STRATEK PLASTICS, LIMITED *v.* JEAN PIERRE IBAR (AC 39520)

Alvord, Keller and Beach, Js.

Syllabus

The plaintiff sought to foreclose a judgment lien on certain real property owned by the defendant. On the day evidence was scheduled to commence, the plaintiff's counsel requested to have fourteen premarked exhibits moved into evidence as full exhibits and informed the court that the parties had reached a number of stipulations, including the amount of the debt, that the plaintiff was entitled to reasonable attorney's fees in connection with the prosecution of the action in an amount to be determined, if necessary, at a later hearing before the court, that the plaintiff would be due an appraisal fee and that a judgment of strict

foreclosure would enter in favor of the plaintiff. The parties did not stipulate to the fair market value of the subject property, which the court determined after an appraisal was entered into evidence. The court then rendered a judgment of strict foreclosure and set the law day in accordance with the stipulation. Thereafter, the plaintiff filed a motion for attorney's fees and costs pursuant to statute (§ 52-249 [a]) and an affidavit, which was accompanied by copies of billing records, biographies of the attorneys who had worked on the matter and a spreadsheet organizing the time entries from the billing records. After a hearing, the trial court granted the motion, finding that the plaintiff was entitled to reasonable attorney's fees and certain costs. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court erred in awarding the plaintiff attorney's fees pursuant to § 52-249 (a) because it did not conduct a hearing as to the form of judgment or the limitation of time for redemption, as required by the statute, that court having had the authority to award attorney's fees under the statute; the proceeding before the trial court constituted a hearing within the meaning of § 52-249 (a) and satisfied that statute's requirement that a hearing be held as to the form of the judgment, as exhibits were entered into evidence, counsel for both parties had the opportunity to address the court during the proceeding, and because the parties did not stipulate to the fair market value of the property, they submitted the question to the court, which made a factual finding as to the value of the property on the basis of the property appraisal submitted into evidence.
2. The defendant could not prevail on his claim that the trial court erred in awarding the plaintiff attorney's fees because, at the time of the foreclosure proceeding, the plaintiff failed to present a statement of the fees requested and a description of the services rendered, the defendant having waived that claim; his counsel expressly agreed during the subject proceeding to a consideration of the question of attorney's fees at a subsequent hearing, the parties' stipulation stated that the plaintiff was entitled to reasonable attorney's fees and that the amount of those fees would be determined, if necessary, at a later hearing before the court, and after the plaintiff's counsel had represented at the proceeding that he would present the amount of fees claimed at a later date, the defendant's counsel did not object, nor did he insist on a presentation at that time of the fees requested and a description of services rendered, and he further consented to the court's suggestion that the attorney's fees issue could be heard on a short calendar day if the parties were unable to resolve the matter themselves.

Argued November 15, 2017—officially released February 20, 2018

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought

to the Superior Court in the judicial district of New Haven, where the court, *Agati*, *J.*, rendered judgment of strict foreclosure in accordance with the parties' stipulation; thereafter, the court granted the plaintiff's motion for attorney's fees, and the defendant appealed to this court. *Affirmed.*

Jeffrey Hellman, for the appellant (defendant).

Thomas J. Rechen, with whom were *Charles D. Ray*, and, on the brief, *James E. Regan*, for the appellee (plaintiff).

Opinion

ALVORD, J. In this action for the foreclosure of a judgment lien, the defendant, Jean Pierre Ibar, appeals from the judgment of the trial court granting the motion for attorney's fees filed by the plaintiff, Stratek Plastics, Ltd. On appeal, the defendant claims that the court erred in awarding attorney's fees because (1) there had been no hearing as to the form of the judgment or the limitation of time for redemption as required by General Statutes § 52-249 (a);[1] and (2) the plaintiff failed to present a statement of the fees requested and services rendered at the time of the trial. We disagree that the award of attorney's fees was improper. Accordingly, we affirm the judgment of the trial court.

The following procedural history is relevant to the resolution of the issues on appeal. On April 9, 2014, the plaintiff filed this action seeking to foreclose a judgment lien in the amount of $139,800.93 and costs of $444. The plaintiff filed an amended complaint dated May 28,

[1] General Statutes § 52-249 (a) provides: "The plaintiff in any action of foreclosure of a mortgage or lien, upon obtaining judgment of foreclosure, when there has been a hearing as to the form of judgment or the limitation of time for redemption, shall be allowed the same costs, including a reasonable attorney's fee, as if there had been a hearing on an issue of fact. The same costs and fees shall be recoverable as part of the judgment in any action upon a bond which has been substituted for a mechanic's lien."

2014. The matter was scheduled for trial on February 23, 2016. Although the trial did not go forward on that date, counsel premarked certain exhibits and evidence was rescheduled to begin the following day, February 24, 2016. On the afternoon of February 24, counsel for both parties appeared before the court, *Agati*, *J.*, and at that time the plaintiff's counsel informed the court that the parties had stipulations that they wanted to put on the record. Before turning to the stipulations, the plaintiff's counsel requested to have fourteen exhibits, which had been premarked the day before, moved into evidence as full exhibits.

The plaintiff's counsel then informed the court of the stipulations reached by the parties. He first represented that the parties had stipulated to the debt in the amount of $171,701.01, which accounted for interest as of that date and a credit to the defendant. He then stated that the parties stipulated that at the time of the deficiency judgment hearing, the interest would be updated to the relevant date at a rate of 10 percent. Third, the plaintiff's counsel noted the parties' stipulation that "the plaintiff . . . is entitled to reasonable attorney's fees in connection with this prosecution . . . in an amount to be determined at a hearing before this court if necessary, such hearing to take place sometime between today and the date of the deficiency hearing . . . ." The parties also agreed that the plaintiff would be due an appraisal fee of $1000. Lastly, the plaintiff's counsel represented that the parties had stipulated that a judgment of strict foreclosure would enter in favor of the plaintiff, to become effective on February 29, 2016, with a law day of June 29, 2016. The court inquired as to whether the parties had anything further to add to the hearing, to which the defendant's counsel replied: "Yes, Your Honor . . . . That . . . accurately states our agreement. I want to just add two additional points maybe by way of clarification. Mr. Ibar is very interested

in having a hearing, an opportunity for a hearing on the attorney's fees, so . . . we would at some point be requesting that before the deficiency date enters so there is definitely some interest in determining what is reasonable; so that issue is still in play, understanding the plaintiff is making a claim for attorney's fees and there's a statutory basis for that, but, nonetheless, we hope to challenge what is reasonable." The court inquired of the plaintiff's counsel: "I assume you're going to provide them with some amount of attorney's fees that you are going to be claiming?" The plaintiff's counsel replied: "We will present the amount we are claiming. Counsel and I will make an effort to work that out by agreement, if we are unable to do so, we will contact the court." The court suggested that the attorney's fees calculation issue could be scheduled on a short calendar day, and the defendant's counsel responded, "[t]hat's fine," and also stated that the parties would stay in communication with the court if a hearing was needed.

After addressing a few outstanding issues, the court noted that representatives of the plaintiff were present in the courtroom and inquired of the plaintiff's counsel whether the plaintiff had authorized him to enter into the agreement just placed on the record. The plaintiff's counsel responded that he did have authority, and the defendant's counsel represented that he had been in telephone and e-mail communication with the defendant, and that he also had authority to enter into the agreement. The court, noting that there had been an appraisal, then inquired whether the parties were stipulating to the fair market value of the property. The parties did not stipulate to the fair market value, the appraisal was entered into evidence, and the court then found the value of the property to be $515,000. The court told the parties to "let me know in the meantime on the scheduling of the attorney's fee issues," and

concluded the matter. The court rendered a judgment of strict foreclosure on February 29, 2016, and set the law day for June 29, 2016.

On May 6, 2016, the plaintiff filed a motion for attorney's fees and costs pursuant to § 52-249. The plaintiff also filed an affidavit accompanied by copies of billing records, biographies of the attorneys who had worked on the matter, and a spreadsheet organizing the time entries from the billing records. The defendant, citing *Smith* v. *Snyder*, 267 Conn. 456, 839 A.2d 589 (2004), objected on the ground that the plaintiff's claim for attorney's fees was "barred by its failure to present evidence concerning those fees at trial." In the alternative, the defendant argued that the fees claimed were excessive. On July 8, 2016, the plaintiff filed a supplemental affidavit, seeking a total award of fees and costs in the amount of $279,890.77.[2] On July 13, 2016, the defendant, citing *Burns* v. *Adler*, 158 Conn. App. 766, 807–808, 120 A.3d 555 (2015), rev'd in part, 325 Conn. 14, 155 A.3d 1223 (2017), filed a supplemental objection, arguing that the statutory requirements of § 52-249 had not been met because the court did not conduct a hearing as to the form of the judgment and the time for redemption. The plaintiff replied that a hearing had been held as to the form of the judgment and that the defendant had stipulated to the plaintiff's entitlement to attorney's fees, with only the reasonableness of the fees left to be decided.

After a hearing on July 11 and 13, 2016, the court issued an order on August 1, 2016, granting the plaintiff's

[2] At the time the plaintiff filed its motion for attorney's fees, the foreclosure had been pending for over two years, and the court record included discovery practice, briefing on multiple motions, including the defendant's motion to dismiss, and pretrial submissions. The court, in its order granting the plaintiff's motion for attorney's fees, noted that a review of the court record showed that the defendant had "vigorously defend[ed]" the case, and that the "case was scheduled to proceed as a contested trial until the day of commencement of evidence . . . ."

motion for attorney's fees. The court found that the plaintiff was entitled to reasonable attorney's fees pursuant to § 52-249. The court multiplied 125 hours by the blended rate of $411 per hour to arrive at a reasonable attorney's fees award of $51,375. The court also awarded costs in the amount of $6799.77 for a total award of $58,174.77. This appeal followed.[3]

I

On appeal, the defendant first claims that the court erred in awarding attorney's fees to the plaintiff pursuant to § 52-249 because the court had not conducted a hearing as to the form of judgment or the limitation of time for redemption as required by § 52-249. He argues that "[w]hile the statute is far from clear on this particular point, in light of the holding in *Burns* . . . the proper reading of the statute requires [the] defendant to contest the form of the judgment or the manner of foreclosure for [the] plaintiff to recover its attorney's fees." We conclude that the statutory hearing requirement was satisfied.

We begin by setting forth our standard of review and relevant legal principles. "Connecticut adheres to the American rule regarding attorney's fees under which successful parties are not entitled to recover attorney's fees in the absence of statutory or contractual authority to the contrary. . . . Thus, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a *statute* may confer such rights." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Clem Martone Construction, LLC* v. *DePino*, 145 Conn. App. 316, 326–27, 77 A.3d 760, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). Section 52-249 (a) provides, in relevant part, that "[t]he plaintiff in any action of foreclosure of a mortgage or lien, upon obtaining judgment of foreclosure, when there has been

[3] The plaintiff filed a cross appeal, which it subsequently withdrew.

a hearing as to the form of judgment or the limitation of time for redemption, shall be allowed the same costs, including a reasonable attorney's fee, as if there had been a hearing on an issue of fact. . . ." "The question of whether a particular statute . . . applies to a given state of facts is a question of statutory interpretation . . . . Statutory interpretation presents a question of law for the court. . . . Our review is, therefore, plenary." (Internal quotation marks omitted.) *Russo Roofing, Inc.* v. *Rottman*, 86 Conn. App. 767, 775, 863 A.2d 713 (2005).

We next consider the meaning of the term "hearing." This court has consistently "acknowledged the definition of a hearing provided in Black's Law Dictionary, as [a] proceeding of relative formality . . . generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented, and in which parties to a dispute have a right to be heard. . . . Our Supreme Court has stated that [a] hearing can be a proceeding in the nature of a trial with the presentation of evidence, it can be merely for the purpose of presenting arguments, or, of course, it can be a combination of the two." (Citation omitted; internal quotation marks omitted.) *Reyes* v. *Bridgeport*, 134 Conn. App. 422, 427–28, 39 A.3d 771 (2012).

This court also has recognized that "[n]ot only does a hearing normally connote an adversarial setting, but usually it can be said that it is any oral proceeding before a tribunal." (Internal quotation marks omitted.) Id., 428. The term has further been described as "capable of considerable broadness"; *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 38, 130 A.3d 268 (2015); and "a verbal coat of many colors." (Internal quotation marks omitted.) *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, 247 Conn. 732, 738, 724 A.2d 1108 (1999).

The defendant relies primarily upon *Burns* v. *Adler*, supra, 158 Conn. App. 766, in support of his contention that the hearing requirement has not been met in the present case because the parties stipulated to the amount of the debt, the judgment of strict foreclosure, and the law day. *Burns* involved a foreclosure of a mechanic's lien on the defendant's property. Id., 768. In the present case, the parties stipulated to the debt owed in the amount of $214,039.09, that the fair market value of the defendant's interest in the property was greater than $500,000, that a judgment of strict foreclosure should enter with a law day of August 14, 2012, to the plaintiff's entitlement to a title search fee in the amount of $225, that the plaintiff was not entitled to an appraisal fee, and "that the issue of the plaintiff's right to attorney's fees [was] left for the court to resolve." (Internal quotation marks omitted.) Id., 790.

Thus, the only issue remaining for the court in *Burns* to resolve after approving the stipulation was the plaintiff's entitlement to statutory attorney's fees pursuant to § 52-249 (a). Id., 790. The trial court explained that the statute permitted an award of attorney's fees only when there has been a hearing on the mechanic's lien and concluded that because there had been no hearing, the plaintiff was not entitled to attorney's fees. Id., 806. This court affirmed the judgment, noting that the parties had "stipulated that there would not be a hearing on the terms of the judgment of foreclosure of the mechanic's lien." Id., 807. The stipulation was "submitted to, and approved by, the court without a hearing." Id.

We conclude that *Burns* is distinguishable and that the proceeding held on February 24, 2016, constituted a hearing within the meaning of § 52-249 (a). In the present case, exhibits were entered into evidence and counsel for both parties had the opportunity to address the court. Unlike the parties in *Burns*, the parties did not stipulate to the fair market value of the property,

and, accordingly, they submitted the question to the court for decision. Although neither party in this matter sought foreclosure by sale, this court has explained that "[t]he determination of value is a major factor in the decision whether to allow a foreclosure by sale rather than a strict foreclosure." (Internal quotation marks omitted.) *SKW Real Estate Ltd. Partnership* v. *Mitsubishi Motor Sales of America, Inc.*, 56 Conn. App. 1, 7, 741 A.2d 4 (1999), cert. denied, 252 Conn. 931, 746 A.2d 793 (2000). In the present case, to assist the court in deciding the fair market value, the plaintiff entered into evidence the property appraisal. The court then made a factual finding as to the fair market value of the property.[4] Under these circumstances, we conclude that the proceeding satisfied the requirement found in § 52-249 (a) that a hearing be held as to the form of the judgment. Thus, the court had authority pursuant to § 52-249 (a) to award attorney's fees and costs.[5]

II

The defendant next claims that the court erred in awarding attorney's fees to the plaintiff because, at the time of the trial, the plaintiff failed to present a statement of the fees requested and a description of the services rendered. The plaintiff claims that the defendant waived this claim when, during the February 24 hearing, he agreed to consideration of the question of attorney's fees at a later date. We agree with the plaintiff.

[4] General Statutes § 52-249 (a) provides for attorney's fees in the event a hearing is held "as to the form of judgment or the limitation of time for redemption . . . as if there had been a hearing on an issue of fact." We note that in making a finding as to the fair market value of the property, the court clearly decided an issue of fact on the basis of evidence presented during the February 24 hearing.

[5] We note that the defendant's counsel represented to the court that he recognized that statutory authority for an award of attorney's fees existed when he stated during the February 24 hearing that "the plaintiff is making a claim for attorney's fees and there's a statutory basis for that, but, nonetheless, we hope to challenge what is reasonable."

We review a trial court's rulings as to attorney's fees for an abuse of discretion. *Landry* v. *Spitz*, 102 Conn. App. 34, 59, 925 A.2d 334 (2007). "Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) Id.

The defendant relies solely upon *Smith* v. *Snyder*, 267 Conn. 456, 839 A.2d 589 (2004), in support of his claim. In *Smith*, our Supreme Court held that "when a court is presented with a claim for attorney's fees, the proponent must present to the court at the time of trial . . . a statement of the fees requested and a description of services rendered. Such a rule leaves no doubt about the burden on the party claiming attorney's fees and affords the opposing party an opportunity to challenge the amount requested at the appropriate time. . . . Parties must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested." (Footnotes omitted.) Id., 479. In *Smith*, our Supreme Court affirmed the award of attorney's fees on the ground that the defendants had not opposed the plaintiff's request for fees. Id., 480. Our Supreme Court explained that had the defendants objected to the request, the trial court would have been required to provide the defendants an opportunity to be heard on that issue. Id., 481. Because the defendants failed to object and consequently "effectively acquiesced in that request," they could not challenge the award on appeal. Id.

It is well established that "[w]hen a party consents to or expresses satisfaction with an issue at trial, claims

arising from that issue are deemed waived and may not be reviewed on appeal."[6] (Internal quotation marks omitted.) *Bohonnon Law Firm, LLC* v. *Baxter*, 131 Conn. App. 371, 387, 27 A.3d 384, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011). In *Bohonnon Law Firm, LLC*, the defendant claimed on appeal that the trial court had improperly awarded attorney's fees to the plaintiff. Id., 383. Specifically, he claimed that the court erred when it precluded him from cross-examining the plaintiff's counsel concerning his affidavit of attorney's fees. Id., 383–84. During the hearing on damages, however, the defendant's counsel told the court: "I don't think that he is going to have to testify to [the affidavit]." Id., 384. The defendant did not claim that testimony was required until after his request for a continuance was denied, at which time the court advised him that the hearing was over. Id., 386. On appeal, this court concluded that he had expressly waived the issue. Id., 384, 386–87; see also *Atlantic Mortgage & Investment Corp.* v. *Stephenson*, 86 Conn. App. 126, 135–37, 860 A.2d 751 (2004) (rejecting defendants' claim that the court could not have assessed the reasonableness of fees because of improperly admitted hearsay documents, agreeing with the plaintiff that the defendants had stipulated that testimony beyond an affidavit was unnecessary).

As in *Bohonnon Law Firm, LLC*, we conclude that the defendant waived his challenge pursuant to *Smith*. First, not only was the defendant on notice at the time of the February 24, 2016 hearing that the plaintiff was

[6] Similarly, where a party fails to object to a request for attorney's fees, that party is deemed to have waived its objection. See *Florian* v. *Lenge*, 91 Conn. App. 268, 286, 880 A.2d 985 (2005) ("The defendant was not prevented from raising an objection [to the plaintiff's request for attorney's fees] but instead waived that claim by failing to object. By failing to object, the defendant effectively acquiesced in that request."); *Avery* v. *Medina*, 174 Conn. App. 507, 524, 163 A.3d 1271, ("[a]n appellate court will not reverse an award of attorney's fees if the defendants fail to object to a bare request for attorney's fees"), cert. denied, 327 Conn. 927, 171 A.3d 61 (2017).

seeking attorney's fees, but his counsel expressly agreed on that date to adjudicate the reasonableness of the plaintiff's request for attorney's fees at a subsequent hearing. In his brief to this court, the defendant concedes that he "agreed to consideration of the question of attorney's fees at a later date . . . ." Second, the stipulation presented to the court on February 24 included recognition that the attorney's fees, to which the plaintiff was entitled, would be in "an amount to be determined at a hearing before this court if necessary, such hearing to take place sometime between today and the date of the deficiency hearing . . . ." Third, after the plaintiff's counsel represented, in response to a question from the court, that he would present the amount of fees claimed, presumably at a later date, the defendant's counsel did not object, nor did he insist on a presentation at that time of the fees requested and a description of services rendered. When the plaintiff's counsel represented that the parties would contact the court if they were unable to agree and the court suggested it could be heard on short calendar day, the defendant's counsel responded, "[t]hat's fine."[7] Because the defendant expressly consented to these procedures, we conclude that he has waived any challenge to the plaintiff's claimed failure to produce a statement of fees requested and services rendered at the time of the February 24, 2016 hearing.

Although we decide the claim on the ground that the defendant waived his objection, we note that the defendant subsequently was afforded ample opportunity to challenge the reasonableness of the fees requested, which was the concern underlying the rule expressed in *Smith*. See *Smith* v. *Snyder*, supra, 267

[7] Months later, after the plaintiff filed its motion for attorney's fees, the defendant changed his position and claimed that the plaintiff was barred from claiming attorney's fees on the ground that it had failed to present a statement of the fees requested at the time of trial.

Conn. 479 ("[s]uch a rule . . . affords the opposing party an opportunity to challenge the amount requested at the appropriate time"). The plaintiff filed an affidavit of attorney's fees accompanied by copies of billing records, biographies of the attorneys who worked on the matter, and a spreadsheet organizing the time entries from the billing records. The court held a hearing over two days, during which the parties submitted evidence and presented argument to the court. On appeal, the defendant does not challenge the reasonableness of the fees awarded.

The judgment is affirmed and the case is remanded for the purpose of setting a new law day.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BRIAN J. SMITH
(AC 38103)
(AC 38104)
(AC 38105)

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

Syllabus

Convicted of the crimes of, inter alia, operating a motor vehicle while under the influence of intoxicating liquor or drugs and tampering with a witness, the defendant, who also was convicted of being a third time offender, appealed to this court. A state police trooper had observed the defendant's stationary vehicle in the travel lane of a road with its brake lights illuminated. When the trooper positioned his vehicle behind the defendant's vehicle, the trooper saw the defendant's brake lights go off and his parking lights go on. The trooper smelled burnt marijuana in the defendant's vehicle and, when he asked the defendant for his driver's license and the vehicle's registration, observed that the defendant's speech was slurred and that his eyes were bloodshot and glazed over. The trooper thereafter administered field sobriety tests, which the defendant failed. After the defendant was released from police custody, he engaged his girlfriend, K, and P and A, who were friends of K and who testified at trial, in a plan to create a false narrative of the events that led to his arrest so that he could claim that he had pulled over for safety and had not driven his automobile because it was inoperative

when he encountered the trooper. After P changed her mind about participating in the defendant's plan, he sent her messages on Facebook in which he attempted to calm her and made various threats against her if she did not testify on his behalf. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support his conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs because it failed to show that he had operated his vehicle just prior to his encounter with the trooper. *Held*:

1. The evidence was sufficient to support the defendant's conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs, the state having presented sufficient evidence to prove beyond a reasonable doubt that the defendant operated a motor vehicle while he was intoxicated: contrary to the defendant's claim, there was ample evidence to support a finding that he had operated his vehicle just prior to the point in time that he encountered the trooper, as a written statement that the defendant provided to the police following his arrest permitted the jury to reasonably find that he had admitted that he pulled over for safety just prior to the trooper's arrival on the scene, the jury reasonably could have inferred that the defendant's explanation to K about the incident with the trooper reflected an implicit admission that he had been driving just prior to the time that he encountered the trooper, and it would have been reasonable for the jury to conclude from the trooper's testimony that he saw the defendant's parking lights go on when the brake lights went off, that the defendant had shifted the gears in the automobile with the key in the ignition, which contradicted the defendant's testimony that his vehicle had been disabled prior to his encounter with the trooper; moreover, the jury reasonably could have rejected as untruthful the defendant's testimony that the automobile was inoperable, as the state presented ample evidence that, following his arrest, the defendant engaged others to provide a false version of events concerning his operation of the automobile, and that evidence was highly probative of the fact that he had operated the vehicle just prior to his encounter with the trooper and of his consciousness of guilt for having operated the motor vehicle while under the influence.

2. The defendant could not prevail on his claim that the trial court improperly admitted into evidence a copy of a written Facebook message that he had sent to P in which he asked her to corroborate his version of the events that led to his arrest; the state satisfied its burden of authenticating the exhibit at issue because it presented sufficient evidence to support a finding that the evidence was what the state claimed it to be, namely, a Facebook message sent to P by the defendant, as P's personal knowledge of the defendant and the subject matter of the message, as well as the distinctive characteristics of the communication in light of the surrounding circumstances in which it was made, constituted sufficient circumstantial evidence of authenticity, the defendant had a

full opportunity to expose to the jury what he believed were weaknesses in the evidence and to argue that it lacked probative value, and any error with respect to the admission of the written Facebook message was harmless, as the message was merely cumulative of other efforts made by the defendant to induce P to testify falsely.

Argued October 23, 2017—officially released February 20, 2018

Procedural History

Two part substitute information charging the defendant, in the first two cases, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle with an elevated blood alcohol content and making a false statement in the second degree, and with possession of a small amount of a cannabis-type substance, and the infractions of improper parking and operating a motor vehicle without carrying an operator's license, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence, and substitute information in the third case, charging the defendant with two counts of the crime of tampering with a witness, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, where the court, *Graham*, *J.*, granted the state's motion to consolidate the cases for trial; thereafter, the charges in the first and third cases of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle with an elevated blood alcohol content, making a false statement in the second degree and tampering with a witness were tried to the jury before *Oliver*, *J.*; verdicts of guilty; subsequently, the charges in the first two cases of possession of a small amount of a cannabis-type substance, improper parking and operating a motor vehicle without carrying an operator's license were tried to the court, *Oliver*, *J.*; finding of guilty; thereafter, the defendant was presented to the court, *Oliver*, *J.*, on a plea of nolo contendere to the second part of the first information; judgment of guilty; subsequently, the court, *Oliver*, *J.*, vacated the verdict of guilty of operating a motor vehicle

with an elevated blood alcohol content; judgments of guilty, from which the defendant filed separate appeals with this court; thereafter, this court consolidated the appeals. *Affirmed.*

Jennifer B. Smith, assigned counsel, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Charles W. Johnson*, assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. In these consolidated appeals,[1] the defendant, Brian J. Smith, appeals from the judgments of

[1] In docket numbers CR-14-0104814-S and MV-14-0372091-S, the state charged the defendant with operating a motor vehicle while under the influence of intoxicating liquor or any drug in violation of General Statutes § 14-227a (a) (1), operating a motor vehicle while having an elevated blood alcohol content in violation of § 14-227a (a) (2), possession of a small amount of a cannabis-type substance in violation of General Statutes § 21a-279a (a), improperly parking a motor vehicle in violation of General Statutes § 14-251, operating a motor vehicle without carrying an operator's license in violation of General Statutes § 14-213, and making a false statement in the second degree in violation of General Statutes § 53a-157b (a). Additionally, under docket numbers CR-14-0104814-S and MV-14-0372091-S, the state charged the defendant in a part B information as being a third time offender in violation of § 14-227a (g) (3). Under docket number CR-15-016544-S, the state charged the defendant with two counts of tampering with a witness in violation of General Statutes § 53a-151 (a).

The defendant elected a jury trial with respect to the criminal offenses charged by the state, namely, operating a motor vehicle while under the influence of intoxicating liquor or any drug, operating a motor vehicle while having an elevated blood alcohol content, making a false statement, and tampering with a witness. The defendant elected a court trial with respect to the infractions charged by the state, namely, improperly parking a motor vehicle and operating a motor vehicle without carrying an operator's license, and the charge of violation of possession of a small amount of a cannabis-type substance. Over the defendant's objection, the court granted the state's motion to consolidate all of the pending charges for trial.

The jury found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or any drug, operating a motor vehicle while having an elevated blood alcohol content, making a false statement in the second degree, and two counts of tampering with a witness.

conviction, rendered following a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or any drug in violation of General Statutes § 14-227a (a) (1), and tampering with a witness in violation of General Statutes § 53a-151 (a). The defendant claims that (1) the evidence was insufficient to convict him of operating a motor vehicle while under the influence of intoxicating liquor or any drug and (2) the court erroneously admitted certain evidence relating to the witness tampering count. We affirm the judgments of the trial court.

The court found the defendant guilty of possession of a small amount of a cannabis-type substance, improperly parking a motor vehicle, and operating a motor vehicle without carrying an operator's license. Thereafter, the defendant entered a plea of nolo contendere to the charge of being a third time offender as alleged in the part B information. Following a canvass of the defendant, the court accepted the plea and made a finding of guilt with respect to the part B information. Prior to imposing sentence, the court, pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), vacated the verdict of guilty of operating a motor vehicle while having an elevated blood content. Thereafter, with respect to the remaining charges, the court imposed a total effective sentence of fifteen years of incarceration, execution suspended after seven years, followed by five years of probation.

Although our rules of practice permitted the defendant to bring a joint appeal; Practice Book § 61-7 (a) (1); the defendant, instead, filed three separate appeals: In AC 38103, he appealed from the judgment of conviction rendered in docket number CR-14-0104814-S; in AC 38104, he appealed from the judgment of conviction rendered in docket number MV-14-0372091-S; and in AC 38105, he appealed from the judgment of conviction rendered in docket number CR-15-016544-S. Later, this court, sua sponte, ordered that the three appeals be consolidated.

Despite the fact that, on his appeal forms, he has indicated that he is appealing from all of the crimes and infractions of which he was convicted, he has brought claims on appeal that pertain to only two criminal offenses. His first claim pertains to his conviction for operating a motor vehicle while under the influence of intoxicating liquor or any drug in violation of § 14-227a (a) (1). His second claim pertains to only one of his two convictions for tampering with a witness in violation of § 53a-151 (a). One of the tampering counts was based on his conduct toward Lena Knowles and the other of the tampering counts was based on his conduct toward Danielle Petsa. His second claim pertains to the count based on his conduct toward Petsa. Because he failed to brief any claims with respect to the remaining convictions, he has abandoned any challenge to those convictions. See *Deutsche*

The jury reasonably could have found the following facts. At approximately 1:50 a.m. on March 7, 2014, James Grimes, a state police trooper, was patrolling near the intersection of Route 44 and Route 195 in Manchester when he observed a stationary motor vehicle in the eastbound travel lane of Route 320, which intersects with Route 195 a short distance from the intersection of Route 44 and Route 195. The motor vehicle, a tan colored Volvo, was impeding travel. Grimes observed the vehicle for a few minutes and saw that the vehicle's brake lights were on and that the vehicle remained stationary.

Grimes positioned his police cruiser behind the stationary vehicle and activated his vehicle's emergency lights. At that time, he observed that "the brake lights [on the stationary vehicle] went off because you could see the parking lights go on as the vehicle was shifted into park." Grimes exited his cruiser and knocked on the passenger window. The sole occupant and operator of the vehicle, the defendant, rolled down the passenger window. Immediately, Grimes smelled burnt marijuana. Grimes asked the defendant "what was going on," to which the defendant replied, "I'm just stopped," and that he was trying to use his cell phone. Grimes, after concluding that the defendant was not experiencing a medical issue and that there were not any mechanical issues with the vehicle, told him that he could have chosen a more suitable location. Grimes then asked the defendant for his driver's license and his vehicle's registration. The defendant, however, did not have his driver's license with him.

While the defendant was searching for his license and registration, Grimes asked him several questions to gauge whether he was impaired. Grimes observed

Bank National Trust Co. v. *Bertrand*, 140 Conn. App. 646, 648 n.2, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013).

that the defendant's speech was slurred and that his eyes were bloodshot and "glazed over . . . ." The defendant's responses were "kind of slow and kind of spacy," and the defendant was "struggling" to understand or was not fully engaged in the conversation. For example, the defendant first told Grimes that he was traveling from Willimantic, but then told Grimes that he was coming from his place of employment at a restaurant in Waterford.

Grimes walked to the driver's side of the defendant's vehicle and the defendant complied with his request to roll down the window. Grimes smelled not just burnt marijuana, but also alcohol. Grimes asked the defendant if he had been drinking or smoking marijuana, and the defendant denied that he had used either substance.

Grimes then asked the defendant, who was still in the vehicle, to complete two tests to gauge his sobriety and coordination. The defendant was asked to recite specified portions of the alphabet and to complete a "finger dexterity test" that required him to count aloud while touching each of his fingertips with his thumb. The defendant failed these tests.

Grimes returned to his cruiser to inform his dispatcher that he was going to administer standardized field sobriety tests to the defendant. When he walked in the direction of the defendant's vehicle, he observed the defendant quickly "shoving" candy into his mouth. In Grimes' experience, "this was a way for people that are driving under the influence to try and mask their breath or try to get something in their system that's going to dilute the alcohol concentration in their system." Grimes instructed him to stop.

At Grimes' direction, the defendant exited the vehicle. He moved slowly and kept his right hand closed. Grimes ordered him to open his hands and to keep them raised, but the defendant did not comply fully as he continued

to keep his right hand closed. Grimes opened the defendant's hand to reveal a small brown pipe. The pipe, like the defendant's vehicle, smelled like burnt marijuana. The pipe contained marijuana residue.

Grimes then administered three standard field sobriety tests, including the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. The defendant failed all of these tests.

At 2:10 a.m., Grimes arrested the defendant after which the defendant was handcuffed, seated in the police cruiser, and transported to the state police barracks for Troop C in Tolland. After Grimes advised the defendant of his *Miranda* rights,[2] the defendant pleaded with Grimes to let him go because "he didn't need this," and that he was worried about losing his job. He stated that "he just was going to see this girl and just wanted to . . . sleep it off . . . ."

At the state police barracks, Grimes searched the defendant's clothing. In a pocket of the defendant's jacket, he discovered a cigar holder containing marijuana. Grimes requested that the defendant submit to a breath test. He advised the defendant of his rights in this regard, as well as the significance of a refusal to submit to the test.[3] The defendant then spoke with his attorney by telephone.

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

[3] Grimes advised the defendant, as follows: "You are requested to submit to a blood, breath or urine test chosen by the police officer. You may refuse a blood test, in which case another test will be selected. If you elect to submit to testing, you will be requested to submit two samples. If you refuse to submit, the test will not be given. Your refusal will result in the revocation of your operator's license for [twenty-four] hours and the suspension of your operator's license for at least six months. If you submit to the test and the results indicate that you have an elevated blood content, your operator's license will be revoked for [twenty-four] hours and will be suspended for at least [ninety] days. If you hold a commercial driver's license, a CDL, your CDL will be disqualified for at least one year. Furthermore, if you are operating a commercial motor vehicle and do not hold a CDL, your privilege to obtain a CDL as well as your privilege to operate a commercial motor

Grimes asked the defendant for his decision with respect to the breath test. The defendant stated that he wanted to talk to his attorney again. Grimes informed the defendant that his indecision constituted a refusal to submit to the test. Grimes summoned another state police trooper, Jonathan Neihengen, to the processing room. At that time, Neihengen witnessed the defendant's failure to cooperate with respect to the test, which constituted his refusal. Grimes again permitted the defendant an opportunity to use the telephone to inform his attorney that he had refused to submit to the test.

As the defendant turned to use the telephone, he inserted a candy or a breath mint into his mouth. Earlier, while Grimes was transporting the defendant to the state police barracks, one of the things he discussed with the defendant was that he could not have anything to eat or drink until after he had completed the test. When Grimes informed the defendant that his conduct, which included eating candy, amounted to a refusal to submit to a breath test, the defendant replied that he had sustained injuries to his wrists as a result of the handcuffs and that he wanted medical treatment at a hospital. Emergency medical personnel arrived on the scene, but they declined to transport him to the hospital to treat what they considered to be an "extremely minor" abrasion. When Grimes told the defendant that he would not be going to the hospital, he then complained for the first time that he wanted to go to the hospital because he was experiencing heart problems

vehicle will be disqualified for at least one year. If you hold an operator's license from a state other than Connecticut, your driving privilege in Connecticut is subject to the same revocation and suspension penalties. The results of the test or the fact of a refusal may be admissible in evidence against you in a criminal prosecution for driving under the influence of alcohol and/or drugs or other offense. The evidence of a refusal may be used against you in any criminal prosecution."

and trouble breathing. The defendant's outward appearance was normal, yet, on the basis of the defendant's new complaints, the emergency medical personnel at the scene made the decision to transport the defendant to Rockville General Hospital for examination.

Despite the fact that Grimes already had recorded the defendant's refusal to submit to a breath test, a state police sergeant, Craig Jones, afforded the defendant yet another opportunity to submit to a breath test. The defendant declined this request, but stated that he would provide a blood sample once he was at the hospital. Grimes accompanied the defendant to the hospital. Upon his arrival, the defendant informed hospital staff that he was experiencing chest pains and palpitations. Hospital staff detected an alcohol-like odor being emitted from the defendant. When hospital staff asked to perform an electrocardiogram and lab work, the defendant immediately replied that he needed to speak with his attorney, his pain had subsided, and he was feeling better since his arrival at the hospital. After speaking with his attorney, the defendant told hospital staff that he would submit to an electrocardiogram test and provide a urine sample, but he stated that he would not submit to a blood test because he was afraid of needles.

Ultimately, at 5:08 a.m., more than three hours after Grimes first encountered the defendant, the defendant provided a blood sample to hospital staff. The defendant's urine sample tested positive for marijuana use, his blood sample reflected a blood alcohol content of 0.10 percent,[4] and the result of his electrocardiogram test was normal. By 6 a.m., the defendant had been discharged from the hospital because he was not suffering from any health issues, and he was returned to

[4] There was evidence at trial that these results reflect that, at the time that the defendant's blood was drawn, he had the equivalent of five alcoholic drinks in his body and that a person typically "lose[s] one drink per hour with the range of about a half a drink to a drink-and-a-half per hour."

the state police barracks. The defendant then gave the police a written statement in which he admitted that when Grimes came upon him earlier that morning, he had pulled his automobile "over for safety" and was attempting to complete a telephone call. After the police completed processing the defendant, he was issued a summons to appear in court and was released from police custody.

The defendant called his girlfriend at that time, Lena Knowles, from the police barracks because he needed to be picked up. Later that day, he stated to her that he was arrested for driving under the influence of alcohol and that he had, in fact, consumed a couple glasses of wine. The defendant stated to her, however, that he had a plan to deal with his arrest because, if he was convicted, he would be separated from his son. Specifically, he planned on claiming that he had not driven his automobile. He asked Knowles to relate the following facts to law enforcement: she had been driving the defendant's automobile on March 6, 2014, while she was out with friends. Meanwhile, the defendant was at home with Knowles' children. A friend of Knowles, Kelly Aston, was following Knowles home when the defendant's automobile began "acting funny . . . ." Knowles pulled over the disabled automobile, and Aston drove her home. Later that night, Knowles drove the defendant to the disabled automobile and left him with the automobile so that he could call for roadside assistance. After Knowles departed, the police encountered the defendant in the automobile.

Despite the fact that no aspect of this story was accurate, Knowles indicated to the defendant that she would relate these facts to the authorities on his behalf because she felt sorry for him. The defendant told Knowles that he had spoken with Aston, who had agreed to corroborate this version of events, and asked

Knowles to persuade another friend of hers, Danielle Petsa, to corroborate this version of events.

Later that day, at Knowles' residence, the defendant spoke with Aston. He told her about the circumstances of his arrest, specifically, that he had consumed wine at his place of employment, began driving to Knowles' residence, and "was pulled over" on the road when the police found him in his automobile. The defendant told Aston the version of events that he had fabricated and, initially, Aston agreed to "go along" with the defendant's story. Subsequently, she spoke with an investigator working for the defendant's attorney and made statements that were consistent with the defendant's false version of events. After speaking with family members about the matter, however, Aston decided that she would not make any further false statements concerning the incident because she was not comfortable doing something that could get her into trouble with law enforcement.

Soon after the incident, Knowles called Petsa on the telephone and invited her to her residence to discuss the defendant's plan. Petsa met with the defendant and Knowles at Knowles' residence. The defendant and Knowles discussed the details of her providing information to law enforcement on the defendant's behalf in accordance with his plan. When Petsa was contacted by an inspector working for the defendant's attorney, however, she had difficulty providing facts that were consistent with the defendant's version of events. She had second thoughts about participating in the defendant's plan, experienced panic attacks, and ultimately decided that she would not provide a false statement. In a second conversation with the investigator, she told him that she would not be involved with this any longer and would not "cover" for the defendant.

When the defendant learned that Petsa was apprehensive about providing false statements to the investigator

and had difficulty doing so, he communicated with her on Facebook in an attempt to calm her and assure her that she could do what he had asked of her. Later, when the defendant learned from Knowles that Petsa would not provide the information that he wanted her to provide, he sent her one or more messages on Facebook in which he stated, among other things, that if she did not testify on his behalf, he would tell the police that she drives with her children in an unregistered automobile and that he would tell the wife of a married man with whom she was having an affair about the affair.[5] Additional facts will be set forth in our analysis of the defendant's claims.

I

First, the defendant claims that the evidence was insufficient to convict him of operating a motor vehicle while under the influence of intoxicating liquor or any drug. We disagree.

To sustain a conviction under § 14-227a (a) (1), the state bore the burden of proving beyond a reasonable doubt that (1) the defendant operated a motor vehicle and (2) that he did so while under the influence of an intoxicating liquor. The defendant does not argue that the evidence did not support a finding that he was intoxicated when Grimes encountered him in the early morning of March 7, 2014. As he did before the trial

[5] Ultimately, neither Knowles, Aston, nor Petsa provided false information to law enforcement in accordance with the defendant's plan. After her relationship with the defendant ended, Knowles told an investigator working with defense counsel that the information she previously had provided to him was untrue. She provided a sworn written statement to an inspector working on behalf of the prosecutor in which she detailed the defendant's plan for her to provide a false statement on his behalf. Similarly, Petsa provided an inspector working on behalf of the prosecutor with a sworn statement in which she described the defendant's plan for her to provide a false statement on his behalf. Similarly, prior to trial, Aston told defense counsel that she did not want to lie under oath.

court,[6] the defendant argues that the state did not present sufficient evidence to demonstrate that he had operated a motor vehicle at or near the time that he encountered Grimes.

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

"We note that the 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. . . .

"Moreover, 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. . . .

[6] At the close of the state's case-in-chief, the defendant moved for a judgment of acquittal with respect to the operating under the influence charge. In relevant part, the defendant argued that there was no evidence that he had operated the motor vehicle. The court, referring to Grimes' testimony that he had observed the defendant's automobile "go into park and the brake lights go off," determined that there was sufficient evidence of operation. The court denied the motion.

It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

Focusing on the essential element of operation of a motor vehicle as used in § 14-227a (a) (1), we observe that although evidence of driving readily proves that operation occurred, the state may prove that operation occurred other than by proof of driving. "Nothing in our definition of 'operation' requires the vehicle to be in motion or its motor to be running." *State* v. *Haight*, 279 Conn. 546, 552, 903 A.2d 217 (2006). "It is well settled that operating encompasses a broader range of conduct than does driving. . . . [T]here is no requirement that the fact of operation be established by direct evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Sienkiewicz*, 162 Conn. App. 407, 410, 131 A.3d 1222, cert. denied, 320 Conn. 924, 134 A.3d 621 (2016). "Operation occurs when a person in the

vehicle intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle. . . . This court has clarified the meaning of operation by holding that an intent to drive is not an element of operation. . . . An accused operates a motor vehicle within the meaning of . . . § 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not." (Internal quotation marks omitted.) *State* v. *Roth*, 104 Conn. App. 248, 251 n.3, 932 A.2d 1071 (2007); see also *State* v. *Wiggs*, 60 Conn. App. 551, 554, 760 A.2d 148 (2000).

In his assessment of the evidence, the defendant relies heavily on his trial testimony. Notably, the defendant testified that that his automobile was inoperable at the time that Grimes came upon him and that he had not driven the vehicle before it became inoperable. The defendant testified to the following version of events: He was driving to Knowles' residence at approximately 7 p.m. on March 6, 2014, when his automobile experienced problems of an electrical or mechanical nature that were related to a continuously running fan. He pulled to the side of the road and removed the key from the ignition. He called Aston for a ride. Aston drove the defendant to a bar where he and Aston smoked marijuana. At a second bar, the defendant consumed alcohol for the first time that evening. At approximately 1 a.m., on March 7, 2014, Aston drove the defendant back to his disabled automobile and left immediately after dropping him off.[7] When he was back inside of

[7] Aston, called by the state as a rebuttal witness, testified that she was not in the company of the defendant at any time during the hours leading up to his arrest.

his automobile, he began searching for his roadside assistance card. This is when Grimes approached him. It was only *after* Grimes walked to his automobile and instructed him to roll down his window that he retrieved his key from his jacket, inserted the key into the ignition, and turned the ignition to the "on" position so that he could lower the window. According to the defendant, the automobile had enough battery power to lower the window, but not enough battery power "to power up the vehicle." The defendant testified that he never attempted to induce Knowles, Aston, or Petsa to make a false statement to help him in connection with the present case.

Relying on his testimony that the automobile was inoperable,[8] as well as the fact that Grimes did not observe the automobile in motion, the defendant argues that operation could not have occurred in the present case. The defendant cites precedent standing for the proposition that an automobile that is totally disabled or incapable of movement cannot be said to have been operated. See, e.g., *State* v. *Cyr*, 291 Conn. 49, 60, 967 A.2d 32 (2009); *State* v. *Swift*, 125 Conn. 399, 404, 6 A.2d 359 (1939).

[8] In addition to his testimony, the defendant presented evidence that the automobile had experienced mechanical problems that led to repairs by a mechanic on March 5, 2014. Also, he presented evidence that, following his arrest, he stated to Knowles and his former wife, Lisa Smith, that the automobile had experienced mechanical problems. Lisa Smith testified that she purchased the defendant's automobile in March, 2014, and that the automobile's motor was repaired on March 5, 2014, because a fan would run when the vehicle was not running. Lisa Smith also testified that the defendant called her in the middle of the night from the police station to tell her that he had experienced a problem with the automobile and that he had been arrested. Smith testified that, after the events at issue, the automobile was repaired for a second time and a new battery was installed in the automobile. It suffices to observe that the issue of whether the defendant's automobile was operable was a disputed issue of fact, the jury was not obligated to accept as true any of the evidence presented by the defense, and that there was ample evidence to support a finding that the defendant had operated the automobile just prior to his encounter with Grimes.

The defendant's analysis of the claim is flawed because, in arguing that the evidence was insufficient to support a finding that he operated the automobile, he disregards ample evidence that supported a finding that he had operated the vehicle just prior to the point in time that Grimes arrested him. In our role as a reviewing court, we are bound to examine the evidence in the light most favorable to the jury's finding of guilt. *State* v. *Crespo*, supra, 317 Conn. 16. The evidence included the written statement that the defendant provided to the police following his arrest. Therein, the defendant stated in relevant part that "[o]n [March 7, 2014,] at about 1:30 [a.m.,] I was stopped along [Route 195] near the four corners and CVS in Willington, CT. I was attempting to make a phone call and had pulled over for safety. A [s]tate [t]rooper then pulled in behind my car and came up to the passenger side of my car and asked for my paperwork." The jury, exercising common sense in its evaluation of the evidence, reasonably could have found that, when the defendant provided this explanation to the police to explain what had occurred when the police found his automobile obstructing traffic, he admitted that he had "pulled over for safety" just prior to Grimes' arrival on the scene. At trial, the defendant testified that several events took place between the time of operation and the time that he encountered Grimes. Yet, the jury reasonably could have inferred that the omission of these events from the defendant's statement suggested that his testimony was not true. A rational interpretation of the statement reflects that the defendant's conduct in pulling over was occasioned by and occurred contemporaneously with his attempt to make a telephone call.[9]

[9] Contrary to the version of events about which the defendant testified at trial, Aston testified that the defendant merely told her that, after he had finished work, he consumed wine at his place of employment "and then, against his better judgment, he ended up deciding to go over to visit [Knowles] and got pulled over that night." The defendant told her that "he was pulled over when the police pulled up behind him."

Consistent with the defendant's written statement was Aston's testimony that the defendant told her that, prior to Grimes' arrival, he had consumed wine at his place of employment, began to drive to Knowles' residence upon leaving work, and pulled his automobile over for some reason. He was pulled over when Grimes came upon him. The jury reasonably could have interpreted the evidence of the defendant's candid explanation to Aston in the same manner that it reasonably could have interpreted the defendant's statement to the police, namely, as evidence of an implicit admission by the defendant that he had operated his automobile just prior to his encounter with Grimes. Moreover, Knowles testified that when she discussed the incident with the defendant upon his release from police custody, he revealed to her that "he had been pulled over and that he was arrested," and that "[h]e said he had a couple of glasses of wine." Nothing in this explanation remotely suggests that the myriad of events detailed by the defendant in his trial testimony occurred between the time that he ceased operating the automobile and the time that Grimes came upon the scene. Additionally, the defendant stated that he "had a plan to say that he hadn't been driving," which included Knowles, Petsa and Aston corroborating a false version of events. In light of the evidence viewed in its entirety, the jury reasonably could have inferred that the defendant's explanation to Knowles reflected an implicit admission by the defendant that, in fact, he had been driving just prior to the time that he encountered Grimes.

Further supporting a finding that the defendant had operated his automobile just prior to his encounter with Grimes was Grimes' testimony that when he first observed the defendant's automobile, it was parked in the middle of the roadway with its brake lights illuminated. Grimes testified that he stopped behind the defendant's automobile and activated his emergency

lights, at which time "the brake lights went off because you could see the parking lights go on as the vehicle was shifted into park."[10] It would have been reasonable for the jury to have concluded that this evidence, which suggested that the defendant had shifted the gears in the automobile with the key in the ignition, plainly contradicted his testimony that, when Aston returned him to the automobile, he merely was in the process of looking for his roadside assistance card.

The defendant testified that he had turned off the motor of his automobile and removed the key from the ignition because a display inside of the automobile warned him of the potential for irreversible damage. Although he denied having driven the automobile just prior to his encounter with Grimes, the defendant acknowledged that, after Aston returned him to his automobile and Grimes arrived on the scene, he inserted his key into the ignition and turned the key so that he could lower his window. The defendant stated that he did so because Grimes had knocked on the window and motioned for him to lower it.

The defendant does not dispute that a finding that he drove the automobile was sufficient to demonstrate operation, and that relevant precedent reflects that the act of inserting the key into the ignition and turning the key within the ignition of an operable motor vehicle is sufficient to demonstrate that a defendant has operated it. See, e.g., *State* v. *Haight*, supra, 279 Conn. 553; *State* v. *Bereis*, 117 Conn. App. 360, 366–67, 978 A.2d 1122 (2009); *State* v. *Clausen*, 102 Conn. App. 241, 244, 925 A.2d 372 (2007). The defendant rebuts the evidence

[10] Relying on his own testimony that the automobile was inoperable, the defendant discounts the probative value of Grimes' observation of the vehicle's lights. We reiterate that the jury, however, could have determined that the defendant's self-serving testimony that the automobile was inoperable was not truthful.

of operation by focusing on the evidence that he presented to demonstrate that the automobile was inoperable. The jury, having carefully considered the evidence in its entirety, reasonably could have relied on the evidence that the defendant had operated the automobile and reasonably could have rejected as untruthful the defendant's testimony that his automobile was inoperable. Moreover, the state presented ample evidence that, following his arrest, the defendant engaged others to provide a false version of events concerning his operation of the automobile. The evidence presented by the state to demonstrate that the defendant tampered with witnesses was highly probative of the fact that he had operated the vehicle just prior to his encounter with Grimes and of the defendant's consciousness of guilt for having operated a motor vehicle while under the influence. These facts supported the jury's reliance on the state's evidence and theory of the case.

In light of the foregoing, we conclude that the state presented sufficient evidence to prove beyond a reasonable doubt that the defendant operated a motor vehicle while he was intoxicated. Accordingly, we reject the defendant's claim.

II

Next, the defendant claims that the court erroneously admitted certain evidence relating to one of the tampering with a witness counts. See footnote 1 of this opinion. We disagree.

During its case-in-chief, the state presented testimony from Petsa about how she was asked to corroborate the defendant's version of events leading up to his arrest. Petsa testified that, initially, Knowles called her on the telephone and asked her to corroborate "a story that would help keep [the defendant] from getting in

trouble."[11] Petsa testified that she then met with Knowles and the defendant at Knowles' residence, and that "[t]he conversation" centered around a false narrative of the events leading up to the defendant's arrest. Petsa testified that, after Knowles and the defendant discussed the plan with her, she did not discuss the plan with either of them until after she spoke with an investigator working on behalf of the defendant's attorney. At that time, she decided that she did not want to get into trouble for making a false statement to law enforcement. Petsa testified that she spoke with an investigator working on behalf of defense counsel, but she was told that the defense did not intend to rely on her because her answers "didn't match what the other people were saying." Thereafter, she spoke with her friend, Knowles, to let her know that she was experiencing panic attacks and did not want to be involved with the defendant's plan.

Petsa testified: "Once [the defendant] found out that I was having panic attacks and stuff like that about it, he tried reaching out to me on Facebook and messaging me on Facebook. You know, kind of some of the first ones were, like, you know, you can handle this; you know, just keep it calm and everything else like that, and then when he found out I wasn't going to back up his story, I started getting messages and, like, pages upon pages of stuff from him saying that he was going to call the state police on me and tell them that I'm driving [without a license or registration] with my kids in the car . . . and if I don't testify on his behalf, then he's going to call the state police and let them know where I drive and all that kind of stuff to get me caught." Petsa testified that, through her relationship with Knowles, the defendant knew that she was having an

[11] Knowles testified that she contacted her friend, Petsa, because the defendant asked her to do so. Also, Knowles testified that Petsa met with her at Knowles' residence very soon after the defendant's arrest.

affair with a married man and that, in an eight page message on Facebook, he also threatened both her and the man by "saying that he was going to rat him out to his wife" if Petsa did not cooperate. Petsa testified that "[a]ny messages on Facebook from [the defendant] were definitely after I talked to the investigator."

The prosecutor showed Petsa a document marked for identification purposes. Petsa stated that it was an excerpt from one of the Facebook messages that she had received from the defendant and that she had provided it to the prosecutor. She stated that she knew it was from the defendant "[b]ecause it comes in from my Facebook and it says who it comes from on Facebook." Petsa stated that the defendant's name appeared at the top of the message because "[i]t prints out automatically from the Internet."

The state offered the Facebook message as a full exhibit on the ground that it was a statement made by a party opponent, the defendant. The court excused the jury after defense counsel objected to the admission of the exhibit. Defense counsel argued that the state had not authenticated the exhibit because the state failed to prove that it came from the defendant's Facebook account or that it was his message.

The prosecutor conducted a voir dire examination of Petsa in an attempt to provide a more complete foundation for the proffered exhibit. Petsa testified that she had a Facebook account for a couple of years and that the defendant was not blocked from her Facebook page. She testified that the exhibit at issue was part of a series of messages that the defendant sent to her on Facebook. In this series of messages, the defendant threatened to expose Petsa's affair with a married man, discussed a baseball team on which Petsa and Knowles played, and discussed the role that Petsa played in the demise of the defendant's relationship with Knowles.

Petsa testified that all of the messages she had received from the defendant made sense to her in light of her relationship with him and with Knowles. She testified that she did not have any reason to believe that the message at issue did not originate from the defendant. She testified: "I knew it came from [the defendant]. . . . Just from meeting [the defendant] and knowing how he talks and how he, like, lays himself out there, that definitely was a message from [the defendant]."

Defense counsel argued that the state failed to satisfy its burden of authenticating the message because it failed to prove that the defendant sent it. Defense counsel suggested that anyone could have sent the message by using the defendant's Facebook account and that Petsa, familiar with the defendant's manner of speaking, could have manufactured the message at issue. The prosecutor argued that, in accordance with § 9-1 of the Code of Evidence, the state had presented sufficient evidence, in the form of Petsa's testimony, for the finder of fact to determine that the evidence was what it was purported to be, namely, a message sent to Petsa from the defendant. The prosecutor disagreed that any additional proof, such as testimony from a Facebook employee, was required to demonstrate that the message was authentic.

The court asked Petsa for additional information with respect to how the message had been printed because, in the court's opinion, the message appeared to be typewritten on plain white paper and was not similar in appearance to other "print-offs from Facebook" with which the court apparently was familiar. In response, Petsa testified that, earlier that month, she was in the prosecutor's office and had printed the message by copying it from her Facebook account and pasting it into a computer program known as "Word" so that she could print it. She stated that "we had an issue with [it] at the office at that time . . . trying to print it from

Facebook directly whereas we copied and pasted from [the defendant's] message to put it into Word so that I could print it for [the prosecutor], but if you were to . . . allow me to log onto my Facebook [account], you could see all that directly under his messages."

The court, stating that it had reviewed the relevant evidentiary rule, ruled as follows: "Based on the content of the writing and the testimony of this witness with the surrounding circumstances, it meets the threshold to be sufficiently put before the jury and to leave to them with cross-examination and rebuttal testimony how much weight they give to it based on the credibility of this witness, other witnesses in support of this . . . plan. So the objection is overruled . . . ."

Thereafter, in the presence of the jury, the prosecutor asked Petsa about the exhibit, as follows:

"Q. Ms. Petsa, is state's [exhibit] 20, which is now a full exhibit, part of a series of Facebook messages that you printed out for me?

"A. Yes.

"Q. Was I in your presence when you printed those out?

"A. Yes.

"Q. And did you actually do that on the computer in my office?

"A. Yes.

"Q. Was that shortly after I learned that those messages existed?

"A. Yes.

"Q. Did you alter any text in those messages in any way?

"A. None at all."

The prosecutor published the exhibit for the jury by reading it aloud. The exhibit, which bears a date of May 29, a time of 11:55 p.m., and the defendant's name, states in relevant part: "Danielle, please give me a call before you call my [l]awyer's [i]nvestigator back tomorrow. Lena told me that, you had a mini panic attack & didn't answer any of his questions today, now you were worried he is suspect. I have dealt with this investigator before & there is absolutely nothing for you to be stressed or have panic about. Your statement in this is so small & I want you to call him & insist that, he either take your statement over the phone, or he drive to you because, you just can't get down there. You are a [w]itness Dani, not the 1 on [t]rial. I'll be the 1 on [t]rial, if it goes that far. He works for my [l]awyer & his job is 2 things. His job is to gather evidence for my [l]awyer so, we don't have to go to [t]rial because, my [w]itnesses are so solid that, [t]rial could possibly be avoided. He is also prepping you for [t]rial, in case I do have to go to [t]rial. I know you got nervous but, don't be. Call Lena in the morning & do what her & Kelly did. Write down everything she tells you to write down so, you can have the answers in front of you on paper so, you won't get nervous. I want to give you a positive pep talk & ask you the questions I think he might ask, to prep you for your call with him, after you've talked to Lena & before you call the [i]nvestigator. So, call me on my cell in the morning. You didn't blow it. We just have to get you ready so, you are confident, like you always are & like Lena & Kelly were, when they talked to him. Call Lena, take notes, then call me before you call him. We got this & thank you for having my back with this. You, Kelly & Lena are really saving my hide with this & I appreciate it more than I could ever tell you. The 3 of you will have my loyalty for life for this. Talk to you in the morning. . . . Goodnight"

As he did at trial, the defendant argues on appeal that the state failed to authenticate the written Facebook

message presented to the jury[12] by presenting sufficient evidence to demonstrate that he authored the message reflected therein.[13] In this vein, the defendant argues that (1) it was not sufficient for the state to demonstrate that the message originated from the defendant's Facebook account; (2) Petsa's testimony concerning other messages that Petsa believed had been sent to her by the defendant was insufficient to demonstrate that he authored the message at issue; (3) the message at issue did not contain information to suggest that it could only have originated with him; and (4) the evidence suggested that it was *possible* that Knowles could have

[12] We observe that the defendant does not raise any claim of error with respect to Petsa's testimony that he sent her other messages via Facebook in which, in furtherance of his plan, he attempted to compel her to participate in his plan to provide false statements. The state did not attempt to present documentary evidence with respect to these other messages, but their incriminatory content was revealed to the jury by means of Petsa's testimony.

[13] Within his analysis of the authentication issue, the defendant refers to Petsa's testimony, which, as set forth previously, reflects that she copied and pasted the message at issue, and that it was not downloaded and printed directly from her Facebook account. According to the defendant, "[t]his raises valid concerns as to whether the message was a true and accurate copy and whether it actually came from [his] account." At the time of oral argument before this court, however, the defendant clarified that he was not raising a separate claim in this regard. Such an evidentiary claim is not preserved, and we would decline to consider its merits. The trial transcript reveals that the gravamen of the defendant's objection was that the state failed to demonstrate that he authored the message. Although the court asked Petsa to explain in further detail how the message was printed and why, in the court's opinion, it did not appear to have been printed directly from her Facebook account, the defendant's attorney did not raise any objection in this regard. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

accessed the defendant's Facebook account and sent the message.

"We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion. . . . Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Citation omitted; internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 29–30, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017).

"Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Conn. Code Evid. § 1-3 (a). "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a). The official commentary to § 9-1 (a) of the Code of Evidence provides in relevant part: "The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such

as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. . . . The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and 'chat room' content, computer stored records and data, and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods . . . or any other proof to demonstrate that the proffer is what the proponent claims it to be, to authenticate any particular item of electronically stored information." (Citations omitted.)

"It is well established that [a]uthentication is . . . a necessary preliminary to the introduction of most writings in evidence . . . . In general, a writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence. . . .

"Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity." (Internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 856, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

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

purports to be . . . . In addition, [a]n electronic document may . . . be authenticated by traditional means such as direct testimony of the purported author or *circumstantial evidence of distinctive characteristics in the document that identify the author*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 619, 110 A.3d 512, cert. denied, 316 Conn. 917, 113 A.3d 70 (2015).

Among the examples of methods of authenticating evidence set forth in the official commentary to § 9-1 (a) of the Code of Evidence is that "[a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be," and "[t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." Conn. Code Evid. § 9-1 (a), commentary. "An unsigned document may be authenticated by any number of circumstances, including its own distinctive characteristics such as its contents and mode of expression, as well as the circumstances and context in which it was found." C. Tait & E. Prescott, Connecticut Evidence § 9.2.3 (5th Ed. 2014).

This court has observed: "The need for authentication arises [in the context of electronic messages from social networking websites] because an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender. This is true even with respect to accounts requiring a unique user name and password, given that account holders frequently remain logged in to their accounts while leaving their computers and cell phones unattended. Additionally, passwords and website security are subject to compromise by hackers. Consequently, proving only that a message

came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship. . . .

"[T]he emergence of social media such as e-mail, text messaging and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship. An electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author. . . .

"Nevertheless, we recognize that the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium. . . . [I]n the case of electronic messaging . . . a proponent of a document might search the computer of the purported author for Internet history and stored documents or might seek authenticating information from the commercial host of the e-mail, cell phone messaging or social networking account." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Eleck*, 130 Conn. App. 632, 638–41, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014).[14]

In the present case, the state satisfied its burden of authenticating the exhibit at issue because it presented sufficient evidence to support a finding that the evidence was what the state claimed it to be, namely, a Facebook message sent to Petsa by the defendant. Petsa testified about the circumstances in which she received

[14] In *Eleck*, this court rejected a defendant's claim that a trial court erroneously excluded from evidence a Facebook message; the trial court's ruling was based on a lack of authentication and, specifically, the defendant's failure to prove authorship of the message. *State* v. *Eleck*, supra, 130 Conn. App. 641–44. In affirming this court's judgment, our Supreme Court assumed, without deciding, that the trial court's ruling was improper and concluded that the evidentiary ruling under review was harmless under the unique facts of the case. *State* v. *Eleck*, 314 Conn. 123, 129–31, 100 A.3d 817 (2014).

the message at issue. She and the defendant were Facebook account holders. She received the message, bearing the defendant's name, only after she had agreed to be a part of the defendant's plan to provide false statements to law enforcement and after she had met with an inspector working for defense counsel. This meeting was unfavorable for the defendant because, during the meeting, Petsa did not sufficiently corroborate the defendant's false version of events. Petsa testified that the message at issue was part of a larger series of messages that culminated in the defendant threatening her in various ways after she informed Knowles that she would not participate in the defendant's plan. The fact that the message at issue was part of a larger, related series of messages was part of how the state properly attempted to demonstrate through circumstantial evidence that the message at issue was sent by the defendant. Therefore, it was not improper, as the defendant argues, for the state to have relied on the other Facebook messages that he sent to Petsa as evidence of the circumstances under which Petsa had received the written message that was memorialized in the exhibit at issue. Petsa testified that the content of these messages made sense to her and revealed things that she would expect the defendant to know. Moreover, Petsa testified that the message at issue, in terms of the unique speaking style that it reflected, as well as its content, led her to believe *definitively* that it had been sent to her by the defendant.

The defendant's arguments before the trial court and before this court seemingly reflect his belief that the state bore the insurmountable burden of ruling out any possibility that the message was not sent by the defendant. The state's burden as the proponent of the evidence, however, was to present "evidence sufficient to support a finding that the offered evidence was what

its proponent claims it to be." Conn. Code Evid. § 9-1 (a). Here, in terms of evidence of Petsa's personal knowledge of the defendant and the subject matter of the message, as well as the distinctive characteristics of the communication in light of the surrounding circumstances in which it was made, the state presented sufficient circumstantial evidence of authenticity.[15] It suffices to observe that the court's ruling that the evidence was admissible did not affect the weight that the jury should afford the evidence. The defendant argues that the content of the message did not reflect facts that could only have been known by the defendant and that there was evidence to suggest that it would have been possible for Knowles to have sent the message. These arguments, which were appropriate fodder for the jury in its scrutiny of the state's case, are misdirected at the court's decision to admit the evidence. The defendant had a full opportunity to expose what he believed to be weaknesses in the evidence and to argue to the jury that the evidence lacked probative value.[16]

[15] The message contains what appears to be the defendant's cell phone number. Although the parties did not refer to this number, or its significance, we observe that during argument on the defendant's objection, the presence of the number on the Facebook message supported a finding that the message was authentic.

[16] The defendant argues that the evidence supported a finding that Knowles could have used his Facebook account to send the message at issue to Petsa. During his cross-examination of Petsa, defense counsel asked her if Knowles had access to the defendant's Facebook account. Petsa testified that she did not know the answer. Moreover, during closing argument, the defendant's attorney argued in relevant part: "The Facebook message, [the defendant] said he didn't send that. People can open Facebook accounts in anybody's name. There are a lot of people with axes to grind here, a lot of people who want to set people up, who don't like people anymore. There's a lot of bad stuff going on here. So, I would ask you to just ignore that, discredit it. If you don't and you decide that it's from [the defendant] to them, I would ask you to look at it critically. Is he telling [them] what to say? No. He's asking them to be clear, to write things down, to get it straight because it's important to him.

"It's easy to misread something. It's easy to assume it's from someone, but those accounts are very easy to open. I could open a Brian Smith account today with Facebook, and nobody questions it and I could start sending all

Finally, we conclude that, even if the court admitted the evidence in error, the ruling was harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in the [state's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the [state's] case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014).

The defendant argues that the evidence cannot be considered to be harmless because "it was the only evidence to support the charge of tampering with a witness with respect to Danielle Petsa. Petsa testified that the Facebook message was the only direct communication she had with the defendant about what to say. . . . In the absence of the message, there was insufficient evidence to show that the defendant induced or attempted to induce Petsa to provide false information." (Citations omitted; footnote omitted.)

The record contradicts the defendant's assessment of the evidence. Prior to the admission of the written

kinds of Brian Smith messages to anybody I care to send them to. There should be more controls on that, but there are not."

Facebook message, the state asked Petsa about her communications with the defendant generally. As detailed previously in this opinion, Petsa testified that, initially, Knowles told her about the defendant's plan. Petsa testified that, soon after the defendant's arrest, she met with the defendant and Knowles at Knowles' residence and that the defendant and Knowles discussed the defendant's plan for her to provide false information. Petsa testified that, after she spoke with the investigator, the defendant messaged her on Facebook to reassure her that she could "handle this" and to "keep it calm . . . ." Petsa testified that, after she made it known to Knowles that she would not "back up" the defendant's false story, the defendant sent her a series of messages on Facebook in which he threatened her in various ways. Thus, apart from the written Facebook message that was admitted as an exhibit, there was evidence in the form of Petsa's testimony that described in general terms the defendant's initial attempt on Facebook to encourage Petsa to corroborate his version of events and, later, his unmistakable attempt on Facebook to threaten her to do so. Petsa's oral description of these Facebook messages from the defendant, viewed in light of her entire testimony, supported a finding that the defendant attempted to induce Petsa to testify falsely. At trial, the defendant objected to the admission of the written Facebook message but did not object to Petsa's description of the messages she had received from him on Facebook. In light of Petsa's testimony, the admission of which is not challenged in this appeal, we conclude that the written Facebook message was merely cumulative of other efforts made by the defendant to induce Petsa to testify falsely. Thus, any error with respect to the admission of the evidence was harmless.

The judgments are affirmed.

In this opinion the other judges concurred.

BENJAMIN M. ALAIMO *v.* MATTHEW J. ALAIMO
(AC 38887)

Sheldon, Elgo and Stevens, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for breach of contract arising out of the defendant's breach of an alleged agreement of the parties. The matter was tried to the court, which rendered judgment in favor of the defendant, concluding that the plaintiff had failed to prove his claim by a fair preponderance of the evidence and that his claim was barred by both the statute of frauds and the relevant statute of limitations. On the plaintiff's appeal to this court, *held* that the record was inadequate to review the plaintiff's claims that the trial court erred in finding against him on the complaint and in favor of the defendant on his special defenses premised on the statute of limitations and the statute of frauds, as the plaintiff's arguments were based on allegations and claims beyond those alleged in the complaint that was the subject of the trial proceedings, and the plaintiff was limited to the allegations of the complaint and could not allege one cause of action and recover on another; moreover, even if those claims were raised in the complaint, the trial court did not file a written memorandum of decision explaining its ruling or sign a transcript of an oral ruling, nor did the plaintiff file a notice with the appellate clerk's office as required by the applicable rule of practice (§ 64-1), or a motion asking the trial court to articulate the factual and legal basis for its ruling, and even though the record contained excerpts from the trial transcript, this court could not readily identify any portion of the record that encompassed the trial court's factual findings necessary for the resolution of the plaintiff's claims.

Argued January 2—officially released February 20, 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 Hartford, small claims session, where the matter was transferred to the regular civil docket and tried to the court, *Wahla*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Benjamin M. Alaimo, self-represented, the appellant (plaintiff).

John M. Wyzik, for the appellee (defendant).

Opinion

PER CURIAM. In this action for damages based on breach of contract, the plaintiff, Benjamin M. Alaimo, appeals, following a bench trial, from the judgment rendered in favor of the defendant, Matthew J. Alaimo. The plaintiff claims that the trial court erred in finding against him on the complaint and in favor of the defendant on his special defenses premised on the statute of limitations and the statute of frauds. We affirm the judgment of the trial court.

This action was instituted in small claims court by the plaintiff and was removed to the regular docket of the Superior Court by the defendant. The plaintiff's complaint claimed that the defendant owed him $5000 plus costs as reimbursement for "fifty percent of Angeline Alaimo's mortgage payoff of $11,047.62." After a bench trial on December 15, 2015, and January 22, 2016, the court issued an oral decision in favor of the defendant and against the plaintiff. The court found that the plaintiff "failed to prove his claim by a fair preponderance of the evidence." The court also ruled in favor of the defendant on two of his special defenses, finding that the plaintiff's claims were barred by the statute of frauds and the statute of limitations.

On appeal, the plaintiff claims that the court erred because he proved that the defendant breached a contract involving the defendant's purchase of certain property from the plaintiff, causing the plaintiff to suffer a $30,000 loss. According to the plaintiff, this contract was in writing, satisfying the statute of frauds under General Statutes § 52-550. The plaintiff also argues that the small claims complaint was brought within six years

of the breach of contract, satisfying the statute of limitations governing actions for breach of written contracts. See General Statutes § 52-576.

The plaintiff's arguments present two problems. First, the plaintiff's arguments appear to be based on allegations and claims beyond those of the small claims complaint that was the subject of the trial proceedings. "It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . A plaintiff may not allege one cause of action and recover upon another." (Citation omitted.) *Malone* v. *Steinberg*, 138 Conn. 718, 721, 89 A.2d 213 (1952); see also *Michalski* v. *Hinz*, 100 Conn. App. 389, 393, 918 A.2d 964 (2007). Second, even if the plaintiff had raised these claims in his complaint, the court did not file a written memorandum of decision explaining its ruling. It also did not prepare and sign a transcript of an oral ruling. The plaintiff did not file a notice pursuant to Practice Book § 64-1 with the appellate clerk's office, nor did he file a motion asking the court to articulate the factual and legal basis for its ruling. See Practice Book § 66-5. "It is axiomatic that the appellant must provide this court with an adequate record for review. See Practice Book § 61-10." *Narumanchi* v. *DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005). Although the record before us includes excerpts from the trial transcript, we cannot readily identify any portion that encompasses the court's factual findings necessary for the resolution of the plaintiff's claims. Under these circumstances, we conclude that the record is inadequate to review the plaintiff's claims of error. See *Michaels* v. *Michaels*, 163 Conn. App. 837, 845, 136 A.3d 1282 (2016); *Murcia* v. *Geyer*, 151 Conn. App. 227, 230, 93 A.3d 1189, cert. denied, 314 Conn. 917, 100 A.3d 406 (2014).

The judgment is affirmed.

IN RE SANDY J. M.-M.*
(AC 40602)

Alvord, Sheldon and Prescott, Js.

Syllabus

S, who was born in Guatemala and had entered the United States while she was still a minor, appealed to the trial court from the decision of the Probate Court dismissing her petition for special immigrant juvenile status findings and denying her petition for removal of her father as guardian. The trial court rendered judgment dismissing the appeal, from which S appealed to this court. Thereafter, S filed a motion for summary reversal of the trial court's dismissal of her appeal from the decision of the Probate Court, which determined that because S had reached her eighteenth birthday and was no longer a minor, it lacked authority to make the requested findings. During the pendency of this appeal, our Supreme Court decided *In re Henrry P. B.-P.* (327 Conn. 312), in which it held that the Probate Court does not lose its authority to make special immigrant juvenile status findings pursuant to statute (§ 45a-608n [b]) when a child who is the subject of the petition reaches the age of eighteen during the pendency of the petition. *Held* that because the resolution of this appeal was controlled by *In re Henrry P. B.-P.*, summary reversal of the trial court's dismissal of the appeal was appropriate under the circumstances of the present case; although our rules of practice do not contain an express provision authorizing summary disposition of an appeal on the merits, this court has the authority to suspend the rules in the interest of expediting decision or for other good cause shown, and where, as here, the disposition of the appeal was plainly and undeniably mandated by a decision of our Supreme Court, summary disposition was warranted and further adjudication of the appeal would waste precious judicial resources, especially where, as here, such relief was unopposed and the failure to act expeditiously might prejudice S by preventing the timely assertion of her rights.

Considered January 18—officially released February 9, 2018**

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

** February 9, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision by the Probate Court for the district of Danbury dismissing the petition by the minor child seeking special immigrant juvenile status findings, and denying the petition for removal of a guardian, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters, and tried to the court, *Ginocchio*, *J.*; judgment dismissing the appeal, from which the petitioner appealed to this court; thereafter, the petitioner filed a motion for summary reversal of the trial court's dismissal of her appeal from the decision of the Probate Court. *Reversed*; *further proceedings*.

Meghann E. LaFountain in support of the motion.

Opinion

PER CURIAM. The petitioner, Sandy J. M.-M., asks this court, by way of a motion filed on January 9, 2018, to reverse summarily the trial court's dismissal of her appeal from a decision of the Probate Court denying her petition seeking special immigrant juvenile status findings. See 8 U.S.C. § 1101 (a) (27) (J) (2012); General Statutes § 45a-608n (b).[1] We conclude that the resolution of this appeal is controlled by our Supreme Court's

[1] General Statutes § 45a-608n (b) provides: "At any time during the pendency of a petition to remove a parent or other person as guardian under section 45a-609 or 45a-610, or to appoint a guardian or coguardian under section 45a-616, a party may file a petition requesting the Probate Court to make findings under this section to be used in connection with a petition to the United States Citizenship and Immigration Services for designation of the minor child as having special immigrant juvenile status under [8 U.S.C. § 1101 (a) (27) (J)]. The Probate Court shall cause notice of the hearing on the petition to be given by first class mail to each person listed in subsection (b) of section 45a-609, and such hearing may be held at the same time as the hearing on the underlying petition for removal or appointment. If the court grants the petition to remove the parent or other person as guardian or appoint a guardian or coguardian, the court shall make written findings on the following: (1) The age of the minor child; (2) the marital status of the minor child; (3) whether the minor child is dependent upon the court; (4) whether reunification of the minor child with one or both of the minor child's parents is not viable due to any of the grounds

recent decision in *In re Henrry P. B.-P.*, 327 Conn. 312, 173 A.3d 928 (2017), and that summary reversal is appropriate in the circumstances of this case. Accordingly, we grant the petitioner's motion and reverse the judgment of the trial court.

According to the relevant pleadings, the petitioner was born in Guatemala at the beginning of March, 1999, and she entered the United States when she was still a minor. Proceedings to remove her from the United States have commenced. On February 14, 2017, when she was seventeen years old, the petitioner initiated, pursuant to § 45a-608n (b), this proceeding requesting special immigrant juvenile status findings. Pursuant to General Statutes § 45a-610, the petitioner also filed with the Probate Court a petition to remove her father as her guardian. On March 30, 2017, the Probate Court, *Yamin*, *J.*, dismissed and denied, respectively, the petitions because the petitioner had reached her eighteenth birthday and the court presumably concluded that it lacked the authority to make the requested findings because she was no longer a minor.

On May 1, 2017, the petitioner appealed to the Superior Court from the Probate Court's dismissal and denial of the petitions. In that appeal, the petitioner asserted in part that the Probate Court had improperly dismissed and denied the petitions because even though she had reached her eighteenth birthday, the Probate Court retained the statutory authority to render the requested findings.

On May 25, 2017, the Superior Court, *Ginocchio*, *J.*, dismissed the appeal from Probate Court, citing to a Superior Court decision that held that it lacked the authority to adjudicate a neglect petition if the minor

sets forth in subdivisions (2) to (5), inclusive, of section 45a-610; and (5) whether it is not in the best interests of the minor child to be returned to the minor child's or parent's country of nationality or last habitual residence."

child turned eighteen years old during the pendency of the petition. See *In re Jessica M.*, 303 Conn. 584, 587–88, 35 A.3d 1072 (2012). On June 29, 2017, the petitioner filed this appeal challenging the propriety of the trial court's dismissal of her probate appeal. On July 27, 2017, this court granted the petitioner's motion to stay the deadline for her to file an appellant's brief until thirty days after the final disposition by our Supreme Court in *In re Henrry P. B.-P.*

The Supreme Court issued its opinion in *In re Henrry P. B.-P.*, supra, 327 Conn. 316, on December 14, 2017, holding that the Probate Court does not lose its authority to make special immigrant juvenile status findings pursuant to § 45a-608n (b) when the child who is the subject of the petition reaches the age of eighteen during the pendency of the petition. We agree with the petitioner that *In re Henrry P. B.-P.* controls the resolution of this appeal.

Although our rules of practice do not contain an express provision authorizing a summary disposition of an appeal on the merits, this court has the authority to suspend the rules "[i]n the interest of expediting decision, or for other good cause shown . . . ." Practice Book § 60-3. If the disposition of an appeal is plainly and undeniably mandated by a decision of our Supreme Court, as in this case, summary disposition is warranted and further adjudication of the appeal would waste precious judicial resources. Summary disposition is particularly warranted if, as in this case, such relief is unopposed and our failure to act expeditiously might prejudice a party by preventing the timely assertion of her rights.

The motion is granted, the judgment of the Superior Court is reversed, and the case is remanded for further proceedings according to law.