STATE OF CONNECTICUT *v.* NIRONE HUTTON (AC 41011)

Alvord, Prescott and Norcott, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. He claimed that his constitutional right to confrontation was violated when the trial court admitted into evidence, as a prior inconsistent statement pursuant to *State* v. *Whelan* (200 Conn. 743), a videotaped statement to the police that was made by W, in which W identified the defendant as the shooter. The defendant and W had gone to a housing complex where they became embroiled in a confrontation with the victim, who had been selling fake crack cocaine there, which adversely affected the defendant's drug business. The defendant claimed that he shot the victim not over a dispute about gang turf and drugs, but in defense of his friend, S, who was being kicked and pistol-whipped by the victim during the confrontation. After W took the witness stand and was sworn in to testify before the jury, he refused to provide verbal responses to any of the questions asked by the prosecutor and by defense counsel, and refused to answer questions after the trial court ordered him to do so. In its ruling admitting the videotaped statement, the court described W's nonverbal mannerisms that it observed when he was on the witness stand, and determined that his presence on the witness stand and the jury's ability to assess his demeanor and body language in responding to questions was sufficient for cross-examination purposes and for confrontation. *Held* that the trial court violated the defendant's right to confrontation when it admitted into evidence W's videotaped statement to the police, as W's refusal to provide verbal responses to counsels' questions rendered him functionally unavailable to testify, which thwarted the defendant from any meaningful opportunity to cross-examine W and to expose infirmities in the videotaped statement or the reasons behind W's recalcitrance or lack of memory: although W was called to the witness stand and put under oath before the jury, his outright refusal to respond to any questions rendered him unavailable for cross-examination, the court did not make any finding that W intended any of his gestures or body language to convey a specific nonverbal response to a question that would amount to a yes or no, and the meaning of the court's observations of W, which were unconnected to verbal responses to questions, was ambiguous and too speculative to be considered the equivalent of testimony, as body language and demeanor are instructive only in assessing the credibility of testimony actually given and are not a substitute for verbal or nonverbal responses that are intended to convey a substantive response to a question; accordingly, because the defendant was deprived of an opportunity

to cross-examine W regarding his prior videotaped statement to the police, the statement was inadmissible, and its improper admission was not harmless beyond a reasonable doubt, it having been reasonably likely that the statement played a significant role in the jury's decision to disregard the defendant's justification defense, as the defendant's claim that the shooting occurred in his defense of S, even if technically weak, was sufficiently supported in law and fact such that the court instructed the jury on that defense, and W's statement provided the jury with evidence of a clear and alternative motive on the part of the defendant to shoot the victim that, if credited, obliterated any need for the jury to consider the defendant's justification defense.

Argued October 25, 2018—officially released March 19, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kahn, J.*; verdict and judgment of guilty, from which the defendant appealed. *Reversed; new trial.*

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

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Nirone Hutton, appeals from the judgment of conviction, rendered against him after a jury trial, of murder in violation of General Statutes § 53a-54a. The defendant claims on appeal that the trial court violated his rights under the confrontation clause of the sixth amendment to the United States constitution[1] as articulated in *Crawford* v. *Washington*,

[1] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. "[T]he sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Specifically, the defendant argues that the court violated his confrontation rights by improperly admitting into evidence a witness' prior videotaped statement to the police in accordance with *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), because the witness was functionally unavailable for cross-examination due to his refusal to provide verbal responses to any questions asked by the prosecutor or defense counsel when called to testify before the jury. The defendant further argues that the improper admission of the witness' prior statement did not constitute harmless error because its content significantly undermined his justification defense. We agree with the defendant and, accordingly, reverse the judgment of conviction and remand the matter for a new trial.[2]

The jury reasonably could have found the following facts. Late in the evening on February 27, 2007, the defendant and Lenworth Williams entered Building 5 of the Greene Homes housing complex in Bridgeport, at which time they encountered the victim, Juan Marcano, and several of his friends. The victim and his friends became embroiled in a confrontation with the defendant and Williams. The defendant, who was part of a group that controlled the sale of drugs in Building 5, was angry with the victim because he had been selling fake crack cocaine in Building 5, damaging the defendant's reputation and drug business. As the confrontation escalated, the victim went to his car and retrieved a handgun. At some point, Williams was able to get

[2] The defendant also claims on appeal that the court improperly admitted evidence of his gang affiliation and prior gun trafficking activities, which the defendant characterizes as inadmissible evidence of uncharged misconduct. See Conn. Code Evid. § 4-5 (a). Because we conclude that the defendant is entitled to a new trial on his other claim of error, and it is speculative whether the uncharged misconduct issue will arise again on retrial, we decline to review this additional claim of error.

away by ascending a nearby staircase, returning soon thereafter with Garrett Bostick, also known as "Slim," who lived on the fifth floor of Building 5, and John Trevil, also known as "Pealz" or "Pills." When the defendant and his group tried to exit the lobby back into the stairwell and up the stairs, the victim grabbed Slim and pulled him back down the stairs, at which time the victim was kicking and pistol-whipping Slim. The victim, who was six feet, eight inches tall and weighed approximately 400 pounds, was considerably larger than Slim. Neither the defendant nor his friends called for help or otherwise attempted to break up the fight by nondeadly means. Rather, the defendant pulled out a pistol and fired two gunshots into the victim's back, which immediately incapacitated him.

The victim's friends chased the defendant and his group up the stairs. Slim and Pills went into Slim's apartment. The defendant tossed his gun into the apartment before he and Williams continued down the hallway, exiting the building via a different stairway. Williams eventually drove the defendant back to his mother's house at 135 Higgins Avenue.

The victim was able to call 911 for medical assistance and, after the police responded, he was transported to Bridgeport Hospital. The next morning, the police arrested Slim, Pills, and a third man, Ricardo Richmond, at Building 5 on wholly unrelated drug charges. At that time, the police searched Slim's apartment and recovered a gun that later was determined to be the gun used in the shooting of the victim.

The police showed photographs of Slim, Pills and Richmond to the victim, who remained hospitalized. The victim was able to identify Slim as the person with whom he was fighting at the time he was shot. The victim could not, however, identify the shooter from the photographs and maintained that the only other

persons in the area at the time of the incident were himself, Slim, and Slim's friends. The victim eventually died of complications from his gunshot wounds.

Despite some leads, the police were unable to develop sufficient evidence to obtain an arrest warrant, and the matter eventually was classified as a cold case. On July 4, 2013, however, Williams, who the police had arrested and were booking on unrelated charges, informed the police that he had information about the 2007 shooting. He thereafter gave a videotaped statement to the police in which he identified the defendant as the person who shot the victim. In his statement, Williams also explained that Building 5 was part of the drug dealing territory controlled by the defendant and Slim. According to Williams, the defendant confronted and shot the victim because the victim had been selling fake drugs in Building 5, which adversely affected the defendant's drug business.[3]

Williams' statement identifying the defendant as the shooter also corroborated other evidence that the police had collected implicating the defendant in the victim's murder. Specifically, the police had obtained a letter that the defendant had sent to a friend in prison. In the letter, the defendant admitted to having committed a "redrum," which was street slang for murder, and he also indicated that Slim had been caught with the gun he used a few hours later. Additionally, a jailhouse informant, Anestos Moffat, who was incarcerated for a time with the defendant and Pills, told the police that

[3] At trial, the state presented testimony from a police sergeant familiar with gang activities at the Greene Homes housing complex. He explained that the five Greene Homes buildings were controlled by several different groups, and that violence often broke out if one group tried to sell drugs to another group's customers. He also explained that if someone sold fake drugs in a building, it would result in both a loss of revenue and reputation for the group that controlled the building, and that the group would seek retribution against such an offender.

the defendant had confessed to him about shooting a "Spanish kid" who was "getting the best of Slim . . . ."

On October 4, 2013, the defendant was arrested and charged with the victim's murder.[4] He pleaded not guilty and elected a jury trial. The defendant testified at trial on his own behalf and admitted to shooting the victim. The theory of the defense was that the defendant had shot the victim, not over a dispute about gang turf and drugs, but in defense of his friend, Slim, who was being repeatedly pistol-whipped by the victim.[5] The state's theory was that the confrontation with the victim centered on a dispute over the victim selling "burn bags," i.e., fake drugs, in the defendant's territory and that the evidence established beyond a reasonable doubt that the defendant's actions were not justified as a defense of others.[6]

The jury found the defendant guilty of murder. On May 2, 2016, the court sentenced him to fifty-five years of incarceration. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[4] In addition to the murder, the state initially charged the defendant with one count of criminal possession of a firearm in violation of General Statutes § 53a-217 and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The state later chose not to pursue those additional charges, filing a substitute information limited to the murder charge.

[5] We note that this defense strategy was in place prior to trial and prior to the admission of Williams' statement identifying the defendant as the person who shot the victim. The defendant submitted pretrial written requests to charge that included an instruction on self-defense and the defense of others.

[6] General Statutes § 53a-19 (a) codifies defense of others and provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend . . . a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

The defendant claims on appeal that the trial court improperly violated his constitutional right to confrontation by admitting into evidence Williams' videotaped statement to the police. In particular, the defendant argues that because Williams refused to answer even a single question when he was called to testify before the jury, he was functionally unavailable for purposes of cross-examination and, therefore, his statement was inadmissible under *State* v. *Whelan*, supra, 200 Conn. 753, and its admission violated his confrontation rights under *Crawford* v. *Washington*, supra, 541 U.S. 36. The defendant further argues that the state could not demonstrate that the improper admission of the statement was harmless beyond a reasonable doubt.

The state responds that the court properly admitted Williams' statement as a prior inconsistent statement in accordance with *Whelan*, and that Williams' refusal to give verbal responses to the questions asked at trial did not implicate the defendant's confrontation clause rights because the jury was able to observe and evaluate Williams' nonverbal reactions to the questions posed to him by the prosecutor and by defense counsel. We agree with the defendant that, despite Williams' physical presence on the witness stand, the defendant was not afforded a meaningful opportunity to cross-examine Williams about his prior statement due to Williams' outright refusal to answer questions, and, therefore, the admission of Williams' statement violated the defendant's right to confrontation. We also agree that the state has failed to demonstrate that the error was harmless beyond a reasonable doubt.

The following additional facts are relevant to our resolution of this claim. On the afternoon of February 3, 2016, during the state's case-in-chief and outside the presence of the jury, the state informed the court, *Kahn, J.*, that it intended to call Williams as its next witness. The prosecutor informed the court that Williams likely

would be a "difficult witness" and that the court may want to permit the state first to question him outside the presence of the jury "just to see where he stands . . . ." The court asked the prosecutor if Williams had a "fifth amendment issue . . . ." The prosecutor indicated that because the case was nine years old, everything but the murder fell outside the statute of limitations and, thus, he did not believe that Williams intended to invoke the fifth amendment. Nevertheless, the prosecutor informed the court that the witness was represented by Attorney Don Cretella, who was present and could address that issue further. Cretella told the court that he had spoken with Williams in the courthouse lockup and that he did not anticipate him invoking his fifth amendment right not to incriminate himself. Cretella, however, informed the court that Williams had indicated that he was going to refuse to answer any questions, despite Cretella's advisement of the possible consequences of pursuing that course of action. After taking a brief recess to speak with all counsel in chambers, the court came back on the record and indicated that it intended to permit the state to question Williams outside the presence of the jury.

After Williams was sworn in, the court addressed him. The court first indicated its understanding that Williams did not intend to invoke his fifth amendment right not to testify. Williams answered that this was correct. The court then explained to Williams that, as a subpoenaed witness, he would be questioned under oath by the state following which defense counsel would have an opportunity to cross-examine him. Williams indicated that he understood the process. When the court asked if he intended to go forward with that process, Williams said: "I'm not complying with nothing you're asking me, ma'am." The court responded: "Well, I don't know what you mean by not complying, but the state is going to ask you some questions . . . ."

The prosecutor began by asking Williams his name, which did not elicit a verbal response. The following colloquy ensued:

"The Court: Mr. Williams, are you going to answer the questions?

"[Williams]: No. There's no question. I don't know nothing.

"The Court: Well, that's different. If you don't know anything, that's different. The question is whether you're going to answer any of the questions—

"[Williams]: No.

"The Court: —posed to you—

"[Williams]: No.

"The Court: —by the state.

"[Williams]: No.

"The Court: What about questions posed by [defense counsel]?

"[Williams]: No—um, no, um, no.

"The Court: You understand that if you refuse to answer questions the court can hold you in contempt?

"[Williams]: Yeah, do that then.

"The Court: And I can sentence you to six months in jail.

"[Williams]: Okay.

"The Court: That you will not get any credit for any good time, and it will not count toward any of your sentence. So that you're basically doing dead time for six months with no credit whatsoever.

"[Williams]: Everything is understood.

"The Court: I'm sorry?

"[Williams]: I said I understand. I understand everything clearly.

"The Court: Okay.

"[Cretella]: I have advised him of that, Your Honor.

"The Court: You have advised him—

"[Cretella]: That it's my opinion that he does—

"The Court: —that the court could hold him in contempt?

"[Cretella]: And it is my opinion that he does understand what I've explained.

"The Court: The state's position?

"[The Prosecutor]: Your Honor, the state would ask that the witness be held in contempt if he refuses to answer the questions.

"The Court: Do you understand, Mr. Williams, that if—if you believe that the information you gave previously is wrong, this would be your chance to correct that, you understand that, and to answer the questions posed to you by the defense. But it's your position not to answer any questions posed by either side?

"[Williams]: No. As I told you before, I'm not answering no questions. I don't know nothing.

"[The Prosecutor]: You can say that to each one of my questions.

"The Court: Yes.

"[The Prosecutor]: You can say that. If you don't know anything, you don't know anything to any of my questions. Did you meet with Detective [Heitor] Teixeira?

"[Williams]: (No verbal response.)

"[The Prosecutor]: Did you meet with the Bridgeport Police Department detectives on July 4th, 2013?

"[Williams]: (No verbal response.)

"[The Prosecutor]: Do you remember meeting with them?

"[Cretella]: Your Honor, the offer of proof I think we can safely assume this is how each question will be answered.

"The Court: So, Mr. Williams, I'm going to begin contempt proceedings. You can talk to your lawyer."

After making findings that the defendant had appeared pursuant to a valid subpoena, he did not have a valid fifth amendment claim, and he was refusing to answer any questions "not just with I don't know anything but not even answering," the court gave the parties an opportunity to address the court regarding contempt. Both Williams and Cretella declined to make any statement. The prosecutor also made no statement with respect to the contempt proceedings but argued that because Williams had indicated to the court under oath during the state's proffer that he did not know anything about the shooting, which was in direct contradiction to his videotaped statement to the police, the state should be permitted to play the videotaped statement to the jury as a prior inconsistent statement. Defense counsel argued that Williams was not "available" to testify and, therefore, his prior statement was not admissible under *Whelan*.

The court found Williams in criminal contempt and imposed a sentence of six months of incarceration for his failure to answer questions. The court ordered Williams to return to court the next day, however, and, indicated that, if Williams decided to answer questions at that time, the court would consider vacating the con-

tempt conviction. The court reserved making a decision on whether Williams' videotaped prior statement would be admitted into evidence.

The next day, in the presence of the jury, the state again called Williams to testify. The prosecutor asked Williams if he remembered being in court the day before and telling the judge that he knew "nothing about nothing . . . ." Williams provided no verbal response. The prosecutor then asked Williams if he remembered being interviewed by the police on July 4, 2013, and signing a statement identifying the person who shot the victim in the present case. Williams refused to respond and initially would not look at the copy of his written statement when it was handed to him by the prosecutor to verify his signature on the document. At the state's request, the court admonished Williams that he was in court under a subpoena and had a legal obligation to answer the questions posed to him. The state briefly resumed questioning Williams, who continued to give no verbal responses to the prosecutor's questions. The court then excused the jury.

Once the jury left, the prosecutor renewed his request that the court allow the jury to hear Williams' videotaped statement. The prosecutor argued that the statement was admissible under *Whelan* as a prior inconsistent statement on the basis of Williams' testimony to the court the day before that he knew nothing. Defense counsel responded that the availability of a witness is a prerequisite to the admission of any *Whelan* statement and that Williams' refusal to answer any of the questions posed to him rendered him unavailable. Defense counsel clarified that he was not challenging whether the videotaped statement was inconsistent with the position Williams had staked out the day before, but that the admission of the prior statement

without any opportunity for meaningful cross-examination would seriously impede the defendant's right to confrontation.

The court made an oral ruling admitting Williams' statement to the police, concluding that the statement met the *Whelan* criteria. Specifically, the court found that the statement was reliably recorded by audio/videotape, the statement was duly authenticated, and Williams had personal knowledge of the events recounted in the statement. With respect to the defense's objection that the witness was functionally unavailable and never subject to cross-examination with respect to his statement, the court first read into the record Williams' testimony proffered the day before, concluding: "Clearly, his statements yesterday under oath are inconsistent with the interview he provided to the police back on July 4th, 2013, as well as what he signed on that date. And pursuant to *State* v. *Simpson*, [286 Conn. 634, 945 A.2d 449 (2008)], the [Supreme] Court admitted under *Whelan* a taped interview, even though the witness did not remember making the prior statement. Also *State* [v. *Cameron M.*, 307 Conn. 504, 55 A.3d 272 (2012), cert. denied, 569 U.S. 1005, 133 S. Ct. 2744, 186 L. Ed. 2d 194 (2013), and overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 748 n.14, 754, 91 A.3d 862 (2014)]. That case really stands for the proposition that *State* v. *Pierre*, [277 Conn. 42, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006)] and other cases this court is relying on are still valid law.

"*State* [v. *Eaton*, 59 Conn. App. 252, 755 A.2d 973, cert. denied, 254 Conn. 937, 761 A.2d 763 (2000)]. Also, there is no need for the court to find that the lack of memory is not feigned. And that's under *State* [v. *Cameron M.*, supra, 307 Conn. 504] and *State* [v. *Rodriguez*, 139 Conn. App. 594, 56 A.3d 980 (2012), cert.

denied, 308 Conn. 902, 60 A.3d 286 (2013)]. And specifically in [*Rodriguez*], the issue was raised about a witness' lack of response to any questions . . . . And in a footnote the [Appellate Court] wrote: we note that the witness, in that case, need not have affirmatively renounced his statement for the court to have properly decided it was inconsistent. [*State* v. *Rodriguez*, supra, 605 n.12.] The court makes its determination based on the overall effect of the witness' testimony looking at both omissions and contradictions under *State* v. [*Whelan*, supra, 200 Conn. 743].

"Both under [*Cameron M.*], [*Rodriguez*], as well as [*Pierre*], *State* [v. *George J.*, 280 Conn. 551, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007)], and under *Crawford* and other cases cited under *Crawford*, it is obvious that as far as availability, both under *Crawford* and under *Whelan*, as long as the witness is physically present on the stand, as he is, and the jury is able to assess his demeanor, his body language, his gestures, his omissions in responding to questions, that is sufficient for cross-examination purposes and for confrontation. And in *State* [v. *Pierre*, supra, 277 Conn. 57], [our Supreme Court] noted: The cross-examination to which a recanting witness will be subjected is likely to be meaningful because the witness will be forced either to explain the discrepancies between the earlier statements and his present testimony or to deny [that] the earlier statement was made at all. If, from all [that] the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. . . . The jury can, therefore, determine whether to believe the present testimony, the prior statement, or neither. . . . Quite simply, when the declarant is in court, under oath, and subject to cross-examination before the [fact finder] concerning

both his out-of-court and in-court statements, the usual dangers of hearsay are largely nonexistent. [Internal quotation marks omitted.]

"The court [in *Pierre*] goes on to note that: Additionally, we note that other jurisdictions that have had the opportunity to interpret what it means to [appear] for cross-examination under *Crawford* [v. *Washington*, supra, 541 U.S. 60 n.9], have concluded that a refusal or inability by the witness to recall the events recorded in a prior statement does not render the witness unavailable for purposes of cross-examination. And they cite cases for which I will now not cite. So, here's what I'm going to do. I'm going to allow the statements to come in."

The court then addressed Williams, explaining that the court was going to bring the jury back into the courtroom and that the state would resume asking him questions. The court explained: "You can choose to answer them or proceed the way you have, at which point they will read portions of yesterday's transcript, and the state will move to admit [your prior written and videotaped statements], at which point, based on my ruling, I will allow that to come in. It's your choice whether you choose to answer the state's questions, not answer the state's questions, recant your statement, not recant it; take it back, not take it back, answer the defense's questions or not.

"I want you to understand something. Not answering the defendant's questions, you're not helping him any because the case law is clear, just by sitting there that's enough for cross-examination for the jury to assess whether you're truthful—your statement back then was truthful or not. They can assess your demeanor and your conduct."

After the jury returned, the prosecutor asked Williams a series of questions, none of which elicited any

verbal response. Williams' prior videotaped statement was admitted into evidence and played for the jury. Williams refused to respond to any of the prosecutor's remaining questions, and he also refused to give verbal responses when defense counsel sought to cross-examine him. After both the prosecutor and defense counsel indicated they had no more questions for Williams, the court excused the jury.

Outside the presence of the jury, the court then elected to vacate Williams' contempt conviction rendered the day before despite the fact that Williams had continued to engage in the same contumacious behavior that had justified the court holding him in contempt the previous day.[7] The court next decided to place on the record the following observations it had made of Williams and the jury while Williams was on the stand: "[T]he jury was looking at the witness while he was being asked questions both by the state as well as on cross-examination by the defense.

"For the record, the defense questioned, based on my timing, this witness for approximately over forty minutes or certainly close to forty minutes. When—

[7] The court stated: "Yesterday, I held Mr. Williams in contempt for his entire conduct yesterday. I told him I'd be bringing him back today. I advised him that, under *Whelan*, given the responses he had given yesterday, that— and the inconsistencies, that, in all likelihood I would take a look at the case law, but his statement to the police back on July 4th would likely be shown to the jury, and he had a choice to answer questions or not answer questions; and by not answering questions and his gestures and facial expressions, that is a part of testimony for which the jury could assess whether his position today, which is inconsistent from that of July 4, 2013, is the truthful one or the statement he gave back on July 4th. They can assess all of it; the questions he was posed both by the state and on cross-examination, his expressions—and I'll make a record of some of those in a moment.

"But given that, Mr. Williams, I understand the predicament that you're in.

"But what I'm going to do is, in light of his conduct today, which was respectful, I'll vacate the contempt, and he'll resume whatever time he has and then he's on his own, obviously, as far as recommendation. But I'll vacate the contempt."

there were times when I observed the witness he either raised his eyebrows, looked askance at counsel. He raised his eyebrows at certain critical times, like when he was cross-examined about not knowing the date of the shooting when the police asked him the date. He first didn't look at state's exhibits 9 and 14, then he looked at it, then he looked and looked away. He had gestures.

"When questioned about whether he could see the first step let alone the landing, he looked down. When asked how long he was selling drugs in Building 5, he looked up at the ceiling. Questioned about not telling the police that the name of the project was Greenes or something like that, yet he knew the name well, he closed his eyes. When asked about whether he was a womanizer, he didn't audibly do it but he sort of chuckled in his nonverbal expression. When questioned whether he wanted the jury to believe that he didn't know where this girl lived that he was seeing, he sat straight up.

"Again, he continued to make facial expressions, closing his eyes. He sighed when he was asked questions about Caroline [a woman at Greene Homes with whom, he told the police, he had been having sex] and that being the reason he went to Building 5, and saying that she was nice and straight. When asked about whether he indicated that [the victim] was the villain who went out of his way to raise trouble, he nodded and raised his eyebrows. Asked questions about whether he observed the victim go to the car to grab a gun and then start a conversation with Slim, he raised his eyebrows, sighed, and looked at defense counsel. And there were many instances where he did that.

"When he was questioned about not knowing [the defendant's] name as Nirone Hutchinson, he frowned. When asked about his plea agreement and plea deal to

get cooperation for his testimony, he nodded and raised his eyebrows, and then when asked about whether he told the police he was smoking and what he was smoking, which was toward the end of the cross, he sighed again. So, there were many instances. I didn't capture them all, but certainly his body language is something from which the jury can assess his credibility."

We begin our discussion of the defendant's claim by setting forth the legal principles that govern our review. Although we review evidentiary rulings, including whether a statement is properly admitted pursuant to *Whelan*, under a deferential abuse of discretion standard; *State* v. *Simpson*, supra, 286 Conn. 643; whether the trial court properly concluded that the admission of Williams' videotaped statement to the police did not violate his confrontation clause rights under *Crawford* presents a legal question over which we exercise plenary review. *State* v. *George J.*, supra, 280 Conn. 592.

Generally, a statement made outside of court and offered at trial to establish the truth of the facts contained in that statement is hearsay and, therefore, presumptively inadmissible. Conn. Code Evid. §§ 8-1 and 8-2. There are, nevertheless, many exceptions to the hearsay rule. One such exception is set forth in § 8-5 of the Connecticut Code of Evidence, which incorporates and codifies a rule established in *State* v. *Whelan*, supra, 200 Conn. 753.

In *Whelan*, our Supreme Court rejected traditional, common-law application of the hearsay rule, pursuant to which courts admitted prior inconsistent statements only for impeachment purposes, and "adopted [a] rule allowing the substantive use of a prior inconsistent statement if: (1) the statement is in writing; (2) it is signed by the declarant; (3) the declarant has personal knowledge of the facts set forth in the statement; and

(4) the declarant testifies at trial and is subject to cross-examination." (Footnote omitted.) *State* v. *Hopkins*, 222 Conn. 117, 123, 609 A.2d 236 (1992). The court in *Whelan* explained: "[If] the declarant is available for cross-examination the jury has the opportunity to observe him as he repudiates or varies his former statement. The cross-examination to which a recanting witness will be subjected is likely to be meaningful because the witness will be forced either to explain the discrepancies between the earlier statements and his present testimony, or to deny that the earlier statement was made at all. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see *and hear* of that person and in court. . . . The jury can, therefore, determine whether to believe the present testimony, the prior statement, or neither. . . . Quite simply, when the declarant is in court, under oath, *and subject to cross-examination before the factfinder concerning both his out-of-court and in-court statements*, the usual dangers of hearsay are largely nonexistent." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Whelan*, supra, 200 Conn. 750–51.

Section 8-5 of the Connecticut Code of Evidence codifies the *Whelan* rule, including later developments and clarifications of that rule. It provides in relevant part: "The following are not excluded by the hearsay rule, *provided the declarant is available for cross-examination at trial*: (1) . . . A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement." (Emphasis added.) As explained in the commentary to the rule, "[u]se of the

word 'witness' in Section 8-5 (1) assumes that the declarant *has testified at the proceeding in question*, as required by the *Whelan* rule." (Emphasis added.) Conn. Code Evid. § 8-5 (1), commentary.

Even if hearsay evidence satisfies an exception to the hearsay rule, however, it may remain inadmissible in a criminal case unless it also comports with the confrontation clauses of the federal and state constitutions.[8] Conn. Code Evid. § 8-2 (b);[9] see also *California* v. *Green*, 399 U.S. 149, 155–56, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (noting that "more than once [the court had] found a violation of confrontation [rights] even though the statements in issue were admitted under an arguably recognized hearsay exception").

In *Crawford* v. *Washington*, supra, 541 U.S. 68, the United States Supreme Court reexamined and refined its confrontation clause jurisprudence with respect to its limitations on the admission of hearsay evidence in criminal cases. Prior to *Crawford*, courts faced with deciding whether the admission of a hearsay statement would violate the confrontation clause followed the test set forth in *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled in part by

[8] The defendant in the present case has not raised a claim under the state constitution. Nevertheless, we note that "our Supreme Court has interpreted Connecticut's confrontation clause to provide the same protections as its federal counterpart. . . . [W]ith respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the United States constitution. The provisions have a shared genesis in the common law. . . . [T]he principles of interpretation for applying these clauses are identical." (Citations omitted; internal quotation marks omitted.) *State* v. *Jones*, 140 Conn. App. 455, 474–75, 59 A.3d 320 (2013) (rejecting claim that confrontation clause of our state constitution provides greater protections than its federal counterpart), aff'd, 314 Conn. 410, 102 A.3d 694 (2014).

[9] Section 8-2 (b) of the Connecticut Code of Evidence provides: "In criminal cases, hearsay statements that might otherwise be admissible under one of the exceptions in this Article may be inadmissible if the admission of such statements is in violation of the constitutional right of confrontation."

Crawford v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Under *Roberts*, hearsay statements by an unavailable declarant were constitutionally admissible provided that the statement had an "adequate indicia of reliability," which could be inferred by a court either on the basis of a "firmly rooted hearsay exception" or if the statement bore other "particularized guarantees of trustworthiness." Id. Thus, in practice, a defendant's confrontation rights were generally not implicated provided that a hearsay statement was admitted pursuant to a recognized statutory or common-law exception to the hearsay rule. The court rejected that approach in *Crawford*, overruling *Roberts*.

The court in *Crawford* reasoned that the cornerstone of a defendant's right to confrontation was *not* the reliability or trustworthiness of a statement, but the defendant's opportunity to question the declarant about the statement through cross-examination. It observed that hearsay statements fell into two broad categories: testimonial and nontestimonial.[10] The court held that, in a criminal trial, the confrontation clause prohibits the admission of testimonial hearsay statements by an unavailable declarant unless the defendant previously had an opportunity to cross-examine the declarant about the statement. The court made clear that if a declarant appears for cross-examination at trial, the confrontation clause "places no constraints at all on

[10] Hearsay statements that are nontestimonial in nature do not implicate the confrontation clause; rather, their admissibility is governed solely by the rules of evidence. See *State* v. *Slater*, 285 Conn. 162, 169–70, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008). Although *Crawford*'s failure to precisely define what it meant by "testimonial" has resulted in an abundance of litigation on that subject; id., 171; the parties in the present appeal agree that the videotaped police interview of Williams was testimonial in nature and, thus, implicates *Crawford*. See *Crawford* v. *Washington*, supra, 541 U.S. 52 ("[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard").

the use of [the declarant's] prior testimonial statements . . . so long as the declarant is present at trial to defend or explain it." (Citations omitted.) *Crawford* v. *Washington*, supra, 541 U.S. 60 n.9. Accordingly, pursuant to the confrontation clause, "[a witness'] testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Turning to the present case, the defendant does not dispute that Williams' testimonial statement to the police was inconsistent with sworn testimony that Williams provided outside the presence of the jury that he "knew nothing," from which it reasonably could be inferred that he was claiming to know nothing about the shooting. There is also no dispute that the state sought to admit Williams' prior statement for the truth of the matters asserted therein, which included both Williams' identification of the defendant as the shooter and his explanation for why the defendant shot the victim, which directly undermined the defense's theory of the case that the defendant was justified in shooting the victim. The court considered all the relevant factors set forth in *Whelan*, including Williams' "availability" for cross-examination at trial and concluded that his prior inconsistent statement was made with personal knowledge, properly recorded and authenticated, and, thus, was admissible hearsay under the *Whelan* rule.

The dispute on appeal is limited to whether the court properly rejected the defendant's argument that, due to Williams' refusal to provide verbal responses to any of the questions asked under oath by the prosecutor and by defense counsel, Williams was functionally unavailable, thus thwarting the defendant from any meaningful opportunity to cross-examine Williams

about his prior statement, something that was necessary to satisfy both the *Whelan* rule and to protect his right to confrontation. Accordingly, we must first consider whether the defendant was denied an opportunity for cross-examination that implicated his right to confrontation, and then, if so, whether that constitutional violation was harmless beyond a reasonable doubt.

I

The United States Supreme Court has described the right of confrontation as composed of several elements: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact . . . ." *Maryland* v. *Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Neither the United States Supreme Court nor any appellate court in this state has held that a witness' mere physical presence at trial on the witness stand is sufficient to satisfy a criminal defendant's right to confrontation. Such a holding would be inconsistent with the right to an adequate opportunity to cross-examine, an indispensable element of a defendant's right to confrontation. See *State* v. *Martinez*, 171 Conn. App. 702, 733–34, 158 A.3d 373 ("primary interest secured by confrontation is the right to cross-examination" and "if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony" [internal quotation marks omitted]), cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017); 5 J. Wigmore, Evidence (Chadbourn Rev. 1974) § 1395, p. 150 ("[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*" [emphasis in original]).

"The test of cross-examination is the highest and most indispensable test known to the law for the discovery

of truth." *Bishop* v. *Copp*, 96 Conn. 571, 575, 114 A. 682 (1921). Cross-examination "cannot be had except by the direct and personal putting of questions *and obtaining immediate answers*." (Emphasis added.) 5 J. Wigmore, supra, p. 150. "Ordinarily, a witness is regarded as subject to cross-examination when he is placed on the stand, under oath, *and responds willingly to questions*." (Emphasis added; internal quotation marks omitted.) *United States* v. *Owens*, 484 U.S. 554, 561, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). We certainly are mindful that "the [c]onfrontation [c]lause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original; internal quotation marks omitted.) *Kentucky* v. *Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Further, "[t]he [c]onfrontation [c]lause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the [c]onfrontation [c]lause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware* v. *Fensterer*, 474 U.S. 15, 21–22, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). In other words, "[t]he [confrontation clause] does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it*." (Emphasis added; internal quotation marks omitted.) *State* v. *Pierre*, supra, 277 Conn. 78.

Accordingly, the mere fact that a witness is called to the stand and placed under oath does not mean that the witness is necessarily available for cross-examination. In some circumstances, an otherwise available witness might render themselves unavailable by his or

her actions on the witness stand. Although no appellate court in this state has squarely addressed whether a witness is "available for cross-examination" if he or she refuses outright to answer any questions after being sworn in to testify, courts in other jurisdictions that have considered this issue have concluded that such a witness is functionally unavailable and, therefore, the admission of a prior statement of that witness would violate the confrontation clause's guarantee of an opportunity to cross-examine. Although not binding on this court, we find these cases persuasive.[11] The state has not cited, nor has our own research revealed, any post-*Crawford* court decision expressly holding that a witness who takes the stand but then refuses to answer any questions despite having no valid right to refuse to answer the questions is available for cross-examination.[12]

[11] "[T]he contours of the post-*Crawford* jurisprudence regarding unavailability for Confrontation Clause purposes—especially as unavailability relates to refusal to testify—are emerging." *State* v. *Kitt*, 284 Neb. 611, 629, 823 N.W.2d 175 (2012).

[12] We note that in *Fowler* v. *Indiana*, 829 N.E.2d 459 (Ind. 2005), cert. denied, 547 U.S. 1193, 126 S. Ct. 2862, 165 L. Ed. 2d 898 (2006), the issue before the Indiana Supreme Court was "whether a witness who is present and takes the stand, but then refuses to testify with no valid claim of privilege, is a witness who 'appears for cross-examination' (as that term is used in *Crawford*) if no effort is made to compel the witness to respond." Id., 465. The court, in a scholarly and historical discussion of the issue, first noted that, pre-*Crawford*, although a witness who asserted an inability to recall any significant information was deemed available for cross-examination under existing United State Supreme Court precedent, some courts nevertheless held that a witness who refused to answer any questions on the stand was not available for cross-examination for confrontation purposes. Id., 466–67. The court in *Fowler* concluded that it was unnecessary to decide the confrontation issue post-*Crawford* because it concluded that the defendant had forfeited any right to confrontation by making no effort to compel the witness' testimony. The court explained: "A refusal to answer, even after a court order, arguably falls on the loss of memory side of the line. Unlike a privilege that, as in *Crawford*, prevents the witness from taking the stand, the refusing witness, like the amnesiac, is before the jury. The basis for the refusal and the [witness'] demeanor can be taken into account in evaluating the prior statement just as the loss of memory can be evaluated by the trier of fact. On the other hand, a simple refusal to answer may be

In *Barksdale* v. *State*, 265 Ga. 9, 453 S.E.2d 2 (1995), the Georgia Supreme Court was presented with a situation quite similar to the one now before us. The defendant in *Barksdale* was charged with murder and armed robbery. The state called as a witness one of the defendant's accomplices, who already had pleaded guilty to armed robbery in exchange for the state's dropping the murder charge against him. The witness, who remained incarcerated, refused to testify at trial, believing that, by doing so, he would put his life in danger. After consulting with counsel, the trial court ruled that the witness did not have any valid fifth amendment privilege to assert, and the court ordered him to testify. The witness nevertheless continued to refuse to answer any questions. The prosecutor asked the court to hold him in contempt, but the trial court declined to do so immediately. The state also moved to admit a videotaped statement that the witness previously had provided to the police. The court postponed ruling on the request to permit counsel time to research the issue. The next day, the state recalled the witness. The prosecutor asked the witness if he still refused to answer questions in light of a possible criminal contempt conviction. He continued to refuse to testify and was excused. The state renewed its motion to admit the prior videotaped statement, arguing that it was admissible for substantive purposes as a prior inconsistent statement under Georgia's version of the *Whelan* rule.[13] The defendant objected, arguing, inter alia, that the admission of the videotaped statement would violate his confrontation rights. The trial court nevertheless ruled that the videotaped statement was admissible as a prior inconsistent

viewed as barring the defendant's access to meaningful cross-examination. We believe we need not resolve this issue because here [the defendant] did not seek an order compelling a response. . . . [W]e think a request for an order directing the witness to respond is necessary to preserve a [c]onfrontation [c]lause objection to prior statements by the witness." Id., 467.

[13] See *Gibbons* v. *State*, 248 Ga. 858, 862–64, 286 S.E.2d 717 (1982).

statement. The state recalled the witness to the stand and played the videotaped statement to the jury. At the conclusion of the videotape, the court permitted the defense to attempt to cross-examine the witness. Defense counsel asked the witness if he intended to continue to refuse to answer questions. The witness answered in the affirmative, and defense counsel indicated that he had nothing further to ask.

In his appeal of the conviction, the defendant in *Barksdale* claimed that the admission of the videotaped prior statement violated his right to confrontation because the witness was not subject to cross-examination regarding the prior statement. The Georgia Supreme Court unanimously agreed and reversed his conviction. In so doing, it distinguished for confrontation purposes the case before it, in which the witness refused to answer questions outright, from cases in which a witness had testified but asserted a lack of memory regarding a prior statement or the events at issue. In the latter line of cases, the court explained, the defendant had "the opportunity to cross-examine a forgetful witness about such matters as his bias, his lack of care and [attentiveness] . . . and even . . . the very fact that he has a bad memory." Id., 13, quoting *United States* v. *Owens*, supra, 484 U.S. 559. The court reasoned that unlike a witness who claims memory loss but nonetheless is willing to answer questions, the witness in the case before it had refused to provide *any* answers to questions, even in the face of a trial court's order to do so or be held in contempt and, thus, "was not available for cross-examination."[14]

[14] We note that because *Barksdale* was decided prior to the United States Supreme Court's decision in *Crawford*, the court, in analyzing whether the defendant's right to confrontation was violated, applied the former trustworthiness standard set forth in *Ohio* v. *Roberts*, supra, 448 U.S. 56. The court's finding that the witness was not available for cross-examination, however, necessarily would have led to the same result under *Crawford*'s new standard. Other courts have reached the same conclusion reached in *Barksdale* under pre-*Crawford* jurisprudential standards. See, e.g., *People* v. *Rios*, 163

The Pennsylvania Supreme Court reached a similar conclusion in *In re N.C.*, 629 Pa. 475, 105 A.3d 1199 (2014). In that case—a delinquency adjudication in which the juvenile was alleged to have committed a sexual assault on a three year old child—the court determined that a juvenile court had admitted a videotaped forensic interview of the minor victim in violation of the juvenile's right to confrontation. Although the victim, who was four years old at the time of the adjudication hearing, was found competent by the juvenile court to testify; id., 480; she was unable on direct examination to verbalize any responses to questions about the juvenile or his alleged contacts with her, although she did nod or shake her head in response to a few preliminary questions. Id., 480–81. After a number of unsuccessful attempts to elicit her testimony, the witness eventually became totally unresponsive and curled up into a fetal position.[15] Id., 487. The juvenile court inquired if defense counsel would like to ask her any questions, but defense counsel declined. Id.

Later in the proceeding, following the testimony of a forensic interviewer, the juvenile court admitted, over the objections of defense counsel, a DVD containing a previously recorded forensic interview of the witness. Id., 487–88. The juvenile objected on the grounds that the video constituted testimonial hearsay evidence and that its admission would violate his sixth amendment right to confrontation. Id. The juvenile court ruled that although there was no Pennsylvania case law defining

Cal. App. 3d 852, 864, 210 Cal. Rptr. 271 (1985) ("we find the admission of a prior statement made by a witness who stonewalls at trial and refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness").

[15] As the Pennsylvania Supreme Court noted in its decision, the juvenile court took two recesses and made changes in the caregivers who sat with the witness on the stand in an effort to make the witness more comfortable, to no avail. *In re N.C.*, supra, 629 Pa. 497.

what it means to testify in a proceeding, it concluded that the witness effectively had testified because she was found competent to testify and took the witness stand. Id., 488. The juvenile was adjudicated delinquent and appealed to the Superior Court.

The juvenile claimed on appeal that the admission of the witness' prior testimonial statement to the forensic interviewer was admitted in violation of *Crawford* because the witness had been unavailable for cross-examination at the adjudicatory hearing. Id., 489–90. The Superior Court agreed, concluding that the juvenile court had improperly found that the witness was available for sixth amendment purposes. It reversed the delinquency adjudication and ordered a new hearing. Id., 490.

The commonwealth was granted permission to appeal from the Superior Court's decision to the Pennsylvania Supreme Court. Id., 492. The commonwealth argued that the dispositive concern under the confrontation clause was not "the manner in which a witness performs during direct examination but rather whether the defendant was given the opportunity to conduct an effective cross-examination of that witness." Id., 494. The commonwealth contended that "a [witness'] evasiveness, refusal to cooperate, or lack of memory of certain events does not preclude a finding that a defendant's right to cross-examine that witness under the confrontation clause has been satisfied." Id. The juvenile responded that the United States Supreme Court has always required "meaningful participation in the courtroom proceeding before a witness may be deemed available for cross-examination and that the [c]ommonwealth's arguments stand for the proposition that the mere presence of a witness in the courtroom will satisfy a defendant's constitutional right to confront that witness." Id., 497. The juvenile noted that the confrontation clause as interpreted by the United States Supreme

Court "requires a witness who appears and takes the stand at trial *and willingly responds to questions*." (Emphasis added.) Id.

The Pennsylvania Supreme Court unanimously agreed with the juvenile that his right to confrontation was violated and affirmed the decision of the Superior Court. Id., 504. The court explained: "[I]t is difficult to harmonize the juvenile court's ultimate determination at the adjudicatory hearing that [the minor witness] was available for cross-examination under the [s]ixth [a]mendment with its unequivocal statement on the record earlier that 'she's not going to testify' and its observation she did not testify on the substantive issues of the case. . . . Its contemporaneous courtroom observations also belie the juvenile court's characterization of [the witness'] behavior as merely 'less than forthcoming' . . . . [A] review of its explanation for its reasoning on the record suggests the juvenile court conflated the federal constitutional challenge that was before it—whether [the juvenile's] right to confrontation under the [c]onfrontation [c]lause of the [s]ixth [a]mendment had been satisfied—with the separate issues of [the witness'] competency to testify at the adjudicatory hearing . . . and of whether the forensic interview was admissible under [a statutory hearsay exception].

"We cannot find the confrontation element of *Crawford* was met herein, for *Crawford* and its progeny require an *opportunity* for effective cross-examination which [the juvenile] simply did not have. Contrary to the juvenile court's analysis, defense counsel's indication he had no questions on cross-examination cannot be deemed to have been a strategic choice, for any attempt on his part to continue to question this young witness whose fear and fragility were evident during direct examination and whose last expression before

melding herself into a fetal position on her grandmother's lap was a desire to go home would have been, at best, pro forma. In addition, [the witness] did not act merely with trepidation at the hearing; she provided virtually no verbal responses on direct examination, despite two recesses and as many changes in caregivers to comfort her while she was on the witness stand which effectively left defense counsel with no opportunity to cross-examine her on the charges brought against [the juvenile].

"[The witness'] inability to speak and physical recoiling simply is not of the ilk of the witnesses in the caselaw to which the [c]ommonwealth cites who either could not remember certain details or refused to cooperate with counsel. As such, the Superior Court correctly determined that the juvenile court improperly deemed [the witness] to have been available for cross-examination and that [the juvenile's] right to confront her guaranteed under the [c]onfrontation [c]lause of the[s]ixth [a]mendment to the United States constitution had been violated when it admitted her recorded statements, which were testimonial in nature, into evidence during [the juvenile's] adjudicatory hearing without [his] having had a prior opportunity to cross-examine her." (Citations omitted; emphasis altered.) Id., 503–504.

Finally, in *State* v. *Irlas*, 888 N.W.2d 709 (Minn. App. 2016), the Court of Appeals of Minnesota, was asked to determine, as a matter of first impression, whether a witness who took the stand and answered some preliminary questions, but then invoked his fifth amendment privilege and refused to respond willingly to questions about a prior guilty plea statement, was not available for cross-examination for purposes of the confrontation clause. Id., 713. The court concluded that, although the witness' invocation of his fifth amendment right on the stand was invalid, it nevertheless rendered

him unavailable for cross-examination, and the subsequent admission of his prior plea transcript violated the defendant's rights under the confrontation clause. Id. The court explained that, by refusing to respond to questions, the witness "did not testify . . . making him not subject to cross-examination under *Crawford*." Id., 714.

On the basis of the preceding case law and our careful consideration of confrontation clause jurisprudence as it exists post-*Crawford*, with its emphasis on the significance of a defendant's right to cross-examine a declarant about any out-of-court testimonial statement that the state seeks to admit against the defendant for substantive purposes, we conclude that Williams' videotaped statement to the police was admitted in violation of the defendant's constitutional right to confrontation. Although Williams was called to the stand and put under oath before the jury, he outright refused to give any verbal responses to questions asked of him. Although both the prosecutor and the defense counsel were permitted to ask Williams a series of questions, merely posing questions is not the equivalent of cross-examination; the defendant is also entitled to answers, whatever they may be. If a witness does not provide even a single answer while on the witness stand, the defendant is completely deprived of any opportunity he might have to probe and expose infirmities in the witness' prior statement or even the reasons behind the witness' recalcitrance or lack of memory. Williams' outright refusal to respond to any questions rendered him unavailable for cross-examination, and because the defendant never had any other opportunity to cross-examine Williams about his statement to the police prior to trial, admission of that statement violated *Crawford*.

Our conclusion that Williams was unavailable for purposes of cross-examination is consistent with the Federal Rules of Evidence regarding criteria that render a

witness unavailable under the federal rules for purposes of admitting hearsay statements. Rule 804 (a) of the Federal Rules of Evidence provides in relevant part: "A declarant is considered to be unavailable as a witness if the declarant . . . (2) refuses to testify about the subject matter despite a court order to do so . . . ." As this court has previously noted, prior to the adoption of the Connecticut Code of Evidence, our Supreme Court has cited with approval rule 804 in determining whether a declarant was unavailable as a witness. See *State* v. *Richard P.*, 179 Conn. App. 676, 687 n.11, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018), citing *State* v. *Bryant*, 202 Conn. 676, 694, 523 A.2d 451 (1987). Here, despite the court's order that he answer questions, Williams refused to provide any information about the "subject matter," which here meant any information about the shooting or about the circumstances surrounding his videotaped statement to the police.

In reaching its contrary conclusion that the defendant's confrontation rights were not violated on the basis of Williams' outright refusal to respond to questions, the court relied on a line of cases in which a witness' prior statement was deemed properly admitted despite the witness' claimed lack of memory either about the statement and/or the events in question. See *State* v. *Cameron M.*, supra, 307 Conn. 504; *State* v. *Simpson*, supra, 286 Conn. 634; *State* v. *George J.*, supra, 280 Conn. 551; *State* v. *Pierre*, supra, 277 Conn. 42; *State* v. *Rodriguez*, supra, 139 Conn. App. 594; *State* v. *Eaton*, supra, 59 Conn. App. 252. For purposes of the confrontation clause analysis now before us, however, we conclude, as did the court in *Barksdale* v. *State*, supra, 265 Ga. 12–13, that cases involving a witness with memory loss, whether real or feigned, are sufficiently distinguishable from the circumstances of the present case to render their holdings inapposite. See also *People*

v. *Foalima*, 239 Cal. App. 4th 1376, 1390–91, 192 Cal. Rptr. 3d 136 (2015) ("[An] opportunity [to cross-examine] may be denied if a witness refuses to answer questions, but it is not denied if a witness cannot remember. A witness who refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness. . . . By contrast, a witness who suffers from memory loss—real or feigned—is considered subject to cross-examination because his presence and responses provide the jury with the opportunity to see [his] demeanor and assess [his] credibility." [Citations omitted; internal quotation marks omitted.]). It is helpful to briefly discuss this line of cases before explaining why they are not controlling under the circumstances of the present case.

The earliest case cited by the trial court was *State* v. *Eaton*, supra, 59 Conn. App. 252, a case decided by this court prior to *Crawford*. In *Eaton*, we held that a witness' written statement to the police properly was admitted as a full exhibit under *Whelan* despite the fact that the witness, when called to testify at trial, indicated that she could not recall making the statement. Id., 264. Specifically, the record on appeal showed that after the witness was called to testify, she was shown the statement that she previously had given to the police. The witness, in response to questioning, indicated that although she recognized the signature on the statement as being her own, she did not recall making the statement. The statement was then admitted into evidence under *Whelan* over the objection of the defendant. The defendant was permitted to cross-examine the witness, and "probed into the circumstances under which she gave her statement to the police, including how she got to the police station, how long she was there, how she was questioned, who questioned her, how she answered the questions and whether the police had [identified

the perpetrator]." Id., 258. This court concluded on appeal that the defendant's sixth amendment right to confrontation was not violated because, despite the claim of lack of memory, the defendant had a meaningful opportunity to cross-examine the witness while she was on the witness stand. We explained: "Although [the witness] was uncooperative for the defense as well as for the state in failing to recall her statement to the police even after she was given the opportunity to review it, she did describe in some detail the circumstances of when she gave her statement to the police. She was able to recall that she signed and initialed the statement after it was read to her and that she was present at the club at the time of that incident. Significantly, she testified that the contents of her statement . . . were truthful." Id., 266.

In *State* v. *Pierre*, supra, 277 Conn. 42, our Supreme Court rejected the defendant's claim on appeal that the trial court improperly admitted a witness' prior written statement to the police because the witness was functionally unavailable for cross-examination at trial and the defendant had not had any prior opportunity to cross-examine the witness about the statement. The defendant argued that although the witness had taken the stand at trial and answered questions, he was functionally unavailable because he claimed that he "could not remember ever having heard any of the information recounted in the written statement, that he never had substantively reviewed the statement, and had signed the document only to stop the police from harassing him . . . ." Id., 79. The Supreme Court agreed with the state that the defendant's confrontation right to cross-examination was not violated because the witness "took the stand at trial, agreed to testify truthfully, was subject to cross-examination by the defendant, and *answered all questions posed by defense counsel*." (Emphasis added.) Id., 84. The witness asserted in response to

questions that he had no memory of the details contained in his signed statement to the police. The court noted, however, that the witness "acknowledged meeting with the detectives in his attorney's office and signing the written statement prepared by the investigating officers. Additionally, [the witness] responded to several questions regarding his motives and interest in providing information to the police. . . . [The witness] stated that he had signed the written statement despite the fact that it was not accurate, because the police had contacted him on several occasions and he was interested in trying to get them to stop bothering him. Moreover, [the witness] confirmed several other pieces of information contained in the statement . . . ." Id., 84–85. In sum, the court held that "a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, *and answers the questions put to him or her during cross-examination*." (Emphasis added.) Id., 86. Later that same year, in *State* v. *George J.*, supra, 280 Conn. 551, our Supreme Court, citing *Pierre*, reiterated that the fact that a testifying witness claimed to have no recollection of the contents of a past statement did not render the witness unavailable for *Crawford* purposes. Id., 596.

In 2008, our Supreme Court decided *State* v. *Simpson*, supra, 286 Conn. 634. The defendant in *Simpson* had been convicted, inter alia, of sexually assaulting a minor. During trial, the court had admitted into evidence for substantive purposes under *Whelan* portions of a videotaped forensic interview of the victim, after the victim testified at trial that she did not remember the defendant touching her body in the way she described in the video. One of the defendant's claims on appeal was that the witness' lack of memory of the events

rendered her functionally unavailable for cross-examination under *Crawford*. Relying on its prior decisions in *Pierre* and *George J.*, the court upheld the admission of the videotape. In so doing, the court noted that the defendant "cross-examined [the witness] extensively about her memory and perception . . . ." Id., 654. Further, with respect to the specific allegations contained in the videotaped statement, "the defendant also cross-examined [the witness] extensively and elicited testimony that she had never seen a man or boy without his clothing on, and that she did not remember participating in the videotaped interview or making the accusation that the defendant had touched her with his penis, that she got in trouble when she was younger for touching herself, and that she was not afraid of the defendant. Finally, the defendant was able to utilize this information in his closing arguments to the jury. Accordingly, we conclude that the defendant had an ample opportunity to cross-examine [the witness] effectively, and, therefore, his confrontation clause rights were not violated by the admission into evidence of the videotaped statement." Id., 654–55.

In *State* v. *Cameron M.*, supra, 307 Conn. 504, the Supreme Court rejected a claim nearly identical to the one raised in *Simpson*, namely, that the child sexual assault victim was functionally unavailable for cross-examination for purposes of *Crawford* because she testified at trial during direct examination that she could not remember anything regarding the forensic interview or the allegations at issue. Id., 515–16. The court indicated that to the extent the defendant was claiming that the witness was functionally unavailable solely due to her lack of memory, that claim was controlled by its holding in *Simpson*. Further, the court noted that the defendant had elected not to cross-examine the witness and, thus, any lack of cross-examination was the result of "a strategic election by the defendant . . . ." Id.,

520. The fact that "the victim could have been cross-examined on, for example, her memory and understandings of truth and fantasy was sufficient to render her available for confrontation purposes under *Crawford*." (Emphasis omitted.) Id.

The circumstances of the present case render it distinguishable from *Pierre* and its progeny. In each of those cases, the witness willingly provided some responses to the questions asked when called to testify. Although the witnesses in the cases cited by the trial court claimed or feigned memory loss regarding the information provided in the statement or of making the statement at all, they nevertheless responded verbally to questioning, providing some relevant information from which the jury, in combination with the witness' demeanor, could evaluate whether to believe the facts of the statement or the witness' trial testimony. In the present case, Williams did not respond in any way to any of the questions asked. He did not assert whether he had or had not made the statement at issue, whether he remembered the contents of the statement or the events contained therein. He simply failed to provide any testimony. Contrary to the position that the state now takes on appeal, at trial, the prosecutor seemed to understand that it was essential that Williams provide verbal responses to questions. When Williams stated, outside the presence of the jury, that he was not "answering no questions," the prosecutor told him that he could say that in response to each question he was asked.

The utter lack of a verbal response to any questions renders the present case wholly unlike the cases that the trial court relied on in admitting Williams' prior statement. The trial court, in rendering its ruling, indicated that the availability required under both *Crawford* and *Whelan* was satisfied simply from the witness' physical presence and the jury's ability to assess his

demeanor and body language "*in responding to questions*." (Emphasis added.) Williams, however, never responded to a single question asked of him before the jury, remaining silent throughout. In its analysis of whether Williams' refusal to answer questions rendered him functionally unavailable to testify, the trial court also appeared to conflate that question with whether a prior statement could be considered inconsistent if a witness failed to respond to questions.

It certainly is within the province of the jury in its role as fact finder to assess the credibility of a witness' answers to questions by assessing the witness' demeanor on the stand, which would include how a witness looks and acts while testifying. In the present case, the trial court stated on the record its own observations of Williams while he was on the stand, including, inter alia, that Williams had looked up at the ceiling, looked down, raised his eyebrows, closed his eyes, and "sort of chuckled in his nonverbal expression." The court did not make any finding, however, that Williams intended any of his gestures or body language to convey a specific nonverbal response to a question that would amount to a yes or no. We agree with the defendant that the meaning of the court's observations of Williams, *which were completely unconnected to verbal responses to questions*, is ambiguous and far too speculative to be considered as the equivalent of testimony. In other words, body language and demeanor are only instructive in assessing the credibility of testimony actually given, and are not a substitute for verbal responses or nonverbal responses intended to convey a substantive response to a question.[16]

[16] The cases the state relies on to support its assertion that nonverbal conduct by a witness properly could be viewed as testimony are limited to instances of nodding and shaking of the head in lieu of a verbal response of yes and no.

Our reasoning is consistent with observations made by the United States Court of Appeals for the Second Circuit in upholding a District Court's ruling that it did not implicate confrontation rights for a witness to testify while wearing dark sunglasses. The Second Circuit noted: "Even if we accept the idea, *grounded perhaps more on tradition than on empirical data*, that demeanor is a useful basis for assessing credibility, the jurors had an entirely unimpaired opportunity to assess the delivery of [the witness'] testimony, notice any evident nervousness, and observe her body language. *Most important*, they had a full opportunity to combine these fully observable aspects of demeanor *with their consideration of the substance of her testimony*, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony." (Emphasis added; footnotes omitted.) *Morales* v. *Artuz*, 281 F.3d 55, 61–62 (2d Cir.), cert. denied sub nom. *Morales* v. *Greiner*, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

In sum, because of Williams' refusal to provide any verbal responses to questions he was asked by both the prosecutor and defense counsel, and absent anything more than speculation as to the nonverbal mannerisms observed by the trial court, we conclude that the defendant was deprived of an opportunity to cross-examine Williams regarding his prior videotaped statement to the police. Because he admittedly had no prior opportunity to cross-examine Williams, the statement was inadmissible under *Crawford*.[17]

[17] Our decision today is to be read as limited to the unique set of circumstances present in this case. We are cognizant of the reality that the state has limited control over recalcitrant and noncooperating witnesses. Nevertheless, this concern is overborne by our duty to adhere to existing confrontation jurisprudence, which seeks to ensure that only testimonial hearsay evidence that has been subjected to a reasonable opportunity for cross-examination is admitted against a defendant.

II

Our conclusion that the court violated the defendant's rights under the confrontation clause by admitting Williams' prior videotaped statement into evidence without an opportunity for cross-examination does not end our inquiry. We must also consider whether the defendant was harmed by this error. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (stating that confrontation clause violations are subject to harmless error analysis). Because the error is constitutional in magnitude, "the state has the burden of proving [that] the constitutional error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 384, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). We conclude that the state has failed to meet that high burden in the present case.

In Williams' videotaped statement, he identified the defendant as the shooter. If the identification had been the only inculpatory information conveyed by Williams in his statement, its subsequent admission at trial likely would have been harmless in light of the defendant's decision to admit that he shot the victim, but that he did so in defense of his friend, Slim. In his prior statement, however, Williams also provided information that, if credited, significantly undercut the defendant's claim that he shot the victim in defense of Slim.

"[General Statutes] § 53a-19 provides for two separate, but related, defenses—self-defense and defense of others . . . ." *State* v. *Bryan*, 307 Conn. 823, 833, 60 A.3d 246 (2013). "The defense of others, like self-defense, is a justification defense. These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . .

Thus, conduct that is found to be justified is, under the circumstances, not criminal." (Internal quotation marks omitted.) Id., 832–33. "Under . . . § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise . . . deadly force if he reasonably believes both that [the] attacker is using or about to use deadly force against [himself or a third person] and that deadly force is necessary to repel such attack." (Internal quotation marks omitted.) Id., 835–36. Unlike an affirmative defense, the defendant has no burden of persuasion for a claim of defense of others, only a burden of production. Id., 834. In other words, once the defendant has adduced evidence to raise a reasonable doubt in the mind of a rational juror as to whether he acted in defense of another, the state has the burden to prove beyond a reasonable doubt that the defendant's actions were unjustified. Id., 832; *State* v. *Hall-Davis*, 177 Conn. App. 211, 224, 172 A.3d 222 (jury's duty to ascertain "whether the state has met its burden of proving beyond a reasonable doubt that the [crime] was not justified" [internal quotation marks omitted]), cert. denied, 327 Conn. 987, 175 A.3d 43 (2017).

The defendant testified before the jury that, at the time he shot the victim, the victim was physically assaulting his friend, Slim, that the victim was much taller and significantly heavier than Slim, and that the victim was armed with a handgun and was pistol-whipping Slim. Significantly, aspects of the defendant's account were corroborated by other evidence. The state's medical examiner testified that the victim was six feet, eight inches tall and weighed about 400 pounds. Detective Michael Fiumidinisi, who initially investigated the shooting, testified that Slim was six feet, two inches tall, from which the jury could infer that he was smaller than the victim. More importantly, Fiumidinisi testified, without objection, about statements that the victim made to him at the hospital, many of which

corroborated the defendant's narrative of the events just prior to the shooting. For example, the victim stated to the detective that he had followed Slim when Slim tried to leave the lobby, that he was trying to intimidate Slim, and that he pulled him down the stairs and was engaged in a fistfight with Slim when he was shot from behind.

Williams' videotaped statement to the police was the only other evidence presented from an eyewitness of the shooting. The significance of his statement cannot be downplayed given that prior to that statement, there was insufficient evidence to establish probable cause for the defendant's arrest. Williams told the police that the defendant was part of the group that controlled drug sales in Building 5. Williams indicated that the defendant knew that the victim was selling fake drugs, which adversely affected the defendant's drug business. It can be reasonably inferred from Williams' statement that this knowledge motivated the defendant to confront and ultimately shoot the victim. If the jury believed Williams, this would have cast serious doubt on the veracity of the defendant's version of events, namely, that he and Williams were initially attacked by the victim and his friends, and that he had shot the victim only to prevent him from seriously injuring Slim, who had come to their aid. Without Williams' alternate version of events, which put the defendant's encounter with the victim into a different context, the only evidence before the jury would have been the account given by the defendant, which, as we have set forth, was corroborated by other evidence.

The state argues that the defendant's testimony was "inconsistent and patently incredible." Moreover, the state contends that the defendant's claimed justification for using deadly force was "internally inconsistent, contrary to common sense and arguably legally insufficient, even viewed in a light most favorable to him." According

to the state, even if the jury credited the defendant's version of events, the jury was "unlikely to have found that the scenario he posited, whereby neither he nor any of his friends made any effort to assist Slim in stopping the victim by using nonlethal force, justified his actions." In short, the state takes the position that the defendant's defense of others claim was so "fraught with problems that the jury could not have overlooked" that any improper admission of Williams' statement was rendered harmless.

Although we acknowledge that, as the state suggests, there were potential problems with the defendant's theory of defense and there is no *guarantee* that the jury would have found the defendant not guilty on that basis in the absence of the erroneous admission of Williams' statement, the state's arguments are insufficient to satisfy its demanding burden of demonstrating harmlessness beyond a reasonable doubt. First, however technically weak the defendant's claim of defense of others might have been, it was sufficiently supported by both law and fact that the court agreed to give the jury an instruction on the defense of others. The state does not argue that the defendant was not entitled to the instruction. Second, and more importantly, the introduction of Williams' statement provided the jury with evidence of a clear and alternative motive on the part of the defendant to shoot the victim that, if credited, effectively obliterated any need for the jury to consider the defendant's justification defense.

Contrary to the position taken by the state, we conclude that it was reasonably likely that Williams' statement played a significant role in the jury's decision to disregard the defendant's justification defense, and, therefore, the improper admission of Williams' statement and its effect on the jury cannot be viewed as harmless beyond a reasonable doubt.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

BERNARD SMALLS v. COMMISSIONER OF CORRECTION (AC 40751)

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

Syllabus

The petitioner, who previously had been convicted of murder, risk of injury to a child and criminal possession of a firearm, sought a writ of habeas corpus, claiming, inter alia, that the habeas counsel who had represented him with respect to a previous habeas petition he had filed provided ineffective assistance by, inter alia, failing effectively to raise the claim that the petitioner's trial counsel was ineffective for failing to fully explain to the petitioner a plea offer he had rejected. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly rendered judgment denying the habeas petition: that court having found that trial counsel properly had conveyed the information regarding the plea offer to the petitioner and that the credible evidence presented revealed that trial counsel had fully explained to the petitioner all of the charges and their minimum and maximum sentences, the petitioner failed to establish that trial counsel's representation of him was deficient, and, therefore, the habeas court properly concluded that he likewise failed to establish that prior habeas counsel's representation of him was deficient; moreover, the habeas court correctly determined that the petitioner was not prejudiced by any alleged deficient performance of either trial counsel or prior habeas counsel, as the petitioner's claim that he would have accepted the plea offer of twenty-five years if trial counsel had explained to him that it would have resolved all of the charges that were then pending against him was belied by the petitioner's testimony that he had adamantly refused to plead guilty to murder and would plead guilty only to manslaughter.

Argued January 3—officially released March 19, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment

denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. Following the granting of his petition for certification to appeal, the petitioner, Bernard Smalls, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court erred in rejecting his claim that his prior habeas attorney rendered ineffective assistance by failing effectively to raise his claim that his attorney in his underlying criminal trial rendered ineffective assistance by failing to explain to him the implications of a plea offer that he rejected. We affirm the judgment of the habeas court.

The following undisputed procedural history is relevant to this appeal. On December 7, 2001, the petitioner was sentenced to a total effective sentence of fifty years incarceration after being convicted of murder by use of a firearm in violation of General Statutes § 53a-54a (a), risk of injury to a child in violation of General Statutes (Rev. to 1999) § 53-21 (1), and criminal possession of a firearm in violation of General Statutes (Rev. to 1999) § 53a-217 (a). His sentence was enhanced by a guilty finding of commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. The petitioner's conviction was affirmed on direct appeal. See *State* v. *Smalls*, 78 Conn. App. 535, 548, 827 A.2d 784, cert. denied, 266 Conn. 931, 837 A.2d 806 (2003).

The petitioner filed his first habeas petition in 2004. On July 31, 2007, the petitioner, who was then represented by Attorney Cheryl A. Juniewic, filed an amended petition, wherein he alleged, inter alia,[1] that he was denied the effective assistance of his trial counsel, Michael Moscowitz. The petitioner claimed, inter alia, that Moscowitz "did not adequately consult with or advise [the] petitioner concerning the status of any plea negotiations, any potential plea agreements or the consequences of accepting a plea agreement as opposed to the consequences of going to trial before a jury." The habeas court rejected the petitioner's claim, finding that "the twenty-five year offer of pleading to murder was in fact conveyed to [the petitioner], and he rejected that offer." This court dismissed the petitioner's appeal from the judgment of the habeas court. See *Smalls* v. *Commissioner of Correction*, 146 Conn. App. 909, 78 A.3d 307 (2013), cert. denied, 311 Conn. 931, 87 A.3d 579 (2014).

On March 12, 2012, the petitioner commenced this habeas action, claiming ineffective assistance by Juniewic in his prior habeas action. He filed a second amended petition on January 20, 2017, wherein he claimed that Juniewic rendered ineffective assistance by, inter alia, failing effectively to raise the claim that Moscowitz was ineffective for failing to fully explain the plea offer to him.

After a two day trial, the habeas court rendered a decision rejecting the petitioner's claim that Juniewic rendered ineffective assistance to him in his previous habeas action. The habeas court concluded that the petitioner failed to prove that Juniewic's representation of him was deficient or prejudicial. The court explained

[1] In that petition, the petitioner also claimed that his appellate counsel, on his direct appeal, was ineffective and that his right to due process was violated because of prosecutorial impropriety. Those claims are not relevant to this appeal.

its ruling as follows: "In the instant matter, all of the credible evidence adduced at the habeas trial clearly demonstrates that the petitioner would not have accepted any plea offer for a murder charge from the prosecuting authority. Attorney Moscowitz testified credibly at the habeas trial that he reviewed with the petitioner the nature and elements of the charges against him, the minimum and maximum sentences he could receive if convicted, and what the state would have to prove in order to convict the petitioner of the charges. Attorney Moscowitz also testified that he presented a twenty-five year offer to the petitioner and advised him to take it, but the petitioner refused to plead guilty unless the [principal charge was] reduced from murder to manslaughter, which [the state's attorney] was unwilling to do. The petitioner also testified at the habeas trial that he did not want to plead guilty to a murder charge. Furthermore, [the state's attorney] testified that he was responsible for all decisions regarding the charges the petitioner faced, and he was not willing to reduce the murder charge in this case. As a result, the court finds that Attorney Moscowitz properly conveyed the information regarding the plea offer to the petitioner, and therefore his conduct did not constitute deficient performance. Furthermore, it is not reasonably probable that the petitioner was going to accept the plea offer given the fact that he admitted that he did not want to plead [guilty] to a murder charge. As a result, the petitioner has failed to sustain his burden of establishing that Attorney Moscowitz was ineffective for failing to properly explain a plea offer, and therefore his claim of ineffective assistance against Attorney Juniewic must be denied." The habeas court granted the petitioner's petition for certification to appeal, and this appeal followed.

The petitioner claims that the habeas court erred in rejecting his claim that Juniewic rendered ineffective assistance in his first habeas action. Specifically, the

petitioner claims that Juniewic rendered ineffective assistance by failing effectively to argue that Moscowitz's representation of him was ineffective because he failed to explain that the twenty-five year plea offer would have resolved all charges that were then pending against him. We disagree.

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. [Id.,] 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . *Lozada* v. *Warden*, supra, 842–43. In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .

"It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 150–52, 196 A.3d 1149, cert. denied, 330 Conn. 946, 196 A.3d 326 (2018).

"To show prejudice from ineffective assistance of counsel where a plea offer has . . . been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they

been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 253–54, 116 A.3d 331, cert. denied, 317 Conn. 917, 117 A.3d 855 (2015).

The petitioner claims on appeal that the habeas court erred in concluding that Juniewic's performance was neither deficient nor prejudicial based on her alleged failure properly to raise his argument that Moscowitz failed to advise him that the twenty-five year plea offer would have resolved all of the charges then pending against him. Although the habeas court found that Moscowitz properly had conveyed the information regarding the plea offer to the petitioner, the petitioner claims that that finding is erroneous based on Moscowitz's testimony in the petitioner's first habeas trial that the parties "didn't get into details about the other charges" during the plea negotiations. The petitioner claims that because the other charges were not discussed during the plea negotiations, Moscowitz could not have advised him and, in fact, did not advise him, that his acceptance of the twenty-five year offer on the murder charge would have resolved all of the charges against him. Moscowitz, however, testified in this habeas action that he did not recall the proposed structure of the twenty-five year plea offer, but that that sentence would be "the controlling sentence," and he had explained that to the petitioner. Although the petitioner testified that Moscowitz did not explain the charges that were pending against him, or the sentences associated with those charges, the habeas court did not find that testi-

mony credible. Rather, the habeas court found that the credible evidence presented revealed that Moscowitz had fully explained to the petitioner all of the charges and their minimum and maximum sentences. Because the petitioner failed to establish that Moscowitz's representation of him was deficient, the habeas court properly concluded that he likewise failed to establish that Juniewic's representation of him was deficient.

Moreover, the petitioner testified, and Moscowitz confirmed, that he had adamantly refused to plead guilty to murder and would only plead guilty to manslaughter. The petitioner testified: "It was just mainly the title, but the number really . . . didn't matter. It was the title, meaning murder or manslaughter." He also testified: "I just didn't want that . . . murder title on my name . . . because I . . . believe that it wasn't intentional. I didn't . . . mean to kill him." Thus, the petitioner's claim that he would have accepted the twenty-five year offer if Moscowitz had explained to him that it would resolve all of the charges that were then pending against him is belied by his own testimony. We therefore conclude that the habeas court also correctly determined that the petitioner was not prejudiced by any alleged deficient performance by either Moscowitz or Juniewic.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANDRE DAWSON
(AC 40337)

Lavine, Bright and Harper, Js.

Syllabus

Convicted, after a jury trial, of the crimes of criminal possession of a pistol or revolver and criminal trespass in the third degree, the defendant appealed to this court. Police officers were patrolling a housing complex when they entered a courtyard where they saw six individuals, including

the defendant. While two officers conversed with the defendant and three others who were seated at a picnic table near a corner formed by the cement walls of a planter, a third officer, L, stepped onto the wall behind the defendant and immediately saw in plain view a gun lying in the corner by the bushes, about four to five feet away from the defendant. Subsequently, the police used swabs to collect DNA from the gun and the ammunition that L had removed from the gun. The swabs, as well as DNA samples provided by the defendant and the three others were delivered to the state forensics laboratory, where R, a forensic science examiner, conducted DNA analyses of the materials. The quantity of the touch DNA on the swabs was small, and the DNA was partially degraded, but R was able to compare the DNA from the swabs with the samples provided in a scientifically accurate way and to obtain scientifically viable and accurate results. R's analysis eliminated the three other individuals as possible contributors to the DNA profile she developed from the swabs, but the defendant could not be eliminated as a contributor. *Held*:

1. The defendant could not prevail on his claim that there was insufficient evidence to support his conviction of criminal possession of a pistol or revolver because there was insufficient evidence of his knowledge of the gun and no evidence to prove his dominion or control over it: even though the defendant was not in exclusive control of the courtyard where the gun was found, the circumstances established a nexus between the defendant and the gun and permitted the jury reasonably to infer that the defendant knew of the gun's presence, that he was in a position to exercise dominion or control over it, and that he intended to do so, as the gun, which was discovered using a flashlight, was found in plain view in the open, and was uncovered and appeared to have been placed near the bushes just before L discovered it, the jury reasonably could have inferred therefrom that the person who put the gun near the bushes did not abandon it and leave the courtyard but, instead, was one of the six individuals in the courtyard when the police officers arrived, L testified that individuals who have a gun in their possession try to discard or stash the gun in an area close to them when they become aware of a police presence so that they will not be detected with it and, thus, it was reasonable for the jury to infer that the defendant, a convicted felon, quickly put the gun on the wall near the bushes to avoid being found with the gun, which was found four to five feet from the defendant, who was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile found on the gun and ammunition; moreover, contrary to the defendant's claim, the state did not rely on DNA evidence alone to prove that the defendant knew of the gun's presence on the wall near the bushes, and although the defendant claimed that the DNA evidence was insufficient due to the questionable reliability of testing a small sample, the size of the DNA sample went to the weight of the evidence, not its admissibility; furthermore, the

defendant could not prevail on his claim that even if the state produced sufficient evidence that he knew of the gun's presence, it failed to adduce any evidence of his intent to exercise dominion or control of the gun, as there was evidence of the defendant's proximity to the gun, which provided a DNA profile from which, among those present, only the defendant could not be excluded, there was circumstantial evidence that the gun recently had been placed on the wall near the bushes, the defendant, a convicted felon, had a reason not to want to be found with the gun on his person, and the jury, therefore, reasonably could have inferred that he stashed the gun but remained in close proximity to it, so that he could exercise dominion or control over it, and that he intended to do so.

2. The defendant's unpreserved claim that he was deprived of his constitutional right to a fair trial as a result of certain instances of prosecutorial impropriety during closing argument was unavailing:

a. Even though the prosecutor provided the jury with an incomplete and incorrect statement of the law of constructive possession by leaving out the necessary element of intent when she incorrectly told the jury that it could convict the defendant if he knew where the gun was located and had access to it, that error did not deprive the defendant of his right to a fair trial; the trial court's jury instructions, which were nearly identical to our model jury instructions for criminal possession of a gun, corrected the prosecutor's incorrect statement of the law of possession by giving a full and complete instruction on possession, the defendant failed to demonstrate how the model jury instruction that was used in the present case was a source of constitutional error, and despite the fact that the prosecutor's inaccurate reference to the law of constructive possession had the potential to confuse the jury, any perceived impropriety did not deprive the defendant of a fair trial, as the prosecutor's argument was not central to the theory of defense that focused on the DNA evidence, the state's case was convincing, and the court's correct charge on constructive possession, coupled with the repeated admonitions that the jury must follow the law as given to it by the court, adequately cured the prosecutor's error.

b. The defendant could not prevail on his claim that the prosecutor mischaracterized the DNA evidence and R's testimony, and improperly suggested that there was no evidence to support the defense's theory that the defendant's DNA on the gun or ammunition came to be there in some incidental or accidental fashion; although R, who testified as to a number of ways in which the defendant's DNA could have been transferred to the gun and that she did not know how his DNA was deposited on it, described possibilities or hypotheticals, her testimony was not evidence of how, in fact, the defendant's DNA came to be on the gun or the ammunition, and the state, which proved that the defendant's DNA was contained in the DNA profile developed from the swab

of the gun and ammunition, and presented circumstantial evidence permitting the jury to find the defendant guilty of criminal possession of a pistol or revolver, was not required to introduce evidence to corroborate that the DNA was placed on the gun or ammunition by direct contact.

Argued November 15, 2018—officially released March 19, 2019

Procedural History

Information, in the first case, charging the defendant with the crime of criminal possession of a firearm, and information, in the second case, charging the defendant with the crime of criminal trespass in the third degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the cases were consolidated; thereafter, the state filed a substitute information charging the defendant with the crimes of criminal possession of a pistol or revolver and criminal trespass in the third degree; subsequently, the matter was tried to the jury before *Hernandez, J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal as to the count of criminal possession of a pistol or revolver; verdicts and judgments of guilty, from which the defendant appealed in part to this court. *Affirmed.*

Erica A. Barber, assigned counsel, with whom, on the brief, was *Allison M. Near*, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Suzanne M. Vieux*, supervisory assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Andre Dawson, appeals from the judgment of conviction, rendered after a jury trial, of criminal possession of a pistol or revolver in

violation of General Statutes § 53a-217c (a) (1).[1] On appeal, the defendant claims that (1) there was insufficient evidence that he was in possession of a pistol or revolver (gun), and (2) he was deprived of a fair trial by the prosecutor's final argument in which the prosecutor allegedly (a) misstated the law of constructive possession and (b) mischaracterized the DNA evidence presented at trial.[2] We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. At approximately 9:35 p.m. on August 10, 2014, Police Officers Kyle Lipeika, Stephen Cowf, and Michael Pugliese (officers) were patrolling Washington Village, a housing complex in Norwalk. The officers were members of the Street Crimes Task Force within the Special Services Division (task force) of the Norwalk Police Department (department).[3] They had entered Washington Village from Day Street and walked through an alley that led to a courtyard between buildings 104 and 304. Lipeika was shining a flashlight in order for people in the courtyard to see the officers approaching. Lipeika and Cowf were wearing uniforms with yellow letters identifying them as police. When the officers entered

[1] Although § 53a-217c (a) (1) was the subject of technical amendments in 2015; see Public Acts, Spec. Sess., June, 2015, No. 15-2, § 7; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] The defendant was also convicted under a separate docket number of criminal trespass in the third degree in violation of General Statutes § 53a-109 (a) (1). He has not challenged that judgment of conviction on appeal.

[3] The task force's objective was to deter street level crime by providing "high visibility police patrol in high crime areas throughout" the city of Norwalk. The department had an agreement with the Norwalk Housing Authority to deter trespassing in housing complexes. The task force undertook foot patrols in housing complexes to put the residents at ease, to let them know that there was a police presence and to fulfill the department's agreement with the housing authority. According to Lipeika, the majority of problems within housing complexes were created by people who did not live there and were trespassing.

the courtyard, they saw benches, a picnic table, a cement retaining wall,[4] bushes, a playground, and six individuals.[5]

The defendant, Kason Sumpter, and Altolane Jackson were seated at the picnic table near a corner formed by the cement walls of a planter. The defendant was seated with his back to the cement wall containing the bushes. See footnote 4 of this opinion. Brian Elmore first walked away from the officers, but turned back and sat at the picnic table.[6] To establish rapport with the individuals sitting at the table, the officers engaged them in conversation. As was their practice, the officers scanned the area for firearms and narcotics that the individuals may have tried to conceal.[7] As Cowf and Pugliese conversed with the individuals at the picnic table, Lipeika stepped onto the wall behind the defendant and immediately saw in plain view a gun lying in the corner by the bushes.

According to Lipeika, the gun looked like it had been placed there just before he discovered it because the gun was resting on top of leaves, was not covered with

[4] Lipeika described a "cement retaining wall with bushes in, like, the retaining wall area." Photographs of the courtyard were placed into evidence and published to the jury. The photographs depict a courtyard surrounded by large concrete planters. One of the planters consists of two arms of a right angle bounding two sides of the courtyard. A long bench is set next to one arm of the planter and a picnic table is situated close to the corner of the angle. A shrubbery hedge is planted in the arm of the planter behind the bench and one side of the picnic table.

[5] The individuals in the courtyard were the defendant, Kason Sumpter, Altolane Jackson, Brian Elmore, Jefferson Sumpter, and Janet Cruz. Lipeika's subsequent investigation disclosed that none of the individuals was a resident of Washington Village.

[6] Jefferson Sumpter and Janet Cruz were "hanging over by the bench" in a different part of the courtyard. According to Lipeika, they appeared to be highly intoxicated and did not approach the picnic table.

[7] Lipeika testified on the basis of his training and experience that when armed subjects are approached by police, they "usually try to discard . . . or stash" a firearm so that it is not detected on their person. Depending on the circumstances, a subject usually places the gun close enough to access it.

dirt or debris, except a twig, and appeared to be free of rust and dust. Jackson and Kason Sumpter were seated closest to the gun, two or three feet away from it. The defendant was seated four to five feet away from the gun. None of the officers who testified had seen the defendant touch the gun.

When Lipeika discovered the gun, he drew his weapon and ordered the six individuals in the courtyard to show their hands. Pugliese and Cowf detained the individuals and moved them away from the gun. Lipeika radioed for more officers and guarded the gun until the scene was secured. The additional officers photographed the scene and the gun. Then Lipeika put on a new pair of rubber gloves and seized the loaded gun in accordance with department procedures. He removed the ammunition from the gun, a revolver with a two inch barrel, and took the ammunition and the gun to the police station.

Days later, at Lipeika's request, the defendant, Kason Sumpter, Jackson, and Elmore went to the police station; each of them voluntarily provided a sample of his DNA. None of them claimed that the gun was his. The defendant also provided a written statement in which he stated that he "walked through Washington Village to Water Street, stopped to talk when officers came through and found a handgun in the bushes in the area [where] I was talking."

Jackson, too, provided a written statement and testified at trial that he was in the Washington Village courtyard when the defendant walked through and stopped to talk. He also stated that ten minutes later someone said "police," and everyone looked up. Jackson did not see the defendant with a gun, and he did not see the defendant walk toward the bushes where the gun was found. Jackson confirmed that the gun did not belong to him.

On August 28, 2014, Arthur Weisgerber, a lieutenant in the department, tested the gun for latent fingerprints but did not find any suitable for identification. Thereafter, he used swabs to collect DNA from the gun and the ammunition that Lipeika had removed from the gun. He placed the swabs in an envelope. In addition, Weisgerber fired the gun and determined that it was operable. The swabs and the DNA samples provided by the defendant, Kason Sumpter, Jackson, and Elmore, were delivered to the state forensics laboratory (laboratory), where Melanie Russell, a forensic science examiner, conducted DNA analyses of the materials. Russell provided expert testimony at trial.

The laboratory has procedures to protect DNA samples and evidence from contamination. It also prescribes how laboratory analysis of DNA is to be conducted. The DNA that Weisgerber swabbed from the gun and ammunition is touch DNA because it was deposited on the gun or ammunition when someone touched them directly, through a secondary transfer or through aerosolization, that is, coughing or sneezing. Touch DNA comes from skin cells left behind when a person touches an object. The quantity and quality of touch DNA varies according to the character of the object's surface, i.e., rough or smooth, and the length of time the DNA has been on the object. DNA degrades with time due to environmental factors, such as heat and moisture. Degradation makes it difficult to amplify the DNA and, in some cases, even to detect DNA.

The quantity of DNA on the swabs was small, and the DNA was partially degraded. Nonetheless, Russell was able to extract a DNA solution of 7.16 picograms per microliter from the swabs. Although she was able to amplify a sample of about seventy picograms of DNA, 1000 picograms is the ideal amount for DNA analysis. A low yield sample will provide a DNA profile but usually not a full profile. Russell was able to generate a

partial profile and obtained results at seven out of fifteen loci tested. The profile Russell obtained from the gun and ammunition consisted of a mixture of DNA, signifying the presence of more than one person's DNA. She was able to compare the DNA from the swabs with the samples provided by the defendant, Kason Sumpter, Elmore and Jackson in a scientifically accurate way and to obtain scientifically viable and accurate results. Her analysis eliminated Kason Sumpter, Elmore, and Jackson as possible contributors to the DNA profile she developed from the swabs. The defendant, however, could not be eliminated as a contributor. The expected frequency of individuals who could not be eliminated as a contributor to the DNA profile is approximately one in 1.5 million in the African-American population, one in 3.5 million in the Caucasian population, and one in 930,000 in the Hispanic population.[8] The defendant is African-American.

A warrant was issued for the defendant's arrest on September 25, 2014. He was charged in separate informations with criminal possession of a firearm in violation of General Statutes § 53a-217[9] and criminal trespass in the third degree in violation of General Statutes § 53a-109 (a) (1). The informations were consolidated for trial. Subsequently, the state filed an amended long form information charging the defendant with criminal possession of a pistol or revolver in violation of § 53a-217c and criminal trespass in the third degree in violation of § 53a-109 (a) (1). At the conclusion of the state's case-in-chief, the defendant moved for a judgment of acquittal on the charge of criminal possession of a pistol or revolver. The court denied the motion for a judgment

[8] Russell's work was reviewed for accuracy by a technical reviewer at the laboratory.

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

of acquittal. The jury found the defendant guilty of both charges. The court sentenced the defendant to consecutive terms of ten years imprisonment, two years being a mandatory minimum, on the conviction of criminal possession of a pistol or revolver, and three months imprisonment on the conviction of criminal trespass in the third degree, for a total effective sentence of ten years and three months to serve. Thereafter, the defendant appealed.

I

The defendant claims that there was insufficient evidence to convict him of criminal possession of a pistol or revolver because there was insufficient evidence of his knowledge of the gun and no evidence to prove his dominion or control over it.[10] We disagree.

The defendant was charged, in part, with violation of § 53a-217c, which provides in relevant part: "(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver . . . and (1) has been convicted of a felony . . . ."[11] General Statutes § 53a-3 (2) defines "possess" as "to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." Because the gun was not found on the defendant's person, the state prosecuted the subject charge under the theory of constructive possession.

"There are two types of possession, actual possession and constructive possession. . . . Actual possession requires the defendant to have had direct physical contact with the [gun]." (Citation omitted; internal quotation marks omitted.) *State* v. *Johnson*, 137 Conn. App.

[10] Throughout his briefs on appeal, the defendant has used the term "exercised dominion *and* control." (Emphasis added.) The language of General Statutes § 53a-3 (2) is "exercise dominion *or* control . . . ." (Emphasis added.)

[11] The parties stipulated that the defendant had a prior felony conviction.

733, 740, 49 A.3d 1046 (2012), rev'd in part on other grounds, 316 Conn. 34, 111 A.3d 447, and aff'd, 316 Conn. 45, 111 A.3d 436 (2015). "Where . . . the [gun is] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the premises where the [gun is] found, it may not be inferred that [the defendant] knew of the presence of the [gun] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 210–11, 24 A.3d 1218 (2011). "The essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent. In our criminal statutes involving possession, this control must be exercised intentionally and with knowledge of the character of the controlled object." *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986).

"[T]o mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." (Internal quotation marks omitted.) *State* v. *Bowens*, 118 Conn. App. 112, 121, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010). "[M]ere proximity to a gun is not alone sufficient to establish constructive possession, evidence of some other factor—including connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise—coupled with proximity may suffice." (Internal quotation marks omitted.) Id., 125.

The standard of review for sufficiency of the evidence claims is well known. "A defendant who asserts an

insufficiency of the evidence claim bears an arduous burden." *State* v. *Hopkins*, 62 Conn. App. 665, 669–70, 772 A.2d 657 (2001). "In reviewing a sufficiency [of the evidence] claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Abraham*, 64 Conn. App. 384, 400, 780 A.2d 223, cert. denied, 258 Conn. 917, 782 A.2d 1246 (2001).

"It is within the province of the jury to draw reasonable and logical inferences from the facts proven. . . . The jury may draw reasonable inferences based on other inferences drawn from the evidence presented. . . . Our review is a fact based inquiry limited to determining whether the inferences drawn by the jury are so unreasonable as to be unjustifiable." (Internal quotation marks omitted.) *State* v. *Bradley*, 60 Conn. App. 534, 540, 760 A.2d 520, cert. denied, 255 Conn. 921, 763 A.2d 1042 (2000). "The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Fagan*, 280 Conn. 69, 80, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). "[T]his court has held that a jury's factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State* v. *Hector M.*, 148 Conn. App. 378, 384, 85 A.3d 1188, cert. denied, 311 Conn. 936, 88 A.3d 550 (2014).

As our Supreme Court has 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 trier, would have resulted in an acquittal. . . . Furthermore, [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . Indeed, direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Robert S.*, 179 Conn. App. 831, 835–36, 181 A.3d 568, cert. denied, 328 Conn. 933, 183 A.3d 1174 (2018), citing *State* v. *Fagan*, supra, 280 Conn. 79–81.

In the present case, there is no dispute that the defendant did not have the gun on his person at the time Lipeika discovered it in the courtyard of Washington Village on August 10, 2014, and that he was not in exclusive possession of the courtyard where Lipeika found the gun. The state, therefore, was required to establish that the defendant was in constructive possession of the gun. To prove constructive possession under § 53a-217c (a) (1), the state had to present evidence beyond a reasonable doubt that the defendant had knowledge of the gun and intended to exercise dominion or control over it. See *State* v. *Hernandez*, 254 Conn. 659, 669, 759 A.2d 79 (2000); *State* v. *Davis*, 84 Conn. App. 505, 510, 854 A.2d 67, cert. denied, 271 Conn. 922, 859 A.2d 581 (2004). The defendant argues on appeal that although the gun was found near him and his DNA

was found on it, his proximity to it and the presence of his DNA on the gun and ammunition are not sufficient evidence to prove that he had knowledge of the gun, knew of its presence or exercised dominion or control over it. In particular, the defendant argues that the presence of his DNA on the gun merely means that at some unknown time and under unknown circumstances his DNA was transferred to the gun, but that is insufficient to support a finding that he knew of the gun's presence.

The state acknowledges that because the defendant was not in exclusive control of the courtyard, the jury could not infer properly from that circumstance that the defendant knew of the gun's presence without incriminating statements or other circumstances to buttress the inference. See *State* v. *Butler*, 296 Conn. 62, 78, 993 A.2d 970 (2010). The state, however, contends that there were four circumstances that established a nexus between the defendant and the gun and permitted the jury reasonably to infer that the defendant knew of the gun's presence, that he was in a position to exercise dominion or control over it, and that he intended to do so. See *State* v. *Hill*, supra, 201 Conn. 516. We agree with the state.

First, the state notes that the gun was found in plain view and appeared to have been placed near the bushes recently. The jury, therefore, reasonably could have inferred that the person who put the gun near the bushes did not abandon it and leave the courtyard but, instead, was one of the six individuals in the courtyard when the officers arrived. In response, the defendant argues that the gun was not in plain view because Lipeika needed a flashlight to see it.[12] The defendant's argument

[12] Most often, plain view, or the plain view doctrine, arises in the context of a fourth amendment illegal search and seizure claim, which is not present in this case. The defendant has not claimed that he had a reasonable expectation of privacy in the courtyard. "The plain view doctrine is based upon the premise that the police need not ignore incriminating evidence in plain view

lacks merit. The police were patrolling the courtyard pursuant to the department's agreement with the housing authority. The officers needed artificial light both to be seen as they approached the courtyard and to see what was in the courtyard. The gun was lying on a wall in a public space, and it was dark. The gun was in the open and uncovered, and, therefore, it was in plain view. It clearly would have been visible in daylight. Under the circumstances, there is no difference between Lipeika's using a flashlight and turning on a light in a dark room. Furthermore, the state's argument is not that the location of the gun is evidence that the defendant saw it there. Instead, the state's argument is that the location of the uncovered gun near the bushes close to the defendant supports the inference that the defendant had placed the gun there. Thus, the lighting conditions at the time were immaterial.

Second, the state points out that Lipeika was shining his flashlight when the officers walked through the alley into the courtyard. In his statement to the police, Jackson stated that someone saw the light and called out "police," causing individuals in the courtyard to look up. According to Lipeika, when individuals who have a gun in their possession become aware of a police presence, they try to "discard . . . or stash" the gun so that they will not be detected with it. The state, therefore, argues that it was reasonable for the jury to infer that the defendant quickly put the gun on the wall near the bushes to avoid being found with it. The jury reasonably could have inferred from the evidence that the defendant, whom it knew to be a convicted felon, was motivated to "stash" the gun because he is not entitled to possess a gun.

while they are . . . entitled to be in a position to view the items seized." (Internal quotation marks omitted.) *State* v. *Arokium*, 143 Conn. App. 419, 433, 71 A.3d 569, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013); see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464–73, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State* v. *Ruth*, 181 Conn. 187, 193, 435 A.2d 3 (1980).

Third, the state cites Lipeika's testimony that, when individuals with a gun seek to "discard . . . or stash" it, they put the gun in a place close enough to be "accessible" to them. In this instance, the gun was four to five feet from the defendant, who was sitting at a picnic table next to the wall and bushes.

Fourth, the defendant was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile found on the gun and ammunition. The chance that a random individual, someone other than the defendant, could have contributed to the DNA was one in 1.5 million in the African-American population. On the basis of these four circumstances, the state argues that the jury reasonably could have inferred that the defendant knew of the gun's presence and could have exercised dominion or control over it, and intended to do so. Although none of the factors alone is direct evidence of the defendant's knowledge of the gun's presence or his intent to possess it, the cumulative force of the circumstantial evidence was sufficient for the jury reasonably to infer that the defendant knew of the gun and was in constructive possession of it. "Where a group of facts [is] relied upon for proof of an element of the crime it is [the] cumulative impact [of those facts] that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard." (Internal quotation marks omitted.) *State* v. *McDonough*, 205 Conn. 352, 355, 533 A.2d 857 (1987), cert. denied, 485 U.S. 906, 108 S. Ct. 1079, 99 L. Ed. 2d 238 (1988). Evidence of the defendant's DNA on the gun and ammunition, plus his proximity to the gun, leads to a reasonable inference that the defendant once had the gun on his person and intended to do so again when the police left the courtyard.

The defendant argues, citing *State* v. *Payne*, 186 Conn. 179, 440 A.2d 280 (1982), that the state cannot rely on the DNA evidence alone to prove that he knew of the gun's presence on the wall near the bushes. He compares the presence of DNA on the gun to fingerprints found on a vehicle in *Payne*. "[A] conviction may not stand on fingerprint evidence alone unless the prints were found under such circumstances that they could have only been impressed at the time the crime was perpetrated." Id., 182. In *Payne*, the defendant's fingerprints were found on the driver's door of a motor vehicle in which the victim had been restrained. Id., 181. The victim was unable to identify the defendant in a photographic array or at trial. Id. Our Supreme Court reversed the defendant's conviction because "[t]he evidence in the present case does not reasonably exclude the hypothesis that the defendant's fingerprints were placed on the car at a time other than during the perpetration of the crime." Id., 184; see also *State* v. *Mayell*, 163 Conn. 419, 426, 311 A.2d 60 (1972) (where defendant was regularly employed to drive vehicle and rightfully in it six hours before crime defendant's fingerprints on rearview mirror of abandoned vehicle were of no moment unless circumstances were such that fingerprints only could have been impressed at time of crime).

The facts of the present case, however, are distinguishable from both *Payne* and *Mayell*. Here, the defendant not only was at the scene at the time the gun was found, but he also was in close proximity to it. Others were in close proximity to the gun too, but the defendant was the only one of them who was a contributor to the DNA obtained from the surface of the gun or the ammunition, or both. Moreover, the defendant had at least two reasons to "stash" the gun. The defendant stipulated to the fact that he was a convicted felon. We discern that the jury reasonably could have inferred

that because the defendant was trespassing[13] and, more importantly, because he was a convicted felon, he had "stashed" the gun to avoid being found with the gun on his person.

The defendant also argues that the DNA evidence is insufficient due to "the questionable reliability of a sample containing only 70 picograms of DNA, when the ideal amount is 1000 picograms of DNA." The defendant did not object to the admission of the DNA evidence at trial, but cites Russell's testimony regarding problems that are inherent in testing small samples of DNA. Despite the small sampling, however, Russell testified that she was able to analyze the DNA from the gun, and that she obtained scientifically viable and accurate results that revealed a high likelihood that the defendant was a contributor to the sample. Her findings were reviewed by a forensic science examiner in the laboratory and no problems were identified. Defense counsel vigorously cross-examined Russell. Although the burden was on the state to prove its case, the defendant presented no evidence to contradict Russell's testimony regarding the accuracy of her analysis.[14]

[13] The state placed into evidence photographs of three signs posted in the courtyard: one sign stated "PRIVATE PROPERTY NO TRESPASSING"; another stated "NOTICE NO TRESPASSING LOITERING SOLICITING ON THIS PROPERTY"; and another sign stated in part "The Community Policing Division has a partnership with the Norwalk Housing Authority . . . . We are committed to making our communities a better, safer, drug free environment where residents and their children can enjoy their right to peace of mind. Officers will be conducting random patrols to specifically address issues . . . ."

[14] Following oral argument in this court, defense counsel submitted a letter pursuant to Practice Book § 67-10, in which she brought the case of *State* v. *Skipper*, 228 Conn. 610, 613–24, 637 A.2d 1101 (1994), to our attention, claiming that the case was pertinent to the state's argument regarding the manner in which the defendant's DNA came in contact with the gun. *Skipper* concerned the determination of paternity. The statistical probability of paternity at issue is distinguishable from the present case in that the probability of paternity was calculated from DNA evidence on the fifty-fifty assumption that intercourse had occurred.

The defendant's claim is not that Russell's testimony regarding the results of her DNA analysis was improperly admitted. The evidence, therefore, properly was before the jury to be considered along with the other evidence. The size of the sample went to the weight of the evidence, not its admissibility. "It is axiomatic that it is the jury's role as the sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses. . . . It is the right and duty of the jury to determine whether to accept or to reject the testimony of a witness . . . and what weight, if any, to lend to the testimony of a witness and the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Osbourne*, 138 Conn. App. 518, 533–34, 53 A.3d 284, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012). The essence of the defendant's argument is that this court should override the inferences drawn by the jury. This we may not, and will not, do. See *State* v. *Davis*, 160 Conn. App. 251, 265–66, 124 A.3d 966 (court on appeal does not sit as seventh juror), cert. denied, 320 Conn. 901, 127 A.3d 185 (2015).

The defendant also claims that even if the state produced sufficient evidence that he knew of the gun's presence, it failed to adduce any evidence of his intent to exercise dominion or control of the gun. "The phrase 'to exercise dominion or control' as commonly used contemplates a continuing relationship between the controlling entity and the object being controlled. Webster's Third New International Dictionary defines the noun 'control' as the 'power or authority to guide or manage.' The essence of exercising control is not the manifestation of an act of control but instead *it is the act of being in a position of control coupled with the requisite mental intent.* In our criminal statutes involving possession, this control must be exercised intentionally and with knowledge of the character of the

controlled object." (Emphasis added.) *State* v. *Hill*, supra, 201 Conn. 516.

The defendant relies on the federal case of *United States* v. *Beverly*, 750 F.2d 34 (6th Cir. 1984), to support his claim of insufficient evidence of control. Although *Beverly* also concerned constructive possession of a firearm by a convicted felon, the facts of that case are distinguishable. In the present case, a police officer found the gun in plain sight in a public space in close proximity to the defendant. In *Beverly*, a police officer executed a search warrant at the apartment of a third party. Id., 35. When the officer entered the apartment, he found two men in the kitchen, one of whom was Herbert Collins Beverly, the defendant in that case. Id. The officer instructed the men to place their hands on the wall while he patted them down. Id. As he was conducting the pat down, the officer noticed a waste basket between the two men, and that it contained two guns. Id. The guns later were examined in the state police crime laboratory, where one identifiable, latent fingerprint was discovered on one of the guns. Id. The fingerprint belonged to Beverly. Id. He was charged with violation of 18 U.S.C. § 922 (h) (1) (1982), which prohibits "the receipt by a convicted felon of a weapon that has been shipped in interstate commerce." Id. At the close of the government's case, Beverly moved for a judgment of acquittal, arguing that the evidence demonstrated that he must have touched the gun at some point, but that it did not establish that he had received the gun within the meaning of the statute. Id. The trial court denied the motion. Id.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the judgment of conviction. Id. At trial, the government had relied on the testimony of the officer who found the gun and the fingerprint expert. Id., 36. It argued that before the search warrant was executed, Beverly had "received the gun within

the meaning of [§] 922 because he exercise[d] control over" it. (Emphasis omitted; internal quotation marks omitted.) Id. The government argued that it, therefore, was entitled to prove Beverly received the gun by inference of his constructive possession. Id. The Court of Appeals disagreed, concluding that the evidence did not prove that Beverly was in constructive possession of the gun because the government had not proven that (1) Beverly had indirect control of the kitchen, waste basket, or gun; (2) Beverly was in direct control of any of them; and (3) he was in constructive possession of the gun. Id., 38. The evidence established only that Beverly was one of two men standing on either side of a waste basket in the kitchen, that the waste basket contained two guns, and that, at some time, he had touched one of the guns. Id. The Court of Appeals, therefore, reversed Beverly's conviction. Id. "Presence alone near a gun . . . does not show the requisite knowledge, power, or intention to exercise control over the gun to prove constructive possession." (Emphasis omitted; internal quotation marks omitted.) *United States* v. *Arnold*, 486 F.3d 177, 183 (6th Cir. 2007), cert. denied, 552 U.S. 1103, 128 S. Ct. 871, 169 L. Ed. 2d 736 (2008).

More than twenty years later, the United States Court of Appeals for the Sixth Circuit, sitting en banc, limited the scope of *Beverly*. See id., 183–84. "As an en banc court, we have subsequently distinguished *Beverly* as a proximity-only case without any evidence connect[ing] the gun to the defendant. [Id., 184]. We filled the evidentiary gap in *Arnold* with statements by the victim connecting the gun to the defendant. [Id., 184–85]." (Internal quotation marks omitted.) *United States* v. *Vichitvongsa*, 819 F.3d 260, 276 (6th Cir.), cert. denied, U.S. , 137 S. Ct. 79, 196 L. Ed. 2d 70 (2016).[15]

[15] In *Arnold*, the victim stated to a 911 operator and responding police that the defendant had a gun. *United States* v. *Arnold*, supra, 486 F.3d 179–80. In *Vichitvongsa*, the defendant made telephone calls from jail in

"While the Government is not required to prove exclusive possession, constructive possession may not be shown merely by introducing evidence of proximity." *United States* v. *Lynch*, 459 Fed. Appx. 147, 151 (3d Cir. 2012). In *Lynch*, the defendant was a convicted felon on parole who was not permitted to possess a firearm. Id., 148. The defendant's parole officer became aware that the defendant had violated the terms of his parole. Id., 148–49. During a permissible warrantless search of the defendant's home; id., 149–50; police found a pistol in the top drawer of a dresser in his bedroom, concealed beneath the defendant's clothing. Id., 149. "A DNA test conducted on a swab from the handle of the firearm revealed a mixture of profiles from which [the defendant's] profile could not be excluded." Id. At trial, the defendant stipulated that he had been convicted of a felony. Id., 150. A jury found the defendant guilty of felony possession of a firearm. Id., 148. On appeal, the defendant argued that there was insufficient evidence that he knowingly possessed the firearm. Id., 151. In support of his position, he cited *Beverly*. The United States Court of Appeals for the Third Circuit distinguished *Beverly* in that the gun was found in a dresser drawer in the defendant's home, not the kitchen of a third person. Id. The court stated that it was not bound to follow *Beverly*, and that although *Beverly* might mitigate the importance of the DNA evidence, there was other evidence tending to show the defendant's constructive possession of the gun. Id.

In the present case, there is evidence of the defendant's proximity to the gun, which provided a DNA profile from which, among those present, only the defendant could not be excluded. There is circumstantial evidence that the gun recently had been placed on

which he stated that he had been pulled over and the police caught him with a gun that he referred to as "[t]he Smitty" and "my burner," which are common references to handguns. (Emphasis omitted; internal quotation marks omitted.) *United States* v. *Vichitvongsa*, supra, 819 F.3d 276.

the wall near the bushes. The defendant, a convicted felon, had a reason not to want to be found with the gun on his person. The jury, therefore, reasonably could have inferred that he "stashed" the gun but remained in close proximity to it, so that he could exercise control over it, and that he intended to do so.

We acknowledge that the facts of this case presented some subtle issues for the jury and that the case against the defendant is grounded in circumstantial evidence. The jury, however, was fully entitled to rely on the circumstantial evidence in reaching its verdict. "[T]he 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, [w]here a group of facts [is] relied upon for proof of an element of the crime it is [its] *cumulative impact* that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard. . . .

"Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 65–66, 43 A.3d 629 (2012). In fact, "circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." (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). "If evidence, whether direct or circumstantial, should convince a jury beyond a reasonable doubt that an accused is guilty, that is all that is required for a conviction." (Internal quotation marks omitted.) *State* v. *Jackson*, 257 Conn. 198, 206, 777 A.2d 591 (2001). "[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 299 Conn. 640, 647, 11 A.3d 663 (2011).

Although the defendant claims that there was insufficient evidence to convict him of constructive possession of the gun, this is not a case in which the state failed to present evidence regarding an element of the crime. This is a case in which the defendant is looking for a different interpretation of the evidence. This court has stated many times that it does "not sit as the seventh juror when [it] review[s] the sufficiency of the evidence . . . rather, [it] must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Glasper*, 81 Conn. App. 367, 372, 840 A.2d 48, cert. denied, 268 Conn. 913, 845 A.2d 415 (2004). In the present case, the state presented evidence of the defendant's proximity to the gun, which provided a DNA profile from which the defendant could not be excluded. There is circumstantial evidence that the gun recently had been placed on the wall near the bushes. The defendant, a convicted felon, had a reason not to want to be found with the gun on his person, and, therefore, the jury reasonably could have inferred that he had "stashed" it and remained in close proximity to it, so that he could exercise dominion or control over it, if he so intended.

On the basis of our review of the record, we conclude that there was sufficient circumstantial evidence by which the jury reasonably could have inferred that the defendant was in possession of the gun when he entered the courtyard, that he put it near the bushes when the police arrived so that it would not be found on his person, and that he intended to retrieve the gun when the police left. Accordingly, the evidence was sufficient to support the defendant's conviction of criminal possession of a pistol or revolver, and the court, therefore, properly denied the defendant's motion for a judgment of acquittal.

II

The defendant also claims that he was deprived of a fair trial because, during her final argument, the prosecutor (1) misstated the law of constructive possession and (2) mischaracterized the DNA evidence. We disagree that the defendant was denied his constitutional right to a fair trial.

The defendant did not object to the prosecutor's closing argument and did not request a curative instruction from the court. We, therefore, review the law applicable to unpreserved claims of prosecutorial impropriety.

When a defendant has not preserved his claims of prosecutorial impropriety, "it is unnecessary for the defendant to seek to prevail under the specific requirements of . . . [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)] and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Our Supreme Court has articulated that following a determination that prosecutorial [impropriety] has occurred, regardless of whether it was objected to, an appellate court must apply the [*State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)] factors to the entire trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived

the defendant of his constitutional right to a fair trial, the *burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process*. . . . In analyzing whether the prosecutor's comments deprived the defendant of a fair trial, we generally determine, first, whether the [prosecutor] committed any impropriety and, second, whether the impropriety or improprieties deprived the defendant of a fair trial. . . .

"When reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial. . . . [Impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] [was harmful and thus] caused or contributed to a due process violation is a separate and distinct question . . . .

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

closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Ruiz-Pacheco*, 185 Conn. App. 1, 38–40, 196 A.3d 805, cert. granted on other grounds, 330 Conn. 938, 195 A.3d 385 (2018).

An appellate court's "determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 561, 34 A.3d 370 (2012).

"[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, *the burden is on the defendant to show . . . that the remarks were improper* . . . ." (Emphasis added.) Id., 562–63. "This allocation of the burden of proof is appropriate because, when a defendant raises a general due process claim, there can be no constitutional violation in the absence of harm to the defendant caused by denial of his right to a fair trial." Id., 563–64. The ultimate question, therefore, is "whether the defendant has proven that the improprieties, cumulatively, so infected the trial with unfairness as to make the conviction[s] a denial of due process." (Internal quotation marks omitted.) Id., 567.

"[T]he defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013).

"To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 37, 975 A.2d 660 (2009).

We now turn to the defendant's prosecutorial impropriety claims.

A

The defendant claims that the prosecutor misstated the law of constructive possession by failing to state that the defendant had to intend to exercise dominion or control over the gun. As a consequence, the defendant argues that the prosecutor invited the jury to disregard

the dominion or control element of possession. Although the prosecutor's argument did contain an incomplete and, therefore, incorrect statement of the law of constructive possession, we conclude that the error did not deprive the defendant of his constitutional right to a fair trial.

To provide a context for the defendant's claims, we have reviewed the entire record, which discloses the following procedural history that is relevant to the defendant's claim that the prosecutor misstated the law. Before the presentation of evidence, the court instructed the jury that "you should understand that the arguments of the attorneys, including the closing arguments and any arguments made during the trial to the court in connection with questions of law, are not evidence. . . . Closing arguments are intended to assist you, the jury, in understanding the evidence and the contentions of the parties in this case. . . . [A]t the conclusion of the final arguments of the parties, *I will instruct you as to the principles of law which you are to apply in your deliberations when you retire to consider your verdicts*."[16] (Emphasis added.) Again, in its final charge to the jury, after thanking the jury for its service, the court gave the customary charge stating that "it is exclusively the function of the court to state the rules of law that govern the case. It is your obligation to accept the law as I state it. You must follow all of my instructions and not single out some and ignore others. They are all equally important."

The record also discloses that the court held two on-the-record charge conferences. The court gave counsel a copy of a draft of its charge and time to review it. The court and counsel subsequently went through the draft page by page, and counsel made several suggestions,

[16] In their final arguments, both the prosecutor and defense counsel stated that the jury was to follow the court's instructions as to the law.

none of which concerned constructive possession. As a result of the charge conference, the court revised portions of its draft charge, presented counsel with its revised charge and provided an opportunity for counsel to review the revisions. At a second on-the-record charge conference, the court and counsel went through the revised charge page by page. Defense counsel orally agreed with the court's revised charge.

"A review of the statements made by the prosecutor, in the context of the entire closing argument, is necessary to address the defendant's challenges." *State* v. *Otto*, supra, 305 Conn. 77. The record contains the arguments of the prosecutor and defense counsel, and the court's instructions, which we have reviewed and hereafter summarize.

In the first portion of her argument, the prosecutor first thanked the jury for its service and then stated that the court will "*remind you as to the elements of the crimes that make up the charges*." (Emphasis added.) The prosecutor then addressed the elements of the crime of criminal trespass in the third degree and the evidence related to that charge.

Thereafter, she stated, in part: "For you to find the defendant guilty of criminal possession of a pistol or revolver, the state must prove the following elements beyond a reasonable doubt. The first element is that the defendant possessed a pistol or revolver. *The judge will define possession as having control over an object.* That is, knowing where it is and being able to access it. Again, possession in this case means knowing where it is and being able to access it."[17] (Emphasis added.)

[17] The record discloses that defense counsel also argued that the state had "to prove, beyond a reasonable doubt, that [the defendant] knew, or had knowledge of, that he was in possession of this weapon, that he knew where it was and that he had access to it." We note that neither argument mirrors *State* v. *Hill*, supra, 201 Conn. 516 ("control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent").

The prosecutor continued: "You've heard that the gun recovered from the scene was found only four to five feet away from [the defendant]. It was lying on top of the leaves, in good condition, as if it had been placed there very recently. No dirt or leaves or other debris were covering it. It was easily in [the defendant's] reach. He was about four to five feet away from it when the police arrived. The state submits that it would have been a matter of seconds for him to stand up, or lean over, and drop the gun, or even pick it up again from where it was lying."

Later in the first portion of her argument, the prosecutor stated: "Here's the thing, *you'll hear the judge instruct you on the law of possession*. And through that you will learn that if [the defendant] walked up to the gun and saw it there and was aware that it was there, he's still in violation of the law. Because as long as he's aware it's there and aware it's a gun, and could grab it off the ground, that's possession. If he walked up to it and said 'oh, no, a gun,' and ran away, i.e., if he immediately removes himself from the situation, that's different. Or if he saw it and immediately dialed 911 or alerted the authorities, that's different, too. But if he sees the gun and remains at the picnic table anyway, four to five feet away from it, not locked up or anything like that, in an area where he could easily get to it, that's constructive possession. It's that simple." (Emphasis added.)

Immediately thereafter, the prosecutor argued: "So for you to find him not guilty, you would have to believe that despite his close proximity to the gun, despite the fact that he's trespassing in the exact location the gun is found, and despite the fact that his DNA, and not the DNA of any other person around the picnic table is on it, he didn't even know it was there. Ask yourselves, based on common sense, is it reasonable and logical to believe that?" The prosecutor also argued that the

jury reasonably could infer that the gun belonged to the defendant.

In his closing argument, which immediately followed, defense counsel addressed the evidence, particularly what he considered to be the weakness in the state's case. He contended that the DNA evidence was not enough to incriminate the defendant because the profile was small, the DNA sample was touch DNA, and the sample had been degraded. The theory of defense was that the DNA evidence was problematic and insufficient to prove that the defendant was guilty of felony possession of the gun. Defense counsel argued, in part, that the state had "to prove, beyond a reasonable doubt, the [the defendant] knew, or had knowledge of, that he was in possession of [the gun], that he knew where it was and that he had access to it." See footnote 17 of this opinion. He continued that the jury could not "infer or assume that [the defendant] knew that a weapon was there, unless there are other incriminating statements or circumstances tending to support such an inference. We argue that no such statements or circumstances exist. . . . You need context, you need corroboration, and you don't have it. You don't have eye witnesses. You don't have fingerprints. You don't have enough."

In the rebuttal portion of her argument, the prosecutor first stated: "I just want to touch on a few things that the defense touched on. I want to start with something. *The judge will instruct you* . . . and I just want to make sure it's clear, that you will come to a separate verdict on each charge. *So, the state has to prove every element of each individual charge.*" (Emphasis added.) She extensively addressed the DNA evidence, which the defendant contended was problematic and insufficient to prove that the gun was his. She argued that the presence of the defendant's DNA on the gun or ammunition and his proximity to the gun was enough to prove his knowledge of it. The prosecutor concluded:

"For you to accept the defense's theory, you have to accept the idea that [the defendant] is the unluckiest man alive. That this set of coincidences has come out of nowhere and each and every one of them has coincidentally occurred on the same evening. The convergence of him trespassing, at a time when unluckily a gun was nearby, within four to five feet of him, only his DNA, and no one else's at the scene, gets on to it, at a time when he happens to be trespassing and happens to be prohibited from possession of such a gun."

Immediately upon conclusion of the prosecutor's rebuttal argument, the court began its charge to the jury, stating: "*It is now my duty to instruct you as to the law that you are to apply to the facts in this case.* . . . The charges [are] to be considered as a whole, and individual instructions are not [to] be considered [in] artificial isolation from the overall charge. . . . It is exclusively the function of the court to state the rules of law that govern the case. *It is your obligation to accept the law as I state it.* You must follow all of my instructions and not single out some and ignore others. They are all equally important." (Emphasis added.)

The court gave general instructions applicable in any trial and then addressed the law related to the crimes with which the defendant was charged.[18] The court's

[18] On appeal, the defendant does not claim that the court improperly charged the jury, but argues that the instruction was insufficient to clarify the element of dominion or control. "[A] defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . Nonetheless, [the] instructions need not be perfect, as long as they are legally correct, adapted to the issues and sufficient for the jury's guidance." (Citation omitted; internal quotation marks omitted.) *State* v. *Roger B.*, 297 Conn. 607, 618, 999 A.2d 752 (2010). More significantly, appellate courts do not review a waived claim of instructional error that is folded into a claim of prosecutorial impropriety. See *State* v. *Hearl*, 182 Conn. App. 237, 253 n.18, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

The defendant also criticizes the trial court for not issuing a curative instruction for the prosecutor's alleged misstatement of the law but acknowledges that he did not request a curative instruction. See *State* v. *Fauci*, 282 Conn. 23, 53, 917 A.2d 978 (2007) (trial court did not give curative instruction,

instruction included definitions of knowledge and *intent*. The court stated, in part: "A person *acts knowingly* with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." (Emphasis added.) It also stated that "[*i*]*ntent* relates to the condition of the mind of the person who commits the act, his or her purpose in doing it. Here, the state is required to prove that the defendant intentionally, and not inadvertently or accidentally, engaged in his actions. In other words, the state must prove that the defendant's actions were intentional, voluntary and knowing, rather than unintentional, involuntary and unknowing." (Emphasis added.)

The court continued: "A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver and has been convicted of a felony. For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. . . . The first element is that the defendant possessed a pistol or revolver. . . . Possession means either having the object on one's person or otherwise having control over the object. That is, knowing where it is and being able to access it. Possession also requires that the defendant knew he was in possession of the firearm. That is, that he was aware that he was in possession of it and was aware of its nature.

"The state must prove, beyond a reasonable doubt, that the defendant knew that he was in possession of the pistol or revolver. Possession does not mean that one must have the illegal object upon one's person.

as defense did not object or request curative instruction). "Given the defendant's failure to object, only instances of grossly egregious [impropriety] will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Singleton*, 95 Conn. App. 492, 504, 897 A.2d 636, cert. denied, 279 Conn. 904, 901 A.2d 1228 (2006).

Rather, a person who, although not in actual possession, knowingly has the power and *the intention*, at a given time, to exercise control over a thing is deemed to be in constructive possession of that item. As long as the object is or was in a place where the defendant could, if he wishes, go and get it, it is in his possession."[19] (Emphasis added.) Neither the prosecutor nor defense counsel took an exception to the charge. See footnote 17 of this opinion.

On appeal, the defendant claims that the prosecutor's argument concerning possession "completely disregards the dominion [or] control element of possession and was a direct invitation to the jury to disregard an element of constructive possession that the state was required to prove." He argues that the prosecutor improperly equated mere access with possession and that her argument does not conform to the definition of possession found in *State* v. *Hill*, supra, 201 Conn. 516, to wit, "[t]o possess, according to § 53a-3 (2), is to have actual physical possession or otherwise to exercise dominion or control . . . ." (Internal quotation marks omitted.)

The state acknowledges that the prosecutor did not state explicitly that the defendant must have, not only the power, but also the intention to exercise dominion or control over the gun. It contends, however, that the defendant has not cited any authority that the prosecutor needs to discuss all aspects of the relevant law in summation. The state argues that it is the court's duty "to give jury instructions that are accurate in law, adapted to the issues and adequate to guide the jury in reaching a correct verdict . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bellamy*,

[19] The court instructed the jury that the parties had stipulated that at the time of the charged offense, the defendant previously had been convicted of a felony and was, therefore, prohibited from possessing a pistol or revolver.

323 Conn. 400, 429, 147 A.3d 655 (2016). Although we agree that the court is responsible for instructing the jury on the law, that fact does not give the prosecutor license to misstate the law to the jury. During closing argument, the prosecutor three times incorrectly told the jury that it could convict the defendant if he knew where the gun was located and had access to it. According to the prosecutor, "[i]t's that simple." Of course, it is not that simple. The prosecutor's statement left out the necessary element of intent. See *State* v. *Hill*, supra, 201 Conn. 512–17. Consequently, the prosecutor's statement of the law was not just incomplete, it was inaccurate.

Nevertheless, the jury was informed numerous times, including by the prosecutor, that it was the court's responsibility to instruct the jury as to the law. In particular, at the beginning of trial and when it commenced its charge, the court informed the jury that it was its duty to instruct the jury on the law and that the jury was bound to follow the law as given by the court. See *State* v. *Gordon*, 104 Conn. App. 69, 83–84, 931 A.2d 939 (court reminded jury prior to trial and following final argument that court, not counsel, was sole source of applicable law), cert. denied, 284 Conn. 937, 937 A.2d 695 (2007).

"In the absence of a showing that the jury failed or declined to follow the court's [general] instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Singleton*, 95 Conn. App. 492, 505, 897 A.2d 636, cert. denied, 279 Conn. 904, 901 A.2d 1228 (2006).

In his reply brief, the defendant takes exception to the state's position that the court's instructions cured the prosecutor's incorrect statement of the law of possession by giving a full and complete instruction on possession. The state represented that the court's

instruction was "nearly identical to the model jury instructions for possession and criminal possession" of a gun.[20] The defendant recognizes that the court's charge conformed to the model jury instructions on the elements of possession, but he argues, citing *State* v. *Reyes*, 325 Conn. 815, 821–22 n.3, 160 A.3d 323 (2017),[21] that the model jury instructions are not indicative of their correctness, and, citing *State* v. *Bellamy*, supra, 323 Conn. 500 (*Palmer, J.*, concurring),[22] that the model instructions have been the source of constitutional error. Despite this argument, the defendant has not demonstrated how the model jury instruction used in the present case is a source of constitutional error, as the model charge for constructive possession, which is explicitly referenced in the model charge for criminal possession of a pistol or revolver, requires that the state prove knowledge of the gun's presence and an intent

[20] Although the parties refer to the "model" jury instructions, the Judicial Branch does not. The collection of jury charges for criminal cases prepared by the Judicial Branch is simply referred to as "Criminal Jury Instructions" and contains the following disclaimer: "This collection of jury instructions . . . is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is *not a guarantee of their legal sufficiency*." (Emphasis added.) Connecticut Judicial Branch Criminal Jury Instructions, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited March 4, 2019). Nevertheless, because the parties use the shorthand term "model" charges, we adopt that nomenclature in this opinion.

[21] In *Reyes*, the defendant asked our Supreme Court to exercise its supervisory authority over the administration of justice to require judges to use the pattern criminal jury instructions found on the Judicial Branch website. *State* v. *Reyes*, supra, 325 Conn. 821 n.3. Our Supreme Court declined the defendant's invitation, noting the express caution on the website that the instructions are intended as a guide in constructing charges and requests to charge, and that their use is entirely discretionary and "their publication by the Judicial Branch *is not a guarantee of their legal sufficiency*." (Emphasis in original; internal quotation marks omitted.) Id., 821–22 n.3.

[22] The issue in *Bellamy* was whether the defendant had waived his unpreserved jury instruction claim under the rule established in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), and whether the *Kitchens* rule should be overturned. *State* v. *Bellamy*, supra, 323 Conn. 402–403. Our Supreme Court declined to overturn the *Kitchens* rule. Id., 439.

to possess it.[23] Moreover, defense counsel had the opportunity to review the court's charge prior to an initial on-the-record charge conference, participated in that charge conference, and offered suggestions. None of the suggestions offered related to the charge on constructive possession. The court made several changes to its charge pursuant to the suggestions of counsel, distributed its revised charge to counsel and held a second on-the-record charge conference. At the conclusion of the second charge conference, defense counsel agreed to the revised charge.[24]

In any event, the court specifically instructed the jury that "a person who, although not in actual possession, knowingly has the power and the intention, at a given time, to exercise control over a thing is deemed to be in constructive possession of that item." "The jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Fields*, 265 Conn. 184, 207, 827 A.2d 690 (2003). "[P]rosecutorial [impropriety] claims [are] not intended to provide an avenue for the tactical sandbagging of our trial courts, but rather, to address *gross* prosecutorial improprieties . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004). In this case, the court's charge corrected the prosecutor's misstatement of the law of constructive possession.

[23] The example cited by Justice Palmer in *Bellamy* concerned a jury instruction given in the case of *State* v. *Johnson*, supra, 137 Conn. App. 760. On appeal in *Johnson*, our Supreme Court concluded that the standard jury instructions on nonexclusive constructive possession of contraband that the trial court used at the defendant's trial was constitutionally deficient. *State* v. *Bellamy*, supra, 323 Conn. 501 (*Palmer, J.*, concurring). The instruction at issue in the present case was not the instruction given in *Johnson*. See *State* v. *Johnson*, supra, 761 n.9.

[24] Again, the defendant does not claim that the court improperly charged the jury, but if he had, the state may well have contended that he waived any instructional error pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

"[T]he prosecutor's choice of words, at best, was inartful, but . . . when viewed in the context of his entire closing argument . . . even if . . . improper, that impropriety did not deprive the defendant of a fair trial." (Citation omitted.) *State* v. *Nicholson*, 155 Conn. App. 499, 516, 109 A.3d 1010, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015). Although the prosecutor's inaccurate reference to the law of constructive possession had the potential to confuse the jury, applying the *Williams* factors, we conclude that any perceived impropriety did not deprive the defendant of a fair trial. But we take this opportunity to remind prosecutors that during the course of argument, they must take care to accurately discuss the elements of the crimes charged. See *State* v. *Gonzalez*, 188 Conn. App. 304, 339, A.3d (2019) (prosecutor summarized law on home invasion). In examining the *Williams* factors, we find that the prosecutor's argument, although not invited by defense counsel, was not central to the theory of defense that focused on the DNA evidence. Furthermore, the state's case was convincing in that the defendant could not be excluded as a contributor to the DNA mixture obtained from the gun or ammunition. Most importantly, the court's correct charge on constructive possession coupled with the repeated admonitions that the jury must follow the law as given to it by the court, adequately cured the prosecutor's error.

For the foregoing reasons, we conclude that the prosecutor's statement regarding the law of constructive possession fell well short of misleading the jury with respect to constructive possession and did not deprive the defendant of a fair trial.

B

The defendant also claims that the prosecutor's mischaracterization of the DNA evidence deprived him of a fair trial. We do not agree.

The defendant claims that the state mischaracterized the DNA evidence and improperly suggested that there was no evidence to support the defense's theory that although his DNA may have been on the gun or ammunition, it came to be there in some incidental or accidental fashion. The defendant contends that Russell testified as to the various ways in which DNA can be transferred, and that she could not conclude how the defendant's DNA came to be on the gun and that, therefore, the following portion of the prosecutor's final argument was improper: "You've heard no evidence that [the defendant], for instance, sneezed on the gun. And you can't assume that happened because it's not in evidence. . . . Secondary transfer would require someone to touch [the defendant], or an object, with his DNA on it, and then to touch the gun. But there's no evidence that ever occurred. No evidence for you to consider with regard to that. . . . So, there is no evidence before you that Officer Lipeika, or anyone else for that matter, touched some object that [the defendant] touched and then touched the gun soon thereafter. You haven't heard any evidence to that effect. . . . Again, I would reiterate, you haven't heard any evidence of a transfer DNA. You haven't heard evidence of someone spitting on the gun. And if [the defendant] had spit on the gun, he would have spat around . . . Jackson from four to five feet away. Does that seem likely? The same thing with a sneeze. He would have sneezed around . . . Jackson from four to five feet away. That's not likely."

Defense counsel did not object to the prosecutor's argument. As stated previously, a defendant's failure to object is not fatal to his claim, but this court has stated that we continue "to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time. . . . This

is particularly true if, as in the present case, a defendant claims prosecutorial impropriety stemming from a prosecutor's discussion of DNA evidence. Such discussions require precise and nuanced distinctions in nomenclature that easily may be misconveyed or misunderstood, especially in light of the zealous advocacy that is part and parcel of a closing argument. If a prosecutor's arguments do not portray accurately the DNA evidence as it was presented to the jury or stray too far from reasonable inferences that may be drawn from such evidence, a contemporaneous objection by defense counsel would permit any misstatements, whether inadvertent or intentional, to be remedied immediately." (Citation omitted; internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 572, A.3d (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019).[25] "[If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 319, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

On appeal, the defendant argues that the state offered Russell's testimony to aid the jury in its understanding of the DNA evidence. On cross-examination, defense counsel explored the problematic issues with the DNA profile that were critical to the defendant's theory of the case, i.e., that his DNA was deposited on the gun by secondary transfer or aerosolization. The defendant argues that the prosecutor's final argument that there was no evidence of a secondary transfer or aerosolization for the jury to consider mischaracterized Russell's testimony. We disagree with the defendant.

[25] In the present case, the defendant's claim concerns the DNA evidence, but it is not specifically directed toward the prosecutor's discussion of the DNA evidence itself. The defendant's claim is directed toward the logic of the prosecutor's argument.

Russell testified as to a number of ways in which the defendant's DNA could have been transferred to the gun and that she did not know how his DNA was deposited on it. Russell's testimony described possibilities or hypotheticals, but such testimony is not evidence of how, in fact, the defendant's DNA came to be on the gun or the ammunition. Russell, however, testified that the most common way for touch DNA to occur is through direct contact. The prosecutor's argument simply was that there was *no evidence* to support the defendant's theory that the defendant's DNA was deposited on the gun by a secondary transfer or aerosolization. The court instructed the jury that its verdicts had to be based on evidence that it heard. "While the jury may not speculate to reach a conclusion of guilt, [it] may draw reasonable, logical inferences from the facts proven to reach a verdict." (Internal quotation marks omitted.) *State* v. *Stovall*, 142 Conn. App. 562, 567–68, 64 A.3d 819 (2013), rev'd in part on other grounds, 316 Conn. 514, 115 A.3d 1071 (2015).

The defendant also argues on appeal that the state never introduced evidence to corroborate that the DNA was placed on the gun or ammunition by direct contact. It was not required to do so.[26] The state proved that the defendant's DNA was contained in the DNA profile

[26] In his brief on appeal, the defendant states in one sentence that the state not only improperly argued that the hypotheticals posited to Russell were not evidence, but that "it also improperly shifted the burden to the defense to proffer evidence of a sneeze, or that someone else touched [the defendant] and transferred the DNA." The state properly argued that Russell's testimony merely provided the jury with examples of how DNA can be transferred, and because there was no evidence in the present case of the defendant's DNA being transferred under the circumstances of any hypothetical, the jury could not speculate. The defendant was under no obligation to provide any evidence as to how the DNA came to be on the gun, but he certainly could have done so if such evidence was available to him. Moreover, defense counsel was not "precluded from arguing that the inconclusive nature of the DNA evidence left reasonable doubt about the defendant's guilt . . . ." *State* v. *Brett B.*, supra, 186 Conn. App. 583–84.

developed from the swab of the gun and ammunition. That fact was in evidence. The state also presented circumstantial evidence permitting the jury to find the defendant guilty of criminal possession of a pistol or revolver. Pursuant to Russell's testimony, the jury reasonably could have found that it was more likely that the defendant's DNA on the gun and ammunition came from his direct contact with them than from either secondary transfer or aerosolization.

For the foregoing reasons, we conclude that, although the prosecutor misstated the law of constructive possession, the defendant has failed to carry his burden to demonstrate that he was denied due process. We also conclude that the prosecutor did not mischaracterize the DNA evidence. The defendant, therefore, has failed to demonstrate that he was deprived of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

LUCILLE NAPPO *v.* WILLIAM NAPPO (AC 40613)

Lavine, Keller and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting in part the plaintiff's amended motion for contempt, modifying his alimony obligation and issuing certain sanctions and remedial orders. Pursuant to the dissolution judgment, which was rendered in 2004, the defendant was ordered to pay the plaintiff as alimony one half of his monthly benefit from his M Co. pension and so much of his social security benefits as would equalize the parties' incomes, taking into account the social security benefits that the plaintiff receives. The alimony order also required the defendant to provide the plaintiff with copies of tax returns and certain forms, and ordered that the parties divide equally the proceeds of a $375,000 bond that the defendant had posted in conjunction with his starting his own business after he retired from M Co., and that the defendant seek the release of the bond from

the bonding company and share the proceeds with the plaintiff. As of November, 2009, the defendant had not recovered the bond proceeds. Following various modifications of the alimony order, the plaintiff filed motions for contempt and for modification of alimony, which were later amended, claiming, respectively, that the defendant had failed to comply with a number of the court's orders and that there had been a substantial change of circumstances with respect to the parties' financial situations. Following a hearing on the plaintiff's motions, the trial court found with respect to the motion for contempt that, although the plaintiff had not proven that the defendant had wilfully violated the alimony order, the order, nevertheless, had been violated because the alimony payments were improperly reduced by certain bank wire transfer charges. The trial court also found that although the plaintiff had not proven that the defendant had wilfully violated the order directing the defendant to pay one half of the bond proceeds to the plaintiff, the order had not been complied with. The court did find the defendant in contempt of an order that required him to provide the plaintiff with notice related to the status of the bond, and for his failure to provide the plaintiff with copies of his tax returns and certain forms. The court issued certain remedial orders and ordered sanctions for the defendant's contempt and noncompliance with certain orders, and it granted the plaintiff's motion for modification of alimony. On the defendant's appeal to this court, *held*:

1. The trial court did not abuse its discretion in granting the plaintiff's amended motion for modification and increasing the defendant's alimony payments to $1300 per month, that court having properly factored into its calculation of the defendant's weekly income certain amounts advanced to him by his current wife and the expenditures she had paid on his behalf: although the defendant claimed that the court erroneously found an increase in his weekly net income by incorrectly assuming that his current wife's contributions to him constituted gifts rather than loans that he was obligated to pay, no promissory note or other documentary evidence was presented to support the defendant's contention that the payments were loans, and there was no evidence that any terms of repayment existed or that any repayment had ever been made or tendered during the entire course of the defendant's current marriage of approximately ten years, and the court correctly considered the current wife's financial contributions in calculating the defendant's weekly income because they were relevant to the defendant's expenses, a material factor in determining his net income and, therefore, his ability to pay the increased alimony; moreover, the defendant's claim that the modified alimony award of $1300, plus $1000 per month to be paid toward an arrearage, was excessive was unavailing, as the award nearly equalized the parties' incomes as was originally intended in the dissolution judgment, and contrary to the defendant's claim, the court's failure to take into account certain additional income that he claimed the plaintiff allegedly derived from renting the parties' former marital home

was not clearly erroneous in light of the evidence before the court, which showed that the property had been foreclosed and was no longer generating rental income.

2. The defendant could not prevail on his claim that the trial court improperly sanctioned him for his contempt of certain court orders and issued additional orders to remediate his failure to comply fully with certain other orders:

a. This court declined to review the defendant's claim that it was unfair for the trial court to award the plaintiff attorney's fees and travel expenses as a sanction for his being found in contempt, which was based on his claim that when the plaintiff failed to appear for a prior hearing, the court denied his motion for sanctions for expenses related to the cost of preparing for that hearing; the defendant brought his motion for sanctions to address the plaintiff's alleged failure to comply with certain discovery requests and to file a financial affidavit, not because of her failure to appear at the subject hearing, and his claim that he also had incurred travel expenses and attorney's fees in preparation for the hearing at which the plaintiff failed to appear was not adequately raised before the trial court and, therefore, was not properly preserved for appeal.

b. The trial court did not abuse its discretion in ordering the defendant to commence paying interest on the plaintiff's share of the bond proceeds if the bond was not released on or before October 31, 2017: although that court did not find the defendant in contempt for failing to comply with its order to obtain the release of the bond and to share the proceeds equally with the plaintiff, it expressed its concern that compliance was lacking and entered the remedial order to secure compliance in the near future, and it would defy common sense to conclude that merely because the defendant's violation of the order was not wilful, the court was deprived of its authority to enforce its order; moreover, the court reasonably determined that the defendant, in the exercise of due diligence, would be able to resolve the payment issue if given several additional months to obtain the release of the bond, and the defendant admitted in his appellate brief that the bonding company has been willing to release the bond proceeds since December, 2017.

c. The trial court did not abuse its discretion in ordering the defendant to reimburse the plaintiff $391.50 for the bank wire transfer charges, as the remedial order was proper even though the defendant's violation of the alimony order was not wilful because it compensated the plaintiff for a minor alimony deficiency.

Argued December 4, 2018—officially released March 19, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Gruendel*, *J.*;

judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Albis*, *J.*, granted in part the plaintiff's amended motion for contempt, granted the plaintiff's amended motion for modification of alimony and issued certain orders, and the defendant appealed to this court. *Affirmed.*

William Nappo, self-represented, the appellant (defendant).

Opinion

KELLER, J. The self-represented defendant, William Nappo, appeals from the judgment of the trial court granting postdissolution motions filed by the plaintiff, Lucille Nappo, for modification of alimony and for contempt.[1] The defendant claims that the court erred in (1) granting the plaintiff's motion for modification, thereby increasing his monthly alimony payments,[2] and (2) imposing certain sanctions and fashioning additional orders directed to the defendant upon finding him in contempt and/or not in compliance with several court orders. We affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. The parties' marriage endured for forty-seven years. After a contested trial, a judgment of dissolution was entered on May 6, 2004. Since the date of the judgment of dissolution, postjudgment proceedings have continued unabated.

[1] The plaintiff did not participate in this appeal. This court entered an order on June 28, 2018, that indicated that this appeal would be considered solely on the basis of the defendant's brief and appendices, and the record in light of the plaintiff's failure to comply with this court's June 1, 2018 order requiring her to file a brief and appendix on or before June 15, 2018.

[2] In his statement of issues in his principal brief, the defendant claims that the court's modification of the alimony award and its order of payments on the resultant alimony arrearage was excessive in light of his income, and that the court improperly treated his current wife's contributions to his financial support as gifts rather than loans. For ease of discussion, we will address these claims together.

At the time of the judgment, both of the parties were sixty-five years old with limited incomes. The dissolution court, however, noted that during the course of the marriage, the defendant had enjoyed significant business success and a lavish lifestyle and had provided generously for his four children without providing for the plaintiff's future. It concluded that it was "satisfied that [the defendant] can again make a good or even extraordinary income.[3] Although he is sixty-five, his health is good, his experience is broad, and his ability to understand, create, and manage business opportunities is brilliant." (Footnote added.) The alimony order provided in pertinent part: "The [defendant] shall pay the [plaintiff] as alimony [one] half of his monthly benefit from his Mobil [Corporation] pension immediately and so much of his social security benefit as will equalize the parties' income, taking into account the $149 per week that the [plaintiff] receives in social security. As additional alimony, the [defendant] shall pay the [plaintiff] $1 per year and the [plaintiff's] medical insurance premium until the death of either of them or the [plaintiff's] remarriage, which shall be nonmodifiable as to term. Each party shall notify the other of any changes in income or employment within two weeks of the same occurring. The [defendant] shall, by April 15th of each year, provide the [plaintiff] with all tax returns, including 1099s and K-1s, for himself, any corporation in which he holds an interest of more than [15] percent . . . and any partnership, sole proprietorship, or other entity in which he holds an interest or from which he derives any financial benefit whatsoever."[4]

[3] The court further indicated that the defendant's "testimony that he has no hidden assets is not credible, but the court has no direct evidence of what assets he may have and therefore assigns no value to any assets except those introduced into evidence."

[4] It is apparent that this modifiable $1 per year alimony order and the requirement of notice to the other party of any change in income or employment supports the dissolution court's conclusion that the defendant might one day achieve a higher level of income than the small income his Mobil

On January 18, 2006, the alimony order was modified by agreement of the parties, and the defendant was required to pay alimony at the rate of $170 per week, payable in biweekly payments of $340. The alimony order was modified again on February 20, 2007, which effectively reinstated the original alimony order contained in the judgment of dissolution. As the language of that judgment indicates, the calculation of the alimony payment due from the defendant to the plaintiff requires periodic recalculation as changes occur in the parties' respective monthly social security benefits. Although a later order was entered on January 13, 2012, it did not change the operable alimony order but required the parties to attend a status conference to discuss further payments due under the 2004 dissolution judgment. The status conference was held on February 9, 2012, and the parties reached an agreement about the proper computation of alimony due under the 2004 dissolution judgment as reinstated in the February 20, 2007 order. Under that agreement, the defendant began to pay monthly alimony in the amount of $609.15.[5]

The judgment of dissolution also ordered that the parties equally divide the proceeds of a bond in the amount of $375,000 that the defendant had posted in conjunction with starting his own business after he retired from Mobil Corporation. The defendant was ordered to seek "to be repaid for the bond and to divide the proceeds" with the plaintiff.

On June 15, 2015, the plaintiff filed a motion for contempt, which she amended on February 23, 2017

Corporation pension and social security benefits were providing him at the time, which might justify an upward modification of alimony.

[5] The court noted that despite apparent changes in the parties' respective social security incomes since 2007, there had been no subsequent recalculation of the appropriate amount due under the formula set forth in the 2004 dissolution judgment.

(amended motion for contempt), alleging that the defendant had failed: (1) to provide her with proof of tax returns and 1099, K-1, and W-2 forms as ordered by the court; (2) to pay her one half of the value of the bond, or to comply with a court order of November 16, 2009, relative to proof of his efforts to obtain release of the bond; (3) to pay alimony on a timely basis; (4) to provide verification of the amounts that the federal government was deducting from his income; (5) to disclose information concerning his American Express credit card on his financial affidavit as ordered by the court on December 9, 2015; and (6) to produce a copy of his passport, also ordered by the court on December 9, 2015.

On June 15, 2015, the plaintiff also filed a motion for modification of alimony, which she amended on February 23, 2017 (amended motion for modification), claiming a substantial change of circumstances based on the financial situations of the parties. On January 27, 2016, the plaintiff filed another motion for contempt (second motion for contempt), alleging that the defendant had failed to provide a true and accurate copy of his credit report as ordered by the court on January 15, 2016.[6] On February 3, 2016, the defendant filed a motion for attorney's fees for the defense of the plaintiff's pending motions. On February 5, 2016, the plaintiff filed a motion for attorney's fees incurred in pursuing her contempt motions and her motion for modification.[7]

On June 15, 2017, after three days of hearings, the court rendered a decision on the February 23, 2017 amended motion for contempt and the January 27, 2016

[6] The orders of the court pertaining to the defendant's American Express credit card, passport, and credit report were a result of the plaintiff's ongoing attempts to obtain full disclosure of the defendant's financial status in order to pursue her contempt and modification motions.

[7] The plaintiff also sought an award of attorney's fees in both of her contempt motions.

second motion for contempt regarding the credit report, as well as the February 23, 2017 amended motion for modification of alimony. The court noted that during the course of the hearing, the plaintiff had determined that she was no longer pursuing certain claims she had alleged in her amended motion for contempt, and it issued the following findings and orders: "As to the plaintiff's claim that the defendant failed to make all alimony payments in a timely manner under the terms of the applicable order, the court finds that some payments were made late but that the defendant generally made the payments within a relatively short time after they were due. As to this ground, the court finds that the plaintiff has not proven by clear and convincing evidence that the defendant wilfully violated the court order, and it does not find the defendant in contempt. No remedial orders are entered with respect to this claim.

"With respect to the plaintiff's claim that her alimony payments were improperly reduced by bank wire charges, the court finds that the defendant made [twenty-five] monthly payments during the period between November, 2013, and February, 2016, by wire transfer. Each of those payments by the defendant via wire transfer was reduced by a wire transfer fee charged by the defendant's sending bank and by a further fee imposed by the plaintiff's receiving bank. As a result of these charges, the amount actually credited to the plaintiff's bank account for each of the months in question was less than the monthly alimony payment of $609.15 due under the applicable order.

"The payment of the alimony by wire transfer was not a requirement of the judgment but, rather, was agreed to by the parties informally. Nevertheless, the order required the defendant to pay $609.15 to the plaintiff. Even though the parties may have agreed to the

wire transfer method, it was incumbent upon the defendant to pay his bank's wire transfer fee rather than have it deducted from the amount due to the plaintiff. The court finds that during the relevant period a total of $391.50 in wire transfer fees charged by the defendant's bank should have been paid by the defendant and not passed on to the plaintiff. However, the court concludes that the defendant is not responsible for the fees charged by the plaintiff's chosen banking institution to receive the funds which she agreed to have paid to her in that manner.

"As to this ground, the court finds that the plaintiff has not proven by clear and convincing evidence that the defendant wilfully violated the court order. However, the court finds that there was a violation of the order insofar as the defendant did not pay the full amount of alimony due from him, and the court enters the remedial orders below to make the plaintiff whole and prevent the defendant's [wire] transfer charges from being passed on to her in the future."

As to the alleged failure of the defendant to transfer to the plaintiff one half of the $375,000 bond pursuant to the 2004 dissolution judgment, the court found that "[t]he bond funds had not yet been recovered by the defendant or paid to the plaintiff on November 16, 2009, when the court ordered the defendant to provide the plaintiff with a written report every six months thereafter on the status of the bond and his efforts to comply with the order to share the proceeds of it with her. . . .

"As to the first of [the plaintiff's] claims, the court finds that the defendant has not yet obtained the bond funds from the bonding company due to certain legal impediments that have arisen. The cash collateral for the bond in question is held by International Fidelity Insurance Company (bonding company). The bonding company was not required to release the funds which

were posted to secure the issuance of the bond until the expiration of the statute of limitations on the liabilities which the bond was intended to protect against, a period which apparently expired on or about April 16, 2016. Since the passage of that date, the release of the funds has been further delayed due to a technical error in the statement, in a related bankruptcy proceeding, of the legal name of the entity controlled by the defendant which posted the collateral funds with the bonding company and to which the refund of the funds is payable. As to this claim of contempt, the court finds that the plaintiff has not proven by clear and convincing evidence that the defendant has wilfully violated the order to pay [one] half of the proceeds of the bond to her. However, the order has not been complied with, and the court enters remedial orders intended to secure such compliance.

"As to the second claim, the court finds that the plaintiff has proven the following elements of contempt by clear and convincing evidence. The defendant had notice of the court's order of November 16, 2009, requiring him to provide the plaintiff with a written report every six months on the status of the bond and his efforts to comply with the order to share the proceeds of it with her. . . . His noncompliance was wilful. The court therefore finds the defendant in contempt of the order . . . . The award to the plaintiff of attorney's fees and travel expenses as hereinafter set forth is attributable, in part, to this finding of contempt."

The court then found the defendant in contempt for failing to provide the plaintiff with copies of his annual income tax returns, 1099 forms and K-1 forms by April 15 of each calendar year, as well as for failing to provide the plaintiff with a copy of his passport. The court noted that its award to the plaintiff of attorney's fees and travel expenses is also attributable, in part, to these additional findings of contempt. The court did not find

the defendant in contempt relative to the plaintiff's claims that he failed to disclose an American Express credit card or that he failed to provide her with a credit report.

As part of its ruling on the February 23, 2017 amended motion for contempt, the court ordered the defendant to pay to the plaintiff within thirty days the sum of $391.50 in reimbursement of the defendant's wire transfer charges that had reduced the amount of alimony the plaintiff received. It also ordered the defendant to provide the plaintiff's attorney with a detailed monthly written statement of his efforts to collect the cash collateral held by the bonding company until he has paid one half of the bond proceeds as required by the 2004 dissolution judgment. The court also ordered that "[i]f for any reason the defendant has not paid the plaintiff in full for her [one] half of the bond proceeds . . . on or before October 31, 2017, then the unpaid portion due to the plaintiff shall accrue interest at the rate of [5 percent] . . . per annum commencing on November 1, 2017, and continuing until the unpaid portion plus accrued interest has been paid in full, with any partial payments after November 1, 2017, to be applied first to interest and then to principal." Finally, the court ordered the defendant to pay the plaintiff within thirty days the sum of $2000 in attorney's fees plus $1000 toward the plaintiff's travel expenses to attend the hearing.[8]

With respect to the amended motion for modification of alimony, the court reviewed the financial affidavits filed by each party at the time of the entry of the February 20, 2007 order and found by a preponderance of the evidence that the defendant's circumstances had improved substantially since that date in two ways.

[8] At the time of the hearing, both parties resided outside of Connecticut and were required to travel to Connecticut to attend the hearing.

First, the defendant had remarried, and his current wife provides the bulk of his financial support. Second, since February 20, 2007, there had been a significant increase in the defendant's net worth. His assets had increased in value by over $400,000, and his liabilities had decreased by almost three million, from $5,371,775 to $2,393.818. The court noted that it found the defendant "to be significantly lacking in credibility," particularly as to the nature of the financial support that his current wife provides him. The defendant claimed that sums contributed to his legal expenses and deposited into his bank account were loans from his current wife, but the court, noting the lack of any promissory note or evidence of any repayment, found that they were gifts, and that such gifts were continuing regularly. In addition, the court found that the defendant's current wife paid for the bulk of the couple's expenses, including the mortgage, taxes and other expenses for two condominium units, one in Connecticut and one in South Carolina; country club memberships; and travel and dining out, beyond that which the defendant could afford on his reported income.

The court found that the defendant's net weekly income was therefore comprised of four elements: his reported weekly income of $586 on his financial affidavit, the average weekly amount he has received from his current wife for ongoing legal fees in the amount of $263, the average weekly amount of gifts of cash provided to him by his current wife for deposit into his bank account in the amount of $90, and $254 in excess weekly expenditures for which the only payment source in evidence is the defendant's current wife, as the defendant's weekly expenses and liability payments exceed his net weekly income. As a result of its consideration of these four elements, the court found the defendant's net weekly income to be $1193.

The court found that the plaintiff's net weekly income as of the date of the hearing was $567, excluding alimony payments. This income calculation included recurring financial support from her son. The court further found that the plaintiff's needs and expenses reasonably required a greater amount of income than the existing alimony order provided her.

Accordingly, the court granted the plaintiff's amended motion for modification and ordered the defendant to pay the plaintiff $1300 per month in alimony retroactive to July 1, 2015, the first month following the date of service of her initial motion for modification on the defendant.[9] The retroactive order generated an arrearage of $16,580, which the court ordered payable in sixteen consecutive monthly installments of $1000, followed immediately by a final monthly installment of $580, commencing on July 15, 2017.

The court also denied the parties' respective motions for attorney's fees, finding no adequate basis for either request. The court indicated that it previously had awarded the plaintiff attorney's fees after finding that the defendant was in contempt of court orders. This appeal followed.

Before addressing the defendant's claims, we set forth the standard of review that applies to our review of the orders challenged on appeal. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as

[9] General Statutes § 46b-86, which governs modification of alimony, provides in relevant part: "No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50. . . ."

it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Schwarz* v. *Schwarz*, 124 Conn. App. 472, 476, 5 A.3d 548, cert. denied, 299 Conn. 909, 10 A.3d 525 (2010). "As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.2d 1230 (2017).

I

The defendant's first claim is that the court abused its discretion when it granted the plaintiff's amended motion for modification of alimony and increased his payments to $1300 per month. The defendant claims that there was insufficient evidence to support the court's finding that the money his current wife contributes to his expenses or advances to him were gifts, rather than loans. He also claims that the modified alimony payment, coupled with the order to pay $1000 per month on the arrearage created by the retroactivity for a total of $2300 per month, constitutes 89 percent of his weekly net income.

Modification of alimony after the date of a dissolution judgment, unless and to the extent that the decree precludes modification, is governed by General Statutes § 46b-86. *Schwarz* v. *Schwarz*, supra, 124 Conn. App. 476. "When . . . the disputed issue is alimony, the applicable provision of the statute is § 46b-86 (a), which

provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . The party seeking modification bears the burden of showing the existence of a substantial change in the circumstances. . . . The change may be in the circumstances of either party. . . . The date of the most recent prior proceeding in which an alimony order was entered is the appropriate date to use in determining whether a significant change in circumstances warrants a modification of an alimony award." (Internal quotation marks omitted.) *Rubenstein* v. *Rubenstein*, 172 Conn. App. 370, 375,160 A.3d 419 (2017).

"In general the same sorts of [criteria] are relevant in deciding whether the decree may be modified as are relevant in making the initial award of alimony. . . . More specifically, these criteria, outlined in General Statutes § 46b-82, require the court to consider the needs and financial resources of each of the parties . . . as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties." (Internal quotation marks omitted.) *Schwarz* v. *Schwarz*, supra, 124 Conn. App. 477. When the initial alimony award was not sufficient to fulfill the underlying purpose of the award, to ensure the continued enjoyment of the standard of living that the supported spouse enjoyed during the marriage, an increase in the supporting spouse's income, in and of itself, may justify an increase in the award. See *Dan* v. *Dan*, 315 Conn. 1, 15–16, 105 A.3d 118 (2014).

The defendant's claims concerning the modification of his alimony payments, to approximately double what he had been paying, essentially concern whether the court appropriately categorized the financial contributions his current wife had been providing to him. We

interpret his claim as an assertion that the court erroneously found an increase in his weekly net income from $568, which was the amount he stated on his financial affidavit, to $1193, by incorrectly assuming that his current wife's contributions to him, totaling approximately $137,000, constituted gifts rather than loans that he was obligated to repay. We disagree.

"Whether money should be characterized as income or a loan is a question of fact for the trial court. . . . This is often a matter that turns on the credibility of the parties and whether any documentation of the loans was provided. Compare *Zahringer* v. *Zahringer*, [124 Conn. App. 672, 678–79, 6 A.3d 141 (2010)] (court, after determining that parties, including father's accountant, were credible and that documentation had been created, held that payments were loans), with *Desai* v. *Desai*, 119 Conn. App. 224, 236–37, 987 A.2d 362 (2010) (court, after determining that parties were not credible and that documentation was lacking, held that payments were not loans)." (Citation omitted.) *Keller* v. *Keller*, 167 Conn. App. 138, 152, 142 A.3d 1197, cert. denied, 323 Conn. 922, 150 A.3d 1151 (2016).

In the present case, although the defendant asserts that the contributions from his current wife were loans that he would have to repay in the future and, thus, should not be considered in the alimony calculation, the court did not find his testimony on the subject to be credible. No promissory note or other documentary evidence was presented to support the defendant's contention that the payments were loans, and there was no evidence that any terms of repayment existed or that any repayment had ever been made or tendered during the entire course of the defendant's current marriage—a period of approximately ten years.

In addition to finding that all the funds advanced to the defendant by his current wife had been gifts and

not loans, the court also found that the evidence showed that the defendant's current wife pays the bulk of the couple's expenses. The court noted that the plaintiff and his current wife led a lifestyle with a level of luxury beyond that which the defendant could afford given the income he reported on his financial affidavit. The court noted that the defendant did not include on his financial affidavit recurring deposits of funds from his current wife into his personal bank account, which the court also determined were gifts and not loans. The court highlighted the fact that some of the funds that the defendant's current wife had given to him and spent for his benefit came from income she received through her position as owner and managing member in an entity, Hampton Ventures, LLC, which owns and rents office space within real property located at 1100 New Britain Avenue in West Hartford. The defendant testified that in 2005, his dissolved company, R.E.T. Capital Corporation, of which he was the sole owner, had lent his current wife $225,000 in order to purchase this rental property. He further testified that despite the fact that a balloon provision in the promissory note required payment in full by May, 2015, the loan had not been repaid; rather, the date the note was payable had been "extended" to some unspecified time.

The court based its determination concerning the financial contributions of the defendant's current wife on the testimony of both parties, the defendant's financial situation, and his spending habits, which included country club fees and the maintenance of two residences. We conclude that the court did not abuse its discretion by factoring into its calculation of the defendant's weekly income the amounts advanced to him by his current wife and the expenditures she had paid on his behalf. The court concluded that the financial needs of the defendant were less than they were at the time of the February 20, 2007 order by reason of the necessities and amenities provided to him by his current wife

above and beyond the funds she gives to him and uses to pay his expenses. The court was correct in considering the income of the defendant's current wife because it was relevant to his current expenses, a material factor in determining his current net income and, therefore, his ability to pay the increased alimony. See *McGuinness* v. *McGuinness*, 185 Conn. 7, 12–13, 440 A.2d 804 (1981).

We further conclude that the court's modified monthly alimony order of $1300 per month plus $1000 per month on an arrearage of $16,580 is not excessive, as the defendant's arguments suggest, in light of the defendant's net monthly income of $4772 ($1193 multiplied by 4.3) and the needs and expenses of the plaintiff, whose current weekly net income, excluding alimony but including additional support of $186.05 per week, a recurring gift from her son, was determined to be $567. This order nearly equalizes the parties' incomes, as originally intended in the dissolution judgment.

The defendant also argues that the court failed to take into account additional income he alleges that the plaintiff derives from renting the parties' former marital home in Avon. The only evidence with respect to her renting those premises came through the testimony of the plaintiff and her son, Jeffrey Nappo. Both indicated that the property had been foreclosed and there was no longer any rental income being generated. The defendant offered no contrary evidence and, viewed in light of the evidence before the court, its failure to attribute rental income to the plaintiff is not clearly erroneous.

II

The defendant's second claim is that the court improperly sanctioned him for his contempt of certain court orders and entered additional orders to remediate his failure to fully comply with others.[10] The defendant specifically takes issue with (1) the court's award to the

[10] The hearing on the plaintiff's two contempt motions was commenced on February 8, 2016. The defendant has failed to provide this court with a

plaintiff of attorney's fees and travel expenses totaling $3000, (2) the court's remedial order that he pay 5 percent interest on any portion of the plaintiff's one-half share of the bond money that remained unpaid after October 31, 2017, and (3) the court's order that he reimburse the plaintiff $391.50 for unpaid alimony as a result of wire transfer fees deducted by the defendant's bank from his alimony payments. We decline to review the first aspect of this claim related to the award of travel expenses and attorney's fees because it was not raised before the trial court. With respect to the other aspects of the claim, we conclude that the remedial orders pertaining to the wire transfer fees and the 5 percent interest on the unpaid balance of the plaintiff's share of the bond money effective November 1, 2017, reflected a proper exercise of the court's inherent authority to effectuate its judgment. See, e.g., *Perry* v. *Perry*, 156 Conn. App. 587, 595, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015); *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 677–78, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

A

We first address the court's award of travel expenses and attorney's fees to the plaintiff, which the court indicated were sanctions it was imposing upon finding the defendant in contempt for failure to provide the plaintiff with periodic reports on the status of his efforts to obtain release of the $375,000 bond; copies of his annual tax returns, 1099 forms, and K-1 forms by April 15 of each calendar year; and a copy of his passport.

transcript of the proceedings that transpired on that date in accordance with Practice Book § 63-8. This defect in the appeal does not hamper our review, however, because the trial court file contains a copy of a certified transcript of the proceedings on February 8, 2016, which the defendant's counsel provided to the trial court at the commencement of a subsequent trial hearing in this matter on March 9, 2017.

The following additional facts are relevant to this claim. The plaintiff sought reimbursement for and presented evidence of her travel expenses from Florida to Connecticut on October 16, 2015, and January 15, 2016, totaling $1929.35.[11] These trips were for previously scheduled hearings on her amended motion for contempt and amended motion for modification.[12] On October 16, 2015, the defendant appeared through counsel, but the hearing did not go forward. On that date, the court ordered a continuance to January 15, 2016, and noted that the defendant "acknowledges his obligation to appear on that date." The court also reserved the plaintiff's "right to seek reimbursement of expenses incurred for her trips to Connecticut for the hearing held today and July 14, 2015 on which the [plaintiff's motion for modification and motion for contempt] were scheduled to be heard."

On January 15, 2016, the defendant moved for a continuance, which the court granted on the condition that he pay the plaintiff certain travel expenses as listed on plaintiff's exhibit 1. In its written order, the court stated: "By agreement of the parties, [the defendant] shall pay within one week of today, the sum of $1500 to [the plaintiff] of which $714.66 is to reimburse her for her travel expenses to appear in court today. The balance is subject to adjustment and *will be applied toward the cost of her return trip for the continued hearing.*[13] The court continues to reserve [the plaintiff's] right to seek reimbursement for prior trips as previously ordered by the court." (Emphasis added; footnote added.) During the hearing on February 18, 2016, the court inquired of

[11] The hearing on the plaintiff's amended motion for contempt and her amended motion for modification previously had been continued from July 15 to October 16, 2015, with an order to the plaintiff that she serve the defendant with a subpoena.

[12] The plaintiff's second motion for contempt was not filed until January 27, 2016.

[13] The court subsequently continued the hearing to February 18, 2016.

the plaintiff whether the defendant had paid her funds in compliance with his January 15 order, and she indicated that she had received $1500. The plaintiff further testified that she had traveled from Florida to Connecticut a third time for the February 18, 2016 hearing. Upon finding the defendant in contempt, the court ordered that he pay the plaintiff an additional $1000 for travel expenses.

The plaintiff, through counsel, also requested that she be reimbursed for attorney's fees of $5000 for each contempt motion. The court, having found the defendant in contempt on some, but not all, of the allegations contained in her amended motion for contempt, awarded the plaintiff $2000 in attorney's fees.

On appeal, the defendant does not dispute the court's calculation of the amounts awarded to the plaintiff for travel expenses and attorney's fees. His only claim is that it was unfair to award attorney's fees and travel expenses to the plaintiff because, on December 1, 2014, she failed to appear for a prior hearing, and that the court denied his motion for sanctions for expenses related to the cost of preparing for that hearing.

First, we observe that the motion for sanctions to which the defendant refers, filed on January 27, 2014, was brought to address the plaintiff's failure to comply with his discovery requests and to file a financial affidavit, not due to her failure to appear in court on December 1, 2014. Second, although, throughout his appellate brief, the defendant has failed to cite to the record, we have conducted a thorough search of the transcripts and the written motions presented to the trial court and have determined that this particular justification for denying the plaintiff's requests for travel expenses and attorney's fees—that *he* also had incurred travel expenses and attorney's fees in preparation for a December 1, 2014 hearing at which the plaintiff failed

to appear—was not adequately raised before the trial court and, thus, is unpreserved.

On February 3, 2016, the defendant filed a motion for attorney's fees on which he presented no evidence, but his counsel did argue this motion at the close of the hearing on March 10, 2017. In his motion, the defendant raised two claims: (1) if the court did not find the plaintiff in contempt, the defendant should be awarded fees pursuant to General Statutes § 46b-87; and (2) the defendant should be awarded attorney's fees for defending the plaintiff's *pending* motions because this was the third time the defendant had to prepare to defend similar motions filed by the plaintiff. During closing arguments, however, counsel for the defendant asked the court to award the defendant fees *if* it did not find the defendant in contempt[14] or *if* it did not grant the plaintiff's amended motion for modification. The court, having found the defendant in contempt and having granted the plaintiff's amended motion for modification, denied the defendant's motion for attorney's fees, finding there was no basis for it.[15] At no point did the defendant seek reimbursement or claim any right of set off for travel expenses or attorney's fees incurred in attending court to defend previous motions that had been scheduled to be heard on December 1, 2014. Additionally, he did not present any evidence as to the amount of such expenses he had incurred. Consequently, the defendant is unable to challenge the court's order on this unpreserved ground.

[14] The defendant claimed fees for defending the contempt motions pursuant to § 46b-87, which provides, in relevant part, that "if any . . . person is found *not* to be in contempt of such order, the court may award a reasonable attorney's fee to such person. . . ." (Emphasis added.)

[15] Apart from the defendant's counsel apprising the court of his hourly rate, the court was provided with no evidence of the amount of fees being sought relative to this litigation.

B

We next address the defendant's claim that the court abused its discretion in ordering him to commence paying interest on the plaintiff's share of the bond proceeds if the bond was not released on or before October 31, 2017.

"[A] trial court possesses inherent authority to make a party whole for harm caused by a violation of a court order, even when the trial court does not find the offending party in contempt." *O'Brien* v. *O'Brien*, 326 Conn. 81, 96, 161 A.3d 1236 (2017). In addition, it has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes. See *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–78, 444 A.2d 196 (1982). A remedial award does not require a finding of contempt. Rather, "[i]n a contempt proceeding, even in the absence of a finding of contempt, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with a court order." (Emphasis omitted; internal quotation marks omitted.) *Clement* v. *Clement*, 34 Conn. App. 641, 647, 643 A.2d 874 (1994); see also *Brody* v. *Brody*, 153 Conn. App. 625, 636, 103 A.3d 981, cert. denied, 316 Conn. 910, 105 A.3d (2014).

We further recognize that "[a]lthough [a] court does not have the authority to modify a property assignment, [the] court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment." (Internal quotation marks omitted.) *O'Halpin* v. *O'Halpin*, supra, 144 Conn. App. 677–78. "[A]n order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties timely compliance therewith." (Internal quotation marks omitted.) Id., 677; see *Perry* v. *Perry*, supra, 156 Conn. App. 595.

The following additional facts are relevant to this claim. The court heard evidence that at least since the defendant had received a letter dated July 11, 2016, from the bonding company, he was on notice that he needed to move to open the bankruptcy judgment to correct the name of the entity that had posted the bond in the bankruptcy order so that the order reflected "Tri-State Terminals Inc." instead of "Tri-State Terminals Corp." Acknowledging that he was familiar with this letter, the defendant testified on March 9, 2017, that he had yet to hire a lawyer or take any other action to correct the misnomer in the bankruptcy order.

As previously noted in this opinion, on the basis of the evidence submitted to the court for its consideration as to why the defendant had failed to obtain the release of the bond, the court found that the defendant had not yet obtained the release due to the fact that the bonding company was not required to release the funds that had been posted to secure the issuance of the bond until the expiration of the statute of limitations on the liabilities that the bond was intended to protect against, a period that apparently expired on or about April 16, 2016. After the passage of that date, the court found that the release of the funds had been further delayed due to a technical error in the statement, in a related bankruptcy proceeding, of the legal name of the entity controlled by the defendant that posted the collateral funds with the bonding company and to which the refund of the funds is payable. Although the court found that the defendant was not in contempt, it expressed its concern that compliance was lacking and entered remedial orders intended to secure compliance in the near future. In particular, the court ordered that "[i]f for any reason the defendant has not paid the plaintiff in full for her [one] half of the bond proceeds . . . on or before October 31, 2017, then the unpaid portion due to the plaintiff shall accrue interest at the rate of [5

percent] . . . per annum commencing on November 1, 2017, and continuing until the unpaid portion plus accrued interest has been paid in full, with any partial payments after November 1, 2017, to be applied first to interest and then to principal." The court then found the defendant in contempt for wilfully failing to provide the plaintiff with a written report every six months, as ordered by the court on November 16, 2009, as to the status of his efforts to obtain release of the bond.

Given the impediments of which the court was made aware and the fact that over twelve years had elapsed since the dissolution court had ordered the defendant to obtain the release of the bond and share the proceeds equally with the plaintiff, the court reasonably determined that the defendant, in the exercise of due diligence, would be able to resolve the payment issue if given several additional months to obtain the release of the bond. "It would defy common sense to conclude that, merely because a party's violation of a court order was not wilful, the trial court is deprived of its authority to enforce the order." *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 241–42, 796 A.2d 1164 (2002). In fact, the defendant now admits in his appellate brief that the bonding company has been willing to release the bond money since December, 2017. Accordingly, we conclude that court did not abuse its discretion in ordering the defendant to commence paying interest on the plaintiff's share of the bond proceeds if the bond was not released on or before October 31, 2017.[16]

[16] The defendant also appears to claim that the order of interest is improper because, in his words, "[the bonding company] has been willing to release the [b]ond since December, 2017, if [the plaintiff] signs the required release form from [the bonding company]. Since [the plaintiff] has not signed the release to date, [the defendant] was forced to file a motion to compel postjudgment . . . on March 23, 2018." The defendant did not raise this argument before the trial court, a failing that is readily apparent in light of the fact that the defendant also explains in his appellate brief that the bonding company was first willing to release the bond, following a release by the plaintiff, in December, 2017—six months *after* the trial court rendered

C

The final aspect of the defendant's claim is that the court improperly ordered that the defendant reimburse the plaintiff $391.50, the sum deducted from his alimony payments by his bank after he agreed to wire transfer alimony payments directly to the plaintiff's bank. The court determined that this resulted in the defendant failing to pay the plaintiff the full amount of alimony owed.

We find no abuse of discretion on the part of the court in issuing this particular remedial order. Although the court did not find the defendant in contempt for failure to pay alimony in a timely fashion, it noted that the parties had informally agreed to have the defendant wire the plaintiff's alimony payments directly to her bank account and that each party had incurred charges from their respective banks as a result. The court deemed it equitable, and we agree, that each party should be responsible for his or her own bank's charges, and noted that as a result of the defendant having not directly paid his wire transfer costs, the plaintiff's alimony checks for the period of time that her payments were wired to her bank were reduced by a total of $391.50. This remedial order was proper in that it compensated the plaintiff for a minor alimony deficiency even though the defendant's violation was not wilful.

the judgment from which he now appeals. Likewise, the defendant draws our attention to a motion to compel, which was filed by him in the trial court approximately nine months *after* the court rendered the judgment from which he now appeals, in which he asks the court to order the plaintiff to sign the release so that the funds may be distributed in accordance with the court's order in the dissolution judgment. Because the plaintiff did not raise this claim concerning the release of the bond before the trial court in connection with the judgment from which he appeals, we decline to address it on appeal. See *Ahmadi* v. *Ahmadi*, 294 Conn. 384, 395, 985 A.2d 319 (2009) ("[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one" [internal quotation marks omitted]).

"Irrespective of whether a violation is wilful, the party violating a court order properly may be held responsible for the consequences of the violation. To hold otherwise would shift the cost of the violation to the innocent party." *O'Brien* v. *O'Brien*, supra, 326 Conn. 101.

"Although ordinarily our trial courts lack jurisdiction to act in a case after the passage of four months from the date of judgment; see General Statutes § 52-212a; there are exceptions. One exception arises when the exercise of jurisdiction is necessary to effectuate prior judgments or otherwise enforceable orders. . . . [Our Supreme Court has rejected a] hypertechnical understanding of the trial court's continuing jurisdiction to effectuate prior judgments. . . . [T]he trial court's continuing jurisdiction is not separate from, but, rather, derives from, its equitable authority to vindicate judgments. . . . [S]uch equitable authority . . . [derives] from its inherent powers . . . and is not limited to cases wherein the noncompliant party is in contempt . . . ." (Internal quotation marks omitted.) *Brody* v. *Brody*, supra, 153 Conn. App. 635.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GREGORY L. WEATHERS
(AC 41291)

Keller, Prescott and Harper, Js.

Syllabus

Convicted by a three judge panel of the crimes of murder, criminal possession of a pistol or revolver, and carrying a pistol without a permit, the defendant appealed. The defendant's conviction stemmed from his conduct in approaching the victim in a construction site and shooting the victim, who died from the gunshot wounds. Following the shooting, the defendant told police he shot the victim to settle a labor dispute. During his police interview, the defendant stated he was looking for a job and felt that the victim had brushed him aside. The defendant asserted an

affirmative defense of not guilty by reason of mental disease or defect and presented the testimony of two expert witnesses, L and A. L testified that at the time of the offense the defendant was suffering from a psychotic disturbance that influenced his thinking and behavior, and that the defendant had reported that on the morning of the offense he experienced auditory hallucinations, delusions and suicidal thinking, including a hallucination of flashing lights conveying to him that the victim was dangerous and that the defendant should shoot him. L also surmised that a psychiatrist at the Department of Correction who had suspected that the defendant may have been exaggerating or fabricating his symptoms likely had not reviewed the defendant's hospital records wherein he was diagnosed with a psychosis, or conducted any collateral interviews. A testified that the sum of the evidence provided a sufficient basis to conclude that the defendant lacked substantial capacity to control his conduct at the time of the offense. *Held*:

1. The defendant could not prevail in his claim that the trial court's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence:

a. The defendant's claim that the court arbitrarily rejected the opinions of his experts that he lacked substantial capacity to control his conduct within the requirements of the law was unavailing: that court's decision was based on its reasonable assessment of the evidence presented, as the court did not merely find that the defendant had failed to prove that he lacked substantial capacity to control his conduct as a result of his psychosis but, rather, found that the defendant was acting under the influence of a multitude of stressful and emotional hurdles in his life not of a psychiatric nature, and, therefore, the court, as the finder of fact, was entitled to adopt that nonpsychiatric explanation for the defendant's conduct and reject the expert opinions; moreover, given the experts' reliance on the defendant's own account of his symptoms and the events surrounding the shooting, it was reasonable for the court to conclude that their opinions were undermined by its finding that the defendant intentionally had either embellished or fabricated psychiatric symptoms over time, and although L credited the defendant's explanation that the victim was dangerous and should be shot, the court found that the defendant shot the victim because he felt brushed aside after inquiring about employmnet opportunities, not because he was laboring under any delusional beliefs, and it reasonably could have found that evidence pertaining to L's understanding of the statutory insanity test undermined the value of his opinions; furthermore, the court reasonably could have found that A failed to account adequately for the defendant's statements to police after the shooting that he shot the victim to settle a perceived labor dispute, and in light of the weight that A placed on the seemingly enigmatic nature of the shooting, the court reasonably could have found A's conclusion to be attenuated.

b. The trial court findings that the defendant shot the victim out of frustration and anger, that there was nothing unremarkable, untoward, or aberrant about the defendant's conduct during his police interview and that the defendant either fabricated or embellished his symptoms were not clearly erroneous and were supported by evidence in the record: given the defendant's preexisting anxiety and depression regarding his unemployment, his perception of the victim's response as a slight, his characterization of their interaction as a dispute, and his admission that he shot the victim to settle this dispute, the court could have found that it was that perceived slight, as opposed to a psychotic delusion or hallucination, that prompted the defendant to shoot the victim, and the fact that there was no direct evidence that the defendant was visibly angry did not render the finding that he shot the victim out of frustration clearly erroneous; moreover, although, during the police interview, there were numerous instances in which the defendant failed to answer the questions asked or gave an unresponsive answer, and some of his statements could be characterized as disorganized, it is not uncommon for defendants to not be entirely responsive during a police interview and to be reticent to respond to police questioning, and inattention and confusion are not necessarily indicative of a mental disease or defect; furthermore, the defendant conceded that there was evidence of malingering in the record, namely, a psychiatrist's notations in his medical records and A's conclusion in his written evaluation, and his claim that a fact finder could not reasonably infer his mental condition at the time of the offense from evidence of his mental condition at a subsequent time was unavailing, as a defendant's state of mind may be proven by his conduct before, during, and after the offense.

2. The defendant's claim that the trial court erred as a matter of law in rendering an opinion on a matter that required expert testimony was unavailing; although expert testimony is of assistance, the ultimate issue of sanity, including intent, is decided by the trier of fact, and if expert testimony was required, there was expert testimony to support the court's conclusion that although the defendant was suffering from a psychosis at the time of the shooting, such psychosis did not impair his capacity to control his conduct within the requirements of the law, as both expert witnesses testified that a psychosis does not necessarily impair an individual's capacity to substantially control his conduct within the requirements of the law, and, therefore, the court reasonably could have concluded as it did.

Argued September 20, 2018—officially released March 19, 2019

Procedural History

Information charging the defendant with the crimes of murder, criminal possession of a pistol or revolver, stealing a firearm, and carrying a pistol without a permit, brought to the Superior Court in the judicial district

of Fairfield and tried to a three judge court, *Kavanewsky, Pavia and E. Richards, Js.*; thereafter, the state entered a nolle prosequi as to the charge of stealing a firearm; judgment of guilty, from which the defendant appealed. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Gregory L. Weathers, appeals[1] from the judgment of conviction, rendered after a trial by a three judge court,[2] of murder in violation of General Statutes § 53a-54a (a), criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that (1) the trial court's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence and (2) the court erred as a matter of law in deciding an issue without the aid of expert testimony. We disagree and, accordingly, affirm the judgment of the trial court.

The court reasonably could have found the following facts from the evidence presented at trial.[3] On the morning of March 26, 2015, the victim, Jose Araujo, and sev-

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

[2] The three judges were impaneled pursuant to General Statutes § 54-82.

[3] Although the court explicitly discussed only a fraction of the evidence adduced at trial in making its findings of fact, it did not indicate that its decision was based *exclusively* on this evidence. As our Supreme Court has stated, where the trial court, in explicating the evidence on which it relied in rejecting a defendant's insanity defense, does not indicate that it relied exclusively on such evidence, "[appellate courts] are free to examine the

eral other individuals employed by Burns Construction were installing an underground gas main on Pond Street in Bridgeport. Fernando Oquendo, a patrolman with the Bridgeport Police Department, was working overtime duty at the construction site and had blocked off Pond Street near Chopsey Hill Road.[4] Around the time in question, Officer Oquendo had gone to retrieve coffee for the construction crew, who were in the process of backfilling a trench that had been dug along the side of the road. Matthew Girdzis, one of the crew members, was seated in a dump truck positioned near the trench. The victim was standing on the driver's side of the truck speaking with Girdzis about where they should dump the fill material.

While the victim and Girdzis were talking, the defendant walked into the work zone and approached the victim. Girdzis had never seen the defendant there before; he was not an employee of Burns Construction. The defendant greeted the victim with a seemingly amicable "fist bump" and asked the victim whether the construction company was hiring. The victim, in turn, relayed the question to Girdzis. Speaking to the defendant directly, Girdzis suggested that he go to the construction company's office downtown to fill out an application and "see what happens." By all accounts, there was nothing unusual or remarkable about the defendant's demeanor during his initial interaction with the victim and Girdzis.[5] There was nothing to suggest

entire record to determine whether a fact finder reasonably could have concluded that the defendant had failed to establish that he lacked substantial capacity to control his desire to commit [the charged offense]." *State* v. *Quinet*, 253 Conn. 392, 410–11, 752 A.2d 490 (2000). Consequently, we properly may consider all of the evidence presented at trial in determining whether the court's rejection of the defendant's affirmative defense is reasonably supported by the record.

[4] Another police officer was blocking off the street from the other direction.

[5] As one of the construction workers testified, however, the defendant kept his right hand in his pocket throughout the encounter.

that any sort of argument or altercation ensued or that the defendant harbored any animosity toward the victim or Girdzis. The defendant did not appear to be acting strangely; he appeared to be rational and to understand what was being said.

Following this encounter, the defendant walked away, seemingly leaving the work zone, but, in fact, he merely walked around to the other side of the truck and stood near the passenger side door. Meanwhile, Girdzis and the victim had begun walking toward the trench. After a few seconds, the defendant looked up and down the street and, seeing the street empty, proceeded to walk back around the truck and reapproach the victim. In a matter of seconds, the defendant, without saying a word, removed a revolver from his pocket and shot the victim several times. The victim ultimately died from gunshot wounds.

Immediately after the shooting, the defendant began running up the street, zig-zagging across it several times. Several of the victim's coworkers chased the defendant on foot. The defendant, seeing that he was being pursued, stopped momentarily at a parked pickup truck and opened its door but then quickly shut it again and resumed running up the street. The coworkers continued chasing the defendant until he ran in between two houses.

Members of the Bridgeport Police Department soon arrived on the scene and began canvassing the area. The defendant eventually was located by Officer Darryl Wilson, who found the defendant hiding in some tall bushes in a backyard. Wilson ordered the defendant to show his hands, at which point the defendant began to run. Wilson ordered the defendant to stop and again demanded that he show his hands. The defendant complied. Upon observing the revolver in the defendant's hand, Wilson ordered the defendant several times to

drop the weapon and warned the defendant that he was prepared to shoot if the defendant did not comply. After repeating this order, the defendant dropped his weapon. Additional police units arrived a few seconds later, and the defendant was arrested. As he was being arrested, the defendant mumbled something to the effect of, "it's all messed up" or "I messed up."

Following his arrest, the defendant was led out from behind the house and into the street, at which point Lieutenant Christopher LaMaine heard the defendant state spontaneously that he had been involved in a "labor dispute." When approached by LaMaine, the defendant again claimed that there had been a "labor dispute." After advising the defendant of his constitutional rights, which the defendant waived, LaMaine questioned him. The defendant seemed to have difficulty focusing, putting his thoughts together, and answering LaMaine's questions fully, and, at times, he rambled on incoherently, causing LaMaine to suspect that the defendant either had a mental illness or was under the influence of phencyclidine (PCP). Upon further questioning, the defendant stated that the victim was a foreman and was not "letting anyone out here work" and that he had shot the victim to settle this dispute.

The defendant subsequently was transported to the police station, where he was interviewed by Detective Paul Ortiz and another detective.[6] As Ortiz observed, there were numerous instances throughout the interview where the defendant either entirely failed to respond to questions or gave less than responsive answers, and some of his statements seemed disorganized. Given his interactions with the defendant, Ortiz thought it was appropriate to have him evaluated at a

[6] A video recording of the police interview was admitted into evidence at trial.

hospital for possible mental health or drug problems. Nevertheless, the defendant appeared to understand the detectives' questions. He admitted to shooting the victim and expressed remorse for it. He stated that he had been looking for a job and felt that the victim had "brushed [him] off." Following the interview, the defendant was transported to Bridgeport Hospital for evaluation and, the next day, was remanded to the custody of the Commissioner of Correction. Additional facts will be set forth as necessary.

The defendant subsequently was charged with, inter alia,[7] murder, criminal possession of a firearm, and carrying a pistol without a permit. The defendant elected to be tried by a three judge court and raised the affirmative defense of mental disease or defect pursuant to General Statutes § 53a-13 (a), otherwise known as the insanity defense. "This defense has both a cognitive and a volitional prong. . . . Under the cognitive prong [of the insanity defense], a person is considered legally insane if, as a result of mental disease or defect, he lacks substantial capacity . . . to appreciate the . . . [wrongfulness] of his conduct. . . . Under the volitional prong, a person also would be considered legally insane if he lacks substantial capacity . . . to [control] his conduct to the requirements of law." (Citation omitted; internal quotation marks omitted.) *Porter* v. *Commissioner of Correction*, 120 Conn. App. 437, 449–50 n.17, 991 A.2d 720, cert. denied, 298 Conn. 901, 3 A.3d 71 (2010). The matter subsequently was tried to the court over the course of two days.

In its oral decision, the court rejected the defendant's insanity defense and found him guilty of the charged offenses. With respect to the insanity defense, the court

[7] The defendant also was charged with stealing a firearm in violation of General Statutes § 53a-212 (a). The state entered a nolle prosequi with respect to this count.

found that there was credible evidence that the defendant did suffer from a mental disease or defect, specifically, psychosis of an unspecific nature. Nevertheless, the court determined that the defendant had failed to establish that, as a result of his psychosis, he lacked substantial capacity to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

With regard to the volitional prong in particular—the only prong at issue in this appeal—the court found that "the defendant's mental disease did not diminish his ability to conform his behavior. The defendant's actions in shooting [the victim] were not borne out of his psychosis. Simply put, he was acting out of frustration and anger. The defendant was faced with a multitude of stressful and emotional hurdles in his life not of a psychiatric nature which motivated his actions that day. . . . The evidence suggests that he made overtures for a job, and when he was directed to make an application elsewhere, he felt rebuffed and in his own words, felt that he had been brushed off." The court further found that the defendant had obeyed police commands and that "there was nothing remarkable, untoward or aberrant about the defendant's conduct" during the police interview.[8] On the basis of these findings, the court determined that "the credible evidence [did] not support a finding that as a result of his mental disease, the defendant lacked the substantial capacity to control his conduct within the requirements of the law." The court rendered judgment accordingly and sentenced the defendant to a total effective term of imprisonment of forty-five years. This appeal followed.

[8] The original language from the transcript of the court's oral decision provides, "there was nothing remarkable, untoward or *admirant* about the defendant's conduct." (Emphasis added.) In response to the defendant's motion for rectification, the court, *Kavanewsky, J.*, corrected the word "admirant" to "aberrant."

I

On appeal, the defendant first claims that the court's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence. He argues that the court improperly rejected his expert witnesses' conclusions that he lacked substantial capacity to conform his conduct within the law. He further argues that the court made certain clearly erroneous findings of fact.[9] We disagree.

As an initial matter, we set forth our standard of review. "The evaluation of . . . evidence on the issue of legal insanity is [within] the province of the finder of fact . . . . We have repeatedly stated that our review of the conclusions of the trier of fact . . . is limited. . . . This court will construe the evidence in the light most favorable to sustaining the trial court's [judgment] and will affirm the conclusion of the trier

[9] The defendant also argues that the court "unreasonably ignored the totality of the record." This argument lacks merit. "[T]he trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [W]e are not justified in finding error upon pure assumptions as to what the court may have done. . . . We cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found. . . . Unless the contrary appears, this court will assume that the court acted properly." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 229, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

In the present case, the defendant does not point to any specific evidence that the court purportedly failed to consider. The defendant merely speculates that the court considered only a fraction of the evidence presented at trial and asserts, in a conclusory fashion, that the court therefore "ignore[d] a vast array of undisputed facts." The court expressly stated in its oral decision, however, that it had "reviewed and considered all applicable statutes, testimony, exhibits, and arguments of counsel in deliberations upon this matter." "Ultimately, the court was not required to mention [any specific piece of evidence] because [t]he [trier of fact] can disbelieve any or all of the evidence on insanity . . . ." (Internal quotation marks omitted.) *State* v. *Campbell*, 169 Conn. App. 156, 166, 149 A.3d 1007, cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016). Because the defendant has failed to show otherwise, this court will assume that the trial court acted properly.

of fact if it is reasonably supported by the evidence and the logical inferences drawn therefrom. . . . The probative force of direct and circumstantial evidence is the same. . . . The credibility of expert witnesses and the weight to be given to their testimony and to that of lay witnesses on the issue of sanity is determined by the trier of fact. . . .

"The affirmative defense of mental disease or defect is codified in . . . § 53a-13 (a) and provides that [i]n any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. Whereas an *affirmative defense* requires the defendant to establish his claim by a preponderance of the evidence, a properly raised *defense* places the burden on the state to disprove the defendant's claim beyond a reasonable doubt." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Campbell*, 169 Conn. App. 156, 161–62, 149 A.3d 1007, cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016).[10]

[10] The state argues that our standard of review of the rejection of a defendant's affirmative defense is limited. According to the state, where the evidence was sufficient to prove that the defendant committed the charged offenses, "analysis of the evidence presented in support of his defense is unnecessary and inappropriate." This argument is inconsistent with controlling case law. Numerous decisions of both our Supreme Court and this court confirm that, in reviewing the fact finder's rejection of a defendant's affirmative defense, we consider the evidence presented at trial concerning the defendant's affirmative defense and determine whether, on the basis of that evidence, the fact finder's rejection of the defense was reasonable. See, e.g., *State* v. *Patterson*, 229 Conn. 328, 334–42, 641 A.2d 123 (1994) (summarizing evidence on defendant's affirmative defenses and concluding that, "because the court's rejection of the defendant's affirmative defenses is reasonably supported by the evidence, his claim must fail"); *State* v. *Campbell*, supra, 169 Conn. App. 161–68 (summarizing evidence regarding defendant's mental state and concluding that defendant "failed to meet his burden of establishing that the court's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence");

To the extent that the defendant challenges the court's factual determinations, "[o]ur review . . . is limited to whether those findings are clearly erroneous. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is *no evidence in the record* to support it or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Altayeb*, 126 Conn. App. 383, 387–88, 11 A.3d 1122, cert. denied, 300 Conn. 927, 15 A.3d 628 (2011).

The following additional facts are relevant to this issue. In support of his affirmative defense, the defendant presented the testimony of two expert witnesses, David Lovejoy and Paul Amble, both of whom produced written evaluations that were admitted into evidence.[11] Lovejoy, a board certified neuropsychologist hired by the defense, examined the defendant on three separate occasions in July, September, and November, 2015. Lovejoy also reviewed a variety of records, conducted interviews with the defendant's wife and two of his friends, and watched the video recording of the police interview.

According to Lovejoy, the defendant and his wife reported that in the two years leading up to the offense, the defendant had been experiencing multiple ongoing

see also *State* v. *Steiger*, 218 Conn. 349, 376, 590 A.2d 408 (1991) (in appeal challenging trial court's rejection of defendant's affirmative defenses of insanity and extreme emotional disturbance, Supreme Court, "[t]o consider these claims properly . . . must necessarily summarize the voluminous evidence presented by the defendant and the state concerning the defendant's mental state").

[11] The defendant also produced a photograph of himself taken on the day of the offense, as well as his Bridgeport Hospital medical records, both of which were admitted into evidence without objection.

stressors. Lovejoy's evaluation revealed that the defendant had lost his job as a truck driver in 2013 and that he had remained unemployed thereafter, despite continuing efforts to secure employment. Following the loss of his job, the defendant began drinking heavily, which resulted in criminal charges for operating a motor vehicle while under the influence of intoxicating liquor or drugs. In January, 2015, the defendant, aware that there was a warrant out for his arrest in connection with these charges, turned himself in to authorities. The defendant remained in prison until his wife was able to secure a bail bond in March, 2015—shortly before the offense in question took place. According to the defendant's representations to Lovejoy, after his release from prison, he began to worry about his family's finances and, over time, started to "feel crazy" and experience thoughts of suicide. (Internal quotation marks omitted.)

According to Lovejoy, "[i]nformation collected during the clinical interviews with [the defendant] and the collateral interviews with his wife and friends indicated that [the defendant] began to decompensate psychiatrically, beginning on [March 22 or 23, 2015]. Strange behaviors, disrupted sleep, ruminative pacing, tangential and confused thinking, and moments of appearing 'spaced out' were observed by those who were with him." The defendant's wife also indicated to Lovejoy that she had observed the defendant begin to espouse paranoid thoughts related to a belief that she wanted to hurt or kill him.

Regarding the defendant's conduct and state of mind later that week, Lovejoy's interviews with the defendant revealed that "[b]y the evening [before and/or morning of the offense, the defendant] appeared to be under the influence of strong beliefs that were not based in reality (delusions)." More specifically, the defendant reported to Lovejoy that he had begun to believe that he was

receiving messages via flashing lights emanating out of his computer screen. In Lovejoy's view, "[t]hese beliefs had become a prominent part of [the defendant's] clinical presentation, at that time." The defendant also reported to Lovejoy that he had begun to hear voices that made critical comments about him. He described these voices as sounding like "me talking to myself from the inside." (Internal quotation marks omitted.) The defendant further represented to Lovejoy that, by the night before the offense, he had resolved to kill himself because he "was tired of trying to get [his] thoughts together and . . . wanted the voices to go away," but he decided against doing it at that time because he did not want his wife and daughter to have to find his body in the house. (Internal quotation marks omitted.)

Lovejoy's interviews with the defendant further revealed that, by the morning of the offense, "auditory hallucinations, delusions and suicidal thinking were present and appeared to be overarching influences on [the defendant's] thinking and behavior." More specifically, the defendant reported to Lovejoy that, on the morning of the offense, he had believed that the flashing lights from his computer screen were sending him a message indicating, "[g]et your gun. You are worthless and others are evil." (Internal quotation marks omitted.) The defendant reported that the message also had indicated that he would receive additional messages from lights outside of his home. The defendant reported that, by this point, he had decided to kill himself at a local cemetery. He further reported, however, that he came upon a construction site displaying a range of colored lights that were flashing at him and that these lights and the voices inside of him told him to stop. According to the defendant, a person at the construction site fixed his eyes on him and then looked to another man with "an evil intent," at which time the lights conveyed to

the defendant that this person was dangerous and that he should shoot him.

In addition to interviewing the defendant and collateral sources, Lovejoy also reviewed the defendant's medical records from after the offense. Regarding the defendant's Bridgeport Hospital records, which were admitted into evidence at trial, Lovejoy noted that mental health experts there had diagnosed him with "psychosis not otherwise specified" and that his Global Assessment of Functioning score indicated "the presence of very severe psychiatric symptoms and associated functional impairments." Lovejoy further noted that the hospital records described a number of symptoms consistent with a thought disorder, including tangential thinking, thought blocking, confused and disorganized thinking, the inaccurate interpretation of reality, suspicious and paranoid thinking, difficulty following conversations and responding to questions, a poverty of speech, and impaired impulse control. The defendant also was observed to be internally preoccupied and staring suspiciously. Regarding the defendant's medical records from the Department of Correction (department), Lovejoy testified that they were largely, but not entirely, consistent with the hospital records.[12] Lovejoy testified that, early on in the defendant's treatment at the department, a psychiatrist, Allison Downer, had suspected that the defendant may have been exaggerating or fabricating his mental health symptoms.[13] Lovejoy surmised, however, that Downer

[12] The defendant's medical records from the department were not in evidence, although they were reviewed by both experts.

[13] In his written evaluation, Amble provided excerpts of the relevant portions of the defendant's medical records from the department. According to Amble, Downer completed an initial psychiatric evaluation of the defendant on March 31, 2015, and noted: "While he presented as odd, the undersigned believes his behavior was intentional as he is trying to feign mental illness to avoid penalty for alleged charges. He was avoidant of eye contact and while seated, [seemed] to be, 'coming in and out,' of different states of orientation and confusion. The mood is euthymic and with odd, bizarre affect. Denies auditory or visual hallucinations, denies suicidal or homicidal

likely had not reviewed the defendant's hospital records nor conducted any collateral interviews.

Finally, as part of his evaluation, Lovejoy also conducted psychological and neuropsychological testing on the defendant. Lovejoy testified that this testing gave no indication that the defendant had been exaggerating his cognitive complaints or had been attempting to fabricate or exaggerate his psychiatric symptoms. According to Lovejoy, the testing revealed the presence of likely delusions, auditory hallucinations, and a tendency to experience confused thinking, which was consistent with the defendant's self-report of his psychological and psychiatric symptoms.

On the basis of the foregoing information, Lovejoy testified that his overall opinion was that, at the time of the offense, the defendant had been suffering from a psychotic disturbance that significantly influenced his thinking and behavior, although he was not able to arrive at any specific diagnosis for the defendant. Although he did not opine in his written evaluation as to whether this psychotic disturbance had impacted the defendant's ability to conform his conduct to the law, upon questioning by defense counsel, Lovejoy testified that the defendant's "psychotic disorder did impact him in that way."

Amble, a board certified forensic psychiatrist hired by the state, also testified for the defense. Amble evaluated the defendant for three and one-half hours in April,

ideation." According to Amble, on April 6, 2015, Downer further noted: "In light of collateral information, past custody records and presentation over his time in the infirmary, it can be stated with confidence [that the defendant] does not suffer with a mental illness and is not in acute risk of hurting himself or others. With the exception of the initial encounter, [the defendant] has been clear, logical and coherent, manifesting no symptoms of mood or psychotic disturbance. Informed him he would be discharged and he will continue to be seen by mental health for supportive intervention with psychotropic intervention to be employed if deemed necessary."

2016. Amble reviewed the same reports, records, and video recording reviewed by Lovejoy and interviewed the same collateral sources. He also reviewed Lovejoy's written evaluation.

Amble testified that the information he obtained during his interviews with the collateral sources was consistent with that reported by Lovejoy. The defendant's account of his symptoms and the circumstances surrounding the offense, as reported in Amble's written evaluation, were also generally consistent with that provided to Lovejoy, but it also included some additional information. Regarding his auditory hallucinations, the defendant reported to Amble that he had first begun to hear voices while still incarcerated on the operating a motor vehicle while under the influence charges. He also reported that these voices had indicated to him on multiple occasions that he should kill himself, and on the morning of the offense he heard his own voice confirming the plan. The defendant further reported that, in addition to the auditory hallucinations, he also had experienced visual hallucinations in the form of his deceased father. Most notably, upon questioning by Amble as to what exactly had prompted him to shoot the victim,[14] the defendant reported that, at the time of the offense, he had perceived himself to be possessed by a demon and that, afterward, he had continued to be possessed until "people in jail prayed over [him] and release[d] the demon." (Internal quotation marks omitted.)

On the basis of his review of the records, Amble concluded that the department's diagnosis of psychosis

[14] Specifically, Amble asked the defendant, "[d]id you feel your body was overtaken by an evil spirit who took control of you and shot the man?" (Internal quotation marks omitted.) The defendant responded affirmatively. When asked to explain, the defendant initially stated that "something from the devil" had taken control of his body and fired the gun. (Internal quotation marks omitted.) Upon further probing, the defendant clarified that he perceived himself to be possessed by a demon.

not otherwise specified was reasonable, although he was likewise unable to make his own diagnosis. As to the defendant's insanity defense, Amble testified that his overall opinion was that, at the time of the offense, the defendant "had some impairments in his ability to conform his conduct to the law." As Amble explained in more detail in his written evaluation, however, there were several pieces of countervailing information that militated against the veracity of the defendant's claim of insanity.

First, Amble noted that the defendant had failed to share with anyone, including Lovejoy, that he was having severe visual hallucinations and auditory hallucinations while incarcerated prior to the offense. Second, the defendant had never before claimed to have been possessed by a demon until after repeated questioning by Amble. Amble opined that these two pieces of information, taken together, strongly suggested the possibility that the defendant was embellishing his psychiatric symptoms and was providing a malingered explanation for why he shot the victim. Third, the mental health evaluations by Downer at the department drew clear conclusions that the defendant was fabricating symptoms of a mental illness. Fourth, the defendant's account of his symptoms was not typical for individuals with a psychotic illness. Specifically, Amble stated that it was atypical for an individual to experience auditory hallucinations in one's own voice and to experience visual hallucinations as distinctive as those described by the defendant. Finally, Amble raised doubts about the claimed impulsivity of the shooting. He found it curious that, although the defendant purportedly had experienced auditory hallucinations telling him to kill himself on numerous occasions and had intended to do so on the day of the offense, the single hallucination at the construction site was enough to cause him to change his plans and kill somebody else.

Ultimately, Amble concluded that, despite these countervailing considerations, "the sum of the evidence, including reports of the defendant's spouse and friends, the illogical nature of the act, the lack of primary gain, and mental health assessments immediately after the crime concluding that he was suffering from a psychiatric illness, provide[s] a sufficient basis to conclude that the defendant lacked substantial capacity to control his conduct at the time of his crime." In response to questioning by the court, Amble clarified that his conclusion was "[t]o some extent based on [the defendant's own] report" but also noted that the collateral information was "very important." He also attributed moderate weight to what he described as the seemingly illogical, senseless nature of the shooting.

In rebuttal to the defendant's insanity defense, the state relied on its cross-examination of the defendant's two experts and the evidence adduced in its case-in-chief. A significant portion of the state's cross-examinations was focused on the possibility that the defendant's mental state had been caused by the use of PCP or "bath salts."[15] See General Statutes § 53a-13 (b) ("[i]t shall not be a defense under this section if such mental

[15] Evidence pertaining to the possible use of PCP or bath salts is as follows. The defendant reported to Lovejoy that he had "experimented with substances such as cocaine, hallucinogens and PCP" but that "he did not like the way that he felt after taking the substances and did not continue [using them]." According to Amble, one of the defendant's friends whom he interviewed—identified only by the nickname "Dread"—claimed that the defendant's wife had mentioned to Dread that she had smelled PCP on the defendant's breath two weeks before the incident. At this point in the telephonic interview, the call was disconnected, and Amble's subsequent attempts to contact Dread were unsuccessful. As Amble noted, the defendant's wife denied any awareness of the defendant having used PCP. In summarizing the defendant's medical records, Amble also noted that there was a notation in the department's records indicating that a urine toxicology screen performed at Bridgeport Hospital had tested positive for PCP, which, as Amble recognized, directly contradicted the Bridgeport Hospital records. In an attempt to resolve this discrepancy, Amble contacted the individual at the department who had made the notation. According to Amble, she could not recall why she had made that notation.

disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof"). Nevertheless, the state also challenged the experts' conclusions regarding the defendant's ability to control his conduct. On cross-examination, Lovejoy conceded that not all people who suffer from psychotic symptoms lose the ability to control their conduct within the requirements of the law and that the majority of people who suffer from some sort of psychosis do not come into contact with the law. Regarding his familiarity with the meaning of the statutory insanity defense, Lovejoy acknowledged that it was "difficult for [him] to separate conceptually in [his] head" the cognitive and volitional prongs because "[f]or [him] the notion of understanding the wrongfulness of your action and the notion of being in control of your actions when you are separated from reality are somewhat intertwined . . . ." Lovejoy agreed that this was "sort of a philosophical difference from the way the law is written."

Amble likewise conceded on cross-examination that a psychosis does not necessarily impair a person's ability to control his or her conduct within the requirements of the law and that the majority of people experiencing their first episode of psychosis do not commit violent acts. Amble further conceded that the fact that a crime is poorly thought out does not necessarily indicate that it is a product of psychosis. Similarly, Amble agreed that the fact that someone may have reacted violently to

At trial, Amble conceded that the defendant's behavior around the time of the shooting could also be consistent with PCP use or with the use of "bath salts," also known as "synthetic marijuana." According to Amble, synthetic marijuana "has a much more potent . . . psychogenic effect on individuals [than marijuana]," and it is commonly used by people who know that they are going to be subjected to drug testing because there is not a readily available, reliable test for it. Ultimately, however, the trial court found that there was insufficient evidence to conclude that the defendant's mental state had been the product of PCP use.

an apparently minor slight does not necessarily indicate that he was operating under the influence of a psychosis. Moreover, in response to questioning by the court, Amble agreed that people who act illogically and commit illogical acts are not necessarily unable to conform their behavior to the requirements of the law. He also acknowledged that there was some evidence that the defendant had "mention[ed] something about a labor dispute at the time of his arrest" but stated that, from the information that Amble had, this "didn't seem to make sense."[16]

A

The defendant first argues that the court arbitrarily rejected Lovejoy and Amble's expert opinions that the defendant lacked substantial capacity to control his conduct within the requirements of the law. According to the defendant, there was no conflicting evidence adduced at trial to undermine the experts' opinions, and, thus, the court had an insufficient basis to reject them. We disagree.

Preliminarily, we set forth the standard for reviewing a fact finder's rejection of expert testimony. "It is well established that [i]n a case tried before a court, the [panel of judges] is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *State*

[16] Regarding the "labor dispute" explanation he had given to LaMaine, the defendant told Amble, "[i]t was like I was a mechanic and this was a labor dispute." (Internal quotation marks omitted.) When asked what was specifically in his mind at the time of the offense, he responded, "I don't know where [this explanation] came from and why." (Internal quotation marks omitted.)

v. *Campbell*, supra, 169 Conn. App. 165. "The trier may not, however, arbitrarily disregard, disbelieve or reject an expert's testimony in the first instance. . . . There are times . . . that the [fact finder], despite his superior vantage point, has erred in his assessment of the testimony. . . . Where the [panel] rejects the testimony of a plaintiff's expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 244, 963 A.2d 943 (2009).

"[I]n its consideration of the testimony of an expert witness, the [fact finder] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them. . . . [T]he [fact finder] can disbelieve any or all of the evidence on insanity and can construe that evidence in a manner different from the parties' assertions. . . . It is the trier of fact's function to consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Campbell*, supra, 169 Conn. App. 165; see also *State* v. *Cobb*, 251 Conn. 285, 490, 743 A.2d 1 (1999) ("the state can weaken the force of the defendant's presentation by cross-examination and by pointing to inconsistencies in the evidence" [internal quotation marks omitted]), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). "The fact, therefore, that both of the defendant's expert witnesses supported his claim of insanity while the state chose to call no expert witnesses, but rather principally relied on cross-examination of the defendant's expert witnesses, does not require a determination that the trier of fact reasonably could not have

concluded that the defendant had failed to prove insanity by the required standard." *State* v. *DeJesus*, 236 Conn. 189, 201, 672 A.2d 488 (1996).

In its oral decision, the court explicated that it was unpersuaded by the experts' testimony because it found that the defendant had (1) "had a perceived motivation, a reason, to commit these crimes," i.e., to seek retribution for having been "brushed off"; (2) obeyed police commands immediately after the shooting and behaved appropriately in the subsequent police interview; and (3) "willingly either fabricated or embellished his symptoms selectively over time."[17] As discussed, in a trial to the court, the court acts as the fact finder to "consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances." (Internal quotation marks omitted.) *State* v. *Campbell*, supra, 169 Conn. App. 167. We conclude that the court properly considered, sifted, and weighed the evidence.

Our review of the record leads us to conclude that the court's decision was based on its reasonable assessment of the evidence presented. Preliminarily, we note that the court did not merely find that the defendant had failed to prove that he lacked substantial capacity

[17] In discussing its rejection of the experts' opinions, the court observed that "their testimony and . . . reports show at least as much divergence as they do uniformity in the basis for their opinions." The defendant argues that "this observation does not justify rejecting both experts' conclusions." We conclude that this claim is inadequately briefed. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018). The defendant devotes less than one page of his brief to his claim, provides no legal authority to support it, and fails to adequately explicate the basis for it. See id., 344–45, and cases cited therein. Accordingly, we decline to address this claim.

to control his conduct as a result of his psychosis. The court also found that the defendant had been acting under the influence of "a multitude of stressful and emotional hurdles in his life *not of a psychiatric nature*," and, thus, it affirmatively found that "the defendant's mental disease did not diminish his ability to conform his behavior." (Emphasis added.).[18] This conclusion directly conflicts with Lovejoy and Amble's opinions. Therefore, the court, as the finder of fact, was entitled to adopt this nonpsychiatric explanation for the defendant's conduct and, accordingly, to reject the expert opinions. Moreover, given the experts' reliance on the defendant's own account of his symptoms and the events surrounding the shooting, it was reasonable for the court to conclude that the experts' opinions were undermined by the court's finding that the defendant intentionally had either embellished or fabricated psychiatric symptoms over time. See *State* v. *Patterson*, 229 Conn. 328, 338, 641 A.2d 123 (1994) (trial court reasonably rejected expert opinion because opinion was based on "generally self-serving interview statements of the defendant and his family members"); *State* v. *Medina*, 228 Conn. 281, 310, 636 A.2d 351 (1994)

[18] The defendant argues that the court's ultimate conclusion that his mental illness did not diminish his ability to control his behavior is not reasonably supported by the evidence. More specifically, the defendant contends that this conclusion is not logically supported by the court's subsidiary findings of fact—namely, that he greeted and exchanged pleasantries with the construction workers, made overtures for a job, and behaved appropriately during the police interview—because these findings are not necessarily inconsistent with a conclusion that the defendant was legally insane. In other words, the defendant's position appears to be that, in order to reasonably infer that he was legally sane from circumstantial evidence of his state of mind, such evidence must be so strong as to exclude every other possible inference. This argument plainly lacks merit, as it contravenes the well-established principle that "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis." (Internal quotation marks omitted.) *State* v. *Berthiaume*, 171 Conn. App. 436, 444, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017).

(because state elicited on cross-examination of defendant's experts that state medical personnel had concluded that defendant was malingerer who did not suffer from serious mental illness, jury was free to credit such conclusion and reject expert testimony).

With respect to Lovejoy in particular, the court reasonably could have found his opinion to be unworthy of belief due to inconsistencies in the defendant's version of events.[19] It is clear from his testimony and written evaluation that Lovejoy credited and viewed as significant the defendant's explanation that he had shot the victim because of a delusional belief that the victim was dangerous and should be shot. The court, however, found that the defendant had shot the victim because he felt brushed aside after inquiring about employment opportunities—not because he was laboring under any delusional beliefs. If an expert's opinion of the defendant's mental state at the time of the offense is based in part on information obtained from the defendant himself during the expert's interview with him, the fact finder may reasonably discredit this opinion if it finds the defendant's account to the expert to be inconsistent with other evidence adduced at trial. See *State* v. *Cannon*, 165 Conn. App. 324, 337, 138 A.3d 1139 ("the inconsistencies in the defendant's [trial] testimony further weakened [the expert's] . . . assessment of the defendant's state of mind because [the expert's] opinion, developed by interviewing the defendant, relied on the assumption that the defendant's version of events was accurate"), cert. denied, 321 Conn. 924, 138 A.3d 285 (2016); see also *State* v. *Crespo*, 246 Conn. 665, 680–81, 718 A.2d 925 (1998) (because expert opined that defendant had been suffering from disorder characterized by tendency to be unable to remember events and that this disorder rendered him unable to control his anger in highly stressful situations, trial court reasonably could have discredited expert opinion because court was enti-

[19] See footnote 3 of this opinion.

tled to disbelieve defendant when he told expert that he could not remember killing victim), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); *State* v. *Steiger*, 218 Conn. 349, 381–83, 590 A.2d 408 (1991) (court's rejection of defendant's insanity defense was supported in part by evidence from which trial court reasonably could have determined that at time of offense defendant was not, as he had claimed during interview with expert, in delusional state in which he thought victims were terrorists).

The court also reasonably could have found that the evidence pertaining to Lovejoy's understanding of the statutory insanity test undermined the value of his opinion. As Lovejoy himself acknowledged, he found it difficult to distinguish between the cognitive and volitional prongs of the test. This difficulty appears to be borne out in his written evaluation, in which he opined that the defendant's psychosis had impaired the defendant's capacity to appreciate the wrongfulness of his conduct but made absolutely no mention of the defendant's capacity to *control* his conduct. It was not until Lovejoy explicitly was asked at trial to opine on the volitional aspect of the affirmative defense that he offered an opinion. Given the conclusory nature of this opinion, his failure to offer such opinion in his written evaluation, and his apparent misapprehension of the distinction between the two prongs of the affirmative defense, the court reasonably could have found Lovejoy's opinion to be unpersuasive.

With respect to Amble, the court reasonably could have found that he had failed to account adequately for the defendant's statements to police immediately after the shooting. As indicated in his written evaluation, Amble found the defendant's reason for shooting the victim to be "a mystery" and relied on the apparent "randomness" and "illogical" nature of the shooting to conclude that the defendant lacked substantial capacity to control his conduct at the time of the offense. As Amble clarified at trial, he gave "moderate" weight to

the seemingly senseless, illogical nature of the act. As previously noted, however, the defendant himself told police immediately after the shooting that the victim had not been "letting anyone out [there] work" and that he had shot the victim to settle a perceived "labor dispute." When confronted with this contradictory evidence at trial, Amble's only response was that the defendant's statements to police "didn't seem to make sense."

In light of the weight that Amble placed on the seemingly enigmatic nature of the shooting, the court reasonably could have found Amble's conclusion to be attenuated. See *State* v. *Patterson*, supra, 229 Conn. 338 (trial court's finding that experts had failed adequately to account for defendant's apparently premeditated attack on victim, his efforts thereafter to avoid detection and apprehension, and his calculated attempts to manipulate hospital staff supported court's conclusion that defendant had failed to meet burden of establishing insanity defense).

Because the court's rejection of Lovejoy's and Amble's expert opinions is reasonably supported by the court's findings of fact and the evidence adduced at trial, the defendant's first argument fails.[20]

B

The defendant also argues that some of the court's express subordinate findings of fact are clearly erroneous. Specifically, the defendant assigns as clearly erroneous the court's findings that (1) the defendant shot

[20] Relying on our Supreme Court's decision in *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 112 A.3d 1 (2015), the defendant argues in the alternative that a "reviewing court may assess the reasonableness of a trial court's decision regarding an expert's opinion when it is based not on demeanor but on the foundation of the opinions and the factual record" and that, therefore, "this court is not bound to defer to the [trial court's] rejection of the [opinions of the] experts . . . ." As explained in footnote 22 of this opinion, the de novo review sanctioned in *Lapointe* is limited to factually similar cases involving a trial court's *predictive* assessment of the credibility of expert testimony. This is not such a case.

the victim out of "frustration and anger"; (2) "there was nothing unremarkable, untoward or aberrant about the defendant's conduct [in the police interview]"; and (3) the defendant either fabricated or embellished his symptoms over time. Because there is evidence in the record to support the court's factual findings and we are not left with the definite and firm conviction that a mistake has been made, we conclude that these findings are not clearly erroneous.

The defendant first contends that the court's finding that he shot the victim out of frustration and anger "is not supported by the testimony of any witness." In support of this argument, the defendant points out that, not only did none of the victim's coworkers testify that the defendant had appeared angry, their testimony suggested the opposite—that there was "nothing unusual" about the defendant's demeanor during his initial interaction with the victim and Girdzis and there did not appear to be any argument or altercation between the defendant and any of the victim's coworkers. The defendant also notes that it was Girdzis and not the victim who had directed the defendant to fill out an application at the construction company's office.

As to the defendant's state of mind in the period leading up to the offense, the defendant's wife reported to Lovejoy that, after losing his job in 2013, the defendant began on a downward emotional spiral characterized by significant depression and feelings of hopelessness about his future. She further reported that the defendant had become increasingly desperate for work in 2014 and that, upon his release from prison in March, 2015, he quickly became overwhelmed by financial pressures. The defendant's wife provided Amble with a similar account of the defendant's financial and emotional circumstances. Moreover, the defendant himself reported to Lovejoy that he had begun to worry about his family's finances and his failures in life upon leaving prison and that he had felt as though he had failed his family and was responsible for the stress

in their lives. Similarly, Lovejoy testified that the defendant had reported experiencing significant financial distress related to his lack of employment, the potential foreclosure of his home, and his bail bond obligation. Given this evidence, it was reasonable for the court to find that the defendant had been facing a "multitude of stressful and emotional hurdles in his life not of a psychiatric nature . . . ."

After the offense, the defendant stated in his interview with Detective Ortiz that he had been out of work for more than a year and that, after approaching the victim and his coworkers looking for a job, "they sent [him] to the office." When asked by Ortiz whether the victim had said anything that upset him, the defendant responded, "he did, he brushed me off." Similarly, Detective LaMaine testified that, immediately after being apprehended, the defendant had stated that the victim was not "letting anyone out here work" and that he had shot the victim to settle a "labor dispute."[21] Given the defendant's preexisting anxiety and depression regarding his prolonged unemployment, his perception of the victim's response as a slight, his characterization of their interaction as a dispute, and his

[21] LaMaine also testified that the defendant had stated that he was employed as a mechanic by a company called "AA." There was no evidence presented at trial to indicate that the defendant had ever worked as a mechanic or for a company called "AA," which fact the defendant cites on appeal as an indication of his delusional thinking at the time of the shooting. The only mention of "AA" in the record is in Lovejoy's written evaluation. The defendant reported to Lovejoy that, on the night before the shooting, he had been placing pages from a phone book into neighbors' mailboxes in the belief that the pages represented messages. According to Lovejoy, the defendant believed that one of these messages related to "AA Automotive." As the defendant appears to suggest, this evidence reasonably might be construed to support the defendant's contention that he was delusional at the time of the shooting. The trial court, however, evidently did not find this evidence to be so strong as to preclude its finding that the defendant's actions were motivated by nonpsychiatric factors. Accordingly, to the extent the defendant is arguing that this evidence renders the court's finding clearly erroneous, we disagree.

admission that he shot the victim to settle this dispute, the court could have properly found that it was this perceived slight—as opposed to a psychotic delusion or hallucination—that prompted the defendant to shoot the victim. Consequently, it was reasonable for the court to find that "[t]he defendant's actions in shooting [the victim] were not borne out of his psychosis" and that he was simply "acting out of frustration and anger." The fact that there was no *direct* evidence that the defendant had been *visibly* angry does not render this finding clearly erroneous. See *Keeley* v. *Ayala*, 328 Conn. 393, 419–20, 179 A.3d 1249 (2018) ("[A] finding is not clearly erroneous merely because it relies on circumstantial evidence. . . . [T]riers of fact must often rely on circumstantial evidence and draw inferences from it. . . . Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . In short, the court, as fact finder, may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." [Citation omitted; internal quotation marks omitted.]). Nor does the possibility that the court might have reached a different conclusion, given that it was Girdzis who ultimately responded to the defendant's inquiry, render clearly erroneous the conclusion that the court did reach. See *Skakel* v. *State*, 295 Conn. 447, 543 n.11, 991 A.2d 414 (2010) ("[A]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, [they] examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with [an appellate tribunal's] duty . . . to review, and not to retry, the proceedings of the trial court." [Internal quotation marks omitted.]); *State*

v. *Barnes*, 27 Conn. App. 713, 723, 610 A.2d 689 (under clearly erroneous standard of review, "[t]he issue is not whether the trial court could have reached a different conclusion but whether the conclusion which it did reach is clearly erroneous" [internal quotation marks omitted]), cert. denied, 223 Conn. 914, 614 A.2d 826 (1992).

The defendant next challenges the court's finding that "there was nothing remarkable, untoward or aberrant about the defendant's conduct [in the police interview]." In support of this contention, the defendant notes the extended periods of time during which he was unresponsive and asserts that he appeared distracted and confused during the interview. Because trial testimony and the video recording of the interview support the court's finding, we conclude that it is not clearly erroneous.[22]

[22] The defendant appears to argue that we may review this finding de novo because "[t]here was no live witness whose credibility could only be assessed by the fact finder," and that, therefore, this court is in as good a position as the trial court to assess the defendant's demeanor during the interview. For this proposition, the defendant relies on our Supreme Court's decision in *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 225. We are not persuaded.

In *Lapointe*, the habeas court was tasked with evaluating the materiality of a petitioner's claims under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 266–67. Our Supreme Court applied de novo review when assessing the habeas court's determination "that the testimony of the petitioner's experts, when viewed in light of [the respondent's expert's] testimony, was not sufficiently credible to give rise to a reasonable probability of a different result at the original trial . . . ." Id., 267. Our Supreme Court concluded that the "habeas court's assessment of the testimony of [the petitioner's experts] was not predicated on their demeanor or conduct on the witness stand, nor was it related to anything else that would reflect adversely on their credibility, such as untruthfulness, bias, poor memory or substandard powers of observation. That assessment also was not dependent on any underlying factual findings requiring the trial court's firsthand observation and determination of the credibility or reliability of other witnesses. Rather, the . . . habeas court rejected the opinions of [the petitioner's experts] solely because, in its view, those opinions lacked an adequate foundation, first, because they were premised on facts that were contrary to the record in the case, as reported by [the respondent's expert], and,

As revealed by the video recording and conceded by Detective Ortiz, there were numerous instances during the course of the interview that the defendant either failed to answer the questions asked or gave an unresponsive answer, and some of his statements could rightly be characterized as disorganized. Ortiz also testified, however, that it is not uncommon for defendants to

second, because the court did not credit the scientific underpinnings of those opinions. In such circumstances, when the habeas court's assessment of the expert testimony has nothing to do with the personal credibility of the expert witness but instead is based entirely on the court's evaluation of the foundational soundness of the witness' professional opinion, this court is as well situated as the habeas court to assess that testimony for *Brady* purposes." Id., 268–69. Accordingly, the court saw no reason to defer to the habeas court's assessment of the materiality of the expert testimony. Id., 272.

Importantly, however, our Supreme Court was careful to emphasize that "[its] conclusion . . . [was] limited to the kind of fact-finding that is implicated in the *Brady* context." Id., 272 n.42. That is to say, its conclusion was limited to a habeas court's "predictive or probabilistic judgment as to whether the original jury reasonably might have credited the testimony of the petitioner's experts"; id., 272; as opposed to a "trial court's findings with respect to the underlying historical facts . . . ." (Internal quotation marks omitted.) Id., 273 n.43. As the court explained, "a habeas court's credibility determination [in the context of a *Brady* claim] is not an 'absolute' finding, as the factual findings of the ultimate finder of fact are, but merely is a threshold evidentiary assessment required for the purpose of determining whether the ultimate finder of fact reasonably could credit the evidence . . . ." Id., 272 n.42.

The present case clearly is not one of the rare cases for which *Lapointe* requires de novo review. See id., 307 ("only in the rare case that a litigant can establish that his case is materially similar to [that in *Lapointe*] will he be entitled to de novo review of the lower court's materiality determination"). In the present case, the court heard testimony from Detective Ortiz regarding his interview of the defendant, reviewed the video recording made of that interview, and, on the basis of this evidence, made an "absolute finding" regarding the defendant's conduct and demeanor during the interview. (Internal quotation marks omitted.) See id., 272 n.42. Thus, the court's factual finding does not constitute the sort of predictive or probabilistic judgment at issue in *Lapointe*, and, consequently, the defendant's reliance on *Lapointe* in unavailing. We therefore limit our review to whether that finding is clearly erroneous. See *State* v. *Smith*, 107 Conn. App. 666, 675, 946 A.2d 319 (reviewing for clear error trial court's finding that photographs included in array all matched description of victim's attacker and that defendant's photograph did not stand out from all other photographs in such manner as to influence victim's identification), cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

not be entirely responsive during an interview. Indeed, it is a matter of common knowledge that an individual involved in the commission of a serious offense might understandably be reticent to respond to police questioning; "[triers of fact] are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life . . . ." (Internal quotation marks omitted.) *State* v. *$7379.54 United States Currency*, 80 Conn. App. 471, 476, 844 A.2d 220 (2003). Common sense similarly dictates that inattention and confusion are not necessarily indicative of a mental disease or defect. Moreover, Amble testified that the defendant's unresponsiveness and blank gaze are "such . . . non-specific observation[s] that . . . [these] certainly could be [indicative of psychosis], *and then it might not be*; it all depends." (Emphasis added.) Given this evidence and the great deference we afford the trier of fact's findings in view of its function "to weigh and interpret the evidence before it"; (internal quotation marks omitted) *State* v. *Campbell*, 328 Conn. 444, 487, 180 A.3d 882 (2018); we cannot agree with the defendant's contention that "[n]o reasonable fact finder could view this interview and conclude that the defendant was not experiencing a mental breakdown of some sort at the time."

Finally, the defendant argues that the court's finding that he either fabricated or embellished his symptoms is clearly erroneous because the evidence on which the court based this finding "cannot reasonably be called substantial evidence." This argument clearly lacks merit. "Under the clearly erroneous standard of review, an appellate tribunal does not weigh the quantum of evidence submitted; it simply inquires as to whether there is *any evidence* in the record to support a given finding, or whether the tribunal otherwise is definitely and firmly convinced that a mistake has been made."

(Emphasis added.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 138, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Moreover, "[p]roof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief that the material fact is more probable than not." (Internal quotation marks omitted.) *Patrick* v. *Burns*, 5 Conn. App. 663, 669–70, 502 A.2d 432 (1985), cert. denied, 198 Conn. 805, 504 A.2d 1059 (1986). Because the defendant concedes that there is some evidence of malingering in the record—namely, Downer's notations in the defendant's medical records with the department and Amble's conclusion in his written evaluation—we cannot conclude that the court's finding is clearly erroneous.

The defendant further argues that, even if this finding is not clearly erroneous, it does not logically support the court's conclusion that the defendant's psychosis did not diminish his ability to control his behavior. More specifically, the defendant contends that the fact that he was fabricating or exaggerating his symptoms *after* the offense "does not prove anything about [his] mental state *at the time of the shooting*." (Emphasis in original.) In other words, the defendant appears to be arguing that a fact finder cannot reasonably infer a defendant's mental condition at the time of the offense from evidence of his mental condition at a subsequent time. This argument plainly lacks merit and requires little discussion, as it is well established that a "defendant's state of mind may be proven by his conduct before, during and after the [offense]." (Internal quotation marks omitted.) *State* v. *Douglas*, 126 Conn. App. 192, 204, 11 A.3d 699, cert. denied, 300 Conn. 926, 15 A.3d 628 (2011).

We conclude that the court's express subordinate findings of fact are reasonably supported by the evidence. Moreover, the defendant has failed to meet his

burden to establish that the court's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence.

II

The defendant additionally claims that the court "erred as a matter of law in rendering an opinion on a matter that required expert testimony." The defendant asserts that, once a fact finder determines that a defendant had been suffering from a mental illness, the fact finder cannot make a finding as to whether that illness impaired the defendant's capacity to control his conduct unless there is expert evidence in the record regarding the effects of that illness on the defendant's behavioral controls. The defendant thus appears to argue that, because the court rejected the opinions of Lovejoy and Amble, and the state did not offer any rebuttal expert testimony, the court had no proper basis on which to conclude that "the defendant's mental disease did not diminish his ability to control his behavior." This claim clearly lacks merit.

It is well established that, although "expert testimony is of great assistance, the ultimate issue of sanity, including intent, is decided by the trier of fact." *State* v. *Evans*, 203 Conn. 212, 242, 523 A.2d 1306 (1987). Thus, this court has stated—albeit in the context of a petition by the state for an order of continued commitment of an insanity acquittee pursuant to General Statutes § 17a-593 (c)[23]—that "[t]he ultimate determination of mental illness . . . is a legal decision. . . . Although psychiatric testimony as to the defendant's

[23] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

condition may form an important part of the trial court's ultimate determination, the court is not bound by this evidence. . . . It may, in its discretion, accept all, part, or none of the experts' testimony." (Citation omitted; internal quotation marks omitted.) *State* v. *Damone*, 148 Conn. App. 137, 167 n.13, 83 A.3d 1227, cert. denied, 311 Conn. 936, 88 A.3d 550 (2014); see also *Ciarlelli* v. *Romeo*, 46 Conn. App. 277, 283, 699 A.2d 217 ("[o]ur courts have held that expert testimony is not required to prove . . . that a criminal defendant is sane after he raises an insanity defense"), cert. denied, 243 Conn. 929, 701 A.2d 657 (1997).

Moreover, even if we assume, arguendo, that expert testimony is generally required in such instances, the defendant's argument would still fail. Contrary to the defendant's assertion, there was expert testimony to support the court's ultimate conclusion. As both expert witnesses testified, a psychosis does not necessarily impair an individual's capacity to substantially control his conduct within the requirements of the law. Consequently, the court reasonably could have concluded that, although the defendant had been suffering from a psychosis at the time of the shooting, such psychosis did not impair his capacity to control his conduct within the requirements of the law.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TIMOLYN DUNBAR
(AC 40924)

DiPentima, C. J., and Alvord and Flynn, Js.

Syllabus

The defendant, who had been on probation in connection with her conviction of the crimes of sale of narcotics and failure to appear in the first degree, appealed to this court from the judgment of the trial court finding her in violation of her probation. During her probation, the defendant was arrested in connection with her alleged sale of narcotics to a confidential

informant. H, a police detective and member of a narcotics task force, arranged for the confidential informant to make a controlled purchase of crack cocaine. During the transaction, H and other task force members kept the informant under constant surveillance. From a distance of 100 feet, H observed a woman approach the confidential informant and engage in a hand-to-hand drug transaction. As the seller walked away, she approached H's location, walking past him at a distance of approximately five feet. The confidential informant later provided H with a written statement about the drug transaction and told H the name by which the seller had identified herself. After learning the possible identity of the seller from a fellow police officer, H entered the information into a probation database, obtained a photograph of the defendant and immediately identified her as the seller. During the evidentiary phase of the violation of probation hearing, H identified the defendant in court as the seller of the crack cocaine. H also testified as to the reliability of the confidential informant and the details of the drug transaction, including how the seller had identified herself to the informant. The trial court also admitted, without objection, the photograph of the defendant from the probation database. At the conclusion of the hearing, the trial court found that the defendant had violated the condition of her probation that she not violate any criminal law of the United States or this state. On the defendant's appeal to this court, *held*:

1. The trial court's finding that the defendant violated her probation was not clearly erroneous and was supported by sufficient evidence and testimony in the record; that court properly relied on and was free to credit H's testimony regarding the drug transaction and his identification of the defendant as the seller of the crack cocaine, as the weight to be given to the evidence and credibility determinations were solely within the province of the court as the trier of fact.
2. The record was inadequate to review the defendant's unpreserved claim that her right to due process was violated because the trial court failed to conduct an analysis pursuant to *Neil* v. *Biggers* (409 U.S. 188) concerning the reliability of H's out-of-court identification of the defendant, which was based on the photograph of the defendant that H had obtained from the probation database: the defendant did not move to suppress or object to the admission of the subject photograph, or ask the court to conduct an analysis pursuant to *Neil*, and, therefore, the trial court did not make any factual findings concerning the suggestiveness of the identification procedure or the reliability of the out-of-out identification by H, which rendered the record inadequate for review of the claim pursuant to *State* v. *Golding* (213 Conn. 233); moreover, because the defendant's due process challenge to the out-of-court identification was not reviewable, her derivative claim that H's in-court identification of her violated her right to due process because it was irreparably tainted by the state's use of the unnecessarily suggestive out-of-court identification procedure necessarily failed as well.

3. This court declined to review the defendant's unpreserved claim that her due process right to confront an adverse witness was violated when H testified at the violation of probation hearing about how the seller had identified herself to the confidential informant during the drug transaction, which was based on her claim that the trial court had failed to balance her interest in confronting the confidential informant against the state's reasons for not producing the informant at the hearing and the reliability of the proffered hearsay; at the hearing, the defendant did not object to that testimony or specifically argue that the identification violated her due process right as a result of the inability to confront the adverse witness, nor did she request that the trial court conduct a balancing test pursuant to *State* v. *Shakir* (130 Conn. App. 458), and, therefore, she failed to sustain her burden of establishing an adequate record for review of her unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233).

Argued January 10—officially released March 19, 2019

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Holden, J.*, denied the defendant's motion for disclosure of the identity of a confidential informant; thereafter, the matter was tried to the court; judgment finding the defendant in violation of probation, from which the defendant appealed to this court. *Affirmed.*

David B. Bachman, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Nicholas J. Bove, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Timolyn Dunbar, appeals from the judgment of the trial court finding her in violation of her probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that

(1) the court improperly found a violation of probation on the basis of insufficient evidence, (2) her right to due process was violated by the identification procedures used in this case and (3) her right to due process was violated when the court denied her the right to confront an adverse witness. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. On December 2, 2011, the defendant was sentenced to fifteen years of incarceration, execution suspended after three years, and three years of probation following her guilty plea and conviction for selling narcotics in violation of General Statutes § 21a-277 (a) and failure to appear in the first degree in violation of General Statutes § 53a-172. The defendant was released from the custody of the Commissioner of Correction on February 14, 2014, and signed her conditions of probation five days later. These conditions included the standard requirement that the defendant not violate any criminal law of the United States or Connecticut.

In 2015, Mark Heinmiller, a detective with the Westport Police Department, was a member of the Southwest Narcotics Task Force (task force).[1] On December 10, 2015, Heinmiller spoke with a confidential informant and set up a controlled purchase of crack cocaine. Heinmiller personally had used this confidential informant approximately thirty times in the past and described this individual as "proven and very reliable."

Later that day, Heinmiller and other members of the task force observed the defendant approach the confidential informant in the area of Park Avenue and Olive Street in Bridgeport. The defendant provided the confidential informant with crack cocaine in exchange for money. The defendant then left the area, coming within

[1] The court did not set forth a detailed memorandum of decision specifically listing all of the facts set forth herein. On two occasions, however, it specifically stated that Heinmiller was a credible witness.

five feet of Heinmiller as he conducted his surveillance. The confidential informant later provided Heinmiller with a written statement about the drug sale. Heinmiller also noted that the confidential informant had told him that the seller of the crack cocaine identified herself as "Timberlyn" or "Timberland."

At a later date, one of the officers who had participated in the surveillance of this controlled drug purchase attended a meeting of the task force. At this meeting, he informed the other members that the person who had sold illegal drugs to the confidential informant went by the name of "Timberlyn" or "Timberland."[2] Other officers suggested that this person could have been the defendant. Following the meeting, Heinmiller entered the defendant's name into a "probation database" and, using a photograph contained therein, identified her as the seller of the crack cocaine to the confidential informant.

Heinmiller prepared an arrest warrant for the defendant and executed it in March, 2016. The defendant subsequently spoke with Heinmiller. She told him that she could not recall the events of December 10, 2015, and that she was "using drugs" at that time.

The state subsequently charged the defendant with violating her probation pursuant to § 53a-32. The court, *Holden, J.*, found that the defendant had violated the conditions of her probation by violating the criminal laws of this state or the United States.[3] It further ordered

[2] In his report setting forth the details of the drug sale, Heinmiller indicated that the confidential informant had told him that the seller of the drugs identified herself as "Timberlyn" or "Timberland." This report was not admitted into evidence at the violation of probation hearing.

[3] The record does not contain a transcript of the court's decision, as is required by Practice Book § 64-1 (a). Additionally, the defendant failed to take any steps to obtain a decision in compliance with our rules of practice. "In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record." *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 25 n.2, 191 A.3d 212 (2018).

that the defendant continue on probation and that the original sentence remain in effect. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly found a violation of probation on the basis of insufficient evidence. Specifically, she argues that she was identified as the seller of the crack cocaine "entirely on unreliable hearsay from an unknown confidential informant related in court by a law enforcement officer."[4] The state counters that the court properly relied on Heinmiller's testimony regarding his observations of the drug sale and his identification of the defendant as the seller of the crack cocaine to support its conclusion that she had violated her probation. We agree with the state.

As an initial matter, we set forth the relevant legal principles and our standard of review. "[T]he purpose of a probation revocation hearing is to determine whether a defendant's conduct constituted an act sufficient to support a revocation of probation . . . rather than whether the defendant had, beyond a reasonable doubt, violated a criminal law. The proof of the conduct at the hearing need not be sufficient to sustain a violation of a criminal law. . . . Thus, *a probation violation*

In the present case, the ability of this court to review the claims raised by the defendant in this appeal has not been hampered by the failure to comply with our rules of practice. Nevertheless, we remind counsel of the obligation to provide this court with a signed transcript or a written memorandum of decision in accordance with Practice Book § 64-1. See *State* v. *Gansel*, 174 Conn. App. 525, 526 n.1, 166 A.3d 904 (2017).

[4] The defendant also contends that Heinmiller's identification was "tainted by the unnecessarily suggestive procedure utilized by the police" and, therefore, was unreliable and cannot form the basis for the finding that she violated her probation. As we conclude in part II of this opinion, the record is inadequate to review the defendant's claim regarding the identification procedures used in this case. Accordingly, this argument regarding the sufficiency of the evidence also fails.

need be proven only by a preponderance of the evidence." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 139, 170 A.3d 120 (2017).

A violation of probation hearing is comprised of an evidentiary phase and dispositional phase. *State* v. *Preston*, 286 Conn. 367, 375–76, 944 A.2d 276 (2008). "In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Fletcher*, 183 Conn. App. 1, 8, 191 A.3d 1068, cert. denied, 330 Conn. 918, 193 A.3d 1212 (2018); *State* v. *Megos*, supra, 176 Conn. App. 139.

"With respect to the evidentiary phase of a revocation proceeding, [t]o support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 282–83, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018); see also *State* v. *Maurice M.*, 303 Conn. 18, 26–27, 31 A.3d 1063 (2011).

In the present case, Heinmiller arranged for the confidential informant to make a controlled purchase of crack cocaine on December 10, 2015. After placing the order, the confidential informant proceeded to the area of Park Avenue and Olive Street to obtain the drugs. Heinmiller, along with other members of the task force, kept the confidential informant under constant surveillance. From a distance of 100 feet, Heinmiller observed a woman approach the confidential informant and engage in a hand-to-hand drug transaction. As the seller walked away, she approached Heinmiller's location, walking past him at a distance of approximately five feet.

After learning the possible identity of the seller from a fellow officer, Heinmiller entered the information into a database, obtained a photograph of her and "immediately identified her as [the] suspect." Heinmiller also identified the defendant as the seller at the violation of probation hearing.

We cannot conclude that the evidence was insufficient to support the court's finding that the defendant had violated her probation. The court was free to credit Heinmiller's observations and identifications. On the basis of the evidence presented at the violation of probation hearing, the court's finding was not clearly erroneous. See, e.g., *State* v. *Shakir*, 130 Conn. App. 458, 468–69, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). To the extent that the defendant contends that we should disregard Heinmiller's identification, we simply note that the weight to be given to the evidence and credibility determinations are decided solely by the trier of fact. Id., 469. This claim, therefore, must fail.

II

The defendant next claims that her right to due process was violated by the identification procedures used in this case. Specifically, the defendant argues that the court failed to perform the analysis of the reliability

of the out-of-court identification pursuant to *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972),[5] and that, as a result, her federal right to due process was violated.[6] She further contends that the in-court identification by Heinmiller violated her right to due process because it was "irreparably tainted" by the use of an unnecessarily suggestive out-of-court identification procedure.[7] The state counters that the defendant failed to preserve her claim pertaining to the out-of-court identification and that the record is inadequate to review it under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by

[5] Our Supreme Court recently stated: "The test for determining whether the state's use of an unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, [supra, 409 U.S. 196–97], and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and, consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, *the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Harris*, 330 Conn. 91, 101, 191 A.3d 119 (2018).

[6] As noted by the state, subsequent to the filing of the defendant's appellate brief, our Supreme Court issued its decision in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018). In that case, the defendant argued, inter alia, that our Supreme Court should reject the framework of *Neil* v. *Biggers*, supra, 409 U.S. 199–200, for purposes of determining whether article first, § 8, of the Connecticut constitution requires suppression of out-of-court and in-court witness identifications. *State* v. *Harris*, supra, 114–15. After applying the factors established in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), it concluded that our state constitution afforded greater protection than the minimum standard set forth in the federal constitution. *State* v. *Harris*, supra, 116.

[7] See, e.g., *State* v. *Dickson*, 322 Conn. 410, 420, 141 A.3d 810 (2016) (both initial identification, if unduly suggestive, and in-court identification may be excluded if improper procedure in former created substantial likelihood of misidentification), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017).

In re Yasiel R., 317 Conn. 773, 781, 120 A.3d 1188 (2015). Finally, the state asserts that the defendant's derivative claim regarding the in-court identification necessarily fails if we decline to review the merits of the due process challenge to the out-of-court identification. See, e.g., *State* v. *Harris*, 330 Conn. 91, 113–14, 191 A.3d 119 (2018). We agree with the state.

The following facts are necessary for our discussion. As we previously stated, Heinmiller had observed the controlled narcotics purchase from a distance of 100 feet and viewed the seller as she came within five feet of his location following the transaction. Using information from the confidential informant and other members of the task force, he learned the possible name of the seller. He entered this name into a probation database, which then displayed a photograph. He "immediately identified her as [the seller he had observed on December 10, 2015]." The state offered this photograph from the probation database for admission into evidence. In the absence of an objection from the defendant, the court admitted this photograph into evidence. Heinmiller previously had identified the defendant in the courtroom at the violation of probation hearing.

In her appellate brief, the defendant does not claim to have objected to the admission of the photograph into evidence and acknowledges that she did not specifically request the court to conduct an analysis pursuant to *Neil* v. *Biggers*, supra, 409 U.S. 188. Instead, she requests *Golding* review of her due process claim. Under this familiar test, "[a] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Davis*, 186 Conn. App. 385, 393–94, A.3d (2018), cert. denied, 330 Conn. 965, A.3d (2019); see also *State* v. *Brown*, 185 Conn. App. 806, 810, 198 A.3d 687 (2018) (defendant bears burden of providing adequate record).

The state argues that this issue is controlled by *State* v. *Collins*, 124 Conn. App. 249, 5 A.3d 492, cert. denied, 299 Conn. 906, 10 A.3d 523 (2010). In that case, the defendant claimed, inter alia, that a pretrial identification procedure was unnecessarily suggestive, thus tainting an in-court identification at his violation of probation hearing. Id., 251–52. In declining to review this unpreserved claim, we stated: "Defense counsel did not make a motion to suppress the identification or object to the admission of [the pretrial] identification, and no evidentiary hearing was held regarding the evidence. Consequently, the court did not make any factual findings or legal conclusions concerning the suggestiveness of the procedures employed or the reliability of [the] in-court identification. Without such findings, the record is inadequate for our review. See *State* v. *Necaise*, 97 Conn. App. 214, 219, 904 A.2d 245 (resolution of whether pretrial identification procedure violates defendant's due process rights requires fact-finding function of trial court), cert. denied, 280 Conn. 942, 912 A.2d 478 (2006); *State* v. *Sargent*, 87 Conn. App. 24, 30, 864 A.2d 20, cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005)." *State* v. *Collins*, supra, 256–57.

Similarly, in the present case, the court, in the absence of a motion to suppress or challenge to the admission into evidence of the photograph from the probation database, did not make factual findings concerning the out-of-court identification by Heinmiller. As a result of the evidentiary lacuna, the record is inadequate, and the defendant's claim regarding the out-of-court identification fails to satisfy the first prong of *Golding*. Additionally, the defendant's dependent claim regarding the in-court identification also must fail.

III

The defendant finally claims that the court violated her right to due process when it denied her the right to confront an adverse witness, namely, the confidential informant. Specifically, she contends that the court should have concluded that her strong interest in confrontation outweighed the state's interest in protecting the identity of informants.[8] The state counters that the record is inadequate to review this due process claim. We agree with the state.

The following additional facts are necessary for our discussion. Prior to the start of the violation of probation hearing, the defendant filed a motion for disclosure of the identity of the confidential informant. In her motion, dated January 17, 2017, the defendant argued that the confidential informant was a necessary witness because that individual was "the only other person that was present during the alleged transaction." She further posited that the testimony of the confidential informant would be beneficial to her, was material to the issues, and would enable her to prepare an adequate defense.

[8] The defendant does not argue that there was a violation of her constitutional rights under the confrontation clause of the sixth amendment to the United States constitution but relies solely on the due process clause of the fourteenth amendment.

In support of her motion, the defendant relied on *Roviaro* v. *United States*, 353 U.S. 53, 61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)[9] and *State* v. *Hernandez*, 254 Conn. 659, 759 A.2d 79 (2000).[10]

On February 22, 2017, prior to the start of the evidentiary phase of the violation of probation hearing, the court heard argument regarding the motion for disclosure. Defense counsel emphasized the ability of the confidential informant to identify the seller of the crack cocaine. In response, the state questioned whether the due process concerns raised by the defendant applied in a violation of probation hearing. Defense counsel

[9] "In *Roviaro* v. *United States*, [supra, 353 U.S. 53], the United States Supreme Court had occasion to define the nature and scope of the informant's privilege. What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. . . .

"*Roviaro* established a test for assessing challenges to the applicability of the informant's privilege. This test involves the balancing of two competing interests: (1) the preservation of the underlying purpose of the privilege; and (2) the fundamental requirements of fairness. . . . The underlying purpose of the privilege is to protect the public interest in the flow of information to law enforcement officials. The fundamental requirements of fairness comprise the defendant's right to a fair trial, including the right to obtain information relevant and helpful to a defense. . . . Whether [disclosure is warranted depends] on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (Internal quotation marks omitted.) *State* v. *Crespo*, 145 Conn. App. 547, 568–69, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015).

[10] In *State* v. *Hernandez*, supra, 254 Conn. 665, our Supreme Court noted that the determination of whether the identity of a confidential informant should be disclosed to a defendant lies within the discretion of the trial court. It also noted that *Roviaro* involved the application of federal law. Id., 666 n.7; see also *State* v. *Richardson*, 204 Conn. 654, 658, 529 A.2d 1236 (1987) (*Roviaro* did not rest on constitutional grounds).

countered that even in a violation of probation hearing, the defendant was entitled to due process, which included the right to confront and cross-examine the witnesses against her, including the confidential informant.[11]

After hearing from the parties, the court noted that it was not deciding the defendant's guilt with respect to the underlying charges, but, rather, whether she had violated the terms of her probation. It then stated: "Evidentiary concerns that are presented in a hearing [concerning a] violation of probation are such that even hearsay is admitted and the question becomes the reliability of the hearsay offer and the rules of evidence are in fact in terms of violation of probation proceeding, quite relaxed in essence and . . . at this point . . . your request . . . for the state to disclose . . . the name of the confidential informant is denied."

During the evidentiary phase of the violation of probation hearing, Heinmiller testified that he personally had worked with this confidential informant a minimum of thirty times and characterized this individual as "proven" and "very reliable." Heinmiller also stated that disclosure of the confidential informant's identity would jeopardize both future police investigations and his or her physical safety. At some point during Heinmiller's testimony, the state offered a written statement from the confidential informant into evidence. The court admitted this statement into evidence, over the defendant's objection that it constituted a due process violation.[12]

[11] Specifically, defense counsel stated: "At a violation of probation hearing, the defendant is still afforded due process based on the fourteenth amendment of the [United States] constitution and the right to confront and cross-examine witnesses, so I do think that the ability to do that to the complaining witness is applicable here."

[12] Defense counsel objected as follows: "I'm not objecting based on hearsay. I'm objecting based on [the defendant's] fourteenth amendment constitutional right to due process. She does have . . . the right to confront the witnesses against her. That's a constitutional right. Due process is implicated in a violation of probation hearing."

Although the defendant directly challenged the denial of her motion for disclosure of the identity of the confidential informant before the trial court, citing *Roviario* and *Hernandez*, she has not done so in this appeal. Instead, the defendant has enlarged her due process claim beyond her objection to the admission of the confidential informant's written statement to include the name of the seller. Moreover, she has amalgamated her due process claim with the denial of her motion.

Our focus, therefore, is directed to the legal issue presented in the defendant's appellate brief, that is, whether her due process right to confront an adverse witness in a violation of probation hearing was violated when Heinmiller testified that he had learned how the seller had identified herself to the confidential informant during the illicit drug transaction. Specifically, the defendant argues in her appellate brief that the court failed to balance her interest in confronting the confidential informant against the state's reasons for not producing the confidential informant at the hearing and the reliability of the proffered hearsay. See, e.g., *State* v. *Giovanni P.*, 155 Conn. App. 322, 335, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015). At the hearing, the defendant did not object to this testimony, nor did she specifically argue that this identification violated her due process right as a result of the inability to confront the adverse witness. The trial court, therefore, was not provided fair notice of claim articulated to this court. See *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013); *State* v. *McKethan*, 184 Conn. App. 187, 193 n.2, 194 A.3d 293, cert. denied, 330 Conn. 931, 194 A.3d 779 (2018). We recently stated: "This court has held that a defendant's due process claim is unpreserved where the defendant never argued to the trial court that it was required to balance his interests in cross-examining [an adverse witness] against the state's good cause for not calling the [adverse witness] as a

witness." *State* v. *Tucker*, supra, 179 Conn. App. 278 n.4. Accordingly, we conclude that this issue was not preserved for appellate review.

The defendant requests that we review her constitutional claim pursuant to the *Golding* doctrine. We conclude that the record is inadequate, and, thus, this claim fails to satisfy the first prong of *Golding*. See, e.g., *State* v. *Medina*, 170 Conn. App. 609, 613, 155 A.3d 285 (unless defendant has demonstrated that record is adequate for appellate review, appellate tribunal will not consider merits of defendant's claim), cert. denied, 325 Conn. 914, 159 A.3d 231 (2017).

We begin our analysis by setting forth the limited due process rights afforded to a defendant in a violation of probation hearing. "Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution . . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected interest . . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty." (Internal quotation marks omitted.) *State* v. *Andaz*, 181 Conn. App. 228, 232–33, 186 A.3d 66, cert. denied, 329 Conn. 901, 184 A.3d 1214 (2018). "[T]he minimum due process requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [a probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adverse criminal proceeding." (Internal quotation marks omitted.) *State* v.

Barnes, 116 Conn. App. 76, 79, 974 A.2d 815, cert. denied, 293 Conn. 925, 980 A.2d 913 (2009); see also *State* v. *Giovanni P.*, supra, 155 Conn. App. 334–35.

This court, on several occasions, has considered an unpreserved due process claim that originated in the inability to confront and cross-examine an adverse witness in a violation of probation hearing. For example, in *State* v. *Shakir*, supra, 130 Conn. App. 468, this court noted that the right to confront a witness in a violation of probation hearing is not absolute. Furthermore, the constitutional requirements for such a hearing were codified in rule 32.1 of the Federal Rules of Criminal Procedure, which provides that a defendant is entitled to "question any adverse witness unless the court determined that the interest of justice does not require the witness to appear . . . ." (Internal quotation marks omitted.) Id., 467. Stated differently, "the court should balance, on the one hand, the defendant's interest in confronting the [witness], against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Internal quotation marks omitted.) Id., 468. This court ultimately concluded that the reasons for not producing the adverse witness were not established in the proceeding before the trial court, and, therefore, the record was inadequate for *Golding* review. Id. As a result, this court declined to consider the merits of the defendant's claim. Id., 466.

More recently, in *State* v. *Tucker*, supra, 179 Conn. App. 281, this court expressly stated that "where the defendant does not request that the court conduct the *Shakir* balancing test or make a good cause finding, the record is inadequate for review of a due process claim under the first prong of *Golding*." In *Tucker*, we reasoned that the defendant had failed to sustain his burden of establishing an adequate record for *Golding* review of his due process claim that he was not able to confront and cross-examine an adverse witness in a violation of probation hearing where (1) the defendant

had failed to request the court to conduct the *Shakir* balancing test, (2) the state had no notice of the due process claim and, therefore, did not present its reasons for not producing the witness at the hearing, (3) the record was silent as why a 911 recording was used in place of the witness and (4) the record was silent as to whether the reasons for not producing the witness amounted to good cause. Id. We concluded that "[u]nder these circumstances, the state was not responsible for the gap in the evidence, and it would be patently unfair to address the defendant's due process claim on the basis of this record." Id., 281–82; see also *State* v. *Polanco*, 165 Conn. App. 563, 575–76, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016).

In the present case, the defendant failed to request that the trial court conduct the *Shakir* balancing test. We therefore conclude, as we did in *Tucker*, *Polanco* and *Shakir*, that the defendant failed to sustain her burden of establishing an adequate record for review, as required by the first prong of *Golding*. Accordingly, we decline to consider the merits of this unpreserved appellate claim.

The judgment is affirmed.

In this opinion the other judges concurred.

DREY ANDRADE *v.* LEGO SYSTEMS, INC. (AC 41322)

Lavine, Moll and Bear, Js.

Syllabus

The plaintiff brought this action against the defendant for alleged employment discrimination after the defendant terminated his employment, claiming that the defendant had discriminated against him on the basis of his sexual orientation in violation of statute (§ 46a-60 [a] [1]). The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. He claimed that the trial court improperly determined that there was insufficient evidence from which a reasonable jury could conclude

that the circumstances surrounding the termination of his employment could give rise to an inference of discrimination on the basis of his sexual orientation. *Held* that trial court properly rendered summary judgment in favor of the defendant; that court's memorandum of decision thoroughly addressed the claim and arguments raised in this appeal, and this court adopted the trial court's well reasoned decision as a proper statement of the facts and applicable law on the issues.

Argued February 7—officially released March 19, 2019

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Bright*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Victoria Woodin Chavey, with whom was *Collin O'Connor Udell*, for the appellee (defendant).

Scott Madeo filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

PER CURIAM. In this employment discrimination action, the plaintiff, Drey Andrade, appeals from the summary judgment rendered by the trial court in favor of the defendant, Lego Systems, Inc. On appeal, the plaintiff claims that the trial court improperly concluded that there was insufficient evidence from which a reasonable jury could conclude that the circumstances surrounding the defendant's termination of the plaintiff's employment could give rise to an inference of discrimination on the basis of his sexual orientation. We affirm the judgment of the trial court.

The record and the trial court's opinion reveal the following relevant facts and procedural history. The plaintiff was employed by the defendant on or about October 12, 2009, as Distribution Operations Manager

CED. In that position, the plaintiff reported to the defendant's Director of Distribution, Americas (director). In his complaint, the plaintiff alleged that he is a homosexual and that the defendant was aware of his sexual orientation. He further alleged that the director treated him in an adversely different manner than she treated other employees who reported directly to her. During a performance review in September, 2010, the director informed the plaintiff that his performance with respect to his communication skills, collaboration, and trust building with his manager and employees whom he supervised was deficient, and that he needed to improve. She provided him with a performance plan. In subsequent performance reviews, the director informed the plaintiff of her continuing concerns regarding his job performance and once offered to transfer him to another position where he could apply his operational strengths, but would be free from managing other employees. The plaintiff addressed some of his deficient performance issues, but concerns remained. The plaintiff was again placed on a performance plan, which he did not satisfactorily address. The defendant terminated the plaintiff's employment on May 9, 2013.

The plaintiff commenced an action against the defendant on August 22, 2014, alleging that the defendant discriminated against him on the basis of his sexual orientation in violation of General Statutes § 46a-60 (a) (1). After the pleadings were closed, the defendant filed a motion for summary judgment, claiming that judgment should be rendered in its favor because the plaintiff had failed to present evidence from which a rational fact finder could infer that the defendant terminated his employment on the basis of his sexual orientation. On January 26, 2018, the trial court granted the defendant's motion for summary judgment. The plaintiff appealed.

On the basis of our review of the record, the briefs, and the arguments of the parties, we conclude that the judgment of the trial court should be affirmed. Because the court's memorandum of decision thoroughly addresses the claim and arguments raised in this appeal, we adopt its well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *Andrade* v. *Lego Systems, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-14-6053523-S (January 26, 2018) (reprinted at 188 Conn. App. 655, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017); see also *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

The judgment is affirmed.

APPENDIX

DREY ANDRADE *v.* LEGO SYSTEMS, INC.*

Superior Court, Judicial District of Hartford
File No. CV-14-6053523-S

Memorandum filed January 26, 2018

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

James V. Sabatini, for the plaintiff.

Victoria Woodin Chavey, for the defendant.

Opinion

BRIGHT, J.

I

INTRODUCTION

This action arises out of the defendant's, Lego Systems, Inc. (Lego), termination of the plaintiff's, Drey

* Affirmed. *Andrade* v. *Lego Systems, Inc.*, 188 Conn. App. 652, A.3d (2019).

Andrade, employment. The plaintiff alleges in the sole count of his complaint that he was terminated based on discrimination against him due to his sexual orientation in violation of General Statutes § 46a-60 (a) (1). The defendant has moved for summary judgment, claiming that there are no genuine issues of material fact that: (1) the person who made the termination decision did not know of the plaintiff's sexual orientation; and (2) the plaintiff was terminated for reasons wholly unrelated to his sexual orientation. The plaintiff argues that he has produced sufficient evidence from which a reasonable jury could infer that the plaintiff's termination was based on his sexual orientation. For the reasons set forth more fully below, the defendant's motion is granted.

II

FACTS

The evidence submitted, viewed in a light most favorable to the plaintiff, establishes the following facts. The plaintiff began working for the defendant on or about October 12, 2009, as Distribution Operations Manager CED. In that role, he reported to Julie Bianchi, Director of Distribution, Americas. The plaintiff is homosexual. Approximately six months after the plaintiff began working for the defendant, the plaintiff and Bianchi were having a conversation about their pets. The plaintiff had several dogs, and Bianchi asked him who took care of his animals. The plaintiff responded that his partner does at home. The plaintiff did not identify the sex of his partner and never told Bianchi that he was gay. The plaintiff did not recall any reaction by Bianchi to his comment. At no other point during his employment with the defendant did the plaintiff ever discuss his sexual orientation with Bianchi. Nor is there any evidence that Bianchi learned the plaintiff's sexual orientation from any other source. The plaintiff never

heard Bianchi refer to him as being gay and never heard Bianchi make any derogatory statements or jokes about gay people.

On September 23, 2010, Bianchi placed the plaintiff on a performance plan. The plan required the plaintiff to take specific actions over a period of ninety days. It provided that if the plaintiff failed to meet the requirements of the plan, additional actions would be taken, including the possibility of termination. The plan was detailed in a memo from Bianchi to the plaintiff. The memo set forth Bianchi's concern about the plaintiff's unavailability on site and his lack of responsiveness. Furthermore, while Bianchi stated her belief that the plaintiff had the hard skills necessary to be a strong performer, she stated that the plaintiff had not demonstrated the necessary competencies around communication, collaboration, and building trust. Both Bianchi and the plaintiff signed the plan. There is no evidence that the plaintiff ever disputed the specific issues raised by Bianchi in the plan. There is also no evidence that the plaintiff did not comply with the ninety day plan. Nor is there any evidence that any further disciplinary actions were taken against the plaintiff as a result of the plan.

In the plaintiff's midyear review for 2011, Bianchi noted further concerns she had about the plaintiff's performance. She rated his performance as "Medium/Low." The review noted that the plaintiff is talented and capable in both operation and transportation. The review provided specific examples of where the plaintiff had performed well in these areas. Nevertheless, Bianchi noted that the plaintiff was not meeting expectations in developing employees who reported to him. The review further noted that Bianchi had discussed with the plaintiff moving to a role that focused on his operational strengths but would remove him from managing other employees. The plaintiff was not interested in

such a move. Instead, he acknowledged to Bianchi that he needed to work on and improve his employee management skills. The review concluded by Bianchi, noting: "I very much want to see you succeed Drey, and will support you in this effort." There is no evidence that the plaintiff in any way disputed the issues raised by Bianchi or her overall assessment of his performance.

The plaintiff's 2012 midyear review prepared by Bianchi reflects her conclusion that the plaintiff had addressed the area of people development and was now meeting expectations. Nevertheless, the review noted two other areas where the plaintiff was performing below expectations. First, Bianchi noted that the plaintiff needed to do better to understand the retail side of the defendant's business. Second, Bianchi noted that the plaintiff needed to focus on collaboration. In particular, Bianchi stated that she found the plaintiff's collaboration with her not acceptable and that his behavior resulted in a lack of trust. Bianchi provided specific examples of a lack of communication and coordination from the plaintiff to her. Again, there is no evidence that the plaintiff disputed the issues raised by Bianchi.

The concerns raised by Bianchi at the midyear review were not addressed to her satisfaction because Bianchi placed the plaintiff on a second performance plan on October 26, 2012. The specific reason given for the performance plan was the plaintiff's failure to achieve target performance level in collaboration and strategic orientation. The plan provided nine detailed examples between February and September, 2012, of what Bianchi viewed as a lack of collaboration between the plaintiff and either her, other Lego employees or third parties with whom the plaintiff dealt. Almost all of the examples centered on Bianchi's perception that the plaintiff was not communicating appropriately with others. The plan set forth specific actions the plaintiff was expected to take over the next sixty days. The plan noted that if

the plaintiff failed to meet the expectations of the plan, further disciplinary action, including termination, could be taken. It concluded by stating: "By signing this document, you are agreeing to execute on the details of the plan outlined above and that you understand the performance plan as presented to you." The plaintiff signed the plan and handwrote next to his signature: "I will provide written feedback on items addressed by 11/2/12." There is no evidence that he ever provided such feedback or otherwise disputed the issues raised by Bianchi in the plan.

On January 31, 2013, the performance plan was extended until March 15, 2013, because the plaintiff had met some, but not all, of the expectations of the plan. Bianchi also identified further specific examples of the plaintiff's performance shortcomings. She further provided specific expectations to be met by the plaintiff by March 15, 2013. The plaintiff signed the extension of the plan. Again, he has provided no evidence that he in any way disputed any of the issues raised by Bianchi.

On March 6, 2013, the plaintiff and Bianchi met to discuss the plaintiff's response to the performance plan. The plaintiff had submitted a response on February 28, 2013. Bianchi's memo from the meeting reflects that she had already recommended that the plaintiff's employment be terminated because he had not met the expectations of the October 26, 2012 plan. It also reflects that Bianchi was concerned that the plaintiff's February 28, 2013 response was focused on his team's past successes and not on addressing the areas of concern identified in the performance plan. Bianchi also discussed with the plaintiff his PMP and KPI scores, which are mathematical metrics the defendant uses to measure employee performance. Bianchi acknowledged that the plaintiff had a very high PMP score. She also acknowledged that he scored well on his KPIs. She explained to the plaintiff, though, that PMP and KPI

scores are based on operational metrics, and did not address the collaboration and strategic orientation issues that were the bases for the performance plan. She also told the plaintiff her belief that his performance scores would be negatively impacted if he did not address the issues identified in the performance plan. Bianchi told the plaintiff that she needed more time to review his submittal, and they scheduled a follow-up meeting for March 15, 2013.

On March 21, 2013, the October 26, 2012 performance plan was extended for a second time. The extension noted that the plaintiff first responded to the deliverables requested in the January 31, 2013 extension in his February 28, 2013 response. The March 21, 2013 extension detailed eight specific reasons why the plaintiff's February 28, 2013 submittal did not meet Bianchi's expectations. In particular, Bianchi noted that the plaintiff's response was focused on what had happened in the past and did not address how things would be improved going forward. Furthermore, Bianchi noted the plaintiff's failure to submit a complete transportation strategy and a distribution recall process, both of which were overdue. She also noted continuing communication issues, including a failure to respond properly and timely to multiple customer logistics requests. The plaintiff was given specific expectations that he was required to meet by May 3, 2013. The plaintiff signed the performance plan extension. He has submitted no evidence that he ever disputed the specific issues raised by Bianchi in that document. The defendant terminated the plaintiff on May 9, 2013. The defendant hired an individual to replace the plaintiff. The defendant does not know this individual's sexual orientation.

The plaintiff testified, and the court accepts as true for purposes of the defendant's motion, that he was not permitted to attend a number of conferences, including the Global Transportation Forum, the company-wide

sales conference, a strategy meeting with PFSweb, a third-party vendor the plaintiff was responsible to manage, and a meeting in Canada to discuss the Canadian distribution market. The plaintiff testified that other similarly situated managers who were not gay were permitted to go to these meetings. The plaintiff further testified that excluding the plaintiff from these meetings allowed Bianchi to criticize the plaintiff's performance in the areas of strategic orientation, collaboration and communication. At the same time, the plaintiff acknowledged that he attended monthly meetings with PFSweb at its offices in Memphis, Tennessee. The plaintiff also attended meetings with a vendor in Pennsylvania, Minnesota, Kansas and Florida, attended a global conference in Prague, and visited the defendant's global headquarters in Billund, Denmark. Additional facts will be discussed as necessary.

III

DISCUSSION

The summary judgment standard is well established. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820, 116 A.3d 1195 (2015). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn.

527, 556, 791 A.2d 489 (2002). "[T]he burden of showing the nonexistence of any material fact is on the party seeking summary judgment." (Internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 126, 968 A.2d 956 (2009). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

"[T]ypically, [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact. . . .

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature

of the facts to overcome a motion for summary, judgment. . . . Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Requiring the nonmovant to produce such evidence does not shift the burden of proof. Rather, it ensures that the nonmovant has not raised a specious issue for the sole purpose of forcing the case to trial." (Citations omitted; internal quotation marks omitted.) *Walker* v. *Dept. of Children & Families*, 146 Conn. App. 863, 870–71, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014).

The plaintiff's sole claim is that his termination was the result of illegal discrimination by Bianchi because the plaintiff is gay. The shifting burdens of proof for establishing such a claim are well settled. "When a plaintiff claims disparate treatment under a facially neutral employment policy, this court employs the burden-shifting analysis set out by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[1] Under this analysis, the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias. . . .

"The burden of establishing a prima facie case [of discrimination] is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. . . . The level of proof required to establish a prima facie case is minimal and need not

[1] While the plaintiff argues that meeting the *McDonnell Douglas Corp.* test is not the only way to establish illegal discrimination, he agrees that this case lends itself to an analysis under that test. Plaintiff's Brief, p. 9. He also has not proffered another basis to analyze his claim.

reach the level required to support a jury verdict in the plaintiff's favor. . . . To establish a prima facie case of discrimination in the employment context, the plaintiff must present evidence that: (1) [he] belongs to a protected class; (2) [he] was subject to an adverse employment action; and (3) the adverse action took place under circumstances permitting an inference of discrimination. . . . To establish the third prong, a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than [he] was. . . . To be probative, this evidence must establish that the plaintiff and the individuals to whom [he] seeks to compare [himself] were similarly situated in all material respects . . . . [A]n employee offered for comparison will be deemed to be similarly situated in all material respects if (1) . . . the plaintiff and those [he] maintains were similarly situated were subject to the same workplace standards and (2) . . . the conduct for which the employer imposed discipline was of comparable seriousness." (Citations omitted; emphasis omitted; footnote added; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 513–14, 43 A.3d 69 (2012). "Moreover, as discrimination will seldom manifest itself overtly, courts must be alert to the fact that [e]mployers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law. . . . However, they must also carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. This undertaking is not one of guesswork or theorization. After all, [a]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]. . . . Thus, the question is whether the evidence can reasonably and logically give rise to

an inference of discrimination under all of the circumstances. As a jury would be entitled to review the evidence as a whole, courts must not view the evidence in piecemeal fashion in determining whether there is a trial-worthy issue." (Citations omitted; internal quotation marks omitted.) *Bickerstaff* v. *Vassar College*, 196 F.3d 435, 448 (2d Cir. 1999), cert. denied, 530 U.S. 1242, 120 S. Ct. 2688, 147 L. Ed. 2d 960 (2000).

The evidence, viewed in a light most favorable to the plaintiff, establishes that he is a member of a protected class and was subject to an adverse employment action. The question is whether the plaintiff has presented sufficient evidence that he was terminated under circumstances that give rise to an inference of discrimination. The defendant argues that such an inference is impossible because the person responsible for terminating the plaintiff, Bianchi, did not know that the plaintiff was gay. Bianchi testified in her affidavit that (1) she never knew that the plaintiff was gay; (2) neither the plaintiff nor anyone else told her he was gay; and (3) the plaintiff never did or said anything that led her to believe he was gay.

In response, the plaintiff does not claim that he ever told Bianchi that he was gay. Nor does he claim that anyone else told her that he was gay. Nor does he claim that he ever heard Bianchi refer to him as gay. The plaintiff's claim that Bianchi knew of his sexual orientation is based entirely on his testimony that he once told Bianchi that his partner stayed at home with his dogs. He did not tell Bianchi the name or sex of his partner and she did not ask. From this one statement the plaintiff argues that a reasonable jury could infer that Bianchi would understand the plaintiff's reference to his partner to mean his "gay partner." The defendant argues that such a conclusion is not a reasonable inference from the evidence, but instead impermissible speculation.

The court agrees with the defendant. The reference to his partner could have several meanings, including his unmarried heterosexual partner. For a jury to conclude from this single comment that Bianchi knew that the plaintiff was gay would require it to speculate or guess that Bianchi took meaning from words that did not express this meaning. Such speculation is particularly troubling here when the plaintiff admits that there is absolutely no other evidence to support the inference the plaintiff suggests. The plaintiff has not offered the testimony of a former coworker or anyone else to suggest that there was reason beyond the plaintiff's single cryptic statement to believe that Bianchi knew that the plaintiff was gay.

In addition, even assuming that Bianchi knew of the plaintiff's sexual orientation, the circumstances surrounding his termination do not permit an inference of discrimination by a reasonable jury. First, while the plaintiff claims that he was not given the same opportunity to attend conferences and meetings that were given to similarly situated heterosexual male colleagues, the evidence he has submitted fails to establish that those other employees were in fact similarly situated. "[W]hether two employees are similarly situated ordinarily presents a question of fact . . . . [However], a court can properly grant summary judgment [on a discrimination claim] where it is clear that no reasonable [fact finder] could find the similarly situated prong met." (Emphasis omitted; internal quotation marks omitted.) *Walker* v. *Dept. of Children & Families*, supra, 146 Conn. App. 876 n.11. There is no evidence that any of those employees were ever the subject of a performance plan. Nor is there any evidence that Bianchi or any other supervisor had even one performance issue with those employees. By contrast, the undisputed evidence establishes that Bianchi set forth in writing detailed

concerns with the plaintiff's job performance. The plaintiff received each of these writings and signed each of the performance plans that set forth Bianchi's issues. There is no evidence that the plaintiff ever disputed any of the issues raised by Bianchi. In fact, the plaintiff has not submitted a single performance related document in opposition to the defendant's motion. No reasonable jury could find that the plaintiff has proved that similarly situated employees were treated differently when he has failed to show that any of the employees were in fact similarly situated. Without knowing whether any of those employees ever did anything that might subject them to discipline makes it impossible for a reasonable jury to address whether the termination of the plaintiff for his undisputed underperformance was motivated by bias against his sexual orientation.

In response, the plaintiff appears to argue that any shortcoming in his performance was due to Bianchi's decision to exclude him from certain conferences and meetings. The undisputed evidence would not permit a reasonable jury to draw such an inference. Most of the issues raised by Bianchi related to the plaintiff's communication with her and others both inside and outside Lego. In addition, Bianchi raised concerns with the plaintiff's failure to timely complete projects and follow through on various commitments he made. No reasonable jury could conclude that such failures would not have occurred had the plaintiff been permitted to attend various conference and meetings. Furthermore, the plaintiff has provided nothing but his own conclusory statements as to the relationship between these conferences and meetings and his job performance. He has provided no documentation or other evidence regarding what occurred at these conferences and how it related to his job duties, and specifically to the issues raised by Bianchi. Finally, because the plaintiff has presented no evidence as to the level of job performance

of the purportedly similarly situated heterosexual employees, there is no factual basis for a jury to conclude that any of those employees should have been denied permission to go to those conferences and meetings due to performance issues like those documented with the plaintiff.

The plaintiff also argues that his high PMP and KPI scores belie any problems with his job performance. This argument ignores, though, that the issues raised by Bianchi were unrelated to the metrics measured by those scores. It also ignores that the only evidence presented to the court regarding the KPI score is that it also measures team or regional performance, and global performance, with a trend toward heavier emphasis on global company performance. Consequently, according to Bianchi, a high KPI score might not indicate strong job performance by the individual employee. The plaintiff has offered no evidence to the contrary. Finally, the plaintiff has not provided the court with the actual PMP or KPI scores for him or the purported similarly situated employees. Consequently, the court is in no position to evaluate the significance of these scores in how the plaintiff or any other employee was treated by the defendant.

Despite these issues, the plaintiff argues that the court may not grant summary judgment when the employer's action is based solely on the subjective evaluation of the employee because such subjectivity may mask discrimination. The plaintiff erroneously equates subjectivity with a lack of objectively measured numerical data supporting the employment action. That has never been the case. When courts talk about unreliable subjective reasons they are referring to actions taken with little or no reason given for them other than the subjective preference of the employer. "Accordingly, an 'employer's explanation of its reasons must be clear and specific' in order to 'afford the employee a full

and fair opportunity to demonstrate pretext.' *Meiri* v. *Dacon*, 759 F.2d 989, 996–97 [2d Cir.] [cert. denied, 474 U.S. 829, 106 S. Ct. 91, 88 L. Ed. 2d 74 (1985)]. Where an employer's explanation, offered in clear and specific terms, 'is reasonably attributable to an honest even though partially subjective evaluation of . . . qualifications, no inference of discrimination can be drawn.' *Lieberman* v. *Gant*, 630 F.2d 60, 67 (2d Cir. 1980)." *Kahn* v. *Fairfield University*, 357 F. Supp. 2d 496, 504 (D. Conn. 2005). Here, Bianchi repeatedly set forth in clear and specific terms the issues with the plaintiff s job performance. As noted above, the plaintiff has submitted no evidence to dispute the issues raised by Bianchi. Given these undisputed facts, there is simply no basis to draw an inference of discrimination.

Finally, no reasonable jury could draw an inference of discrimination given the manner in which Bianchi handled the plaintiff's job performance issues. The plaintiff claims that Bianchi learned of his sexual orientation sometime in the spring or summer of 2010, approximately six months after he started working for the defendant. Yet, he was not terminated until three years later, in May, 2013. During that three year period it is undisputed that Bianchi gave the plaintiff repeated warnings about his inadequate job performance. She provided the plaintiff with specific examples of deficient performance and gave him an opportunity to address them. Bianchi also provided the plaintiff with encouragement, and praised him for his positive attributes. She also offered the plaintiff an opportunity to transition to another position that seemed to be a better fit for his skills. The defendant twice extended the October 26, 2012 performance plan to give the plaintiff additional time to comply with its terms. Based upon the undisputed evidence submitted by the defendant, no reasonable jury could conclude that sometime in 2010

Bianchi embarked on a three year plan of both criticizing and praising the plaintiff, and offering him other career paths, with the ultimate goal of terminating him.

For all of the foregoing reasons there is simply insufficient evidence from which a reasonable jury could conclude that the circumstances surrounding the plaintiff's termination could give rise to an inference of discrimination. The defendant produced considerable evidence that belies any such inference. The plaintiff has produced no evidence in response that raises a genuine issue of material fact.

IV

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted.