interpretation of this contract presents a question of law subject to plenary review. See *JSA Financial Corp.* v. *Quality Kitchen Corp. of Delaware*, 113 Conn. App. 52, 59, 964 A.2d 584 (2009).

"The individual clauses of a contract . . . cannot be construed by taking them out of context and giving

them an interpretation apart from the contract of which they are a part. . . . A contract should be construed so as to give full meaning and effect to *all of its provisions* . . . . [T]he language of the choice of law portion of the parties' agreement cannot be read in isolation, but instead must be considered in light of the language of the arbitration portion." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998). Moreover, it is a well established principle of contract interpretation that "the particular language of a contract must prevail over the general." (Internal quotation marks omitted.) *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 511, 789 A.2d 974 (2002).

Furthermore, "[a]ll parties in an arbitration proceeding are entitled to notice and an opportunity to be heard. . . . Parties must be allowed to present evidence without unreasonable restriction . . . and must be allowed to confront and cross-examine witnesses. . . . Where a party to an arbitration does not receive a full and fair hearing on the merits, a [trial] court will not hesitate to vacate the award. . . . In [such] cases, vacatur of the award [is] justified [where] the lack of notice or denial of an opportunity to be heard involve[s] the merits of the controversy." (Citations omitted; internal quotation marks omitted.) *Konkar Maritime Enterprises, S.A.* v. *Compagnie Belge D'Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987); see also *CEEG (Shanghai) Solar Science & Technology Co., Ltd.* v. *LUMOS LLC*, 829 F.3d 1201, 1206 (10th Cir. 2016) ("[n]otice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [arbitration] and afford them an opportunity to present their objections" [internal quotation marks omitted]).

In the present case, the defendants maintain that because they did not receive notice of the arbitration

beyond the original demand, which did not contain the date, time, or place of the arbitration hearing, they were deprived of their opportunity to be heard, and as a result, the award is not enforceable against them. In its memorandum of decision, the court stated: "The parties do not dispute the enforceability or scope of the arbitration clause. As a result, paragraph 10 (f) of the [f]ranchise [a]greement is inapplicable to the present proceeding." We disagree.

Paragraph 10 (f) of the franchise agreement provides in relevant part: "Any disputes concerning the enforceability . . . of the arbitration clause shall be resolved pursuant to the [act] . . . and *the parties agree that the* [*act*] *preempts any state law restrictions . . . on the enforcement of the arbitration clause in this Agreement*." (Emphasis added.) By agreeing that the act preempts any state law restrictions on the enforcement of the arbitration clause, the parties have made clear that federal law governs the procedures by which the arbitration clause contained in the franchise agreement is to be enforced.[7] It necessarily follows that

[7] Several cases explain that the act does not preempt state procedural rules governing the conduct of arbitration, so long as the state procedural rule does not undermine the goals of the act. See *Moscatiello* v. *Hilliard*, 939 A.2d 325, 329 (Pa. 2007) ("[t]he [act] does not preempt the procedural rules governing arbitration in state courts, as that is beyond its reach"); *Joseph* v. *Advest, Inc.*, 906 A.2d 1205, 1209–10 (Pa. Super. 2006) ("the broad reach of the [act] will not extend so far as to preempt the procedural rules of state proceedings because there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate" [internal quotation marks omitted]); *Sultar* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV-04-0527411-S (October 13, 2004) (38 Conn. L. Rptr. 108) (applying Connecticut law and not federal law to determine timeliness of motion to vacate because Connecticut law "does not conflict with the primary purpose of the [act], which is to encourage arbitration to the fullest scope of the parties' agreement to arbitrate"). Here, unlike the cases cited, the parties expressly agreed in the franchise agreement that federal law preempted the state law procedures used to enforce the arbitration clause. Therefore, federal law should have been used to determine whether the

the procedure for moving to vacate an arbitration award is governed by federal law. Application of Connecticut's statute of limitations for filing a motion to vacate, pursuant to § 52-420 (b), would contradict the parties contractual intent to use federal law, as expressly agreed to in the franchise agreement.[8]

We acknowledge that the parties agreed that Connecticut law would govern the franchise agreement. Paragraph 13 of the franchise agreement states in relevant part: "The Agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, *except as may otherwise be provided in this Agreement.*" (Emphasis added.) The franchise agreement did, in fact, provide otherwise when it specified, in paragraph 10 (f), that the act preempted any state law restrictions on the enforcement of the arbitration clause. As our Supreme Court has instructed, we

defendants timely filed their motion to vacate. See, e.g., *Ungerland* v. *Morgan Stanley & Co.*, 52 Conn. Supp. 164, 172–73, 35 A.3d 1095 (2010) ("[t]he exception to the use of Connecticut procedural arbitration laws by a Connecticut court is when the parties have agreed . . . in an arbitration agreement . . . to abide by the law of a particular [jurisdiction]").

[8] The court's reliance on *Hotz Corp.* v. *Carabetta Builders, Inc.*, Superior Court, judicial district of New Haven, Docket Nos. CV-91-0318394-S and CV-91-0318936-S (November 29, 1991) is misplaced. In *Hotz*, the court relied on the United States Supreme Court's decision in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), for the principle that "the [act] does not preempt this state's arbitration rules in that the parties have agreed to abide by Connecticut law to the exclusion of federal arbitration law . . . ." Id., 479; *Hotz Corp.* v. *Carabetta Builders, Inc.*, supra. The defendants' argument in the present case, however, is not that the act, in general, preempts Connecticut law. Rather, they argue that, pursuant to the language of the franchise agreement, the parties agreed that federal law governs, thereby rendering inapplicable any state law restrictions regarding the enforcement of the arbitration clause. In sum, we do not deviate from the established precedent that holds that the act does not preempt state law where the parties agreed to abide by state arbitration rules. In this case, the parties expressly intended and contracted that federal law would apply to any disputes regarding the enforcement of the arbitration clause.

must give effect to each provision of the parties' agreement and not read the choice of law clause in isolation from the arbitration clause; see *Levine* v. *Advest, Inc.*, supra, 244 Conn. 753; and particular language in a contract must prevail over general. See *Miller Bros. Construction Co.* v. *Maryland Casualty Co.*, 113 Conn. 504, 514, 155 A. 709 (1931).

When the general choice of law clause of the franchise agreement is read in light of the arbitration clause, it becomes clear that although, generally, Connecticut law governs the terms of the agreement, federal law governs the procedures used to enforce the arbitration clause.[9] Compare, e.g., *Smith Barney, Harris Upham &*

[9] Although not binding on this court, the Superior Court decision in *Sultar* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV-04-0527411-S (October 13, 2004) (38 Conn. L. Rptr. 108), is instructive. In *Sultar*, the parties signed an investment contract that contained both a choice of law clause and an arbitration clause. Id. The choice of law clause established that New York law would apply to the enforcement of the investment contract. Id. The parties did not specify which law would govern the arbitration clause, i.e., the parties did not specify whether federal law preempted state law regarding the enforcement of the arbitration clause. Id. The court concluded that the choice of law clause did not demonstrate which state's law the parties intended to apply to the plaintiff's motion to vacate the arbitration award. Id. The court explained that the choice of law clause "merely provides that the law of the state of New York applies to the enforcement of the agreement," and when read in light of the arbitration clause, the "provisions do not allow for an interpretation that the parties intended New York law to apply to the process of vacating the [arbitration] award." Id. The court applied Connecticut law because, with no agreement specifying to do otherwise, the court applied the law of the jurisdiction in which the motion to vacate was filed. Id.

In the present case, the general choice of law clause does not demonstrate which law to apply to a motion to vacate an arbitration award, however, the parties specified in paragraph 10 (f) of the franchise agreement that federal law preempted state law regarding the enforcement of the arbitration clause, which includes the process of vacating an arbitration award. Accordingly, reading the general choice of law clause and the arbitration clause together provides for the conclusion that the parties intended to apply federal law to the process of vacating an arbitration award. The court, therefore, should have followed the limitations period provided by the act when determining whether the defendants timely filed their motion to vacate.

Co. v. *Luckie*, 85 N.Y.2d 193, 202, 647 N.E.2d 1308, 623 N.Y.S.2d 800 (concluding that when choice of law clause explained "that New York law would govern the agreement *and its enforcement*," parties intended to "arbitrate to the extent allowed by [New York] law" [emphasis in original; internal quotation marks omitted]), cert. denied sub nom. *Manhard* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 U.S. 811, 116 S. Ct. 59, 133 L. Ed. 2d 23 (1995), with *N.J.R. Associates* v. *Tausend*, 19 N.Y.3d 597, 602, 973 N.E.2d 730, 950 N.Y.S.2d 320 (2012) (concluding that question of timeliness "must be resolved by an arbitrator under [the act's] principles" where choice of law clause provided only that "the Agreement shall be governed by, and construed in accordance with, the laws and decisions of the State of New York," and "[did] not include the critical enforcement language" [internal quotation marks omitted]). We conclude, therefore, that the defendants are entitled to a hearing to determine whether they timely moved to vacate the arbitration award under the statutory time limit provided in the act. See footnote 5 of this opinion. If the defendants did comply with the limitations period provided by federal law, the court shall then reach the merits of the defendants' motion to vacate the arbitration award.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MIGUEL JUAREZ (AC 38953)

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

Syllabus

Convicted of the crimes of conspiracy to commit murder and attempt to commit murder in connection with his alleged conduct in attempting to hire a hit man to kill his wife's boyfriend, F, the defendant appealed to this court, claiming, inter alia, that there was insufficient evidence

to support his conviction. The defendant allegedly had offered to pay Z, who formerly had been employed by the defendant, to kill F, but when Z responded that he could not do it, the defendant asked him to find someone who would kill F. Z then asked a friend, M, to kill F or to find someone who would do so. M, a police informant, contacted the police, who arranged a meeting between Z and a police officer who posed as the hit man. During the meeting, Z provided the officer with information about F and offered to pay the officer money to kill him. *Held*:

1. The evidence was sufficient to support the defendant's conviction of conspiracy to commit murder, as the defendant's offer to pay Z to kill F was sufficient to prove the defendant's intent to enter into an agreement with Z to have F killed; the defendant's conduct in the months that followed that offer, which included hundreds of phone calls made by the defendant to Z asking Z to follow his wife and whether Z had found someone to kill F, was corroborative of the defendant's intent to have F killed, and the jury reasonably could have concluded that the defendant and Z knew who F was, even if they did not know his name, as the evidence proved that the defendant had directed Z to F's house, and that Z had seen F numerous times at various locations kissing and hugging the defendant's wife.
2. There was sufficient evidence to support the defendant's conviction of attempt to commit murder; on the basis of the defendant's offer to pay Z to kill F, and his subsequent request that Z find someone else to kill F when Z stated that he could not do it, the jury reasonably could have inferred that the defendant intended to cause F's death, given the nature and frequency of the defendant's communications with Z, it was reasonable to infer that the defendant had solicited, requested, commanded, importuned or intentionally aided Z to engage in an attempt to murder F, and Z, by soliciting and ultimately hiring the police officer to kill F, took substantial steps in a course of conduct that was planned to culminate in F's murder.
3. The defendant could not prevail on his claim that the state had failed to prove the charges against him as they were set forth in the long form information because he was not charged as an accessory in the attempt count and the state did not prove that he engaged in any criminal conduct during the relevant time period; the fact that the defendant was not formally charged as an accessory did not preclude his conviction as such and, thus, there was no merit to the defendant's challenge to his conviction of attempt to commit murder as an accessory on the ground that he was not charged as an accessory, and the defendant's claim that there was no evidence that he had engaged in any criminal conduct on the dates alleged in the information was unavailing, as the dates set forth in the information clearly related to the period of time during which Z was actively seeking an individual to kill F, as requested by the defendant, the conduct of Z, a coconspirator, on those dates was

sufficient to support the guilty verdict on those charges, and the defendant did not argue that he was prejudiced by the inclusion of the dates in the information or that substantial injustice was done to him because of the language of the information.

Argued October 24, 2017—officially released February 6, 2018

Procedural History

Substitute information charging the defendant with the crimes of conspiracy to commit murder and attempt to commit murder, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Hon. Richard F. Comerford, Jr.*, judge trial referee; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

A. Paul Spinella, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *David I. Cohen*, former state's attorney, and *James M. Bernardi*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Miguel Juarez, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a. On appeal, the defendant claims that (1) the evidence adduced at trial was insufficient to support his conviction of either charge, and (2) the state failed to prove the charges of which he was convicted as they were set forth in its long form information. We affirm the judgment of the trial court.

The jury was presented with evidence of the following facts on which it could have based its verdict. In December, 2009, German Zecena approached the defendant and asked to borrow $300 from him because he was unemployed and his mother was sick. Zecena had

worked for the defendant's landscaping company for two seasons prior to that date. The defendant gave Zecena the $300 that he asked for, and he asked Zecena to follow his wife "to see who she was seeing and if she was with a boyfriend or not." The defendant told Zecena that "he knew or he kind of knew that [his wife] had a boyfriend and, if that in fact was the case, then he was going to get a divorce." The defendant asked Zecena to go to the lower part of the Stamford Mall parking lot to see if the defendant's wife's car was there, and if she was there, to see if anybody was with her.

Thereafter, Zecena observed the defendant's wife at the mall "three or four times with the same person." Zecena witnessed the defendant's wife and that man, later identified as William Forte, kissing.[1] When Zecena told the defendant that he had witnessed his wife kissing another man at the mall, the defendant became upset and called his wife various names, using "curse words." Thereafter, in addition to sending Zecena to the mall to look for his wife, the defendant asked Zecena to drive by Forte's house, which was located in Greenwich, to see if his wife was there. When Zecena drove by Forte's house, he saw Forte sitting beside the defendant's wife on the stairs outside of the house. Zecena observed the couple talking, hugging and kissing. The defendant also instructed Zecena to look for his wife around the area of exit five on Interstate 95. At that location, Zecena saw the defendant's wife and Forte inside a car, talking, hugging and kissing. Zecena subsequently followed the defendant's wife, at the defendant's direction, five or six more times.

Zecena's relationship with the defendant continued into the spring of 2010, when Zecena started working for another landscaping company. In that time frame, at

[1] Neither Zecena nor the defendant knew Forte's name until they were arrested.

the defendant's request, Zecena would drive by Forte's house two or three times each week to see if the defendant's wife was there. Between February 22, 2010, and June 19, 2010, the defendant called Zecena, on average, ten to fifteen times each day. Zecena did not answer most of those calls, but when he did speak to the defendant, "[the defendant] always asked . . . if [Zecena had] seen his wife, if [Zecena] had passed by the house where his wife's boyfriend lived."

At one point in the spring of 2010, Zecena met the defendant at a stone yard on Larkin Street in Stamford. In that meeting, after Zecena told the defendant that he had seen his wife with Forte, the defendant told Zecena that he would give him $5000 to kill Forte. When Zecena responded by telling the defendant that he did not have "sufficient courage" to kill Forte, the defendant asked Zecena to find someone else to kill Forte. Zecena agreed to find someone to kill Forte, although he testified that he "was going to ask [the defendant] for an additional $1000 . . . so that [he] could keep $500 for [him]self and then $500 for the other person that [he] was going to ask to find someone to do that job." The defendant thereafter called Zecena three or four times to receive updates as to Zecena's efforts to find someone to kill Forte.

On June 10, 2010, Zecena approached Luis Miranda, whom Zecena had known for several years through Miranda's work as a bouncer at a bar in Stamford. Zecena asked Miranda if he knew someone who would kill Forte, and he offered Miranda $5000 if he would kill Forte, or $500 if he would find someone else to do it. On or about June 17, 2010, Miranda called Zecena and told him that he had found someone to "do that job." Miranda set up a meeting between Zecena and the "hit man" for June 19, 2010. Zecena called the defendant and told him that he had found someone to kill Forte, to which the defendant responded, "[t]hat['s]

very well . . . go speak with that person." Zecena told the defendant that he "was going to interview . . . that guy" himself.[2]

Miranda was a police informant who regularly dealt with Stamford Police Officer Raphael Barquero. Miranda contacted Barquero to report the substance of his June 10, 2010 conversation with Zecena. Barquero told Miranda to try to get additional information from Zecena. To that end, Miranda called Zecena on or about June 14, 2010. Miranda testified that when Zecena had confirmed to him that he wanted to "go forward and talk to someone who would kill someone for him," Miranda told Zecena, at Barquero's instruction, that he would find someone to kill Forte. Barquero told Miranda that he would find another officer to pretend to be "a contract killer."

On June 19, 2010, at about 4:30 or 5:30 p.m., Miranda called Zecena. Zecena told Miranda to "meet [off] exit five in front of CVS" in a shopping center in Greenwich. After that call, both Miranda and Detective Frederick Quesada of the Greenwich Police Department, the officer who would pretend to be the "contract killer," travelled to the location specified by Zecena. Upon arriving at the CVS parking lot, Miranda exited his car and looked around for Zecena. When he saw Zecena, he introduced Zecena to Quesada as the man who was "going to do the job."

Upon meeting, Zecena and Quesada decided to talk in Quesada's car. Zecena "asked [Quesada] if he could kill a person." Zecena told Quesada that he wanted him to kill Forte because Forte owed him a lot of money.[3] Quesada agreed to kill Forte. Zecena told Quesada that Forte lived "right around the corner" from where they

[2] Zecena testified that at no time did the defendant tell him that he had changed his mind and no longer wanted Zecena to find someone to kill Forte.

[3] Zecena testified at trial that this was a lie.

were talking in the CVS parking lot and suggested that they drive to Forte's house. Quesada agreed and Zecena directed him to Forte's house, pointing out both his house and his car, a blue Volvo. Zecena told Quesada that, although Forte lived alone, he had frequently observed a ninety year old woman at Forte's house, whom he presumed to be Forte's mother. Zecena described Forte to Quesada as tall, bald and chubby. Zecena told Quesada that Forte did not leave his house often because he is "getting up in years." After driving through Forte's neighborhood, Zecena and Quesada stopped at a liquor store to buy some beer, which they drank while they talked. Throughout the course of their discussions, Zecena repeatedly told Quesada that he would like to know when Quesada intended to do the job because he wanted to be sure to have the money ready to pay Quesada when the job was done. Quesada indicated that he would do it either that night or the next night. During his meeting with Quesada, Zecena called the defendant. The defendant told Zecena that he was in a meeting and thus could not talk to him, but that he would call him back in thirty minutes. When Quesada and Zecena returned to the CVS parking lot, Quesada asked Zecena if he had "something [he] could use" to kill Forte. Zecena gave him a knife that he carried in his truck for work. Zecena also gave Quesada $80, with the promise of another $420 in "half an hour, an hour." Zecena told Quesada that he would call him when he got the $420, and Quesada stated that he would remain in the area to wait for his call and also to watch Forte's house. Zecena left the CVS parking lot to go home, but he was pulled over and arrested.

Following an investigation, the defendant also was arrested and charged with conspiracy to commit murder and attempt to commit murder. The defendant was convicted of both charges, after a jury trial, and the court thereafter imposed a total effective sentence of

twenty years incarceration, execution suspended after eight years, and five years probation. This appeal followed.

I

The defendant first challenges the sufficiency of the evidence presented at trial to sustain his conviction. We begin by recognizing that "[a] defendant who asserts an insufficiency of the evidence claim bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Leandry*, 161 Conn. App. 379, 383, 127 A.3d 1115, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015). "As to the standard of review for this claim, this court applies a two part test. We first review the evidence presented at the trial, construing it in the light most favorable to sustaining the verdict. . . . [Second, we] . . . determine whether the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt. . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . The issue is whether the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt. . . .

"The law relevant to an insufficiency of the evidence claim teaches that the jury 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 jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the

evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . We, however, are mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citations omitted; internal quotation marks omitted.) *State* v. *Daniel B.*, 164 Conn. App. 318, 325–26, 137 A.3d 837, cert. granted on other grounds, 323 Conn. 910, 149 A.3d 495 (2016). With these principles in mind, we turn to the defendant's claims of insufficiency.

A

The defendant claims that the evidence adduced at trial was insufficient to sustain his conviction of conspiracy to commit murder. Specifically, the defendant claims that the only evidence offered by the state of an agreement between him and Zecena was his initial offer to pay Zecena $5000 to kill Forte, and that that statement was "simply talk in the air, with no evidence of any discussion [of] who the victim was, and any details about how his murder would occur."[4] We are not persuaded.

"To prove the crime of conspiracy, in violation of § 53a-48, the state must establish beyond a reasonable doubt that an agreement existed between two or more persons to engage in conduct constituting a crime and

[4] The defendant also claims that the evidence was insufficient because Zecena was the only one who testified that the defendant made that statement and he was not a credible witness. It is axiomatic that a challenge to the credibility of a witness is not a valid ground on which to base a claim of evidentiary insufficiency.

It is noteworthy that the defendant testified on his own behalf and that the jury thus had the opportunity to assess his credibility as well as Zecena's.

that subsequent to the agreement one of the conspirators performed an overt act in furtherance of the conspiracy. . . . The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Here the crime underlying the conspiracy is murder. Intent to cause the death of a person is an element of the crime [of murder] and must be proved beyond a reasonable doubt. . . . Intent may, however, be inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . .

"The existence of a formal agreement between parties need not be proved. It is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. . . . Because of the secret nature of a conspiracy, a conviction is usually based on circumstantial evidence. . . . The state need not prove that the defendant and a coconspirator shook hands, whispered in each other's ear, signed papers, or used any magic words such as we have an agreement. . . . . Rather, [t]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts. . . . Further, [c]onspiracy can seldom be proved by direct evidence. It may be inferred from the activities of the accused persons. . . .

"[T]he size of a defendant's role does not determine whether that person may be convicted of conspiracy charges. Rather, what is important is whether the defendant willfully participated in the activities of the conspiracy with knowledge of its illegal ends. . . . Participation in a single act in furtherance of the conspiracy is enough to sustain a finding of knowing participation." (Citations omitted; internal quotation marks omitted.) *State* v. *Balbuena*, 168 Conn. App. 194, 200–

201, 144 A.3d 540, cert. denied, 323 Conn. 936, 151 A.3d 384 (2016).

Here, the defendant's claim that his offer to Zecena of $5000 to kill Forte was "simply talk in the air" is belied by the record. Zecena's testimony that the defendant made that offer to him is sufficient to prove the defendant's intent to enter into an agreement with Zecena to have Forte killed. The defendant's conduct in the months that followed that initial statement—the hundreds of phone calls that he made to Zecena asking him to follow his wife and to ascertain whether he had found someone to kill Forte—was corroborative of his intent to have Forte killed.

We also reject the defendant's claim that the state failed to prove that he intended to enter into a conspiratorial agreement with Zecena to kill Forte because the defendant "had no idea who the intended victim was . . . ." Although neither the defendant nor Zecena knew Forte's name until Zecena was arrested, the evidence adduced at trial proved that the defendant directed Zecena to Forte's house, that Zecena had seen the defendant's wife at Forte's house, and that Zecena had seen Forte numerous times at various locations kissing and hugging the defendant's wife.

On the basis of the foregoing, the jury reasonably could have concluded that the defendant intended to enter into an agreement with Zecena to kill his wife's boyfriend, and that he and Zecena knew who her boyfriend was, even if they did not know his name. We thus conclude that the evidence adduced at trial was sufficient to support the jury's guilty verdict on the charge of conspiracy to commit murder.

B

The defendant also claims that the evidence was insufficient to sustain his conviction of attempt to commit murder. Specifically, the defendant claims that the

evidence was insufficient to prove that he had intended to cause Forte's death or had engaged in any conduct that could be construed as a substantial step in a course of conduct planned to culminate in the murder of Forte. We disagree.

Section 53a-54a (a) defines murder, in relevant part, as follows: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ." Section 53a-49 (a) defines criminal attempt, in relevant part, as follows: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does . . . anything which, under the circumstances as he believes them to be, is an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Section 53a-49 (b) provides in relevant part: "Conduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose. . . ."[5]

[5] General Statutes § 53a-49 (b) also provides: "Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime."

The defendant's offer to give Zecena $5000 to kill Forte, followed by his request that Zecena find someone who would kill Forte, would have been sufficient to constitute a substantial step in a course of conduct planned to culminate in the murder of Forte pursuant to § 53a-49 (b) (7). The state,

"[T]he standard for the substantial step element of criminal attempt focuse[s] on what the actor has already done and not what remains to be done. . . . The substantial step must be at least the start of a line of conduct which will lead naturally to the commission of a crime. . . . What constitutes a substantial step in any given case is a question of fact. . . . [T]he ultimate measure of the sufficiency of the defendant's conduct to constitute a substantial step in a course of conduct planned to culminate in the commission of [a crime] is not, to reiterate, how close in time or place or final execution his proven conduct came to the consummation of that crime, but whether such conduct, if at least the start of a line of conduct leading naturally to the commission of the crime, strongly corroborated his alleged criminal purpose." (Internal quotation marks omitted.) *State* v. *Daniel B.*, supra, 164 Conn. App. 331.

In this case, the jury was instructed that the defendant could be found guilty of attempt to commit murder as an accessory. "[Section] 53a-8 (a) provides: A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . . To convict a defendant of a crime on the theory of accessorial liability under this statute, the state must prove both that a person other than the defendant acting as a principal offender, committed each essential element of that crime, and that the defendant, acting with the mental state required for the commission of that crime, solicited, requested, commanded, importuned or intentionally aided the principal offender to engage in the conduct constituting that crime. Since under our law

however, did not rely on the defendant's offer to Zecena as the substantial step required to prove his guilt.

both principals and accessories are treated as principals . . . if the evidence, taken in the light most favorable to sustaining the verdict, establishes that [the defendant] . . . did some act which . . . directly or indirectly counseled or procured any persons to commit the offenses or do any act forming a part thereof, then the [conviction] must stand." (Citation omitted; internal quotation marks omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 426–27, 167 A.3d 1076, cert. granted on other grounds, 327 Conn. 969, A.3d (2017). Thus, in this case, to prove the defendant guilty of violating §§ 53a-49 and 53a-54a, the state had to prove beyond a reasonable doubt that the defendant or Zecena, with the intent to cause the death of Forte, committed an act that was a substantial step aimed at achieving his death.

Here, on the basis of the defendant's offer to Zecena of $5000 to kill Forte, and his subsequent request that Zecena find someone else to kill Forte when Zecena stated that he did not have the courage to kill Forte himself, the jury reasonably could have inferred that the defendant intended to cause Forte's death. In addition to that initial meeting between the defendant and Zecena, the jury also heard that the defendant repeatedly asked Zecena to follow his wife and directed Zecena to various locations where he suspected Zecena might find his wife with Forte, including Forte's home in Greenwich. The defendant called Zecena hundreds of times in the early months of 2010 to ask Zecena if he had followed his wife, if he had seen his wife with Forte, and if he had found anyone to kill Forte. Zecena also testified that he called the defendant when Miranda informed him that he had found a hit man and that the defendant responded, "very well . . . ." Given the nature and frequency of his communications with Zecena, it is reasonable to infer that the defendant "solicited, requested, commanded, importuned or intentionally aided Zecena" to engage in the attempt to murder Forte. Moreover, by soliciting and ultimately hiring

Quesada to kill Forte, Zecena took substantial steps in a course of conduct planned to culminate in the murder of Forte.[6] We thus conclude that the evidence was sufficient to sustain the defendant's conviction of attempt to commit murder.

II

The defendant finally claims that the state did not prove that he committed the offenses of which he was convicted in substantially the manner described in the information. Specifically, the defendant argues that the state failed to charge him with attempt to commit murder as an accessory, that the information pointed only to the dates of May and June, 2010, and that it was not proven that he had engaged in any criminal conduct during that time period. We reject the defendant's claims.

"[G]enerally speaking, the state is limited to proving that the defendant has committed the offense in substantially the manner described in the information. . . . Despite this general principle, however, both this court and our Supreme Court have made clear that [t]he inclusion in the state's pleading of additional details concerning the offense does not make such allegations essential elements of the crime, upon which the jury must be instructed. . . . Our case law makes clear that the requirement that the state be limited to proving an offense in substantially the manner described in the information is meant to assure that the defendant is provided with sufficient notice of the crimes against which he must defend. As long as this notice requirement is satisfied, however, the inclusion of additional

[6] The fact that Zecena paid Quesada only $80 does not undermine our conclusion. See *State* v. *Servello*, 59 Conn. App. 362, 373, 757 A.2d 36, cert. denied, 254 Conn. 940, 761 A.2d 764 (2000). "To constitute a substantial step, however, consummation of [paying the hit man] is not required. Any other interpretation would impose a requirement of a more stringent standard of proof for attempt than is provided by § 53a-49." Id., 375.

details in the charge does not place on the state the obligation to prove more than the essential elements of the crime." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Vere C.*, 152 Conn. App. 486, 527, 98 A.3d 884, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014).

"[A] defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information. . . . To establish prejudice, the defendant must show that the information was necessary to his defense, and not merely that the preparation of his defense was made more burdensome or difficult by the failure to provide the information." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Caballero*, 172 Conn. App. 556, 566, 160 A.3d 1103, cert. denied, 326 Conn. 903, 162 A.3d 725 (2017).

Although the state did not specifically charge the defendant in the long form information as an accessory to the crime of attempt to commit murder, it is well established that "a defendant may be convicted as an accessory even though he was charged only as a principal as long as the evidence presented at trial is sufficient to establish accessorial conduct." (Internal quotation marks omitted.) *State* v. *James*, 247 Conn. 662, 679, 725 A.2d 316 (1999); see *State* v. *Vasquez*, 68 Conn. App. 194, 215, 792 A.2d 856 (2002) (defendant charged with crime is on notice that he may be convicted as accessory to that crime). "Therefore, the fact that the defendant was not formally charged as an accessory does not preclude his being convicted as such . . . and a defendant who is charged with an offense should be on notice that he may be convicted as an accessory." (Internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 848–49, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015). The defendant's

challenge to his conviction of attempt to commit murder as an accessory on the ground that he was not charged as an accessory is thus without merit.

We also reject the defendant's claim that the evidence adduced at trial was insufficient to prove his guilt of either of the charges of which he was convicted in substantially the manner described in the information because there was no evidence that he engaged in any criminal conduct on the dates alleged in the information. The defendant's claim in this regard fails for two reasons. First, the dates set forth in the information—"the months of May and June" on the conspiracy charge, and June 19, 2010, on the attempt charge—clearly relate to the period of time during which Zecena was actively seeking an individual to kill Forte, as requested by the defendant. The conduct of Zecena on those dates, as a coconspirator and the principal on the attempted murder charge, was sufficient to support the guilty verdict on those charges. Moreover, the defendant has not argued that he has been prejudiced by the inclusion of the dates in the information or that "substantial injustice was done to him because of the language of the information." (Internal quotation marks omitted.) *State* v. *Caballero*, supra, 172 Conn. App. 566. At trial, the defendant steadfastly denied any knowledge or involvement in a conspiracy or attempt to murder Forte. The defendant has not demonstrated, or even claimed, that the dates included in the information thwarted the preparation of that defense.

On the basis of the foregoing, the defendant's claim that the state failed to prove his guilt in substantially the same manner in which he was charged in the state's information is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.