IP MEDIA PRODUCTS, LLC *v.* SUCCESS, INC., ET AL.
(AC 41242)

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

Syllabus

The plaintiff brought an action against the defendant I Co. seeking to foreclose a mortgage on certain real property. Although service was made on I Co., the allegations in the plaintiff's complaint were asserted against a different entity, L Co., and not I Co. The note and mortgage had been

signed by C, as the president of L Co. The trial court rendered judgment in favor of I Co. on the grounds that there were no allegations in the complaint against I Co., and that the mortgage and note were unenforceable against I Co. because it was not the entity that conveyed the mortgage and signed the note, and because C did not have the authority to execute those documents on behalf of I Co. On appeal to this court, the plaintiff claimed that it was a holder in due course entitled to enforce the mortgage and note, irrespective of whether those documents were executed with the requisite corporate authority. *Held* that the plaintiff having failed to raise its holder in due course claim in the trial court, the claim was not properly preserved for appellate review; the plaintiff did not challenge the trial court's factual finding that C did not have the authority to act on behalf of I Co. when he executed the mortgage and note and, instead, rested its entire argument on the position that it was a holder in due course, but its complaint made no allegation that it was seeking to foreclose the mortgage as a holder in due course, nor did it plead such a claim as a matter in avoidance of the defendant's special defense that the mortgage and note were executed without corporate authority, and the plaintiff failed to introduce any evidence at trial seeking to establish the elements required by the statute (§ 42a-3-302) that defines a holder in due course, and did not claim in either its posttrial brief or motion to reargue that it was a holder in due course entitled to enforce the mortgage and note despite the court's finding that C lacked the corporate authority to encumber the property on behalf of I Co.

Argued February 8—officially released July 30, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Michael Hartmere*, judge trial referee, rendered judgment in favor of the defendant JD's Café I, Inc.; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Stephen R. Bellis, for the appellant (plaintiff).

Barbara M. Schellenberg, with whom, on the brief, was *Vincent M. Marino*, for the appellee (defendant JD's Café I, Inc.).

Opinion

DiPENTIMA, C. J. In this appeal, the plaintiff, IP Media Products, LLC, brought a foreclosure action against the defendant, JD's Café I, Inc.,[1] seeking to enforce a mortgage and note that were conveyed and signed, respectively, by a purportedly different entity, namely, JD's Café I, LLC. On appeal, the plaintiff claims that the trial court improperly concluded that it could not recover against the defendant because (1) the complaint contained no allegations against the defendant; (2) the entity that conveyed the mortgage and signed the note was not the named defendant; and (3) the mortgage and note were executed without the requisite corporate authority. As to the third claim, the plaintiff does not challenge the court's finding of lack of corporate authority, but argues for the first time on appeal that, because it is a holder in due course, this defense does not apply to it. We conclude that because this argument was not preserved, the plaintiff's third claim fails. Moreover, because we affirm the judgment of the trial court on this basis, we need not address the remainder of the plaintiff's claims.[2]

The following undisputed facts and procedural history are relevant to this appeal. On August 25, 2004, Gus

[1] Success, Inc., Curcio Carting, Inc., Oronoque Road, LLC, Theresa Symers, Gus Curcio, Jr., and the Department of the Treasury, Internal Revenue Service, also were named as defendants in the underlying action. Success, Inc., and Curcio, Jr., appeared and the claims against them subsequently were withdrawn. Curcio Carting, Inc., Oronoque Road, LLC, Symers, and the Department of the Treasury, Internal Revenue Service, did not appear and have not participated in this appeal. Our references to the defendant are to JD's Café I, Inc.

[2] Although the plaintiff raises three claims, its failure to challenge properly the court's independent basis for rendering judgment in favor of the defendant is dispositive of this appeal. See *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 784 n.1, 185 A.3d 643 (2018). We, therefore, do not review the first and second claims as to the allegations in the complaint and whether reformation was required to enforce the mortgage and note against the defendant, respectively.

Curcio, Jr., acquired all of the corporate stock in the defendant and, at a shareholder meeting on November 11, 2005, became the defendant's president and director. On July 19, 2007, the defendant acquired 3010 Huntington Road, in Stratford (Stratford property), from Curcio Jr.'s mother. The next day, July 20, 2007, Curcio, Jr., as president of Curcio Carting, Inc., executed a promissory note with Dade Realty Company I, LLC (Dade Realty), in the amount of $110,000. The note indicated that it was secured by a lien on trucks owned by Curcio Carting, Inc., and a mortgage on the Stratford property. The note and mortgage were signed by Curcio, Jr., as president of Curcio Carting, Inc., and Robin Cummings as the president of JD's Café I, LLC.

On August 26, 2014, Dade Realty assigned the note to the plaintiff and shortly thereafter, on October 14, 2014, the plaintiff commenced a foreclosure action against the defendant and several other parties. Although service was made on the defendant, the allegations in the complaint are asserted against JD's Café I, LLC, and not the defendant. Nonetheless, in its answer, the defendant admitted the plaintiff's allegation that JD's Café I, LLC, was the record owner of the Stratford property at the time the mortgage was conveyed. The defendant denied that it had conveyed a mortgage to Dade Realty, or that it was indebted to the plaintiff. In the same responsive pleading, the defendant also asserted several special defenses, alleging, inter alia, that the mortgage and note were unenforceable because they were conveyed and signed, respectively, without the requisite corporate authority and, alternatively, that JD's Café I, LLC, could not convey a mortgage because it was not the record owner of the Stratford property.[3]

At trial, the parties stipulated that the note and mortgage were assigned to the plaintiff and that the debt

[3] We note that this latter special defense is contrary to the defendant's admission that JD's Café I, LLC, was the record owner of the parcel at the time the mortgage was conveyed.

remained unpaid. Additionally, the parties agreed that Curcio, Jr., was the defendant's sole shareholder on the date the note and mortgage were executed.[4] The plaintiff called Curcio, Jr., and Attorney Donal Collimore to testify. Through the testimony of Curcio, Jr., the plaintiff introduced into evidence several exhibits, including copies of the mortgage and note. Curcio, Jr., testified that he signed both of these documents on behalf of Curcio Carting, Inc., and was under the belief that the loan security was limited to three vehicles owned by Curcio Carting, Inc. It was his recollection that when he signed both documents, neither contained any indication that JD's Café I, LLC, was involved in the transaction.[5] Further, Curcio, Jr., testified that he was unfamiliar with an entity known as JD's Café I, LLC, but assuming that the mortgage and note contained a misnomer, he was familiar with the defendant. Curcio, Jr., stated that, at the time of the transaction, he was the sole shareholder and president of the defendant, and would not have consented to a mortgage being placed on the Stratford property. When asked whether Cummings had any authority to convey a mortgage on the Stratford property, or affiliation with the defendant corporation, Curcio, Jr., responded that Cummings had no authority and any affiliation he purportedly had was the result of "shenanigans" involving Gus Curcio, Sr.[6]

[4] With the consent of both parties, the court also took judicial notice of a prior decision from this court, *Success, Inc.* v. *Curcio*, 160 Conn. App. 153, 124 A.3d 563, cert. denied, 319 Conn. 952, 125 A.3d 531 (2015), which involved several of the same parties and events in this case.

[5] Later in his testimony, Curcio, Jr., intimated that all references to JD's Café I, LLC, and the mortgage on the Stratford property were added to the documents after he had signed them.

[6] An "Interim Notice of Change of Officer/Director" filed with the secretary of state on July 20, 2007, the same day the loan and mortgage documents were signed, indicated that Cummings had been appointed as president of the defendant corporation. In *Success, Inc.* v. *Curcio*, 160 Conn. App. 153, 177, 124 A.3d 563, cert. denied, 319 Conn. 952, 125 A.3d 531 (2015), this court found that the appointment was not valid, however, because the evidence established that Cummings was appointed by Curcio, Sr., who lacked the authority, or apparent authority, to make such an appointment. Id.

Following the testimony of Curcio, Jr., the plaintiff called Collimore, who had represented both Curcio Carting, Inc., and the defendant with respect to the transaction with Dade Realty. Collimore testified that the note and mortgage documents were prepared by the lender and that he did not notice the misnomer with respect to the defendant's corporate designation on both documents. Through Collimore's testimony, the plaintiff introduced the title insurance policy that was procured for the benefit of Dade Realty. The policy provides that title to the Stratford property is held by the defendant, and not JD's Café I, LLC. With respect to the logistics of the loan transaction, Collimore testified that he obtained signatures from Curcio, Jr., and Cummings separately. He first met with Curcio, Jr., and then met with Cummings on his boat to have him sign on behalf of the defendant. He also testified that Curcio, Jr., was aware that the defendant, through Cummings, was involved in the transaction.

At the close of evidence, the defendant moved for dismissal pursuant to Practice Book § 15-8.[7] The defendant's counsel argued that the evidence revealed that the mortgage and note had been executed without the requisite corporate authority and, therefore, were unenforceable. Counsel also contended that, in the absence of reformation, the mortgage and note could not be enforced against the defendant because they were signed in the name of JD's Café I, LLC. The court reserved judgment on both issues and requested that the parties file posttrial briefs.

Thereafter, on June 14, 2017, the trial court rendered judgment in favor of the defendant on the basis,

[7] Practice Book § 15-8 provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made."

inter alia, that there were no allegations in the complaint against the defendant; rather the allegations were asserted against JD's Café I, LLC. Additionally, the court concluded that the mortgage and note were unenforceable against the defendant because it was not the entity that conveyed the mortgage and signed the note, and the plaintiff had failed to plead reformation to correct this discrepancy. Finally, the court determined that the mortgage and note were void and unenforceable against the defendant because Cummings did not have the authority to execute those documents on behalf of the defendant. The court made no determinations of credibility with respect to either the testimony of Curcio, Jr., or Collimore. After the court's decision, the plaintiff filed a motion to reargue that was summarily denied on December 26, 2017. This appeal followed.

In its challenge to the court's conclusion that Cummings was not authorized to convey the mortgage or sign the note on behalf of the defendant, the plaintiff argues only that it is a holder in due course entitled to enforce the mortgage and note irrespective of whether those documents were executed with the requisite corporate authority. Our review of the record reveals that this argument was not raised before the trial court and, therefore, is not properly preserved for appellate review.[8]

Although we do not address the merits of the plaintiff's claim, we briefly set forth the legal principles that support the trial court's conclusion that the mortgage and note were unenforceable against the defendant due to a lack of corporate authorization. It is a well-established principle of our law that a "corporation is only liable for the acts of its president if it is shown that his acts are so related to his duties as president that they may reasonably be held to have been done in the prosecution of the business of the corporation and while

[8] See footnote 2 of this opinion.

he was acting within the scope of his employment." (Internal quotation marks omitted.) *Cohen* v. *Holloways', Inc.*, 158 Conn. 395, 406–407, 260 A.2d 573 (1969). Where the action is outside the scope of the president's employment, the plaintiff must "demonstrate that (1) [the] action was expressly authorized by resolution of the board of directors; or (2) [the] action was impliedly authorized by the board of directors; or (3) [the] action, although not authorized, was subsequently ratified by the board of directors. . . . Whether a corporate officer is authorized to act on behalf of a corporation is a question of fact to be resolved by the trier." (Citations omitted.) *Czarnecki* v. *Plastics Liquidating Co.*, 179 Conn. 261, 268, 425 A.2d 1289 (1979).

Here, the trial court found that Cummings did not have the authority to act on behalf of the corporation when he executed the mortgage and note. The plaintiff makes no challenge to this factual finding and instead rests its entire argument on the position that it is a holder in due course. The plaintiff's complaint makes no allegation, however, that it is seeking to foreclose the mortgage as a holder in due course, nor did the plaintiff plead such a claim as a matter in avoidance of the defendant's special defense that the mortgage and note were executed without corporate authority. Further, the plaintiff failed to introduce any evidence at trial seeking to establish the elements required by General Statutes § 42a-3-302,[9] and did not claim in either its posttrial brief or motion to reargue that it is a holder in due course entitled to enforce the mortgage and note despite the court's finding that Cummings lacked the corporate authority to encumber the Stratford property

[9] General Statutes § 42a-3-302 provides in relevant part: " '[H]older in due course' means the holder of an instrument if . . . (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 42a-3-306, and (vi) without notice that any party has a defense or claim in recoupment in section 42a-3-305 (a)."

on behalf of the defendant. See footnote 2 of this opinion. "[T]he party claiming the rights of a holder in due course bears the burden of proving all elements of that classification." *Connecticut National Bank* v. *Giacomi*, 242 Conn. 17, 73, 699 A.2d 101 (1997).

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Internal quotation marks omitted.) *Williams* v. *State*, 189 Conn. App. 172, 185, 206 A.3d 779, cert. denied, 332 Conn. 902, 208 A.3d 281 (2019). Accordingly, in light of the plaintiff's failure to challenge the court's finding that the mortgage and note were unenforceable because they were conveyed and executed, respectively, without the requisite corporate authority, we affirm the judgment for the defendant on this ground.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* VICTOR M. ALICEA
(AC 40311)

Prescott, Bright and Eveleigh, Js.

Syllabus

Convicted of two counts of the crime of assault in the first degree and of being a persistent dangerous felony offender in connection with his conduct in slashing the victim with a razor blade, the defendant appealed to this court. The defendant had been charged with one count each of intentional assault in violation of statute (§ 53a-59 [a] [1]) and reckless

assault in violation of § 53a-59 (a) (3). The victim had argued with the defendant at their place of employment, a restaurant. Some of the altercation was caught on the restaurant's video. The defendant called 911 after the victim ran from the restaurant and, about forty-five minutes later, gave a statement to the police about the incident. After the close of the state's evidence, the defendant moved for a judgment of acquittal, in which he alleged, inter alia, that he could not be guilty of both assault charges because he had engaged in one act against one victim, and each charge required a mutually exclusive state of mind. During argument on the motion, the prosecutor indicated that he did not think the defendant could be convicted of both charges. The trial court stated that the evidence reasonably would permit a finding of guilt on both counts and denied the motion for a judgment of acquittal. The defendant thereafter elected not to testify in his defense. On appeal to this court, the defendant claimed, inter alia, that the jury's guilty verdicts of both intentional and reckless assault were legally inconsistent, and that the trial court improperly excluded from evidence his statement to the police. *Held*:

1. The defendant could not prevail on his claim that the verdicts of guilty of both intentional and reckless assault were legally inconsistent; to find the defendant guilty under § 53a-59 (a) (3), the jury was required to find that he engaged in conduct that was reckless and that created a grave risk of death to the victim that resulted in serious physical injury, which was not inconsistent with the jury's finding under § 53a-59 (a) (1) that the defendant also intended to seriously injure the victim, and because a conviction of one offense did not require a finding that negated an essential element of the other offense, the offenses were not mutually exclusive and, therefore, not legally inconsistent.
2. This court found unavailing the defendant's claim that his right to due process was violated because he was unaware that he could be convicted of both assault charges; on the basis of the relevant charging document, the theory on which the case was tried and submitted to the jury, and the trial court's jury instructions regarding the assault charges, the defendant had notice, prior to when he had to decide whether to testify, that both assault charges were going to be presented to the jury separately and not in the alternative, and he was aware of the charges brought against him and how the court was going to instruct the jury regarding those charges, as neither the information nor the state's argument informed the jury that it should find the defendant guilty on only one of the charges, after the court informed counsel that a guilty verdict on both counts was permitted under the law, the state told the court and defense counsel that it would be arguing consistent with that message, at closing argument the prosecutor told the jury that the evidence demonstrated that the defendant acted intentionally or, at the very least, recklessly, and did not tell the jury that it could or should find guilt only as to one of the those charges, and the court's instructions to the jury were not based on alternative charges.

3. The trial court did not abuse its discretion by excluding from evidence the defendant's statement to the police, which the defendant claimed was admissible under the spontaneous utterance exception to the rule against hearsay; the defendant did not meet his burden of proving that he did not have an opportunity to think about and fabricate or embellish his story, as he did not begin his statement to the police until approximately forty minutes after the end of his 911 call, which lasted less than two minutes, and although the amount of time that passes between an incident and the utterance of a statement is not dispositive of its spontaneity, nothing in the record demonstrated error in the trial court's determination that the defendant had time to fabricate and embellish his statement.

4. The evidence was sufficient to disprove beyond a reasonable doubt the defendant's claim of self-defense; the defendant's assertions that it was possible that his left hand circled the victim's head first as he cut the victim's throat and that the victim had thrown a left hook at the defendant before the slashing were unavailing, as the jury reasonable chose to credit the victim's testimony, which was consistent with the restaurant's video, that he did not strike the defendant, that he and the defendant were arguing, and that the defendant grabbed him and cut his throat.

Argued April 8—officially released July 30, 2019

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts of the crime of assault in the first degree and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the first part of the information was tried to the jury before *Seeley*, *J.*; thereafter, the court denied the defendant's motions to dismiss and for a judgment of acquittal; verdict of guilty; subsequently, the defendant was presented to the court on a plea of nolo contendere to the second part of the information; judgment in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Jonathan R. Formichella, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's

attorney, and *Mark A. Stabile*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Victor M. Alicea, appeals, following a jury trial, from the judgment of conviction of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) (intentional assault) and assault in the first degree in violation of General Statutes § 53a-59 (a) (3) (reckless assault). The defendant, following a plea of nolo contendere to a part B information, also was convicted of being a persistent dangerous felony offender pursuant to General Statutes § 53a-40 (a) (1) (A). On appeal, the defendant claims that (1) the jury's verdicts of guilty on both intentional and reckless assault were legally inconsistent, (2) the court erred in excluding his statement to the police, given approximately forty-five minutes after the incident at issue, and (3) the state failed to disprove his claim of self-defense. We affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury on the basis of the evidence, and procedural history assist in our consideration of the defendant's claims. The defendant and the victim, Tyrone Holmes, worked at Burger King in the Dayville section of Killingly (restaurant). Holmes generally worked third shift as a porter, doing maintenance and cleaning at the restaurant. On July 9, 2015, the defendant, who also worked as a porter at the restaurant, was covering Holmes' third shift. After midnight, Holmes, accompanied by his friend, Robert Falu, arrived at the closed restaurant to drop off some supplies and to speak with the defendant, whom, he had heard, had been talking about him. Falu waited in or around Holmes' vehicle while Holmes let himself into the back entrance using his key. Holmes then asked the defendant to step outside. The defendant and Holmes went outside, had a

brief discussion, and the defendant denied having talked negatively about Holmes. Everything appeared fine to Holmes. Holmes returned to his vehicle, retrieved some supplies, and went back into the restaurant.

Upon returning to the restaurant, Holmes heard the defendant on his cell phone telling whomever was listening to get to the restaurant because the defendant had a problem. Holmes told the defendant that they did not have a problem, and the defendant walked away while Holmes was trying to talk to him. Holmes followed the defendant, who went near the fryers, and the defendant repeatedly told Holmes that he was trying to save Holmes' life. Holmes, who was holding a set of car keys in his hands, tossing them from one hand to the other, became angry and the two began arguing. The defendant then pulled Holmes' head toward him and cut his throat with a razor blade. Initially, Holmes thought the defendant had punched him, and he assumed a fighter's stance. He then saw that he was bleeding, however, and he ran from the restaurant. Some of the altercation was caught on the restaurant's video. Once outside, Holmes threw his car keys to Falu and told him to start the car. The defendant, who had followed Holmes outside, chased him around the car twice, and said, "see what happens when you mess with me." Holmes got into the driver's seat of the car and drove away with Falu. After Holmes arrived home, Holmes' wife called 911, and she tried to stop the bleeding from Holmes' neck by applying pressure with a towel. The defendant also called 911 from the restaurant.

Holmes was taken by ambulance to Day Kimball Hospital in Putnam, where he was examined by Joel Bogner, an emergency medicine physician, who determined that Holmes had sustained a neck laceration that was approximately seven inches long and that the care he needed was "beyond the capabilities of Day Kimball Hospital . . . ." Holmes was given morphine sulfate for pain and then was transferred to Hartford Hospital,

via ambulance, where he underwent surgery for the laceration to his neck, which included the repair of a lacerated neck muscle and his left external jugular vein.

The defendant was arrested and later charged with both intentional and reckless assault. The jury found the defendant guilty of both charges,[1] and, after accepting the verdict, the court rendered judgment of conviction on both counts. The defendant also pleaded nolo contendere to being a persistent dangerous felony offender. The court merged the conviction of the two assault charges and sentenced the defendant to a mandatory minimum term of ten years of incarceration, followed by twelve years of special parole on the count of intentional assault as a persistent dangerous felony offender. This appeal followed.

I

A

The defendant first claims that the jury's verdicts of guilty of both intentional and reckless assault were legally inconsistent because each charge required a mutually exclusive state of mind. He contends that he cannot be guilty of both intentional and reckless assault because he engaged in but one single act, against one single victim. The defendant relies on *State* v. *Chyung*, 325 Conn. 236, 157 A.3d 628 (2017), and *State* v. *King*, 216 Conn. 585, 583 A.2d 896 (1990), to support his claim. The state responds that the verdicts were not legally inconsistent in this case because a person can act both recklessly and intentionally at the same time, as to different results, as was concluded by our Supreme Court in *State* v. *Nash*, 316 Conn. 651, 660–61, 114 A.3d 128 (2015). We agree with the state.

[1] The defendant filed a motion for a judgment of acquittal and a motion for a new trial, arguing that the jury's verdict was legally inconsistent because each charge requires a mutually exclusive state of mind. The court denied the motions.

Section 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

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

Pursuant to § 53a-3 (13): "A person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ."

"A claim of legally inconsistent convictions, also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our

review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Nash*, supra, 316 Conn. 659.

"[C]ourts reviewing a claim of legal inconsistency must closely examine the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of [more than one offense]." Id., 663. Nevertheless, the state is bound by the theory it presented to the jury. See *State* v. *Chyung*, supra, 325 Conn. 256 (where state argued defendant engaged in only one act, rather than two, principles of due process prohibited state on appeal from relying on theory that defendant engaged in two acts).

The defendant argues that *King* and *Chyung* are similar to the present case and that *Nash* is inapposite. We recently discussed the distinctions between those three cases in *State* v. *Daniels*, 191 Conn. App. 33, 43–48, A.3d (2019).

In *Daniels*, we first discussed our Supreme Court's explanation of *State* v. *King*, supra, 216 Conn. 585: "In *Nash*, our Supreme Court discussed *King* at length and explained: In *King*, the defendant had 'claimed that his convictions of attempt to commit murder and reckless assault of the same victim based on the same conduct were legally inconsistent because they required mutually exclusive findings with respect to his mental state. . . . We agreed with this claim, explaining that King's conviction for attempt to commit murder required the jury to find that he acted with the *intent to cause the death of the victim*, whereas his conviction for reckless assault required the jury to find that he *acted recklessly and thereby created a risk that the victim would die.* . . . We further explained that the statutory definitions of intentionally and recklessly are mutually exclusive and inconsistent. . . . Reckless conduct is not intentional conduct because [a person] who acts recklessly does not have a conscious objective to cause a particular result. . . . Thus, we observed that [t]he *intent to*

cause death required for a conviction of attempted murder [under General Statutes §§ 53a-49 and 53a-54a (a)] . . . necessitated a finding that the defendant *acted with the conscious objective to cause death* . . . [whereas] [t]he *reckless conduct necessary to be found for a conviction of assault* under [§ 53a-59 (a) (3)] . . . required a finding that *the defendant acted without such a conscious objective*. . . . We concluded, therefore, that the jury verdicts [with respect to attempt to commit murder and reckless assault in the first degree] each of which requires a mutually exclusive and inconsistent state of mind as an essential element for conviction cannot stand.' . . . *State* v. *Nash*, supra, 316 Conn. 660–61." (Emphasis in original.) *State* v. *Daniels*, supra, 191 Conn. App. 43–44.

We then discussed *State* v. *Chyung*, supra, 325 Conn. 236: "In *Chyung*, the jury found the defendant guilty of murder, in violation of § 53a-54a, and of reckless manslaughter in the first degree with a firearm, in violation of General Statutes §§ 53a-55a (a) and 53a-55 (a) (3), for the shooting death of his wife. . . . The court in *Chyung* found that the jury's guilty verdicts as to both charges were legally inconsistent because the defendant could not act both intentionally and recklessly with respect to the same victim, the same act, and the same result simultaneously. . . . Our Supreme Court explained that to find the defendant guilty of the crime of intentional murder, the jury was required to find that the defendant had the *specific intent to kill the victim*, his wife, but, to find the defendant guilty of reckless manslaughter, the jury was required to find that he acted recklessly, meaning, that he *acted without a conscious objective to cause the death of the victim*, but consciously disregarded the risk of his actions, thereby putting the life of the victim in grave danger. . . . The court concluded that a defendant cannot act with a *conscious disregard* that his actions will create *a grave risk of death* to another, while, at the same

time, specifically *intending to kill* that person. . . . The defendant cannot simultaneously act intentionally and recklessly with respect to the same act and the same result . . . .'' (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Daniels*, supra, 191 Conn. App. 44–45.

Finally, we discussed our Supreme Court's decision in *State* v. *Nash*, supra, 316 Conn. 651, which we found controlling. See *State* v. *Daniels*, supra, 191 Conn. App. 45–48. As background, the defendant in *Nash* had become angry with the brother of the victim. *State* v. *Nash*, supra, 654–55. The defendant wanted to teach a lesson to the victim's brother, so he and a friend went to the home of the victim's brother, where he resided with his family, including the victim. Id. The defendant walked to the backyard of the victim's home and fired several gunshots into the second story of the home. Id., 655. At the time of the shooting, the victim and her sister were in a second floor bedroom. One of the bullets penetrated through the bedroom wall and struck the victim, who then was transported by ambulance to a hospital, where she was treated for a gunshot wound. Id.

We explained in *Daniels*: ''In *Nash*, the jury found the defendant guilty of, among other things, both intentional and reckless assault in the first degree pursuant to . . . § 53a-59 (a) (1) and (a) (3), respectively, and the court rendered judgment in accordance with the jury's verdicts. . . . On appeal, the defendant claimed in part that the jury's verdicts of guilty on both intentional and reckless assault were legally inconsistent because each crime required a mutually exclusive state of mind. . . . Our Supreme Court disagreed, explaining that the two mental states required for intentional and reckless assault in the first degree *related to different results*. . . . More specifically, the court explained, 'in order to find the defendant guilty of [*both* intentional and reckless assault in the first degree], the jury was required to find that *the defendant intended*

to injure another person and that, in doing so, he recklessly created a risk of that person's death. In light of the state's theory of the case, there was nothing to preclude a finding that the defendant possessed both of these mental states with respect to the same victim at the same time by virtue of the same act or acts. In other words, the jury could have found that the defendant intended only to injure another person when he shot into [the victim's] bedroom but that, in doing so, he recklessly created a risk of that [victim's] death in light of the circumstances surrounding his firing of the gun into the dwelling. Accordingly, because the jury reasonably could have found that the defendant simultaneously possessed both mental states required to convict him of both intentional and reckless assault, he cannot prevail on his claim that the convictions were legally inconsistent'. . . . [*State* v. *Nash*, supra, 316 Conn.] 666–68.

"The court in *Nash* went on to examine and compare § 53a-59 (a) (1) and (a) (3): 'Intentional assault in the first degree in violation of § 53a-59 (a) (1) requires proof that the defendant (i) had the intent to cause serious physical injury to a person, (ii) caused serious physical injury to such person or to a third person, and (iii) caused such injury with a deadly weapon or dangerous instrument. Reckless assault in the first degree in violation of § 53a-59 (a) (3) requires proof that the defendant (i) acted under circumstances evincing an extreme indifference to human life, (ii) recklessly engaged in conduct that created a risk of death to another person, and (iii) caused serious physical injury to another person. As we previously explained, the mental state elements in the two provisions—"intent to cause serious physical injury" and "recklessly engag[ing] in conduct which creates a risk of death"—do not relate to the same result.[2] Moreover, under both provisions, the

[2] The defendant argues that the Supreme Court clarified in *Chyung* that the result of the crime is synonymous with "injury to the victim." See *State*

resulting serious physical injury is an element of the offenses that is separate and distinct from the mens rea requirements.' Id., 668–69. The court then held: 'Because the defendant's convictions for intentional and reckless assault in the first degree required the jury to find that the defendant acted intentionally and recklessly with respect to different results, the defendant cannot prevail on his claim that those convictions are mutually exclusive and, therefore, legally inconsistent.'[3] Id., 669.

"The court in *Nash* provided an example of where a single act, directed to a single victim, could result in a conviction of both intentional and reckless assault in

v. *Chyung*, supra, 325 Conn. 246. According to the defendant, this means that because Holmes suffered only one injury from one act, both charges against the defendant related to the same result, and he, therefore, could not be convicted of both charges. The defendant essentially is arguing that *Chyung* overruled *Nash* regarding the meaning of "the same result." Although we acknowledge that our Supreme Court stated in *Chyung* that "a defendant cannot simultaneously [act] intentionally and recklessly with regard to the same act and the same result, i.e., the injury to the victim"; (internal quotation marks omitted) id.; the defendant has taken this one sentence out of context. The statement is a quote from the court's earlier decision in *State* v. *King*, supra, 216 Conn. 593. In *Nash*, the court thoroughly discussed and distinguished *King*. See *State* v. *Nash*, supra, 316 Conn. 658–66. The court, in *Nash*, then concluded that even though the charges under § 53a-59 (a) (1) and (a) (3) related to the same injury to the same victim, they did not relate to the same result and were not legally inconsistent because the charges involved different mens rea that were not inconsistent with each other. Id., 668–69. Given this history, we are unpersuaded that in 2017 the Supreme Court in *Chyung* intended effectively to overrule, sub silentio, *Nash*, a decision issued just two years earlier, merely by quoting a 1999 decision that it went to great lengths to distinguish in *Nash*.

[3] In *Nash*, our Supreme Court also carefully explained: "We emphasize that our conclusion that the defendant's convictions of intentional and reckless assault in the first degree were not mutually exclusive does not mean that a defendant lawfully may be punished for both offenses. . . . [T]he trial court in the present case merged the two assault convictions for purposes of sentencing and sentenced the defendant only on his intentional assault conviction. The defendant has not claimed that this approach violates his right against double jeopardy." (Citation omitted.) *State* v. *Nash*, supra, 316 Conn. 669–70 n.19.

the first degree. 'For example, if A shoots B in the arm intending only to injure B, A nevertheless may recklessly expose B to a risk of death if A's conduct also gave rise to an unreasonable risk that the bullet would strike B in the chest and thereby kill him. In such circumstances, a jury could find both that A intended to injure B and, in doing so, recklessly created an undue risk of B's death.' Id., 666 n.15." (Citations omitted; emphasis in original; footnotes altered.) *State* v. *Daniels*, supra, 191 Conn. App. 45–48.

In *Daniels*, we also explained: "We recognize that the differences between *King*, *Chyung*, and *Nash* are subtle. For example, in *King*, the jury necessarily would have to have found that the defendant acted with the specific intent to cause the death of the victim (attempted murder), and, at the same time, acted without the conscious objective to create a risk of death for the victim (reckless assault). See *State* v. *King*, supra, 216 Conn. 585. It is impossible to possess both mental states simultaneously.

"In *Chyung*, the jury necessarily would have to have found that the defendant had the specific intent to kill the victim (murder), and simultaneously, that the defendant acted without the conscious objective to create a grave risk of death for the victim (reckless manslaughter). See *State* v. *Chyung*, supra, 325 Conn. 236. Again, it is impossible to have both intents simultaneously.

"In *Nash*, however, the jury would have to have found that the defendant intended to cause *serious physical injury* to the victim (intentional assault), and, at the same time, that the defendant acted without the conscious objective of creating a *grave risk of death* for the victim, resulting in the victim's serious physical injury (reckless assault). See *State* v. *Nash*, supra, 316 Conn. 666–67. Intentional assault requires a *specific intent to cause serious physical injury*; reckless

assault requires *recklessly creating a grave risk of death*, which results in serious physical injury. One can intend to cause serious physical injury to a victim, while, at the same time, consciously disregarding the fact that he or she is putting that victim's life in grave danger, ultimately resulting in serious physical injury to the victim." (Emphasis in original.) *State* v. *Daniels*, supra, 191 Conn. App. 48 n.10.

Accordingly, to be guilty under § 53a-59 (a) (3), it was not enough for the defendant to have engaged in conduct that was reckless, resulting in serious physical injury to Holmes; rather, the jury was required to find that the defendant engaged in conduct that was reckless and that *created a grave risk of death to Holmes*, ultimately resulting in Holmes' serious physical injury. Such a conclusion is not inconsistent with the jury finding that the defendant also intended to seriously injure Holmes under § 53a-59 (a) (1). Put another way, because a conviction of one offense does not require a finding that negates an essential element of the other offense, they are not mutually exclusive, and therefore not legally inconsistent.

Although the defendant has presented a well argued, well briefed claim on this issue, we conclude that our Supreme Court's decision in *Nash* is controlling. Guided by that decision, as well as by our recent decision in *Daniels*, we conclude that the jury's verdicts of guilty of both intentional and reckless assault are not legally inconsistent.

B

As part of his inconsistent verdict claim, the defendant also argues that "[r]eversal is mandated in this case for a second reason." He contends that the state is bound by the theory it allegedly presented at trial, namely, that these charges were brought in the alternative. He states that the majority in *State* v. *Chyung*, supra, 325 Conn. 236, and the dissent in *State* v. *King*,

321 Conn. 135, 159–71, 136 A.3d 1210 (2016) (*King 2016*), mandate "that the state may not rely upon a theory establishing legal consistency of verdicts when it does not argue that theory to the jury." In his reply brief, he contends that his right to due process is implicated and that he made the decision not to testify in this case only after the state set forth its position that these charges were in the alternative. But see id., 148 (due process analysis should not be blended with legal consistency of verdict analysis, and each should be evaluated independently of each other, as two separate claims). We conclude that the defendant's right to due process was not violated because he was aware of the charges brought against him and how the court was going to instruct the jury regarding those charges.

"A determination of whether a defendant has received constitutionally sufficient notice of the charges to be brought against him at trial is guided by the following framework. A fundamental tenet of our due process jurisprudence is that [i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . [T]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . Reviewing courts, therefore, cannot affirm a criminal conviction based on a theory of guilt that was never presented to the jury in the underlying trial. . . .

"Principles of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial. . . . Although we recognize that the finder of fact may consider all of the evidence properly before it, in order for us to uphold the state's theory

of the case on appeal, that theory must have been not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon [review of] the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense. . . . Essentially, the state may not pursue one course of action at trial and later, on appeal, argue that a path [it] rejected should now be open to [it] . . . . To rule otherwise would permit trial by ambuscade. . . . Accordingly, on appeal, the state may not construe evidence adduced at trial to support an entirely different theory of guilt than the one that the state argued at trial." (Citations omitted; internal quotation marks omitted.) Id., 148–49.

Our Supreme Court in *King 2016* instructed: "Whether a defendant has received constitutionally sufficient notice of the charges of which he was convicted may be determined by a review of the relevant charging document, the theory on which the case was tried and submitted to the jury, and the trial court's jury instructions regarding the charges." (Internal quotation marks omitted.) Id., 149–50.

In the present case, the information set forth two independent charges, intentional and reckless assault, with no indication whatsoever that the charges were being brought in the alternative. After reviewing the information and the transcripts of the trial, we are not persuaded that the state tried the case or presented its evidence in a manner that indicated that it was proceeding on the theory that the charges against the defendant were in the alternative. We acknowledge that the prosecutor, during argument on the defendant's oral motion for a judgment of acquittal, which, in part, was brought on the ground that the charges were mutually exclusive, held outside of the presence of the jury and after the close of the state's evidence, indicated to the defendant and the court that he did not think that the defendant could be convicted of both charges. The trial court,

however, citing *Nash*, immediately sought to clarify the prosecutor's statement. The court stated that it could consider charging these counts in the alternative by telling the jury that if it finds the defendant guilty on count one, then it should find him not guilty on count two, but that it thought, "under *Nash*, both do go to the jury; if the jury comes back guilty on both, then, at sentencing it becomes a question of either . . . merger or vacating." The prosecutor responded that he understood and that he had put his stance "in [a] more stark position than [he] actually [would] when [he] stand[s] in front of the jury, but that's going to be sort of the message that [he would be] conveying." The court then denied the defendant's motion for a judgment of acquittal, stating in relevant part that, "taking [the] evidence in the light most favorable to the state, the evidence reasonably would permit a finding of guilty for both count one and count two." Thus, contrary to his position on appeal, the defendant had notice, prior to the point in time when he had to make the decision to testify, that both charges of the information were going to be presented to the jury separately and not in the alternative.

The next day, the defendant informed the court that he would not testify in his defense. At that time, the court also raised the defendant's motion for a judgment of acquittal again, and it restated, specifically for the record, the discussion of the previous day and the holding in the *Nash* case. The court then stated that the parties had engaged in several charging conferences and that the court previously had handed out preliminary jury instructions, and it indicated that the defense had submitted a request to charge on self-defense. The court also stated for the record that it had e-mailed counsel the revised jury charge the previous evening and that counsel had met that morning to put in the final touches, after conducting a page by page review.

Defense counsel stated that he was "satisfied that the language that the court intend[ed] to instruct the jury with [was] appropriate."

The prosecutor, during closing argument, went over the elements of each count separately, and, during his argument as to the elements of the second count, told the jury that he believed that the evidence demonstrated that the defendant's conduct was intentional, and that, if the jury "[d]id not agree with that," then, "at the very least," the jury could conclude that the defendant "acted recklessly." The prosecutor continued his argument on the elements of the second count and, thereafter, stated, "once again, if you do not agree, then I believe that, at the least, you can conclude that [the defendant] simply didn't care if [Holmes] lived or died based on his action, the slitting of the throat . . . ." Defense counsel's closing argument centered on the defendant's claim of self-defense. During rebuttal, the prosecutor argued that the state's evidence demonstrated that the defendant did not act in self-defense. The court charged the jury on both counts and on the defendant's claim of self-defense. Consistent with *Nash*, the court did not tell the jury that the charges were in the alternative. Rather, the court told the jury to consider each count separately, along with its separate consideration of whether the state disproved the defendant's self-defense claim on each count. On appeal, the defendant does not claim error in the charge.

The defendant relies on *Chyung* and the dissent in *King 2016* to support his claim that his right to due process was violated because he was unaware that he could be found guilty of both counts. In *Chyung*, the verdicts were inconsistent because the state had proceeded at trial on a one act, one result, one victim theory for the charges of intentional murder and reckless manslaughter. *State* v. *Chyung*, supra, 325 Conn. 239–40; see also part I A of this opinion. Our Supreme Court explained that these two charges, when tried on

such a theory, involve mutually exclusive states of mind, which a defendant cannot possess simultaneously. Id., 247–48. The state, on appeal, argued, in part, that the conviction could be upheld on the alternative ground that the jury could have found that the defendant did not act both intentionally and recklessly with regard to the same act and the same result, but that he engaged in two separate acts, one reckless and one intentional, with two separate results. Id., 254–55. Our Supreme Court rejected the state's argument on due process grounds because the state had not presented that theory to the jury, but, instead, had proceeded only on a one act, one result, one victim theory throughout the trial. Id., 255–56.

In *King 2016*, the defendant was convicted of intentional assault in the first degree and reckless assault in the first degree. *King 2016*, supra, 321 Conn. 137. On appeal to the Appellate Court, the defendant had argued that the verdicts were legally inconsistent and that the state had tried the case on a one act, one result, one victim theory; the Appellate Court agreed. See *State* v. *King*, 149 Conn. App. 361, 362–63, 87 A.3d 1193 (2014), rev'd, 321 Conn. 135, 136 A.3d 1210 (2016). Following the granting of certification to appeal, our Supreme Court concluded that the verdicts were not legally inconsistent because the evidence permitted the jury to conclude that there were two acts, not one, each with a different mental state; *King 2016*, supra, 144; and because the conviction, pursuant to *Nash*, was not legally inconsistent as a matter of law in that the two mental states related to different results. Id., 142, 144–45.

Our Supreme Court explained in *King 2016* that the issue of whether the verdicts were legally inconsistent and whether the defendant's right to due process was violated by the state's attempt to change its theory of the case are separate issues. Id., 148. On the issue of whether the defendant's right to due process had been

violated because the state had prosecuted him on a theory that each crime had been charged in the alternative and he was unaware that he could be convicted of both, our Supreme Court held that the defendant had sufficient notice of the charges against him. Id., 150. The court explained that the state did not present the evidence in a manner that related specifically to one charge or the other charge; id., 146; the trial court told the defendant that he could be convicted of both charges; id.; the defendant was charged in the information with *both* intentional and reckless assault; id., 139; and the trial court, in its instructions, told the jury to reach a verdict on both charges. Id., 154. The court also pointed out that the state's closing argument to the jury was ambiguous on whether it was seeking a conviction on only one of the charges, rather than on both. Id., 155–56.

The dissent in *King 2016*, on which the defendant relies, expressed disagreement with the majority on the issue of whether the state in closing argument expressed to the jury that its theory of the case was that the defendant was guilty of *either* intentional or reckless assault. Id., 171 (*Robinson*, *J.*, dissenting). The dissent in *King 2016*, however, offers the defendant no assistance in this case; it is the *dissenting* opinion. The majority in *King 2016* disagreed with the dissent's approach to its analysis because the dissent "relie[d] solely on the prosecutor's statement during closing argument to the exclusion of the contents of the substitute information and the jury instructions"; id., 157 n.13; and the majority, although concluding that the state's closing argument was ambiguous, held that "when viewed in the context of the substitute information, the state's evidence at trial, and the jury instructions, the defendant had sufficient notice that he could be convicted of both reckless and intentional assault. Accordingly, the manner in which the defendant was convicted satisfies the requirements of due process." Id., 157–58.

In the present case, reviewing "the relevant charging document, the theory on which the case was tried and submitted to the jury, and the trial court's jury instructions regarding the charges"; (internal quotation marks omitted) id., 149–50; we conclude that the defendant's right to due process was not violated; he had sufficient notice of the charges against him. On the basis of our review of the transcripts, we are not persuaded that the state proceeded on a theory that the charges were in the alternative, and, furthermore, neither the information nor the state's argument informed the jury that it should find the defendant guilty on only one of the charges. Additionally, although the state indicated to the court during argument on the defendant's oral motion for a judgment of acquittal, outside of the presence of the jury, that it would argue those charges to the jury in the alternative, the court immediately told both attorneys that *Nash* permitted a guilty verdict on both counts because they were not inconsistent, and the state then corrected itself and told the court and defense counsel that it would be arguing consistent with that message. Thus, when he made his decision not to testify, the defendant knew that the court was going to submit both charges to the jury and that he could be found guilty of both charges. At closing argument, the prosecutor told the jury that the evidence demonstrated that the defendant acted intentionally, but, at the very least, he acted recklessly, without concern for the life of Holmes. The prosecutor did not tell the jury that it could or should find guilt only as to one of the charges. Finally, the court's instructions to the jury were not based on alternative charges, and the defendant was well aware of the court's intent not to charge the jury in the alternative before he chose not to testify. The court clearly told the jury to consider each charge and defense separately. After reviewing the record in this case, and after considering the relevant case law, we conclude that the facts of this case

are not substantively different from those in *King 2016*. Applying the holding in that case, as we must, we conclude that the defendant's right to due process was not violated.

II

The defendant also claims that the court erred in excluding his statement to the police, given approximately forty-five minutes after the incident at issue. He contends that the statement was admissible as a spontaneous utterance,[4] and that it was critical to his self-defense claim because it demonstrated that he thought Holmes was hostile and threatening. We are not persuaded.[5]

The following additional facts inform our review. Approximately forty-five minutes after the incident, the defendant gave a statement to the police. In that statement, he told the police, in relevant part: "Some time after 12:30 a.m., [Holmes] came inside into the kitchen through the rear door. I said, 'hey, how you doing?' He told me to come outside but didn't tell me why. I followed him outside. I put a broom by the door to keep it from locking behind me. Once outside, [Holmes] told me that he heard I was talking shit about him. I asked him who told him that. He told me not to worry about it. I told him to bring the person here so I could smack

[4] The defendant also offered the statement as a statement against penal interest and as a statement of his then-existing mental or emotional condition. He concedes that neither claim is viable under existing Supreme Court precedent; he stated in his appellate brief that he raised these grounds on appeal only for the sake of "future review." Accordingly, they need not be addressed.

[5] The defendant contends that the court's exclusion of his statement to the police denied him the constitutional right to present a defense. We disagree. See *State* v. *Kelly*, 256 Conn. 23, 59 n.19, 770 A.2d 908 (2001) (disagreeing with claim that exclusion of defendant's statement to father raises constitutional question, and concluding, instead, that claim was evidentiary in nature, subject to review under abuse of discretion standard). "Evidentiary matters are generally not constitutional in nature and will be overturned only upon a showing of abuse of discretion." Id.

him for lying. He told me he couldn't do that because it was [one] of his people. I told him I didn't care and that I don't talk about him or anybody else. [Holmes] had brought another male friend with him who was also outside at the time.

"He started to get hostile and told me that he wasn't from here and he represents Bloods. I had my spray bottle of [degreaser] with me so I went inside [to] put it away. [Holmes] followed me inside and he kept yelling and accusing me. I raised [my] hands up in front of me telling him to leave me alone. I was holding my hands open and not in a fighting stance. I did have a razor blade in my hands still which I use for scraping the fryers in the [restaurant]. I told him, 'listen, I'm trying to save your life.' I told him that because I suffer from bi-polar disease and I know I can get violent when I feel threatened. He then got into a fighting stance with his hands clenched in a fist. [Holmes] is a big guy and I knew that if he hit me I'd be out for the count. I then lashed out at him with my right hand. I had the razor blade in my hand. I cut him on the left side of his neck. [Holmes] ran out yelling 'the mother fucker cut me!' [Holmes] then got in the driver side of the car and the other male got in the passenger side. [Holmes] said he was going to call the cops. I told him I would call them for him because he came to [the restaurant] when he wasn't supposed to be there. I then called 911 to report [the] incident. In the process of the altercation, I also cut my right hand on the middle finger."

During trial, the defendant offered this statement into evidence on the grounds that two hearsay exceptions applied, namely, as a spontaneous utterance and as a statement of mental/emotional condition. The court held that the spontaneous utterance exception did not apply because the defendant had time to embellish and fabricate in his statement. The court also held that the mental state exception did not apply. On appeal, the

defendant claims that the court erred in failing to admit the statement as a spontaneous utterance. See also footnote 4 of this opinion.

"The [spontaneous] utterance exception is well established. Hearsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein when (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant." *State* v. *Kelly*, 256 Conn. 23, 41–42, 770 A.2d 908 (2001).

"The ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation. . . . While the amount of time that passes between a startling occurrence and a statement in question is not dispositive, the court is entitled to take all the factual circumstances into account when deciding the preliminary question of whether a statement was spontaneous. . . . The appropriate question is whether the statements were made before reasoned reflection had taken place." (Citations omitted; internal quotation marks omitted.) Id., 60–61.

The defendant contends that he established the admissibility of his statement by meeting the four part test for admissibility. See id., 41–42. He argues in relevant part: "The trial court's conclusion that the defendant had time to fabricate information contained in the voluntary statement was erroneous. The defendant did not have time to fabricate or embellish after the altercation. . . . [T]he defendant's statement was made only forty-five minutes after the altercation. This was not enough time to fabricate critical facts that would lead

to his acquittal, particularly as he was occupied with the 911 call during a substantial [portion] of that time." He also argues that the statement "is corroborated by the surveillance footage," thereby demonstrating its reliability. The state contends that the court's exclusion of the statement was not an abuse of discretion. We agree with the state.

The record reveals that the defendant called 911 within minutes of the altercation, at 12:48 a.m. Contrary to the defendant's argument that the 911 call took up "a substantial [portion]" of the time between the incident and his statement to the police, the defendant's phone call to 911 lasted less than two minutes. The defendant did not begin his statement to the police until 1:30 a.m., approximately forty minutes after his 911 call ended. Although we are mindful that the amount of time that passes between an incident and the utterance of a statement is not dispositive of its spontaneity, the trial court in the present case determined that the defendant had time to fabricate and embellish his statement. There is nothing in the record that demonstrates error in that finding. Accordingly, the defendant has not met his burden of proving that he did not have an opportunity to think about and fabricate or embellish his story. The court did not abuse its discretion in excluding the statement. See *State* v. *Kelly*, supra, 256 Conn. 61 (defendant failed in burden of proving court abused discretion in concluding that one and one-half hour time frame between incident and utterance was enough time to fabricate story).

III

The defendant also claims that the state failed to disprove his claim of self-defense. He argues: "In this case, the defendant was confronted, while alone and at night, by a dangerous former drug dealer and potential gang member, in an enclosed space from which he

was unable to easily escape. At trial, the defendant asserted that he cut [Holmes] in self-defense, as Holmes was the initial aggressor and was acting in a menacing manner." He contends that "the state's evidence did not disprove beyond a reasonable doubt that the defendant acted in self-defense." The state argues that it presented sufficient evidence to disprove the defendant's self-defense claim and to establish that the defendant was not justified in using deadly physical force against Holmes. We agree with the state.

"On appeal, the standard for reviewing sufficiency claims in conjunction with a justification offered by the defense is the same standard used when examining claims of insufficiency of the evidence. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

"The rules governing the respective burdens borne by the defendant and the state on the justification of self-defense are grounded in the fact that [u]nder our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. See General Statutes § 53a-16. 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. See General Statutes § 53a-12. Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 778–79.

Under § 53a-19 (a), "a person is justified in using reasonable physical force upon another person to defend himself . . . 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 . . . ."

Under § 53a-19 (b), "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he or she is in his or her dwelling, as defined in section 53a-100, or place of work and was not the initial aggressor . . . ."

Under § 53a-19 (c), "a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues

or threatens the use of physical force, or (3) the physical force involved was the product of a combat by agreement not specifically authorized by law."

In order to determine whether the state produced sufficient evidence to disprove beyond a reasonable doubt the defendant's claim of self-defense, we first must set forth the defendant's theory of self-defense. The defendant's theory of self-defense was that he took reasonable steps to defend himself, given the threatening behavior of Holmes. The defendant relied on the following evidence. Holmes showed up at the restaurant, after hours, in violation of the employee handbook, with another person. Holmes had been drinking earlier that night.[6] Holmes asked the defendant to go outside, where he confronted him about allegations he had heard. The defendant denied the allegations and went back into the restaurant, calling his wife on the phone to tell her that he was having a problem and needed assistance. The defendant sounded very concerned. Holmes followed the defendant into the restaurant and was confronting him in a threatening manner. The defendant again tried to walk away. Holmes followed him and the two ended up face to face, with Holmes holding his keys in his hand, behaving aggressively. Feeling threatened, the defendant, using a razor blade that he used to clean the fryers at work, struck Holmes to protect himself from what he believed to be an imminent physical attack.[7]

[6] Holmes testified that he drank three Heinekens at approximately 9 or 10 p.m. that evening. His medical records from Hartford Hospital showed the presence of alcohol in his blood, but Dr. Bogner could not testify with confidence regarding a level of intoxication because he was not aware of whether Hartford Hospital used the same conversion tables as Day Kimball Hospital. Dr. Bogner did state, however, that if both hospitals used the same conversion tables, that Holmes' blood alcohol level would have been 0.064 percent, which is less than the legal limit of 0.08 percent. The records also showed the presence of opiates in Holmes' bloodstream, but Dr. Bogner testified that this may have been due to the administration of morphine while he was at Day Kimball Hospital.

[7] In his 911 call after the incident, which was admitted into evidence, the defendant reported that Holmes had threatened his life, and that he cut Holmes with a razor while defending himself.

We next consider the evidence produced by the state, viewed in a light consistent with the jury's verdict, to disprove the defendant's claim of self-defense. Holmes and the defendant had words outside the restaurant, where they resolved Holmes' issue with the defendant. The defendant returned to the inside of the restaurant and called his wife to tell her he was having a problem. When Holmes returned to the restaurant, the defendant did not go into the bathroom and lock the door. He did not call the police or 911. Instead, he moved around the restaurant, often with his back to Holmes, and then moved near the fryer. The defendant then repeatedly told Holmes that he was trying to save Holmes' life. Holmes was yelling at the defendant, tossing his keys from hand to hand, but he did not strike the defendant. The defendant, holding a razor blade that was used to clean the fryer, then reached out, grabbed Holmes by the neck or back of the head, pulled Holmes' head closer to him, and cut Holmes' throat with the razor blade. Holmes then fled the restaurant, bleeding from his neck. The defendant ran after him into the parking lot, chased Holmes around the car twice, and said, "see what happens when you mess with me."

Although the defendant, on appeal, concedes that the restaurant's video does not show Holmes striking the defendant, he argues that although "[i]t is possible the defendant's left hand circles Holmes' head first [as he cut Holmes' throat]; it is also possible, from the movements of the parties, that Holmes threw a left hook at the defendant's ribs before this happened." On appeal, we do not entertain possibilities inconsistent with the jury's verdict. Although the defendant argues that he was afraid of the larger, more muscular Holmes, who "possibly" hit him in the ribs, and that his fear justified his use of deadly force, the jury reasonable chose to credit the testimony of Holmes. Holmes testified that he did not strike the defendant, that he and

the defendant were arguing, and that the defendant, then, reached out, grabbed him, and cut his throat. This testimony also was consistent with the video. Viewing the evidence in the light most favorable to sustaining the verdict, as we must, we conclude that the state produced evidence that was sufficient to disprove beyond a reasonable doubt the defendant's defense.

The judgment is affirmed.

In this opinion the other judges concurred.

TOWN OF NEWTOWN ET AL. *v.* SCOTT OSTROSKY (AC 40975)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court denying his motion to dismiss the action and to open and vacate the court's prior judgment that had been rendered in favor of the plaintiff town and several of its agencies and employees. The defendant owned property that was located in the plaintiff town and an adjacent town. The plaintiffs commenced the underlying action seeking, inter alia, injunctive relief compelling the defendant to comply with two cease and desist orders, which alleged violations of zoning and inland wetlands regulations. The present action was consolidated with a similar action brought by the adjacent town and several of its agencies and employees. In July, 2014, the court held an evidentiary hearing on the merits of the action, but neither the defendant nor anyone on his behalf appeared at that hearing. In August, 2014, the court rendered judgment in favor of the plaintiffs. The defendant was served with notice of the judgment in September, 2014, but he did not appeal from that judgment, nor did he move to open the judgment. In February, 2015, the defendant and his attorney were present in court during a hearing on a motion for contempt filed by the plaintiffs, which the court granted, awarding damages to the plaintiffs. A hearing seeking supplemental damages for violation of the injunction was held in May, 2016, and the defendant was present and filed an appearance. The court awarded damages, attorney's fees and costs to the plaintiffs. In December, 2016, the defendant filed a motion to open and vacate the judgment and to dismiss the present action, which the court denied, concluding that it was too late to open the judgment. On appeal, the defendant, recognizing that the motion to open was filed more than four months after the judgment had been rendered, claimed that exceptions to the four month limit established

by statute (§ 52-212a) and the applicable rule of practice (§ 17-4) applied. *Held*:

1. The defendant could not prevail on his claim that the trial court lacked subject matter jurisdiction to determine municipal boundaries and that his motion to dismiss, therefore, should have been granted because the court's judgment necessarily determined a boundary line; although the Superior Court does not have the authority to establish municipal boundaries, in reaching its decision, the court did not establish a town boundary but, instead, adjudicated the case using the municipal boundary that both towns recognized and did not dispute.
2. The defendant's claim that the trial court erred in denying his motion to open because he had not received notice of, and did not have an opportunity to be heard at, the July, 2014 hearing was unavailing, as the defendant was well aware of the proceedings, which had occurred over a number of years; even if the defendant did not receive notice of the July, 2014 hearing or have the opportunity to participate in that hearing, and, thus, the trial court's power to entertain a motion to open on that basis was not limited by the four month rule, the court nevertheless did not abuse its discretion in denying the motion to open the judgment, as various cease and desist orders and copies of court orders, subpoenas and notices had been served on the defendant, who was timely served with the August, 2014 judgment and participated in two contempt hearings, including the February, 2015 contempt hearing, the predicates of which were the injunctive orders now under collateral attack, but he waited over two years before he moved to open the judgment.
3. The defendant could not prevail on his claim that, because a court has continuing jurisdiction to enforce and to modify its injunctive orders, the August, 2014 judgment was not subject to the four month rule and could validly be revisited at any time; although a court has continuing jurisdiction to enforce or to modify its injunctive orders in appropriate circumstances, a court is not obligated to grant every motion requesting such relief, and the trial court in the present case did not find that it lacked the power to open the judgment but, instead, exercised its discretion to deny the defendant's motion to open, which sought to void the injunction ab initio, concluding that there must be an end to litigation at some point.

Argued January 7—officially released July 30, 2019

Procedural History

Action, for, inter alia, a temporary and permanent injunction requiring the defendant to comply with certain cease and desist orders, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Hon. Richard P. Gilardi*, judge trial referee; judgment for

the plaintiffs; thereafter, the court granted the motion for contempt filed by the plaintiffs and awarded damages to the plaintiffs; subsequently, the court awarded damages, attorney's fees and costs to the plaintiffs; thereafter, the court, *Radcliffe*, *J.*, denied the motion to open and vacate the judgment and to dismiss filed by the defendant, and the defendant appealed to this court. *Affirmed.*

Robert M. Fleischer, for the appellant (defendant).

Barbara M. Schellenberg, with whom was *Jason A. Buchsbaum*, for the appellees (plaintiffs).

Opinion

BEACH, J. The defendant, Scott Ostrosky, appeals from the judgment of the trial court denying his motion to dismiss the action and to open and vacate the court's prior judgment that had been rendered in favor of the plaintiffs, the town of Newtown and several of its agencies and employees.[1] On appeal, the defendant claims that (1) the court lacked subject matter jurisdiction to adjudicate the plaintiffs' claims, (2) he was deprived of his due process right to notice and the opportunity to be heard on the merits of his case, and (3) the court had continuing jurisdiction to enforce and to modify its injunctive orders even if the motion to open and to vacate judgments was untimely. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. This case arises out of efforts by the plaintiffs to enforce cease and desist orders relating to activity on the defendant's property. The defendant's property comprises 21.9 acres of land, of which 5.5 acres are

[1] The term "the plaintiffs" in this appeal refers to the town of Newtown, the Planning & Zoning Commission of the Town of Newtown, the Inland Wetlands Commission of the Town of Newtown, and Steve Maguire, the town of Newtown land use enforcement officer.

located in Newtown. The majority of the defendant's property is located in the town of Monroe.[2] On August 13, 2013, Steve Maguire, the plaintiff land use enforcement officer for the town of Newtown, issued two cease and desist orders, which were served on the defendant on August 21, 2013. One order cited several conditions that allegedly violated zoning regulations, including the presence of unregistered vehicles, commercial vehicles, inoperable vehicles, waste, abandoned material, and junk accumulation. The order required the defendant to take corrective action within thirty days to avoid fines or legal actions. The second order noted violations of inland wetlands regulations, including "clearing, filling, deposition, and removal of material within the regulated wetland area." Failure to "cease and desist all activities" bore potential fines and penalties of up to $1000 per day. (Emphasis omitted.)

In December, 2013, the plaintiffs initiated the underlying action, seeking, inter alia, injunctive relief compelling the defendant to comply with the cease and desist orders and to submit an application to the Inland Wetlands Commission of the Town of Newtown to remediate affected areas. The complaint also sought civil fines, penalties, and attorney's fees. The defendant was served with this summons and complaint on January 13, 2014, by a state marshal.

On February 7, 2014, Attorney Thomas Murtha[3] filed an appearance on behalf of the defendant. The plaintiffs

[2] The town of Monroe is a plaintiff in a case that was consolidated with this case in the trial court. The defendant's appeal in the Monroe case was argued the same day as this appeal, and we have issued decisions in the two cases simultaneously. See *Monroe* v. *Ostrosky*, 191 Conn. App. 474, A.3d (2019).

[3] Murtha resigned from the bar of the state of Connecticut, waived the ability to reapply to the bar, and admitted that he had committed professional misconduct. See *Office of Chief Disciplinary Counsel* v. *Murtha*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6058810-S (September 8, 2016).

moved pursuant to Practice Book § 9-5 to consolidate the action with a similar action brought by the town of Monroe and several of its agencies and employees. See *Monroe* v. *Ostrosky*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6041168-S. After the cases were consolidated, Murtha moved to withdraw his appearance on the ground of a conflict of interest with the town of Monroe. A hearing on the motion to withdraw was scheduled for June 23, 2014. An order included in the notice of hearing required that "[p]ursuant to Practice Book § 3-10, notice must be 'given to attorneys of record' and your client(s) must be 'served with the motion.' " There is no indication in the record that Murtha notified the defendant of his intention to withdraw. At the hearing on the motion to withdraw, Attorney Peter Karayiannis from Murtha's law office appeared on behalf of the defendant. The following colloquy occurred before the court, *Bellis*, *J.*:

"The Court: Is [the defendant] present?

"[Attorney] Karayiannis: He's not, Your Honor.

"The Court: And do you have the proof of service?

"[Attorney] Karayiannis: We haven't gotten the green card back, but he's aware of the conflict, and he's been advised to retain new counsel.

"The Court: So—and can you represent that he's received a copy of the motion?

"[Attorney] Karayiannis: I don't know if he's—I haven't spoken to him about that, so I wouldn't want to—

"The Court: Does he know—can you represent that he knows it's down today?

"[Attorney] Karayiannis: I don't know if [Attorney] Murtha spoke to him about that. If you would like, I

can try to place a call. I know Attorney Murtha [is] in court too.

"The Court: Right. Do you know if he has an objection to it?

"[Attorney] Karayiannis: I do not—I do not believe he has an objection to it, no, Your Honor.

"The Court: All right.

"[Attorney] Karayiannis: We're kind of stuck with it. I mean, if there's a conflict—

"The Court: No, I understand that. I just—I just want to make sure he is not blindsided, that's all. And since the motion was just—you know, we put it on—

"[Attorney] Karayiannis: Understood.

"The Court: —for today. I mean, I'm—I don't know that it's going to make much of a difference anyway, but I'll grant it based on the representation that he consents to the motion being granted. . . . But counsel, since I granted this without [the defendant] here and without knowing for sure that he received a copy of the motion, what I'm going to do is, I'm going to require your office to send correspondence to [the defendant], giving him the new hearing date—

"[Attorney] Karayiannis: Okay.

"The Court: —for both cases, and carbon copy that letter. I mean, it's just going to be one line, the new hearing—you know.

"[Attorney] Karayiannis: Do you want me to send him a copy of the order as well or—today's order or—

"The Court: You probably should—

"[Attorney] Karayiannis: Okay.

"The Court: —tell him that you've withdrawn, here's the new hearing, and then [carbon copy] counsel on it.

"[Attorney] Karayiannis: Okay, Your Honor.

"The Court: I don't want to see a copy. I just want to make sure that we don't pick a hearing date, he doesn't show up and we go forward. This way I'll know that he has [a] hearing—maybe you should ask—get a green card back on it too, just in case.

"[Attorney] Karayiannis: Okay."[4]

On July 23, 2014, the court, *Hon. Richard P. Gilardi*, judge trial referee, held an evidentiary hearing on the merits of the action. Neither the defendant nor anyone on his behalf appeared at the hearing, which was attended by attorneys for both towns. The plaintiffs' counsel apprised the court that Murtha had withdrawn from the case. The attorney for the town of Monroe informed Judge Gilardi that Judge Bellis had granted the motion to withdraw and had "instructed [Murtha's law office] to send a letter to [the defendant], notifying him of the fact that [it was] no longer in the case on his behalf and giving him the date and time [of the new hearing]." The attorney further explained that "[Murtha's law office] confirmed [that] morning to [him] on the phone . . . that [it] did, indeed, send a letter to [the defendant], notifying him of the fact that the matter was going forward and [that Murtha's law office] no longer represented him." The hearing proceeded without the presence of the defendant or an attorney on his behalf.

[4] There is no indication in the record that the defendant actually had been notified of the order granting Murtha's motion to withdraw. On June 23, 2014 the court, *Bellis, J.*, issued notices that the hearing on the merits of the plaintiffs' case was scheduled for July 23, 2014. The defendant alleges that he never received notice of the new hearing. There is no indication in the record that the defendant was notified about the hearing.

At the hearing, Maguire testified about the defendant's violations of Newtown's wetlands and zoning regulations.[5] On August 5, 2014, the court issued a memorandum of decision, finding in favor of the plaintiffs. Relying on the evidence presented by the plaintiffs, the court ordered the defendant to comply with Newtown's inland wetlands and zoning regulations by September 17, 2014, and it required the defendant to allow zoning enforcement officers from the towns of Newtown and Monroe on the property for inspection on that date. Failure to comply would result in a fine of $100 per day until the defendant complied with the court's orders. The defendant was served with notice of the judgment on September 5, 2014, by a state marshal. The defendant did not appeal from the court's August 5, 2014 judgment, nor did he move to open the judgment.[6]

In January, 2015, the plaintiffs filed a "Joint Motion for Contempt," seeking, inter alia, a monetary judgment for the fines resulting from the defendant's failure to comply with the court's order. The motion alleged that the defendant had prevented access to his property for inspection on September 17, 2014. The plaintiffs' counsel certified that a copy of the motion had been

[5] The plaintiffs also introduced into evidence several exhibits, including photographs documenting several claimed violations of Newtown zoning regulations.

[6] The defendant filed a timely motion to open the August 5, 2014 judgment in *Monroe* v. *Ostrosky*, supra, Superior Court, Docket No. CV-14-6041168-S. The defendant noted in his brief that, "[o]n September 15, 2014, Attorney Michael Nahoum, acting at the request and direction of Attorney Murtha, filed an appearance on behalf of the defendant in the Monroe case, but not the Newtown case, and filed a bare-bones motion to open the injunction . . . (without the required memorandum of law) and a motion for stay. . . . The defendant was not aware that Attorney Nahoum had appeared in the Monroe case and had filed papers on his behalf. . . . The defendant never spoke with Attorney Nahoum or retained him. . . . For reasons unknown to the defendant, Attorney Nahoum abandoned the motion to open and the motion for stay, and those motions were never decided or acted upon by the court." (Citations omitted.)

mailed to the defendant. On February 15, 2015, the defendant was served by a state marshal with a subpoena to appear at a contempt hearing scheduled for February 25, 2015. The defendant was present at the hearing with an attorney, Richard Grabowski.[7] Grabowski confirmed that the defendant had received the injunctive orders issued in August, 2014. The plaintiffs maintained that (1) they had not been permitted on the property to inspect it, (2) inspection of the defendant's property from adjacent properties showed that the orders had not been complied with, (3) items ordered to have been removed from the property had not been removed, and (4) the defendant had not filed an application with the wetlands agency. The following colloquy occurred:

"[Attorney] Graboswki: [B]ack in August, [2014], when the hearing took place, when Your Honor found in the plaintiffs' favor, my client was not notified that the hearing was going forward. He has since retained an attorney to place a motion to stay the judgment and to open it and give him a chance to have his day in court, so that he could present evidence as to why he's not out of compliance with the zoning ordinances and that nothing on the property is in violation, and he just hasn't had the opportunity to do that as of yet. And that's what we would be looking for. That's what I'm going to be moving for once I get involved with the case.

"The Court: When was the order entered?

"[The Plaintiffs' Counsel]: Your Honor, the order was entered on August 4, [2014], I believe. . . . And also, Your Honor, first off, I believe they were notified of the

[7] Grabowski did not file an appearance prior to the start of the contempt hearing. Nevertheless, the court allowed Grabowski to proceed based on his representation that he would file an appearance by the end of that day. The record indicates that Grabowski did not file an appearance until March 4, 2015.

hearing. But, regardless, we actually served the order by state marshal on the defendant in August of 2014. This is six months later. Nobody in the Newtown case has ever filed an appearance or filed any motions to open judgments or anything. So, [the defendant has] been on notice for some time.

"The Court: Well, let's just cut to the quick. I issued an order in August, [2014]. I want some evidence that it hasn't been complied with. So, if you want to put on a witness."

The plaintiffs then presented evidence. Maguire testified that he went to the defendant's property on September 17, 2014, to inspect the premises. He could not gain access to the property for inspection because a steel gate was closed, chained and padlocked. He testified that the defendant had not submitted an application to the Inland Wetlands Commission of the Town of Newtown in accordance with the court's orders, and inspection of the defendant's property from adjacent properties had revealed that the defendant had not removed from his property the items detailed in the court's prior order. The plaintiffs submitted as exhibits photographs of the defendant's property showing broken down cars, unregistered vehicles, various types of heavy equipment, and other debris located on the lot. The defendant's cross-examination of Maguire revealed that he had not attempted to contact the defendant when he could not enter the property, and that the local police department advised him not to attempt to enter the property.

The court found the defendant in contempt of court and ordered, again, that the defendant comply with the prior orders. The court also ordered "that [a] monetary judgment be entered against the defendant in the amount of $20,500 per municipality, totaling $41,000, representing the $100 per day fine due to both munici-

palities pursuant to the orders of the court . . . from August [5], 2014 . . . [and that] the [plaintiffs were] entitled to attorney's fees, but the defendant [was] entitled to a hearing on the matter . . . [and] that the property . . . be accessible to zoning enforcement officers." On March 11, 2015, the defendant was served with a copy of judgment liens, which had been filed in the land records after the defendant had not satisfied the judgment. The defendant appealed from the court's judgment granting the motion for contempt on March 16, 2015. That appeal was dismissed on December 22, 2015, because the defendant had not filed his brief.

On September 1, 2015, Grabowski filed a motion to withdraw his appearance due to a "breakdown in communication." The defendant was served by a state marshal with notice of this motion on September 10, 2015. The court, *Bellis*, *J.*, granted Grabowski's motion to withdraw on September 21, 2015.

On May 12, 2016, Judge Gilardi held a hearing, resulting in a second supplemental judgment and an award of attorney's fees. The defendant was present but not represented by counsel at this hearing. The following colloquy occurred:

"[The Defendant]: I only got—a marshal brought me a notice a week and a half ago, and I'm completely taken aback and had no chance to respond to any of this or react to it. . . .

"The Court: Wait a minute, wait a minute. This thing's been kicking around since 2013; you couldn't have been that oblivious as to what's going on.

"[The Defendant]: I wasn't aware of the status of the case because, like I said, I was just given a marshal paper a week and a half ago.

"[The Plaintiffs' Counsel]: Your Honor, you may recall that [the defendant] was present on February 25, 2015, and did testify at the—

"The Court: Right.

"[The Plaintiffs' Counsel]: —contempt hearing and was represented by counsel, and it was at that hearing that the court entered a supplemental judgment for [$]20,500 and indicated that [it] would schedule another date to talk about the attorney's fees. So [the defendant] was aware of that.

"The only reason why we're here today instead of a year ago was because [the defendant] filed an appeal, which delayed things. [He] never pursued it; it took us a while to get that dismissed.

"The Court: Okay. I think counsel withdrew, right?

"[The Plaintiffs' Counsel]: Yeah.

"[The Defendant]: Yeah, I no longer have that attorney and that's why there's the confusion.

"The Court: Okay.

"[Counsel for the Town of Monroe]: . . . You'll notice in my affidavit in support of my attorney's fees that [the defendant] has had legal representation in this matter since 2002. At that time, he was represented by Attorney . . . Murtha. Part of the delay between when this matter started and when the hearing was presented in front of Your Honor in August of [2014] was Attorney Murtha withdrawing his appearance in this matter.

"We then came in February of 2015 and, on that day, Attorney . . . Grabowski came on behalf of [the defendant] and took part in the hearing in front of Your Honor, at that point. So, for [the defendant] to say that he's confused and he doesn't know what's going on in this matter, I'm sorry, but that's totally illogical and unreasonable. . . .

"[The Defendant]: I strongly disagree because I have not had any dealings with [Attorney] Grabowski in months, and I am not aware of this court case up until about a week and a half ago. And I'm asking for two

weeks just to find an attorney, so I can further go forward with this to sort this out. I have no problem with that; not denying anything else other than the fact that at this day and age, I do not have an attorney. I'd be more than happy to get one because I've only had a week and a half. . . .

"The Court: Well, what—these are—these are the fees that have been incurred up until now, so it doesn't have anything to do with what's going to happen in the future. But if you want the charges to stop, you can do so.

"[The Defendant]: Well, I need to just get an attorney, that's all I'm asking for.

"The Court: I'm not saying—I said you can do so.

"[The Defendant]: I mean, I'm here.

"The Court: No, that's not it. There was a cease and desist with a whole list of things and you ignored all of them.

"[The Defendant]: I disagree with that.

"The Court: Including—wait a minute.

"[The Defendant]: But I also live at my property, so I'm not clear what a cease and desist is. I'm supposed to stay locked in my bedroom to honor it? I'm not really quite sure, but I do live there, I do have a farm, I do have animals and I have to take care of them, and I don't do much else to my property other than that.

"The Court: Okay. Anything else?

"[The Plaintiffs' Counsel]: No, [Your] Honor. We're just—we're requesting an award of attorney's fees, and we're also requesting a supplemental judgment, just so we can quantify the number of the fines from February 25, [2015], to today. That number, as I calculate . . . is 443 days. So, we're requesting an additional $44,300

judgment for each town on top of the [$]20,500 the court already ordered."

On May 12, 2016, the court [rendered] a supplemental judgment against the defendant in the amount of $64,800, plus attorney's fees and costs of $29,618.63, for a total of $94,418.63. Another judgment lien was served on the defendant on May 31, 2016.

On December 12, 2016, Attorney Robert Fleischer filed an appearance in the present case on behalf of the defendant. On the same day,[8] the defendant filed a motion to open and vacate the judgments in the actions brought by both towns pursuant to General Statutes § 52-212a[9] and Practice Book § 17-4,[10] and, additionally, to dismiss the present action.[11]

The defendant offered several rationales in support of his motion. First, he argued, as to the actions brought by both towns, that his due process rights had been violated because he had not received notice of the July 23, 2014 hearing, from which the original injunction arose. He also sought an order to open the supplemental judgments of February 25, 2015, and May 12, 2016, as the judgments were predicated on the injunctions arising from the July 23, 2014 hearing.

[8] Attorney Fleischer filed an appearance and a similar motion to open on behalf of the defendant in the companion case of *Monroe* v. *Ostrosky*, supra, Superior Court, Docket No. CV-14-6041168-S, on February 6, 2017.

[9] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ."

[10] Practice Book § 17-4 (a) provides: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court."

[11] The grounds of the motion to dismiss, to be discussed in the summary of relevant facts and procedural history, did not apply to the companion action brought by the town of Monroe.

The defendant next claimed that the court lacked subject matter jurisdiction to adjudicate the merits of the action brought by the plaintiffs, and that the case should, therefore, be dismissed. He asserted that the boundary line between Newtown and Monroe had not been lawfully established, that the judgment in favor of Newtown depended on a finding that the land on which violations were found was located in Newtown, and that the court lacked jurisdiction "to fix or change any existing town line boundary." He, thus, requested the court to open all judgments and to dismiss the case brought by Newtown.

On October 2, 2017, the court, *Radcliffe*, *J.*, heard argument regarding the defendant's motion to open the judgment and to dismiss and, thereafter, denied the defendant's motion in its entirety. It concluded that it was too late to open the judgment. The court further stated "that the defendant had notice, according to all of the information which the court has reviewed throughout the proceedings, and, therefore, there is no basis for [the court to open] the judgment this long after the [rendering] of judgment by Judge Gilardi . . . ." The court concluded by noting that the "judgment was properly [rendered] to begin with, and there must be an end to litigation at some point, and this [was] the point in this case." This appeal from the denial of the motion to open followed.

Recognizing that the motion to open was filed far later than four months after any of the judgments in question had been rendered,[12] the defendant argues, with respect to the motion to open, that two exceptions to the four month limit established by § 52-212a and

[12] The defendant focuses primarily on the judgment of August 5, 2014, ordering injunctive relief. In his view, the supplemental judgments of February 25, 2015, and May 12, 2016, necessarily should be vacated if the initial injunctive orders on which the supplemental judgments are premised are vacated.

Practice Book § 17-4 apply. He claims that the court lacked subject matter jurisdiction to grant the injunctive orders because a finding in favor of the plaintiffs required a finding as to the location of the boundary lines between the towns of Newtown and Monroe, and the court lacked the jurisdictional ability to determine municipal boundaries. He further claims that the August 5, 2014 judgment was rendered in violation of his due process rights to notice and an opportunity to be heard. He finally suggests that the four month rule does not apply, in any event, because the court has continuing jurisdiction over its injunctive orders. We disagree with all of his claims and affirm the judgment.

I

The defendant first argues that the court lacked subject matter jurisdiction to determine municipal boundaries and his motion to dismiss, therefore, should have been granted because the court's judgment of August 5, 2014, necessarily, in his view, determined a boundary line. He primarily relies on *Romanowski* v. *Foley*, 10 Conn. App. 80, 521 A.2d 601, cert. denied, 204 Conn. 803, 525 A.2d 1352 (1987), for the proposition that the power to establish town boundary lines lies in the legislature, and the legislature has delegated that power to the municipalities themselves by virtue of General Statutes §§ 7-113 and 7-115. We agree with the general proposition that the Superior Court does not have the authority to establish municipal boundaries, but the proposition does not help the defendant in the circumstances of the present case because the court did not establish a municipal boundary.

In *Romanowski*, this court addressed the issue of whether the trial court had subject matter jurisdiction to determine the correct location of a town boundary line. Id., 80–81. In reaching the conclusion that there was "neither constitutional nor statutory authority for

the court to determine or alter town boundary lines"; id., 85; this court observed that "[p]ursuant to constitutional authority, the legislature has delegated authority for establishing such boundaries to the towns, cities and boroughs themselves. [Section] 7-113 directs towns to mark their boundaries. [Section] 7-115 provides for a procedure in the event that adjoining towns dispute the boundary. When *two towns disagree* as to the place of the division line between their respective communities, the [S]uperior [C]ourt, upon application of either, shall appoint a committee of three to fix such disputed line and establish it by suitable monuments and report their doings to said court. When such report has been accepted by said court . . . the line so fixed and established shall thereafter be the true division line between them . . . . The court's only function under this statute is to appoint a committee and accept the report which fixes the disputed line." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 84.

The plaintiff in *Romanowski* owned land in the town of Marlborough. Id., 81. The deed to his property described the eastern boundary as the Hebron-Marlborough town line. Id. The individual defendants owned abutting property, the western boundary of which was the town line. Id. The plaintiff claimed that the correct boundary line was established by the legislature in 1803 and was described in a survey recorded in the Hebron land records in 1804. Id. The plaintiff argued that the established line was altered by a 1981 map which was filed and recorded in the Hebron land records and was accepted by the town of Marlborough. Id. The plaintiff argued that moving the boundary line caused him to lose land to his Hebron abutters, and he requested the court to quiet title to his land and to order the towns to correct the boundary line so that it conformed to the 1804 survey. Id., 81–82.

The trial court denied relief, holding on the merits that the plaintiff had failed to sustain his burden of proof. Id., 82–83. This court agreed with the result but reversed the judgment and ordered that the case be dismissed because the trial court had lacked subject matter jurisdiction over the action, "since the plaintiff sought to have [the trial court] determine the placement of a town boundary line, a matter reserved to the legislature, or to the towns themselves pursuant to proper statutory procedures." Id., 85.

Application of the principles expressed in *Romanowski* defeats the propositions advanced by the defendant. In the present case, the trial court found that there was no disagreement between the towns of Newtown and Monroe as to the location of the town line. The defendant acknowledged in his brief that the towns agreed to the location of the line, at least "informally."[13] Pursuant to *Romanowski*, then, the trial court had no power to change the line in order to accommodate the claims of the defendant.[14] In the present case, as in *Romanowski*, the towns themselves had no disagreement as to the location of the boundary. In reaching its decision, the court did not establish a town boundary but only adjudicated the case using the municipal boundary that the towns recognized. The court did not err in so doing, and the court properly denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

[13] The defendant claims that the towns never followed the procedure mandated by § 7-113 to mark the boundary with appropriate monuments. There is no statutory or other authority for the proposition that a boundary does not exist until it is properly monumented. Towns may have the duty to set out proper monuments, but we need not decide the issue in the circumstances of this case.

[14] The location of the boundary mattered in this case because the defendant posits that the land on which alleged zoning and wetlands violations existed was within the town of Monroe, and, therefore, Newtown had no authority over these conditions.

II

The defendant's second claim is that the court erred in denying his motion to open because he had not received notice of, and did not have an opportunity to be heard at, the July 23, 2014 hearing. "The principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . . The exercise of equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Internal quotation marks omitted.) *CUDA & Associates, LLC* v. *Smith*, 144 Conn. App. 763, 765–66, 73 A.3d 848 (2013), citing *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94–95, 952 A.2d 1 (2008). Additionally, "[t]he modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal." (Internal quotation marks omitted.) *CUDA & Associates, LLC* v. *Smith*, supra, 766, citing *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 103–104, 616 A.2d 793 (1992).

As stated previously in this opinion, Murtha withdrew his appearance prior to the July 23, 2014 hearing, and the defendant has asserted that he was not advised of the withdrawal, of the necessity that he or a new attorney file an appearance, or of the date of the hearing. In the course of denying the motion to open, the court stated that it made "a finding that neither motion [to

open][15] was filed in a timely fashion, that there must be an end to litigation, that the defendant had notice, according to all of the information which the court has reviewed throughout the proceedings . . . ." (Footnote added.) The parties apparently have proceeded on the assumption that the defendant likely did not receive actual prior notice of the July 23, 2014 hearing.[16] We assume for the purpose of this discussion, then, that because of his attorney's withdrawal and apparent failure to follow the prescribed procedure of notifying the client,[17] the defendant did not receive notice of the July 23, 2014 hearing. In the unusual circumstances of this case, we hold that the court, nonetheless, did not abuse its discretion in denying the motion to open.

It is not disputed that the defendant did receive actual notice of the injunction on multiple occasions. He was served with a copy of the memorandum of decision on September 5, 2014, and the defendant stated in a subsequent pleading that he received a copy of the injunction on September 10, 2014. The defendant could have, but did not, move to open the court's August 5, 2014 judgment at that time.

The first motion for contempt was mailed to the defendant on January 15, 2015, and the defendant and his new attorney, Grabowski, were present in court during the hearing on the motion. The defendant had been served personally with notice to attend the hearing. Again, the defendant could have, but did not, move to open the court's August 5, 2014 judgment.

Damages for violating the terms of the injunction were awarded at the hearing, and a judgment lien was

[15] The defendant filed motions to open the judgments in the cases brought by both towns.

[16] The plaintiffs in their brief mention the court's finding that "the defendant had notice," but they do not argue that the court's general and passing reference was a specific finding that the defendant had prior notice of the July 23, 2014 hearing, and the plaintiffs do not argue that any notice referred to by the court is an independent basis for affirming the judgment.

[17] See Practice Book § 3-10.

served on the defendant. He appealed to this court from the judgment awarding damages, but the appeal ultimately was dismissed because of his failure to file a brief. A second hearing seeking supplemental damages for violation of the injunction was held on May 12, 2016; the defendant was present and filed an appearance. Once again, the defendant did not seek to open the August 5, 2014 judgment. The court rendered a second supplemental judgment on the day of the hearing and notice was sent to appearing parties, including the defendant, on May 20, 2016.

The town of Newtown served the defendant with a second judgment lien on May 31, 2016, and commenced a foreclosure action on October 26, 2016. See *Newtown* v. *Ostrosky*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6060962-S.

Only then, on December 12, 2016, did the defendant move to open the judgments of August 5, 2014, in both actions, partly on the ground that he had not received notice of the hearing on the towns' complaints for injunctive relief heard on July 23, 2014. The court, as noted previously, denied the motion to open because the defendant undoubtedly had knowledge of the injunction for more than two years prior to moving to open that judgment. The defendant claims that his right to due process was violated.

Because we assume for the purpose of this decision that the defendant did not have prior notice of the July 23, 2014 hearing or the opportunity to participate in that hearing, we, therefore, also assume that the court's power to entertain a motion to open on that basis was not limited by the four month rule established by § 52-212a and repeated in Practice Book § 17-4. The court has inherent authority to open judgments rendered in the absence of notice. See *General Motors Acceptance Corp.* v. *Pumphrey*, 13 Conn. App. 223, 228–29, 535 A.2d 396 (1988).

Although the court had the power to open the judgment,[18] it was not required to do so. Our case law recognizes an interest in finality even where the initial judgment sought to be opened was rendered in the absence of jurisdiction, especially where the movant has had a prior opportunity to contest the judgment. *Urban Redevelopment Commission* v. *Katsetos*, 86 Conn. App. 236, 240–44, 860 A.2d 1233 (2004) (opening judgment almost three years after it was rendered was not warranted despite lack of subject matter jurisdiction because lack of jurisdiction was not obvious and could have been raised on direct appeal), cert. denied, 272 Conn. 919, 866 A.2d 1289 (2005); see also *CUDA & Associates, LLC* v. *Smith*, supra, 144 Conn. App. 764, 766–67 (affirming denial of second motion to open where defendant failed to appeal from denial of first motion to open, claiming that default judgment was rendered without notice); see, e.g., *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013).

As recited previously, the defendant was well aware of the proceedings, which had occurred over a number of years. Various cease and desist orders and copies of court orders, subpoenas and notices had been served. Perhaps most notably, the defendant was served with a subpoena to appear at the February 25, 2015 contempt hearing and was, in fact, present. The defendant appealed from that judgment of contempt on March 16, 2015. He allowed that appeal to be dismissed by not filing a brief. He was timely served with the August 5, 2014 judgment and he participated in two contempt hearings, the predicates of which were the injunctive

[18] The plaintiffs argue in their brief that the negligence of counsel in not following proper procedures in the course of withdrawing his appearance does not prevent the application of the four month rule regarding a motion to open. See *Wren* v. *MacPherson Interiors, Inc.*, 69 Conn. App. 349, 363–64, 794 A.2d 1043 (2002). In light of our disposition of the appeal, we need not decide whether the withdrawal of counsel, combined with lack of notice to the client, nonetheless requires enforcement of the four month rule.

orders now under collateral attack. Yet, he waited over two years before moving to open the judgments. In these circumstances, the court did not abuse its discretion in denying the motion to open.

III

The defendant finally asserts that, because a court has continuing jurisdiction to enforce and to modify its injunctive orders, the orders of August 5, 2014, could validly be revisited at any time.[19] He relies on cases such as *Hall* v. *Dichello Distributors, Inc.*, 14 Conn. App. 184, 540 A.2d 704 (1988), for the proposition that the four month rule does not apply to permanent injunctions.

The defendant correctly states that § 52-212a and Practice Book § 17-4 expressly except from the four month rule "cases in which the court has continuing jurisdiction . . . ." Courts generally have the ongoing power to enforce existing injunctions and to modify permanent injunctions when circumstances so dictate. See *Adams* v. *Vaill*, 158 Conn. 478, 482, 262 A.2d 169 (1969) ("[i]t cannot be doubted that courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to do so"). If a party seeks to open an injunction to enable a court to modify or, hypothetically, to dissolve an injunction, the court has the power to entertain the motion. See id.; see also *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 215–16, 884 A.2d 981 (2005); *Hall* v. *Dichello Distributors, Inc.*, supra, 14 Conn. App. 193.

[19] The defendant has also suggested in passing that the injunctive orders were impermissibly vague and, thus, violative of the right to due process. We find nothing in the record to indicate that this claim was raised in the trial court and, therefore, do not address this unpreserved claim on appeal. *Burns* v. *Adler*, 325 Conn. 14, 20, 155 A.3d 1223 (2017) (concluding that certified question was not raised in trial court and, therefore, was not reviewable).

The rather unremarkable proposition that a court has continuing jurisdiction to enforce or to modify its injunctive orders in appropriate circumstances does not compel the conclusion that a court must grant every motion requesting such relief. The court in the present case appears not to have held that it lacked the power to open the judgment.[20] Rather, the court exercised its discretion to deny the motion, concluding that "there must be an end to litigation at some point . . . ."

We also note that the defendant did not seek to modify the injunction in order to accommodate and to respond to a change in circumstances, as in *Adams* v. *Vaill*, supra, 158 Conn. 480–84, or to clarify the application of the injunction, as in *Hall* v. *Dichello Distributors, Inc.*, supra, 14 Conn. App. 190–91. Such actions impliedly accept the validity of the underlying injunction but, for articulated reasons, suggest that the original valid order should be amended. Rather, the defendant in the present action sought to void the injunction ab initio and also urged that the two judgments awarding monetary damages be vacated as well.[21] For reasons stated previously, it was not unreasonable for the court to recognize the interest in finality and the defendant's opportunities to raise the issue in a more timely manner. In these circumstances, the court did not abuse its discretion in denying the motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

[20] To the extent that the court's oral ruling in the transcript was ambiguous, we do not resolve the ambiguity by assuming an incorrect application of the law. See *Johnson* v. *de Toledo*, 61 Conn. App. 156, 162, 763 A.2d 28 (2000) ("It is important to recognize that a claim of error cannot be predicated on an assumption that the trial court acted incorrectly. . . . Rather, we are entitled to assume, unless it appears to the contrary, that the trial court . . . acted properly, including considering the applicable legal principles." [Internal quotation marks omitted.]), appeal dismissed, 258 Conn. 732, 785 A.2d 192 (2001).

[21] The defendant presented no authority for the proposition that the court had continuing jurisdiction over the two judgments for monetary damages.

TOWN OF MONROE ET AL. *v.* SCOTT OSTROSKY (AC 40976)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court denying his motion to open and vacate the court's prior judgment that had been rendered in favor of the plaintiff town and several of its agencies and employees. The defendant owned property that was located in the plaintiff town and an adjacent town. The plaintiffs commenced the present action after the defendant failed to comply with two cease and desist orders, which alleged violations of zoning and inland wetlands regulations. The present action was consolidated with a nearly identical action brought by the adjacent town and several of its agencies and employees, and the cases shared the same pertinent history in the trial court and in this court. *Held* that the defendant could not prevail on his claim that he did not have notice of, and an opportunity to be heard at, an evidentiary hearing, this court having addressed and fully resolved a similar claim raised by the adjacent town in the companion case of *Newtown* v. *Ostrosky* (191 Conn. App. 450), which was also decided by this court today.

Argued January 7—officially released July 30, 2019

Procedural History

Action for, inter alia, a temporary and permanent injunction requiring the defendant to comply with certain cease and desist orders, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Hon. Richard P. Gilardi*, judge trial referee; judgment for the plaintiffs; thereafter, the court granted the motion for contempt filed by the plaintiffs and awarded damages to the plaintiffs; subsequently, the court awarded damages, attorney's fees and costs to the plaintiffs; thereafter, the court, *Radcliffe, J.*, denied the motion to open and vacate the judgment filed by the defendant, and the defendant appealed to this court. *Affirmed.*

Robert M. Fleischer, for the appellant (defendant).

Jeremy F. Hayden, with whom, on the brief, was *John P. Fracassini*, for the appellees (plaintiffs).

Opinion

PER CURIAM. The defendant, Scott Ostrosky, appeals from the judgment of the trial court denying his motion to open and to vacate the court's judgment in favor of the plaintiffs, the town of Monroe and several of its agencies and employees.[1] The defendant claims that he did not have notice of and an opportunity to be heard at an evidentiary hearing. We affirm the judgment of the trial court.

The defendant owns property that is located in the towns of Monroe and Newtown. The town of Monroe served two cease and desist orders on the defendant on May 14, 2013, which orders alleged violations of zoning and inland wetlands regulations. The defendant failed to comply, and the plaintiffs served a summons and complaint dated February 20, 2014. In April, 2014, this case was consolidated with the nearly identical case of *Newtown* v. *Ostrosky*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6041984-S.

The cases brought by the towns of Newtown and Monroe, and the towns' various agencies and employees, thereafter shared the same pertinent history in the trial court and in this court. The cases were argued before this court on the same day. Parts II and III of our opinion in *Newtown* v. *Ostrosky*, 191 Conn. App. 450, A.3d (2019), together with the factual discussion therein, fully resolve the issues presented in

[1] The plaintiffs are the town of Monroe, the Planning and Zoning Commission of the Town of Monroe, the Inland Wetlands Commission of the Town of Monroe, and Joseph Chapman, the town of Monroe land use enforcement officer.

this case, and no useful purpose would be served by repetition here.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* KERLYN T.*
(AC 40163)

Prescott, Elgo and Pellegrino, Js.

Syllabus

Convicted of the crimes of aggravated sexual assault in the first degree, home invasion, risk of injury to a child, assault in the second degree with a firearm, unlawful restraint in the first degree, threatening in the first degree and assault in the third degree, the defendant appealed to this court. He claimed that the trial court erred in finding that his jury trial waiver was knowing, intelligent and voluntary under the totality of the circumstances, and by failing to conduct an adequate inquiry into the underlying facts giving rise to his request to remove his privately retained defense counsel. *Held*:

1. The trial court did not err when it determined that the defendant knowingly, intelligently, and voluntarily waived his right to a jury trial: although the defendant claimed that he was not competent at the time he waived his right to a jury trial, the record showed that prior to the waiver, he was twice determined to be competent by the trial court, and the record also indicated that the defendant was represented by counsel at the time of the waiver, that the defendant believed that he had sufficient time to discuss the decision with defense counsel, that the defendant was satisfied with the advice of defense counsel, that the court explained the purpose of the canvass as it related to the waiver, that the defendant understood the right he was giving up, and that the court informed the defendant that his election was not revocable; moreover, the defendant could not prevail on his claim that the colloquy was constitutionally inadequate because it failed to elicit information regarding his background, experience, conduct, and mental and emotional state, as the defendant was approximately thirty-two years of age, had lived in the United States for all of his adult life, and was familiar with the court system, and our courts repeatedly have rejected claims that an otherwise valid waiver of the right to a jury is undermined by

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* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e; *State* v. *Jose G.*, 290 Conn. 331, 963 A.2d 42 (2009).

the trial court's failure to include a specific item of information in its canvass.

2. The trial court did not abuse its discretion when it determined that the defendant had not demonstrated a substantial reason that warranted either the discharge of defense counsel or a more searching inquiry into the request; the record indicated that the trial court inquired as to the reason for the defendant's request to discharge defense counsel and requested that defense counsel address the issue on the record, the defendant's principal complaint concerned a matter of trial strategy, which does not necessarily compel the appointment of new counsel, the defendant's own behavior toward defense counsel contributed to the frequent delays at trial, and given that at no other time during the proceedings did the defendant state his desire to discharge defense counsel, request the appointment of a public defender, or request to proceed as a self-represented party, and given that the defendant demonstrated through his subsequent cooperation with defense counsel during his case-in-chief that his relationship with defense counsel had not wholly broken down, the court had good reason to doubt whether the defendant's request was based on a substantial reason.

Argued March 14—officially released July 30, 2019

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of criminal attempt to commit assault in the first degree, intimidating a witness, strangulation in the second degree, and assault in the third degree, and substitute information, in the second case, charging the defendant with three counts of the crime of threatening in the first degree, and with the crimes of aggravated sexual assault in the first degree, home invasion, risk of injury to a child, assault in the second degree with a firearm, assault in the third degree, kidnapping in the first degree with a firearm, unlawful restraint in the first degree, criminal possession of a firearm, and criminal violation of a protective order, brought to the Superior Court in the judicial district of Danbury, where the cases were consolidated and tried to the court, *Russo*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of criminal attempt to commit assault in the first degree; judgments of guilty of two

counts each of assault in the third degree and threatening in the first degree, and of aggravated sexual assault in the first degree, home invasion, risk of injury to a child, assault in the second degree with a firearm, and unlawful restraint in the first degree, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sharmese Hodge*, assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Kerlyn T., appeals from the judgments of conviction, rendered following a trial to the court, of aggravated sexual assault in the first degree in violation of General Statutes § 53a-70a (a) (1), home invasion in violation of General Statutes § 53a-100aa (a) (2), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), assault in the second degree with a firearm in violation of General Statutes § 53a-60a (a), unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and two counts each of threatening in the first degree in violation of General Statutes § 53a-61aa (a) (3),[1] and assault in the third degree in violation of General Statutes § 53a-61 (a) (1). On appeal, the defendant claims that the court erred (1) in finding that his jury trial waiver was knowing, intelligent and voluntary, and (2) by failing to conduct an adequate inquiry into the underlying facts giving rise to his request to remove his privately retained counsel. Upon review, we conclude that the court did

[1] Although § 53a-61aa (a) (3) was the subject of technical amendments in 2016; see Public Acts 2016, No. 16-67, § 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.

not err when it determined that the defendant's jury trial waiver was knowing, intelligent and voluntary, nor did it err when it denied the defendant's request to remove defense counsel midtrial without a more searching inquiry. Accordingly, we affirm the judgments of conviction.

In its oral decision, the court found the following relevant facts. On May 26, 2013, the defendant confronted and assaulted the victim. On May 28, 2014, the defendant broke into the victim's Danbury apartment armed with a semiautomatic assault style rifle. Although the victim was not present, the defendant remained in the apartment, concealing himself therein. The victim returned to the apartment later that evening accompanied by her minor child[2] and a coworker. Once inside, they were confronted by the defendant and held at gunpoint inside for approximately three hours. During that time, the defendant forcefully restrained the victim, bound her to a chair, taped her mouth shut and, thereafter, assaulted her both physically and sexually, while the minor child and the coworker were present in the apartment.

The defendant was subsequently arrested. The operative informations charged the defendant with aggravated sexual assault in the first degree in violation of § 53a-70a (a) (1), home invasion in violation of § 53a-100aa (a) (2), risk of injury to a child in violation of § 53-21 (a) (1), assault in the second degree with a firearm in violation of § 53a-60a (a), unlawful restraint in the first degree in violation of § 53a-95 (a), two counts of assault in the third degree in violation of § 53a-61 (a) (1), three counts of threatening in the first degree in violation of § 53a-61aa (a) (3), criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1), strangulation in the second degree in violation of General

[2] The defendant is the biological father of the minor child.

Statutes (Rev. to 2013) § 53a-64bb (a), intimidating a witness in violation of General Statutes § 53a-151a, kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1),[3] and criminal violation of a protective order in violation of General Statutes (Rev. to 2013) § 53a-223.

A six day trial to the court was held in February and May, 2016. At trial, the court heard testimony from, among others, the victim, the coworker, and the defendant relating to the May 26, 2013 confrontation and the May 28, 2014 home invasion. After largely crediting the testimony of the victim and the coworker, the court found the defendant guilty on nine counts.[4] This appeal followed. Additional facts will be provided as necessary.

I

On appeal, the defendant first claims that the court erred when it determined that he knowingly, intelligently and voluntarily waived his right to a jury trial under the totality of the circumstances.[5] Specifically, the defendant claims that his waiver was constitutionally inadequate because, despite stating that he was not ready to make such a decision, the choice was "imposed

[3] 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.

[4] During trial, the defendant moved for a judgment of acquittal, and the court dismissed one count of criminal attempt to commit assault in the first degree. After the close of evidence, the court found the defendant not guilty of strangulation in the second degree, criminal violation of a protective order, kidnapping in the first degree with a firearm, one count of threatening in the first degree, and criminal possession of a firearm. The court also dismissed one count of intimidating a witness for improper pleading.

[5] Without expressly challenging the court's competency findings, the defendant seems to suggest that he was not competent when the waiver was made because of an unspecified mental illness that he was suffering from at the time. For the reasons stated herein, we are not persuaded.

on [him] by the combined pressure of the court, the prosecutor, and [defense counsel].'' The defendant further claims that, at a minimum, the court should have informed the defendant of, among other things, the number of jurors that comprise a jury panel and that a jury's verdict must be unanimous. We disagree.

The following additional facts are relevant to the defendant's claim. On January 22, 2015, following the defendant's arrest, Attorney Mark Johnson, a public defender, appeared before the court on behalf of the defendant and requested a formal competency evaluation of the defendant pursuant to General Statutes § 54-56d, on the basis of Attorney Johnson's belief that the defendant was unable to assist in his own defense.[6] During an otherwise brief hearing, the court granted the motion after Attorney Johnson stated that the defendant's state of mind was impairing his ability to prepare a proper defense.

The competency evaluation was conducted on February 13, 2015, by the Office of Forensic Evaluations, which determined that the defendant, at that time, was not competent to stand trial. It further concluded that there was a ''substantial probability [that the defendant] could be restored to competence within the maximum statutory time frame,'' and, therefore, ''recommend[ed] an initial commitment period of sixty days . . . [in] the *least restrictive setting* . . . .'' (Emphasis added.) After the court adopted the evaluation, the defendant was admitted to Whiting Forensic Division of Connecticut Valley Hospital (Whiting) for treatment and rehabilitation. On May 7, 2015, the court, *Russo*, *J.*, adopted the conclusion of a second competency evaluation

[6] General Statutes § 54-56d provides in relevant part: ''(a) . . . a defendant is not competent if the defendant is *unable* to understand the proceedings against him or her or *to assist in his or her own defense*.'' (Emphasis added.)

administered at Whiting on April 23, 2015, that determined that the defendant was competent to stand trial.[7]

On November 6, 2015, after the defendant rejected the state's offer of a plea agreement, the court notified the defendant that the matter would be placed on the trial list and that jury selection would commence the following month. On February 6, 2016, when the defendant appeared before Judge Russo for jury selection, the defendant requested that the court provide him with more time to consider whether to elect a jury trial or a court trial. The court denied his request.

At that hearing, defense counsel, Attorney Gerald Klein,[8] was unable to ascertain whether the defendant wanted to elect a jury trial or a court trial and moved for a second § 54-56d competency evaluation due to his belief that the defendant was unable to continue assisting with his own defense. In response, the court engaged the defendant in a lengthy colloquy and permitted him to speak freely about various grievances, which ranged from his frustrations with the discovery process to an alleged assault that occurred during his confinement at Whiting.

[7] The following colloquy took place between defense counsel, Attorney Johnson, and the court during the defendant's second competency hearing on May 7, 2015.

"The Court: [I have] . . . a report dated April 27, 2015, from the Department of Mental Health and Addiction Services. That report [is] very comprehensive, and it does conclude that [the defendant], who is present in court today . . . has been restored to competency and does demonstrate a sufficient understanding of the proceedings and can ably assist in his own defense. [Attorney] Johnson?

"[Attorney] Johnson: Yes, Your Honor . . . as I said, [we would stipulate to the findings contained in that exhibit and request] that he be released back to [the Department of Correction] at this time."

[8] Attorney Johnson represented the defendant during the preliminary stages of his criminal proceedings relating to the May, 2014 home invasion, in addition to a number of other matters that arose prior to that arrest. Attorney Johnson was later replaced by privately retained counsel, Attorney Klein, in June, 2015. Thereafter, Attorney Klein represented the defendant during all relevant proceedings.

At the conclusion of the colloquy, the court denied Attorney Klein's request for a second competency evaluation, stating: "[A]fter spending nearly [one and one-half hours] with [the defendant] on a number of topics, [I] cannot justify ordering the examination for a variety of reasons. For one, [the defendant] has presented himself here today, as I have witnessed him in the past, [as] a competent, articulate, [and] to steal a phrase from [Attorney] Klein, [as] a very measured individual, who, at least in my view, certainly understands the nature of the proceedings here in court, certainly understands the function of the personnel that are assembled in this very room, certainly understands the nature of the proceedings against him and the charges that have been alleged against him. . . . I also believe—and I realize that . . . [Attorney] Klein may [disagree] on this point—that [the defendant] does have the ability to assist in his own defense. . . . So, I do not find that the examination at this point in time is justified."

The court proceeded to address the issue of whether the defendant would elect a jury or a court trial. Taking into account the defendant's earlier request for more time, the court provided an additional opportunity for the defendant to meet with Attorney Klein. After a forty minute recess, the defendant waived his right to a jury trial and elected a court trial. Prior to making that decision, the following canvass occurred on the record.

"The Court: . . . I would ask both counsel to pay particular[ly] close attention to my questions. If I miss any, please let me know, so that we can complete the canvass. . . . [O]n the issue of waiving your constitutional right to a jury trial . . . the United States constitution and our state constitution both mandate that you have a constitutional right to be tried by a jury of your peers. Do you understand that, [sir]?

"The Defendant: Yes, Your Honor.

"The Court: And after speaking with you and, equally as important, speaking with [Attorney] Klein, you have elected to waive that right to a jury trial and you've elected to have [what is] called a courtside trial, meaning that, likely me or someone like me, another Superior Court judge, would be the finder of fact in the trial and also would be the sentencing judge if you were found guilty. . . . Is that your understanding, [sir]?

"The Defendant: Yes, I understand . . . .

* * *

"The Court: [Sir], are you on any drugs or medication that would affect your ability to understand what I'm saying right now?

"The Defendant: No, Your Honor.

"The Court: And have you had time to consult with [Attorney] Klein about your election to waive your constitutional right to a trial by jury and [to] elect a courtside trial? . . .

"The Defendant: Yes, Your Honor.

"The Court: And I believe [Attorney] Klein . . . said that he would encourage you to waive your right to a jury trial and elect a trial by the court. And do you agree with him on that suggestion, [sir]?

"The Defendant: Yes, Your Honor.

"The Court: And are you aware . . . [that], as you stand there today, you are cloaked with the presumption of innocence, and I look at you as a person who is presumed innocent?

"The Defendant: Yes, Your Honor.

* * *

"The Court: Do you understand, [sir], that you have been charged with those charges that I've just recited for you here today on the record? . . .

"The Defendant: Yes, Your Honor, I understand.

* * *

"The Court: Is there any other question that either counselor would feel comfortable if I ask?

* * *

"[Attorney] Klein: . . . I would suggest . . . [that] the court [tell] him that this is a final decision as to these matters, and he can't change his mind . . . .

"The Court: All right. And [the defendant is] nodding his head in agreement with [defense counsel]. I do take that as his—

"The Defendant: Yes, Your Honor.

"The Court: —his affirmation to the court that he won't change his mind and it will be a courtside trial.

* * *

"[Attorney] Klein: Thank you, Your Honor.

"The Court: Thank you, [sir].

"The Defendant: No, thank you, Your Honor. I appreciate that. God bless."

As a preliminary matter, we note that the defendant raises this claim for the first time on appeal, requesting review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[9] Because the

[9] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781.

record is adequate for review and the claim is of a constitutional nature,[10] we agree with the defendant that the claim is reviewable under *Golding*.[11] Accordingly, we next consider whether the defendant's claim satisfied the third prong of *Golding*, namely, whether "the alleged constitutional violation . . . exists and . . . [whether it] deprived the [defendant] of a fair trial." (Internal quotation marks omitted.) *In re Yasiel R.*, supra, 781.

"The right to a jury trial in a criminal case is among those constitutional rights which are related to the procedure for the determination of guilt or innocence. The standard for an effective waiver of such a right is that it must be knowing and intelligent, as well as voluntary. . . . Relying on the standard articulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), we have adopted the definition of a valid waiver of a constitutional right as the intentional relinquishment or abandonment of a known right. . . . Our task, therefore, is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to a jury trial. . . . Our inquiry is dependent upon the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused."

[10] Although the defendant also asserts a violation of our state constitution, he has provided no independent state constitutional analysis. We, thus, limit our review to the defendant's federal constitutional claim. See *State* v. *Jarrett*, 82 Conn. App. 489, 498 n.5, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004).

[11] Additionally, the defendant requests that this court use its supervisory authority to establish a more uniform procedure for conducting a canvass on the waiver of the right to a jury trial. "Supervisory authority is an extraordinary remedy that should be used sparingly . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014). Because traditional protections are adequate to safeguard the rights of a defendant who waives his right to a jury trial and to safeguard the integrity of the judicial system, we decline to exercise our supervisory powers in the present case. See *State* v. *Scott*, 158 Conn. App. 809, 820–21, 121 A.3d 742, cert. denied, 319 Conn. 946, 125 A.3d 527 (2015).

(Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gore*, 288 Conn. 770, 775–77, 955 A.2d 1 (2008).

Moreover, "[i]n *Gore*, our Supreme Court concluded that [although] the right to a jury trial must be personally and affirmatively waived by the defendant in order to render such waiver valid . . . [the] canvass need not be overly detailed or extensive . . . . [Rather] it should be sufficient to allow the trial court to obtain assurance that the defendant: (1) understands that he or she personally has the right to a jury trial; (2) understands that he or she possesses the authority to give up or waive the right to a jury trial; and (3) voluntarily has chosen to waive the right to a jury trial and to elect a court trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Scott*, 158 Conn. App. 809, 815–16, 121 A.3d 742, cert. denied, 319 Conn. 946, 125 A.3d 527 (2015). Furthermore, this court has held that "the canvass required for a jury trial waiver [need not] be as extensive as [for example] the canvass constitutionally required for a valid guilty plea because in pleading guilty, a defendant forfeits a number of constitutional rights." (Internal quotation marks omitted.) Id., 816.

Critically, our Supreme Court "repeatedly has determined that, even when a defendant has a history of mental illness and/or incompetency, if he presently is competent, the trial judge need not engage in a more searching canvass than typically is required before accepting the defendant's waiver of his right to a jury." *State* v. *Rizzo*, 303 Conn. 71, 110, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). In such a case, we look to the "totality of the circumstances analysis to determine whether the defendant's personal waiver of a jury trial was made knowingly, intelligently and voluntarily." *State* v. *Gore*, supra, 288 Conn. 782 n.12.

On appeal, the defendant claims, in essence, that the trial court's canvass was constitutionally inadequate because he was suffering from an unspecified mental illness at the time he waived his right to a jury trial and, therefore, his waiver could not be knowing, intelligent, and voluntary.[12] Despite the defendant's suggestion that he was not competent at the time he waived his right to a jury trial, the record shows that prior to the waiver he was twice determined to be competent by Judge Russo. See *State* v. *Ouellette*, 271 Conn. 740, 752–53, 859 A.2d 907 (2004) ("It is undisputed that an accused who is competent to stand trial also is competent to waive constitutional rights. . . . Thus, any criminal defendant who has been found competent to stand trial, ipso facto, is competent to waive the right to [a jury trial] as a matter of federal constitutional law." [Citation omitted; footnote omitted; internal quotation marks omitted.]); see also *State* v. *Rizzo*, supra, 303 Conn. 110 (court denying defendant's claim that more robust canvass was necessary because of his history of mental illness).

Here, in addition to the competency determinations, the record also indicates that the defendant was represented by counsel at the time of the waiver and that

[12] In support of his claim, the defendant directs our attention to dicta in our Supreme Court's decision in *State* v. *Ouellette*, 271 Conn. 740, 754–55 n.18, 859 A.2d 907 (2004), in which the court addressed a similar claim. In *Ouellette*, the defendant claimed that "the trial court failed to canvass [the defendant] adequately regarding his waiver of the right to a jury trial in light of his history of mental illness." Id., 754 n.18. In considering that claim, the court noted that the nonbinding authority cited by the defendant did not "[constitute] persuasive precedent for [his] claim." Id. In the present case, for example, one of the principal cases now cited by the defendant, *United States* v. *Christensen*, 18 F.3d 822, 823 (9th Cir. 1994), which also was relied on by the defendant in *Ouellette*, was determined to be of no consequence because the court in *Christensen* "did not have the benefit of a recent and comprehensive evaluation of the defendant's mental condition at the time of the jury trial waiver"; *State* v. *Ouellette*, supra, 755 n.18; and, thus, the case was materially distinct from the present case. Here, as in *Ouellette*, the facts are equally as inapposite in that the trial court had a recent and comprehensive competency evaluation of the defendant at the time of the waiver.

he believed that he had sufficient time to discuss the decision with Attorney Klein. Furthermore, the defendant stated on the record that he was satisfied with Attorney Klein's advice. See *State* v. *Scott*, supra, 158 Conn. App. 817 (defendant's consultation with defense counsel concerning right to waive jury trial supports conclusion that waiver was constitutionally sound).

In addition, the record indicates that the court explained the purpose of the canvass as it related to the waiver and that the defendant understood the right that he was giving up. See *State* v. *Woods*, 297 Conn. 569, 586, 4 A.3d 236 (2010). During the canvass, the defendant's responses were delivered in a clear and unequivocal, "yes, Your Honor," "no, Your Honor." See *State* v. *Scott*, supra, 158 Conn. App. 818 ("[t]he defendant's immediate and unequivocal replies to the court's inquiries reflected his strong desire to proceed to trial before the court, not a jury" [internal quotation marks omitted]). Finally, at the conclusion of the canvass, the court asked whether it had missed anything. In response to the court's inquiry, Attorney Klein asked the court to inform the defendant that his election was not revocable, and the court promptly did so, thus, assuring itself that the defendant knew he could not change his mind.

Despite these facts, the defendant further asserts that the colloquy was constitutionally inadequate because it failed to elicit information regarding "the defendant's background, experience, conduct, and . . . mental and emotional state." Specifically, the defendant argues that, because he was reared in a country with a civil legal system, and because he does not possess a high school diploma, the court's failure to provide a more thorough canvass constitutes reversible error.

As previously stated in this opinion, "our inquiry is dependent upon the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." (Internal quotation marks omitted.) *State* v. *Gore*, supra, 288 Conn.

777. The record indicates that at the time of the waiver, the defendant was approximately thirty-two years of age, had lived in the United States for all of his adult life, and was familiar with the court system, having pleaded guilty to a series of misdemeanors in 2012 in connection with three separate criminal matters. See *State* v. *Smith*, 100 Conn. App. 313, 324, 917 A.2d 1017 (in determining whether defendant validly waived right to jury trial, court considered fact that defendant "had some familiarity with the court system, having a lengthy criminal history that included robberies"), cert. denied, 282 Conn. 920, 925 A.2d 1102 (2007).

In sum, "[t]he court's failure to include in its canvass [certain information, such as] the number of jurors to which the defendant would be entitled and the requirement that the jury's verdict be unanimous does not compel the conclusion that the defendant's waiver was constitutionally deficient. Our courts [repeatedly] have declined to require [such] a formulaic canvass and have rejected claims that an otherwise valid waiver of the right to a jury is undermined by the trial court's failure to include a specific item of information in its canvass." (Internal quotation marks omitted.) *State* v. *Scott*, supra, 158 Conn. App. 819; see also *State* v. *Rizzo*, supra, 303 Conn. 99–105.

For these reasons, we conclude that the court did not err when it determined that the defendant knowingly, intelligently, and voluntarily waived his right to a jury trial. Accordingly, the defendant's claim does not satisfy the third prong of *Golding* and, therefore, fails.

II

The defendant next claims that the trial court erred in failing to conduct an adequate inquiry following the defendant's request to replace his privately retained counsel. Specifically, he claims that the court abused its discretion because it "simply rejected the defendant's grievances on their face" and "failed to conduct

any type of inquiry" into his request. (Emphasis omitted; internal quotation marks omitted.) We disagree.

The following facts and procedural history are relevant to the defendant's claim. On May 11, 2016, prior to the start of the fourth day of trial, the defendant made an oral motion to discharge Attorney Klein, claiming that he was not representing his interests. The court inquired as to the reason for the defendant's request. The defendant explained that he did not like that Attorney Klein encouraged him to accept the plea agreement offered by the state, and, additionally, he thought that Attorney Klein was not properly conducting cross-examination of the witnesses because he was not putting on evidence in response to their testimony. The court denied the motion after reminding the defendant that he would be able to put on evidence and call his own witnesses during his case-in-chief after the state rested its case.

As a preliminary consideration, "we note that we look with a jaundiced eye at complaints regarding adequacy of counsel made on the eve of trial, or during the trial itself"; *State* v. *Robinson*, 227 Conn. 711, 726, 631 A.2d 288 (1993); because, "[w]hile a criminal defendant's right to be represented by counsel implies a degree of freedom to be represented by counsel of [the] defendant's choice . . . this guarantee does not grant a defendant an unlimited opportunity to obtain alternate counsel on the eve of trial. . . . A request for substitution of counsel requires support by a *substantial reason*, and may not be used to achieve delay." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Gonzalez*, 205 Conn. 673, 683, 535 A.2d 345 (1987). "Where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction." (Internal quotation marks omitted.) *State* v. *Robinson*, supra, 725.

In challenging the court's inquiry, the defendant does not claim that the request to discharge counsel was, in

fact, supported by a "substantial reason." Rather, he claims that simply because he made such a request, the court should have initiated a more searching inquiry into the underlying reasons and, at a minimum, explained the different legal options available to him and allowed him to seek alternative representation. We are not persuaded.

"If [t]he defendant's [request falls] . . . short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney. . . . The extent of an inquiry into a complaint concerning defense counsel lies within the discretion of the trial court." (Citation omitted; internal quotation marks omitted.) *State* v. *Robinson*, supra, 227 Conn. 725. "In evaluating whether the trial court abused its discretion in denying [the] defendant's motion for substitution of counsel, [an appellate court] should consider the following factors: [t]he timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense." (Internal quotation marks omitted.) *State* v. *Hernaiz*, 140 Conn. App. 848, 854–55, 60 A.3d 331, cert. denied, 308 Conn. 928, 64 A.3d 121 (2013).

In applying the abuse of discretion standard to the record before us, we are particularly mindful of the context in which the motion to discharge counsel arose and that the court had an opportunity to observe the defendant's interactions with Attorney Klein over time and, therefore, was in a superior position to determine whether there was a proper factual basis for the defendant's request. See *State* v. *Rosado*, 52 Conn. App. 408, 430, 726 A.2d 1177 (1999) ("It is within the trial court's discretion to determine whether a factual basis exists for appointing new counsel. . . . [A]bsent a factual

record revealing an abuse of [the court's] discretion, the court's failure to allow new counsel is not reversible error." [Internal quotation marks omitted.]).

Principally, the defendant's claim that the court simply dismissed his request outright is belied by the record. The record indicates that the court *did*, in fact, inquire as to the reason for his request to discharge Attorney Klein, at which point, the defendant repeated his complaints. The court also made an additional inquiry by requesting that Attorney Klein address the issue on the record.[13] Furthermore, we note that the defendant's principal complaint concerned a matter of trial strategy. As our Supreme Court has stated: "[A difference] of opinion over trial strategy . . . [does] not necessarily compel the appointment of new counsel." (Internal quotation marks omitted.) *State* v. *Robinson*, supra, 227 Conn. 726–27. In addition, it was the defendant's own behavior toward Attorney Klein that contributed to the frequent delays at trial. See id., 727 ("[a] defendant is not entitled to demand a reassignment of counsel simply on the basis of a breakdown in communication which he himself induced" [internal quotation marks omitted]).

Given that at no other time during the proceedings did the defendant state his desire to discharge defense counsel, request the appointment of a public defender, or request to proceed as a self-represented party, and given that the defendant demonstrated through his subsequent cooperation with defense counsel during his case-in-chief that his relationship with defense counsel

[13] In response, Attorney Klein stated: "The only thing I can add, You Honor . . . is that I read a case just [last] week . . . [regarding] whether a formal evidentiary hearing has to be held when someone seeks to remove counsel at a critical time in the proceeding . . . . [T]he judge in that case did just as Your Honor is doing, ask[ing] the reasons and if it doesn't find . . . a meaningful reason that would require sworn testimony, [then the decision would be within the court's discretion]."

had not wholly broken down, the court had good reason to doubt whether the defendant's request was based on a "substantial reason." Accordingly, we conclude that the court did not abuse its discretion when it determined that the defendant had not demonstrated a substantial reason that warranted either the discharge of defense counsel or a more searching inquiry into the request.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAVIER VALENTIN PORFIL
(AC 40305)

Prescott, Elgo and Harper, Js.

Syllabus

Convicted, after a jury trial, of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, sale of narcotics within 1500 feet of a school, possession of drug paraphernalia, possession of narcotics and interfering with an officer, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction and that the trial court deprived him of his constitutional right to present a defense by improperly excluding certain photographic evidence. The police had received an anonymous telephone call, stating that the defendant, whom the caller identified by first and last name, had warrants and was selling narcotics from the open front porch of a three-story multifamily house. After verifying that the defendant had active warrants, a police officer, P, obtained a photograph of the defendant and drove to the subject house, where he observed the defendant sitting alone on the porch wearing shorts, a blue tank top and a baseball hat. P then positioned himself across the street from the house, where he had a clear view of the porch through his binoculars and was able to see that the left front door was open, revealing a little part of a staircase leading to the second floor landing. After watching the defendant for a while, P observed a man approach the house and engage in a brief conversation with the defendant at the bottom of the porch stairs. P then observed the defendant walk through the open doorway, reemerge after a time, descend the porch stairs and engage in an item-for-item exchange with the man, who then left. A few minutes later, P saw a car park at an intersection near the house and

observed a man exit the car, approach the house and engage in a brief conversation with the defendant, who again walked into the house through the open doorway, reappeared a few seconds later and engaged in another item-for-item exchange. The man then walked back to his car and drove away. No one else was seen with the defendant throughout this transaction other than the person with whom he had made the exchange. During this time, P was in constant radio communication with other officers positioned nearby, who, upon receiving P's notification, approached the front and the rear of the house. T and two other officers found the defendant alone on the porch, dressed in a blue tank top, shorts and a baseball cap, with the left front door to the house open. Upon seeing the officers, the defendant turned around and ran through the open doorway up the staircase and entered the second floor apartment. As the officers pursued the defendant, they observed that there was no one else in the stairwell. Meanwhile, S and another officer had positioned themselves on the back porch near the exterior rear door. After a short time, S observed the defendant begin to exit through the door, but, upon seeing the officers, he retreated back into the house and shut the door. The police subsequently searched the entire house, but the defendant could not be located. In searching the house, however, they found a brown paper bag in plain view in the second floor hallway, which contained a digital scale, rubber bands, and 171 bags of heroin, packaged in bundles of ten glassine packets, tied with rubber bands, and packed in rice. The total street value of the heroin was between approximately $1000 and $1150. P subsequently arrested the defendant. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction, which was based on his claim that the state failed to produce sufficient evidence to prove beyond a reasonable doubt that he had constructive possession of the narcotics recovered by the police from the common area of the subject house: the defendant's reliance on *State* v. *Nova* (161 Conn. App. 708) for his contention that the state failed to establish, in addition to his spatial and temporal proximity to the narcotics, the existence of other incriminating statements or circumstances linking him to them was misplaced, as unlike in *Nova*, there was evidence in the present case of hand-to-hand exchanges in a high crime area with substantial narcotic activity, which transformed the defendant's prior presence on the porch and movement toward the second floor hallway into something more than mere proximity to the narcotics seized from that hallway, the state did not did not rely solely on the hand-to-hand exchanges and the defendant's proximity to the narcotics, as the street value of the heroin recovered, the particular location in which it was found and the absence of other individuals observed in that location provided additional support for an inference that the defendant had been selling the narcotics from the porch of the house, and provided a basis for the jury reasonably to conclude that the most likely explanation for why the narcotics were found in plain

view in a common area of the house was that whoever claimed ownership or possession of them had placed them there intentionally and actively was engaged in selling them; moreover, given the tip from the anonymous caller and the testimony of P and T that the defendant had been alone on the porch throughout the transactions and that no one else had been seen in the stairwell, the jury reasonably could have concluded further that it was the defendant who had been actively engaged in selling the narcotics, and, on the basis of the defendant's flight, the jury reasonably could have inferred that he possessed a guilty conscience with respect to both the conduct underlying his outstanding arrest warrants against him and the conduct underlying the present case; accordingly, considering all of this evidence together with the defendant's temporal and physical proximity to the narcotics recovered by the police, the jury reasonably could have inferred that the defendant had been selling the subject narcotics from the porch of the house during the time in question and, by necessary implication, concluded that he was aware of the nature and presence of the narcotics and had dominion and control over them.

2. The defendant's claim that the trial court committed evidentiary error and deprived him of his constitutional right to present a defense by improperly excluding certain photographs of the front and back of the house was unavailing:

a. The trial court's exclusion of the photograph of the front of the house, which depicts what appear to be two trees with lush foliage completely obstructing the view of the porch from where P had observed the defendant engaging in the two hand-to-hand exchanges, did not deprive the defendant of his constitutional right to present a defense: even if this court assumed that the exclusion of the photograph was improper, the defendant was able to adequately present his defenses of misidentification and lack of possession by other means and had additional, alternative avenues available to him to further bolster his defenses, and, therefore, the exclusion of the photograph did not rise to the level of a constitutional violation; moreover, this court had a fair assurance that any impropriety in excluding the defendant's photograph of the front of the house did not substantially affect the jury's verdict because, even without P's testimony regarding the hand-to-hand exchanges, there was compelling substantial evidence tending to prove the defendant's identity as the suspect and of his constructive possession of the narcotics, and, contrary to the defendant's contention that the excluded photograph likely would have significantly undermined P's testimony that he had a clear view of the porch, there was strong evidence corroborating P's testimony.

b. The trial court properly excluded the photograph of the rear of the house, that court having correctly determined that the defendant failed to authenticate the photograph; at trial, defense counsel represented to the court that the defendant was prepared to testify that the front of

the house, as depicted in his photograph, looked substantially similar to the way it looked at the time the offenses were committed, but he made no similar offer of proof with respect to the photograph of the back of the house, and, therefore, the defendant failed to make the prima facie showing required to authenticate the photograph of the back of the house.

3. The defendant could not prevail on his claim that the trial court improperly prevented him from showing a scar on his back to the jury, thereby depriving him of this constitutional right to present his defense that he was misidentified as the suspect seen running from the police at the house, as that court did not abuse its discretion by excluding the demonstration of the scar as needlessly cumulative; although the defendant's medical records, which were admitted into evidence by agreement of the parties, did not disclose the condition of the defendant's back at the time of the offenses, the jury reasonably could have inferred from the records that a spinal surgery undergone by the defendant had left a scar on his back, and the jury did not need to rely solely on inferences, as the defendant explicitly testified that, as a result of the spinal surgery, he had a scar on his back, and the state did not contest that aspect of the defendant's testimony.

Argued January 9—officially released July 30, 2019

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, sale of narcotics within 1500 feet of a school, possession of drug paraphernalia, possession of narcotics and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Harmon*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was, *Samantha L. Oden*, former certified legal intern, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Javier Valentin Porfil, appeals from the judgment of conviction, rendered after

a jury trial, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of General Statutes § 21a-278a (b), possession of drug paraphernalia in violation of General Statutes § 21a-267, and possession of narcotics in violation of General Statutes § 21a-279 (a).[1] The defendant claims on appeal that (1) the evidence was insufficient to establish that he was in constructive possession of narcotics,[2] (2) the trial court deprived him of his constitutional right to present a defense by improperly excluding certain photographic evidence and (3) the trial court deprived him of his constitutional right to present a misidentification defense by preventing him from displaying a scar to the jury. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On August 14, 2015, the Waterbury Police Department received an anonymous telephone call, stating that the defendant, whom the caller identified by first and last name, "had warrants" and was selling narcotics from the porch of 126–128 Walnut Street in Waterbury. Located at this address is a three-story multifamily house with an open front porch. The house has two front doors; the door on the left opens to a staircase leading to the second floor landing, and the door on the right opens to a first floor apartment. The house also has a back door that leads to the back door of the first floor apartment and a back staircase to the second

[1] The defendant also was convicted of interfering with an officer in violation of General Statutes § 53a-167a. He does not challenge this conviction on appeal.

[2] As relief under this claim, the defendant seeks reversal of his conviction and a judgment of acquittal on the narcotics related charges and the charge of possession of drug paraphernalia. The defendant, however, does not separately analyze the question of sufficiency of the evidence of possession of drug paraphernalia. Accordingly, neither do we.

floor. The defendant did not live at this address, but he was there often to visit family members. After verifying that the defendant did indeed have active warrants, Officer Scott Phelan obtained a photograph of the defendant and headed to the house in an undercover vehicle. Meanwhile, several other uniformed officers waited in unmarked vehicles in the vicinity of the house, ready to "move in" on the defendant on Phelan's word.

Phelan proceeded to drive past the house where he observed the defendant sitting alone on the porch wearing shorts, a blue tank top, and a baseball hat. Phelan then sought out a location from which he could best observe the defendant. He eventually took up a position across the street in the area of the intersection of Walnut Street and Cossett Street, approximately 150 or 175 feet southwest of the porch. From this position, Phelan had a clear view of the porch through his binoculars and was able to observe that the left front door was open, revealing a "little bit" of the staircase. He did not observe anyone in the stairway. After watching the defendant for a time, Phelan observed a man approach the house and engage in a brief conversation with the defendant at the bottom of the porch stairs. The defendant then walked through the open doorway, reappeared after a time, descended the porch stairs, and "exchange[d] . . . an item for an item" with the man. The man then left.

A few minutes later, Phelan saw a vehicle pull up and park on the corner of Catherine Avenue and Walnut Street and observed a man exit the vehicle, approach the house, and engage in a brief conversation with the defendant.[3] The defendant again walked into the house through the open doorway, reappeared a few seconds later, and engaged in another item-for-item exchange. The man then walked back to his car and drove away. No one else was seen with the defendant throughout

[3] The house is located on the northeast corner of the intersection of Catherine Avenue and Walnut Street.

this transaction other than the person with whom he had made the exchange.

During this time, Phelan was in constant radio communication with the other officers positioned nearby and relayed to them that he had observed the defendant engage in two hand-to-hand exchanges. Meanwhile, the other officers waited to receive notification from Phelan that the defendant had stepped far enough away from the house to give the officers a good chance of apprehending him in case he tried to run back inside. After receiving such notification, Officer Jerome Touponse and two other officers ran to the front porch, and two officers went to the back of the house to secure the rear door.

Upon approaching the front of the house, Touponse and the other officers found the defendant alone on the porch, dressed in a blue tank top, shorts, and a baseball cap, with the left front door to the house open. The defendant then turned around and ran through the open left front doorway up the staircase and entered the second floor apartment.[4] The officers gave chase. There was no one else in the stairwell as they pursued the defendant. The officers eventually made their way inside the second floor apartment, where the occupants pointed the police to the back door of the apartment. Touponse went to the back door, but the defendant was nowhere to be seen.

Meanwhile, the two officers tasked with covering the back of the house, Rose[5] and David Shaban, positioned themselves on the back porch near the exterior rear door; Shaban stood directly in front of the door, with Rose a few steps behind him. After a short time, Shaban

[4] At the top of the staircase, a hallway extending to the right leads to the front door of the second floor apartment. From this point, the hallway extends to the right parallel to the first stairwell and leads to a stairway to the third floor.

[5] The record does not identity Officer Rose's first name.

observed the defendant, who was wearing a blue shirt and a baseball cap, begin to exit through the door, but, upon seeing the officers, he retreated back into the house and shut the door. When the officers were eventually able to get through the door, they found the back door to the first floor apartment was open. The front door to the apartment was also open, which indicated to Shaban that the defendant had run right through the apartment.

The police subsequently searched the entire house, but the defendant could not be located. In searching the house, however, they found a brown paper bag in plain view in the hallway extending to the right of the entrance to the second floor apartment. See footnote 4 of this opinion. The bag contained a digital scale, rubber bands, and 171 bags of heroin, packaged in bundles of ten glassine packets, tied with rubber bands, and packed in rice. The total street value of the heroin was between approximately $1000 and $1150.

Officer Phelan arrested the defendant several months later, in February, 2016. After Phelan explained to him that he was being arrested in connection with the events of August 14, 2015, the defendant stated that he was "sorry for running." The defendant subsequently was charged with, inter alia, possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b), possession of drug paraphernalia in violation of § 21a-267, and possession of narcotics in violation of § 21a-279 (a). A jury trial was held beginning on October 11, 2016, at which the defendant testified in his own defense.[6] On October 13, 2016, the jury returned a verdict of guilty on all counts, and the defendant was sen-

[6] The defendant moved for a judgment of acquittal after the state's case-in-chief and again upon the conclusion of all of the evidence. The court denied both motions.

tenced on January 20, 2017.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the evidence adduced at trial was insufficient to support his conviction because the state did not produce sufficient evidence to prove beyond a reasonable doubt that he had constructive possession of the narcotics recovered by the police from 126–128 Walnut Street. We disagree.

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

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

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . .

[7] The defendant was sentenced to a total effective sentence of twenty years of incarceration, execution suspended after ten years, eight years of which are mandatory, followed by five years of probation.

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

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Griffin*, 184 Conn. App. 595, 613–14, 195 A.3d 723, cert. denied, 330 Conn. 941, 195 A.3d 692 (2018) and cert. denied, 330 Conn. 941, 195 A.3d 693 (2018).

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where . . . the [narcotics were] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may

not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime. . . . [T]he test for illegal possession of drugs is that the accused must know that the substance in question is a drug, must know of its presence and exercise dominion and control over it. . . .

"Importantly, [k]nowledge of the presence of narcotics and control may be proved circumstantially. . . . Knowledge that drugs are present and under a defendant's control when found in a defendant's home or car is more easily shown, of course, if the defendant has exclusive possession of the area in which the drugs are found. The difficult cases . . . arise when possession of an area, such as a car or home or an apartment, is shared with another person or persons. In situations in which the putative offender is not in exclusive possession of the premises where the narcotics are found, we may not infer that he or she knew of the presence of the narcotics or that he or she had control over them, without incriminating statements or circumstances to support that inference." (Internal quotation marks omitted.) *State* v. *Bischoff*, 182 Conn. App. 563, 571–72, 190 A.3d 137, cert. denied, 330 Conn. 912, 193 A.3d 48 (2018).

In the present case, there is no dispute that narcotics were found in the second floor hallway of 126–128 Walnut Street, and the defendant concedes in his appellate brief that the quantity of narcotics recovered permits

an inference that they were intended for sale.[8] There is also no dispute—at least for purposes of the defendant's evidentiary insufficiency claim—that, shortly before the discovery of the narcotics by the police, the defendant repeatedly entered 126–128 Walnut Street through the doorway leading to the second floor hallway. As previously stated, however, spatial and temporal proximity to contraband, without more, is insufficient to establish constructive possession if, as in the present case, the contraband is found in a common area over which the defendant did not have exclusive possession. The state, therefore, was required to establish the existence of other incriminating statements or circumstances linking him to the narcotics. According to the defendant, the state failed to introduce evidence of any such statements or circumstances, and, therefore, his conviction must be reversed. In support of this claim, the defendant relies primarily on this court's decision in *State* v. *Nova*, 161 Conn. App. 708, 129 A.3d 146 (2015). This reliance is misplaced.

In *Nova*, the defendant had been the subject of an ongoing police investigation, and the police had obtained a warrant to search the defendant and an apartment to which he was linked for narcotics. Id., 710. In preparation for execution of the warrant, police officers conducted surveillance of the building. Id. During the surveillance, the defendant was observed entering the apartment through the main entry door, which

[8] The evidence supporting such an inference is as follows. The police recovered 171 bags of heroin and a digital scale from the second floor landing at 126–128 Walnut Street. The heroin was packaged in bundles of ten glassine packets, tied with rubber bands, and packed in rice. According to Officer Gary Angon, an expert on heroin sales, heroin sellers typically possess the drug in quantities larger than that usually possessed by an individual user—often in conjunction with a scale—and typically package the drug in individual bags or ten bag bundles tied by rubber bands. Angon also testified that sellers typically use substances like rice to protect the drugs from being ruined by moisture. In Angon's expert opinion, someone in possession of 171 bags of heroin is likely a dealer.

opened into the kitchen. Id., 711. He reemerged a few moments later and ascended an external staircase to a balcony on the third floor of the building that adjoined the upper level of the apartment, where he remained for approximately one minute. Id. The defendant then returned to his car in the apartment building's parking lot. Id.

"Shortly after the defendant returned to his car, police observed a brief meeting between the defendant and another individual in the building's parking lot. Specifically, the officers saw a white male drive a pickup truck into the parking lot and park next to the defendant's car. The defendant opened the pickup truck's passenger side door, leaned in, and spoke to the driver for approximately one minute. During the meeting, police did not observe any hand-to-hand contact or the exchange of any item. Afterward, the pickup truck left the parking lot." Id. Moments later, a police officer observed the driver of the pickup truck appear to snort something and wipe his nose while stopped at a red traffic signal. Id. The officer, however, did not see any drugs or hear the driver snorting, and the police did not attempt to stop the truck. Id.

The defendant was then detained and arrested; he did not resist or make any incriminating statements, and no cash or drugs were found on his person or in his car. Id., 711–12, 713. "The search of the apartment revealed drugs and drug paraphernalia throughout. In the kitchen, a knotted plastic bag containing crack cocaine and a plastic bag containing powder cocaine were in a kitchen cabinet; and clear plastic bags, aluminum foil, and colored tape containing cocaine residue were in a garbage can. On the third floor balcony . . . officers found a clear plastic sandwich bag containing twelve small yellow ziplock bags in a Wal-Mart shopping bag." Id., 712.

Following a trial to the court, the defendant was convicted of possession of narcotics and possession of narcotics within 1500 feet of a school. Id., 710. "In reaching its judgment, the court relied on several factors that it deemed sufficiently incriminating to support an inference of constructive possession: the defendant's status as the target of the police investigation; his presence in the areas of the apartment where drugs and paraphernalia were found—namely, the kitchen and the balcony; his meeting with the driver of the pickup truck; and his unfettered access to the apartment . . . ." Id., 720. On appeal to this court, the defendant claimed that this evidence was insufficient to sustain his conviction because the state had failed to prove beyond a reasonable doubt that he constructively possessed the drugs found in the common areas of the apartment. Id., 716. This court agreed, holding that none of these factors, alone or in combination with the others, established anything more than a temporal and spatial nexus between the defendant and the cocaine. Id., 720, 725.

With regard to the defendant's presence in the kitchen and balcony, the court concluded that this "evidence established merely that he briefly appeared in those areas." Id., 721. More specifically, the court stated that, given the absence of "evidence show[ing] the [defendant] making suspicious movements toward the narcotics, or carrying a bag similar to one later found to contain narcotics, *or engaging in a drug sale near the narcotics*," the state had failed to show "a compelling correlation between the defendant's actions . . . and the conclusion that he controlled the narcotics in the apartment." (Emphasis added.) Id., 722. As to the evidence regarding the defendant's meeting with the driver of the pickup truck and the driver's apparent snorting of some substance thereafter, the court concluded that such evidence fell short of supporting an inference that

the defendant had controlled the cocaine in the apartment. Id., 723. In so concluding, the court stressed that, "[w]ithout *evidence of any item changing hands* or of the substance the driver was supposedly consuming, his suspicious movements did not transform the defendant's prior presence on the balcony and in the kitchen into something more than mere proximity to the contraband seized from those places." (Emphasis added.) Id., 724. Accordingly, this court reversed the defendant's conviction. Id., 725.

Contrary to the defendant's contention, *Nova* is materially distinguishable from the present case. Most significantly, the defendant in the present case was observed by Officer Phelan engaging in two hand-to-hand transactions. In each instance, the defendant was approached by an individual from the street. After a brief conversation with the individual, the defendant entered the house through the open left front door, reemerged moments later, and proceeded to exchange "an item for an item" with the individual, who then promptly left. In Phelan's experience, this behavior was indicative of hand-to-hand drug transactions.

Officer Gary Angon, an expert on heroin sales, likewise testified that the defendant's behavior on the porch was consistent with heroin dealing. Angon testified that sellers generally keep the heroin they sell in a location near the point of sale but not on their person, so as to avoid detection by the police. According to Angon, "[u]sually they like to keep it within sight so they can tell if anyone is going to try and take their product," "usually in a spot that's within a few seconds so they can be able to make their interaction with a customer, find out what it is they need to get and go to that spot, retrieve it and come back." Phelan's and Angon's opinions at trial were supported further by testimony that 126–128 Walnut Street is situated in a high crime area with substantial narcotics activity. See *State* v.

Slaughter, 151 Conn. App. 340, 349, 95 A.3d 1160 (detectives' conclusions that defendant's conduct was consistent with that of drug sellers were supported by testimony that neighborhood in which purported sales occurred was known to be high crime area in which drug sales took place), cert. denied, 314 Conn. 916, 100 A.3d 405 (2014); see also *State* v. *Barber*, 64 Conn. App. 659, 667, 781 A.2d 464 ("[e]vidence demonstrating that the defendant was present in a known drug trafficking area further suggests an intent to sell" [internal quotation marks omitted]), cert. denied, 258 Conn. 925, 783 A.2d 1030 (2001). Consequently, unlike in *Nova*, there was evidence in the present case of items changing hands, thus transforming the defendant's prior presence on the porch and movement toward the second floor hallway into something more than mere proximity to the contraband seized from that hallway. See *State* v. *Nova*, supra, 161 Conn. App. 724.

The defendant further argues, however, that the evidence of the hand-to-hand exchanges fails to show a compelling correlation between his actions and the conclusion that he controlled the narcotics found in the hallway because there was no evidence that the items exchanged were either money or contraband. According to the defendant, "[i]n those cases in which observed, alleged drug sales have formed a basis for sustaining a defendant's conviction, additional circumstantial evidence establishing a direct connection has been introduced. Usually this involves a view of either the object or of the currency." Specifically, the defendant points to this court's decisions in *State* v. *Slaughter*, supra, 151 Conn. App. 340, and *State* v. *Forde*, 52 Conn. App. 159, 726 A.2d 132, cert. denied, 248 Conn. 918, 734 A.2d 567 (1999).

In *Slaughter*, the defendant was observed engaging in what police officers believed to be a hand-to-hand drug transaction. *State* v. *Slaughter*, supra, 151 Conn.

App. 342–43. Narcotics were later discovered in an apartment in which the defendant had been seen entering during the course of the transaction, and $1559 in cash was found on the defendant's person. Id., 343–44. In *Forde*, the police observed the defendant approach a truck, take money from the driver, and then discreetly give a signal to the defendant's associate, who then approached a nearby stone wall before handing an unidentified item to the driver. *State* v. *Forde*, supra, 52 Conn. App. 161. The police subsequently found $460 on the defendant's person. Id., 162. The police also retrieved a paper bag containing cocaine from the wall that the defendant's associate had approached, and the bag had the associate's fingerprints on it. Id., 162 and n.5.

Contrasting the circumstances in the present case with those in *Slaughter* and *Forde*, the defendant contends that "[t]he fact that neither money nor contraband were identified as part of the transaction [in the present case] establishes that they may only be labeled drug transactions by speculation." We disagree. Although the evidence deemed sufficient in *Slaughter* and *Forde* included certain facts and circumstances not found in the present case, nothing in those opinions indicates that such evidence would be necessary in every case involving an observed hand-to-hand exchange. See *State* v. *Stephen J. R.*, 309 Conn. 586, 595 and n.8, 72 A.3d 379 (2013) (defendant's reliance on *State* v. *Thomas H.*, 101 Conn. App. 363, 922 A.2d 214 [2007], for proposition that victim's testimony must be corroborated to be sufficient to support sexual assault conviction, was misplaced; "[a]lthough the evidence deemed sufficient in [*Thomas H.*] included a bloodstain on the victim's underwear . . . nothing in the opinion indicates that the Appellate Court deemed this evidence relevant to its conclusion or that such evidence would be necessary in every case" [internal quotation marks omitted]). Moreover, the state in the present case did not rely solely on

the hand-to-hand exchanges and the defendant's proximity to the contraband.

The street value of the heroin recovered, the particular location in which it was found, and the absence of other individuals observed in that location provide additional support for an inference that the defendant had been selling the heroin from the porch of 126–128 Walnut Street. As the state's expert on heroin sales, Officer Angon, testified, the street value of the heroin recovered was between approximately $1000 and $1150. Consequently, the jury reasonably could have concluded that, given the value of the drugs and their illicit nature, the most likely explanation for why they were found in plain view in a common area of the house was that whoever claimed ownership or possession of them had not simply left them there carelessly but, rather, had placed them there intentionally and actively was engaged in selling them. Given the testimony of Officers Phelan and Touponse that the defendant had been alone on the porch throughout the transactions and that no one else had been seen in the stairwell, the jury reasonably could have concluded further that it was the defendant who had been actively engaged in selling the drugs.

There was also testimony from Officers Phelan, Touponse, and Shaban that, on the day in question, the Waterbury Police Department had received a telephone call from an anonymous caller, stating that the defendant, whom the caller identified by first and last name, "was selling narcotics from the porch of [126–128] Walnut Street, and that he had a couple of warrants . . . ." Upon receiving this tip, the police confirmed that the defendant did indeed have several active felony warrants out for his arrest, and Phelan's subsequent drive-by confirmed that the defendant was indeed present on the porch of 126–128 Walnut Street. See *Navarette* v. *California*, 572 U.S. 393, 398, 134 S. Ct. 1683, 188 L.

Ed. 2d 680 (2014) ("officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity"). The defendant did not object to the admission of this testimony as substantive evidence that the defendant was selling drugs from the porch. Consequently, it "enter[ed] the case as part of the evidence and [could] be considered by the jury." *State* v. *Hickey*, 23 Conn. App. 712, 718, 584 A.2d 473, cert. denied, 217 Conn. 809, 585 A.2d 1233, cert. denied, 501 U.S. 1252, 111 S. Ct. 2894, 115 L. Ed. 2d 1058 (1991); see *Clougherty* v. *Clougherty*, 131 Conn. App. 270, 274, 26 A.3d 704, cert. denied, 302 Conn. 948, 31 A.3d 383 (2011).

Moreover, the defendant's flight from 126–128 Walnut Street upon seeing the police approach the front porch supports "an inference of consciousness of guilt, suggesting that the defendant knew of the presence and character of the narcotics . . . nearby . . . and sought to distance himself from them." *State* v. *Bischoff*, supra, 182 Conn. App. 573; see *State* v. *Jefferson*, 67 Conn. App. 249, 258, 786 A.2d 1189 (2001) ("[w]hen considered together with all the facts of the case, flight may justify an inference of the accused's guilt" [internal quotation marks omitted]), cert. denied, 259 Conn. 918, 791 A.2d 566 (2002). The defendant contends, however, that such an inference is unjustified in the present case because, at the time of his flight, there were several unrelated warrants out for his arrest, "suggesting a reason to flee the police [that] had nothing at all to do with any alleged illegal conduct on August 14, 2015." We are not persuaded.

Our Supreme Court rejected a similar argument in *State* v. *Kelly*, 256 Conn. 23, 57, 770 A.2d 908 (2001), noting: "[R]equiring the state to prove *which* crime caused a defendant to flee would place upon the [s]tate an impossible burden to prove that one charged with multiple violations of the law fled solely because of his

consciousness that he committed one particular crime. *It is better logic to infer that the defendant, who is charged with several offenses, fled because of a conscious knowledge that he is guilty of them all.*" (Emphasis in original; internal quotation marks omitted.) Thus, we conclude that the jury in the present case reasonably could have inferred from the defendant's flight that he possessed a guilty conscience with respect to both the conduct underlying his outstanding arrest warrants and the conduct underlying the present case.[9]

Considering this evidence together with the defendant's temporal and physical proximity to the narcotics recovered by the police, the jury reasonably could have inferred that the defendant had been selling those narcotics from the porch of 126–128 Walnut Street during the time in question. See *State* v. *Slaughter*, supra, 151 Conn. App. 347 (finder of fact reasonably could infer defendant's knowledge of presence of drugs in apartment from observations by police of apparent drug transactions, including his frequent trips to and from apartment in course of these transactions). By necessary implication, the jury reasonably could have concluded that the defendant was aware of the nature and presence of the narcotics and had dominion and control over them. Accordingly, we conclude that the state presented sufficient evidence at trial to prove beyond a

[9] The defendant further argues that no inference of consciousness of guilt was warranted in the present case because, rather than run *away* from the contraband when the police approached, he ran *toward* it. See *State* v. *Bischoff*, supra, 182 Conn. App. 573 ("[t]he defendant's act of running *away* upon the officers' entry reasonably could have been found to support an inference of consciousness of guilt, suggesting that the defendant knew of the presence and character of the narcotics on the nearby TV stand and sought to *distance* himself from them" [emphasis added]). We are not persuaded. The jury reasonably could have determined that, given the defendant's position on the front porch when the police approached him, his only viable path away from the scene of the crime was through the house. Consequently, the fact that this path led past evidence of the crime does not render unreasonable an inference of consciousness of guilt.

reasonable doubt that the defendant had constructive possession of the narcotics.

II

The defendant next claims that the trial court deprived him of his constitutional right to present a defense under the sixth amendment to the United States constitution[10] by improperly excluding photographs of the front and back of the house. We disagree.

The following additional procedural history is relevant to this claim. During its case-in-chief, the state presented evidence regarding the police officers' views of the front and back of the house. Regarding the front of the house, Officer Phelan pointed out on a map the location where he had positioned himself during his undercover observation of the defendant and testified that he had had a clear view of the defendant from this position. During this testimony, the state's exhibit 2, a Google Maps photograph of the front of 126–128 Walnut Street, was admitted as a full exhibit by agreement of the parties. Exhibit 2 shows what appear to be one tree at the edge of the property line abutting Walnut Street and another, smaller tree at the edge of the property line abutting Catherine Avenue. Although the branches of the trees partially obstruct the view of the porch, the foliage as depicted in the exhibit is not dense, and the porch is largely visible. Phelan testified that this photograph depicts the house at roughly the same angle from which he had observed the defendant. Phelan

[10] "A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . [which] are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 272 n.3, 96 A.3d 1199 (2014). 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; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

could not say when the photograph was taken, but Officer Angon testified that it showed the house as it was at the time of the offenses in August, 2015. Angon did not state the basis for this assertion, and defense counsel did not cross-examine him on the matter.

Regarding the back of the house, Officer Shaban testified that while he and Officer Rose were positioned near the rear door, Rose alerted him that he had seen the defendant through a window descending the back staircase. Shaban did not testify regarding his own view of the back windows, and defense counsel did not cross-examine him on the matter. Nor did defense counsel call Rose to testify.

On October 13, 2016, during the defendant's case-in-chief, defense counsel sought to have two photographs of the house at 126–128 Walnut Street admitted into evidence. The first photograph is of the front of the house and depicts what appear to be two trees with lush foliage completely obstructing the view of the porch from which the defendant was purportedly observed by Officer Phelan engaging in the two hand-to-hand exchanges. The second photograph is of the back of the house and depicts one or more windows on each story. According to defense counsel, this photograph demonstrates that there was no window through which Officer Rose could have observed the defendant running down the back staircase.

The state objected to the admission of these photographs, arguing that, because they had been taken in October, 2016—approximately fourteen months after the offenses occurred—they did not "fairly and accurately represent that location . . . ."[11] In other words,

[11] With respect to the photograph of the front of the house in particular, the state noted that the defendant's photograph was "a complete[ly] different photograph from the Google Earth map of August, 2015, when this incident occurred" and argued that its prejudicial effect, therefore, outweighed its probative value.

the state was concerned about the authenticity of the photographs. See *State* v. *Walker*, 180 Conn. App. 291, 326, 183 A.3d 1 (to satisfy authentication requirement, photograph "[must] be introduced through a witness competent to verify it as a *fair and accurate representation* of what it depicts" [emphasis added; internal quotation marks omitted]), cert. granted on other grounds, 328 Conn. 934, 183 A.3d 637 (2018). Specifically, the state noted its concern about the possibility that, during this fourteen month period, the condition of the trees could have changed and the house could have been remodeled.

As to the photograph of the front of the house, defense counsel offered to have the defendant testify that he is familiar with the property at 126–128 Walnut Street, that the photograph "accurately reflect[ed] the way the house and the tree looked"[12] when he took the photograph, and that "the way the tree looks in [his] photograph is substantially similar to the way it looked in August of 2014."[13] Defense counsel therefore argued that the state's concern regarding this photograph went to the weight of the evidence, not its admissibility. As to the photograph of the back of the house, defense counsel discounted the state's concern about the possibility of subsequent remodeling, noting that there was no evidence that any repair work had been done on the house. Defense counsel, however, made no offer of proof that such work had *not* been done or that the back of the house as depicted in the photograph looked substantially similar to the way it did at the time of the offenses.

The court issued its ruling from the bench, stating: "The court's concern is in the delay in the time frame

[12] It is unclear from the transcript which tree defense counsel was referring to.

[13] Presumably, defense counsel meant August, 2015, the date of the offenses.

of the photograph[s] and the concern that [these] photograph[s] [were] taken over one year from when the actual incident allegedly occurred here in this matter. Based upon that, I'm not considering [these] photograph[s] to be relevant at this time." Later in the proceeding, the court clarified that it had also excluded the photographs due to (1) the fact that the photographs were taken in the autumn whereas the offenses occurred during the summer and (2) the possibility that there may have been repairs to the property. The court did, however, permit the defendant to testify as to the condition of the house and trees at the time of the offenses.

On appeal, the defendant claims that the trial court committed evidentiary error and deprived him of his constitutional right to present a defense by excluding these two photographs. To resolve this claim we must determine, "[f]irst, whether the court's ruling was improper. *State* v. *Saunders*, 267 Conn. 363, 385, 838 A.2d 186, cert. denied, 541 U.S. 1036, 124 S. Ct. 2113, 158 L. Ed. 2d 722 (2004). Should we answer that question in the negative, we need go no further. Should we answer that question in the affirmative, the second question we must answer is whether that impropriety rises to the level of a constitutional violation. Id. Should we answer that question in the affirmative as well, the third question we must answer is whether the state has demonstrated that the constitutional impropriety was harmless beyond a reasonable doubt. *State* v. *William C.*, 267 Conn. 686, 706, 841 A.2d 1144 (2004). A negative answer to this third question will warrant a new trial. E.g., id., 709–10." *State* v. *Tutson*, 84 Conn. App. 610, 622, 854 A.2d 794 (2004), rev'd on other grounds, 278 Conn. 715, 899 A.2d 598 (2006). Alternatively, if the impropriety is not constitutional in nature, the burden is on the defendant to demonstrate that the evidentiary error was harmful. *State* v. *William C.*, supra, 706.

With this framework in mind, we next address each of the excluded photographs in turn.

A

Beginning with the photograph of the front of the house, we first must determine whether the trial court's ruling was improper. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Smith*, 179 Conn. App. 734, 761, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

The evidentiary ruling at issue in the present case implicates the requirement of authentication.[14] "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn.

[14] The basis for the state's objection to the admission of the photographs was the lack of authentication. The court, in excluding the evidence, echoed the substance of the state's objection but couched its ruling in terms of relevancy. "Authentication and identification are *aspects of relevancy* that are a condition precedent to admissibility." (Emphasis added; internal quotation marks omitted.) *State* v. *Morales*, 78 Conn. App. 25, 47–48, 826 A.2d 217, cert. denied, 266 Conn. 901, 832 A.2d 67 (2003); see E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 9.1.2 ("[t]o be relevant, all items of evidence offered as exhibits must be authenticated"). Accordingly, we construe the trial court's ruling as being based in the requirement of authentication more specifically.

Code Evid. § 9-1 (a). This requirement applies to all types of evidence, including demonstrative evidence such as photographs. See Conn. Code Evid. § 9-1 (a), commentary; *State* v. *Papineau*, 182 Conn. App. 756, 788, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). In order to satisfy the authentication requirement of § 9-1 of the Connecticut Code of Evidence, "[t]he proponent need only advance evidence *sufficient* to support a finding that the proffered evidence is what it is claimed to be." (Emphasis added; internal quotation marks omitted.) Conn. Code Evid. § 9-1 (a), commentary. In the case of photographs, "all that is required is that [the] photograph be introduced through a witness competent to verify it as a fair and accurate representation of what it depicts." (Internal quotation marks omitted.) *State* v. *Walker*, supra, 180 Conn. App. 326.

The defendant argues that his offer to testify to the appearance of the trees at the front of the property was sufficient to satisfy the authentication requirement and that, therefore, the photograph should have been admitted. According to the defendant, "[t]he fact that there is conflicting evidence as to the accuracy of [a photograph] does not require [its] exclusion. If the [witness] for the party offering the [photograph] testif[ies] that [it is] substantially correct [it] may be admitted, and [its] correctness then becomes a jury question." In other words, the defendant appears to argue that, in determining whether the authentication requirement has been met with respect to photographic evidence, the trial court's role is limited to ensuring that *sufficient* evidence of authenticity has been made and that it may not pass upon the *credibility* of such evidence.

The defendant's argument finds some support in appellate precedent. Our appellate courts consistently have described the evidentiary burden that must be met in order to satisfy the authentication requirement as "a

prima facie showing of authenticity." See, e.g., *State* v. *Garcia*, 299 Conn. 39, 57, 7 A.3d 355 (2010) ("Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court." [Internal quotation marks omitted.]); *State* v. *Manuel T.*, 186 Conn. App. 51, 67–68, 198 A.3d 648 (2018) (same), cert. granted, 330 Conn. 968, 200 A.3d 189 (2019). As this court repeatedly has recognized, "[t]he phrase prima facie evidence means evidence which, *if credited*, is sufficient to establish the fact or facts which it is adduced to prove." (Emphasis added; internal quotation marks omitted.) *In re Cheyenne A.*, 59 Conn. App. 151, 158, 756 A.2d 303, cert. denied, 254 Conn. 940, 761 A.2d 759 (2000). Thus, our case law appears to suggest that the trial court's role in the context of the authentication requirement is to determine whether the proof of authenticity offered by the proponent of evidence is *sufficient* for the trier of fact to find the evidence authentic—not whether, in the court's view, the proof of authenticity is *credible*. Indeed, it is well established, albeit in the context of a motion for a judgment of dismissal under Practice Book § 15-8, that a trial court may not pass upon the credibility of the evidence presented in determining whether a prima facie case has been made. See *Sonepar Distribution New England, Inc.* v. *T & T Electrical Contractors, Inc.*, 133 Conn. App. 752, 758, 37 A.3d 789 (2012).

The defendant's contention is further supported by our rules of evidence. Section 1-3 (a) of the Connecticut Code of Evidence provides in relevant part that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court." As noted in the commentary to § 1-3 (a), this rule operates in conjunction with the rules of evidence governing

authentication: "The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX [of the Connecticut Code of Evidence]. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be." Conn. Code Evid. § 1-3 (a), commentary.

Ultimately, however, we need not definitively determine whether the trial court in the present case improperly excluded the photograph of the front of the house. Even if we assume that the photograph was excluded improperly, we cannot conclude that such impropriety rose to the level of a constitutional violation. "[T]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense." (Internal quotation marks omitted.) *State* v. *Jackson*, 183 Conn. App. 623, 655–56, 193 A.3d 585, cert. granted on other grounds, 330 Conn. 922, 193 A.3d 1214 (2018).

Whether a trial court's exclusion of evidence offered by a criminal defendant deprives him of his constitutional right to present a defense "is a question that must be resolved on a case by case basis. . . . The primary

consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 276, 96 A.3d 1199 (2014). Moreover, "[a] defendant may not successfully prevail on a claim of a violation of his right to present a defense if he has failed to take steps to exercise the right or if he adequately has been permitted to present the defense by different means. See *State* v. *Tomas D.*, 296 Conn. 476, 498, 995 A.2d 583 (2010) ('a defendant may not successfully establish a violation of his [right] to present a defense . . . without first taking reasonable steps to exercise [that right]'), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 564, 34 A.3d 370 (2012); *State* v. *Shabazz*, 246 Conn. 746, 758 n.7, 719 A.2d 440 (1998) (no deprivation of constitutional right to present defense when 'defendant was adequately permitted to present his claim of self-defense by way of his own testimony, by cross-examining the state's witnesses, and by the opportunity to present any other relevant and admissible evidence bearing on that question'), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999)." *State* v. *Santana*, 313 Conn. 461, 470–71, 97 A.3d 963 (2014).

In the present case, the defendant argues that the photograph of the front of the house was central to his arguments regarding misidentification and lack of possession because it "would have considerably undercut" Officer Phelan's testimony that he had a sufficiently good view of the porch to be able to recognize the suspect as the defendant and to observe him walk into the house where the drugs were found before engaging in two hand-to-hand exchanges. The state counters that the defendant was not deprived of his right to present his defenses because he was adequately permitted to present the defenses by different means and there were

additional, alternative avenues that he could have taken to exercise his right. We agree with the state.

In support of his misidentification argument, the defendant was able to testify that (1) there are two berry trees at the front of 126–128 Walnut Street that block the entire front of the house in July and August, (2) a person standing at the intersection of Cosset and Walnut Streets where Phelan had been positioned would not have been able to see the front porch in August, 2015, (3) he had not been on the porch of 126–128 Walnut Street on the day in question, (4) he has been unable to run since being injured in an automobile accident in 2009, and (5) upon being arrested in February, 2016, he never acknowledged having run away from the police on the day in question. In addition, defense counsel was able to elicit during his cross-examination of Officer Phelan that Phelan had been positioned so far away from the porch that he had required binoculars to observe the defendant. Defense counsel also was able to elicit from Phelan that the person he had observed on the porch had been wearing a blue tank top, shorts, and a baseball hat, whereas one of the defendant's witnesses, Castille Morales, testified that she had been present in the second floor apartment of 126–128 Walnut Street at the time in question when a man dressed in a black or blue hoodie and long black pants ran through the apartment. Morales, who is the grandmother of the defendant's wife, also testified that the man who ran through her apartment was taller than the defendant and that, in the five or six years that she had known the defendant, she had never seen him running.

In support of the defendant's argument that he did not possess the narcotics, defense counsel was able to cross-examine Phelan regarding his inability to identify the items exchanged during the two suspected hand-to-hand transactions and the fact that police made no

attempt to identify or arrest the two suspected narcotics buyers. Defense counsel also elicited testimony from Officer Touponse that he had not seen the suspect throw anything away as he chased the suspect into the house. Moreover, the defendant testified that no drugs, money, or paraphernalia were found on him when he was arrested.

There also were additional avenues that the defendant could have pursued to support his defenses. He could have cross-examined Phelan regarding the appearance of the foliage on the day in question and cross-examined Angon regarding the basis for his testimony that the photograph of the front of the house submitted into evidence by the state represented the appearance of the foliage on the day in question. He also could have questioned Morales and Carmen Cruz[15]—both of whom testified for the defense and claimed to have lived at 126–128 Walnut Street—regarding the appearance of the foliage.

In sum, we agree with the state that the defendant was able to adequately present his defenses of misidentification and lack of possession by other means and had additional, alternative avenues available to him to further bolster his defenses. Accordingly, we conclude that the exclusion of the defendant's photograph of the front of 126–128 Walnut Street did not deprive him of his constitutional right to present a defense.

Because the defendant has not established that the exclusion of the photograph rose to the level of a constitutional violation, the burden is on the defendant to demonstrate that the alleged evidentiary error was harmful. See *State* v. *William C.*, supra, 267 Conn. 706 ("If . . . a constitutional right is implicated [by the improper exclusion of defense evidence], [t]he state

[15] Cruz testified that she is the defendant's aunt and lives in the first floor apartment at 126–128 Walnut Street.

bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. . . . Conversely, if the evidentiary impropriety is not constitutional in nature, the defendant bears the burden of demonstrating harm." [Citation omitted; internal quotation marks omitted.]). The defendant has failed to meet that burden.

"[W]hether [the improper exclusion of defense evidence] is harmless in a particular case depends upon a number of factors, such as the importance of the [excluded evidence] in the . . . case, whether the [evidence] was cumulative, the presence or absence of [other] evidence corroborating or contradicting the [excluded evidence] on material points . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Eleck*, 314 Conn. 123, 129, 100 A.3d 817 (2014).

The defendant argues that the evidentiary error was harmful because the state's case was weak in that it relied solely on the testimony of police officers that would have been undermined had the defendant's photograph of the front of the house been admitted into evidence. More specifically, the defendant asserts that the state's proof of identity and possession depended primarily on Officer Phelan's testimony that he had observed the defendant entering and exiting the house from the front porch of 126–128 Walnut Street before engaging in two hand-to-hand transactions, which testimony, according to the defendant, would have been

called into doubt by his excluded photograph.[16] We disagree.

Having reviewed the record in the present case, we have a fair assurance that any impropriety in excluding the defendant's photograph of the front of 126–128 Walnut Street did not substantially affect the verdict in this case. First, contrary to the defendant's suggestion, the state did not rely solely on Officer Phelan's testimony to prove identity and possession. As to the issue of identity, Officer Touponse testified that he had been familiar with the defendant from prior encounters with him and had reviewed photographs of the defendant immediately prior to approaching 126–128 Walnut Street and that, upon approaching the front of the property, he had observed the defendant on the porch wearing a blue tank top, shorts, and a baseball cap. Officer Shaban similarly testified that he had been familiar with the defendant from prior interactions with him and that, while waiting at the back of the property during the time in question, he had observed the defendant, dressed in a blue shirt and baseball cap, attempt to exit the house from the back door. Shaban also testified that, during the subsequent search of the building, the residents of the second floor apartment, Ronnie Morales and Brenda Rivera, had related to him that the defendant had passed through their apartment. Moreover, the defendant testified that he often visits family members at 126–128 Walnut Street and will sometimes "hang out" on the front porch. Indeed, the grandmother of the defendant's wife, Castille Morales, confirmed that he hangs out on the front porch between one to three times a week. Thus, there was substantial evidence aside from Phelan's testimony tending to prove the defendant's identity

[16] The defendant appears to totally discount the testimony of Officers Touponse and Shaban identifying the suspect as the defendant because, according to the defendant, these officers "saw the suspect for mere seconds, as he ran."

as the suspect seen fleeing police at 126–128 Walnut Street.

On the issue of possession, we first note that, had the state relied exclusively on the defendant's temporal and spatial proximity to the narcotics and Phelan's observation of the hand-to-hand exchanges, the exclusion of evidence tending to undermine the accuracy of Phelan's observation likely would have had a significant impact on the jury's verdict. If such were the case, the defendant's reliance on *State* v. *Nova*, supra, 161 Conn. App. 708, would be well taken. See id., 724 (without evidence of any items changing hands, defendant's mere proximity to contraband was insufficient to support finding of constructive possession). In the present case, however, the state also presented police testimony regarding an anonymous telephone call that the Waterbury Police Department had received earlier in the day. The caller informed the police that the defendant, whom the caller identified by first and last name, was selling narcotics from the porch of 126–128 Walnut Street and had active warrants out for his arrest. The police confirmed the existence of several active felony warrants, and Officer Touponse confirmed that the defendant was present on the porch when he and the other officers approached the front of 126–128 Walnut Street. The defendant did not object to the admission of this testimony, and, accordingly, the jury was entitled to consider this evidence in conjunction with the other evidence of possession noted in part I of this opinion. Thus, even without Phelan's testimony regarding the two hand-to-hand exchanges, there was compelling evidence of the defendant's constructive possession of the narcotics.

We also disagree with the defendant's contention that the excluded photograph likely would have significantly undermined Phelan's testimony that he had had a clear view of the porch of 126–128 Walnut Street, as there

was strong evidence corroborating Phelan's testimony. In the photograph of the front of the house offered by the state, which was admitted into evidence by agreement of the parties, the front porch is clearly visible. In addition, the descriptions of the defendant's clothing given by Officers Touponse and Shaban, whose views of the suspect were unobstructed, matches that given by Phelan. Moreover, the defendant conceded at trial that the front porch was not obstructed from every angle. More specifically, he testified that, whereas one can see only "peeks" of Walnut Street from the porch, Catherine Avenue was "somewhat" visible. Given Phelan's testimony that he had been able to see a car pull up and park on the corner of Catherine Avenue, the defendant's concession that the porch was somewhat visible from Catherine Avenue tends to support Phelan's testimony that he had had a clear view of the porch.

In light of the foregoing circumstances, we are not persuaded that the exclusion of the photograph of the front of the house substantially affected the jury's verdict.

B

The defendant also claims that the court improperly excluded the photograph of the back of the house and thereby deprived him of his ability to present his misidentification defense. We conclude that, because the defendant failed to authenticate this photograph, the trial court properly excluded it.

At trial, defense counsel represented to the court that the defendant was prepared to testify that the *front of the house* as depicted in his photograph looks substantially similar to the way it looked at the time of the offenses. Defense counsel made no similar offer of proof with respect to the photograph of the back of the house. The defendant, therefore, failed to make the prima facie showing required to authenticate the photograph of the back of the house, and, consequently, the

trial court properly excluded it. Because we conclude that the trial court's evidentiary ruling was proper, "we need go no further." *State* v. *Tutson*, supra, 84 Conn. App. 622.

III

Finally, the defendant claims that the court improperly prevented him from displaying a scar to the jury and that this deprived him of his constitutional right to present his misidentification defense. We disagree.

The following additional facts and procedural history are relevant to this claim. During his case-in-chief, the defendant testified that he had undergone spinal surgery in 2009 after shattering his spine in an automobile accident. As summarized in his Waterbury Hospital medical records, which were admitted into evidence by agreement, the defendant sustained several vertebral fractures in the accident. In order to treat an unstable compression fracture to one of the vertebrae, a posterior spinal fusion was performed. As detailed in the surgeon's report, the procedure required "[a] midline longitudinal incision . . . from the low thoracic region down into the lumbar area," which was closed with staples following the procedure. As to the defendant's postsurgical prognosis, the surgeon stated in his report that he "would anticipate some long-term aches and pains" but that, "typically, these types of injuries heal sufficiently so that people can return to a productive and active lifestyle." Despite this prognosis, the defendant testified at trial that he was no longer able to run.

The defendant further testified that the surgery had left him with a scar on his back, whereupon defense counsel requested the court's permission for the defendant to display the scar to the jury. The state objected, arguing that the defendant already had testified regarding his condition and that the scar was irrelevant. The court sustained the state's objection on the ground that demonstrating the scar to the jury would be cumulative,

ruling: "I think just the defendant's testimony regarding the scar itself . . . is sufficient. I don't think it's necessary for him to demonstrate that to the jury at this time . . . ."

On appeal, the defendant claims that the court improperly excluded this evidence as cumulative[17] and thereby deprived him of his right to present a defense, namely, that he was misidentified as the suspect seen running from the police at 126–128 Walnut Street. As explained in part II of this opinion, such a claim requires us to first determine the propriety of the court's ruling. See *State* v. *Tutson*, supra, 84 Conn. App. 622. On this point, the defendant argues, in relevant part, that demonstration of his scar would not have been cumulative because, "although [he] was able to admit his medical records into evidence, these records did not describe the current condition of his back."[18] We are not persuaded, and, accordingly, "we need go no further" in

[17] The defendant also claims that his scar was relevant demonstrative evidence and that, therefore, it was improper for the court to exclude it. The court, however, did not exclude the evidence on the basis of relevancy; the court excluded it on the ground that it was cumulative. Consequently, we need not determine whether such evidence was relevant. Our review is limited to determining whether the court properly excluded the evidence of the scar as cumulative.

[18] The defendant also claims that demonstration of his scar would not have been cumulative of his trial testimony because the prosecutor, during cross-examination, "continuously, and incorrectly, discounted the seriousness of the defendant's injuries." This claim is unreviewable. The defendant sought to demonstrate his scar to the jury during *direct examination*, and the court ruled on the admissibility of the proposed demonstration on the basis of the facts and circumstances then existing. Following the prosecutor's cross-examination, the defendant did not ask the court to reconsider its prior ruling. Thus, the defendant's claim, that the prosecutor's line of questioning during cross-examination somehow rendered demonstration of his scar no longer cumulative, was never presented to the court. "Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. See Practice Book § 5-2 ('[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority'); Practice Book § 60-5 ('[t]he [reviewing] court shall not be bound to consider a claim unless it was distinctly raised at trial or arose subsequent to trial').

addressing the defendant's claim. *State* v. *Tutson*, supra, 84 Conn. App. 622.

"Evidence may be precluded if its probative value is outweighed by the 'needless presentation of cumulative evidence.' Conn. Code Evid. § 4-3. Evidence is cumulative if it multiplies witnesses or documentary matter to any one or more facts that were the subject of previous proof. . . . The court's power in that area is discretionary. . . . In precluding evidence solely because it is cumulative, however, the court should exercise care to avoid precluding evidence merely because of an overlap with the evidence previously admitted." (Citations omitted.) *Glaser* v. *Pullman & Comley, LLC*, 88 Conn. App. 615, 627, 871 A.2d 392 (2005). Nevertheless, "[b]ecause of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Morquecho*, 138 Conn. App. 841, 853–54, 54 A.3d 609, cert. denied, 307 Conn. 941, 56 A.3d 948 (2012); see *State* v. *Gutierrez*, 132 Conn. App. 233, 237, 31 A.3d 412 (2011) ("[t]he trial court is vested with wide and liberal discretion in determining the admissibility of evidence claimed to be repetitious, remote or irrelevant" [internal quotation marks omitted]).

In the present case, the defendant's medical records established that the spinal surgery he underwent had required an incision that had to be stapled closed after the surgery. As the defendant notes, the medical records

For that reason, we repeatedly have held that 'we will not decide an issue that was not presented to the trial court. To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge.' " *Samuel* v. *Hartford*, 154 Conn. App. 138, 145–46, 105 A.3d 333 (2014). We, therefore, decline to consider the defendant's claim.

do not disclose "the current condition of his back." Nevertheless, the jury reasonably could have inferred from this evidence that the surgery left a scar on the defendant's back; it is a matter of common knowledge that surgical incisions generally leave permanent scars. At any rate, the jury in this instance had no need to rely solely on inferences—the defendant explicitly testified that, as a result of the spinal surgery, he now has a scar on his back. The state did not contest this aspect of the defendant's testimony, and, therefore, the trial court found it unnecessary to have the defendant demonstrate the scar to the jury. Under these circumstances, we cannot conclude that it was an abuse of discretion for the court to exclude the demonstration as needlessly cumulative. See *State* v. *Book*, 155 Conn. App. 560, 574, 109 A.3d 1027 (notice of appeal form offered by defendant was properly excluded on ground that it represented needless presentation of cumulative evidence where he "had already testified that he had appealed from the prior convictions, and the court found it unnecessary to admit the notice of appeal form"), cert. denied, 318 Conn. 901, 122 A.3d 632 (2015), cert. denied, U.S. , 136 S. Ct. 2029, 195 L. Ed. 2d 219 (2016).

The judgment is affirmed.

In this opinion the other judges concurred.

LISA A. DUFRESNE *v.* GERALD E. DUFRESNE, JR.
(AC 41582)

Lavine, Elgo and Pellegrino, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion to modify visitation with the parties' minor child. The trial court previously had granted the plaintiff sole legal custody of the child, ordered that the child continue in counseling with the child's therapist, and referred the matter to family relations

to monitor the defendant's supervised visitation with the child. The defendant alleged in his motion to modify only that he had been denied visits and phone communication with the child. The motion made no mention of the child's counseling relationship with the therapist and contained no request to terminate that relationship. At the hearing on the defendant's motion, the court concluded that it was not in the child's best interests to continue counseling and terminated the therapy. The court also heard testimony from S, a family relations counselor, about, inter alia, reports that had been prepared by parenting services agencies that had been involved in the supervised visitation between the defendant and the child. The reports were not introduced into evidence, and the defendant did not object to S's testimony on the basis of hearsay. The court did not credit S's testimony and determined that some of it was unreliable and untrustworthy because it was hearsay. On appeal to this court, the plaintiff claimed that the trial court improperly terminated the child's counseling with the therapist and failed to credit S's testimony. *Held*:

1. The trial court improperly granted the defendant's motion to modify visitation; that court abused its discretion by, sua sponte, issuing an order terminating the child's counseling with the therapist, as the motion to modify did not seek joint custody of the child or to terminate the counseling, and, thus, the parties had no notice that the court intended to address that issue, which was not properly before the court, and the issue of the child's therapy was for the plaintiff to decide, as it was the plaintiff's right to make decisions in the child's interests and the plaintiff had engaged the therapist.
2. The trial court abused its discretion by failing to credit S's testimony, as the substance of her testimony pertained to the supervised visits that the court had ordered and was probative of whether to grant the defendant's motion to modify, and although S's testimony contained hearsay, the defendant failed to object to it on that ground.

(*One judge concurring separately*)

Argued April 11—officially released July 30, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Windham at Putnam and tried to the court, *Fuger*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *A. dos Santos*, *J.*, granted the defendant's motion to modify visitation, and denied the plaintiff's motions for attorney's fees and for an order to require the defendant to request leave of the court prior to filing certain motions, and the plaintiff appealed to this court; subsequently,

the court, *A. dos Santos, J.*, issued an articulation of its decision. *Reversed; further proceedings.*

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellant (plaintiff).

Opinion

LAVINE, J. In this postdissolution appeal, the plaintiff, Lisa A. Dufresne,[1] appeals from the judgment of the trial court granting the motion to modify visitation with the parties' minor child (motion to modify) filed by the self-represented defendant, Gerald E. Dufresne, Jr. On appeal, the plaintiff claims that, in granting the motion to modify, the court improperly (1) concluded that it was not in the child's best interests to continue counseling with her therapist and terminated the relationship, and (2) failed to credit the testimony of a family relations counselor.[2] We reverse the judgment of the trial court.

The following facts and procedural history as disclosed by the record are relevant to this appeal. The parties were married on October 14, 2006. Their only child, a daughter, was born in January, 2008. The plaintiff commenced an action to dissolve the marriage on March 24, 2010. She also filed a motion requesting that the matter be referred to "family relations" and that a guardian ad litem be appointed for the child.[3] On September 1, 2010, the parties entered into an agreement whereby the plaintiff relocated to Chicopee, Massachusetts. The parties agreed to joint legal custody

[1] The plaintiff's maiden name has been restored to her, and she is now known as Lisa A. Blasdell. We refer to her as the plaintiff in this opinion.

[2] The defendant failed to comply with this court's December 31, 2018 order to file an appellee's brief on or before January 14, 2019. This court, therefore, ordered that the appeal shall be considered on the basis of the plaintiff's brief and the record as defined by Practice Book § 60-4 only.

[3] The court, *A. dos Santos, J.*, appointed Attorney Anne R. Hoyt to be the child's guardian ad litem on May 19, 2010. Hoyt did not participate in the hearing on the defendant's motion to modify and did not appear in this court.

of the child and that the issue of the child's primary residence was to be evaluated by the Family Relations Office (family relations) of the Court Support Services Division of the Judicial Branch.[4] The parties also agreed to a visitation schedule. On October 27, 2010, the defendant agreed to pay the plaintiff child support.

The trial court, *Fuger*, *J.*, dissolved the parties' marriage on April 29, 2011. Pursuant to the divorce decree, the parties were granted joint legal custody of the child, and the child's residence was "shared." The parties entered into an extensive and detailed parenting plan that provided for shared parenting time with the child.

On January 9, 2015, the matter was referred to family relations for a comprehensive evaluation. On July 6, 2015, the plaintiff filed a motion for modification of visitation and parenting time. Following a hearing held on July 29, 2015, the court, *Graziani*, *J.*, granted the plaintiff sole legal custody of the child. The child was to continue in counseling, and the parties were to participate in the child's counseling as the therapist recommended. The defendant was to visit with the child as mutually agreed by the parties, and the parties were to use the Family Wizard program[5] to communicate.

On August 10, 2016, the defendant filed a "Motion to Open and Modify Access, Postjudgment," alleging that despite the court's order of July 29, 2015, that he have "access" to the child by mutual agreement, the plaintiff had not allowed him to have access to the child since October 15, 2015, and had not allowed telephone contact between him and the child since January 13, 2016.

[4] "Family relations provides myriad services to help parties resolve custody and visitation disputes, including negotiations, conflict resolution conferences, and mediation." *Barros* v. *Barros*, 309 Conn. 499, 504, 72 A.3d 367 (2013).

[5] "Our Family Wizard" is a website that "offers web and mobile solutions for divorced or separated parents to communicate, reduce conflict, and reach resolutions on everyday do-parenting matters," available at https://www.ourfamilywizard.com/about (last visited 7/25/19).

On the same day, he also filed a motion for contempt in which he made the same allegations. By order dated October 5, 2016, the court, *A. dos Santos*, *J.*, denied the motion for contempt and issued the following orders: the defendant shall have supervised visitation at the supervision agency, Kids Safe; the parties shall reactivate their Family Wizard accounts, and cooperate and communicate through this medium or a different medium by mutual agreement; the matter shall be referred to family relations to monitor supervised visitation, and the parties shall cooperate with family relations; the plaintiff shall encourage the child to participate in visits with the defendant; and visits must be consistent and scheduled by the parties on a regular basis.

On August 30, 2017, the defendant filed the motion for modification that underlies the present appeal.[6] In his motion, the defendant alleged that he had been denied visitation and phone communication with the child. On September 14, 2017, the plaintiff filed a motion for an order requiring that the defendant request leave of the court before filing further orders for modification of custody or visitation. She also filed a motion for attorney's fees, postjudgment.

Judge dos Santos held a hearing on the parties' motions on October 18 and November 15, 2017. The plaintiff was represented by counsel; the defendant was self-represented. The court issued a memorandum of decision on March 12, 2018. The court found that after the October 5, 2016 hearing, family relations arranged for the defendant and the child to visit at the Access Agency on five occasions. The defendant testified that his visits with the child were positive for him and the child. He also testified that he had helped to rear the child from birth and had a good relationship with her.

[6] The defendant previously was represented by counsel.

He was emotional when he saw the child after not having seen her for approximately two years. The defendant admitted that on one occasion he brought photographs to share with the child, which was not permitted by the agency. After realizing his mistake, the defendant returned the photographs to his motor vehicle. He also brought hot chocolate for the child, which also was not permitted during visits. The defendant became upset and exchanged words with Access Agency staff, but not in front of the child. The defendant has anger issues. According to the defendant, he was happy to see the child, and she was happy to see him. They spoke and played games together. The child appeared to be comfortable with him.

The court found that, following the supervised visits, Access Agency staff produced a written report, which was not introduced into evidence. The family relations counselor, Nicole Stutz, who arranged for the supervised visits, read from the report during her testimony at the hearing on the parties' motions. The court stated that the assertions contained in the report were not subject to cross-examination because none of the individuals involved in the supervised visits came to court to testify as to their observations.

Following the five supervised visits, the parties agreed to transfer the matter to the Transitions in Parenting program, and the court entered orders in connection with the parties' agreement. A clinical social worker, Gregg LePage, met with the parties and the child, and issued a report. The report was not entered into evidence, but Stutz testified as to the contents of the report. LePage did not testify.

The court observed that the plaintiff did not testify at the hearing, and, therefore, the court did not hear her concerns for the child or about communication she may have had with the child about the visits. On the

date of some of the defendant's supervised visits with the child, the plaintiff arranged playdates for the child at the conclusion of the visit.

The court found that the child's therapist, Patricia Hempel, has counseled the child once a week since September or October, 2015. On three occasions, Hempel utilized Trauma Forensic Cognitive Behavior Therapy, whereby the child essentially must relive the event when the defendant was taken away in an ambulance after he had expressed suicidal ideation. During the event, the defendant told the plaintiff to come for the child because he believed that he was not capable of taking care of her. Since then, the defendant has received counseling and is fully compliant with his prescribed medications. As a veteran, he counsels other veterans who suffer post-traumatic stress disorder, and he is in the company of children whose "parent veteran" has post-traumatic stress disorder. Hempel testified that it is not in the child's best interests to have contact with the defendant at the present time, including telephone contact. In addition, she opined that the child should not have further contact with the defendant until the child is twenty-three years old when her brain is fully developed.[7] The court disagreed with Hempel's opinion.

Prior to issuing its orders regarding the defendant's motion to modify, the court discussed the legal principles guiding its analysis. "The court has continuing jurisdiction over a custody decree . . . and the noncustodial parent retains the option to move to modify custody based on a substantial change in circumstances affecting the welfare of the children." (Citation omitted.) *Cookson* v. *Cookson*, 201 Conn. 229, 236, 514 A.2d 323 (1986). "The burden is on the party seeking modification to show the existence of a substantial change in circumstances." (Internal quotation marks omitted.) *Jaser* v.

[7] The child was born in 2008 and, therefore, at the time of trial was nine years old.

Jaser, 37 Conn. App. 194, 204, 655 A.2d 790 (1995). A material change in circumstances must be based on circumstances that have arisen since the prior order of custody. "If such a material change is found, the court may then consider past conduct as it bears on the present character of a parent and the suitability of that parent as custodian of the child." *Simons* v. *Simons*, 172 Conn. 341, 342–43, 374 A.2d 1040 (1977). The court must make the necessary findings that a change of custody would be in the best interest of the child. See *Hibbard* v. *Hibbard*, 139 Conn. App. 10, 21, 55 A.3d 301 (2012).

The court found that the defendant suffers from post-traumatic stress disorder and the effects of Lyme disease. He has received counseling and takes prescribed medications for post-traumatic stress disorder. He counsels fellow veterans regarding post-traumatic stress disorder and is, at times, in the presence of children. The court, therefore, found that there were changed circumstances.[8]

The court also found that during the incident in which the defendant experienced suicidal ideation, he recognized his illness and asked the plaintiff to come for the child. The child saw the defendant taken away by ambulance. The court was not convinced that the defendant presents a danger to the child. The court opined that Hempel "is doing more damage than helping the child. She continues to reinforce the traumatic event with the child by repeating the event when the defendant went by ambulance to the hospital." Although it had not been asked to do so, the court concluded that it is not in the best interests of the child to continue counseling with Hempel.

Moreover, the court found that following a hearing on October 5, 2016, it had ordered the defendant to see

[8] On appeal, the plaintiff does not claim that the court's finding of changed circumstances is clearly erroneous.

the child at Access Agency. Although the court had ordered that the visits be consistent and scheduled by the parties on a regular basis, the defendant has seen the child only five times. The intent of the October 5, 2016 order was not to limit the defendant's access to the child to five occasions.

The court also found that the plaintiff did not testify during the hearing[9] but that she relied on hearsay and double hearsay testimony from Stutz to justify denying the defendant access to the child in the future. It noted that "[h]earsay means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." (Internal quotation marks omitted.) *Walker* v. *Housing Authority*, 148 Conn. App. 591, 600, 85 A.3d 1230 (2014). Hearsay is generally inadmissible. See Conn. Code Evid. § 8-2. The reason for the hearsay rule is because hearsay testimony is deemed unreliable. See *State* v. *Heredia*, 139 Conn. App. 319, 331, 55 A.3d 598 (2012) (discussing hearsay within hearsay), cert. denied, 307 Conn. 952, 58 A.3d 975 (2013).

The court found that although Stutz testified about the visits at Access Agency and testing at the Transitions in Parenting program, she was not present during these events. As a general case manager, her role, as assigned by the court, was to facilitate and direct the parties to the services offered in the community and not to make assessments or recommendations on the case. The court did not credit her testimony concerning the Access Agency or the Transitions in Parenting program because she did not observe the alleged events contained in the reports from those agencies. During her testimony, Stutz responded affirmatively when asked

[9] In a footnote, the court stated that a "failure to testify can be the basis for a negative inference," citing *Sosin* v. *Sosin*, Docket No. FA-03-0401416, 2005 WL 1023016, *10 n.13 (Conn. Super. March 22, 2005) (*Hon. Howard T. Owens, Jr.*, judge trial referee).

whether the Transitions in Parenting program report, which was not placed into evidence, concluded that reintroducing the defendant to the child's life would be "counterintuitive and may result in a crisis to the child's life."

The court apparently considered the testimony but disagreed with the conclusion by stating in its opinion that "[y]oung children need encouragement from both parents to continue their relationship with their parents." The child, who spends most of her time with the plaintiff, is not being encouraged by the plaintiff to continue to see the defendant. The plaintiff's decision to keep the child in counseling with Hempel and arrange playdates for the child on the dates the defendant was to have supervised visits "serve only to alienate the child from her father," the court concluded. Alienation of one parent by the other from the child, and exposing the child to conversations that are critical of the other parent, may constitute a substantial change in circumstances. See *Naumann* v. *Naumann*, Docket No. FA-15-6057847-S, 2016 WL 1710780, *1 (Conn. Super. April 8, 2016) (*Shluger*, *J.*); *Fiore* v. *DeRuosi*, Docket No. 14-P-1736, 2015 WL 6758521, *2 (Mass. App. November 6, 2015) (decision without published opinion, 88 Mass. App. 1112, 40 N.E.3d 1055 [2015]). Coercive or manipulative acts designed to alienate the other parent and interfere with his or her relationship with the child are proper considerations regarding the best interests of the child. See *Eisenlohr* v. *Eisenlohr*, 135 Conn. App. 337, 348, 43 A.3d 694 (2012).[10]

The court concluded that the plaintiff had failed to show by credible evidence that the defendant's supervised visits with the child should end. In fact, the court had ordered that supervised visits were to continue and

[10] On appeal, the plaintiff does not claim that the principles regarding parent-child relationships cited by the court are improper or inapplicable.

eventually lead to unsupervised visits. The defendant is willing to continue with supervised visits and wants telephone contact with the child. The court ultimately concluded that it is in the child's best interests to continue to have visits with the defendant, notwithstanding the opinions of Hempel and family relations. It, therefore, granted the defendant's motion for modification.[11] The court also issued numerous orders concerning the parties and the child. The plaintiff appealed from the judgment granting the defendant's motion to modify.

On April 2, 2018, the plaintiff filed a motion to reargue, claiming that the court erred in failing to credit Stutz' testimony because her testimony was in accord with Family Services General Case Management policy and the defendant did not object to Stutz' testimony on hearsay grounds. The plaintiff also claimed that the court improperly terminated the child's counseling with Hempel, as the defendant did not request it in his motion to modify. He requested only that he have supervised visits and telephone communication with the child. She added that the parties had no notice that termination of the child's counseling would be considered and, therefore, the court violated the parties' rights to due process. Moreover, the plaintiff argued that she has sole custody of the child and the legal authority to make decisions for the child. Judge dos Santos denied the motion for reargument.

On June 29, 2018, the plaintiff filed a motion for articulation, asking the court to articulate answers to

[11] The court denied the plaintiff's motion that the defendant submit an affidavit and request leave of the court before filing additional motions pursuant to Practice Book § 25-26 (g). The court also denied the plaintiff's motion for attorney's fees without prejudice, after finding that no evidence regarding attorney's fees was presented at the hearing. Although the appeal form references those rulings, the plaintiff did not brief any claims challenging those rulings on appeal. Accordingly, we consider those claims to be abandoned.

six questions. On July 13, 2018, the court denied articulation requests one, two, five and six, but did articulate as to requests three and four about why it "believed it could not rely on hearsay testimony" and "why [it] would not rely on hearsay evidence when the Family Relations Case Management program was designed to permit hearsay evidence." The court articulated that it found some of Stutz' testimony unreliable and untrustworthy because it was hearsay. "The purpose behind the hearsay rule is to effectuate the policy of requiring that testimony be given in open court, under oath, and subject to cross-examination." (Internal quotation marks omitted.) *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 573, 680 A.2d 301 (1996). The court stated that "Stutz was not present during the alleged doings of the witnesses who could have been called to testify by the plaintiff." Because it did not find the hearsay evidence reliable and trustworthy, it did not credit it.[12]

Before we address the plaintiff's claims on appeal, we set forth the well known standard of review we apply in domestic relations cases. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Williams* v. *Williams*, 276 Conn. 491, 496–97, 886 A.2d 817 (2005).

I

The plaintiff first claims that the court abused its discretion by terminating therapy for the parties' child

[12] On August 16, 2018, the plaintiff filed a motion for review in this court pursuant to Practice Book §§ 66-7 and 60-2. The plaintiff asked this court to issue an order that the trial court respond to the four articulation questions

because (1) the defendant's motion to modify visitation did not seek to terminate the child's counseling relationship with her counselor, and (2) the plaintiff has sole legal custody of the child. We agree with the plaintiff.

A

The plaintiff first claims that the court lacked authority to consider the child's relationship with her counselor because there was no notice that the court would consider the issue. We agree.

In his motion to modify, the defendant alleged that he had been denied visits and phone communication with the child pursuant to the court's orders of October 5, 2016. The motion to modify makes no mention of the child's therapy and contains no request to terminate it.

"General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation." (Internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 868, 133 A.3d 866, cert. denied, 320 Conn. 932, 134 A.3d 621, and cert. denied, 320 Conn. 932, 136 A.3d 642 (2016). Motions to modify are governed by Practice Book § 25-26 (e), which provides "[e]ach motion for modification shall state the specific factual and legal basis for the claimed modification and shall include the outstanding order and date thereof to which the motion for modification is addressed." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 513, 146 A.3d 26 (2016). "In exercising its statutory authority to inquire into the best interests of the child, the court cannot sua sponte decide a matter that has not been put in issue, either by the parties or by the court itself. Rather, it must . . . exercise that authority in a manner consistent with the due process requirements of fair notice and reasonable opportunity to be heard." (Internal quotation marks omitted.) Id., 515. "[I]t is clear that

it had declined to address. This court granted the motion for review but denied the relief requested.

[t]he court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Breiter* v. *Breiter*, 80 Conn. App. 332, 335, 835 A.2d 111 (2003).

In the present case, the defendant did not seek to terminate the child's counseling with Hempel and, therefore, the parties had no notice that the court intended to address the issue of the child's therapy with Hempel, let alone terminate it. The issue was not properly before the court. We, therefore, conclude that the court abused its discretion by sua sponte issuing an order terminating the child's therapy with Hempel.

B

The plaintiff also claims that the court abused its discretion by terminating the child's therapy relationship with Hempel because the plaintiff has sole legal custody of the child. We agree.

Our Supreme Court has explained that the sole custodian "has the ultimate authority to make all decision regarding a child's welfare, such as education, religious instruction and medical care . . . ." *Emerick* v. *Emerick*, 5 Conn. App. 649, 657 n.9, 502 A.2d 933 (1985), cert. dismissed, 200 Conn. 804, 510 A.2d 192 (1986); see also R. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice (2010) § 42:7, p. 516. In the present case, the plaintiff had engaged Hempel to be the child's therapist. A parent's right to make decisions in the interest of his or her children is of constitutional dimension. See *Troxel* v. *Granville*, 530 U.S. 57, 65–69, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The defendant did not seek to terminate the therapy relationship, nor did he seek joint custody. The issue before the court was the defendant's request for visits and telephone communication with the child. The issue of the child's therapy was for the plaintiff to decide. The court, therefore, improperly issued an order terminating the child's therapy with Hempel.

II

The plaintiff's second claim is that the court improperly refused to credit the testimony of the family relations counselor, which was admitted into evidence without objection. We agree.

In granting the defendant's motion to modify, the court stated that although Stutz "testified about what allegedly occurred at Access Agency and the testing by [the Transitions in Parenting program], she was not present during these events. Her testimony relied solely on hearsay events and occurrences outside her observations. Finally, the family relations counselor testified that as a general case manager, which was the role assigned to her by the court, [her role] was to facilitate and direct the parties to the services offered in the community and not to make assessments or recommendations on the case at issue. The court does not credit her testimony concerning Access Agency or [the Transitions in Parenting program] because she did not observe the alleged events contained in the Access Agency report and the [Transitions in Parenting program] report that were never introduced into evidence." In its articulation, the court stated that it found some of Stutz' testimony unreliable and untrustworthy because it was hearsay.

During the hearing on his motion to modify, the defendant did not object to Stutz' testimony on the basis of hearsay. "Hearsay evidence admitted because no objection was voiced can be considered to prove the matters in issue for whatever its worth on its face. *Sears* v. *Curtis*, 147 Conn. 311, 317, 160 A.2d 742 (1960)." *Derderian* v. *Derderian*, 3 Conn. App. 522, 528, 490 A.2d 1008, cert. denied, 196 Conn. 810, 811, 495 A.2d 279 (1985). "Evidence admitted without objection remains evidence in the case subject to any infirmities due to

any inherent weaknesses. . . . The trier may not, however, rely only on hearsay evidence which is lacking in rational probative force." (Citation omitted.) *Marshall* v. *Kleinman*, 186 Conn. 67, 72, 438 A.2d 1199 (1982). A "failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have." (Internal quotation marks omitted.) *Cohen* v. *Cohen*, 11 Conn. App. 241, 248, 527 A.2d 245 (1987).[13]

Our review of Stutz' testimony indicates that although it contained hearsay and double hearsay, the defendant failed to object to the testimony on hearsay grounds. The substance of the testimony pertained to the supervised visits that the court had ordered and, thus, was probative of the issue before the court, namely, whether to grant the defendant's motion to modify. The court, therefore, abused its discretion by failing to credit the testimony of the family relations counselor on the basis of her hearsay testimony.

For the foregoing reasons, we conclude that the court improperly granted the defendant's motion to modify and remand the case for a new hearing on the motion to modify.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion PELLEGRINO, J., concurred.

[13] The plaintiff also argues that the court's failure to credit Stutz' testimony overlooks the policy of the Family Services General Case Management, which requires a family relations counselor to prepare a report to the court when the period of supervised visitation is finished. We are not required to reach the plaintiff's argument to resolve his claim and, therefore, decline to address it.

ELGO, J., concurring in part and concurring in the judgment. I agree with and join part I of the majority opinion. I do not agree that the trial court abused its discretion by failing to credit the testimony of the family relations counselor. Rather, I believe the trial court committed reversible error in refusing to consider the substance of that testimony. Accordingly, I respectfully concur with the result reached in part II of the majority opinion.

The issue before this court is a purely evidentiary one regarding the testimony of Nicole Stutz, a family relations counselor. At the hearing in question, Stutz offered testimony regarding supervised visitation between the defendant, Gerald E. Dufresne, Jr., and his minor daughter that was conducted in conjunction with the Access Agency, and the Transitions in Parenting program (TIP), following the trial court's referral of the matter to the family services unit of the Court Support Services Division of the Judicial Branch. In her testimony, Stutz (1) read from a report prepared by Access Agency and (2) testified as to the contents of a report prepared by a clinical social worker involved in the TIP program.

It is undisputed that the defendant never objected to Stutz' testimony on hearsay grounds. The trial court nonetheless rejected Stutz' testimony on that basis. As the court stated in its memorandum of decision: "Although [Stutz] testified about what allegedly occurred at Access Agency and the testing by TIP, she was not present during these events. Her testimony relied solely on hearsay events and occurrences outside her observations. . . . The court does not credit her testimony concerning Access Agency or TIP because she did not observe the alleged events contained in the Access Agency report and the TIP report that were never introduced into evidence."[1]

[1] The plaintiff, Lisa A. Dufresne, now known as Lisa A. Blasdell, thereafter requested an articulation of the basis for that determination. In response,

It is well established that the trial court "is in the best position to view the evidence in the context of the entire case and has wide discretion in making its evidentiary rulings." *State* v. *Schovanec*, 326 Conn. 310, 320, 163 A.3d 581 (2017); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 382, 999 A.2d 721 (2010) (trial court has broad discretion in ruling on admissibility of evidence). Nonetheless, a fundamental prerequisite to the exercise of that broad discretion is an objection by a party to the proceeding. As this court has explained, "[a] failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have." (Internal quotation marks omitted.) *Cohen* v. *Cohen*, 11 Conn. App. 241, 248, 527 A.2d 245 (1987). For that reason, our Supreme Court has emphasized that "[e]vidence admitted without objection remains evidence in the case subject to any infirmities due to any inherent weaknesses." *Marshall* v. *Kleinman*, 186 Conn. 67, 72, 438 A.2d 1199 (1982).

In the present case, the trial court did not reject Stutz' testimony due to any inherent weakness. Both the court's memorandum of decision and its subsequent articulation plainly indicate that the court rejected her testimony solely on hearsay grounds, in contravention of the aforementioned precedent. Because hearsay objections pertain to the issue of evidentiary admissibility; see *State* v. *Vinal*, 205 Conn. 507, 515, 534 A.2d 613

the court issued an articulation, in which it stated that it had "found that some of the testimony of [Stutz] was unreliable and untrustworthy because it was hearsay." In neither its March 12, 2018 memorandum of decision nor its July 13, 2018 articulation did the court provide any other basis for rejecting Stutz' testimony.

(1987); *State* v. *Papineau*, 182 Conn. App. 756, 779, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018); rather than evidentiary weight, I respectfully disagree with my colleagues that the error in the present case arises from the court's failure to credit Stutz' testimony. Rather, I believe that it is the court's refusal to consider the substance of that testimony which constitutes reversible error.[2]

The distinction between failing to consider certain evidence and failing to credit that evidence is not merely semantic. I fully agree with the majority's conclusion that the trial court improperly rejected Stutz' testimony

[2] The issue presented in this appeal concerns the court's rejection of Stutz' testimony. I acknowledge that the plaintiff's appellate brief references the court's failure to credit that testimony. At the same time, the plaintiff in that brief argued that "[t]here was no basis for the court's rejection of [Stutz'] testimony." The plaintiff further stated: "Critically, the court did not reject [Stutz'] testimony because the court did not find it to be substantively credible; [the court] rejected it categorically because it was hearsay." The defendant, therefore, was on notice that the plaintiff's contention concerned the court's wholesale rejection of the testimony offered by the family relations counselor.

The plaintiff further clarified the specific nature of her claim during oral argument before this court. At that time, the plaintiff's counsel argued that the trial court, in its memorandum of decision, had said that Stutz' testimony " 'is all hearsay and I'm going to disregard it.' Now, this is important [as to] what [this claim] is not about. This is not a situation where the court said, 'I don't find [Stutz] credible.' Or, 'I don't find the underlying data that [Stutz was] reporting to be credible.' Or, 'I don't find the [defendant's] testimony to be more credible.' What happened is, there was a categorical rejection of [Stutz' testimony regarding the supervised visitation administered by the Agency Access and the TIP program] because it was hearsay." Soon thereafter, the plaintiff's counsel was asked if he was arguing that the trial court was obligated to credit Stutz' testimony. In response, counsel stated: "No. [The court] was required to hear it, and [the court] didn't. [The court] was required to not categorically reject it on the basis of hearsay, but to give it the opportunity and to weigh it and compare it to [the defendant's] testimony. . . . The court would be in the role, as the arbiter of credibility, to make a determination [as to whether Stutz] was accurately reporting and, if so, is the underlying data reliable or is it credible, and to weigh it against [the defendant's] credibility. But that didn't happen here because [the court] said, 'I'm not going to give [Stutz' testimony] any weight at all because it's hearsay.' "

on hearsay grounds.[3] That testimony properly was admitted without objection by the defendant. The trial court, therefore, was obligated to consider the substance of that evidence. *Marshall* v. *Kleinman*, supra, 186 Conn. 72; *Cohen* v. *Cohen*, supra, 11 Conn. App. 248. At the same time, our precedent instructs that such evidence remains "subject to any infirmities due to any inherent weaknesses." *Marshall* v. *Kleinman*, supra, 72; accord *Volck* v. *Muzio*, 204 Conn. 507, 518, 529 A.2d 177 (1987) ("[w]hen hearsay statements have come into a case without objection they may be relied upon by the trier . . . in proof of the matters stated therein, for whatever they were worth on their face" [internal quotation marks omitted]).

In all cases, it remains the prerogative of the trial court to determine the proper weight to be accorded the evidence before it. See *Fucci* v. *Fucci*, 179 Conn. 174, 183, 425 A.2d 592 (1979). With respect to family relations counselors specifically, our Supreme Court has explained: "We have never held, and decline now to hold, that a trial court is bound to accept the expert opinion of a family relations officer. As in other areas where expert testimony is offered, a trial court is free to rely on whatever parts of an expert's opinion the court finds probative and helpful. . . . The best interests of the child, the standard by which custody decisions are measured, does not permit such a predetermined weighing of evidence." (Citations omitted.) *Yontef* v. *Yontef*, 185 Conn. 275, 281–82, 440 A.2d 899 (1981). I therefore respectfully disagree with the conclusion of my colleagues that the trial court in the present

[3] In light of that conclusion, I believe that much of the factual recitation set forth in the majority opinion is unwarranted. Because this court today concludes that the trial court improperly rejected the testimony of the family relations counselor, necessitating reversal of the court's judgment, I believe that the factual findings made by the court subsequent to that evidentiary error are largely irrelevant to the claims presented in this appeal.

case abused its discretion in "failing to credit" Stutz' testimony.[4]

On the facts of this case, I would conclude that the trial court committed reversible error when it declined to consider the substance of Stutz' testimony on hearsay grounds. I therefore agree that the case must be remanded to the trial court for further proceedings on the motion in question.

[4] I appreciate the plaintiff's argument regarding the proper role of family relations counselors like Stutz. As our Supreme Court has noted, "[f]amily relations evaluators assist the court by providing a disinterested assessment of the circumstances of a case." (Internal quotation marks omitted.) *Barros* v. *Barros*, 309 Conn. 499, 515–16, 72 A.3d 367 (2013); see also id., 504 ("[f]amily relations provides myriad services to help parties resolve custody and visitation disputes, including negotiation, conflict resolution conferences, and mediation"). To that end, Practice Book § 25-61 provides in relevant part that "[t]he family services unit shall, at the request of the judicial authority, provide assistance with regard to issues concerning custody, visitation, finances, mediation, case management and such other matters as the judicial authority may direct, including, but not limited to, an evaluation of any party or any child in a family proceeding. . . ."

The record before us suggests that the plaintiff merely was adhering to existing Judicial Branch policy when she called Stutz to testify before the court. This case involves a referral by the trial court to the family services unit, which precipitated both Stutz' involvement in the matter and her testimony before the court. As the plaintiff notes in her appellate brief, Policy No. 3.20 of the Judicial Branch's Court Support Services Division, which became effective on August 1, 2016, sets forth a policy by which the family services unit "will be available to screen and accept referrals from the Family Civil Court to provide General Case Management for any custody and visitation matter." In defining "General Case Management," § 1 of that policy states in relevant part that "[e]very effort will be made . . . to provide the court with needed information . . . . Factual information and testimony will be provided to the court as required." Section 5 F further states that the family relations counselor "will report to the Court . . . as ordered," and will "testify as ordered by the Court and will provide factual information." In short, the policy plainly contemplates the testimony of family relations counselors before our family courts. In light of that existing policy—as well as the fact that Stutz' involvement originated in a referral from the court—the plaintiff's consternation with the trial court's decision to disregard Stutz' testimony on hearsay grounds is understandable. Although the trial court was not obligated to credit that testimony; see *Barros* v. *Barros*, supra, 309 Conn. 514; I do believe that the policy, and the important interests that the general case management scheme is designed to further, required the court to at least consider the substance of Stutz' properly admitted testimony in the present case.

STATE OF CONNECTICUT *v.* JUAN V.* (AC 40889)

Prescott, Bright and Cobb, Js.

Syllabus

Convicted of four counts of the crime of risk of injury to a child in connection with his alleged sexual abuse of the minor victim, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court committed plain error by permitting the jury, during its deliberations and in the jury room, to view, without limitation, a video recording of a forensic interview of the victim, which had been admitted into evidence as a full exhibit: because the video recording had been admitted into evidence for substantive purposes as a full exhibit with the agreement of defense counsel, the trial court correctly submitted the exhibit to the jury for its consideration as required by the applicable rule of practice (§ 42-23), which requires that all exhibits received into evidence be submitted to the jury, and in a manner consistent with our Supreme Court's stated preference for juries to receive all exhibits, when feasible, in the jury room; moreover, because the forensic interview was an exhibit and not the functional equivalent of in-court testimony, such as a deposition, the rule of practice (§ 42-26) requiring that the play back of trial testimony at the request of the jury be conducted in the courtroom did not apply to the jury's viewing of the video exhibit of the forensic interview; accordingly, because the defendant failed to demonstrate any error on part of the trial court, his claim of plain error failed.

2. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury on inferences, which was based on his assertion that the inferences instruction was an impermissible two-inference instruction that improperly diluted the state's burden of proof:

   a. The defendant waived his right to challenge the inferences instruction on appeal, as he had a meaningful opportunity at trial to review it and expressed no concerns regarding the charge as given to the jury; the court provided defense counsel with a copy of the proposed instructions prior to the charging conference and held in-chambers conferences regarding the instructions, and defense counsel declined to object or take exception with the inferences instruction when the court read the final instructions to the parties at the charging conference.

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

b. The defendant did not demonstrate that the inferences instruction constituted an error that was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal under the plain error doctrine: the instruction given by the court was a correct statement of law and did not constitute an impermissible two-inference instruction, as it did not instruct the jury to draw a conclusion of guilt or innocence, but to draw a conclusion that seemed reasonable and logical, it related only to conclusions regarding individual pieces of evidence rather than the evidence as a whole, and the instructions, taken as a whole, did not mislead the jury as to the state's burden to prove every element of the charged offense beyond a reasonable doubt, and, therefore, the defendant's claim did not involve an error so obvious that it affected the fairness of or public confidence in the judicial proceeding; moreover, even if such error existed, the inferences instruction did not constitute manifest injustice, as the defendant failed to demonstrate that the challenged instruction was of such monumental proportion that it threatened to erode our system of justice or resulted in harm so grievous that fundamental fairness required a new trial.

3. The trial court did not abuse its discretion by denying the defendant's motion for a disclosure to the defense of the victim's school records following an in camera review of such records; this court's independent review of the undisclosed records confirmed the trial court's conclusion that the material did not contain information that was probative of the victim's credibility or otherwise exculpatory.

Argued March 7—officially released July 30, 2019

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Russo*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, was *Stephen J. Sedensky*, state's attorney, for the appellee (state).

Opinion

COBB, J. The defendant, Juan V., appeals from the judgment of conviction, rendered after a jury trial, of two counts of risk of injury to a child in violation of

General Statutes § 53-21 (a) (1)[1] and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] On appeal, the defendant claims that the court improperly (1) permitted the jury to have with it during its deliberations a video recording of a forensic interview between the victim and a forensic interviewer, which was admitted as a full exhibit, (2) instructed the jury on inferences in a manner that diluted the state's burden of proof, and (3) denied his motion for a disclosure of the victim's school records. The defendant's first two claims concededly are unpreserved and we conclude that the defendant has failed to demonstrate that this court should review them or that he should prevail pursuant to the doctrines on which he relies. As to the defendant's third claim of error, we have reviewed the victim's school records and conclude that they do not contain any information that is exculpatory or otherwise bears on the victim's credibility. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2006, the defendant began dating the victim's mother, E, and after about six months, the defendant moved in with E and the victim. At that time, the victim was approximately four years of age. In 2008, the defen-

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a class C felony . . . ."

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

dant and E married, and the defendant adopted the victim in 2009.[3]

When the victim was approximately ten years old, the defendant began touching her inappropriately when E was not home. Specifically, the defendant "touched [the victim] on [her] breasts and vagina with . . . [h]is mouth, his hands and his penis." On one occasion, the defendant attempted to put his penis inside of the victim's vagina. At another point, the defendant masturbated in front of the victim and ejaculated onto her leg.

On April 2, 2014, after watching a video in health class about sexually transmitted diseases, the victim, who was twelve years old, told two friends, J and S, that the defendant had touched her inappropriately. J and S encouraged the victim to tell her mother or another adult about the defendant's conduct, but the victim said that she was too afraid to do so. Later that day, at an after school program that the victim, J, and S attended, a program counselor overheard J and S discussing what the victim had told them about the defendant and reported what she had heard to her supervisor, who, in turn, contacted the Department of Children and Families (department).

The next day, the department contacted E. That same day, E met with Terry Harper, a department social worker, and Harper informed E about the victim's allegations. That evening, E and the victim met with Donna Meyer, a forensic interviewer and consultant for the department's multidisciplinary investigative team. Meyer conducted a videotaped interview of the victim, during which the victim stated that the defendant began

[3] In 2011, the defendant and E began having marital troubles. Between 2011 and late 2013, the defendant periodically would move out of the house that he shared with E and the victim. On December 29, 2013, the defendant travelled to the Dominican Republic where he remained until February 1, 2014. When the defendant returned, E refused to allow him to move back into the house. In the spring of 2014, the defendant and E divorced.

touching her inappropriately when she was ten years old and that his inappropriate conduct continued until approximately three weeks before her twelfth birthday. Specifically, the victim stated that the defendant touched her breasts and vagina multiple times and tried to kiss her on the mouth once or twice. The victim also stated that the defendant once came into the bathroom while she was showering. The victim described another occasion when the defendant showed her a pornographic video on his tablet computer and touched her breast. The victim stated that she was worried about contracting HIV because the defendant once licked his hand before touching her vagina.

After the forensic interview, Veronica Ron-Priola, a board certified pediatrician and a medical consultant for the department's multidisciplinary investigative team, performed a medical examination of the victim. The victim informed Ron-Priola that the defendant "touched her breast and her private parts, under her clothes." The victim also stated that the defendant "tried to put his thing in [her] private parts." Ron-Priola asked the victim whether, by "thing," she meant the defendant's penis, and the victim responded "yes." The victim also told Ron-Priola that it "hurt" when the defendant put his finger inside of her "privates" and that "a couple of times it hurt to go pee-pee" after the defendant touched her. Ron-Priola reported that the results of the victim's medical examination were normal.

The defendant subsequently was arrested and charged with two counts of risk of injury to a child in violation of § 53-21 (a) (1) and two counts of risk of injury to a child in violation of § 53-21 (a) (2). On September 29, 2016, following a jury trial, the defendant was convicted of all charges. On June 28, 2017, the defendant was sentenced to a total effective sentence of thirty years of incarceration, execution suspended after twelve years, and twenty years of probation. The

defendant then filed the present appeal. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the court improperly permitted the jury to have with it during its deliberations the videotaped recording of the victim's forensic interview, which had been received into evidence as a full exhibit. Specifically, the defendant claims that the court should not have allowed the exhibit to be viewed by the jury in the jury room, but should have required that the exhibit be maintained separately and viewed only in open court upon request by the jury. The defendant argues that by allowing the jury "unfettered access" to the recording, the court permitted the jury to afford the victim's forensic interview more weight than the rest of the evidence or other exhibits. We disagree.

The following additional facts and procedural history are relevant to this claim. Prior to trial, the state filed a notice of its intent to offer into evidence the videotaped recording of the victim's April 3, 2014 forensic interview and a transcript of the interview. In response, the defendant filed a written objection. In the defendant's memorandum of law filed in support of the objection, he argued that if the victim testified at trial, "the video should only be admitted if anything in her testimony contradicts the statements made to the forensic interviewer."

On May 10, 2017, the victim testified at trial. During direct examination, the victim testified in detail regarding numerous instances of sexual assault by the defendant that she had described in the forensic interview. The victim also testified to additional incidents of sexual assault by the defendant that she had not described in the forensic interview. Additionally, during her trial testimony, the victim stated that she did not recall telling Meyer of one occasion of assault and that she had

misstated the location of another one of the assaults she had described in the forensic interview.

Immediately following this testimony by the victim, the state offered the video recording and a transcript of the forensic interview for substantive purposes. The defendant agreed that the recording and transcript should be admitted as full exhibits, "given the nature of the testimony here today and what is contained on the . . . video . . . ." The video recording and the transcript were admitted into evidence as full exhibits. The state then played the entire videotaped forensic interview for the jury, and then finished its direct examination of the victim. During the defendant's cross-examination of the victim, the defendant referenced the forensic interview multiple times.

During closing argument, defense counsel pointed out discrepancies between the victim's forensic interview and her testimony at trial. Defense counsel expressly informed the jury that the recording and a transcript of the forensic interview were full exhibits in the case, that it would have them in the jury room during deliberations, and urged them to review the video recording in evaluating the victim's credibility.[4]

After the court charged the jury, it reviewed the exhibits with counsel prior to delivering them to the jury for deliberations. The courtroom clerk informed the parties that the video recording of the forensic interview was a full exhibit. The prosecutor then asked whether the necessary equipment would be provided to the jury in the jury room so that it could view the exhibit. The clerk responded, "That's my understanding." Defense counsel raised no objection to the exhibit

[4] The state has not argued that the defendant waived any claim of error or induced any error by expressly agreeing to the submission of the video recording to the jury and encouraging the jury to review it.

being submitted to the jury in the jury room for its deliberations in the same way as the other exhibits.

During deliberations, the court received a note from the jury asking to hear "[the victim's] full testimony . . . ." In response to this note, the court reminded the jury that the victim's testimony included the videotaped recording of her forensic interview.[5] The court then informed the jury that the recording was a full exhibit and that they could watch it "in the privacy of the jury room . . . ."[6] The court also informed the jury: "If you want to send an additional note, specifying further exactly what you'd like to hear, I'll dismiss you for a couple of seconds . . . ." The jury responded that it wanted to hear the victim's live testimony only and not the video recording of the forensic interview. The court then had the victim's in-court testimony played back for the jury.

Although the defendant agreed that the video recording of the forensic interview should be admitted as a full exhibit and encouraged the jury to view the recording in the jury room during the jury's deliberations, he now claims that it was error for the court to permit the jury to have unlimited access to the exhibit, and that the court should have withheld the exhibit from the jury and allowed it to watch the recording only in open court upon request by the jury.

The defendant concedes that this claim is unpreserved but argues that the judgment should be reversed under the plain error doctrine. "It is well established that the plain error doctrine . . . is an extraordinary

[5] The video recording of the victim's forensic interview was not part of her in-court testimony but was an out-of-court statement admitted for its truth and played during the victim's in-court testimony.

[6] There is no evidence in the record to establish whether the jurors ever watched the recording of the forensic interview in the jury room or, if they did so, whether they watched it more than once.

remedy used by appellate courts to rectify errors committed at trial that, although unpreserved . . . are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Ruocco*, 322 Conn. 796, 803, 144 A.3d 354 (2016).

"Our Supreme Court . . . clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . . [U]nder the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *State* v. *Ruocco*, 151

Conn. App. 732, 739–40, 95 A.3d 573 (2014), aff'd, 322 Conn. 796, 144 A.3d 354 (2016).

In the present case, the defendant argues that the trial court committed plain error because allowing the video recording of the victim's forensic interview to be viewed by the jury in the jury room without limitation is contrary to the Supreme Court's decision in *State* v. *Gould*, 241 Conn. 1, 9, 695 A.2d 1022 (1997). The state disagrees and argues that the trial court had discretion to determine how the jury viewed the exhibit under *State* v. *Jones*, 314 Conn. 410, 419–24, 102 A.3d 694 (2014). We agree with the state that the trial court did not commit an error that was so clear, obvious, and indisputable as to warrant the extraordinary remedy of reversal under the plain error doctrine.

The submission to the jury of the video recording was required by Practice Book § 42-23, which provides in relevant part: "(a) The judicial authority *shall submit* to the jury . . . (2) All exhibits received in evidence. . . ." (Emphasis added.) Pursuant to this clear rule, exhibits received in evidence during a trial should be submitted to the jury for its consideration. The rule requires "[a]ll" exhibits to be submitted to the jury and does not contain an exception for video recordings of forensic interviews or any other type of exhibit. The video recording of the victim's forensic interview was received into evidence as a full exhibit after the defendant agreed that it was admissible. The exhibit was played in full during the trial and both parties used the exhibit during the trial and closing arguments. Thus, the court correctly followed the rule of practice that expressly governs the submission of exhibits to the jury.

The court also correctly followed the most recent Supreme Court case to consider and interpret Practice Book § 42-23 (a), *State* v. *Jones*, 314 Conn. 410, 102 A.3d

694 (2014). In *Jones*, the defendant made the opposite argument to the one being asserted here. The defendant claimed that the trial court violated § 42-23 (a) by ruling that the jury could view, during deliberations, a video exhibit of a police stop of the defendant's car in open court rather than the jury deliberation room. Id., 412–13. Our Supreme Court held that "although Practice Book § 42-23 (a) requires trial courts to submit exhibits to the jury, that section does not control the manner in which exhibits must be submitted, and that the trial court retains discretion to determine the manner in which the jury examines submitted exhibits." Id., 417. The court, however, expressed its preference for allowing jurors to review trial exhibits in the privacy of the jury room, stating: "In light of the long-standing practice of our courts to provide juries all exhibits for their review in the privacy of the jury room . . . the preferred option is for juries to receive all exhibits, when feasible, in the jury room." (Citation omitted; internal quotation marks omitted.) Id., 424.

The defendant's reliance on the earlier case of *State* v. *Gould*, supra, 241 Conn. 1, is misplaced because that case did not involve exhibits, but, rather, it involved videotaped deposition testimony, admitted with the court's permission pursuant to different provisions of our rules of practice. See Practice Book (1997) §§ 791 and 803 (now §§ 40-44 and 40-56).[7] In *Gould*, the trial court allowed the state to take a witness' deposition in lieu of in person trial testimony because the witness was physically ill and unavailable to be called as a witness at trial. Id., 10. The deposition was taken pursuant to Practice Book § 791 (1), now Practice Book § 40-44 (1), which provides that upon request of any party, the court "may issue a subpoena for the appearance of any person at a designated time and place to give his

[7] The relevant Practice Book provisions were renumbered in 1998. Practice Book (1997) §§ 791 and 803 are identical to Practice Book §§ 40-44 and 40-56.

or her deposition if such person's testimony may be required at trial and it appears to the judicial authority that such person . . . [w]ill, because of physical or mental illness or infirmity, be unable to be present to testify at any trial or hearing . . . ." Such depositions are taken under oath by "any officer authorized to administer oaths." Practice Book § 40-47. "The scope and manner of examination and cross-examination [at the deposition] shall be the same as that allowed at trial." Practice Book § 40-50. "So far as otherwise admissible under the rules of evidence, a deposition may be used as evidence at the trial or at any hearing if the deponent is unavailable . . . ." Practice Book § 40-46. Thus, the videotaped deposition testimony in *Gould* was the functional equivalent of in-court testimony, and was intended to and did serve as the witness' trial testimony. In *Gould*, the witness' deposition was taken under oath and was subject to examination and cross-examination and then played for the jury at the trial in lieu of the witness' in person testimony. *State* v. *Gould*, supra, 10–11. When trial testimony is played back for the jury during deliberations, Practice Book § 42-26[8] requires that "the jury shall be conducted to the courtroom."

Although the play back of the testimony in *Gould* should have been conducted in the courtroom, the Supreme Court concluded that "allowing the jury to view the testamentary videotape of [the state's main witness], as it requested, was a discretionary matter for the trial court, and [the trial] court did not abuse that discretion." *State* v. *Gould*, supra, 241 Conn. 13. The court, however, held, under its supervisory powers, "that in the future this state's trial courts should supervise the jury review of such videotaped deposition testimony." Id., 9. In support of this holding, the court stated:

[8] In *Gould*, the court analyzed Practice Book (1997) § 863, which was renumbered as Practice Book § 42-26 in 1998. *State* v. *Gould*, supra, 241 Conn. 11–12. Sections 863 and 42-26, however, are substantively indistinguishable.

"There is value . . . in requiring trial courts to supervise a jury's review of videotaped deposition testimony. . . . Where a court decides, pursuant to that court's sound discretion that the jury should be permitted to replay videotaped deposition testimony, it must be done in open court under the supervision of the trial judge and in the presence of the parties and their counsel." Id., 15.

In the present case, the victim testified in person at the trial. Her forensic interview was not conducted pursuant to the rules of practice governing trial depositions. See Practice Book §§ 40-44 through 40-58. The interview was not authorized or required by any judicial authority, but was conducted at the behest of the department as part of its investigation. At the interview, the victim was not under oath or subject to cross-examination. The video recording of the interview was played for the jury during a break in the victim's direct examination during the trial and then admitted into evidence as a full exhibit. The trial court followed the applicable rules of practice in this case when, after receiving a request by the jury to hear the victim's testimony, it submitted the full exhibit of the video recording of the forensic interview to the jury for its deliberations pursuant to Practice Book § 42-23 (a), and played back the victim's trial testimony in the courtroom pursuant to Practice Book § 42-26.[9]

[9] The defendant also argues, on the basis of nonbinding authority from other jurisdictions, that the court plainly erred in allowing the recording to be submitted to the jury for its deliberations in the jury room because it was "testimonial" in nature and "many courts in other jurisdictions hold it is erroneous for the trial court to allow the jury to have unsupervised access to either recorded testimony or recorded pretrial interviews in the jury room during deliberations even if they have been admitted as exhibits." The defendant, however, has not provided, and the court is not aware of, any cases that support a finding of plain error on the basis of nonbinding out-of-state cases. We cannot conclude that such cases "demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Ruocco*, supra, 151 Conn. App. 740.

We conclude that submitting the exhibit of the recording of the forensic interview to the jury in the jury room was a correct application of Practice Book § 42-23 and our Supreme Court's preference, expressed in *Jones*, that the jury receive all exhibits, when feasible, in the jury room. See *State* v. *Jones*, supra, 314 Conn. 424. Because allowing the jury to view the interview recording in the jury room was not an error, let alone an obvious, patent, or nondebateable error, we need not delve further into plain error analysis. Accordingly, the defendant's claim fails.[10] See *State* v. *Jamison*, 320

This is particularly true because the cases on which the defendant relies are distinguishable. See, e.g., *People* v. *Jefferson*, 411 P.3d 823, 827 (Colo. App. 2014) (allowing jury to view, unsupervised, recording of forensic interview with child who could not recall details of alleged abuse during trial was harmful error), aff'd, 393 P.3d 493 (Colo. 2017); *McAtee* v. *Commonwealth*, 413 S.W.3d 608, 622 (Ky. 2013) (improper to allow jury to view recording of witness' statements to law enforcement in jury room); *Reed* v. *State*, 373 P.3d 118, 122 (Okla. Crim. App. 2016) (improper to allow videotaped forensic interview of child, which included administration of oath wherein child affirmed she would be truthful, to be taken with jury into deliberations).

Unlike *People* v. *Jefferson*, supra, 411 P.3d 827, where the child victim's forensic interview became the main account of the alleged assault because, at trial, the victim was unable to recall the details of what had happened, in the present case, the victim provided a detailed description of the assaults when she testified at trial. *McAtee* v. *Commonwealth*, supra, 413 S.W.3d 622, also is distinguishable because it involved statements made to law enforcement, whereas the statements in the present case were made to a forensic psychiatrist. Finally, *Reed* v. *State*, supra, 373 P.3d 122, is distinguishable because, prior to being interviewed, the child victim in the case was required to swear an oath, whereas in the present case, the victim was not asked to give any such affirmation before her forensic interview.

To the extent that the defendant relies on *State* v. *Vin*es, 268 Conn. 239, 244, 842 A.2d 1086 (2004), to support his claim that the forensic interview was testimonial, such reliance is misplaced. *Vines* involved the playback of several witnesses' in person trial testimony and not an out-of-court investigative forensic interview. Id., 241–42.

[10] The defendant argues that even if this unpreserved claim is not plain error, the court should reverse the judgment pursuant to its supervisory powers over the administration of justice. Specifically, the defendant urges this court to create a new rule that requires juries to review forensic interviews in child sex abuse cases in open court under the judge's supervision. "Supervisory authority is an extraordinary remedy that should be used

Conn. 589, 597, 134 A.3d 560 (2016) ("[a]n appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is . . . obvious in the sense of not debatable" [internal quotation marks omitted]).

II

The defendant next claims that the trial court improperly instructed the jury on inferences in a manner that diluted the state's burden of proof. Specifically, the defendant argues that the instruction was an incorrect statement of the law on permissible inferences and "violated the defendant's right not to be convicted unless the state proved all the elements of the crime beyond a reasonable doubt." We conclude that the defendant waived this claim of instructional error and that he cannot prevail pursuant to the plain error doctrine.

The following additional facts and procedural history are relevant to this claim. On May 15, 2017, the state filed its request to charge, which included the following instruction on inferences: "While you the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. If it is reasonable and logical for the jury to

sparingly . . . . Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . [W]e are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015); see also *State* v. *Simmons*, 188 Conn. App. 813, 846, 205 A.3d 569 (2019). Because we are unpersuaded that there is a pervasive and significant issue in allowing juries to replay forensic interviews outside of the presence of the court, or that this practice is offensive to the administration of justice, we decline to exercise our supervisory powers.

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. . . .

"With respect to individual pieces of evidence, when the evidence is subject to two possible interpretations, you are not required to accept the interpretation consistent with innocence. You are allowed to choose the interpretation that seems reasonable and logical." In support of its requested instruction on inferences, the state cited *State* v. *Stanley*, 223 Conn. 674, 678, 682 n.5, 613 A.2d 788 (1992).

The defendant did not file a request to charge. Later that day, the trial court informed the parties that it anticipated having a revised draft of the jury charge for counsel to review soon and that it would contact them when the charge was ready.

On the morning of May 16, 2017, the court held an on the record charging conference with counsel for both parties. At the outset of the conference, the court stated: "We have had some chambers conference[s] . . . in connection with the . . . drafting of the charge itself. But we have a final edition and I'll ask the parties to give me their attention as I go through each captioned subsection and ask them if they have any objections or comments to each one." During the conference, the court asked whether either counsel had any comments or objections as to the final version of the instruction on inferences, which was identical to the instruction proposed by the state, except that the court added the following penultimate sentence: "But you are also not required to accept the interpretation consistent with guilt." Both counsel stated "[n]o comment" in response to the court's inquiry. The instructions, thereafter, were marked as an exhibit.

Later that day, the court charged the jury consistent with its final version of the instruction, which it had read to counsel at the charging conference and on which it received no comment from either party: "While you, the jury, must find every element proven beyond a reasonable doubt, in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"With respect to individual pieces of evidence, when the evidence is subject to two possible interpretations, you are not required to accept the interpretation consistent with innocence. But, you are also not required to accept the interpretation consistent with guilt. You are allowed to choose the interpretation that seems reasonable and logical."

The defendant admits that this claim was not raised before the trial court, but argues that it is reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[11] The defendant argues

[11] "Under [the *Golding*] 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

that *Golding* review is warranted "because the record is adequate for review and it implicates the defendant's constitutional right not to be convicted unless the state has proven every element of the crimes beyond a reasonable doubt." The state argues that "[t]he defendant's claim fails under the second and third prongs of *Golding* because: (1) the claim is not of constitutional magnitude; (2) he expressly waived the claim below; and (3) the instruction was a correct statement of law that did not dilute the state's burden of proof or mislead the jury." Although we agree with the defendant that the record is adequate for review of this claim, we agree with the state that the defendant waived this claim pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011).

"[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 467; see also id., 482–83.

"[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of

in original; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 644, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

each case." (Internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 409, 147 A.3d 655 (2016).

In the present case, the defendant does not argue that he lacked a meaningful opportunity to review the proposed charge. Indeed, the court gave counsel a copy of the proposed jury instructions prior to the charging conference and held in-chambers conferences regarding the instructions. Additionally, the trial court went through each of the instructions, on the record, and specifically asked whether the parties had any objections. When the court asked the parties whether they had any objections to the instruction on inferences, defense counsel stated "[n]o comment." Thus, we conclude that the defendant waived this claim of instructional error.[12]

Alternatively, the defendant argues that he should prevail on this claim pursuant to the plain error doctrine. See *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017) (holding *Kitchens* waiver does not preclude plain error review). We agree with the state that the defendant has failed to establish plain error.

The defendant argues that the court committed plain error because the "error here is certainly obvious as it goes against established precedent stating that if the jury can reconcile the facts proven with any reasonable theory consistent with innocence, then it cannot find the defendant guilty" and "the failure to grant relief from the court's error would result in manifest injustice."[13] The standards for plain error review are set forth in part I of this opinion.

[12] We note that the defendant did not file a reply brief. Had he done so, he could have argued, contrary to the state's assertion in its brief, that this claim was not waived under *Kitchens*.

[13] The defendant also argues that "[a]lternatively, the defendant's convictions should be reversed under this court's supervisory powers." Specifically, the defendant asks this court to invoke its supervisory authority because the instruction at issue "allowed the jurors to convict the defendant even though they may have concluded that the evidence led to an interpretation of innocence as well as guilt." "Supervisory authority is an extraordinary

The defendant cites our Supreme Court's decision in *State* v. *Griffin*, 253 Conn. 195, 209–10, 749 A.2d 1192 (2000), which involved a challenge to a jury instruction commonly known as a "two-inference" instruction. Specifically, the charge in *Griffin* provided: "If two conclusions reasonably can be drawn from the evidence, one of innocence and one of guilt, you must adopt the one of innocence." (Internal quotation marks omitted.) Id., 204 n.12. The court concluded that the trial court did not err in giving this instruction, stating: "[T]he two-inference charge, when viewed in the context of an otherwise proper instruction on reasonable doubt, does not impermissibly dilute the state's burden of proof. Consequently, the defendant cannot prevail on his . . . claim of constitutional impropriety." Id., 209. The court, however, invoked its "supervisory authority over the administration of justice to direct that, in the future, our trial courts refrain from using the 'two-inference' language so as to avoid any such possible misunderstanding." (Footnotes omitted.) Id., 209–10. The court went on to provide the following as a permissible alternative to the two-inference charge: "If you can, in reason, reconcile all of the facts proved with any reasonable theory consistent with the innocence of the accused, then you cannot find him guilty." (Internal quotation marks omitted.) Id., 210 n.18.

The court in the present case did not give a two-inference instruction. Whereas the instruction in *Griffin* provided that if a jury could draw two inferences

remedy that should be used sparingly . . . . Our supervisory powers are invoked only in the rare circumstance [in which] . . . traditional protections are inadequate to ensure the fair and just administration of the courts. . . . [W]e are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015). Because the instruction at issue was a correct statement of law, we conclude that this claim fails to meet the requirements of this extraordinary remedy.

from the evidence, it must adopt the inference consistent with innocence, the charge in the present case did not instruct the jury to draw a conclusion of guilt or innocence. Indeed, the charge in the present case explicitly provided that the jury was *not* required to draw a conclusion of guilt or innocence and, instead, instructed the jury to draw the conclusion that "seems reasonable and logical." Furthermore, the charge did not relate to conclusions to be drawn from the evidence as a whole, which was the issue in *Griffin*. In this case, the charge related only to how the jury should evaluate individual pieces of evidence. It was, therefore, not a two-inference instruction.

Even if we were to assume that the specific charge in the present case was substantively similar to the charge in *Griffin*, that alone would be insufficient to establish plain or instructional error because the standard for instructional error requires the court to examine the entirety of the charge. "The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, [a reviewing court] must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, [a reviewing court] must consider whether the instructions [in totality] are sufficiently correct in law, adapted

to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Newton*, 330 Conn. 344, 359–60, 194 A.3d 272 (2018).

In the present case, the court instructed the jury extensively on reasonable doubt and stated, at the end of its reasonable doubt instruction and immediately before its inferences instruction, that "[t]he state has the burden, at all times, to establish each of the elements of the crime charged beyond a reasonable doubt . . . ." In addition to its charge on reasonable doubt, the court began its inferences instruction by reiterating that "you, the jury, must find every element proven beyond a reasonable doubt." Furthermore, the court emphasized that the inferences instruction related only to individual pieces of evidence by beginning the second part of the inferences instruction with the phrase "[w]ith respect to individual pieces of evidence." Taken as a whole, therefore, the instruction did not mislead the jury as to the state's obligation to prove every element of the charge beyond a reasonable doubt.

Thus, the defendant has not demonstrated that the court's instruction on inferences constituted an error that was so clear, obvious, and indisputable as to warrant the extraordinary remedy of reversal as required under our plain error analysis. See *State* v. *Jackson*, 178 Conn. App. 16, 24, 173 A.3d 974 (2017), cert. denied, 327 Conn. 998, 176 A.3d 557 (2018).

Moreover, even if we were to assume that such error exists, which we decline to do, the defendant has failed to demonstrate that the court's instruction constituted manifest injustice. To show manifest injustice, the defendant must demonstrate that the error "was of such monumental proportion that it threatened to erode our system of justice . . . or that it resulted in harm so grievous that fundamental fairness requires a new trial." (Citation omitted; internal quotation marks omitted.) Id., 29. Here, the defendant has failed to do so, and,

accordingly, we conclude that his claim of plain error is without merit.

III

Finally, the defendant claims that the trial court erred in denying his motion for a disclosure of the victim's school records. Specifically, the defendant claims that the court should have granted his motion to disclose the records because they might be germane to the victim's credibility and could contain exculpatory evidence. We have reviewed the records in camera and disagree with the defendant's claim.

The following additional facts and procedural history are relevant to the resolution of this claim. On December 28, 2016, prior to the start of trial, the defendant filed a motion for a disclosure of the victim's school records. On January 25, 2017, the court held a hearing on the motion, and defense counsel explained that he was seeking a disclosure of the records pursuant to *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984). Defense counsel argued that the records might bear on the victim's credibility because there was evidence that "the [victim] might have been having problems at . . . school . . . ." The court stated that it would review the records in camera to determine whether they contained any exculpatory information.

On April 4, 2017, after reviewing the records in camera, the court held another hearing at which it denied the motion and the following exchange occurred:

"The Court: . . . [T]he court has reviewed th[e] records and there is . . . next to nothing that would be relevant to the presentation or defense of the case. I say next to nothing because there was one, I want to say it was March of 2014, what could be categorized as a one time disruptive behavior where the [victim] and her girlfriend were roughhousing in the hallway

and they both fell on the floor. They were given an in-school suspension, both parents were called and they came to the school and were given a letter that suggested that they were roughhousing between periods and that was not going to be tolerated. They did some work in school and that was it. That was the only, the only piece of information that had any type of negative inference to it and that's not much of one.

"[The Prosecutor]: Um-huh.

"The Court: The [victim's] grades seemed to be very consistent throughout that period, as was her school attendance.

"[Defense Counsel]: The only question I would have for Your Honor, as Your Honor I believe was made aware [of] during the argument for the [*State* v.] *Esposito*, [supra, 192 Conn. 166] motion . . . the [victim] in this case initially reported . . . the allegations [of abuse] to one of her friends at school and . . . was overheard by . . . a staff member. I would just be interested in knowing if the person that she had this little incident with is one of the witnesses that she had revealed the allegations to.

"The Court: . . . [T]here's nothing in the school records that mentions any complaint, any criminal matter. [The defendant's name] never comes up. . . . [T]here was [also] an administrative checklist that had to be filled out by somebody and it simply mentioned that [the defendant] was not allowed to pick [the victim] up or on the grounds of the school. That was it. It's the only thing I saw."

The defendant asks this court to review the school records and determine whether the records are exculpatory to the extent that they impact the victim's credibility. The state agrees that this court should review the records.

"On review, we must determine whether the court's decision constituted an abuse of discretion. . . . This court has the responsibility to conduct its own in camera review of the sealed records to determine whether the trial court abused its discretion in refusing to release those records to the defendant. . . . While we are mindful that the defendant's task to lay a foundation as to the likely relevance of records to which he is not privy is not an easy one, we are also mindful of the witness' legitimate interest in maintaining, to the extent possible, the privacy of her confidential records. . . . The linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality . . . . Whether and to what extent access to the records should be granted to protect the defendant's right of confrontation must be determined on a case by case basis." (Internal quotation marks omitted.) *State* v. *Tozier*, 136 Conn. App. 731, 753, 46 A.3d 960, cert. denied, 307 Conn. 925, 55 A.3d 567 (2012).

After an in camera review of the victim's school records, we conclude that the trial court did not abuse its discretion by denying the defendant's motion for a disclosure of those records. The records do not contain information that is probative of the victim's credibility or is otherwise exculpatory.

The judgment is affirmed.

In this opinion the other judges concurred.

KARIM SEWARD *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT, ET AL.
(AC 41423)

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

Syllabus

The defendant administrator of the Unemployment Compensation Act appealed to this court from the judgment of the trial court sustaining the plaintiff's appeal from the decision of the Employment Security Board of Review, which affirmed the determination by an appeals referee that the plaintiff was not entitled to certain unemployment benefits. The plaintiff, who had been employed as a truck driver for C Co., had been discharged from his employment due to his failure to follow certain safety protocols, which resulted in the trailer separating from a truck that he was driving, causing damages. The plaintiff had filed an application for unemployment compensation benefits that initially was approved by the administrator. C Co. appealed from that decision, and the appeals referee, following a hearing, found that because the plaintiff had engaged in wilful misconduct, he was ineligible to receive benefits. The plaintiff, who did not attend the hearing before the appeals referee, thereafter filed a motion to open the referee's decision, which the referee denied on the ground that the plaintiff had not established good cause for his failure to participate in the hearing. The board subsequently affirmed the decision of the referee, concluding that the plaintiff had waived his right to challenge the referee's findings by failing to attend the hearing. The board further concluded that the plaintiff's reason for his absence, namely, that he did not open the referee's hearing notice because it did not indicate it was from the appeals division and, therefore, he had been unaware of the hearing date, did not constitute good cause. Thereafter, the plaintiff appealed to the trial court, which denied the administrator's motion for a judgment of dismissal and remanded the matter to the board with direction to grant the motion to open. In doing so, the trial court, which found that the plaintiff was an ordinary, working class person who had been overwhelmed by the amount of mail he was receiving, that he immediately moved to open the matter upon realizing his error, and that he already had been deemed eligible for benefits, concluded that the denial of the motion to open constituted an abuse of discretion. *Held* that the trial court exceeded the scope of its authority by making factual findings not in the record and relying on those findings in determining that the board had abused its discretion by denying the plaintiff's motion to open; in an appeal from a decision of the board, the trial court is bound by the board's factual findings, and, therefore, it was improper for the trial court to make and to rely on its own factual

finding, namely, that the plaintiff was an ordinary layperson who had been overwhelmed by the amount of mail he was receiving, as a basis for its determination that the board's conclusion that the plaintiff had not established good cause to open the appeal referee's decision was an abuse of discretion.

Submitted on briefs April 23—officially released July 30, 2019

Procedural History

Appeal from the decision of the Employment Security Board of Review affirming the decision by an appeals referee that the plaintiff was not entitled to certain unemployment compensation benefits, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Hon. Joseph H. Pellegrino*, judge trial referee; judgment sustaining the appeal and remanding the case for further proceedings, from which the named defendant appealed to this court. *Reversed*; *judgment directed.*

Beth Z. Margulies and *Philip M. Schulz*, assistant attorneys general, and *George Jepsen*, former attorney general, filed a brief for the appellant (named defendant).

Opinion

DiPENTIMA, C. J. The defendant, the Administrator of the Unemployment Compensation Act, appeals from the judgment of the Superior Court reversing the decision of the Employment Security Board of Review (board) denying benefits to the plaintiff, Karim Seward, and remanding the matter to the board for further proceedings.[1] On appeal, the defendant claims that the court improperly (1) found and relied on facts beyond those certified by the board and (2) used those facts to determine that the board had abused its discretion in concluding that the plaintiff had not established good

[1] The plaintiff, who prevailed before the Superior Court, did not file a brief; therefore, this appeal was considered on the basis of the defendant's brief and appendix only.

cause to open the decision of the appeals referee. We agree and, accordingly, reverse the judgment of the Superior Court.

The following facts and procedural history are relevant to our discussion. Cowan Systems, LLC (Cowan), employed the plaintiff as a truck driver from August 23, 2016, until March 15, 2017. On March 11, 2017, the plaintiff drove out of Cowan's truck yard in the course of his work duties. Shortly thereafter, the trailer separated from the truck, resulting in approximately $10,000 in damages. At the commencement of the plaintiff's employment, Cowan had informed the plaintiff of the requirement to conduct a "pull test," which was designed to prevent separation of the trailer from the truck, ensure safety and prevent property damage. Despite the plaintiff's claim that the separation had been the result of equipment failure, Cowan concluded that the plaintiff had failed to conduct the "pull test" and considered the incident to have been a "preventable accident" and therefore terminated his employment.

On April 24, 2017, the defendant approved the plaintiff's application for unemployment compensation benefits. Cowan appealed the defendant's determination to the Employment Security Appeals Division. The appeals referee, in a May 19, 2017 decision, noted that the plaintiff had failed to participate in the May 18, 2017 hearing. The referee further stated that the issue was "whether the employer discharged the [plaintiff] for wilful misconduct in the course of his employment." After setting forth the factors for determining whether an employee had been discharged from employment for wilful misconduct, and thus was ineligible for unemployment compensation benefits; see General Statutes § 31-236 (a) (2) (B); the referee found that the accident resulted from the plaintiff's failure to conduct a "pull test."

Applying the applicable statute[2] and the relevant factors set forth in the Regulations of Connecticut State Agencies,[3] the referee determined that the plaintiff had "knowingly violated a reasonable employer policy which was uniformly enforced and reasonably applied." The referee further concluded that the plaintiff was disqualified from receiving unemployment benefits pursuant to § 31-236 (a) (2) (B). Accordingly, the referee sustained Cowan's appeal. The plaintiff's subsequent

[2] General Statutes § 31-236 (a) provides in relevant part: "An individual shall be ineligible for benefits . . . (2) . . . (B) if, in the opinion of the administrator, the individual has been discharged . . . for . . . wilful misconduct in the course of the individual's employment . . . ." General Statutes § 31-236 (a) (16) provides in relevant part that " 'wilful misconduct' means deliberate misconduct in wilful disregard of the employer's interest, or a single knowing violation of a reasonable and uniformly enforced rule or policy of the employer, when reasonably applied, provided such violation is not a result of the employee's incompetence . . . ."

[3] "To establish that an individual was discharged or suspended for wilful misconduct under this definition, pursuant to § 31-236-23b of the Regulations of Connecticut State Agencies, all of the following findings must be made. First, there must have been a knowing violation in that (1) the individual knew of such rule or policy, or should have known of the rule or policy because it was effectively communicated to the individual. . . . (2) [T]he individual's conduct violated the particular rule or policy; and (3) the individual was aware he [or she] was engaged in such conduct. Regs., Conn. State Agencies § 31-236-26b (a). Second, the rule or policy must be reasonable in that it furthers the employer's lawful business interest. Id., § 31-236-26b (b). Third, the rule or policy must be uniformly enforced in that similarly situated employees subject to the workplace rule or policy are treated in a similar manner when a rule or policy is violated. Id., § 31-236-26b (c). Fourth, the rule or policy must be reasonably applied in that (1) . . . the adverse personnel action taken by the employer is appropriate in light of the violation of the rule or policy and the employer's lawful business interest . . . and (2) . . . there were no compelling circumstances which would have prevented the individual from adhering to the rule or policy. Id., § 31-236-26b (d). Fifth, the violation of the rule or policy must not have been a result of the individual's incompetence, where the individual was incapable of adhering to the requirements of the rule or policy due to a lack of ability, skills or training, unless it is established that the individual wilfully performed below his employer's standard and that the standard was reasonable. Id., § 31-236-26b (e)." (Internal quotation marks omitted.) *Resso* v. *Administrator, Unemployment Compensation Act*, 147 Conn. App. 661, 666, 83 A.3d 723 (2014).

motion to open the referee's decision was denied for failing to "[cite] any reason that could constitute good cause for failing to participate in the referee's hearing on May 18, 2017."

The plaintiff filed a timely appeal to the board, where the issues were "whether the [plaintiff] has demonstrated good cause for failing to participate in the referee's hearing which was scheduled for May 18, 2017; and whether the referee properly denied the [plaintiff's] motion to [open]." In his "written argument" in support of his appeal, the plaintiff stated: "I was totally unaware of the scheduled hearing date of May 18th and [it was] denied based on the fact of not being involved. I was not involved in that hearing because I was not aware of it. When I received the hearing packet, it wasn't marked to indicate it was from the appeals department, nothing to show it was anything different from what is normally sent after starting a claim and I missed the date."

The board concluded that this was not a sufficient excuse for failing to appear at the May 18, 2017 hearing, stating: "[W]e find that the [plaintiff's] failure to timely read his mail constituted poor mail handling, which does not excuse his failure to participate in the referee's May 18, 2017 hearing. We conclude that the [plaintiff] has not shown good cause for failing to appear at the referee's hearing and that the referee did not err in denying his motion to [open]. By choosing not to attend the referee's hearing despite having received notice of the hearing, the [plaintiff] has waived the right to object to the referee's findings of fact and conclusions of law which were based on the testimony and evidence presented at that hearing." (Footnote omitted.) Accordingly, the board affirmed the decision of the referee.

On September 13, 2017, the plaintiff filed an appeal with the Superior Court.[4] Approximately three months later, the defendant filed a motion for a judgment to

[4] See General Statutes § 31-249b.

dismiss the appeal. On February 14, 2018, the court, after conducting a hearing, issued a memorandum of decision overruling the defendant's motion and remanding the matter to the board with direction to grant the motion to open to afford the plaintiff an opportunity to defend the initial ruling that he was entitled to unemployment benefits. The court "observed that the [plaintiff] was just an ordinary, working class person a bit overwhelmed with the amount of mail he was receiving . . . . When the [plaintiff] realized his error, he immediately requested that the matter be reopened so that he could have an opportunity to present his case. To deny the [plaintiff] an opportunity to have his day in 'court' when he already was adjudicated eligible for benefits is, in the opinion of this court, a gross abuse of discretion, especially when he immediately responded to the decision of the [board] when he discovered his mistake. There would not have been a long delay in the process if his request would have been granted and he would have had an opportunity to present his side of the story." This appeal followed.[5]

As an initial matter, we set forth the general principles regarding an appeal involving unemployment benefits.

[5] Although the court's remand order was interlocutory in nature, we conclude that it was a final judgment for purposes of appeal. "A trial court may conclude that an administrative ruling was in error and order further administrative proceedings on that very issue. In such circumstances, we have held the judicial order to be a final judgment, in order to avoid the possibility that further administrative proceedings would simply reinstate the administrative ruling, and thus would require a wasteful second administrative appeal to the Superior Court on that very issue. *Schieffelin & Co.* v. *Dept. of Liquor Control*, 202 Conn. 405, 410, 521 A.2d 566 (1987)." (Internal quotation marks omitted.) *Ray* v. *Administrator, Unemployment Compensation Act*, 133 Conn. 527, 532 n.3, 36 A.3d 269 (2012).

We conclude that the present case presents a situation where the administrator's ruling was held to be in error and further administrative proceedings on that very issue are necessary. Thus, the decision of the Superior Court constituted a final judgment for the purpose of this appeal. See *Belica* v. *Administrator, Unemployment Compensation Act*, 126 Conn. App. 779, 784 n.8, 12 A.3d 1067 (2011).

"In the processing of unemployment compensation claims . . . the administrator, the referee and the employment security board of review decide the facts and then apply the appropriate law. . . . [The administrator] is charged with the initial responsibility of determining whether claimants are entitled to unemployment benefits. [See generally] General Statutes § 31-241. . . . This initial determination becomes final unless the claimant or the employer files an appeal within twenty-one days after notification of the determination is mailed. [General Statutes § 31-241(a)]. Appeals are taken to the employment security appeals division which consists of a referee section and the board of review. [See] General Statutes §§ 31-237a [and] 31-237b. . . . The first stage of claims review lies with a referee who hears the claim de novo. The referee's function in conducting this hearing is to make inquiry in such manner, through oral testimony or written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the provisions . . . of the law. General Statutes § 31-244. This decision is appealable to the board of review. General Statutes § 31-249. Such appeals are heard on the record of the hearing before the referee although the board may take additional evidence or testimony if justice so requires. [General Statutes § 31-249]. Any party, including the administrator, may thereafter continue the appellate process by appealing to the Superior Court and, ultimately, to [the Appellate and Supreme Courts]." (Internal quotation marks omitted.) *Ray* v. *Administrator, Unemployment Compensation Act*, 133 Conn. App. 527, 531–32, 36 A.3d 269 (2012); see also *Addona* v. *Administrator, Unemployment Compensation Act*, 121 Conn. App. 355, 360–61, 996 A.2d 280 (2010) (appeals from board to Superior Court are exempted from Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., and controlled by § 31-249b).

The standard of review for judicial review of this type of case is well established. "In appeals under . . . § 31-249b, the Superior Court does not retry the facts or hear evidence but rather sits as an appellate court to review only the record certified and filed by the board of review. Practice Book § [22-9]. The court is bound by the findings of subordinate facts and reasonable factual conclusions made by the appeals referee where, as here, the board . . . adopted the findings and affirmed the decision of the referee. . . . Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the board of review has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Nonetheless, issues of law afford a reviewing court a broader standard of review when compared to a challenge to the factual findings of the referee." (Citations omitted; internal quotation marks omitted.) *Addona* v. *Administrator, Unemployment Compensation Act*, supra, 121 Conn. App. 361; see also *Burnham* v. *Administrator, Unemployment Compensation Act*, 184 Conn. 317, 321–22, 439 A.3d 1008 (1981).

On appeal, the defendant claims that the Superior Court exceeded the scope of its review by finding and relying on facts outside of the certified record, in violation of controlling case law and our rules of practice, and then improperly used those facts to determine that the board had abused its discretion. We agree.

In its decision, the court found, on the basis of its observations, that "the [plaintiff] was just an ordinary, working class person a bit overwhelmed with the amount of mail he was receiving . . . ." It further found that the plaintiff has made immediate efforts to remedy his error in failing to attend the hearing before the referee. These facts formed the foundation of the

court's conclusion that denying the plaintiff an opportunity to present his case amounted to a "gross abuse of discretion."

The board did not find that the plaintiff was "an ordinary, working class person" who had been overwhelmed by the volume of mail related to the claim for unemployment benefits. "In an appeal to the court from a decision of the board, the court is not to find facts. . . . In the absence of a motion to correct the finding of the board, the court is bound by the board's finding." (Citations omitted.) *Ray* v. *Administrator, Unemployment Compensation Act*, supra, 133 Conn. App. 533; see also *Belica* v. *Administrator, Unemployment Compensation Act*, 126 Conn. App. 779, 786, 12 A.3d 1067 (2011) (failure to file timely motion for correction of board's findings in accordance with Practice Book § 22-4 prevents further review of facts found by board); *Shah* v. *Administrator, Unemployment Compensation Act*, 114 Conn. App. 170, 176, 968 A.2d 971 (2009) (same); *Kaplan* v. *Administrator, Unemployment Compensation Act*, 4 Conn. App. 152, 153, 493 A.2d 248 (power of Superior Court is limited in this type of appeal; it does not try matter de novo and its function is not to adjudicate questions of fact), cert. denied, 197 Conn. 802, 495 A.2d 281 (1985).

We conclude that the Superior Court exceeded the scope of its review in this case by finding facts. The facts improperly found by the court formed the basis of its determination that the board had abused its discretion. Stated differently, the reasoning of the Superior Court, in reversing the decision of the board and remanding the case for further proceedings, rested on *facts found by the court*. The Superior Court, under these facts and circumstances, was bound by the facts *found by the board*. By making and relying on its own factual findings, the Superior Court exceeded its role. The determination that the board abused its discretion, therefore, is improper.

The judgment is reversed and the case is remanded with direction to render judgment affirming the decision of the Employment Security Board of Review.

In this opinion the other judges concurred.