DWIGHT DALEY *v.* J.B. HUNT TRANSPORT, INC., ET AL.
(AC 39835)

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

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, a violation of the Connecticut Fair Employment Practices Act (§ 46a-60 et seq.) in connection with the termination of the plaintiff's employment. The day after the jury returned its verdict in favor of the plaintiff, one of the jurors, R, appeared at the courthouse and notified court staff that she was ready to continue jury deliberations. After the trial judge reminded R that the jury had returned its verdict the day before and of the amount of the verdict, R became visibly upset and stated that she did not remember the jury concluding its deliberations or returning its verdict. The court subsequently held a status conference in which it informed the parties' attorneys of the events that had transpired with R. Thereafter, the defendants filed a motion seeking a new trial or, alternatively, an evidentiary hearing regarding the competency of R. The trial court denied the defendants' motion seeking a new trial or an evidentiary hearing, finding that the parties had deemed R to be an acceptable juror during jury selection, and that the parties did not challenge the competency of R during the evidentiary portion of the trial, jury deliberations or the return and acceptance of the jury's verdict. On the defendants' appeal and the plaintiff's cross appeal, *held* that, under the unique circumstances of this case, the trial court erred in failing to hold a postverdict evidentiary hearing to examine R's competency during

trial; there must be a preliminary showing of strong evidence that the juror likely was incompetent during his or her jury service before a trial court is required to conduct a full postverdict inquiry into the juror's competency, as that standard serves the interests of the avoidance of postverdict harassment of jurors, the preservation of the finality of judgments, the discouragement of meritless applications for postverdict hearings, and the reduction of the likelihood of and temptation for jury tampering, and there was sufficient evidence in the present case indicating that R likely was not competent to serve on the jury, as R's statements to the trial judge and in a letter she had submitted to the court, in which she stated that she had experienced a memory gap with respect to the deliberations and the verdict, that she was concerned that she may have suffered other mental lapses during the trial and that she planned to undergo a medical evaluation to determine whether she suffered from dementia or Alzheimer's disease, constituted strong evidence that R likely had been incompetent during her jury service, such that a full inquiry by the court into R's competency was necessary.

Argued October 11, 2018—officially released February 5, 2019

Procedural History

Action to recover damages for, inter alia, wrongful termination of employment, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Hon. William B. Rush*, judge trial referee; verdict and judgment for the plaintiff; thereafter, the court denied the defendants' motion for a new trial and their motion to set aside the verdict and for judgment notwithstanding the verdict, and the defendants appealed and the plaintiff cross appealed to this court. *Reversed in part; further proceedings.*

Christopher M. Hodgson, with whom, on the brief, was *Warren L. Holcomb*, for the appellants-cross appellees (defendants).

Francis D. Burke, for the appellee-cross appellant (plaintiff).

Opinion

MOLL, J. The defendants, J.B. Hunt Transport, Inc. (J.B. Hunt), and David Bryant, appeal, and the plaintiff,

Dwight Daley, cross appeals, from the judgment of the trial court rendered in accordance with a jury verdict returned in favor of the plaintiff. The threshold issue raised by the defendants on appeal that we must resolve is whether the court erred in declining to conduct a postverdict evidentiary hearing to determine whether one of the jurors, R.L.,[1] had been competent to serve on the jury. We conclude that the court committed error, and we reverse in part the judgment of the court and remand the case for further proceedings while retaining our jurisdiction over the remaining claims on appeal and over the cross appeal pending the outcome of the proceedings on remand.

The following facts, as found by the trial court in its memorandum of decision or as undisputed in the record, and procedural history are relevant to our resolution of the threshold issue before us. In December, 2013, the plaintiff commenced the underlying action against the defendants. In the operative complaint (complaint), the plaintiff alleged, inter alia, that the defendants terminated his employment despite previously having assured him that he could return to work after he recovered from injuries he had sustained as a result of a motor vehicle accident unrelated to his employment. The complaint included, inter alia, the following counts asserted against the defendants: violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-60 et seq.; promissory estoppel; negligent misrepresentation; fraudulent misrepresentation; and, as to J.B. Hunt only, breach of the implied covenant of good faith and fair dealing. The defendants denied the plaintiff's substantive allegations and raised several special defenses. The plaintiff denied the allegations of the defendants' special defenses.

[1] To protect the privacy of the juror discussed in this opinion, we shall refer to her only by her initials. See *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 388 n.14, 3 A.3d 892 (2010).

The case was tried to a jury over the course of seven days in August, 2016. Shortly after 5 p.m. on Thursday, August 11, 2016, following less than one day of deliberations,[2] the jury returned a verdict in favor of the plaintiff, awarding him $200,000 in economic damages and $25,000 in noneconomic damages. In reaching its verdict, the jury answered several interrogatories.[3] On the record, the clerk twice read the jury's verdict and its answers to the interrogatories, and, after each recitation, the clerk asked the jury to confirm its verdict. All of the jurors, including R.L., replied "yes" on both occasions.[4] The trial court, *Hon. William B. Rush*, judge trial referee, thereupon accepted and recorded the verdict at 5:08 p.m.

On Friday, August 12, 2016, R.L. appeared at the courthouse where the underlying case had been tried and notified court staff that she was ready to continue jury deliberations.[5] Judge Rush spoke with R.L. in the

[2] The jury was charged on August 11, 2016.

[3] On the basis of its answers to the interrogatories, the jury found in favor of the plaintiff on the following counts: promissory estoppel; negligent misrepresentation; fraudulent misrepresentation; and breach of the covenant of good faith and fair dealing.

[4] After the jury twice had confirmed its verdict, the trial court submitted two additional interrogatories to the jury, namely: (1) whether the plaintiff was entitled to recover $225,000 in damages from the defendants collectively; or (2) whether the plaintiff was entitled to recover $225,000 in damages from each defendant, for a total amount of $450,000. The jury answered "yes" to the first interrogatory and "no" to the second interrogatory. On the record, the court read the jury's answers to those interrogatories and asked the jury to confirm its answers. All of the jurors, including R.L., replied "yes."

[5] In a memorandum of decision disposing of, inter alia, several postverdict motions, the trial court stated that the verdict had been accepted on "Friday August 11, 2016" and that R.L. had gone to the courthouse "[t]he following Tuesday . . . ." On July 10, 2017, the parties filed a joint motion to correct the memorandum of decision, to reflect, inter alia, that R.L.'s postverdict appearance at the courthouse occurred on Friday, August 12, 2016, and that the parties' attorneys had attended a status conference with the court on Tuesday, August 16, 2016, to discuss the events concerning R.L. The court neither ruled on the joint motion to correct nor amended the memorandum of decision at any time thereafter.

We take judicial notice that August 11, 2016, was a Thursday and August 12, 2016, was a Friday. See *Federal Deposit Ins. Corp.* v. *Napert-Boyer*

civil caseflow office and reminded her that the jury had returned its verdict in favor of the plaintiff the day before. Judge Rush also reminded R.L. of the amount of the verdict. In response to that information, R.L. became visibly upset and stated that she did not remember the jury concluding its deliberations or returning its verdict. Immediately thereafter, the court scheduled a status conference, which took place in chambers on August 16, 2016, during which he apprised the parties' attorneys of the events that had transpired regarding R.L. During the status conference, the court also provided the attorneys with a copy of a handwritten letter submitted by R.L. to the court,[6] which was dated August 12, 2016, in which R.L. wrote in relevant part: Upon arriving at the courthouse for the purpose of finishing the jury's deliberations, she was "surprise[d]" to learn that the jury had returned its verdict; she did not remember the jury concluding its deliberations or returning its verdict the day before; she did not have a prior history of "memory gaps," but she "definitely" had experienced such a memory lapse with regard to the jury's deliberations and the return of its verdict; she was concerned that she may have suffered "other gaps" during

Partnership, 40 Conn. App. 434, 442, 671 A.2d 1303 (1996) ("[f]acts which are of common knowledge, that is, facts so well known that evidence to prove them is unnecessary are proper subjects of judicial notice" [internal quotation marks omitted]); see also *Old Lyme Associates Corp.* v. *Zoning Commission*, 31 Conn. Supp. 440, 441, 333 A.2d 406 (1974) ("[c]ourts may take cognizance of the days of the week with the days of the month"). In their joint motion to correct, the parties represented that R.L. had arrived at the courthouse on Friday, August 12, 2016. Further, in a letter dated August 12, 2016, which R.L. had submitted to the court, R.L. wrote that she had arrived at the courthouse "today . . . ." In addition, during argument on the parties' respective postverdict motions, Judge Rush, in reciting the events regarding R.L., stated that he had informed R.L. that the jury's verdict had been returned and accepted "the day before . . . ." The verdict was returned and accepted on Thursday, August 11, 2016. In light of the above, we conclude that the court mistakenly determined that R.L. had gone to the courthouse on August 16, 2016, the Tuesday following the return and acceptance of the verdict, rather than on Friday, August 12, 2016.

[6] R.L. addressed the letter to the Honorable Barbara N. Bellis, the presiding civil judge for the judicial district of Fairfield.

the trial; she was sixty-four years old and intended to undergo a medical evaluation to determine whether she had "dementia/Alzheimer's [disease]," which had been recommended to her by a caregiver because her mother had been diagnosed with early onset Alzheimer's disease at sixty years of age; and she disagreed with the amount of the verdict, as she would "never want [the defendants] to pay any more than [thirty, forty, *maybe* fifty] thousand [dollars]." (Emphasis in original.)

On September 16, 2016, the defendants filed a motion seeking a new trial on the ground that R.L. had been incompetent during the trial, thereby depriving them of their right to due process.[7] As alternative relief, the defendants requested that the court conduct an evidentiary hearing to evaluate R.L.'s competency.[8] The plaintiff opposed that motion.

On October 11, 2016, the trial court heard argument on, inter alia, the defendants' motion seeking a new trial or, alternatively, an evidentiary hearing addressing R.L.'s competency during trial. By way of a memorandum of decision dated November 4, 2016, the court denied the motion seeking a new trial, including the alternative request for an evidentiary hearing.[9] The court found that, during jury selection, the parties had deemed R.L. to be an acceptable juror, and that none of the parties had challenged the competency of R.L. during the evidentiary portion of the trial, jury deliberations, or the return and acceptance of the jury's verdict.

[7] The trial court granted the parties an extension of time to file postverdict motions through September 16, 2016.

[8] On August 23, 2016, the defendants filed a caseflow request asking the trial court to schedule an evidentiary hearing to determine whether R.L. had been competent to serve on the jury. The plaintiff opposed that request.

[9] In its memorandum of decision, the trial court also denied the following: a motion to set aside the verdict and for judgment notwithstanding the verdict filed by the defendants; a motion for punitive damages filed by the plaintiff; a motion for prejudgment and postjudgment interest filed by the plaintiff; and a request to file an amended complaint filed by the plaintiff.

It also found that R.L., along with the other jurors, twice confirmed the verdict on the record.

In addition, the court determined that, although a specific claim of juror misconduct generally would require an inquiry by the court, a juror's failure to remember deliberations that resulted in a verdict did not constitute juror misconduct. The court further stated in relevant part: "The instructions to the jury by the court . . . instructed the jury that each juror must decide the case for themselves and not merely acquiesce in the verdict of their fellow jurors. The fact that, after the lengthy deliberations and the [rendition and acceptance of the verdict], a juror does not remember those events does not mean that they did not take place in accordance with our laws. The notes of the court indicate the instructions to the jury were completed at 11:03 a.m. and that the verdict was accepted shortly after 5 p.m. so that it is not a short period of time that [R.L.] cannot recall. However the failure to recall those events is itself a postverdict event. The holding of a hearing on [the] issue of the competence of [R.L.] during the course of the trial, the deliberations of the jury and the rendition and acceptance of the verdict would require, for a thorough analysis, an inquiry into areas which, under the law, the court cannot do. If [R.L.] cannot recall the deliberations and the rendition of the verdict it is doubtful that [R.L.] could reliably recall the state of her competency during the trial itself and any further inquiry would involve the court directly in the process of the deliberations. Accordingly, the request of the defendants to hold a hearing and the motion to set aside the verdict on the issues raised [concerning R.L. are] hereby denied."[10] This appeal and cross appeal followed.

[10] Although the trial court stated that it was denying "the request of the defendants to hold a hearing and the motion to set aside the verdict on the issues raised [concerning R.L.]," we construe the court's ruling as a denial of the defendants' motion seeking a new trial or, alternatively, an evidentiary hearing to address R.L.'s competency. The court subsequently denied the

The threshold issue raised by the defendants on appeal is whether, in light of the events involving R.L. that transpired on Friday, August 12, 2016, the trial court erred in declining to conduct a postverdict evidentiary hearing to determine whether R.L. had been competent to serve as a juror during the trial. We conclude that, under the unique circumstances of the present case, the court committed error in failing to hold a postverdict evidentiary hearing to examine R.L.'s competency.

We begin by setting forth the relevant standard of review. "We consistently have held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *Customers Bank* v. *CB Associates, Inc.*, 156 Conn. App. 678, 695, 115 A.3d 461 (2015). The defendants have not identified a statute, a rule of practice, or a rule of evidence that required the trial court to hold an evidentiary hearing to evaluate R.L.'s competency and, thus, we review the court's decision declining to conduct an evidentiary hearing under the abuse of discretion standard of review.

As an initial matter, we note that, in cases involving specific allegations of juror *misconduct*, a trial court is required to perform a preliminary inquiry into those allegations. See *Harrison* v. *Hamzi*, 77 Conn. App. 510, 522, 823 A.2d 446, cert. denied, 266 Conn. 905, 832 A.2d 69 (2003). "[T]he form and scope of such an inquiry lie within a trial court's discretion . . . . That form and scope may vary from a preliminary inquiry of counsel, at one end of the spectrum, to a full evidentiary hearing at the other end of the spectrum, and, of course, all points in between. Whether a preliminary inquiry of

defendants' separate motion to set aside the verdict and for judgment notwithstanding the verdict.

counsel, or some other limited form of proceeding, will lead to further, more extensive, proceedings will depend on what is disclosed during the initial limited proceedings and on the exercise of the trial court's sound discretion with respect thereto." (Internal quotation marks omitted.) Id. In the present case, the threshold issue before us is whether the trial court erred in declining to conduct a postverdict evidentiary hearing to address a juror's competency during trial, rather than a juror's alleged misconduct. The parties have not cited, and our research has not revealed, any authoritative Connecticut case law that informs our analysis of this discrete issue. Thus, we turn to federal case law for guidance. See, e.g., *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 88, 931 A.2d 237 (2007).

In *Sullivan* v. *Fogg*, 613 F.2d 465, 467–68 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit held that a trial court erred in failing to conduct a complete postverdict inquiry into a juror's competency. In *Sullivan*, approximately one month following a criminal jury trial in which the petitioner had been found guilty of two counts of murder and one count of illegal possession of a weapon, one of the jurors contacted the local district attorney to complain that he was being harassed by "voices." (Internal quotation marks omitted.) Id., 466. The juror was brought before the trial court for questioning to determine whether he had been competent during the trial. Id. The juror presented testimony suggesting that he had experienced delusions or paranoid sensations during the trial and that he had heard "vibrations" throughout the trial that seemed amplified in the jury room. (Internal quotation marks omitted.) Id. He testified that he had heard a "voice, [he had] heard [his] name," and that "they were spying maybe in favor of the [petitioner]," but that the "voices" had not influenced him in reaching his

verdict. (Internal quotation marks omitted). Id. He further testified that he previously had heard "voices" while serving as a juror in a prior unrelated criminal trial, which had resulted in a conviction. Id. The trial court appointed a psychiatrist to perform an independent evaluation of the juror. Id. In a written report submitted to the court, the court-appointed psychiatrist determined that, although the juror appeared to have a "schizoid personality with paranoid features . . . vulnerable to a paranoid psychotic decompensation," the juror had been competent during the trial because the "voices" he had heard had not influenced his verdict or prevented him from making a rational judgment on the merits of the case. (Internal quotation marks omitted.) Id. The petitioner was not given an opportunity to cross-examine the court-appointed psychiatrist or to retain his own psychiatrist to testify. Id. On the basis of the court-appointed psychiatrist's report, the trial court concluded that no additional inquiry into the juror's competency was necessary. Id. The petitioner's conviction was affirmed on appeal. Id. Thereafter, the petitioner filed a petition for a writ of habeas corpus in federal district court, which was denied. Id.

On appeal from the denial of his petition for a writ of habeas corpus, the petitioner claimed that his right to due process had been violated as a result of the trial court's failure to conduct a full and fair hearing to evaluate the juror's competency. Id. The Second Circuit agreed with the petitioner that a full inquiry into the juror's competency was necessary. Id., 467–68. In reaching that conclusion, the Second Circuit pronounced: "Due process requires that jurors be sane and competent during trial. . . . Once a preliminary showing of incompetence or juror misconduct has been made there is a corresponding right to an inquiry into the relevant surrounding circumstances. . . . Where the allegations involve considerations internal to the jury deliberation process, such as juror insanity, this court has

required strong evidence that it is likely that the juror suffered from such incompetence before ordering a post-verdict inquiry. . . . This high threshold is intended to avoid post-verdict harassment of jurors, preserve the finality of judgments, discourage meritless applications for post-verdict hearings, and reduce the likelihood of and temptation for jury tampering." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 467. The Second Circuit determined that there had been a "sufficient showing of incompetence to justify, indeed to require, a further inquiry" into the juror's competency, emphasizing in particular the juror's unsolicited statements that were "strongly suggestive of incompetence during trial and deliberations."[11] Id. As relief, the Second Circuit reversed the

[11] In *Sullivan*, the Second Circuit distinguished the case before it from *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 873, 95 S. Ct. 134, 42 L. Ed. 2d 112 (1974), in which it had addressed a claim regarding a juror's competency. In *Dioguardi*, approximately ten days following a jury trial in which two codefendants had been found guilty of several criminal charges, one of the jurors mailed an unsolicited letter to one of the defendants in which the juror wrote, inter alia, that her "clairvoyant" powers enabled her to see that the defendant was a good person, but that she believed he was guilty and should repent. Id., 72, 75. Several psychiatrists contacted by defense counsel opined, on the basis of the juror's letter, that the juror appeared to suffer from various mental illnesses, but that a psychiatric evaluation was necessary to develop a clear diagnosis and determine whether the juror's mental illnesses had prevented her from comprehending the trial proceedings. Id., 76. The codefendants moved for a new trial or, alternatively, an evidentiary hearing to examine the juror's competency. Id., 78. The trial court denied the motion. Id. On appeal, the Second Circuit upheld the denial of the motion, concluding that the juror's letter, accompanied by the "horseback uninformed opinions" of the psychiatrists, fell "considerably short of justifying any further inquiry" into the juror's competency. Id., 78–79, 81.

In *Sullivan*, the Second Circuit determined that *Dioguardi* was distinguishable, stating: "In *Dioguardi*, unlike this case, there was *no evidence* that the alleged feelings of clairvoyance and other psychic phenomena exhibited by the juror after trial were present *during trial*. In addition, the evidence in [*Dioguardi*] consisted of a letter written by the juror to the defendant. Here the juror's own statements indicated that the delusions occurred during trial, and there was ample justification for ordering a further inquiry." (Emphasis added.) *Sullivan* v. *Fogg*, supra, 613 F.2d 467. The

habeas court's judgment and remanded the case with instructions to grant the petition for a writ of habeas corpus unless the state reopened the hearing and provided the petitioner with an opportunity to cross-examine the court-appointed psychiatrist or the petitioner was granted a new trial. Id., 468.

We adopt the standard set forth in *Sullivan*, namely, that there must be a preliminary showing of strong evidence that a juror likely was incompetent during his or her jury service before a trial court is required to conduct a full postverdict inquiry into the juror's competency. Id., 467. We are persuaded that such a standard serves the interests identified in *Sullivan*, namely, the avoidance of postverdict harassment of jurors, the preservation of the finality of judgments, the discouragement of meritless applications for postverdict hearings, and the reduction of the likelihood of and temptation for jury tampering. Id.

In the present case, the defendants assert that there was sufficient evidence in the record indicating that R.L. likely was not competent to serve on the jury and, therefore, the court should have held a postverdict evidentiary hearing to inquire into R.L.'s competency. In response, the plaintiff argues, inter alia, that there was no evidence in the record suggesting that R.L. had been incompetent during her jury service. We agree with the defendants. One day after the jury had finished deliberating and returned its verdict, R.L. spoke with Judge Rush personally and informed him that she could not recall the conclusion of the jury's deliberations or

foregoing indicates that the Second Circuit, in concluding that the high threshold necessitating a full evidentiary hearing had been satisfied in *Sullivan*, found particularly important that (1) the juror made personal, unsolicited statements suggesting that he had suffered from a mental illness, and (2) the evidence showed that the juror's alleged mental illness likely had been present *during the trial*.

the return of the verdict. In addition, in her letter submitted to the court, R.L. wrote that she was "surprise[d]" to learn that the jury had returned its verdict, she "definitely" had experienced a "memory gap" with respect to the jury's deliberations and the return of the verdict, and she was concerned that she may have suffered other mental lapses during the trial. She further wrote that she planned to undergo a medical evaluation, which had been recommended to her by a caregiver, to determine whether she suffered from "dementia/Alzheimer's [disease]," particularly given that her mother had been diagnosed with early onset Alzheimer's disease at approximately her age. Although there had not been any overt indication prior to the jury returning its verdict that R.L. may have been suffering from a medical condition that rendered her incompetent during her jury service, we conclude that R.L.'s statements to Judge Rush and her letter submitted to the court constitute strong evidence that R.L. likely had been incompetent during her jury service, such that a full inquiry by the court into R.L.'s competency was necessary.[12] Thus, the court erred in failing to hold a postverdict eviden-

[12] We consider the unique circumstances of this case to be more analogous to *Sullivan* than to *Dioguardi*. In her unsolicited statements made personally to Judge Rush and/or in her letter submitted to the court, R.L. expressed: she was "surprise[d]" to learn that the jury had returned its verdict, as she had no recollection of the jury concluding its deliberations or returning its verdict; although she did not have a prior history of "memory gaps," she "definitely" had experienced such a memory lapse as to the jury's deliberations and the return of its verdict and she feared that she potentially had suffered "other gaps" during the trial; and she was sixty-four years old and intended to undergo a medical evaluation to determine whether she had "dementia/Alzheimer's [disease]," per a caretaker's recommendation because her mother had been diagnosed with early onset Alzheimer's disease at sixty years of age. Here, as in *Sullivan* and unlike *Dioguardi*, the evidence in the record indicates that it is likely that R.L. suffered from a medical condition that rendered her incompetent *during the trial*, and the evidence was not limited to the letter submitted by R.L. to the trial court, but also consisted of unsolicited statements made personally by R.L. to Judge Rush. See footnote 11 of this opinion.

tiary hearing to determine whether R.L. had been competent to serve as a juror during the trial.[13]

Having concluded that the trial court committed error in failing to conduct a full postverdict inquiry into R.L.'s competency during the trial, we reverse the portion of the judgment denying the defendants' motion seeking a new trial or, alternatively, an evidentiary hearing addressing R.L.'s competency and remand the case for an evidentiary hearing to determine whether R.L. had been competent to serve as a juror.[14] Deciding the form

[13] The plaintiff argues that, even assuming that R.L. had been incompetent to serve as a juror, there is no indication that the defendants were prejudiced by R.L.'s incompetency. We disagree. Due process requires that jurors be sane and competent during trial. *Sullivan* v. *Fogg*, supra, 613 F.2d 467. A juror deemed to be incompetent cannot, as a matter of law, be considered to be a fair and impartial juror.

[14] We note that we consider our conclusion to be consistent with the United States Supreme Court's decision in *Tanner* v. *United States*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987). In *Tanner*, the court held that Federal Rule of Evidence § 606 (b) (Rev. 1974), which prohibited a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith," subject to exceptions pertaining to "extraneous prejudicial information" or "outside influence[s]," precluded jurors from being called as witnesses at a postverdict evidentiary hearing to testify about misconduct in the form of drug and alcohol use by certain jurors during trial for the purpose of impeaching the jury's verdict because juror intoxication did not constitute an "outside influence." (Internal quotation marks omitted.) Id., 121–25. The court noted that § 606 (b) was "grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." Id., 121. The court also recognized that there was another common-law exception allowing a postverdict inquiry into a juror's competency in cases of "substantial if not wholly conclusive evidence of incompetency . . . ." (Internal quotation marks omitted.) Id., 125. Without deciding whether § 606 (b) retained that common-law exception, the court determined that the evidence in the record supporting the allegation of juror misconduct, which included a juror's affidavit in which the juror attested that several jurors consumed alcohol and fell asleep during the trial, did "not suffice to bring this case under the common-law exception allowing post-verdict inquiry when an extremely strong showing of incompetency has been made." Id., 126.

and scope of the hearing to be held on remand is within the discretion of the trial court.[15] See, e.g., *Sullivan* v. *Fogg*, supra, 613 F.2d 468 (trial court has discretion to determine form of postverdict evidentiary hearing examining juror's competency); see also, e.g., *State* v. *Biggs*, 176 Conn. App. 687, 709, 171 A.3d 457 (trial courts have wide discretion in conducting evidentiary hearings to assess allegations of juror misconduct), cert. denied, 327 Conn. 975, 174 A.3d 193 (2017).[16] After conducting the evidentiary hearing and determining whether R.L. was competent to serve on the jury, the trial court must decide whether to grant the defendants' motion seeking a new trial.[17]

[15] The plaintiff argues that an evidentiary hearing addressing R.L.'s competency necessarily would require an inquiry into R.L.'s mental processes during the jury's deliberations in violation of Practice Book § 16-34. We disagree. Section 16-34 provides: "Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined. Subject to these limitations, a juror's testimony or affidavit shall be received when it concerns any misconduct which by law permits a jury to be impeached." The proscription contained in § 16-34 is not implicated here. An inquiry into R.L.'s competency will not require the parties or the court to delve into the substance of the jury's deliberations or R.L.'s "mental processes by which the verdict was determined"; rather, the relevant inquiry will be whether R.L. suffered from a medical condition that would have prevented her from fulfilling her duties as a competent juror.

[16] We are aware that a considerable amount of time has passed since the verdict was returned and accepted in this case. We expect that, in exercising its discretion on remand, the trial court will consider the passage of time.

[17] Thereupon, pursuant to Practice Book § 61-9, the parties may file an amended appeal and/or an amended cross appeal, as the case may be, for the narrow purpose of seeking appellate review of any subsequent rulings made by the trial court on remand.

In addition, to avoid triggering a dispute over the application of General Statutes § 51-183c, we make clear that we perceive no bar to Judge Rush, if available, conducting the proceedings on remand as ordered herein. See *State* v. *Santiago*, 245 Conn. 301, 340–41 n.25, 715 A.2d 1 (1998) (following reversal of judgment with respect to trial court's decision not to conduct more extensive inquiry into postverdict allegation of juror misconduct, different judge is not required to preside over proceedings on remand to make such inquiry); see also *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 426–27 n.10, 142 A.3d 290 (2016) ("We observe that the court [in *Santiago*] did not remand the case for a new trial on the merits of the case,

This conclusion effectively disposes of the threshold issue before us. In addition to appealing from the trial court's denial of their motion seeking a new trial or, alternatively, an evidentiary hearing addressing R.L.'s competency, the defendants claim that the court erred in denying (1) their motion to set aside the verdict and for judgment notwithstanding the verdict, and (2) a request submitted by them to charge the jury on mitigation of damages. In his cross appeal, the plaintiff claims that the court erroneously denied (1) his motion for punitive damages, (2) his motion seeking postjudgment interest,[18] and (3) a request submitted by him to charge the jury on retaliation in violation of the Connecticut Fair Employment Practices Act. Rather than addressing these other claims at this time, we believe that the wiser approach, under the unique circumstances of this case, is to retain our jurisdiction over the remaining claims on appeal and over the cross appeal pending the outcome of the proceedings on remand, which may obviate the need for appellate review of these other claims. See, e.g., *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 688, 986 A.2d 290 (2010) (reversing judgment denying motion to dismiss and remanding case for further proceedings while retaining jurisdiction over appeal to review, as necessary, other claims raised on appeal); *Higgins* v. *Karp*, 239 Conn. 802, 811, 687

but for further proceedings related to an allegation of juror misconduct. As opposed to a new trial, such a proceeding is more like a sentencing hearing, a hearing related to pretrial matters, or a short calendar hearing—proceedings to which § 51-183c does not apply. . . . In light of the particular circumstances of that case and the issues that would come before the court on remand, it determined prospectively that the trial judge's participation in the case on remand would not give rise to an appearance of impartiality or bias. Its determination in this regard was dispositive of the issue of the propriety of the trial court's participation in the case on remand." [Citations omitted.]), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018).

[18] The plaintiff also moved for an award of prejudgment interest, which the trial court denied. During oral argument before this court, the plaintiff conceded that he is not pursuing his claim on appeal regarding prejudgment interest.

A.2d 539 (1997) (reversing judgments and vacating denials of motions to set aside defaults, and remanding case for redetermination of whether good cause existed to set aside defaults while retaining jurisdiction over appeal to review other claims raised on appeal in event that trial court did not find good cause to set aside defaults); *Gilbert* v. *Beaver Dam Assn. of Stratford Inc.*, 85 Conn. App. 663, 675, 680–81, 858 A.2d 860 (2004) (affirming in part and reversing in part judgment and remanding case for additional proceedings on plaintiff's claims under Common Interest Ownership Act, General Statutes § 47-200 et seq., while retaining jurisdiction over appeal to consider plaintiff's claim regarding validity of association's bylaws pending outcome of proceedings on remand), cert. denied, 272 Conn. 912, 866 A.2d 1283 (2005); *Colonial Penn Ins. Co.* v. *Patriot General Ins. Co.*, 45 Conn. App. 630, 633, 697 A.2d 694 (1997) (ordering limited remand for trial court to assure compliance with applicable notice requirement while retaining jurisdiction over case); *O'Bymachow* v. *O'Bymachow*, 10 Conn. App. 76, 78–79, 521 A.2d 599 (1987) (setting aside judgment declining to consider motion to open and remanding case to trial court to adjudicate motion to open while retaining jurisdiction over appeal from denial of motion for modification pending resolution of motion to open); see also General Statutes § 51-197a (b) (providing that "[t]he Appellate Court may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law").

The judgment is reversed only as to the denial of the defendants' motion seeking a new trial or, alternatively, an evidentiary hearing and the case is remanded for further proceedings consistent with this opinion. We retain jurisdiction over the case in order to resolve, as necessary, the remaining claims presented in the appeal

and the cross appeal pending the outcome of the proceedings on remand.

In this opinion the other judges concurred.

TOWN OF WETHERSFIELD ET AL. *v.* PR ARROW, LLC (AC 40407)

Keller, Elgo and Sullivan, Js.

Syllabus

The defendant appealed to the trial court from the decision by the plaintiff town upholding a cease and desist order that had been issued by the plaintiff zoning enforcement officer, L. The cease and desist order stated, inter alia, that the defendant was in violation of the applicable town zoning regulation (§ 5.2.H.5) that prohibited certain trucking or freight operations on its real property, which was located in a business park zone, without a special permit, as required by the zoning regulations. The defendant appealed from that order to the town's Zoning Board of Appeals but withdrew the appeal before the board could conduct a public hearing on the matter. When the activities at issue allegedly continued on the defendant's property, the plaintiffs commenced this action, alleging, inter alia, that the defendant had violated § 5.2.H.5 due to ongoing trucking or freight operations without a special permit. The plaintiffs also alleged that the defendant had violated the zoning regulations by permitting the parking and storage of commercial vehicles on the property that were not accessory to any use by a tenant at the property. The defendant thereafter filed an answer and six special defenses, one of which alleged that § 5.2.H.5 was void for vagueness. The trial court granted the plaintiffs' motion to preclude evidence concerning the defendant's special defenses that had been raised in the appeal to the board, which had been withdrawn. The court thereafter rendered judgment for the plaintiffs and ordered, inter alia, that the defendant obtain a special permit if it wanted to continue trucking and freight operations on its property. The court also retained jurisdiction as to the accessory use issue, and imposed fines and awarded costs and attorney's fees pursuant to statute (§ 8-12), and the defendant appealed to this court. The trial court thereafter granted the plaintiffs' postjudgment motion for contempt, finding that the violations on the defendant's property had continued after it rendered judgment, and the defendant filed an amended appeal. *Held*:

1. The defendant could not prevail on its claims that because the plaintiff did not plead an accessory use violation, the trial court lacked subject

matter jurisdiction as to the issue of whether the parking and storage of commercial vehicles on its property constituted a valid accessory use, and that L lacked standing to bring an action on behalf of himself or the town: that court properly retained jurisdiction as to the accessory use issue, as that question fell within the authority conferred on the court by § 8-12, the plaintiffs raised that issue in their complaint and prayer for relief, and it was proper for the court, after the granting of a permanent injunction related to trucking operations conducted on the property without a special permit, to retain jurisdiction to the extent that there was a question on an accessory use with respect to commercial vehicles stored on the property; moreover, because the defendant failed to challenge the standing of the town to maintain this action pursuant to § 8-12 and the town was a party to the zoning enforcement action, there was no justiciable controversy as to the standing of L, and, therefore, the defendant's appeal as to the standing of L was dismissed as moot.

2. The trial court properly determined that the defendant failed to exhaust its administrative remedies as to its special defense that L exceeded his authority in issuing the cease and desist order:

   a. Although the defendant claimed that the zoning regulations vest exclusive authority in the town Planning and Zoning Commission to interpret words in the zoning regulations that are undefined, it was required first to raise its claim before the zoning board, which is empowered by statute (§ 8-6 [a] [1]) and the applicable town zoning regulation (§ 10.4.B.2) to decide appeals where it is alleged that there is an error in any order of a zoning enforcement officer and, thus, had the power to determine whether L exceeded his authority in issuing the order in the present case; accordingly, the defendant was required to exhaust that administrative remedy before raising such a claim in the Superior Court, which it indisputably did not do.

   b. The defendant's claim that an exception to the exhaustion requirement applied because an appeal to the board would have been futile was unavailing, as that claim was unsupported by the record and speculative: the board had the authority to determine whether there was any error in the cease and desist order, and to the extent that it did not rule in the defendant's favor, an avenue of judicial review was available to the defendant pursuant to statute (§ 8-8 [b]); furthermore, only one of the defendant's six special defenses raised a constitutional claim, which was that § 5.2.H.5 was void for vagueness and, thus, was excepted from the exhaustion requirement, and the trial court properly determined that the exhaustion requirement pertained to the remaining special defenses, which concerned the actions of L in issuing the order and did not fall within the narrow exception to the exhaustion requirement for constitutional claims.

3. The defendant could not prevail on its claim that § 5.2.H.5 of the zoning regulations was void for vagueness, which was based on its claim that the words "trucking or freight operations" were not defined in the

regulations and that, without a definition, it could not ascertain whether the parking and storage of commercial vehicles on its property is prohibited: the term trucking operations pertained to all phases of the business of transporting goods on trucks, L testified that the storage of trucks was a significant facet of a trucking business, the title of § 5.2.H, which mentions storage uses, underscored the applicability of § 5.2.H.5 to the storage of commercial vehicles by trucking companies, and the defendant and its representatives were capable of utilizing their common sense when construing § 5.2.H.5, which dictated that the parking and storage of trucks was part and parcel of trucking operations; moreover, § 5.2.H.5 provided adequate notice to the defendant of the standards utilized to evaluate a special permit request for the parking and storage of commercial vehicles, as it was the only provision in the regulations that ostensibly encompassed the storage of commercial vehicles as a principal use and specifically permitted trucking operations as a conditional principal use in the business park zone, the defendant was charged with knowledge that the storage of commercial vehicles must be specifically permitted under the regulations, which are permissive in nature, and § 5.2.H.5 expressly required complete visual screening of equipment on the defendant's property, provides that owners of property in a business park zone must obtain a special permit for a conditional use from the commission before engaging in trucking operations on the property, and contained detailed criteria that governed special permit applications and the storage of commercial vehicles.

4. The defendant could not prevail on its claim that the trial court improperly interpreted the term trucking operations and substituted its interpretation for that of the commission; that court accorded trucking and freight operations its ordinary meaning, its construction was consistent with the apparent intent of the commission in enacting § 5.2.H.5, as the permissive nature of the regulations demonstrated that the commission intended to confine the principal uses of property in the business park zone to those specified in § 5.2 and the commission's classification of trucking operations as a conditional use that required a special permit indicated that it wanted to retain an additional degree of oversight and control over such activities, and the court was not bound by the interpretation of § 5.2.H.5 by the commission or zoning board, as the construction of the zoning regulation presented a question of law over which the court was obligated to exercise plenary review.

5. The trial court properly exercised its discretion in fashioning permanent injunctive relief in favor of the plaintiffs, as the court was presented with evidence that commercial vehicles were being stored by trucking companies on the defendant's property in contravention of the regulations, and the court, as the arbiter of credibility, was free to credit that evidence.

6. The defendant's claim that the trial court's injunction lacked sufficient clarity and definiteness was unavailing, the defendant having mischaracterized the wording of the court's decision; the plain terms of the court's

order were sufficiently clear and definite, as they informed the defendant that it must obtain a special permit in accordance with the zoning regulations in order to conduct trucking or freight operations on its property as a principal use.

7. The trial court did not abuse its discretion by imposing a daily fine against the defendant; although the defendant claimed that the imposition of a fine was improper because the plaintiffs had failed to prove that the storage of commercial vehicles on the defendant's property was a public nuisance, § 8-12 does not contain any such requirement, the defendant provided no authority mandating such proof and, to obtain relief under § 8-12, the plaintiffs needed to prove only that the regulations were violated, and it was within the court's discretion to impose the fine, as the circumstances required, from the date that the defendant withdrew its first appeal to the board to the date of the court's judgment.

8. The court did not abuse its discretion in awarding costs and attorney's fees to the plaintiffs pursuant to § 8-12, as the court set forth the applicable standard for wilfulness in the zoning violation context, found that the defendant willingly allowed a use of its property in contravention of the regulations after the cease and desist order had been issued, and noted that there was no evidence that weighed in the defendant's favor.

9. The defendant's claims that the trial court lacked subject matter jurisdiction over the plaintiffs' motion for contempt and that the motion was filed prematurely and granted improperly, were unavailing:

a. The trial court's jurisdiction over the contempt motion stemmed from its inherent authority to enforce its orders; the defendant provided no authority indicating that a court lacks subject matter jurisdiction over a postjudgment motion for indirect civil contempt unless a separate and distinct proceeding is commenced in the trial court, and although defense counsel, for the first time, moved to dismiss the plaintiff's motion for contempt at the hearing thereon due to allegedly insufficient service of process, the trial court concluded that the defendant waived that objection to the contempt motion when it did not file a timely motion to dismiss, and the defendant, by filing an objection to the motion and a memorandum of law, and then fully participating in the contempt hearing, submitted to the jurisdiction of the court.

b. The trial court properly granted the plaintiffs' motion for contempt; the plaintiffs were entitled to file their contempt motion at any time after the court issued its permanent injunction, the defendant having failed to provide any authority to the contrary or to request a discretionary stay of the trial court's order pursuant to the applicable rule of practice (§ 61-12), the evidence adduced at the contempt hearing substantiated the court's finding that the zoning violations that gave rise to this enforcement action still existed on the property, and although the defendant claimed that it operated under a good faith belief that certain efforts it had taken constituted compliance with the court's

order, the trial court rejected the defendant's purported good faith understanding of its order, and in finding that the defendant's failure to comply with the order was not excused by its disingenuous attempts to avoid compliance and that a finding of contempt was therefore warranted, the court necessarily concluded that the defendant's violation of the court's order was wilful.

Argued October 15, 2018—officially released February 5, 2019

Procedural History

Appeal from the decision by the named plaintiff upholding an order issued to the defendant by the plaintiff zoning enforcement officer of the town of Wethersfield to cease and desist certain activities on certain of the defendant's real property, brought to the Superior Court in the judicial district of Hartford, where the matter was transferred to the Land Use Litigation Docket and tried to the court, *Berger*, *J.*; thereafter, the court granted in part the plaintiffs' motion to preclude certain evidence; judgment for the plaintiffs, from which the defendant appealed to this court; subsequently, the court, *Berger*, *J.*, denied the defendant's motion to dismiss and granted the plaintiffs' motion for contempt, and the defendant filed an amended appeal. *Appeal dismissed in part*; *affirmed.*

Kevin J. Burns, for the appellant (defendant).

Thomas A. Plotkin, with whom, on the brief, was *John W. Bradley*, *Jr.*, for the appellees (plaintiffs).

Opinion

ELGO, J. In this zoning enforcement action, the defendant, PR Arrow, LLC, appeals from the judgment of the trial court granting permanent injunctive relief in favor of the plaintiffs, the town of Wethersfield (town) and its zoning enforcement officer, Justin LaFountain.[1] On appeal, the defendant claims that (1) the court lacked

[1] For clarity, in this opinion we refer to the town of Wethersfield and LaFountain collectively as the plaintiffs and individually by name.

subject matter jurisdiction in multiple respects, (2) the court improperly applied the doctrine of exhaustion of administrative remedies, (3) the zoning regulation in question is void for vagueness, (4) the court improperly interpreted that regulation, (5) the court improperly granted the permanent injunction, (6) the injunction lacked sufficient clarity and definiteness, (7) the court abused its discretion in imposing daily fines pursuant to General Statutes § 8-12, (8) the court abused its discretion in awarding costs and attorney's fees pursuant to § 8-12 without making a finding that it wilfully violated the zoning regulations and (9) the court improperly found the defendant in contempt. We dismiss as moot the defendant's jurisdictional challenge with respect to the standing of LaFountain. We affirm the judgment of the trial court in all other respects.

This appeal concerns activities conducted on real property known as 61 Arrow Road in Wethersfield (property) that at all relevant times was owned by the defendant. The property is located in the "Business Park (BP)" zoning district and is approved for office and industrial use. Principal and accessory uses permitted in the BP zone are specified in §§ 5.2 and 5.3, respectively, of the Wethersfield Zoning Regulations (regulations).

At all relevant times, LaFountain served as the town's zoning enforcement officer. In that capacity, he acted as the agent of the town's Planning and Zoning Commission (commission). See *Piquet* v. *Chester*, 306 Conn. 173, 176 n.1, 49 A.3d 977 (2012) ("[t]he zoning enforcement officer acts as the agent of the local planning and zoning commission"); Wethersfield Zoning Regs., art. X, § 10.3.A.1 ("[t]hese Regulations shall be enforced by the Zoning Enforcement Official as the Commission's duly authorized agent for enforcement of these Regulations"). By letter dated November 18, 2015, LaFountain issued a cease and desist order (order) to the defendant regarding certain activities on the property. That order

stated in relevant part: "This letter is to inform you that [the property] is in violation of the [regulations]. Section 5.2.H.5 . . . states that 'trucking or freight operations with complete visual screening of equipment and materials' requires a Special Permit from the [commission]. Other commercial vehicles on the property must be accessory to uses within the offices and industrial bays. You are hereby ordered to *Cease and Desist* allowing trucking or freight operations to be permitted on the property. You may either appeal this order to the Zoning Board of Appeals or comply within [fifteen] days of receipt. . . . If you wish to maintain the trucking or freight operations, a Special Permit would be required from the [commission]. Failure to comply with this order will leave this Department no alternative but to begin issuing [$100] Citations for every day the property is in violation. . . . In addition to any fines or penalties imposed therein, the applicable section(s) of the [regulations] may be enforced by injunctive procedure in the Superior Court."[2] (Emphasis in original.)

On December 2, 2015, the defendant filed an appeal of that order with the town's Zoning Board of Appeals (board). The "appeal application" form completed by the defendant asks applicants to "[p]lease describe your appeal (please include your documentation backing up your appeal)." In response to that query, the defendant attached a document that enumerated nine distinct grounds of appeal.[3] Before the board could hold a public

[2] As the trial court noted in its memorandum of decision, "[e]vidently, the violation was discovered as a result of a due diligence inquiry by a prospective buyer checking on the zoning compliance status of the property. . . . LaFountain investigated, took a series of photographs . . . and discovered the alleged violations. Consequently, he refused to provide the routine letter of compliance." (Citation omitted.)

[3] In the application that it submitted to the board, the defendant alleged in relevant part:

"1. [The order] is impermissibly vague, lacks specificity and is not based on sufficient standards, because, among other reasons; the phrase 'trucking and freight operations' as used in the [o]rder is not . . . defined in the [regulations] nor in [t]he [o]rder.

hearing on the matter, the defendant formally withdrew its appeal of the order by letter dated January 22, 2016.

When activities allegedly continued on the property in contravention of the order, the plaintiffs commenced the present action pursuant to § 8-12.[4] The basis of that action was twofold in nature. First, the plaintiffs alleged that the defendant violated § 5.2.H.5 of the regulations due to "ongoing 'trucking or freight operations' at the [p]roperty without the required special permit . . . ."[5]

"2. The [o]rder denies and violates the requirements of substantive and procedural due process of law under the United States Constitution and the Constitution of the State of Connecticut and other federal and state laws.

"3. The [o]rder denies and violates the property owner's right of equal protection law under the United States Constitution and the Constitution of the State of Connecticut and other federal and state laws.

"4. The [o]rder seeks to enforce changes in the [regulations] ex post facto and in violation of the [defendant's] rights under the United States Constitution and the Constitution of the State of Connecticut and other federal and state laws.

"5. As stated in the [o]rder, the use and occupancy of the property for, among other things, commercial truck parking is a permissible accessory use. Nevertheless, to the extent that the [o]rder alleges otherwise, the use and occupancy of the property for, among other things, commercial truck parking by owner and its tenants, is a prior, non-conforming use which may not be revoked or limited by the [o]rder . . . .

"6. The law alleged to have been violated in the [o]rder is an illegal application of 'spot zoning,' otherwise not made under or inconsistent with the applicable comprehensive plan, otherwise abusive and violative of property owner's rights.

"7. The [o]rder is not based on substantial evidence.

"8. The [o]rder is otherwise not in conformance with law, an abuse of discretion and made without and/or in excess of, legal authority.

"9. The Zoning Regulation alleged to have been violated in the [o]rder was not instituted in accordance with Connecticut [l]aw and is therefore void and unenforceable." (Emphasis omitted.)

[4] General Statutes § 8-12 provides in relevant part: "If any . . . land has been used, in violation of any provision . . . of any bylaw, ordinance, rule or regulation made under authority conferred hereby, any official having jurisdiction, in addition to other remedies, may institute an action or proceeding to prevent such unlawful . . . use or to restrain, correct or abate such violation . . . ."

[5] Section 5.2.H.5 of the regulations provides that "[t]rucking or freight operations with complete visual screening of equipment and materials" may only be conducted as a "Conditional Use" in the BP zone after a special

Second, the plaintiffs alleged that the defendant violated the regulations by permitting the parking and storage of commercial vehicles on the property that "were not accessory to any use by a tenant."[6] With respect to those two grounds, the plaintiffs specifically alleged that "the current violations of the [r]egulations at the [p]roperty include: [a] an illegal trucking and freight operation; [b] the parking and storage of several commercial vehicles that are not associated with any business operating at this [p]roperty; [c] the frequent ingress and egress of tractor trailers, truck tractors, semitrailers, and/or other large commercial vehicles to-from the [p]roperty, including such vehicles that are not associated with any tenant; [d] the illegal parking of tractor trailers, truck tractors, semitrailers, and/or other large commercial vehicles at the [p]roperty for compensation." The plaintiffs further alleged that those violations constituted "a public nuisance due to the presence of and traffic created by tractor trailers, truck tractors, semitrailers, and/or other large commercial vehicles, and the emission or odors and noise." In their prayer for relief, the plaintiffs requested, inter alia, injunctive relief ordering the defendant to cease and desist from the aforementioned activities, a civil penalty of $2500, a civil fine to be imposed on a daily basis "until the violations are remedied," and an award of costs and attorney's fees pursuant to § 8-12.

On June 23, 2016, the defendant filed its answer, in which it denied that any of the alleged violations had transpired on the property. The defendant also raised

permit is approved by the commission. It is undisputed that no such special permit was secured for the property.

[6] "Accessory Use" is defined in § 2.3.A of the regulations as "[a] use subordinate and customarily incident to a principal use on the same lot in compliance with the same standards and procedures that govern the principal use of a property." Pursuant to § 5.3.A.1 and A.2 of the regulations, "Parking . . . for the principal use" and "Parking of Commercial Vehicles" are both permissible accessory uses in the BP zone.

six special defenses,[7] which the plaintiffs denied in their entirety. Days later, the case was transferred by order of the court to the land use litigation docket in the judicial district of Hartford pursuant to General Statutes § 51-347b (a). On June 27, 2016, the plaintiffs filed a certificate of closed pleadings.

Prior to the filing of the defendant's answer, the plaintiffs had filed a motion in limine, in which they sought to preclude "all evidence, whether testimonial or documentary, pertaining to any issue which was included in the defendant's appeal of the [order], which appeal was filed with the [board] but withdrawn prior to an evidentiary hearing by that municipal board." In that motion, the plaintiffs argued that, "[h]aving failed to first proceed with an available administrative process provided . . . by statute, the defendant should not be permitted to present any such evidence or argument in this case." Relying principally on *Greenwich* v. *Kristoff*, 180 Conn. 575, 430 A.2d 1294 (1980), the plaintiffs claimed that "[s]ince the defendant chose to withdraw its [board] appeal of the [order] prior to that evidentiary hearing, this court should prohibit the defendant from now asserting [its] purported defenses in this zoning

[7] The defendant alleged the special defenses of (1) existing nonconforming use; (2) laches; (3) selective enforcement; (4) "balancing of the equities" with respect to "the defendant being allowed to continue its present use of the [property] without any injunction"; (5) "impermissibly vague [zoning] regulation"; and (6) "unconstitutionality of the [order]." With respect to the last defense, the defendant alleged that the issuance of the order by LaFountain allegedly violated its federal and state constitutional rights to substantive due process, procedural due process, and equal protection under the law. In addition, the defendant claimed that the order was "impermissibly vague"; that it sought "to enforce changes in the [regulations] ex post facto"; that it was "not based on specific substantial evidence"; and that it was "made with malice, recklessness and or negligence of such a degree that it is not in conformance with substantive and procedural due process . . . and is otherwise an unconstitutional abuse of discretion . . . ." Many of those defenses previously were raised in the defendant's December 2, 2015 appeal to the board. See footnote 3 of this opinion.

enforcement litigation." By order dated October 13, 2016, the court ruled that "[t]he issues in the motion [in limine] will be taken up at trial."

A two day court trial was held in January, 2017. At its outset, the court addressed the motion in limine. The court explained that it was granting the motion insofar as the defendant sought to present evidence on special defenses that had been raised in the defendant's appeal to the board. The court nonetheless advised the parties that it would consider such evidence to the extent that it was relevant to the balancing of the equities inherent in injunctive relief.

At trial, more than 100 exhibits were admitted into evidence, including dozens of photographs depicting what generically may be described as commercial trucks parked on the property.[8] In addition, two witnesses testified—LaFountain and John A. Tartaglia, the manager and 1 percent owner of the defendant. In his testimony, Tartaglia explained that the property was 5.5 acres in size and contained a 41,000 square foot building (building) "divided into twelve commercial bays and an office wing . . . ." He also testified that the property contained three parking lots located on the northerly, easterly, and southerly sides of the building. Tartaglia indicated that the northerly parking lot located to the rear of the building was only partially paved; the

[8] The vehicles in those photographs primarily are box trucks and tractor trailers, which are classified as commercial vehicles under § 2.3.C of the regulations. See footnote 16 of this opinion. As this court has observed, "[a] box truck is a utility truck with a box type body . . . ." *Ventura* v. *East Haven*, 170 Conn. App. 388, 391 n.3, 154 A.3d 1020, cert. granted on other grounds, 325 Conn. 905, 156 A.3d 537 (2017). A tractor trailer "is a vehicle with a cab and a detachable trailer." *Holmes* v. *United States*, United States District Court, Docket No. C 08-5619 PJH, 2011 WL 1791596, *2 (N.D. Cal. May 10, 2011); see also General Statutes (Rev. to 2015) § 14-1 (93), as amended by No. 15-46, § 1, of the 2015 Public Acts (defining "[t]ractor-trailer unit" as "a combination of a tractor and a trailer or a combination of a tractor and a semitrailer").

remainder was gravel. The majority of the photographs admitted into evidence depict commercial trucks parked on that rear lot.

In his testimony, LaFountain confirmed that the order was issued in response to the presence of those trucks on the property. LaFountain testified that he had received multiple complaints about that issue, including a written complaint from a neighbor who resided at an abutting condominium complex.[9] Significantly, Tartaglia admitted in his testimony that "there were trucks parking on the property . . . that were not tenants of physical space in the building, but would park trucks in the back, licensed commercial vehicles. Commercial vehicles by definition would include any tractor-trailer or object that has a commercial plate in the state of Connecticut. I do not deny this." In its memorandum decision, the court found that Tartaglia had "devised [a] 'tag' system . . . to allow nonbuilding tenants to store trucks on [the] property."[10] (Citation omitted.)

[9] In her December 18, 2015 complaint, which was admitted into evidence as a full exhibit, Lynn Burdick stated: "I am writing to identify my concern over the trailer trucks that have been parked [on the property] for the past several months. I am aware the landlord has the opportunity to rent this area to bring in revenue to his company but this is inappropriate and unacceptable to the homeowners at the [condominium complex]. The [rear] parking lot is opposite our condominium complex and some of the owners have to face large tractor trailers coming and going at all hours of the day and night. This is a residential area housing 172 units which was built in 1985. Until a few years ago there [was] a line of trees which were a buffer between these two properties. The landlord cut those trees down a few years ago and as a result these condominiums are now directly exposed to this view and noise ongoing. I would appreciate anything you can do to assist in eliminating this activity on this property. Thank you."

[10] One example of Tartaglia's "tag system" is reflected in the October 1, 2013 "Month To Month Equipment—Parking Lot Use License" agreement signed by Tartaglia and Adisa Jauzovic that was admitted into evidence at trial. That agreement states that Jauzovic shall receive seven tags to display on vehicles stored in the "rear parking lot" of the property in exchange for a "storage fee" of $600 per month. It further provides that "[u]nder no circumstances is the [l]icensee permitted to enter any building on the [p]roperty or to use or avail himself of any utility or other facility appurtenant to the [p]roperty . . . without the express written permission of [Tartaglia]."

The court emphasized that the defendant's rent rolls, which also were admitted into evidence, documented various "enterprises storing trucks [on the property that were] not renting space within the buildings," including "a large number of Budget trucks" that are plainly visible in the photographs in evidence. At trial, Tartaglia admitted that only three of the thirteen tenants with parking privileges listed on the defendant's September, 2015 rent roll were renting office or industrial space in the building at that time.

The court also was presented with evidence, which it acknowledged in its memorandum of decision, that subsequent to the issuance of the order, Tartaglia sought to enter into lease agreements with tenants that were not renting space in the building. The deposition testimony of Melissa Ahmetovic was admitted as a full exhibit at trial. In that testimony, Ahmetovic confirmed that she operated a business with her husband known as M&A Express Transport, LLC, a "trucking company" that transported goods across the country. In 2015, M&A Express Transport, LLC, began renting space from the defendant to store its trucks on the property. Ahmetovic testified that, after LaFountain issued the order, Tartaglia contacted her and "said that he's going to make out a lease agreement stating that [Ahmetovic had] an office in there, there will be an office . . . on the last floor of the building . . . just in case the [plaintiff] comes after him, to state that [she did] have an office there, that [she does] work and everything, just in case if the town comes after him." Appended to that deposition as an exhibit was a document titled "Office Lease" that identified Ahmetovic and her husband as the tenant, and described the use as "General Office Use" for which "Overnight Parking" was permitted, commencing on December 1, 2015.[11] Ahmetovic testified that she never

[11] That document also features a handwritten notation on the upper right corner of its first page, which states "3 Trucks / M&A permitted."

asked to rent office space on the property and thereafter never used an office on the property.[12] Although Tartaglia professed a lack of knowledge about the actual operations conducted on the property or the specific tenants that were storing trucks thereon, the court expressly found that testimony not credible in its memorandum of decision. Tartaglia also admitted in his testimony that he had forbidden the town's zoning enforcement officers from entering the property.[13]

At trial, the parties offered contrasting interpretations of § 5.2.H.5 of the regulations. Tartaglia opined that the phrase "trucking or freight operations," as used in that regulation, did not apply to the mere parking and storage of commercial vehicles, but rather required an active trucking operation to be conducted on the property.[14] Tartaglia testified that his interpretation was predicated on his "years involved in the real estate business" and conceded that he did not examine any of the resources specified in § 2.2.B of the regulations.[15]

[12] With respect to such tenants, LaFountain testified that if the "principal use" of the property was "the trucking and freight operation," the tenant could not claim that the parking of commercial vehicles was an accessory use of an industrial or office use on the property.

[13] That testimony is consistent with the May 14, 2014 letter that Tartaglia sent to the town's building official, which was admitted into evidence. In that letter, Tartaglia requested "that no civil official of the [town] enter upon the property . . . without warrant and due process of law."

[14] As an example, Tartaglia testified that a "trucking operation or the freight operation involves something active. It requires an intermodal facility . . . . The global partners oil terminal facility on the Connecticut River in Wethersfield could be considered a trucking and freight operation because it has massive oil tanks. Trucks are sent in to pick up oil and take it away."

[15] Section 2.2 of the regulations is titled "Word Usage." Section 2.2.B provides: "For the purpose of interpretation and enforcement of these regulations, certain words not defined in this Section shall be defined by the [commission] after consulting:

"1. The Building Code.

"2. The Illustrated Book of Development Definitions.

"3. The Connecticut General Statutes.

"4. Black's Law Dictionary.

"5. Webster's Third New International Dictionary."

In his testimony, LaFountain stated that he had consulted those resources and also noted that § 2.3.C of the regulations contains a definition of the term "commercial vehicle," which includes "box trucks" and "tractor trailers."[16] After reviewing those resources, LaFountain concluded that "a trucking or a freight operation essentially is an activity where the main operation is the transportation of materials using trucks. If your business is using trucks to move materials or freight . . . it's a trucking or freight operation." LaFountain also emphasized that "the parking of trucks is . . . a very large facet of a trucking operation. . . . [W]hen you have a truck storage yard, for lack of a better term, it's where the primary piece of equipment that you use in a trucking operation is being stored." For that reason, he concluded that the parking and storage of commercial vehicles by entities engaged in the transportation of goods constituted "trucking or freight operations" on the property, for which a special permit was required pursuant to § 5.2.H.5 of the regulations. LaFountain further opined that the parking and storage of commercial trucks by tenants that were not engaged in a principal industrial or office use on the property could not be deemed an accessory use under the regulations.

In its April 20, 2017 memorandum of decision, the court found that the plaintiffs had "clearly proved by a preponderance of the evidence that the defendant is engaging in a trucking or freight operation without a special permit in violation of the town's zoning regulations. Notwithstanding Tartaglia's protestations and his

[16] Section 2.3.C defines the term "commercial vehicle" as "[a]ny vehicle or equipment regularly used to carry, deliver, handle or move goods in the conduct of a business, commerce, profession, or trade" that features at least two of the nine "characteristics" specified therein. That regulation then states in relevant part: "The following types of vehicles when regularly used to carry, deliver, handle or move goods in the conduct of a business, commerce, profession, or trade shall all be considered commercial vehicles . . . cargo vans, box trucks, flat bed or stake bed trucks, buses, semi trailers, tractor trailers . . . ."

allowed testimony on equitable considerations, there is no evidence that weighs in the defendant's favor." The court thus granted the plaintiffs' request for permanent injunctive relief and ordered: "[T]he defendant must comply with the town's regulations. If it seeks to conduct such trucking and freight operations on the property, it must first obtain a special permit to do so in accordance with the town's zoning regulations. Hence, all trucking operations not associated with a specific tenant business use on the property . . . or any trucking and freight operations being conducted without a special permit must immediately cease. Further, in accordance with § 8-12, this court imposes a civil fine of $2500 for the violation of the cease and desist order as well as a civil fine of $50 per day from January 22, 2016, to the date of this order, together with costs and attorney's fees to be established at a hearing at a later date." In addition, the court noted that "[t]o the extent there is a question on an accessory use, this court will retain jurisdiction." From that judgment, the defendant appealed to this court on May 3, 2017.

The plaintiffs subsequently filed a motion for contempt with the trial court, alleging in relevant part that the defendant "continues to operate trucking or freight operations on the property, and continues to allow the parking or storage of trucks without a special permit in violation of the [regulations] and in violation of this court's order that [it] immediately cease the illegal activity." The defendant filed an objection to that motion, and the court held a hearing on July 6, 2017. By memorandum of decision dated August 18, 2017, the court granted the motion for contempt, finding that "the testimony and the evidence is clear that the subject violations still exist." The court then expressly "deferred the issue of monetary penalties" while the underlying matter was on appeal, but noted that "[t]he evidence

from this proceeding will be included in that evaluation." The defendant thereafter filed an amended appeal with this court to encompass the trial court's ruling on the motion for contempt.

I

The defendant claims that the trial court lacked subject matter jurisdiction in two respects. It first alleges that "because [the] plaintiff[s] did not plead an accessory use violation, the court erred in making findings and retaining jurisdiction thereon." The defendant also argues that LaFountain lacked standing to sue on behalf of himself or the town. Those contentions are equally unavailing.

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). "Jurisdiction of the subject matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Internal quotation marks omitted.) *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 485, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018). "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 308, 309 (2013). In addition, when a decision as to whether a court has subject matter jurisdiction is required, "every presumption favoring

jurisdiction should be indulged." (Internal quotation marks omitted.) *Novak* v. *Levin*, 287 Conn. 71, 79, 951 A.2d 514 (2008).

A

The defendant's first claim requires little discussion. The plaintiffs brought this action pursuant to § 8-12, which "empowers [zoning enforcement] officers . . . to take overt action in order to compel compliance with the zoning laws." (Internal quotation marks omitted.) *Labulis* v. *Kopylec*, 128 Conn. App. 571, 578 n.11, 17 A.3d 1157 (2011). As this court has observed, "[t]he purpose of § 8-12 is to provide a means to enforce the zoning regulations and to prevent an unlawful use" of property. *Stamford* v. *Stephenson*, 78 Conn. App. 818, 826, 829 A.2d 26, cert. denied, 266 Conn. 915, 833 A.2d 466 (2003). Whether the parking and storage of commercial vehicles by trucking companies on the property constituted a valid accessory use is a question that plainly falls within the scope of authority conferred on the court by § 8-12. The court, therefore, did not lack subject matter jurisdiction over that issue.

While the court generally is not permitted to decide issues beyond those raised in the pleadings; see *Lynn* v. *Bosco*, 182 Conn. App. 200, 213, 189 A.3d 601 (2018); the plaintiffs in their complaint raised the issue of whether the activities in question constituted a valid accessory use.[17] Paragraph 6 of that pleading complains of "the existence of . . . commercial vehicles at the property, which were not accessory to any use by a tenant. . . ."[18] Paragraph 8 then alleges in relevant part that "[t]he current violations of the regulations at the

[17] We reiterate that the regulations define "accessory use" as "[a] use subordinate and customarily incident to a principal use on the same lot in compliance with the same standards and procedures that govern the principal use of a property." Wethersfield Zoning Regs., art. II, § 2.3.A.

[18] In its June 23, 2016 answer, the defendant left the plaintiffs to their burden of proof with respect to that allegation.

property include . . . [b] the parking and storage of several commercial vehicles that are not associated with any business operating at this property; [c] the frequent ingress and egress of tractor trailers, truck tractors, semitrailers, and/or other large commercial vehicles to/from the property, including such vehicles that are not associated with any tenant . . . ."[19] Furthermore, in their prayer for relief, the plaintiffs requested, among other things, injunctive relief barring "the parking and storage of any commercial vehicle not associated with any business operating at this property . . . ." Accordingly, the question of whether the parking and storage of commercial vehicles on the property constituted a valid accessory use properly was at issue in this zoning enforcement action.

Although the defendant argues that the court improperly retained jurisdiction on that issue, it is well established that "a permanent injunction necessarily requires continuing jurisdiction . . . ." *Hall* v. *Dichello Distributors, Inc.*, 14 Conn. App. 184, 193, 540 A.2d 704 (1988); accord *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 242 n.11, 796 A.2d 1164 (2002) ("courts have inherent power to *change or modify* their own injunctions that is not limited by [General Statutes] § 52–212a" [emphasis in original]); *Conservation Commission* v. *Price*, 5 Conn. App. 70, 73, 496 A.2d 982 (1985) ("the court retained continuing jurisdiction through its original grant of a permanent injunction to the town"). For that reason, we conclude that the court, after granting a permanent injunction to enjoin "all trucking operations" that are "conducted without a special permit" and are "not associated with a specific tenant business use on the property," properly retained jurisdiction "[t]o the extent there is a question on an

[19] In its June 23, 2016 answer, the defendant denied the truth of those allegations.

accessory use" with respect to commercial vehicles stored on the property.

B

The defendant also argues that LaFountain lacks standing in the present case. Because the defendant does not challenge the standing of the town to maintain this zoning enforcement action, that claim is moot.

In *DeRito* v. *Zoning Board of Appeals*, 18 Conn. App. 99, 100, 556 A.2d 632 (1989), the defendant property owners appealed to this court from the judgment of the trial court in favor of the plaintiffs, the town of Middlebury and its zoning enforcement officer. On appeal, the defendants challenged the standing of the zoning enforcement officer. This court declined to consider the merits of that contention, stating: "[T]he defendants do not challenge the standing of the plaintiff town of Middlebury . . . . Thus, even without [the zoning enforcement officer] as a party to the [action], the trial court had subject matter jurisdiction . . . by virtue of the presence of the plaintiff town of Middlebury." (Citations omitted.) Id., 103. As a result, this court concluded that "the standing of [the zoning enforcement officer] . . . presents no justiciable controversy on appeal" because "[n]o practical relief can be granted to the defendants on this claim, and it is not the province of appellate courts to decide questions disconnected from the granting of actual relief or from the determination of which no practical relief can follow." Id., 103–104. The court thus dismissed that part of the appeal. Id., 104.

That logic applies equally to the present case. Here, the town is a party to the zoning enforcement action brought against the defendant pursuant to § 8-12. As in *DeRito*, the defendant has not challenged the standing of that municipality. Accordingly, the standing of LaFountain presents no justiciable controversy in this appeal. See id., 103–104. The portion of the defendant's

appeal challenging his standing, therefore, must be dismissed.

II

We next address the defendant's claim that the court improperly applied the doctrine of exhaustion of administrative remedies to its special defenses due to the defendant's withdrawal of its appeal to the board. The applicability of that doctrine implicates the subject matter jurisdiction of the Superior Court; *Piquet* v. *Chester*, supra, 306 Conn. 179; and thus presents a question of law over which our review is plenary. *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 208, 105 A.3d 210 (2015).

A

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 477, 55 A.3d 251 (2012); see also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51, 58 S. Ct. 459, 82 L. Ed. 638 (1938) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"). "The exhaustion doctrine reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief, and to give the reviewing court the benefit of the local board's judgment." (Internal quotation marks omitted.) *Simko* v. *Ervin*, 234 Conn. 498, 504, 661 A.2d 1018

(1995); see also *Owner-Operators Independent Drivers Assn. of America* v. *State*, 209 Conn. 679, 692, 553 A.2d 1104 (1989) (exhaustion doctrine "relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review"). Our courts have long recognized that the doctrine applies to administrative proceedings of municipal land use agencies such as the board. See, e.g., *Piquet* v. *Chester*, supra, 306 Conn. 190–91; *Simko* v. *Ervin*, supra, 503; *Florentine* v. *Darien*, 142 Conn. 415, 431, 115 A.2d 328 (1955).

Under Connecticut law, municipal zoning boards of appeal are empowered "[t]o hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ." General Statutes § 8-6 (a) (1); see also General Statutes § 8-7 ("[t]he concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations"). That grant of power also is reflected in the local regulations at issue in the present case,[20] which authorize the board "[t]o hear and decide appeals where it is alleged that there is an error in an order or decision of the Zoning Enforcement Official in the enforcement of these Regulations." Wethersfield Zoning Regs., art. X, § 10.4.B.2. Those reciprocal state and municipal enactments represent a legislative determination "that an appeal [to the zoning board of appeals] is the proper mechanism for challenging the

[20] "It is well established that a zoning regulation . . . is a municipal legislative enactment." *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 699, 136 A.3d 24 (2016), aff'd, 326 Conn. 55, 161 A.3d 545 (2017).

decision of a zoning enforcement officer." *Wnuk* v. *Zoning Board of Appeals*, 225 Conn. 691, 697 n.8, 626 A.2d 698 (1993).

Like the present case, *Piquet* v. *Chester*, supra, 306 Conn. 176, involved a cease and desist order issued by a municipal zoning enforcement officer. After reviewing the doctrine of exhaustion of administrative remedies, our Supreme Court held that "when a landowner receives notice from a zoning [enforcement] officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals . . . ." Id., 185; see also *Greenwich* v. *Kristoff*, supra, 180 Conn. 578 ("[c]learly the defendant had a statutory right to appeal the cease and desist order to the zoning board of appeals"); *Holt* v. *Zoning Board of Appeals*, 114 Conn. App. 13, 22, 968 A.2d 946 (2009) ("[a]ppeals [to the zoning board of appeals] are often taken from actions of zoning enforcement officers that involve . . . the issuance of cease and desist orders"). The court thus concluded that the plaintiff's failure to exhaust that administrative remedy prior to instituting a declaratory action "left the trial court without jurisdiction . . . ."[21] *Piquet* v. *Chester*, supra, 191.

In the present case, LaFountain issued a cease and desist order that apprised the defendant that, in his view, the existing use of the property violated the regulations. Inherent in that order was a determination that the defendant did not have a valid nonconforming use.

[21] In so doing, our Supreme Court emphasized that "if the plaintiff had appealed to the board, and if the board had decided in the plaintiff's favor, she would not have needed to file the present [declaratory judgment] action. If the board had decided the case against the plaintiff, the Superior Court would be presented with the reasons for the board's decision and would have been able to make an informed decision as to whether the board had acted arbitrarily." *Piquet* v. *Chester*, supra, 306 Conn. 187.

See *Greenwich* v. *Kristoff*, supra, 180 Conn. 578. Pursuant to both §§ 8-6 (a) (1) and 8-7 of the General Statutes and § 10.4.B.2 of the regulations, the defendant was entitled to appeal those determinations to the board, which the defendant, in fact, did. See footnote 3 of this opinion. Had the defendant not withdrawn that appeal, the board could have determined whether LaFountain's interpretation of the applicable regulations was proper and whether the defendant had an existing nonconforming use. See *Piquet* v. *Chester*, supra, 306 Conn. 190; *Greenwich* v. *Kristoff*, supra, 578; *Lane* v. *Cashman*, 179 Conn. App. 394, 429, 180 A.3d 13 (2018); *Borden* v. *Planning & Zoning Commission*, 58 Conn. App. 399, 411, 755 A.2d 224, cert. denied, 254 Conn. 921, 759 A.2d 1023 (2000).

On appeal, the defendant attempts to draw a distinction between LaFountain's *interpretation* of the regulations and his *authority* to do so, claiming that § 2.2.B[22] vests exclusive authority in the commission to interpret words in the regulations that are undefined. Irrespective of the merits of that novel contention, it nonetheless remains that the defendant was free to raise that very argument in an appeal to the board. We reiterate that, by their plain language, General Statutes § 8-6 (a) (1) and § 10.4.B.2 of the regulations both empower the board to hear and decide appeals where it is alleged that there is an error in any order of a zoning enforcement officer. That broad grant conferred on the board the power to decide whether LaFountain exceeded his authority in issuing the order in the present case. The defendant thus was required to exhaust that administrative remedy before raising such a claim before the Superior Court, which it indisputably did not do.

B

The defendant further claims that two exceptions to the exhaustion requirement excuse its failure to obtain

[22] See footnote 15 of this opinion.

a ruling from the board on the propriety of the order. We address each in turn.

1

The defendant first invokes the futility exception to the exhaustion requirement, claiming that an appeal to the board in this case "would have been futile . . . ." As our Supreme Court has explained, the futility exception applies "*only* when [the administrative remedy] could not result in a favorable decision . . . ." (Emphasis added.) *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 429, 655 A.2d 1121 (1995); see also *Concerned Citizens of Sterling* v. *Sterling*, 204 Conn. 551, 560, 529 A.2d 666 (1987) ("[F]utility is more than a mere allegation that the administrative agency might not grant the relief requested. In most instances, we have held that the failure to exhaust an administrative remedy is permissible only when the administrative remedy would be useless."). Our Supreme Court further has instructed that "an administrative remedy is adequate when it could provide the [party] with the relief that it seeks and provide a mechanism for judicial review of the administrative decision." *O & G Industries, Inc.* v. *Planning & Zoning Commission*, supra, 426.

The defendant's bald allegation that an appeal to the board would have been futile finds no support in the record before us and, thus, is "purely speculative." Id., 429. In the present case, the board had the authority, under both state law and municipal regulation, to determine whether there was any error in the order issued by LaFountain. Moreover, to the extent that the board did not rule in the defendant's favor, an avenue of judicial review was available pursuant to General Statutes § 8-8 (b).[23] The defendant's claim of futility, therefore, fails.

[23] General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a [municipal zoning board of appeals] . . .

The defendant also claims that its constitutional claims are excepted from the exhaustion requirement. Our Supreme Court has recognized a "narrow exception" for claims of constitutional dimension; *LaCroix* v. *Board of Education*, 199 Conn. 70, 79, 505 A.2d 1233 (1986); that "applies when the challenge is to the constitutionality of the statute or regulation under which the board or agency operates, rather than to the actions of the board or agency." *O & G Industries, Inc.* v. *Planning & Zoning Commission*, supra, 232 Conn. 426 n.5; see also *Conto* v. *Zoning Commission*, 186 Conn. 106, 115, 439 A.2d 441 (1982) (constitutional exception applies when party alleges "[a] constitutional defect in the [zoning] regulations whose enforcement is at issue"); *Helbig* v. *Zoning Commission*, 185 Conn. 294, 300, 440 A.2d 940 (1981) ("[o]ur estoppel doctrine does not preclude a party from attacking the constitutionality of a statute or [zoning] ordinance in an independent proceeding"). That exception to the exhaustion requirement also applies when a defendant raises "the constitutional validity of a municipal [zoning] ordinance [as a defense to] an action to enforce its provisions against [the defendant]." *Norwich* v. *Norwalk Wilbert Vault Co.*, 208 Conn. 1, 5, 544 A.2d 152 (1988).

In answering the complaint in the present case, the defendant raised multiple defenses predicated on protections embodied in our state and federal constitutions. See footnote 7 of this opinion. With one exception, those defenses all pertain to the actions of LaFountain in issuing the order, which are beyond the narrow purview of the constitutional exception. See *O & G Industries, Inc.* v. *Planning & Zoning Commission*, supra, 232 Conn. 426 n.5. The court, therefore,

may take an appeal to the superior court for the judicial district in which the municipality is located . . . ."

properly determined that the exhaustion requirement applied to those defenses.

The exception is the defendant's fifth special defense, in which the defendant argues that § 5.2.H.5 of the regulations is void for vagueness. Unlike its other defenses, the defendant's fifth special defense contests the constitutionality of the zoning regulation itself, which LaFountain enforced as the agent of the commission. See Wethersfield Zoning Regs., art. X, § 10.3.A. In that defense, the defendant challenges the language employed in the zoning regulation, rather than the actions of the official tasked with its enforcement. See *Addessi* v. *Connecticut Light & Power Co.*, 10 Conn. App. 86, 88, 521 A.2d 605 (1987) (noting that "the language of the statute . . . is central to the constitutional void for vagueness analysis"). For that reason, it properly may be raised as a special defense in this injunctive action. See *Norwich* v. *Norwalk Wilbert Vault Co.*, supra, 208 Conn. 7 ("where the plaintiff city has haled the defendant into court, the defendant may defend on the ground of the general invalidity of the ordinance, without exhausting all available administrative remedies"). Moreover, this court has recognized that a void for vagueness challenge to a municipal zoning regulation qualifies under the constitutional exception to the exhaustion requirement. *Ogden* v. *Zoning Board of Appeals*, 157 Conn. App. 656, 666, 117 A.3d 986, cert. denied, 319 Conn. 927, 125 A.3d 202 (2015). The trial court improperly concluded otherwise. We therefore must consider the merits of the defendant's claim that § 5.2.H.5 of the regulations is void for vagueness, which claim the parties have briefed in this appeal.

III

The void for vagueness doctrine "is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and

fourteenth amendments to the United States constitution. . . . [Our Supreme Court has] equated vagueness analysis under our state constitution with the corresponding federal constitutional analysis." (Citation omitted; internal quotation marks omitted.) *State* v. *McMahon*, 257 Conn. 544, 551 n.9, 778 A.2d 847 (2001), cert. denied, 534 U.S. 1130, 122 S. Ct. 1069, 151 L. Ed. 2d 972 (2002). "The vagueness rubric . . . is largely based on the requirements of fair notice and nondiscretionary standards. . . . Due process requires that a statute afford a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited." (Citation omitted; internal quotation marks omitted.) *Addessi* v. *Connecticut Light & Power Co.*, supra, 10 Conn. App. 87–88. Furthermore, "[a]n imprecise statute . . . may be sufficiently definite if it provides reasonably distinct boundaries for its fair administration." *State Management Assn. of Connecticut, Inc.* v. *O'Neill*, 204 Conn. 746, 758, 529 A.2d 1276 (1987).

Civil enactments like the zoning regulation at issue in the present case "must be definite in their meaning and application, but may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes." (Internal quotation marks omitted.) Id., 757. "In order to pass constitutional muster, a zoning ordinance need not contain detailed and rigid standards that anticipate every conceivable factual situation. Indeed, [our Supreme Court has] recognized that detailed standards within a zoning ordinance that may be impractical or impossible to apply are not necessary, and that some flexibility is permitted when one standard cannot be adopted to all situations." *Campion* v. *Board of Aldermen*, 278 Conn. 500, 526, 899 A.2d 542 (2006). Furthermore, when the regulation at issue pertains to a specially permitted use,[24] additional leeway "must be

[24] A specially permitted use is one which requires property owners to secure special permit approval from the applicable land use agency, which ordinarily is the municipal planning and zoning commission. See *Barberino*

afforded" in construing its wording. *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 620, 610 A.2d 1205 (1992).

A municipal zoning regulation, like a statute, "is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity." (Internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 672, 894 A.2d 285 (2006). "The party challenging a [regulation's] constitutionality has a heavy burden of proof; the unconstitutionality must be proven beyond all reasonable doubt." *Bottone* v. *Westport*, 209 Conn. 652, 657, 553 A.2d 576 (1989). That heavy burden requires proof "that the regulation complained of is impermissibly vague *as applied to the facts of the particular case*." (Emphasis added.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 620; see also *Bombero* v. *Planning & Zoning Commission*, 218 Conn. 737, 743, 591 A.2d 390 (1991) (because regulations "do not exist in a vacuum," courts should evaluate "their purported vagueness . . . in the context of a specific factual situation, so that a court may resolve any ambiguities and, if necessary, interpret them in the light of those facts so as to avoid any potentially unconstitutional vagueness"); *Rocque* v. *Farricielli*, 269 Conn. 187, 205, 848 A.2d 1206 (2004) ("[t]o do otherwise . . . would be to put courts in the undesirable position of considering every conceivable situation which might possibly arise in the application of [the regulation]" [internal quotation marks omitted]).

Realty & Development Corp. v. *Planning & Zoning Commission*, 222 Conn. 607, 620, 610 A.2d 1205 (1992). "[T]he special permit process is, in fact, discretionary. . . . [G]eneral considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit." (Citation omitted.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 626–27, 711 A.2d 675 (1998).

Accordingly, "outside the context of the first amendment, in order to challenge successfully the facial validity of a [regulation], a party is required to demonstrate . . . that the [regulation] may not be applied constitutionally to the facts of [the] case." (Internal quotation marks omitted.) Id. The determination of whether a zoning regulation is impermissibly vague is a question of law and thus subject to our plenary review. *Ogden* v. *Zoning Board of Appeals*, supra, 157 Conn. App. 669.

A

Because Regulations Are Permissive, Parking And Storage of Commercial Vehicles On Defendant's Property Must Be Specifically Permitted

We begin our analysis by noting the overarching principle that any use of real property in the town is "prohibited if not clearly permitted" under the regulations.[25] Like the majority of municipalities in Connecticut, the town's regulations here are "permissive in nature, meaning that those matters not specifically permitted are prohibited." *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653. The defendant, like all property owners in the town, therefore was charged with notice that *any* activity conducted on the property must be specifically permitted under the regulations. See *M & L Homes, Inc.* v. *Zoning & Planning Commission*, 187 Conn. 232, 244–45, 445 A.2d 591 (1982) (buyers of property charged with knowledge of zoning regulations); *Kalimian* v. *Zoning Board of Appeals*, 65 Conn. App. 628, 632, 783 A.2d 506 (property owner "charged

[25] Titled "Prohibited If Not Clearly Permitted," § 2.1.A of the regulations provides: "1. Use of land, buildings or structures not clearly permitted in the various zoning districts is prohibited. 2. Activities not clearly permitted in the [r]egulations are prohibited."

with notice" of "zoning regulations in effect" when purchasing property), cert. denied, 258 Conn. 936, 785 A.2d 231 (2001).[26]

The activity at issue in this case is the parking and storage of commercial vehicles on real property located in the BP zone. Only three sections of the regulations specifically address that activity.[27] The first two deal with accessory use. Section 3.5.5, which is part of the section of the regulations addressing accessory uses in residential zones, specially permits the parking of one commercial vehicle in a residential district, subject to certain requirements. Section 3.5.5.B details specific criteria regarding commercial vehicles that are to be considered in addition to the special permit requirements contained in article VIII of the regulations.[28] Section 3.5.5.C then indicates that those criteria *also* apply to the parking of commercial vehicles in business zones,

[26] It is undisputed that the regulations at issue were in effect when the defendant acquired the property from a predecessor company, 61 Arrow Road, LLC, in September, 2014. Tartaglia served as the manager of both 61 Arrow Road, LLC. and the defendant.

[27] Although § 6.2 also concerns parking, that section pertains to the adequacy of parking spaces on a given property and the specifications thereof. That section does not authorize the parking or storage of commercial vehicles as a principal or accessory use.

[28] Section 3.5.5.B of the regulations provides in relevant part:

"1. The Board may require that commercial vehicles approved under this subsection shall be parked in a location that will be screened from view along the nearest property line or from a public right-of-way with appropriate vegetative buffering, fencing, earthen berms or a combination thereof.

"2. In considering an application for a commercial vehicle, the Board shall consider such factors as:

"a. the proposed method of screening,

"b. proximity to adjacent lots and buildings,

"c. the size and characteristics of the vehicle,

"d. the intended use,

"e. the hours of operation of the vehicle,

"f. other vehicles on the property and,

"g. the character of the neighborhood.

"3. The Board may attach reasonable restrictions on any [special permit] approved under these regulations in order to maintain neighborhood residential character.

stating: "The parking of commercial vehicles is permitted in business zones as an accessory use to the permitted use of the property after the issuance of Site Development Plan approval from the [commission] permitting such vehicles. The [c]ommission shall be governed by the submission requirements and review criteria of [§] 3.5.5.B of these regulations." Section 5.3.2, in turn, permits the "Parking of Commercial Vehicles, subject to the provisions of [§] 3.5.5.B" as an accessory use of properties in the BP zone following site plan approval by the commission. Accordingly, the parking and storage of commercial vehicles may be permitted as an accessory use pursuant to §§ 3.5.5.C and 5.3.2 of the regulations, as the court recognized in its memorandum of decision.[29] At the same time, nothing in either §§ 3.5.5 or 5.3.2 permits the parking and storage of commercial vehicles as a principal use.

Principal uses of real property permitted in the BP zone are set forth in § 5.2 of the regulations. The only conceivable subsection that could authorize the parking and storage of commercial vehicles as a principal use of the defendant's property is § 5.2.H.5, which provides that "[t]rucking or freight operations with complete visual screening of equipment and materials" may be conducted as a "Conditional Use Permitted Only After Special Permit Approval By the Commission" in the BP

"4. All applications for a [special permit] shall be accompanied by:

"a. a detailed description of the vehicle on a form provided by the Town that shall include: gross vehicle weight, height, total length, box length, wheelbase, model and make.

"b. a color photograph of the vehicle and,

"c. a site plan identifying the proposed parking area for the vehicle, proximity to adjacent buildings and any proposed screening."

[29] In its April 20, 2017 memorandum of decision, the court stated: "While some tenants did indeed have trucks as part of their operation—a legitimate accessory use—this was not the focus of this [injunctive] action." The court further noted that "[t]o the extent there is a question on an accessory use, this court will retain jurisdiction."

zone.[30] In the order at issue in this appeal, LaFountain cited that section and noted that it requires a special permit from the commission.

B

Language of § 5.2.H.5

On appeal, the defendant claims that § 5.2.H.5 of the regulations is void for vagueness. Its claim is premised on the fact that the words "trucking or freight operations" are not defined in the regulations. Without a definition, the defendant argues, it cannot ascertain whether the parking and storage of commercial vehicles is prohibited on its property. We disagree.

As this court repeatedly has recognized, "a zoning regulation is [not] necessarily vague because it contains a term that is not defined." *Ogden* v. *Zoning Board of Appeals*, supra, 157 Conn. App. 669–70; see also *Zarembski* v. *Warren*, 28 Conn. App. 1, 5, 609 A.2d 1039, cert. denied, 223 Conn. 918, 614 A.2d 831 (1992). Rather, undefined words in zoning regulations are accorded their ordinary meaning. *Property Group, Inc.* v. *Planning & Zoning Commission*, 226 Conn. 684, 692, 628 A.2d 1277 (1993); see also *Spero* v. *Zoning Board of Appeals*, 217 Conn. 435, 441, 586 A.2d 590 (1991) (words

[30] If the defendant is correct that § 5.2.H.5 is constitutionally infirm and, hence, inapplicable to its property, then no parking and storage of commercial vehicles can transpire on the property as a principal use. We reiterate that the regulations here are permissive in nature; as a result, only principal uses specifically permitted under the regulations are allowed. See Wethersfield Zoning Regs., art. II, § 2.1.A. As our Supreme Court has noted, "given the town's permissive zoning scheme, where all uses not specifically permitted are deemed prohibited, in order for the [property owner] to be entitled to [engage in the use of the property in question] at all, there must be some language in the regulations *permitting* that activity." (Emphasis in original.) *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 656. The defendant has not identified any other provision of the regulations that specifically permits the parking and storage of commercial vehicles on its property as a principal use.

in zoning regulation "are to be interpreted in accordance with their natural and usual meaning"). Our Supreme Court has explained that "[i]f the meaning of a [regulation] can be fairly ascertained a [regulation] will not be void for vagueness since [m]any [regulations] will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the [regulation], the common law, legal dictionaries, or treatises may be necessary to ascertain a [regulation's] meaning to determine if it gives fair warning." (Emphasis omitted; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 673; accord *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 717, 960 A.2d 1018 (2008) (appropriate to look to common understanding as expressed in dictionary when zoning regulations do not define term).

General Statutes (Rev. to 2015) § 14-1 (94), as amended by No. 15-46, § 1, of the 2015 Public Acts, defines "truck" as "a motor vehicle designed, used or maintained primarily for the transportation of property." Webster's Third New International Dictionary (2002)[31] defines trucking as "the process or business of transporting goods on trucks"; defines freight as "something that is loaded for transportation"; and defines "operations" as "a phase of a business or of business activity." Considered together, those definitions indicate that the term "trucking operations" pertains to all phases of the business of transporting goods on trucks. As LaFountain noted in his testimony at trial, the storage of trucks is a significant facet of a trucking business. The Court of Appeals of New Mexico similarly has recognized that "[p]art of the business of running a trucking enterprise involves the storage of the vehicles when

[31] Section 2.2.B of the regulations specifies Webster's Third New International Dictionary as a preferred dictionary "[f]or the purpose of interpretation" of words that are not defined in the regulations.

they are not in use."[32] *Smart* v. *Carpenter*, 139 N.M. 524, 527, 134 P.3d 811 (App. 2006); see also *McKosky* v. *Planning & Zoning Commission*, Docket No. CV-13-6039112-S, 2014 WL 6996359 (Conn. Super. October 31, 2014) (upholding commission's finding that trucking business existed on property where owner stored truck on property); *Morgan* v. *Callaway*, Docket No. Civ. A 02A-02-002, 2003 WL 1387127, *2 (Del. Super. January 29, 2003) ("trucking operations" conducted on property where "the trucks were stored"); *Parish of Jefferson* v. *H4th & B, Inc.*, 155 So. 3d 567, 571 (La. App. 2013) ("the trucking business" included "storage of vehicles on the property"); *Bisson* v. *Eck*, 40 Mass. App. 942, 942, 667 N.E.2d 276 (noting that plaintiff "had used the land for the storage and maintenance of tractor trailer trucks and other vehicles in connection with his trucking business"), review denied, 423 Mass. 1107, 671 N.E.2d 951 (1996); *Lancaster Township* v. *Zoning Hearing Board*, 6 A.3d 1032, 1036 (Pa. Commw. 2010) (trucks stored on property "inseparable" from trucking business); *St. Croix County* v. *Bettendorf*, Docket No. 99-1776, 2000 WL 365860, *1 (Wis. App. April 1, 2000) (decision without published opinion, 235 Wis. 2d 277, 616 N.W.2d 525 [App. 2000]) ("[t]he absence of authorization for parking in the ordinances demonstrates that parking and storage are considered an integral part" of defendant's trucking business).

[32] For that reason, we find utterly unconvincing the defendant's semantical argument that the phrase "trucking or freight operations," as used in § 5.2.H.5, applies only to "active" trucking operations. It is undisputed that trucking businesses, such as Igor Transportation, LLC, and M&A Express Transport, LLC, actively stored their commercial vehicles on the defendant's property. While it is true that "doubtful language [in a zoning regulation] will be construed against rather than in favor of a [restriction]" (internal quotation marks omitted) *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, 167 Conn. App. 383, 392, 142 A.3d 1236, cert. denied, 323 Conn. 935, 151 A.3d 383 (2016); the natural and usual meaning of the language at issue in this case is not in doubt.

Furthermore, it bears emphasis that § 5.2.H.5 is a subsection of § 5.2.H—a section of the regulations titled "Industrial & *Storage* Uses." (Emphasis added.) That title is illuminating; see *P.X. Restaurant, Inc.* v. *Windsor*, 189 Conn. 153, 160, 454 A.2d 1258 (1983); and further underscores the applicability of § 5.2.H.5 to the storage of commercial vehicles by trucking companies in the BP zone.

In construing the words of a zoning regulation, "common sense must be used." *Smith* v. *Zoning Board of Appeals*, 227 Conn. 71, 92, 629 A.2d 1089 (1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1190, 127 L. Ed. 2d 540 (1994). To paraphrase the observation of our Supreme Court in *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 675, the defendant and its representatives were just as capable of utilizing their common sense when construing § 5.2.H.5 of the regulations as any other member of the general public, which dictates that the parking and storage of trucks is part and parcel of trucking operations.

C

Adequacy of Notice

The remaining question is whether the regulations provided the defendant adequate notice of the standards utilized to evaluate a request for that permitted use. See *Campion* v. *Board of Aldermen*, supra, 278 Conn. 526. That query must be resolved in light of the "specific factual situation" presented in this case. *Bombero* v. *Planning & Zoning Commission*, supra, 218 Conn. 743.

The specific factual situation here is a property owner that knowingly allowed trucking companies to store their commercial vehicles on its property. Tartaglia acknowledged that most of his tenants were registered

as transport companies, such as Igor Stefak, who operated Igor Transportation, LLC. Tartaglia testified that Stefak had "a United States Department of Transportation carrier license" and was storing "ten or eleven" commercial vehicles on the property at the time of trial. M&A Express Transport, LLC, is another trucking company that stored its trucks on the property. As Tartaglia emphatically stated at the subsequent contempt hearing, the defendant's tenants were "registered as transport companies or courier companies. Indeed, that is their business. They transport through the United States Postal Service, pharmaceutical companies, Amazon. At my property, they operate offices and they park their trucks. . . . We have never denied this." It suffices to say, then, that the defendant was cognizant that trucking companies were storing their commercial vehicles on the property. Moreover, the photographs admitted into evidence demonstrate that numerous commercial vehicles were stored on the property, some bearing the name of a particular trucking company such as "Igor Transportation, LLC," "VM Express," and "M&A Express Transport, LLC."

Because the regulations here are permissive in nature, the defendant is charged with knowledge that the storage of those commercial vehicles on the property must be specifically permitted thereunder. See Wethersfield Zoning Regs., art. II, § 2.1.A; *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 656. Section 5.2.H.5 is the only provision in the regulations that ostensibly encompasses the storage of commercial vehicles as a principal use, as it specifically permits trucking operations as a conditional principal use in the BP zone.

With respect to the standards governing its application, § 5.2.H.5 expressly requires "complete visual screening of equipment" on the property.[33] Section

[33] That requirement mirrors the mandate of Wethersfield Zoning Regs., art. VIII, § 8.9.B, which requires consideration of whether a specially permitted use proposed by a property owner "will provide adequate landscaping

5.2.H.5 further provides that owners of property in the BP zone must obtain a special permit for a conditional use from the commission before engaging in trucking operations on the property. As our Supreme Court has explained, "a specially permitted use is ordinarily allowed in any existing zoning district, provided, of course, that the site plan conforms to the regulations governing special permits. Unlike a permitted use wherein the commission has already made the determination that a particular use is appropriate in a particular area, in reviewing a special permit application the commission must examine the proposed site plan submitted with the application and determine, inter alia, whether it would be compatible with the zoning district and the existing structures permitted in that zone as of right. . . . The commission, therefore, must tailor its review of each site plan accompanying a special permit application to the particular zoning district in which the landowner seeks to develop." *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 620.

The regulations here contain detailed criteria that govern special permit applications; see Wethersfield Zoning Regs., art. VIII; as well as criteria specific to the storage of commercial vehicles. See Wethersfield Zoning Regs., art. III, § 3.5.5.[34] Accordingly, the commission, in evaluating a request for a special permit pursuant to § 5.2.H.5, must consider, inter alia, whether "the location and size of the proposed use . . . will be in harmony with the orderly development of the area and compatible with other existing uses"; Wethersfield Zoning Regs., art. VIII, § 8.1.A; whether the proposed use will "alter the essential characteristics of the area or

and screening for the protection of abutting uses." It is undisputed that the abutting property north of the lot where commercial vehicles are stored is used as a residential condominium complex.

[34] See footnote 28 of this opinion.

adversely affect property value in the neighborhood"; Wethersfield Zoning Regs., art. VIII, § 8.2.B; whether the property in question has suitable access and parking to accommodate the proposed use; Wethersfield Zoning Regs., art. VIII, § 8.4; and whether the proposed use will "have any detrimental effects upon the public health, safety, welfare, convenience, or property values." Wethersfield Zoning Regs., art. VIII, § 8.8.A.

It nevertheless remains that the commission's "[r]eview of a special permit application is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed [use] would be [made]." *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 457, 853 A.2d 511 (2004). That "fact-specific inquiry makes the [commission's] approval of a similar facility at another site . . . legally irrelevant." Id. For that reason, our Supreme Court has instructed that a commission "must be afforded" additional leeway "in the wording of the regulations" when a vagueness challenge to a specially permitted use regulation is raised. *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 620. Affording that leeway, we conclude that § 5.2.H.5 provided the defendant with adequate notice of the standards utilized to evaluate a special permit request for that conditional use.

D

CONCLUSION

In light of the foregoing, and making every presumption in favor of its validity, we conclude the defendant has not met its burden of demonstrating beyond all reasonable doubt that § 5.2.H.5, as applied to the specific facts of this case, clearly and unequivocally is impermissibly vague. See *Graff* v. *Zoning Board of*

Appeals, supra, 277 Conn. 672. Section 5.2.H.5 sufficiently apprises persons of ordinary intelligence that the storage of commercial vehicles by trucking companies as a principal use of property in the BP zone requires a special permit from the commission.

IV

The defendant also claims that the court improperly (1) interpreted § 5.2.H.5 and (2) substituted its interpretation for that of the commission in so doing. We do not agree.

The defendant's first claim does not merit extensive discussion. In its decision, the court accorded the phrase "trucking or freight operations" its ordinary meaning, as gleaned from definitions contained in our General Statutes and dictionaries. The court's construction fully comports with that set forth in part III B of this opinion.

Moreover, the court's construction is consistent with the apparent intent of the commission in enacting § 5.2.H.5. See *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 699, 784 A.2d 354 (2001) ("in construing regulations, our function is to determine the expressed legislative intent"). The explicitly permissive nature of the regulations; see part III A of this opinion; demonstrates that the commission, in enacting those regulations, intended to confine the principal uses of property in the BP zone to those specified in § 5.2. Furthermore, the fact that the commission classified trucking operations conducted in the BP zone as a "conditional use" requiring special permit approval from the commission indicates that it wanted to retain an additional degree of oversight and control over such activities, consistent with the primary aim of zoning, which "is to promote the health, safety, welfare and prosperity of the community." *Langbein* v. *Board of Zoning Appeals*, 135 Conn. 575, 580, 67 A.2d 5 (1949); see also *Smith* v. *Planning &*

Zoning Board, 3 Conn. App. 550, 554, 490 A.2d 539 (1985) ("purpose of zoning is to regulate property uses . . . in a manner to advance the public welfare"), aff'd, 203 Conn. 317, 524 A.2d 1128 (1987). That concern for the public welfare also is reflected in the fact that § 5.2.H.5 expressly requires "complete visual screening of equipment" associated with such trucking operations. We reiterate that § 5.2.H.5 is a subsection of the section of the regulations that outlines permissible "Industrial and *Storage* Uses." (Emphasis added.) Wethersfield Zoning Regs., art. V, § 5.2.H. Mindful that zoning regulations "are to be construed as a whole"; *Smith* v. *Zoning Board of Appeals*, supra, 227 Conn. 91; we conclude that the court properly interpreted the term trucking operations, as it is used in § 5.2.H.5, to encompass the storage of commercial vehicles by trucking companies on property located in the BP zone.

We likewise find no merit to the defendant's contention that the court improperly substituted its interpretation of § 5.2.H.5 for that of the commission. Although a municipal planning and zoning commission often interprets undefined terms in the first instance, it is well established that the proper construction of a zoning regulation presents a question of law over which a court exercises plenary review. *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 442, 994 A.2d 1270 (2010). For that reason, our courts are not bound by the legal interpretation of a regulation provided by a planning and zoning commission or zoning board of appeals.[35] See *Jalowiec Realty Associates, L.P.* v. *Planning & Zoning Commission*, 278 Conn. 408, 414, 898

[35] Our Supreme Court has explained that "although [the] court is not bound by a zoning board's interpretation of its regulations, a board's reasonable, time-tested interpretation is given great weight." *Jalowiec Realty Associates, L.P.* v. *Planning & Zoning Commission*, 278 Conn. 408, 414, 898 A.2d 157 (2006); see also *Doyen* v. *Zoning Board of Appeals*, 67 Conn. App. 597, 604, 789 A.2d 478 (although not binding, "[i]f a board's time-tested interpretation of a regulation is reasonable . . . that interpretation should be accorded great weight by the courts"), cert. denied, 260 Conn. 901, 793 A.2d 1088

A.2d 157 (2006); *Northeast Parking, Inc.* v. *Planning & Zoning Commission*, 47 Conn. App. 284, 293, 703 A.2d 797 (1997), cert. denied, 243 Conn. 969, 707 A.2d 1269 (1998). Because the present case involves a question as to the proper construction of § 5.2.H.5, the trial court was obligated to conduct a plenary review thereof. The defendant's claim, therefore, is baseless.

V

The defendant next argues that the court abused its discretion in granting a permanent injunction in favor of the plaintiffs. We disagree.

"A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Maritime Ventures, LLC* v. *Norwalk*, 277 Conn. 800, 807, 894 A.2d 946 (2006). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014).

The plaintiffs in the present case brought this action pursuant to § 8-12. As our Supreme Court has explained, when an injunction is sought pursuant to that statute, "the town is relieved of the normal burden of proving irreparable harm and the lack of an adequate remedy at law because § 8-12 by implication assumes that no adequate alternative remedy exists and that the injury was irreparable. . . . The town need prove only that

(2002). There is no indication in the record or assertion by the defendant that § 5.2.H.5 is the subject of a time-tested interpretation.

the [regulations] were violated." (Citation omitted.) *Gelinas* v. *West Hartford*, 225 Conn. 575, 588, 626 A.2d 259 (1993).

At trial, the court was presented with testimonial, documentary, and photographic evidence indicating that commercial vehicles were being stored by trucking companies on the defendant's property in contravention of the regulations. The court, as arbiter of credibility, was free to credit that evidence. See *Cadle Co*. v. *D'Addario*, 268 Conn. 441, 462, 844 A.2d 836 (2004) ("In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . It is within the province of the trial court, as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." [Citation omitted; internal quotation marks omitted.]). In granting injunctive relief, the court ordered an immediate cease to "all trucking operations" that are (1) "not associated with a specific tenant business use on the property" and (2) "conducted without a special permit . . . ." The court further retained jurisdiction "[t]o the extent there is a question on an accessory use" with respect to particular vehicles on the property. In the present case, we cannot say that the court abused its discretion in so doing. Our review of the record convinces us that the court properly exercised its discretion in fashioning permanent injunctive relief in favor of the plaintiffs.

VI

The defendant also claims that the injunction "lacks sufficient clarity and definiteness." That claim is predicated on a mischaracterization of the actual wording of the court's decision. In its principal appellate brief, the defendant misquotes that decision to state: " 'If [the defendant] *wishes to* conduct such trucking or freight operations the defendant must first apply for and receive

a special permit to do so.' " (Emphasis added.) The defendant then argues that the injunction "was conditional on a state of mind that was contradicted by . . . testimony [that] indicated that the defendant 'did not wish to conduct trucking or freight operations' . . . ."

Contrary to the defendant's contention, it remains that the salient portion of the court's memorandum of decision states: "[T]he defendant must comply with the town's regulations. If [the defendant] *seeks* to conduct such trucking and freight operations on the property, it must first obtain a special permit to do so . . . ." (Emphasis added.) By its plain terms, that order informed the defendant that it must obtain a special permit in accordance with the regulations in order to conduct trucking or freight operations on its property as a principal use. The court's order thus was sufficiently clear and definite in its terms. See *Castonguay* v. *Plourde*, 46 Conn. App. 251, 268–69, 699 A.2d 226, cert. denied, 243 Conn. 931, 701 A.2d 660 (1997).

VII

The defendant also challenges the court's imposition of a "fine of $50 per day from January 22, 2016, to the date of this [April 20, 2017] order" pursuant to § 8-12. The defendant claims that the court abused its discretion in imposing that fine because the plaintiffs failed to prove a public nuisance caused by the storage of commercial vehicles on the property. The defendant alternatively argues that any daily fine should be imposed from the April 20, 2017 date of the court's decision. We do not agree.

Section 8-12 provides in relevant part that "[t]he owner . . . of any . . . premises where a violation of any provision of such regulations has been committed or exists . . . shall be fined not less than ten dollars or more than one hundred dollars for each day that such violation continues . . . ." That statute "authorizes the trial

court to exercise its discretion in determining whether to award daily fines." *Monroe* v. *Renz*, 46 Conn. App. 5, 14, 698 A.2d 328 (1997). This court's review of a trial court's decision to impose a daily fine pursuant to § 8-12 is governed by the abuse of discretion standard. *Stamford* v. *Stephenson*, supra, 78 Conn. App. 824.

We reject the defendant's assertion that proof of a public nuisance is a prerequisite to the imposition of such fines.[36] Section 8-12 does not contain any such requirement and the defendant has provided no authority mandating such proof. As this court has observed, "[t]he purpose of § 8-12 is to provide a means to enforce the zoning regulations and to prevent an unlawful use" of property; id., 826; and the imposition of fines under that statute is intended to deter violations of the zoning regulations. *Monroe* v. *Renz*, supra, 46 Conn. App. 14. To obtain relief under § 8-12, the plaintiffs here needed to "prove only that the [regulations] were violated." *Gelinas* v. *West Hartford*, supra, 225 Conn. 588. When that burden is met, the imposition of a daily fine is left to the sound discretion of the trial court. *Monroe* v. *Renz*, supra, 14. We perceive no abuse of discretion in the present case.

The defendant alternatively argues that the daily fine imposed by the court should not begin to accrue until

[36] We further reject the premise underlying the defendant's argument, as there is no indication in the court's memorandum of decision that it found that the plaintiffs failed to prove that the storage of commercial vehicles on the property constituted a public nuisance, as alleged in the operative complaint. If anything, that memorandum of decision reasonably can be construed as containing an implicit finding of a public nuisance, as the court (1) found that LaFountain had "received complaints about the parking of trucks" on the property; (2) found that the town "was concerned with trucking operations on the property, and the evidence indicates that the defendant willingly allowed such a use"; and (3) found that "there is no evidence that weighs in the defendant's favor." Furthermore, no articulation of the court's decision was sought by the defendant with respect to that issue. See Practice Book § 66-5; see also *Brennan* v. *Brennan Associates*, 316 Conn. 677, 705, 113 A.3d 957 (2015) (responsibility of appellant to ask trial judge to rule on overlooked matter).

the date of the trial court's decision in this case. We disagree. In the order sent to the defendant on November 18, 2015, LaFountain informed the defendant that, in his view, the existing use of the property violated the regulations—specifically, trucking operations that were not accessory to a principal use and for which a special permit had not been secured. The defendant was free to appeal that determination to the board, which it initially did on December 2, 2015. The defendant withdrew that administrative appeal on January 22, 2016. In its memorandum of decision, the court imposed a daily fine from that date until "the [April 20, 2017] date of this order . . . ." As this court has observed, the trial court "has discretion to impose [daily] fines, as the circumstances require." *Stamford* v. *Stephenson*, supra, 78 Conn. App. 826. We conclude that the court did not abuse its discretion in assessing a daily fine for that time period.

VIII

The defendant next claims that the court abused its discretion in awarding costs and attorney's fees pursuant to § 8-12 without making a finding that it wilfully violated the zoning regulations. We disagree.

Section 8-12 provides in relevant part: "If the court renders judgment for such municipality and finds that the violation was wilful, the court shall allow such municipality its costs, together with reasonable attorney's fees to be taxed by the court. . . ." Like daily fines, the imposition of costs and attorney's fees under § 8-12 is entrusted to the discretion of the trial court. *Stamford* v. *Stephenson*, supra, 78 Conn. App. 824. As this court has explained, "the use of 'shall' in § 8-12 does not create a mandatory duty to impose fines. . . . Rather, a court has discretion to impose such fines, as the circumstances require. . . . [T]he case law allows

the court to use its discretion to impose fines and to award attorney's fees." (Citations omitted.) Id., 825–26.

In their complaint, the plaintiffs alleged ongoing violations of the regulations on the defendant's property in violation of the order. After noting that the action was brought pursuant to § 8-12, the plaintiffs requested, inter alia, an award of "costs and reasonable attorney's fees" pursuant to that statute. Such an award requires a finding "that the violation was wilful . . . ." General Statutes § 8-12; see also *Monroe* v. *Renz*, supra, 46 Conn. App. 11–13.[37]

In its memorandum of decision, the court noted that a decision to grant or deny a request for injunctive relief must "take into account the gravity and willfulness of the violation . . . ." (Internal quotation marks omitted.) The court also stated that "[a] wilful act is one done intentionally or with reckless disregard of the consequences of one's conduct. . . . Willfulness in violating a [zoning regulation] implies not so much malevolent design as action with knowledge that one's acts are proscribed or with careless disregard for their lawfulness or unlawfulness." (Internal quotation marks omitted.) The court then made a series of findings regarding the defendant's conduct subsequent to the issuance of the order instructing the defendant to cease and desist all trucking operations on the property. The court found that "[t]he town was concerned with the trucking operations on the property, and the evidence indicates the defendant *willingly* allowed such a use." (Emphasis added.) The court further found that "Tartaglia's purported lack of knowledge in his testimony

[37] Because an award of costs and attorney's fees pursuant to § 8-12 requires proof of a wilful zoning violation, we reject the defendant's ancillary contention that the plaintiffs failed to properly allege in their complaint that they were entitled to such an award. Inherent in the plaintiff's request for an award of costs and attorney's fees pursuant to § 8-12 was the assertion that the defendant had wilfully violated the regulations in question, as detailed more specifically in paragraph 8 of the complaint.

about the actual operations or the specific tenants storing trucks was not persuasive. . . . Notwithstanding Tartaglia's protestations . . . there is no evidence that weighs in the defendant's favor." In light of those findings, the court, in fashioning relief, awarded the plaintiffs "costs and attorney's fees to be established at a hearing at a later date."

This case thus is one in which the trial court was presented with a request for an award of costs and attorney's fees that required a finding of wilfulness. In its decision, the court first set forth the applicable standard for wilfulness in the zoning violation context and then made a finding that the defendant "willingly" allowed a use of its property in contravention of the regulations after the order was issued, noting that there was "no evidence that weighs in the defendant's favor." Given those findings, we conclude that the court did not abuse its discretion in awarding costs and attorney's fees to the plaintiffs pursuant to § 8-12.

IX

As a final matter, the defendant challenges the court's finding of contempt. It raises two distinct claims in this regard. First, the defendant claims that the court lacked subject matter jurisdiction over the plaintiffs' motion for contempt. Second, the defendant claims that the motion for contempt was premature and, thus, improperly granted.[38] We are not persuaded.

Before considering the defendant's specific claims, we note certain fundamental precepts. "It has long been

[38] The defendant also alleges that the plaintiffs' failure to explicitly plead an allegation of wilfulness "rendered the [contempt] proceeding defective." The defendant has provided neither legal authority nor analysis to substantiate that contention. We therefore decline to review that inadequately briefed assertion. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]).

settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes. . . . The court's enforcement power is necessary to preserve its dignity and to protect its proceedings. . . . A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in self-help by disobeying a court order to achieve the party's desired end." (Citations omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 96–97, 161 A.3d 1236 (2017).

"The court has an array of tools available to it to enforce its orders, the most prominent being its contempt power. . . . Our law recognizes two broad types of contempt: criminal and civil. . . . Civil contempt . . . is not punitive in nature but intended to coerce future compliance with a court order, and the contemnor should be able to obtain release from the sanction imposed by the court by compliance with the judicial decree. . . . A civil contempt finding thus permits the court to coerce compliance by imposing a conditional penalty, often in the form of a fine or period of imprisonment, to be lifted if the noncompliant party chooses to obey the court." (Citations omitted; internal quotation marks omitted.) Id., 97–98.

"To impose contempt penalties . . . the trial court must make a contempt finding, and this requires the court to find that the offending party wilfully violated the court's order; failure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot

impose contempt penalties." (Citations omitted; internal quotation marks omitted.) Id., 98–99; see also *Bolat* v. *Bolat*, 182 Conn. App. 468, 480, 190 A.3d 96 (2018) (factual findings of contempt and requisite wilfulness both dependent on underlying facts and circumstances).

"We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Bolat* v. *Bolat*, supra, 182 Conn. App. 479–80.

A

The defendant first raises a jurisdictional challenge to the motion for contempt filed by the plaintiffs. Because the present case involves indirect civil contempt,[39] the defendant argues that the constitutional guarantees of due process "[seem] to require a separate proceeding, with separate service" for the court to have subject matter jurisdiction over the plaintiffs' motion.

The defendant has provided this court with no authority indicating that a court lacks subject matter jurisdiction over a postjudgment motion for indirect civil contempt unless a separate and distinct proceeding is commenced in the Superior Court. Rather, the court's jurisdiction over such motions stems from its inherent authority to enforce its orders. As our Supreme Court has explained, "the trial court's continuing jurisdiction to effectuate prior judgments . . . is not separate from,

[39] "Civil contempt may be either direct or indirect. Indirect contempt concerns conduct occurring outside of the court's presence." *Alldred* v. *Alldred*, 132 Conn. App. 430, 434 n.4, 31 A.3d 1185 (2011), appeal dismissed, 303 Conn. 926, 35 A.3d 1075 (2012).

but, rather, *derives* from, its equitable authority to vindicate judgments. . . . [S]uch equitable authority does not derive from the trial court's contempt power, but, rather, from its inherent powers." (Emphasis in original.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 241, 796 A.2d 1164 (2002); see also *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 846–47, 100 A.3d 909 (2014), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015). We therefore reject the defendant's claim that the court lacked subject matter jurisdiction over the plaintiffs' postjudgment motion for contempt.

With respect to service of process requirements, our Supreme Court has recognized that "due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." (Internal quotation marks omitted.) *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 150, 496 A.2d 476 (1985). "Adjudication of a motion for civil contempt . . . implicates these constitutional safeguards. . . . [W]here the alleged contempt does not occur in the presence of the court . . . process is required to bring the party into court, and the acts or omissions constituting the offense are to be proved as in ordinary cases." (Internal quotation marks omitted.) *Alldred* v. *Alldred*, 132 Conn. App. 430, 434–35, 31 A.3d 1185 (2011), appeal dismissed, 303 Conn. 926, 35 A.3d 1075 (2012). Accordingly, this court has held that "a postjudgment motion for contempt that is filed for the purpose of enforcing an antecedent judicial order requires proper service of process." Id., 435.

Service of process implicates the personal jurisdiction of the court. Id., 431. It is well established that "[a]

challenge to a court's personal jurisdiction . . . is waived if not raised by a motion to dismiss within thirty days . . . ." *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 32, 848 A.2d 418 (2004); see also Practice Book § 10-32 ("[a]ny claim of lack of jurisdiction over the person or insufficiency of process or insufficiency of service of process is waived if not raised by a motion to dismiss"). In the present case, the plaintiffs filed their motion for contempt on May 4, 2017. The defendant thereafter did not file a timely a motion to dismiss that contempt motion. Rather, the defendant on May 11, 2017, filed an objection that addressed the merits of the plaintiffs' motion for contempt. The court subsequently held a hearing on the plaintiffs' motion for contempt on July 6, 2017, at which the defendant presented evidence, including the testimony of Tartaglia. During closing arguments at that hearing, the defendant's counsel for the first time moved to dismiss the plaintiffs' motion due to allegedly improper service of process.

In its memorandum of decision on the motion for contempt, the court concluded that the defendant "clearly waived" that objection to the plaintiffs' post-judgment motion for contempt because it did not file a timely motion to dismiss, as required by Practice Book § 10-30 (b), and did not file a supporting memorandum of law, as required by Practice Book § 10-30 (c).[40] We agree. Furthermore, by filing an objection to the plaintiffs' motion that was accompanied by a memorandum

[40] Practice Book § 10-30 provides: "(a) A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process.

"(b) Any defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance.

"(c) This motion shall always be filed with a supporting memorandum of law and, where appropriate, with supporting affidavits as to facts not apparent on the record."

of law and then fully participating in the contempt hearing, the defendant submitted to the jurisdiction of the court. See *Narayan* v. *Narayan*, 305 Conn. 394, 402, 46 A.3d 90 (2012) (personal jurisdiction may be created through consent). We therefore conclude that the court properly denied the defendant's untimely motion to dismiss.

B

The defendant also claims that the court improperly granted the plaintiffs' motion for contempt. Because it allegedly had taken steps to secure compliance with the regulations, the defendant argues that the plaintiffs' filing of the motion was premature. Once again, we disagree with the defendant.

We begin by noting that it is "within the equitable powers of the trial court to effectuate its prior judgment *at any time*, regardless of whether the noncompliant party [is] in contempt." (Emphasis added; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, supra, 260 Conn. 244. It is undisputed that the defendant did not request a discretionary stay of the court's order pursuant to Practice Book § 61-12 during the pendency of this appeal. For that reason, the plaintiffs were entitled to file their motion for contempt any time after the permanent injunction was issued. The defendant has provided no legal authority to the contrary.

We therefore turn to the substance of the defendant's claim that the court improperly found it in contempt. The evidence adduced at the July 6, 2017 contempt hearing substantiates the court's finding that the zoning violations that gave rise to this enforcement action "still exist" on the property. LaFountain testified that he had inspected the property on four separate occasions over the course of more than two months. Each time, he observed numerous commercial vehicles stored in the

rear lot of the property.[41] During those inspections, LaFountain took photographs, twenty-one of which were admitted into evidence at the contempt hearing. Those photographs depict the storage of commercial vehicles on the property that belong to trucking businesses. In light of his firsthand observation of the property in the months following the issuance of the permanent injunction, LaFountain testified that he believed that a zoning violation continued to exist on the property.

After the plaintiffs rested, the defendant called Tartaglia to the witness stand. In his testimony, Tartaglia confirmed that trucking businesses continued to store trucks on the property. Tartaglia also admitted that the defendant had not applied for a special permit to conduct trucking operations on the property. In addition, Tartaglia testified that he believed that the permanent injunction issued by the court months earlier was "unjust, unfair, inequitable and an affront," stating "that's my opinion and I'm entitled to it." He nevertheless described certain steps he had taken that allegedly were intended to secure compliance with the regulations. Specifically, Tartaglia testified that he had served notices to quit on three tenants due to violations of the terms of their leases; copies of those notices were admitted into evidence. At the same time, Tartaglia professed ignorance when asked whether the defendant subsequently had commenced eviction proceedings in the Superior Court against those tenants. Tartaglia also testified that he had provided those tenants with instructions on how to apply for a special permit with the town.[42]

[41] For example, LaFountain testified that he observed "approximately fifteen to twenty box trucks" during his April 24, 2017 inspection of the property.

[42] At the contempt hearing, the court was presented with evidence that those three tenants did, in fact, file special permit applications with the commission. The record does not contain copies of the applications submitted to the commission, nor does it contain any evidence of the public

In addition, Tartaglia acknowledged that the lease agreements with those tenants, which were submitted into evidence at the contempt hearing, authorized the defendant to immediately revoke parking privileges and remove a tenant's vehicles from the property at any time.[43] Furthermore, the defendant submitted into evidence a copy of the letter that it sent to Stefak shortly after the permanent injunction was granted, in which Tartaglia informed Stefak that the defendant was cancelling his lease and "any parking privileges are immediately revoked." On cross-examination, Tartaglia was asked if he had "attempt[ed] to lock the gate" or taken any other steps to "keep the box trucks out of" the property. Tartaglia admitted that he had "done no such thing." He also stated that " if someone in this [courtroom] thinks that we should go there and club them over the head, or throw [the tenants] out, I'm not [going to] do that because that's not what a businessman would do; and I wouldn't do that to any other person, especially decent people who've done no harm. And if that doesn't accommodate the town, I'm very sorry. But I can't do more than that because it would be wrong. Of course, it would be improper. And it's uncalled for in this case. Uncalled for. And if I'm acting from decency and proper business judgment and moving as quick as we can, and

hearings, deliberations, or formal decisions of the commission. Rather, the court heard testimony that the special permit applications were denied by the commission because they did not comply with certain requirements in the regulations. In its memorandum of decision, the court emphasized that "[t]he record does not indicate that the three applications would satisfy the zoning regulations," and the defendant has not argued otherwise in this appeal.

[43] For example, the lease agreement with Stefak that was admitted into evidence states in relevant part: "Notwithstanding anything in this lease to the contrary—any default under this lease will result in a lock out from the space and the building. Parking is a privilege, not a right and *may be terminated at any time* by Landlord in Landlord's sole discretion. Landlord reserves the right to tow *immediately* upon tenant default." (Emphasis altered.)

that's not quick enough for someone in this [courtroom], then I think someone in this [courtroom] says that I was unreasonable."[44]

The defendant nonetheless claims that, in light of the fact that Tartaglia sent eviction notices and special permit application instructions to certain tenants, the court improperly granted the plaintiffs' motion for contempt. At its essence, the defendant's claim is that it operated under a good faith belief that such efforts constituted compliance with the court's order, which precludes a finding that it wilfully violated that order.

The court's order plainly states that "the defendant must comply with the town's regulations. If [the defendant] seeks to conduct such trucking and freight operations on the property, it must first obtain a special permit to do so. Hence, all trucking operations not associated with a specific tenant business use on the property or any trucking and freight operations being conducted without a special permit must immediately cease." (Footnote omitted.) Like the order at issue in *Gill* v. *Shimelman*, 180 Conn. 568, 571, 430 A.2d 1292 (1980), the injunction here "ordered the company and its owners, not the tenants, to stop" the prohibited activity on its property. It is undisputed that the defendant neither applied for nor received a special permit to conduct trucking operations on its property.

The only question, then, is whether a good faith dispute as to the mandate of the court's order precludes a finding of wilful contempt. See *Sablosky* v. *Sablosky*, 258 Conn. 713, 718, 784 A.2d 890 (2001). Whether a good faith dispute exists depends on the circumstances of the particular case and, thus, is a factual question "committed to the sound discretion of the trial court."

[44] At that point in the contempt hearing, the court urged Tartaglia to "be mindful of what you're saying." Tartaglia replied, "Your Honor, I'm very mindful of what I'm saying here."

O'Brien v. *O'Brien*, supra, 326 Conn. 98. Our review of that factual determination is governed by the clearly erroneous standard of review; *Bolat* v. *Bolat*, supra, 182 Conn. App. 479–80; a "deferential standard" under which reviewing courts must not "examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . On appeal, we do not retry the facts . . . ." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 328 Conn. 615, 643, 181 A.3d 531 (2018).

The trial court in the present case rejected the defendant's purported good faith understanding of its order. As it found in its memorandum of decision: "[T]he testimony and the evidence is clear that the subject violations still exist. Indeed, many of the newest pictures of the property submitted into evidence by the plaintiffs show the same type of—or perhaps the exact same—trucks shown in pictures submitted into evidence at trial. . . . Tartaglia does not dispute that the trucks are still parked on the property. Instead, he attempts to separate his responsibilities from that of his tenants and to individualize the truck owners as the offending violators. These disingenuous attempts to avoid compliance were and are rejected. The defendant has two choices: it can either conduct its operations in compliance with the zoning regulations—which includes its rental policies as to [trucking companies]—or cease its operations that violate the regulations. Despite Tartaglia's protestations, the defendant has the ability to comply." The court thus granted the plaintiffs' motion for contempt.

In finding that the defendant's failure to comply with its order was not excused by its "disingenuous attempts

to avoid compliance" and that a finding of contempt was therefore warranted, the court necessarily concluded that the defendant's violation of the court order was wilful.[45] On our review of the record before us, we decline to disturb that factual determination. Accordingly, the defendant's claim must fail.

The appeal is dismissed with respect to the defendant's challenge to the standing of LaFountain. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DENNIS BERRIOS (AC 40043)

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

Syllabus

Convicted of the crimes of manslaughter in the first degree, tampering with a witness, intimidating a witness and evasion of responsibility in the

[45] Without offering any citation to authority or legal analysis, the defendant baldly asserts on the thirty-fifth and final page of its principal appellate brief that the court failed to find that the defendant's violation of the court order was wilful. Apart from the patent inadequacy of that briefing, we are mindful that "our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Citations omitted; internal quotation marks omitted.) *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013); see also *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017) ("the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary" [internal quotation marks omitted]). Absent an indication to the contrary, we therefore "must assume [that] the court acted property." *Water Street Associates Ltd. Partnership* v. *Innopak Plastics Corp.*, 230 Conn. 764, 774, 646 A.2d 790 (1994). Read and reasonably interpreted as a whole, we can only construe the court's memorandum of decision as one containing the requisite finding of wilfulness on the part of the defendant. Although not expressly stated, such a finding plainly emanates from the court's decision. See *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, 318 Conn. 737, 753, 123 A.3d 417 (2015) (appellate courts construe ambiguous memorandum of decision to support judgment).

operation of a motor vehicle, the defendant appealed to this court. The victim, T, was killed when, while crossing a street with another individual, G, he was struck by a vehicle driven by the defendant. T was pulled under and dragged by the defendant's vehicle before one of its tires bounced on his head. The defendant then drove away at a high rate of speed. About one hour before the incident in which T was killed, the defendant had driven his vehicle, in the darkness with its headlights off, through an intersection without stopping at a stop sign, and then accelerated and swerved the vehicle toward T, G and M, who jumped onto a sidewalk to avoid being struck. The defendant had attempted to get money from his girlfriend, W, to buy a gun in the hours before T's death, when he angrily told W that he was going to hurt others. After the defendant was arrested but before trial, he sent crude text messages to W in which he insulted and threatened her. During trial, the defendant informed the court that he planned to pursue a defense of self-defense. The defendant claimed, inter alia, that during the incident in which T was killed, T and G had thrown rocks at his vehicle, and that he had driven off to protect himself because he assumed that his life was in danger. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of tampering with a witness and intimidating a witness because the state failed to prove that any threats he had made to W were intended to prevent W from testifying or to induce her to testify falsely; the jury reasonably could have concluded, in light of all the evidence up to the time that the defendant sent the text messages to W and the surrounding circumstances, that he intended to prevent W from testifying at his criminal trial, as the evidence showed that he sent W text messages in which he threatened her and stated that her decisions came with consequences and that she should choose between supporting him or T's family, and that, on the night of T's death, he attempted to obtain a gun and spoke to W about hurting others, which reasonably supported the jury's conclusion that the defendant wanted to prevent such evidence from being heard at his criminal trial.
2. The trial court did not abuse its discretion when it permitted S, a state medical examiner, to testify that the manner of T's death was homicide, which concerned an ultimate issue in the case, that conclusion having been based on S's medical knowledge, training and experience, and not solely or primarily on information she had received from the police investigation; S conducted the autopsy of T, documented his injuries, consulted with a neuropathologist about certain of those injuries and reviewed T's hospital medical records, and S's testimony that law enforcement and the Office of the Chief Medical Examiner cooperate to determine the manner of death was supported by the statute (§ 19a-407 [c]) that grants access to the Office of the Chief Medical Examiner to items in the custody of law enforcement.

3. The trial court did not abuse its discretion by admitting certain evidence of the defendant's prior misconduct, which consisted of testimony from W that the defendant had smashed car windows in his neighborhood and challenged her father to a fight, and evidence that he had thrown a bloody ice pack at a hospital employee while he was intoxicated and belligerent in the emergency department:

   a. The trial court did not abuse its discretion in determining that W's testimony about the defendant's smashing of car windows and his challenge to fight her father was admissible either as uncharged misconduct evidence or pursuant to the opening the door doctrine, as W's testimony was a proper means for the state to rehabilitate her credibility after the defendant on cross-examination had attempted to persuade the jury that she was not credible; moreover, the trial court did not abuse its discretion in determining that the probative value of W's testimony about those incidents outweighed its prejudicial impact, as the evidence explained and put into context the actions and testimony of W, who was a significant witness for the state, it did not inflame the emotions of the jury, it involved conduct that was less shocking in nature than the defendant's alleged conduct in attempting to interfere with a witness or driving his motor vehicle into T and dragging T under the vehicle, and any prejudicial effect of W's testimony was lessened by the court's limiting instruction to the jury.

   b. The trial court did not abuse its discretion in concluding that the defendant's testimony that he sent crude text messages to W only after he became depressed and started drinking heavily opened the door to other incidents in which he consumed alcohol and acted in such a manner, and the prejudicial impact of the evidence of his behavior at the hospital emergency department did not outweigh its probative value.

4. The defendant's claim that the trial court abused its discretion by admitting into evidence the vulgar text messages he had sent to W was unavailing; that court properly determined that the probative value of the text messages outweighed the prejudicial effect of the defendant's crude language, which defense counsel did not contemporaneously challenge, as the probative value of the text messages was high and the jury had heard an audio recording of a police interview with the defendant in which he used similar language.

5. The defendant could not prevail on his claim that the trial court improperly instructed the jury on the initial aggressor and provocation exceptions to his defense of self-defense, and improperly instructed the jury with respect to the retreat exception to the use of deadly physical force:

   a. The jury reasonably could have concluded that the defendant was the initial aggressor and, thus, was not justified in using any physical force; the evidence showed that one hour prior to T's death, the defendant, with his vehicle's headlights off, revved the engine and swerved the vehicle toward T, G and M, which caused them to jump onto a sidewalk for safety, the defendant failed to provide authority holding

that the passage of one hour rendered the initial aggressor exception inapplicable, and a reasonable jury could have concluded that the defendant had not communicated his withdrawal so as to nullify the initial aggressor exception to self-defense.

b. The evidence was adequate to warrant the court's jury instruction on the provocation exception to the defense of self-defense; the defendant's act of swerving his vehicle toward T, G and M was not indisputably a separate incident that foreclosed the jury from finding that it was done with the requisite intent for provocation, as the evidence before the jury showed that the defendant had targeted individuals for physical harm, that he had attempted to purchase a gun earlier on the day of T's death, and that he had sought revenge against those in his neighborhood who allegedly had harassed him.

c. Although the trial court improperly included an objective standard in its jury instruction on the retreat exception to the use of deadly physical force, the jury reasonably could not have been misled by the court's failure to properly convey the subjective standard of the duty to retreat; the defendant did not raise his self-defense claim until several days into the trial, the jury was required to resolve a credibility contest between inconsistent versions of the events at issue, as the defendant's self-defense claim was established through his testimony and interview with the police, whereas the state presented evidence that he intentionally hit T with his vehicle, and neither party presented much evidence as to the retreat exception or discussed it in detail.

Argued September 12, 2018—officially released February 5, 2019

Procedural History

Substitute information, in the first case, charging the defendant with two counts of the crime of manslaughter in the first degree, one count of the crime of murder, and with the commission of a felony while on release and the commission of an offense while on release, and substitute information, in the second case, charging the defendant with the crimes of tampering with a witness and intimidating a witness, and substitute information, in the third case, charging the defendant with the crime of evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of Fairfield, where the cases were consolidated; thereafter, the court, *Kahn*, *J.*, granted the defendant's motion to dismiss the charge of having committed an offense while on release; subsequently, the matter was

tried to the jury; thereafter, the court denied the defendant's motions to preclude certain evidence, and for a judgment of acquittal as to the charges of tampering with a witness and intimidating a witness; verdicts and judgments of guilty of one count of manslaughter in the first degree, and tampering with a witness, intimidating a witness and evasion of responsibility in the operation of a motor vehicle, from which the defendant appealed to this court. *Affirmed.*

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

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Dennis Berrios, appeals from the judgments of conviction, rendered after a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1), tampering with a witness in violation of General Statutes § 53a-151 (a), intimidating a witness in violation of General Statutes § 53a-151a (A) (1) and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a).[1] On appeal, the defendant

[1] The defendant was charged in three separate informations, which were consolidated for trial. In the first information, docket number CR-14-0281021-T, the state charged the defendant with murder in violation of General Statutes § 53a-54a (a), manslaughter in the first degree in violation of § 53a-55 (a) (1), manslaughter in the first degree in violation of § 53a-55 (a) (3), commission of a felony while on release in violation of General Statutes § 53a-40b (1), and commission of an offense while on release in violation of § 53a-40b (2). In the second information, docket number CR-15-0282776-T, the state charged the defendant with tampering with a witness in violation of § 53a-151 (a) and intimidating a witness in violation of § 53a-151a (a). In the third information, docket number MV-14-652530-T, the state charged the defendant with evading responsibility in the operation of a motor vehicle in violation of § 14-224 (a). Prior to trial, the court granted the defendant's motion to dismiss the count that alleged that he had committed an offense

claims that (1) there was insufficient evidence to support his conviction of tampering with a witness and intimidating a witness, (2) the trial court improperly permitted certain testimony from a state medical examiner, (3) the court abused its discretion in admitting certain prior misconduct evidence, (4) the court abused its discretion in admitting into evidence crude text messages sent by the defendant and (5) the court improperly instructed the jury with respect to self-defense. We disagree and, accordingly, affirm the judgments of conviction.

The jury reasonably could have found the following facts. On August 9, 2014, Wilma Figueroa (Wilma) spent time with the defendant, her boyfriend, at his home on Park Street in Bridgeport. While in his kitchen after 7 p.m., the defendant angrily told Wilma that "the only thing he wanted for his [upcoming] birthday was to make everyone pay." He continued by stating that he had "unfinished business," that he was going to "hurt others" and that "there was going to be bloodshed." The defendant identified Wilma's brother, William Figueroa (William), as one of his targets. The defendant further stated that he needed money to purchase a gun from his cousin in Hartford and that he would use it to kill William.

Wilma went with the defendant to an automated teller machine, but purposefully entered an incorrect code to "lock out" the bank card and prevent the defendant from getting cash to buy the gun. After returning to the defendant's home, Wilma and her son departed at about 9 p.m.

while on release. The jury found the defendant not guilty of murder, but guilty of manslaughter in the first degree in violation of § 53a-55 (a) (1), and the charges set forth in the second and third informations. The court noted during the sentencing proceeding that the state chose not to pursue the count alleging the commission of a felony while on release.

Shortly thereafter, Justin Griffin walked from his residence to the home of the victim, Tyron Tate. Griffin saw a black Chevy Avalanche[2] with its headlights off proceed through the intersection at William Street and Arctic Street without stopping at a stop sign, even though it was dark outside. Another witness, Michael Shuler, claimed that he was with Griffin and the victim when the defendant drove past the stop sign, "hit the gas and swerved towards [them while driving the Avalanche], and [they] jumped on the sidewalk."[3]

Approximately thirty minutes later, Griffin and the victim were walking to a corner store in the vicinity of Noble Avenue and Jane Street. While crossing the intersection, Griffin, who was talking or texting on his phone, walked in front of the victim. The victim shoved Griffin forward while shouting, "there's [the defendant]." While being pushed, Griffin looked to the left and saw a vehicle that had "just popped out of nowhere right there and had hit [the victim]." Shuler, who also was present, observed the defendant "hit the gas" and drive toward Griffin. Shuler also saw the Avalanche hit and drag the victim. Another witness to the incident, Jonathan Santos, observed the Avalanche depart in the wrong lane of travel at a high rate of speed.

The victim, after being struck by the Avalanche, was pulled under the front of the vehicle. Griffin chased after the vehicle as the victim was trapped underneath. Griffin observed the victim "stuck" under the Avalanche, which was "bouncing up and down on him." Eventually, the front tire on the driver's side of the Avalanche "bounc[ed]" on the victim's head, and his

[2] Wilma testified that she registered the Avalanche in her name, but that the defendant was the person who drove it.

[3] Some of the witnesses' accounts varied as to the specific details of the night of August 9, 2014. The resolution of such discrepancies is reserved for the jury. See, e.g., *State* v. *Vega*, 181 Conn. App. 456, 491 n.12, 187 A.3d 424, cert. denied, 330 Conn. 928, 194 A.3d 777 (2018).

body was freed as the vehicle was driven away. As Griffin approached the victim, he observed a significant blood loss from the head and face, as well as other injuries.

As Shuler ran toward the home of the victim's mother, he noticed that the Avalanche had returned to the area of Jane Street and Noble Avenue. The driver's side window had been lowered, and Shuler identified the defendant as the operator of the vehicle. Shuler also stated that the defendant might have "laughed or something."

Anthony Caiazzo, a Bridgeport police officer, received a dispatch at approximately 10 p.m., and was directed to Noble Avenue between Arctic Street and Jane Street. Upon Caiazzo's arrival, he observed the victim on the ground receiving medical aid. Paramedics transported the victim to Bridgeport Hospital, where he died from his injuries.[4] Caiazzo retrieved a surveillance video from a store located on the corner of Arctic Street and Noble Avenue.

The next morning, on August 10, 2014, Bridgeport police officers located the Avalanche and detained the defendant at his home. The defendant invited the officers into his home where he was interviewed by the officers, who audio recorded the interview. The defendant initially claimed to have left Bridgeport in the Avalanche at about 6:30 or 7 p.m. on August 9, 2014, to visit his brother in Dayville. The defendant then stated that he had returned to his Bridgeport home moments before the police officers detained him. Upon further questioning, the defendant again stated that he was at his brother's residence in Dayville and not in Bridgeport at the time of the incident involving the victim.

[4] Susan Williams, a pathologist in the Office of the Chief Medical Examiner, performed the autopsy of the victim and testified that the cause of the victim's death was blunt head, neck, torso and extremity trauma. She further explained that, "basically, he died from his head injuries."

The police informed the defendant of the existence of a video recording of his Avalanche in Bridgeport the prior night. The defendant's initial response was that the video must have been recorded earlier that evening, but he eventually acknowledged that the Avalanche was in Bridgeport at the time the victim was hit. The police then questioned the defendant regarding certain damage[5] to the Avalanche. At first, the defendant claimed that the damage had occurred in April, 2014, but subsequently stated that "two people [had thrown] rocks at his vehicle at the corner of Noble [Avenue] and Jane [Street] that night before." The defendant eventually acknowledged that he had hit the victim with the Avalanche on August 9, 2014. At the conclusion of this interview, the police arrested the defendant.

The police interviewed Wilma on August 21, 2014. At that time, she did not discuss the verbal threats made by the defendant on August 9, 2014. During the next few months, the relationship between the defendant and Wilma waned, and they stopped being intimate in October, 2014. In the middle of January, 2015, the defendant sent her text messages that caused her to contact the police. The defendant texted Wilma a warning that she should "[c]hoose wisely," that the victim's mother had performed oral sex on him during the relationship, that his attorney was going to "rip [you all] a new [a]sshole," that she was going to find out what the defendant was "[a]bout," that "[d]ecisions come with consequences," that he hated her because she abandoned him, that she played "both sides of the fence" and would "pay [for her] betrayal," and that he was standing on her "corner . . . ." These text messages frightened Wilma. A police detective conducted a second interview with her on January 23, 2015.

[5] This damage included a cracked windshield and impact marks on the hood of the Avalanche that appeared to have come from objects thrown at the vehicle.

The state charged the defendant in three separate informations. The informations were consolidated for trial, which occurred over several days in October, 2016. The jury found the defendant guilty of manslaughter in the first degree, tampering with a witness (Wilma), intimidating a witness (Wilma) and evasion of responsibility in the operation of a motor vehicle. The court accepted the verdicts and, on December 9, 2016, sentenced the defendant to twenty years incarceration for the manslaughter conviction, ten years incarceration, execution suspended after five years for the evasion of responsibility conviction, ten years incarceration, execution suspended after five years for the intimidating a witness conviction and ten years incarceration for the tampering with a witness conviction. The sentences for the evasion of responsibility and intimidating a witness counts were to run consecutively to the sentence for the manslaughter count; the sentence for tampering with a witness was to run concurrently with the other counts. Thus, the defendant's total effective sentence was forty years incarceration, execution suspended after thirty years, and five years probation with certain conditions. This appeal followed. Additional facts will be set forth as needed.

I

The defendant first claims that there was insufficient evidence to support his conviction of tampering with a witness and intimidating a witness. Specifically, he argues that his conviction for these two crimes "must be vacated because the state failed to prove that any threats [he] made were intended to prevent or affect [Wilma's] testimony. The texts show that [the] defendant was infuriated with her because she had been supporting [the victim's] family and aligning herself with her brother behind his back. The threats were made because of her betrayal and were not about any future testimony she might give." The state counters that the evidence was sufficient to support the finding

that the defendant's threats "were not simply rants motivated by anger over her perceived betrayal and disloyalty, but were intended to influence or prevent any testimony that she might give against him at a criminal trial." We agree with the state.

As an initial matter, we set forth our standard of review and relevant legal principles. "A defendant who asserts an insufficiency of the evidence claim bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Reed*, 176 Conn. App. 537, 545, 169 A.3d 326, cert. denied, 327 Conn. 974, 174 A.3d 194 (2017); *State* v. *Leandry*, 161 Conn. App. 379, 383, 127 A.3d 1115, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015). "The standard of review [that] we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a [fact finder's] factual inferences that support a guilty verdict need only be reasonable. . . .

"[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 trier, would have resulted in an acquittal. . . . [I]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Seeley*, 326 Conn. 65, 72–73, 161 A.3d 1278 (2017); see *State* v. *Dubuisson*, 183 Conn. App. 62, 68–69, 191 A.3d 229, cert. denied, 330 Conn. 914, 193 A.3d 560 (2018). Simply stated, "[o]n 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 jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 817, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

Next, we turn to the relevant statutory language for §§ 53a-151 and 53a-151a. See, e.g., *State* v. *Pommer*, 110 Conn. App. 608, 613, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). Section 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." Simply stated, "liability under § 53a-151 hinges on the mental state of the perpetrator in engaging in the conduct at issue—his intent to induce a witness to testify falsely [or withhold testimony, elude legal process or absent himself or herself from the proceeding]—not on whether he must overcome by coercive means the will of a witness reluctant to do so." *State* v. *Coleman*, 83 Conn. App. 672,

678, 851 A.2d 329, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), cert. denied, 544 U.S. 1050, 125 S. Ct. 2290, 161 L. Ed. 2d 1091 (2005); see also *State* v. *Ortiz*, 312 Conn. 551, 562–63, 93 A.3d 1128 (2014); *State* v. *Cavallo*, 200 Conn. 664, 668–72, 513 A.2d 646 (1986); *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 59, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004).

Section 53a-151a (a) provides: "A person is guilty of intimidating a witness when, believing that an official proceeding is pending or about to be instituted, such person uses, attempts to use or threatens the use of physical force against a witness or another person with intent to (1) influence, delay or prevent the testimony of the witness in the official proceeding, or (2) induce the witness to testify falsely, withhold testimony, elude legal process summoning the witness to testify or absent himself or herself from the official proceeding." Our Supreme Court has stated that "[i]n light of the close relationship between §§ 53a-151 (a) and 53a-151a (a), it is appropriate to give the same phrase in each statute the same meaning." *State* v. *Sabato*, 321 Conn. 729, 747, 138 A.3d 895 (2016).

The following additional facts are necessary for our discussion. The defendant and Wilma began dating in late 2011. On August 9, 2014, she was with the defendant until approximately 9 p.m. She did not learn of the victim's death until the next morning. On August 21, 2014, when she spoke with a police detective, Heitor Teixeira, she did not reveal the threats made by the defendant, or his desire and efforts to obtain a gun on the night of the incident. She also agreed with the prosecutor's statement that the defendant "seemed just fine" on that date. She subsequently informed the defendant of this police interview.

After the incident but prior to the end of their relationship, Wilma, who knew that the defendant had been

arrested and released on bail, made efforts not to be seen with him. Wilma saw the defendant only about three or four times after August, 2014. In January, 2015, Wilma attended court proceedings to support the mother of the victim.

In mid-January, 2015, over the course of several days, the defendant sent Wilma a number of text messages, which were entered into evidence. In the text messages sent on January 14, 2015, the defendant expressed regret and sorrow over the end of their relationship.[6] Two days later, however, the content and tenor of the text messages abruptly changed into insults and threats.[7] Wilma did not respond to these texts; instead, she met with Teixeira on January 23, 2015.

[6] On January 14, 2015, at 10:04 p.m., the defendant sent the following series of text messages to Wilma:

"(1/3) I to this day don't know Wilma don't know what happened between us but I want u to know dat I love u more than anything in this world. There's not a day that passes

"(2/3) that I don't think of u or [your son]. U were my best friend and all I ever wanted was 2 grow old w u by my side. I can't turn back time but I can say dat I

"(3/3) love u w all my heart n I never ment to hurt u. I hope u find the happiness u deserve my cosita bella. U will always have a special place in my heart."

[7] On January 16, 2015, starting at 6:01 p.m. and ending at 10:46 p.m., the defendant sent Wilma the following text messages:

"[6:01 p.m.] Make sure u choose ur decision wisely! Janet [the victim's mother] n ur bro ain't gonna be around when this is all over! Choose wisely

"[9:23 p.m.] Since u n ur bro r so tight now. Ask him n Jessy [the girlfriend of William] y her mom was sucking my dick every other night after u n [your son] went home!

"[9:25 p.m.] Janet was texting 4 months trying 2 fucking me. Ur a sucker Wilma. I tried to explain 2 u da trash they were. Now u wanna play me.

"[9:27 p.m.] [My attorney] gonna rip all y'all a new Asshole! [Emoji omitted]

"[9:28 p.m.] Ur life is sad!

"[9:35 p.m.] I dedicated my life 2 u. . . . U piece of shit! Fuck my truck! U gonna find out wat Dennis Berrios is bout

"[9:53 p.m.] There using u like the stupid Bitch dat u are! Keep my truck Wilma. Tell them niggas were I'm at! Decisions come w consequences!

"[9:57 p.m.] Ur a piece of shit! U never had my back u fucking weirdo! U n ur bro will never beat me! I'm ready to die 4 this! Cunt

"[10:15 p.m.] Ask Jessy y her mom don't stop asking 2 SUCK MY DICK? Ask her? U look like trash being next 2 them. I'm out here. . . where ur people at! Let's keep it real

"[10:15 p.m.] Cunt

On appeal, the defendant challenges only the intent element of the tampering with a witness and intimidating a witness charges.[8] "[D]irect evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . [A]ny such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and

"[10:16 p.m.] Fuck u Wilma. . . . U a ho playing both sides of da fence. Y u got burnt

"[10:25 p.m.] (1/3) I was there 4 u while ur fam shitted on u. U played me this

"[10:25 p.m.] (2/3) whole time! I thought u were my friend! Ur a piece of shit like

"[10:25 p.m.] (3/3) ur brother n ur father! [Emoji omitted]

"[10:28 p.m.] Jessy mom used to watch u leave my house then would suck n swallow my nut 4 hours. Ur brother wld make sure u dint notice!

"[10:31 p.m.] I tried to tell u wat a piece of shit ur brother was. I stopped it when I truly fell in love w u. Janet kept trying 2 SUCK MY DICK all da time.

"[10:33 p.m.] U look like trash being next to them. . .but ur a Figueroa! Dats wat y'all stand 4! Garbage

"[10:42 p.m.] Ur a sucker like ur brother. . . . I'm out here. Wats good lil nigga!

"[10:43 p.m.] Wassup

"[10:46 p.m.] U fucked up"

On January 17, 2015, starting at 12:34 a.m. and ending at 12:46 a.m., the defendant sent Wilma the following text messages:

"[12:34 a.m.] I fucking hate u n will never 4get how u abandoned me. U 2 face piece of shit.

"[12:36 a.m.] U played both sides of the fence. I fucking loved u n [your son] w all my heart. U will pay 4 ur betrayal! Die motherfucker die. I'm standing on ur corner!

"[12:39 a.m.] Fucking suckas!

"[12:41 a.m.] 2face slut

"[12:46 a.m.] I put my dreams n future into our relationship! N u fucking took advantage of my love! I fucking hate u Wilma"

[8] At the conclusion of the state's case, the defendant moved for a judgment of acquittal as to the charges of violating §§ 53a-151 (a) and 53a-151a (a). Specifically, defense counsel stated: "I just move for judgment of acquittal just on the general ground that the state has not met its burden of proof regarding the elements of those offenses." The court denied the defendant's motion.

The defendant correctly contends that even if we were to conclude that he had failed to preserve this claim, he is entitled to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re*

founded upon the evidence." (Internal quotation marks omitted.) *State* v. *Robert S.*, 179 Conn. App. 831, 836, 181 A.3d 568, cert. denied, 328 Conn. 933, 183 A.3d 1174 (2018); see also *State* v. *Griffin*, 184 Conn. App. 595, 615–16, 195 A.3d 723, cert. denied, 330 Conn. 941, 195 A.3d 692, 693 (2018); *State* v. *O'Donnell*, 174 Conn. App. 675, 687–88, 166 A.3d 646, cert. denied, 327 Conn. 956, 172 A.3d 205 (2017). "For example, intent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances. . . . [W]hen a jury evaluates evidence of a defendant's intent, it properly rel[ies] on its common sense, experience and knowledge of human nature in drawing inferences and reaching conclusions of fact." (Internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 828, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017). Additionally, "it is a permissible, albeit not a necessary or mandatory, inference that a defendant *intended the natural consequences of his voluntary conduct*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Bennett-Gibson*, supra, 84 Conn. App. 53.

The defendant argues that his "text messages had nothing to do with any trial testimony Wilma might have given. Rather, the threats pertained to her past action of siding with [the victim's] family and her brother. The most that can be gleaned from the texts was that he was threatening retaliation for her betrayal. There simply is no indication that he was threatening her to prevent her from testifying." This interpretation of evidence represents a conclusion that *could* have been reached by the fact finder. Nevertheless, a reasonable jury, in considering all of the evidence up to the

Yasiel R., 317 Conn. 773, 781, 120 A.3d 1188 (2015). See, e.g., *State* v. *Faust*, 161 Conn. App. 149, 158–59, 127 A.3d 1028 (2015), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016).

time the defendant sent the text messages to Wilma and the surrounding circumstances, also could have inferred that he had intended to prevent her from testifying at his criminal trial. Thus, mindful of our limited review; see *State* v. *Bush*, 325 Conn. 272, 304, 157 A.3d 586 (2017) (reviewing court does not sit as thirteenth juror); the defendant's sufficiency claim must fail.

The defendant sent the text messages to Wilma in the time period after his arrest, but prior to his criminal trial. Additionally, Wilma, following the end of her romantic relationship with the defendant, had attended court proceedings and supported the victim's mother. The defendant twice told Wilma to "[c]hoose wisely" and that the victim's mother would not "be around" at the conclusion of the proceedings. He referred to the upcoming legal proceedings when he cautioned Wilma that his attorney would "rip . . . y'all a new [a]sshole . . . ." The defendant further stated that Wilma was being "us[ed]" and that her decisions came with consequences. He then accused Wilma of "playing both sides of the fence" and that stated she had betrayed him, despite his loyalty to her. Finally, he threatened her by proclaiming that he was "standing on [her] corner . . . ."

Without resorting to speculation or conjecture, the jury reasonably could have inferred that the defendant intended to affect Wilma's testimony in violation of §§ 53a-151 (a) and 53a-151a (a). The state presented evidence that the defendant, by telling Wilma to choose between supporting him or the victim's family, by referencing their past romantic relationship and his loyalty to her, and by threatening and insulting her, sought either to prevent her from testifying or to induce her to testify falsely. Moreover, on the night of the victim's death, the defendant had spoken with Wilma about "hurting others" and had attempted to obtain a gun. The jury reasonably could have concluded that the

defendant wanted to prevent such evidence from being heard at his criminal trial. We conclude, therefore, that there was evidence supporting the jury's conclusion that he had the requisite mental state to violate §§ 53a-151 (a) and 53a-151a (a).[9] Accordingly, we conclude that his claim of evidentiary insufficiency must fail.

II

The defendant next claims that the court improperly permitted certain testimony from the medical examiner. Specifically, he argues that the court erred by allowing the medical examiner to testify that the manner of death in this case was homicide because this conclusion was not based on her medical expertise, but on information she had received from the police. The state counters that the court did not abuse its discretion in permitting such testimony and that certain aspects of the defendant's claim are not properly before this court. We agree with the state.

The following additional facts are necessary for our discussion. The defendant filed a motion in limine dated October 17, 2016, seeking to preclude certain testimony from Susan Williams, a pathologist in the Office of the Chief Medical Examiner, who had performed the August 11, 2014 autopsy of the victim. The defendant argued that on the date of the autopsy, Williams listed the manner of death as "[c]ircumstances pending further investigation." On December 24, 2014, she amended the manner of death to homicide. The defendant contended

[9] The defendant's reliance on out-of-state authority is misplaced, as those cases are factually distinguishable from the present appeal. See, e.g., *State* v. *Bailey*, 346 Or. 551, 555–56, 213 P.3d 1240 (2009) (en banc) (Oregon Supreme Court concluded that it was not reasonable "for a jury to conclude—and to conclude beyond a reasonable doubt—that, when [the] defendant was warning his daughter against going through with the specific and imminent action *that she had threatened*—going to the police—he also specifically had in mind the remote-in-time prospect that she might be called to testify in a criminal proceeding against him that could arise out of her report to the police" [emphasis in original]).

that this amendment was based not on Williams' medical expertise but on the completion of the police investigation, and, therefore, the jury would not need her testimony on the manner of the victim's death, which was an ultimate issue in the case.

On October 18, 2016, the court heard argument on the defendant's motion in limine outside of the presence of the jury. Defense counsel argued that Williams' determination as to the manner of death was not based on her medical expertise, and therefore her testimony would not assist the jury. The state responded that defense counsel had "gloss[ed] over" the portion of § 7-3 of the Connecticut Code of Evidence, which provides that "an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue." The state also noted that the medical examiner's office had a statutory duty to investigate the victim's death,[10] and to issue a report[11] and a death certificate.[12] The state further represented to the court that the report from the medical examiner's office must classify the manner and cause of death as (1) unable to determine, (2) accidental, (3) suicide, (4) natural or (5) homicide. After further argument, defense counsel again claimed that Williams had amended her classification to homicide on the basis of the police investigation, and not her medical expertise. Therefore, her testimony was not necessary to explain the cause of death to the jury.

The court denied the motion in limine. It reasoned that Williams had a statutory obligation to identify the

[10] General Statutes § 19a-406 (a) provides in relevant part: "The Chief Medical Examiner shall investigate all human deaths in the following categories: (1) Violent deaths, whether apparently homicidal, suicidal, or accidental . . . ."

[11] See General Statutes § 19a-411 (a).

[12] See General Statutes § 19a-409.

cause and the manner of death,[13] and that defense counsel could cross-examine Williams as to whether her ultimate conclusion of homicide was based on the police investigation. It also determined that the objection went to the weight, and not the admissibility, of Williams' testimony.

Williams testified later that day. At the outset of her testimony, Williams indicated that she was board certified in, inter alia, forensic pathology, which is the medical specialty of determining the cause and manner of death. She stated that the victim had died from his brain injuries and that the manner of death was homicide.

During cross-examination, Williams testified that she had a statutory obligation to provide both the cause of death and the manner of death. Defense counsel posed the following question to Williams: "And when you did the autopsy on August 11, 2014, what was the manner of death that you had concluded at that point in time?" Williams responded: "So, when the investigation is still ongoing, we say circumstances pending further investigation. . . . And that's what I did in this case." Williams further explained that when a pedestrian is struck by a motor vehicle, it could be an accident, or a suicide or a homicide, depending on the particular facts and circumstances of each particular incident. Williams stated that the information she received from the police

[13] The Arizona Court of Appeals has explained that "[c]ause of death is the disease or injury responsible for the lethal sequence of events. . . . Manner of death explains how the cause of death arose." (Citation omitted; internal quotation marks omitted.) *State* v. *Sosnowicz*, 229 Ariz. 90, 94 n.4, 270 P.3d 917 (App. 2012); see also *State* v. *Tyler*, 867 N.W.2d 136, 155 (Iowa 2015) (Iowa administrative code defines cause of death as "the disease or injury which sets in motion the chain of events which eventually result in the death of a person" and manner of death as "the circumstances under which the cause of death occurred" . . . [and] "may be specified as . . . natural, accident, suicide, homicide, undetermined, or pending" [internal quotation marks omitted]); *State* v. *Vining*, 645 A.2d 20, 20 (Me. 1994) (medical examiner testified that manner of death refers to agent that causes death, i.e., natural cause, accident, suicide or homicide).

investigation assisted with her decision to classify the manner of death as a homicide. On redirect examination, Williams noted that, similar to a motor vehicle incident, the manner of death from a single gunshot could be a homicide, a suicide or an accident. Williams further explained that pathologists would consider the context of the events, as obtained by the police, to assist in the determination of the manner of death.

We begin by setting forth our standard of review and the relevant legal principles. "We review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision. . . . Although we afford trial courts significant discretion, [w]here it clearly appears that an expert witness is qualified to give an opinion, the exclusion of his testimony may be found to be [an abuse of discretion]. . . . To the extent the trial court makes factual findings to support its decision, we will accept those findings unless they are clearly improper. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party. . . .

"We also note our standards for admitting expert testimony. Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation

marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 123–24, 156 A.3d 506 (2017); see also *State* v. *Beavers*, 290 Conn. 386, 414, 963 A.2d 956 (2009); *State* v. *Rivera*, 169 Conn. App. 343, 368, 150 A.3d 244 (2016), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017); see generally Conn. Code Evid. § 7-2.

On appeal, the defendant argues that Williams testified regarding the ultimate issue in the case, that is, whether the defendant intentionally hit the victim with the Avalanche or had done so accidently. "By testifying that the death was a homicide, the expert [Williams] gave her opinion that the state's version of events was correct without basing it on any expertise or specialized knowledge." He then directs us to § 7-3 (a) of the Connecticut Code of Evidence, which provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue." Put a different way, the defendant contends that because Williams' testimony was not based on her medical knowledge and training, but on information obtained from the police investigation, her testimony regarding the manner of the victim's death did not provide the jury with expert assistance with respect to that issue. Thus, he argues that the general rule regarding the inadmissibility of testimony that embraced the ultimate issue applied, and the testimony should not have been permitted. In support of this argument, the defendant cites out-of-state authority.[14] He further contends that he was

[14] Specifically, the defendant relies on the following cases: *State* v. *Tyler*, 867 N.W.2d 136, 156–57, 164–65 (Iowa 2015); *State* v. *Vining*, 645 A.2d 20, 20–21 (Me. 1994); *Bond* v. *Commonwealth*, 226 Va. 534, 311 S.E.2d 769 (1984); *State* v. *Sosnowicz*, 229 Ariz. 90, 270 P.3d 917 (App. 2012); and *People* v. *Eberle*, 265 App. Div. 2d 881, 882, 697 N.Y.S.2d 218 (1999).

harmed as a result of this evidentiary impropriety. We are not persuaded.

Section 7-3 of the Connecticut Code of Evidence adopted the common-law rule that a witness' opinion on an ultimate issue in the case is inadmissible. *State* v. *Finan*, 275 Conn. 60, 66, 881 A.2d 187 (2005); see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 7.17.2, pp. 486–87. "The common-law rule protects the defendant's right to have the jury determine his guilt or innocence." *State* v. *Finan*, supra, 66. The ultimate issue in a case is one that "cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Internal quotation marks omitted.) Id.; see also *State* v. *Favoccia*, 306 Conn. 770, 786, 51 A.3d 1002 (2012).

Our law recognizes, however, that "[e]xperts can sometimes give an opinion on an ultimate issue if the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass." C. Tait & E. Prescott, supra, § 7.17.3, p. 487; see also Conn. Code Evid. § 7-3 (a) ("an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue"); *State* v. *Taylor G.*, 315 Conn. 734, 761, 110 A.3d 338 (2015); *State* v. *Lamme*, 19 Conn. App. 594, 603, 563 A.2d 1372 (1989), aff'd, 216 Conn. 172, 579 A.2d 484 (1990). In the present case, the defendant does not challenge, as a general matter, the propriety of Williams' expert testimony. Instead, the defendant contends that her opinion was improper, under these facts and circumstances, because it was not based on her medical expertise, but rather on information she had received from the police investigation. Put differently, the defendant claims that because Williams relied primarily on police information, and not on her medical expertise in reaching her conclusion that the manner of death

was a homicide, this testimony was not that of an expert and thus inadmissible.

The defendant acknowledges that there are no Connecticut cases to support his claim, and relies on out-of-state authority. For example, he directs us to *State* v. *Jamerson*, 153 N.J. 318, 324, 708 A.2d 1183 (1998), where the defendant, Charles L. Jamerson, was convicted of reckless manslaughter, in part on the basis of his having operated a motor vehicle while under the influence of alcohol. His strategy at trial was to show that his conduct did not amount to recklessness and that the victims' vehicle had failed to stop at a stop sign. Id. "The [s]tate introduced testimony through a county medical examiner that [Jamerson] was operating his vehicle in a reckless manner at the time it collided with the decedent's vehicle." Id.

At the trial, the medical examiner, Claus Speth, was qualified as a forensic pathologist, but not as an accident reconstructionist. Id., 330. Nevertheless, Speth considered the facts and witnesses' statements to conclude that Jamerson had caused the accident and had driven under the influence of alcohol. Id. Speth also determined, on the basis of witness statements and his own personal observations, that there was no evidence that the victims " 'had violated the stop sign,' " and that Jamerson had operated his vehicle in violation of numerous traffic laws. Id., 331–32. Finally, Speth personally interviewed a witness to the accident and concluded that from her vantage point, she could not have observed the stop sign that she claimed the victims had failed to observe. Id., 333.

The New Jersey Supreme Court concluded that Speth had been qualified only as an expert in forensic pathology and, therefore, should not have been permitted to testify as to matters that would be within the purview of an accident reconstructionist. Id., 338–39. Additionally,

under these facts, the circumstances of the accident were within the understanding of an average juror, and, thus, expert testimony was improper. Id., 340–41. Finally, Speth improperly commented on the credibility of another witness. Id., 341.

The defendant also refers us to cases from other jurisdictions that have established a general rule that the opinion of a medical examiner is inadmissible when the medical examiner relies primarily or largely on the testimony of fact witnesses, such as police officers, rather than on his or her medical knowledge, to reach an opinion as to the manner of death. See, e.g., *State* v. *Sosnowicz*, 229 Ariz. 90, 95, 270 P.3d 917 (App. 2012) (medical examiner's opinion that manner of death was homicide and not accident was based on circumstances as reported to him by police and not on his specialized medical knowledge); *State* v. *Tyler*, 867 N.W.2d 136, 156 (Iowa 2015) (where medical examiner is too reliant on witness statement or information obtained through police investigation in forming opinions on cause or manner of death, such opinions may not assist trier of fact); *State* v. *Vining*, 645 A.2d 20, 20–21 (Me. 1994) (medical examiner's opinion of homicide was not product of her expertise and was based solely on her discussions with police investigators and thus amounted to assessment of credibility and investigatory acumen of police).

The present case is distinguishable from the sibling authority cited in the defendant's brief. At the outset, we note that General Statutes § 19a-407 (c) specifically grants access to the Office of the Chief Medical Examiner to any object, writings or other articles of property in the custody of any law enforcement office when such items may be useful in determining the manner of death.[15] Upon such a request, such law enforcement

[15] General Statutes § 19a-407 (c) provides in relevant part: "In conducting his investigation, the Chief Medical Examiner or his authorized representative shall have access to any objects, writings or other articles of property

officials shall deliver the items and any reports of the analysis of such items by law enforcement. See General Statutes § 19a-407 (c). Thus, our statutes clearly contemplate and support Williams' testimony that cooperation and coordination between law enforcement and the Office of the Chief Medical Examiner occur to determine the manner of death.

Next, the facts and circumstances of the present case support a conclusion that Williams' determination of the victim's manner of death was based on her medical knowledge and expertise, and not solely or primarily on the police reports. Williams conducted the autopsy of the victim on August 11, 2014. She documented the injuries suffered by the victim, including abrasions to the left side of the head, forehead and left lower back, bruising on the left lower back and left flank, skull fractures, subarachnoid hemorrhage, signs of brain injury, skin lacerations, and numerous fractures of both scapula, the neck, lumbar vertebrae and the left femur. Williams consulted with Dean Uphoff, a neuropathologist, regarding the injuries to the victim's brain, and reviewed the victim's medical records from the hospital regarding the efforts to save his life. It is clear, therefore, that Williams' ultimate conclusion as to the manner of death was not made solely or largely on the basis of the police reports, but rather on her medical knowledge, training and experience.[16] These facts stand in stark contrast to those set forth in *State* v. *Jamerson*, supra,

in the custody of any law enforcement official which in the Chief Medical Examiner's opinion may be useful in establishing the cause or manner of death. Upon the Chief Medical Examiner's request, a law enforcement official having custody of such articles shall deliver them to the Chief Medical Examiner, along with copies of any reports of the analysis of such articles by such law enforcement official. The Chief Medical Examiner shall analyze such articles and return them to the official from whom they were obtained. . . ."

[16] We acknowledge the following colloquy during the cross-examination of Williams by the defendant's counsel:

"Q. Okay. So—so, it was about four months later that you put down in your report that the manner was homicide?

"A. Correct.

153 N.J. 318. Accordingly, we conclude that the court did not abuse its discretion in denying the motion in limine and permitting Williams to testify as to the manner of death.

III

Next, the defendant claims that the court abused its discretion in admitting certain prior misconduct evidence. Specifically, the defendant argues that the court improperly admitted evidence that he (1) had damaged cars in his neighborhood, (2) had challenged Wilma's father to a physical fight and (3) while intoxicated, had thrown a bloody ice pack at hospital staff.[17] The defendant contends that this evidence was irrelevant, and that its prejudicial impact outweighed its probative value such that he was harmed, thereby necessitating a new trial. The state counters that the court did not

"Q. All right. And obviously you were not a witness to what happened that brought about [the victim's] death, and a witness as far as being there, is that fair to say?

"A. That is.

"Q. Okay. And so is it fair to say that in order to reach the conclusion as to a manner of death that you had to reach, you waited until police continued their investigation?

"A. Correct.

"Q. And it was based on whatever information you received from the police that you ended up putting homicide down?

"A. Right."

At first blush, Williams' response could be read as an agreement that her determination regarding the manner of the death in this case was based solely on the information she had received from the police. Such a reading, however, ignores her testimony regarding her examination of the victim's body and injuries and the assistance she received from Uphoff.

[17] The defendant also raised a somewhat vague argument that the court improperly admitted evidence that he had "threatened people . . . ." The defendant did not object during Wilma's direct examination testimony stating that the defendant, on August 9, 2014, made threats against "Mike" and her brother, William, and claimed that he would make "Janet [the victim's mother] pay." Further, it was defense counsel, during cross-examination, who mentioned that Wilma previously had told Detective Teixeira that the defendant had threatened to kill her and her father. As a result, we decline to review the nebulous claim that the court erred in admitting evidence that the defendant had threatened "people . . . ."

abuse its discretion in admitting the challenged evidence and that, in any event, such error was harmless. We agree with the state that the court's evidentiary rulings did not constitute an abuse of discretion.

The following additional facts are necessary for our review of this claim. During her direct examination, Wilma testified that on the evening of August 9, 2014, the defendant made threatening statements against various individuals, including her brother, William. During cross-examination, she indicated that during her January 23, 2015 interview with Detective Teixeira, she stated that the defendant had threatened to kill her and her father in addition to her brother and another individual. She then explained that she had continued her physical relationship with the defendant, despite his verbal threats, until October, 2014, to protect herself, her brother and her father.[18]

Prior to its redirect examination, the state made a proffer as to certain misconduct evidence. Outside of the presence of the jury, Wilma stated that, in May, 2014, the defendant said that "he was going to get even for everything," and had challenged her father to a physical fight. Second, Wilma testified that, in November, 2013, the defendant had used a baseball bat to damage vehicles around Wilma's house because he lost his wallet containing recently collected rent money. Third, she indicated that, prior to August 9, 2014, the defendant had threatened her five or six times when he was angry.

[18] Specifically, the following colloquy occurred between defense counsel and Wilma:

"Q. And you weren't concerned that there was a potential [that your child] could be left without his mother and uncle and his grandfather?

"A. That's why I continued to see [the defendant]. I put myself in danger because I thought if I saw him, I would know his every move.

"Q. Okay. And did you think by continuing to have sex with him through October, that was just part of your strategy in watching his every move?

"A. Because I would keep him, you know, thinking that I was siding with him, or on his side. I didn't want to anger him more and cause more problems in the neighborhood where he's come out and hurt more people."

Finally, she stated that she did not go to the police after hearing his August 9, 2014 threats because she "thought . . . he would forget about it in the morning."

Defense counsel argued that breaking car windows in November, 2013, was not relevant evidence. The state claimed that during cross-examination, Wilma's "motives and reason" were raised, and, therefore, the incidents of the defendant's prior misconduct were "highly probative and relevant."

The court then ruled: "All right. My ruling is that, based on what I've heard from the proffer, while certainly the fact that he damaged windows of people's cars in the neighborhood, and that he had threatened her father, agreed to—wanted to fight him, and her knowledge of his temper all are probative of the issue which defense opened up on cross-examination, the entire cross-examination was designed to make this witness appear to be lying about the threats the defendant made on August 9th and what she observed on August 9th as a fabrication after the fact. She was specifically asked and pointed to her testimony—her statements as to Detective Teixeira about she didn't know anything, and if she could make up a story, and her reasons for not being up front with police. And she was questioned extensively about what she told the police the second time she met with Detective Teixeira and why she wouldn't. She was—specifically said, you know, basically, you—someone threatens your father, your brother, you, and you do nothing about it, all to suggest that this is a fabrication, and that her motives for not coming to the police are false. Therefore, the door has been opened, and it is probative for the jury to understand. And she was asked about the nature of their relationship, why she maintained sexual relations with the defendant. All of which go to her experience with this defendant, her motives for doing what she did

when—and when she did it. And so for those reasons, I will allow [it to come into evidence] . . . .

"All of the cross-examination questions were designed to paint this witness as lying; therefore, her experience with the defendant directly relates to the cross-examination of the witness and her reasons for doing what she did. So, I will allow her testimony relating to the altercation with her father, that—that what he stated, that he wanted to get even, her observations about his temper, given the length of their relationship and her reasons, as well as the fact that he smashed windows. That he threatened her in the past goes to the believability of why she would or would not have gone to the police the day of August 9th. . . . And the state ought to be entitled to ask her about that, since she was extensively cross-examined about her credibility as to why she did or did not tell the police the entire story on August 21st when she met with them."

After a recess, the court summarized the basis for its ruling and indicated that it would provide the jury with a limiting instruction either prior to or at the conclusion of Wilma's testimony. Defense counsel then objected, arguing that the prejudicial effect of this evidence far outweighed its probative value. In a dialogue with defense counsel, the court noted that the cross-examination of Wilma "was very broad, very extensive, challenging her motivations, challenging her credibility . . . . You questioned her about the nature of their relationship and why it changed and when it changed and why she did what she did, suggesting that she made up the story. And therefore, because your cross-examination was so broad, it opened the door to her knowledge of your client's temper, and how he acts and reacts, to come in. And for that reason, I find the evidence to be—yes, it's prejudicial, but it's also highly probative in light of the cross-examination. The probative value far outweighs the prejudicial impact of this evidence."

After the jury returned, the state conducted its redirect examination of Wilma. She first testified that the defendant had a violent demeanor and a temper at times. She iterated that prior to August 9, 2014, he had threatened her five or six times. Wilma informed the jury that in May, 2014, the defendant had challenged her father to a fight. She further stated that in the year prior to August 9, 2014, the defendant had told her about an incident in which he damaged a number of automobiles with a crowbar. He explained that he had lost his wallet containing rents that had been paid to him as the reason for this conduct. At the conclusion of Wilma's testimony, the court provided the jury with a limiting instruction with respect to his conduct toward Wilma's father and the smashing of car windows.[19]

The defendant subsequently testified. He stated that despite never shooting or owning a gun, he had wanted to purchase one for protection. He further testified that, with respect to his relationship with Wilma, they never had a serious argument and that it was a "pleasant, respectful [relationship] from both sides." He also stated that prior to January, 2015, he never verbally threatened or physically abused her. The defendant indicated that in January, 2015, he was very lonely and depressed, drinking heavily, and had contemplated taking his own life. On January 16, 2015, after drinking alcohol and feeling resentment toward Wilma for "disappearing"

[19] Specifically, the court instructed the jury: "Ladies and gentlemen, I'm going to give you a limiting instruction. . . . The evidence that you just heard relating to the defendant's alleged conduct involving an incident with this witness—this witness' father and [the] incident relating to car windows being smashed is being admitted for a limited purpose. It is offered by the state to explain the witness' state of mind. This is not being admitted to prove the bad character of the defendant. You may consider such evidence if you believe it and further find . . . that it reasonably and logically supports the issue for which it is being offered by the state. On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not reasonably and logically support the issue for which it is being offered by the state, namely, that the conduct relates to this witness' state of mind, then you may not consider that testimony for any other purpose."

from his life and choosing to "side" with the victim's family, the defendant sent her a series of derogatory and insulting text messages. See footnotes 6 and 7 of this opinion.

Outside the presence of the jury, the state indicated that it would cross-examine the defendant regarding his smashing of car windows on November 2, 2013. Additionally, the state intended to question the defendant regarding an incident in March, 2014, where the defendant, with drugs or alcohol in his system, was taken to the hospital, threatened the staff, threw medical equipment and left before receiving treatment. The court then noted that, in addition to these two incidents, the state also planned to cross-examine the defendant regarding his attempt to engage Wilma's father in a physical altercation.

After hearing argument, the court observed that during his direct examination, the defendant had denied threatening Wilma prior to the January, 2015 text messages, and that those text messages were a result of his depression and use of alcohol following the end of their relationship. "So, the impression that he left this jury with is that his threatening behavior in the text messages were fueled by a new approach in his life, which is to drink his life away. By using the term, at this point in my life, he's trying to leave the jury with the impression that his drinking and substance abuse began after . . . August 9, 2014. When, in fact, a lot of these incidents, and the ones that brought him to the hospital, would suggest otherwise. So, given his testimony about his conduct and his own self-serving statement that prior to this time in his life, and only at this point in his life, he started drinking. I think he's opened up the door to some of this history."

During cross-examination, the state questioned the defendant about his smashing of car windows on

November 2, 2013. The defendant admitted that after the car windows incident, he was taken to the hospital and was "highly intoxicated . . . ." The state then turned to the events of March 22, 2014, and introduced into evidence the defendant's medical records from that night, his second visit to the hospital while intoxicated. This exhibit provided that the defendant had arrived at the emergency department of Bridgeport Hospital at 8:09 p.m. He claimed to have been assaulted and had a laceration under his left eye. In the notes electronically signed at 8:42 p.m., a registered nurse wrote that the defendant had left without being treated by medical personnel after "swearing" and throwing a "bloody ice pack" at an employee due to a long wait. In his testimony, the defendant seemed to deny complaining about the wait time to be seen, as well as throwing the ice pack.[20]

A

First, we consider the defendant's arguments regarding the November 2, 2013 incident involving his smashing of car windows and his May, 2014 challenge to physically fight Wilma's father. The court ruled that Wilma's testimony regarding these two incidents was relevant to and highly probative of her credibility, namely, "why she would or would not have gone to the police the day of August 9th." The court further indicated that defense counsel had opened the door in his cross-examination of Wilma. The court specifically noted defense counsel's efforts to suggest that her reasons for not going to the police on August 9, 2014, were

[20] The following colloquy occurred between the prosecutor and the defendant:

"Q. Did you deny that you swore and threw your bloody ice pack at the [hospital employee], stating that the wait was too long; do you deny saying that?

"A. Yes, that specifically, yes.

"Q. Yes or no—

"A. Yes."

false. Defense counsel then argued that the prejudicial impact of this evidence outweighed the probative value. The court considered, and rejected this argument, concluding that the probative value far outweighed the prejudice.

1

The trial court appears to have permitted Wilma's testimony as to these two incidents as both prior misconduct evidence[21] and because defense counsel opened the door to the prosecutor's questioning as to those incidents.[22] See, e.g., *State* v. *Zachary F.*, 151 Conn. App. 580,

[21] "As a general rule, evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . [S]ee also Conn. Code Evid. § 4-5 (a). In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . . The primary responsibility for making these determinations rests with the trial court. We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . .

"Under the first prong of the test, the evidence must be relevant for a purpose other than showing the defendant's bad character or criminal tendencies. . . . Recognized exceptions to this rule have permitted the introduction of prior misconduct evidence to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. Conn. Code Evid. § 4-5 [c]." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gerald A.*, 183 Conn. App. 82, 106–107, 191 A.3d 1003, cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018); see also *State* v. *Campbell*, 328 Conn. 444, 517–18, 180 A.3d 882 (2018).

[22] "Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating inquiry has made unfair use of the evidence. . . . This rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context. . . . The doctrine of opening the door cannot, of course, be subverted into a rule for injection of prejudice. . . . The trial

584–85, 95 A.3d 563 (inadmissible prior misconduct evidence may become admissible through "opening the door" doctrine), cert. denied, 314 Conn. 919, 100 A.3d 851 (2014). We emphasize that defense counsel's strategy during his cross-examination of Wilma, in part, was to raise a question of credibility in the minds of the members of the jury. Specifically, defense counsel questioned Wilma as to why she would continue to engage in sexual conduct with the defendant after he had threatened her, her father and her brother, and not report these threats to the police. Simply put, defense counsel attempted to persuade the jury that Wilma was not a credible witness.

In *State* v. *Estrella J.C.*, 169 Conn. App. 56, 95, 148 A.3d 594 (2016), we noted that § 4-5 (a) of the Connecticut Code of Evidence prohibits the admission of evidence of other crimes, wrongs or acts to prove the bad character, propensity or criminal tendencies of a person. Subsection (c) of that provision of our evidence code provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Internal quotation marks omitted.) Id., 96.

We then noted that the official commentary to § 4-5 (c) provides in relevant part: "Admissibility of other

court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 479, 72 A.3d 48 (2013); see also C. Tait & E. Prescott, supra, § 1.32.3, p. 101.

crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value outweighs its prejudicial effect. . . . The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors." (Emphasis omitted; internal quotation marks omitted.) Id.

Under the facts of that case, we then concluded that the uncharged misconduct evidence was relevant to the issue of the victim's credibility. Id., 96–97. Specifically, the victim's credibility had been called into question as a result of his testimony that he lied and stole. Id., 98. The testimony that the defendant in that case had told the victim to steal was properly used to rehabilitate the victim's credibility. Id.

In the present case, the court determined that allowing Wilma to testify about the November 2, 2013 and May, 2014 incidents functioned as a proper means to rehabilitate her credibility. Additionally, it concluded that her testimony regarding these two incidents was admissible pursuant to the opening the door doctrine following defense counsel's attack on her credibility. We conclude that the court's rulings that this evidence was admissible as uncharged misconduct evidence or

admissible pursuant to the opening the door doctrine did not constitute an abuse of discretion.

2

Next, we turn to the question of whether the prejudicial impact of Wilma's testimony regarding these two incidents outweighed its probative value. Defense counsel argued to the trial court that this evidence painted "the defendant as a bad person, [a] person who loses their temper, [and it] far outweigh[ed] any probative value . . . ." The court acknowledged that the challenged testimony was prejudicial. Nevertheless, the court determined that his evidence was "highly probative in light of [Wilma's] cross-examination" and that any prejudice was "far" outweighed by its probative value. The court also provided the jury with a limiting instruction at the conclusion of Wilma's testimony.

We are mindful that "[w]hen the trial court has heard a lengthy offer of proof and arguments of counsel before performing the required balancing test, has specifically found that the evidence was highly probative and material, and that its probative value significantly outweighed the prejudicial effect, and has instructed the jury on the limited use of the evidence in order to safeguard against misuse and to minimize the prejudicial impact . . . we have found no abuse of discretion. . . . Proper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct. . . . Furthermore, a jury is presumed to have followed a court's limiting instructions, which serves to lessen any prejudice resulting from the admission of such evidence." (Internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 180, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016).

On appeal, the defendant maintains that the evidence had "nominal" probative value. He ignores, however, the court's basis for determining the strong probative

value of this evidence—the prosecutor's rebuttal of his attack on Wilma's credibility during cross-examination. This evidence served to explain and put into context the actions and testimony of Wilma, a significant witness for the state. We are not persuaded that this evidence improperly inflamed the emotions of the members of the jury. See *State* v. *Gonzalez*, 167 Conn. App. 298, 310–11, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016). Attempting to engage Wilma's father in a physical altercation and smashing car windows are less shocking in nature than driving a motor vehicle into an individual, dragging that individual under the vehicle or attempting to interfere with the testimony of a witness. See, e.g., *State* v. *Morales*, supra, 164 Conn. App. 181 (admission of evidence not unduly prejudicial when prior acts of misconduct substantially less shocking than crime charged); *State* v. *Zubrowski*, 101 Conn. App. 379, 395–96, 921 A.2d 667 (2007) (court did not abuse discretion in concluding that prejudicial impact of testimony that defendant had been physically and verbally abusive to his wife did not outweigh its probative value in light of nature of murder of wife by slashing her throat), appeal dismissed, 289 Conn. 55, 956 A.2d 578 (2008), cert. denied, 555 U.S. 1216, 129 S. Ct. 1533, 173 L. Ed. 2d 663 (2009). Additionally, any prejudicial effect was lessened by the court's limiting instruction given to the jury at the conclusion of Wilma's testimony. See *State* v. *Zubrowski*, supra, 396; see also *State* v. *Grant*, 179 Conn. App. 81, 94, 178 A.3d 437, cert. denied, 328 Conn. 910, 178 A.3d 1041 (2018); *State* v. *Morales*, supra, 181–82.

For these reasons, we conclude that the court did not abuse its discretion in determining that the probative value of these two incidents outweighed their prejudicial impact. Affording every reasonable presumption in favor of the court's ruling, we conclude that the defendant has not demonstrated a manifest abuse of

discretion or that an injustice resulted. See *State* v. *Collins*, 299 Conn. 567, 592, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

B

Finally, we consider the defendant's arguments regarding the March 22, 2014 incident at the hospital where the intoxicated and belligerent defendant threw a bloody ice pack at an employee working in the emergency department. As we noted previously, the defendant testified that, at the time he sent the offensive text messages to Wilma, his life "was all screwed up." He stated that during that time period, he was unemployed, had been forced to leave his home, Wilma had disappeared from his life, the holiday season had just ended, and he had been portrayed as a "monster" by the media. He claimed to be stressed, consuming an excessive amount of alcohol and contemplating suicide. His testimony conveyed the impression that the text messages to Wilma constituted an atypical course of conduct for him, a result of his mental state and alcohol consumption.

After hearing argument, the court noted that the defendant "left this jury with [the impression] that his threatening behavior in the text messages [was] fueled by a new approach in his life, which is to drink his life away. By using the term, at this point in my life, he's trying to leave the jury with the impression that his drinking . . . began after August—August 9, 2014. When, in fact, a lot of these incidents, and the ones that brought him to the hospital, would suggest otherwise. So, given his testimony about his conduct and his own self-serving statement that prior to this time in his life, and only at this point in his life, he started drinking. I think he's opened the door to some of this history." During cross-examination, the prosecutor questioned

the defendant briefly about his March 22, 2014 visit to the emergency department at the hospital.[23]

We iterate that "a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party." (Internal quotation marks omitted.) *State* v. *Frazier*, 181 Conn. App. 1, 23, 185 A.3d 621, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018).

During his testimony, the defendant provided the jury with the impression that he sent the offensive text messages to Wilma only after he had become depressed and started drinking heavily. In other words, he claimed that only the combination of stressors and increased alcohol consumption in January, 2015, resulted in sending crude messages to Wilma. After this subject area arose in direct examination, the state was free to present evidence that the defendant previously had exhibited similar behavior. On the basis of the defendant's direct examination, we cannot say that the court abused its discretion in concluding that he had opened the door to other incidents where he had consumed alcohol and acted in such a manner.

[23] After the defendant admitted that he went to the hospital on March 22, 2014, the following colloquy occurred between the prosecutor and the defendant:

"Q. Okay. And that while you were there, you were swearing and threw your bloody ice pack at the hospital personnel, stating the wait was too long; did you say that, yes or no?

"A. No.

"Q. You deny saying that?

"A. Correct. . . .

"Q. Are you denying that the following occurred, that you left without being seen; you deny that occurred, sir?

"A. No.

"Q. Did you deny that you swore and threw your bloody ice pack . . . stating that the wait was too long; do you deny saying that?

"A. Yes, that specifically, yes."

Finally, we consider, and reject, the defendant's argument that the prejudicial impact of the March 22, 2014 evidence outweighed its probative value. See *State* v. *Brown*, 309 Conn. 469, 479, 72 A.3d 48 (2013). We note that the state did not conduct a lengthy examination regarding this evidence. See *State* v. *Frazier*, supra, 181 Conn. App. 25–26. Furthermore, we are not persuaded that the jury's hearing testimony and considering documentary evidence regarding the defendant's conduct in the emergency department constituted undue prejudice given the facts and circumstances of this case. Accordingly, we conclude that the defendant failed to establish that the prejudicial effect of this evidence outweighed its probative value. Therefore, this argument fails.

IV

Next, the defendant claims that the court abused its discretion in admitting into evidence crude and vulgar text messages he had sent to Wilma. Specifically, he argues that the prejudicial impact of these "highly inflammatory" text messages outweighed their probative value and that their improper admission was harmful. The state counters that the court's ruling did not constitute an abuse of discretion and, in the alternative, that any such error was harmless. We agree that the court did not abuse its discretion in determining that the probative value of the text messages outweighed their prejudicial impact.

The following additional facts are necessary for our discussion. Outside the presence of the jury, the court noted the state's intention to introduce into evidence the text messages sent by the defendant to Wilma in January, 2015. Defense counsel objected solely[24] on the

[24] On appeal, the defendant raised, for the first time, a claim that his text messages "were totally irrelevant to the tampering and intimidating charges." The state correctly asserts that this evidentiary claim is unpreserved and thus unreviewable by this court. See *State* v. *Jorge P.*, 308 Conn. 740, 747, 66 A.3d 869 (2013); *State* v. *Gonzalez*, 272 Conn. 515, 539–40, 864 A.2d 847 (2005). Accordingly, we decline to consider this claim.

ground that "the prejudicial value of some of these text messages outweighs the probative value of them." Specifically, he objected to the January 16, 2015 text message at 9:23 p.m., the two text messages at 10:15 p.m., the text message at 10:28 p.m. and the text message at 10:31 p.m. See footnote 7 of this opinion. The court overruled defense counsel's objections.[25]

We set forth the relevant legal principles and our standard of review. "Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Small*, 180 Conn. App. 674, 683, 184 A.3d 816, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018); see also *State* v. *Bell*, 113 Conn. App. 25, 45, 964 A.2d 568, cert. denied, 291 Conn. 914, 969 A.2d 175 (2009). With respect to the balancing of the probative value and prejudicial impact, we indulge in every reasonable presumption in favor of the ruling of the trial court. *State* v. *Estrella*

[25] Specifically, the court noted: "[The jury] just heard this defendant curse at length and repeatedly in this statement to the police. So, if he's willing to use the word—the F word—repeatedly in front of the police, the fact that he uses foul language to communicate with his girlfriend . . . all of these messages are in context. He's trying to intimidate her, threaten her, and get her to change her testimony, and, even though the messages are crude, it's an attempt to get the witness to turn against her family and to support him. . . . And yes, while it is prejudicial in terms of the language that [he] uses, it's not any language that [the jurors] haven't heard from this defendant, certainly, in his own words on [the audio recording of his police interview]."

J.C., supra, 169 Conn. App. 99; see also *State* v. *Kalil*, 314 Conn. 529, 548, 107 A.3d 343 (2014); *State* v. *Coccomo*, 302 Conn. 664, 671, 31 A.3d 1012 (2011).

"There are situations where the potential prejudicial effect of relevant evidence would suggest its exclusion. These are: (1) where the facts offered may unduly arouse the jury's emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." *State* v. *DeMatteo*, 186 Conn. 696, 702–703, 443 A.2d 915 (1982); see also *State* v. *Gerald A.*, 183 Conn. App. 82, 108–109, 191 A.3d 1003, cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018).

The defendant appears to focus this argument on the first situation, that is, that these text messages, which he claims painted him as a "loathsome person," unduly aroused the hostility and emotions of the jury. We conclude that the court did not abuse its discretion in overruling the objection to the text messages on the ground that the prejudicial impact outweighed their probative value. We emphasize that "[p]rejudice is . . . measured by . . . the impact of that which is extraneous." *State* v. *DeMatteo*, supra, 186 Conn. 703.

In the present case, the court determined, and defense counsel did not contemporaneously challenge, that the probative value of the text messages was "incredibly high and [outweighed] its prejudicial impact." Thus, the court properly balanced the probative value of the text messages against their prejudicial impact. See, e.g., *State* v. *Rosario*, 99 Conn. App. 92, 105, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). Specifically, the court noted that the jury had heard the audio

recording of the police interview with the defendant in which he used similar language.

Case law supports our conclusion. For example, in *State* v. *Joly*, 219 Conn. 234, 248–49, 593 A.2d 96 (1991), the defendant claimed, inter alia, that the trial court should have excluded statements from a police detective recounting the defendant's unsolicited remarks made during the execution of a search and seizure warrant. The police detective testified that the statements made by the defendant at his apartment regarding the fifteen year old murder victim were made in a "remorseless tenor" and contained "expletives and sexually explicit language." Id., 254. Our Supreme Court acknowledged that these aspects of the detective's testimony "unquestionably had the tendency adversely to affect the jury's attitude toward the defendant . . . ." Id. Furthermore, it noted that, had it been serving as the trial court, it may well have determined that this testimony was too prejudicial. Id. It ultimately concluded, however, that the trial court had not abused its broad discretion in performing the difficult task of balancing the probative value against the prejudicial impact. Id.; see also *State* v. *Bush*, 249 Conn. 423, 430–31, 735 A.2d 778 (1999) (after careful review of record, no reasonable possibility that epithets used by defendant in conversations where he planned to threaten witnesses unduly aroused jury's emotions or unduly distracted jury from main issue in case). Similarly, we conclude in the present case that the court properly considered the prejudicial effect of the defendant's crude language and did not abuse its discretion in allowing the text messages to be admitted into evidence.

V

Finally, the defendant claims that the court improperly instructed the jury on self-defense, thereby violating his rights under the fifth, sixth and fourteenth

amendments to the United States constitution.[26] Specifically, he argues that the court improperly (1) instructed the jury on the initial aggressor and provocation exceptions to a claim of self-defense[27] and (2) included an objective standard in the portion of the instructions explaining the statutory retreat exception to the use of deadly physical force in self-defense.[28] The state counters that, with respect to the former, the court's instructions were proper, and as to the latter, the court committed harmless error in failing to convey the subjective component of the duty to retreat in its instructions. We agree with the state.

We begin with our standard of review and the legal principles relevant to a claim of constitutional error in a jury instruction. "[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, we must consider the jury charge as a whole to determine whether

[26] Our Supreme Court has noted that "[a]n improper instruction on a defense, like an improper instruction on an element of an offense, is of constitutional dimension." (Internal quotation marks omitted.) *State* v. *Bryant*, 233 Conn. 1, 9, 658 A.2d 89 (1995).

[27] General Statutes § 53a-19 (c) provides in relevant part: "[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 . . . ."

[28] See General Statutes § 53a-19 (b) (1).

it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Newton*, 330 Conn. 344, 359–60, 194 A.3d 272 (2018); *State* v. *Si*, 184 Conn. App. 402, 410, 194 A.3d 1266 (2018).

Next, we recite our Supreme Court's "brief review of the law of self-defense. Under our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. . . . 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. . . . 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." (Internal quotation marks omitted.) *State* v. *O'Bryan*, 318 Conn. 621, 631–32, 123 A.3d 398 (2015).

The following additional facts are necessary for our discussion. During the first days of the trial, the court observed, and the parties did not dispute, that self-defense was not an issue in the proceedings. On October 19, 2016, the state called Christopher LaMaine, a Bridgeport police lieutenant, as a witness. LaMaine testified that he and other members of the police department traveled to the defendant's home on the morning of August 10, 2014. Upon his arrival, LaMaine noticed damage to the "front area and the driver's side" of the

defendant's Avalanche. The defendant invited the police officers into his home shortly after 9 a.m. LaMaine and Teixeira interviewed the defendant in his kitchen. The defendant initially claimed to have been at his brother's home in Dayville at 10 p.m. the prior night, but he eventually admitted that he had operated the Avalanche in Bridgeport at that time.

During direct examination by the prosecutor, LaMaine recounted the conversation he had with the defendant regarding the physical condition of the Avalanche:

"A. . . . I asked him about the condition of his vehicle the night before; if that damage had been there. Initially, he told me that that damage was old, that it occurred that April, about four months earlier. Then he went on to tell me the story about how it had occurred. And then later he changed his story.

"Q. And the story changed to one—when he changed his story, was it as to when it occurred or how it occurred or both?

"A. Both.

"Q. Okay. And how did it change, please?

"A. Well, he eventually told me that two people threw rocks at his vehicle at the corner of Noble [Avenue] and Jane [Street] that night before. This got into the story where he said that he did strike the victim."

The prosecutor played the audio recording of LaMaine's interview with the defendant for the jury. During cross-examination, LaMaine agreed with defense counsel that the defendant had stated in the interview that while at the corner of Noble Avenue and Jane Street, "two kids ran up and threw what he called boulders at his truck . . . ." LaMaine testified that at the conclusion of the interview, he went to the corner

of Noble Avenue and Jane Street and found some rocks, which were collected and processed as evidence.[29]

On October 20, 2016, the fourth day of the trial, defense counsel informed the court that, in addition to his claim that the death of the victim was the result of an accident, he planned to pursue a claim of self-defense.[30] On October 24, 2016, the defendant testified that he had wanted to purchase a gun on August 9, 2014, because William had threatened and harassed him for "pretty much the whole summer [and] spring." The defendant claimed that William had driven by and pointed a gun at him a few days prior to August 9, 2014. He also stated that on the morning of August 9, 2014, prior to the incident, there was no damage to the hood, windshield or upper section of the door of the Avalanche.

The defendant's direct examination continued the next day and he claimed that on the night of August 9, 2014, he stopped at a stop sign when he heard a "boom" and heard something hit the front door of the Avalanche. On the basis of his clashes with people in the neighborhood, including William, the defendant posited that "somebody was shooting at [him]." After another rock struck the windshield, the defendant, under the assumption that he was being shot at and that his life was in danger, sought to protect himself and escape from the situation. The defendant testified that he observed the victim and Griffin in the intersection. Wanting to flee, the defendant drove off while in a "downward protected position."

After returning to his home, the defendant stated that he assessed both his body and his vehicle for damage.

[29] Photographs of these "rocks" or "boulders" were admitted into evidence.

[30] Although accident and self-defense are separate and inherently inconsistent claims, our law recognizes the ability of a defendant to raise them as alternative theories. See, e.g., *State* v. *Singleton*, 292 Conn. 734, 753 n.14, 974 A.2d 679 (2009).

He returned to the scene to check if he had hit anyone. The defendant assumed that "nothing serious [had] happened" and proceeded to his brother's home in Dayville.

The defendant further testified that when he returned to Bridgeport the next morning, his residence had been ransacked. Almost immediately thereafter, police officers arrived, and he spoke with LaMaine and Teixeira. The defendant iterated that he had heard two loud noises before running into the victim and that he feared for his life during this encounter.

After the parties rested, the court discussed the proposed jury instructions on the record. Defense counsel objected to the proposed instructions regarding the provocation and initial aggressor exceptions to self-defense, arguing that there was no evidence to support such instructions. The court responded: "The evidence of the initial aggressor or provocation is the testimony of Justin Griffin, if they choose to believe it, that [the defendant], about an hour earlier, drove down the street with the lights off, revved up the engine and tried to hit him with his car."[31]

Defense counsel responded that neither an initial aggressor nor a provocation instruction was warranted due to the one hour gap between these two incidents. The prosecutor disagreed that this brief time period necessitated a conclusion that the two incidents were separate and distinct. Defense counsel again argued that there was no evidence that Griffin and Tate had

[31] The court's reference to Griffin's testimony appears to be mistaken. Griffin testified that he was with the victim during the evening hours of August 9, 2014. He also stated that approximately thirty minutes before the fatality, he had been talking to a woman while walking to the victim's home. At this point, he observed the Avalanche as it proceeded past a stop sign without stopping and with the headlights turned off. This incident occurred at the intersection of Arctic Street and William Street. Griffin also indicated that the victim was not with him at this time.

It was Shuler who testified that he was with the victim on the night of August 9, 2014, in the area of Arctic Street and William Street. At that time and location, he stated that he was with the victim and Griffin when the defendant "hit the gas and swerved towards" the group of three, causing them to jump onto the sidewalk.

thrown the rocks at the Avalanche because the defendant had attempted to run them down earlier that evening. Defense counsel repeated that because of the one hour time gap, neither exception applied.

The next day, prior to closing arguments and the jury instructions, the court again addressed the jury instructions: "And then the other issue was the defense request that I not charge initial aggressor. [Defense counsel] abandoned the claim as to provocation, but insisted that initial aggressor was an error. And I pointed out that—that I believed, certainly—and I reviewed the testimony of Mr. Griffin, he talks about an incident earlier that evening where the defendant is—is at a stop sign with his lights out and just sitting there for a few minutes, and then revs up the engine and comes at them and swerves at them and they jump onto the sidewalk to avoid being hit by his truck.[32] So, there was that incident . . . .

"So, there are two very diverging theories here. The state's theory is there were no rocks and that this defendant was the only aggressor, not just the initial aggressor, but the only aggressor. And the defense theory is that the—the victim and his friend were the initial aggressors, or were throwing rocks at him and he acted in self-defense. Both sides are entitled to argue to the jury, but the evidence that the court heard would suggest that there is an appropriate instruction for initial aggressor." (Footnote added.) The court then considered the defendant's argument that there cannot be a valid initial aggressor exception to self-defense when a one hour time period existed between the first incident and the fatal one. On the basis of its research, the court concluded that such a determination was reserved for the jury.

[32] The court's statement actually refers to the testimony of Shuler, and not Griffin. See footnote 31 of this opinion.

Later that day, the court instructed the jury. The court's charge included instructions on the provocation and initial aggressor exceptions to self-defense.[33] The court also instructed the jury on the duty to retreat

[33] Specifically, the court instructed the jury: "In addition, the state can defeat the defendant's claim of self-defense by proving one of the statutory disqualifications of self-defense. The statute defining self-defense describes certain circumstances in which a person is not justified in using any degree of physical force in self-defense against another.

"One, provocation, § 53a-19 (c) (1). One such circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when he provokes the other person to use physical force against him. In order to provoke the use of physical force by another, it is not enough that the defendant, by his conduct, elicited the use of physical force by another. Rather, the defendant must mis—rather, the defendant must have embarked upon such conduct with such—with the specific intent to provoke the other into using physical force and intending to cause the other physical injury or death.

"The defendant must have specifically intended to provoke another into using physical force, and then used force to defend himself from the ensuing use of force by the person provoked. It is important to remember that the defendant has no burden to prove that he did not provoke [the victim] into using physical force against him. To the contrary, you may only reject his defense on the basis of this—this statutory disqualification, if you find that the state has proved beyond a reasonable doubt that the defendant provoked the use of physical force by [the victim] against him.

"Two, initial aggressor. Another circumstance under which a person is not justified in using any degree of physical force in self-defense against another is when he is the initial aggressor in the encounter with another person, and he does not both withdraw from the encounter and effectively communicate his intent to do so before using the physical force at issue in the case. Under this provision, the state can prove that the defendant was not justified in using physical force in self-defense by proving beyond a reasonable doubt that he was the initial aggressor in his encounter with [the victim]. And that he neither withdrew from that encounter, nor effectively communicated his intent to do so before using physical force against [the victim].

"To prove that the defendant was the initial aggressor in his encounter with [the victim], the state need not prove that the defendant was the first person to use physical force in that encounter. The initial aggressor can be the first person who threatened to use physical force or even the first person who appeared to threaten the imminent use of physical force under [the] circumstances.

"It is important to remember that the defendant has no burden to prove that he was not the initial aggressor or that he withdrew from the encounter and communicated his intent to do so before he used physical force against [the victim]. To the contrary, you may only reject his defense on the basis of this—this—this statutory disqualification, if you find that the state had proved beyond a reasonable doubt that the defendant was the initial aggres-

exception to the use of deadly physical force in self-defense.[34] See General Statutes § 53a-19 (b) (1).[35] We

sor, did not withdraw from the encounter, and did not withdraw from the encounter, and did not communicate his intent to withdraw before using physical force."

[34] The court instructed the jury: "Exception to [the] use of deadly physical force, duty to retreat. In addition, the state can defeat the defendant's claim of self-defense by proving a statutory disqualification to the use of deadly physical force. The statute defining self-defense describes a circumstances in which a person is not justified in using deadly physical force in self-defense of another. So, if you have found the defendant used deadly physical force, you must consider this exception.

"Duty to retreat, § 53a-19 (b) (1). A person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety by retreating. This disqualification requires a defendant to retreat instead of using deadly physical force whenever two conditions are met. One, a complete safe retreat is, in fact, available to him, and, two, he knows that he can avoid the necessity of using deadly physical force by making that completely safe retreat. The law stresses that self-defense cannot be retaliatory; it must be defensive and not punitive.

"The term complete safety, as used in this statute, means without any injury to the defendant whatsoever. A person acts knowingly with respect to a circumstance described in a statute when he is aware that such circumstance exists. A person acts knowingly with respect to a circumstance when he is aware that it exists. Ordinarily, knowledge can be established only through an inference from other proven facts and circumstances. *The inference may be drawn if the circumstances are such that a reasonable person of honest intention in the situation of the defendant would have concluded that one could avoid the necessity of using deadly physical force by making that completely safe retreat.*

"The determinative question is whether the circumstances in the particular case form a basis for the sound inferences as to the knowledge of the defendant in the circumstances under inquiry. It is important to remember that the defendant has no burden whatsoever to prove that he could not have retreated with complete safety or he didn't know that a safe retreat was possible before he used physical force against [the victim]. To the contrary, you may only reject his defense on the basis of this statutory disqualification if you find that the state has proved beyond a reasonable doubt that he did know that he could retreat with complete safety. . . .

"[Y]ou must find that the defendant did not act in self-defense if you find that the state has proved beyond a reasonable doubt that, now I'm going to cover the exceptions, one, the defendant provoked [the victim] into using physical force against him, or, two, the defendant was the initial aggressor in the encounter, or, three, the defendant had a duty to retreat from the physical encounter because he knew he could do so with complete safety." (Emphasis added.)

[35] General Statutes § 53a-19 (b) provides in relevant part that "a person is not justified in using deadly physical force upon another person if he or

now turn to the defendant's specific claims of instructional error.

A

The defendant first argues that the court improperly instructed the jury on the initial aggressor and provocation exceptions to self-defense. Specifically, he contends that there was no evidence to warrant instructing the jury on these two exceptions to self-defense. He also argues that the initial aggressor instruction was improper because he had effectively withdrawn from the initial incident. We are not persuaded by either of these arguments.

The court's proposed jury charge, dated October 24, 2016, contained instructions on the statutory exceptions of provocation and initial aggressor. The next day, defense counsel objected to the inclusion of these exceptions in the court's instructions, thereby preserving the defendant's claims for appellate review.[36] Accordingly, we proceed to the merits of the defendant's claim.

We start with the relevant legal principles and our standard of review. Our Supreme Court has stated that

she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating . . . ."

[36] The state argues that the defendant's claim as to the provocation instruction is not reviewable because his defense counsel remained silent when the court stated that he had abandoned the challenge to that specific instruction. In support, the state directs us to *State* v. *McCall*, 62 Conn. App. 161, 166B, 780 A.2d 134, cert. denied, 258 Conn. 935, 785 A.2d 231 (2001), where defense counsel agreed with the court's ruling on a motion in limine regarding the defendant's prior misconduct. We declined to consider the appellate claim that the court had improperly denied that motion, noting that "[a]ppellate courts do not review rulings that the defendant accepted or requested at trial . . . ." (Internal quotation marks omitted.) Id.

In the present case, defense counsel did not expressly agree with the court's statement that he had abandoned the objection to the provocation instruction. Additionally, as noted in his reply brief, the defendant challenged the provocation instruction in his postverdict motion for a new trial, and the court addressed it. Under these facts and circumstances, we conclude that this claim is reviewable.

when determining whether a party is entitled to a particular jury instruction, we must consider the evidence in a light most favorable to providing that instruction. *State* v. *Bryan*, 307 Conn. 823, 826, 60 A.3d 246 (2013). "If . . . the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 318–19, 163 A.3d 581 (2017); see also *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 169, 143 A.3d 1106 (party seeking certain instruction bears initial burden of producing sufficient evidence and conversely, court has duty not to charge jury on issue for which evidence would not reasonably support finding), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); see generally *State* v. *Bryan*, supra, 834–35.

The defendant focuses his appellate argument on the length of time between the incidents on August 9, 2014. Specifically, he claims that because approximately one hour had elapsed, from the time he allegedly accelerated his vehicle and drove it at the victim, Griffin and Shuler with his lights off, and when he claimed that the rocks were thrown at his Avalanche and drove it over the victim, the evidence did not support a jury instruction on either the provocation or initial aggressor exceptions to self-defense. He also argues that, with respect to the initial aggressor claim, the evidence demonstrated that he withdrew from the encounter and effectively communicated that withdrawal, thereby defeating this exception to self-defense. See General Statutes § 53a-19 (c) (2). We are not persuaded by his arguments.

1

First, we consider the defendant's contention that the court improperly instructed the jury on the initial

aggressor exception to self-defense. "A defendant who acts as an initial aggressor is not entitled to the protection of the defense of self-defense." *State* v. *Skelly*, 124 Conn. App. 161, 167–68, 3 A.3d 1064, cert. denied, 299 Conn. 909, 10 A.3d 526 (2010); see also General Statutes § 53a-19 (c) (2); *State* v. *Beltran*, 246 Conn. 268, 276, 717 A.2d 168 (1998) (concept of initial aggressor is limitation on what would otherwise constitute valid defense of use of force in self-defense). An initial aggressor may, however, avail himself of the defense of self-defense if he withdraws from the encounter and effectively communicates to such other person his intent to do so. *State* v. *Pauling*, 102 Conn. App. 556, 583, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007); see also *State* v. *Osimanti*, 299 Conn. 1, 28–29, 6 A.3d 790 (2010) (initial aggressor must withdraw or abandon conflict in such way that adversary is aware that he is no longer in any danger from initial aggressor).

In *State* v. *Jimenez*, 228 Conn. 335, 340, 636 A.2d 782 (1994), our Supreme Court concluded that, under our law, the first person to use physical force is not necessarily the initial aggressor. "Read according to its plain language, and as a whole, doubtlessly § 53a-19 contemplates that a person may respond with physical force to a reasonably perceived threat of physical force without becoming the initial aggressor and forfeiting the defense of self-defense. Otherwise, in order to avoid being labeled the aggressor, a person would have to stand by meekly and wait until an assailant struck the first blow before responding. If an assailant were intending to employ deadly force or inflict great bodily harm, such an interpretation of the statute would be extremely dangerous to one's health. Such a bizarre result could not have been intended by the legislature." Id., 341.

We are cognizant that the court had a duty not to submit to the jury, in its charge, an issue upon which the evidence would not reasonably support a finding.

State v. *Whitford*, 260 Conn. 610, 625, 799 A.2d 1034 (2002); *State* v. *Wortham*, 80 Conn. App. 635, 649, 836 A.2d 1231 (2003), cert. denied, 268 Conn. 901, 845 A.2d 406 (2004). Additionally, when the evidence warrants an initial aggressor instruction, the question of whether the defendant acted as an initial aggressor, and thus was disentitled to the protection of the defense of self-defense, is for the fact finder. See *State* v. *Skelly*, supra, 124 Conn. App. 168–70.

The state presented evidence that approximately one hour prior to the fatal impact, the defendant, with his headlights off, revved his engine and swerved his Avalanche toward the victim, Griffin and Shuler, causing them to jump onto the sidewalk for safety. On the basis of this testimony, the jury reasonably could have found that the defendant was the initial aggressor and, thus, was not justified in using any physical force. See, e.g., *State* v. *Pauling*, supra, 102 Conn. App. 583–84 (court properly provided initial aggressor instruction where state presented evidence that defendant grabbed victim first and began slapping her face). Moreover, the defendant has not provided us, nor have we located, a case from this jurisdiction holding that the passage of one hour necessarily renders the initial aggressor exception inapplicable. See, e.g., *State* v. *Prioleau*, 235 Conn. 274, 277–78, 292–94, 664 A.2d 743 (1995) (initial aggressor instruction given where defendant and victim had heated argument in November, 1991, when defendant stated he would "get" the victim, who expressed fear and concern that situation had escalated out of control, and on December 1, 1991, defendant shot and killed victim).

Likewise, we are not persuaded that the evidence required a conclusion that the defendant had withdrawn and communicated his intent to withdraw so that the initial aggressor instruction was improper. See *State* v. *Diggs*, 219 Conn. 295, 299, 592 A.2d 949 (1991) ("[A]n

instruction as to the effect of an aggressor withdrawing from an encounter and communicating the intent to withdraw is only necessary where the particular factual situation supports such an instruction. . . . Further, the doctrine of communicated withdrawal may not be invoked unless the aggressor's intent to withdraw is clearly made known to his victim. . . . In other words, the initial aggressor must withdraw or abandon the conflict in such a way that the fact of withdrawal is perceived by his opponent, so that his adversary is aware that he is no longer in any danger from the original aggressor." [Citations omitted; internal quotation marks omitted.]). A reasonable jury could conclude that the defendant had not communicated his withdrawal so as to nullify the initial aggressor exception to self-defense. We conclude, therefore, that the court's instructions on the initial aggressor exception to self-defense were not improper.

2

Next, we consider the defendant's contention that the court improperly instructed the jury on the provocation exception to self-defense. Section 53a-19 (c) provides that "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 . . . ." See also *State* v. *Corchado*, 188 Conn. 653, 664, 453 A.2d 427 (1982); *State* v. *Turner*, 33 Conn. App. 616, 618, 637 A.2d 3 (1994).

The rationale for our rejection of the defendant's initial aggressor argument applies to his provocation argument. We disagree that the act of swerving his vehicle toward the victim, Griffin and Shuler was indisputably a separate incident and foreclosed the jury from finding that it was done with the requisite intent for provocation. There was evidence before the jury that the defendant had targeted individuals for physical

harm, that he had taken steps in an attempt to purchase a gun earlier that day, and that he sought revenge against those in the neighborhood who allegedly had harassed him. The state presented adequate evidence to warrant a provocation instruction. Accordingly, we reject this claim.

B

The defendant next argues that the court improperly instructed the jury with respect to the retreat exception to the use of deadly physical force. Specifically, he contends that the court improperly used an objective standard in defining the knowledge element. The state agrees that this claim was preserved for appellate review and that the challenged instruction failed to convey properly the subjective standard of the duty to retreat. It maintains, however, that the erroneous instruction was harmless beyond a reasonable doubt. We agree with the state.

A distinction exists between the use of nondeadly physical force and deadly physical force in a case involving self-defense. See *State* v. *Singleton*, 292 Conn. 734, 747, 974 A.2d 679 (2009). The determination of whether the use of deadly physical force in a case of self-defense was warranted involves a subjective-objective inquiry. See *State* v. *Prioleau*, supra, 235 Conn. 286–87; see also *State* v. *O'Bryan*, supra, 318 Conn. 632–33; *State* v. *Reddick*, 174 Conn. App. 536, 552–53, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). If the use of deadly physical force is appropriate, the state still may defeat such a claim if it proves, beyond a reasonable doubt, that the defendant knew that he could retreat in complete safety. *State* v. *Singleton*, supra, 747. Subsection (b) of § 53a-19 contains a subjective test that states that a defendant is not justified in using deadly physical force in self-defense "if he . . .

knows that he . . . can avoid the necessity of using such force with complete safety (1) by retreating . . . .'' See, e.g., *State* v. *Ash*, 231 Conn. 484, 494–95, 651 A.2d 247 (1994) (improper instruction where court's charge suggested that § 53a-19 permitted jury to measure defendant's knowledge of ability to retreat according to objective standard of reasonableness rather than subjective standard of his actual knowledge); *State* v. *Carter*, 48 Conn. App. 755, 769–70, 713 A.2d 255 (§ 53a-19 [b] requires recourse to retreat in lieu of deadly physical force only when defendant himself knows he can avoid necessity of using such force with complete safety), cert. denied, 247 Conn. 901, 719 A.2d 905 (1998).

In the present case, the disputed issue is not whether the use of deadly force was warranted but, rather, whether the court properly instructed the jury on the retreat exception to the use of deadly physical force in self-defense. See General Statutes § 53a-19 (b). The court initially used a subjective standard when it provided the jury with an instruction on the duty to retreat.[37] Thereafter, it used an objective standard of reasonableness when it instructed the jury to consider whether the defendant's use of deadly physical force was not justified on the basis of the opportunity to retreat with complete safety.[38] We agree with the parties

[37] Specifically, the court instructed the jury: ''A person is not justified in using deadly physical force upon another person *if he knows* that he can avoid the necessity of using such force with complete safety by retreating. This disqualification requires a defendant to retreat instead of using deadly physical force whenever two conditions are met. One, a completely safe retreat is, in fact, available to him and, two, *he knows that he can avoid the necessity of using deadly physical force by making that completely safe retreat*. . . . A person acts knowingly with respect to a circumstance described in a statute when is aware that such circumstance exists. A person acts knowingly with respect to a circumstance when he is aware that it exists.'' (Emphasis added.)

[38] Specifically, the court instructed the jury: ''Ordinarily, knowledge can be established only through an inference from other proven facts and circumstances. The inference may be drawn if the circumstances are such that *a*

that the court's inclusion of an objective standard regarding the statutory duty to retreat was improper. See *State* v. *Rios*, 171 Conn. App. 1, 49–50, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017).

Having concluded that the court's instruction on the duty to retreat was improper, we turn to the question of harmlessness. See *State* v. *Prioleau*, supra, 235 Conn. 288. "If an improper jury instruction is of constitutional magnitude, the burden is on the state to prove harmlessness beyond a reasonable doubt. . . . [A]n instructional constitutional error is harmless if there is no reasonable possibility that the jury was misled. . . . In performing harmless error analysis, we keep in mind that [i]n determining whether it was indeed reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding [it] to a correct verdict in the case. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Anderson*, 158 Conn. App. 315, 357, 118 A.3d 728, cert. granted on other grounds, 319 Conn. 907, 908, 123 A.3d 437, 438 (2015) (appeals withdrawn May 4 and 5, 2016); see also *State* v. *Flowers*, 278 Conn. 533, 543–44, 898 A.2d 789 (2006); see generally *State* v. *Prioleau*, supra, 288 (harmlessness of jury instruction error gauged by reference to evidence and issues and charge as whole).

reasonable person of honest intention in the situation of the defendant would have concluded that one could avoid the necessity of using deadly physical force by making that completely safe retreat." (Emphasis added.)

We begin with our Supreme Court's decision in *State* v. *Quintana*, 209 Conn. 34, 547 A.2d 534 (1988). In that case, the defendant stabbed the victim in the chest on a sidewalk. Id., 36. The defendant's former girlfriend testified that two days after the stabbing, the defendant had claimed that the stabbing was done in self-defense. Id. The defendant's friend, however, testified that the defendant had stated that he killed the victim during an attempted robbery. Id., 37.

On appeal, the defendant claimed, inter alia, that the trial court improperly had instructed the jury on the duty to retreat. Id., 44–45. The state conceded that the court's instruction was improper, but claimed that the error was harmless. Id., 46. Our Supreme Court first noted that "[t]he charge must be considered from the standpoint of its effect on the jury in guiding [it] to a proper verdict" and that the instruction, read as a whole, "presented the case to the jury in a manner so that no injustice . . . result[ed]." (Internal quotation marks omitted.) Id., 47. It then reasoned that the only evidence of self-defense came from the testimony of the defendant's former girlfriend; this evidence, however, was contradicted by the friend's testimony of an intentional killing following an attempted robbery. Id. "In this posture, then, the evidence presented to the jury can fairly be said to center on the credibility of [the former girlfriend's] self-defense version of the stabbing, measured against the credibility of [the friend's] testimony that an attempted robbery was the motivating force behind the stabbing. The jury's verdict can fairly be read to indicate a choice between these two inconsistent versions of the stabbing, a choice that accepted the version presented by [the friend's] testimony and rejected the self-defense version presented by [the former girlfriend]. . . . The principal factual issues, therefore, were not classically dependent upon [the subtleties of the law of self-defense] for their proof, as is true in

cases where the principal factual issue is the . . . [defendant's subjective knowledge of the availability of safe escape]." (Citation omitted; internal quotation marks omitted.) Id., 47–48. As a result, our Supreme Court concluded that the erroneous instruction on the duty to retreat was harmless. Id., 48.

Applying the reasoning of *Quintana*, our Supreme Court concluded that an improper instruction on the duty to retreat was harmless in *State* v. *Whitford*, supra, 260 Conn. 610. In that case, the victim shared an apartment with Bonnie Courchaine and Anna Holcomb. Id., 612. The defendant arrived to renew his relationship with Courchaine and to help ensure that the victim moved out. Id. A few days after the defendant's arrival, the victim and Holcomb became embroiled in an argument which resulted in police intervention. Id., 613. Responding officers asked Holcomb to leave the apartment to defuse the situation. Id. After she returned, Holcomb complained about the victim to the defendant. Id. The defendant told the victim that he needed to leave immediately; the victim, however, ignored the comment and walked toward his bedroom. Id. The defendant followed the victim and stabbed him twice in the side. Id.

At trial, the defendant claimed self-defense. Id., 614–15. The defendant testified that while Holcomb was in her bedroom, he watched television with the victim. Id., 615. The defendant further testified that he inquired as to why the victim remained in the apartment when he knew that Courchaine and Holcomb wanted him to leave. Id. According to the defendant, the victim became enraged and jumped on top of him. Id. The victim choked the defendant while screaming at him. Id. The defendant unsuccessfully attempted to remove the victim's hands from his neck and then stabbed him. Id.

On appeal, the defendant argued, inter alia, that the court improperly instructed the jury on the duty to

retreat because there was no evidence that retreat was a viable option. Id., 624–25. Our Supreme Court agreed that neither the defendant's evidence[39] nor the state's evidence[40] warranted a retreat instruction, and, thus, the instruction was improper. Id., 625–27.

The court in *Whitford* addressed the issue of harmlessness by discussing its decision in *Quintana*. Id., 628. It stated: "The manner in which the present case was tried is analogous to that of *Quintana*. The defendant sought to establish his self-defense claim only though his own testimony. The state, on the other hand, presented evidence to suggest that the defendant attacked the victim of his own volition in an attempt forcibly to persuade him to vacate the apartment. The state did not, however, introduce any evidence tending directly to defeat the particular elements necessary to establish the defendant's claim of self-defense. Thus, the jury here ultimately was faced with a credibility contest between two inconsistent versions of the altercation, as had been the jury in *Quintana*. The rule in *Quintana*, therefore, applies with equal force to the

[39] Specifically, our Supreme Court explained: "The defendant's evidence concerning the stabbing consisted solely of his own testimony and was factually inconsistent with an instruction regarding the duty to retreat. According to the defendant, the victim jumped on top of him without warning and began strangling him. The defendant testified that he attempted, unsuccessfully, to free himself by removing the victim's hands from his throat prior to using the pocketknife. Given this factual scenario, the jury reasonably could not have determined that there existed any opportunity for the defendant to retreat safely prior to using force." *State* v. *Whitford*, supra, 260 Conn. 625–26.

[40] Specifically, our Supreme Court stated: "The state, choosing affirmatively to advocate for the victim's version of events, presented no evidence tending directly to defeat the claim of self-defense. The state's case was thus presented largely through the testimony of the victim, who maintained that the defendant, unprovoked, assaulted and stabbed him in his bedroom. This factual scenario, however, does not even raise the issue of whether the defendant was justified in using force. It therefore cannot form the basis of an instruction on an exception to the claim of self-defense." *State* v. *Whitford*, supra, 260 Conn. 626.

claimed instructional error now at issue . . . .'' Id., 629; but see *State* v. *Ash*, supra, 231 Conn. 498 (factually distinguishable from *Quintana* because state's case hinged substantially on whether defendant failed to retreat within meaning of § 53a-19).

In the present case, the issue of self-defense did not arise until LaMaine's testimony several days into the trial. LaMaine recounted how the defendant initially stated during the August 10, 2014 interview that the damage to his Avalanche had occurred in April, 2014, but later changed his story and claimed that the victim and another individual actually caused it on August 9, 2014. The prosecutor played an audio recording of the August 10, 2014 interview for the jury in which the defendant claimed that the victim and another individual rapidly approached his vehicle and hurled boulders at it. After hearing the impact of the boulders, the defendant ''hit the gas and hit the . . . [victim].'' The defendant specifically stated that after the impact of the rocks, he ''couldn't hit reverse, [he] didn't have time, [he] wasn't expecting [the victim] to do that.'' The defendant testified that when the boulders hit his Avalanche on August 9, 2014, ''everything happened very quickly'' and that he ''just reacted.'' The defendant claimed that he ''consciously hit the gas to get out of there.'' He also stated that there was no time to determine whether he could have backed up his vehicle.

After a careful review of the evidence presented at the defendant's trial, we are persuaded that this is not a case classically dependent on the subtleties of the law of self-defense. See *State* v. *Quintana*, supra, 209 Conn. 47–48. First, we note that the defendant did not raise a claim of self-defense until several days into the trial. Second, the jury was faced with conflicting and inconsistent versions of the events of August 9, 2014, namely, whether the defendant intended to kill the victim with the Avalanche or whether the victim's death

was a result of an accident or self-defense. The self-defense claim was established primarily through the defendant's August 10, 2014 interview with the police and by his own testimony. In contrast, the state presented evidence that the defendant had hit the victim with the truck intentionally. The jury, therefore, ultimately was required to resolve a credibility contest between the inconsistent versions of the events of August 9, 2014, at the intersection of Noble Avenue and Park Street. See *State* v. *Whitford*, supra, 260 Conn. 629; *State* v. *Quintana*, supra, 47–48. Finally, we note that neither party presented much evidence, or discussed in detail, the retreat exception to self-defense. For these reasons, we conclude that the improper instruction reasonably cannot be said to have misled the jury.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CARROLL L. BUMGARNER-RAMOS
(AC 39923)

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

Syllabus

Convicted of the crimes of assault in the first degree, aggravated sexual assault of a minor, risk of injury to a child and manslaughter in the first degree in connection with the death of the three year old victim, who had sustained numerous injuries while in the defendant's care, the defendant appealed to this court. He claimed that there was insufficient evidence to convict him of aggravated sexual assault of a minor and that his conviction of both assault in the first degree and manslaughter in the first degree violated the constitutional guarantee against double jeopardy. *Held*:

1. There was sufficient evidence to support the defendant's conviction of aggravated sexual assault of a minor: contrary to the defendant's claim that the state failed to prove that he engaged in vaginal sexual intercourse

with the victim within the meaning of the applicable statutes (§§ 53a-70c [a] [3] and 53a-70 [a] [2]) because there was no evidence of penetration, the trial court credited the testimony of the associate medical examiner who performed the autopsy of the victim's body that the victim had suffered, inter alia, a small laceration that started outside the right labia majora and extended inside the labia majora, as well as a contusion inside the labia majora, and found that the defendant had caused such injuries, and consistent with established legal principles set forth by our Supreme Court, such evidence demonstrated sufficient penetration of the labia majora to constitute vaginal intercourse under the relevant statute (§ 53a-65 [2]), which provides that penetration, however slight, is sufficient to complete vaginal intercourse; moreover, the trial court's finding that the victim's injuries were inflicted by the application of physical force on the subject areas by the defendant was relevant to and necessary for its finding that the defendant was guilty of aggravated sexual assault of a minor, which required that the defendant used violence to commit the offense of sexual assault in the first degree.

2. The defendant's conviction of both assault in the first degree and manslaughter in the first degree violated the constitutional guarantee against double jeopardy, as it was undisputed that his conviction of those charges arose out of the same transaction and, as charged by the state, the assault charge was a lesser included offense of the manslaughter charge: the defendant could not have caused the death of the victim in the manner described in the operative information without first having caused serious physical injury to her, as the defendant was charged with assault in the first degree pursuant to statute (§ 53a-59 [a] [3]), which only required proof that the defendant, under circumstances evincing an extreme indifference to human life, recklessly engaged in conduct that created a risk of death to another person, and thereby caused serious physical injury to another person, and, therefore, proof that the defendant caused the victim serious physical injury under the assault charge was subsumed within the evidentiary requirement under the manslaughter charge that he caused the victim's death, and this court was not aware of any conceivable circumstance in which the defendant could have caused the victim's death without also having caused her serious physical injury; accordingly, a constitutional violation existed that deprived the defendant of a fair trial, and because the error was not harmless, the case was remanded with direction to vacate the conviction of the lesser included offense of assault in the first degree.

Argued October 11, 2018—officially released February 5, 2019

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, aggravated sexual assault of a minor, risk of injury to a child and

manslaughter in the first degree, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the court, *Swords*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Patricia Froehlich*, former state's attorney, and *Matthew Crockett*, former senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Carroll L. Bumgarner-Ramos, appeals from the judgment of conviction, rendered after a court trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (3), aggravated sexual assault of a minor in violation of General Statutes §§ 53a-70c (a) (3) and 53a-70 (a) (2), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3). On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to convict him of aggravated sexual assault of a minor and (2) his conviction of both assault in the first degree and manslaughter in the first degree violated the constitutional guarantee against double jeopardy. We agree with the defendant with regard to his double jeopardy claim and vacate his conviction of assault in the first degree. We affirm the judgment of the trial court in all other respects.

The following facts are relevant to the defendant's claims on appeal. The defendant met the victim's mother, Kim F.[1] (Kim), in 2009, when she was four

[1] In accordance with our policy of protecting the privacy interests of the victims of the crimes of sexual assault and 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.

months pregnant with N, the victim. The two began a relationship, and, following the birth of N in June, 2010, the defendant took on a paternal role until his incarceration[2] in August, 2011, at which time the couple's relationship ended. Following his release, the defendant reconciled with Kim in May, 2013, and, shortly thereafter, Kim and N began to stay periodically at the defendant's apartment in Willimantic.

On June 11, 2013, Ronald Kelly, a pediatrician, performed a routine medical examination of N, who was then three years old. During the examination, Kelly observed "some big bruises" on the child's back that Kim was unable to explain. The bruises were diagonal and similar to the shape of three fingers on a person's hand. Kelly also noted that N was acting unusual; "she was throwing herself on the ground, [and acting] totally out of control." Following the examination, Kelly, in accordance with his responsibility as a mandatory reporter,[3] informed the Department of Children and Families (department) that N had unexplained bruises.[4]

The department assigned a social worker, Rosiris Espejo, to investigate the suspected abuse. Several days after Kelly had informed the department, Espejo met with Kim at the residence of N's grandmother. During their meeting, Espejo asked Kim to name the people who were responsible for N's care. She identified herself, the grandmother, and N's daycare provider, Marion Snow. She did not mention the defendant or the fact that N had often spent time at his apartment.

On June 24, 2013, Kim brought N to the grandmother's house. When the grandmother saw N that day, she

[2] Kim testified that the defendant was incarcerated in connection with an incident of domestic violence against her.

[3] See General Statutes § 17a-101 (b) (1).

[4] At trial, Kim testified that the defendant had spanked N, causing the bruises that Kelly observed.

noticed that N had "black and blue" bruises around her eyes. Kim told her that the bruises were caused by a fall.[5] Later that day, when the grandmother attempted to change N's diaper and to give her a bath, N started screaming and jumped into her grandmother's arms. N had never acted this way before and seemed scared, as though "something came to her mind."

Two days later, on June 26, 2013, Kim and N stayed at the defendant's apartment. The defendant had rented a room in the basement of a three-story house that was occupied by several other individuals. When Kim and N stayed at the apartment, Kim slept with the defendant on a mattress on the floor, and N slept on a smaller mattress beside them. That evening, Kim began to pack some of her belongings, intending to leave with N and to go to the grandmother's house. The defendant became angry, yelled at Kim and, in an effort to prevent her from leaving, took her cell phone and car keys. The defendant then went into the living room, just outside the bedroom, and stayed there for most of the night while Kim and N remained in the bedroom. At around midnight, the defendant came back into the bedroom to sleep.

In the early morning hours of June 27, 2013, N started "fussing and crying and wouldn't settle down." The defendant got out of bed, went over to where N was sleeping, and repeatedly and forcefully poked her in the stomach. While he was poking her, he yelled at her: "This is what you do to me. You're going to keep me up? How do you like it?" After he poked her several times, N started to cry. Kim picked her up and eventually comforted her back to sleep.

Later that morning, the defendant left to attend a therapy program at Natchaug Hospital. A short while

[5] Kim first noticed the bruises after she had left N alone with the defendant on June 22, 2013. The defendant told Kim that N had fallen and hit her head on the baseboard heater in his bedroom.

later, Kim and N woke up. N did not seem to be in any apparent distress, and she ate her breakfast without difficulty. Kim received a phone call from the defendant asking her to come get him at Natchaug Hospital because he felt sick and his therapist told him to go home. After she picked him up and dropped him off at the apartment, Kim went to the grandmother's house to get some medicine. When she got back to the apartment, she took a bath with N, during which she noticed bruising on the child's chest in the area where the defendant had poked her. At approximately 12:30 p.m., Kim left for work, leaving N alone with the defendant.

While she was at work, Kim and the defendant exchanged several text messages. At 1:42 p.m., the defendant sent the following message: "So far so good just brushed her hair her bump is still a little swollen but it should be gone soon!"[6] Then, six minutes later, he texted: "Hopefully her bump leaves soon! She's behaving really well!!!" At 1:52 p.m., Kim responded to the second message: "Where is it?" Five minutes later, the defendant answered: "I feel shitty I can't breathe. The same swollen side that [N] had. I noticed it when I brushed her hair, she's doing good tho[ugh]!!!"

At 2:21 p.m., Kim texted the defendant: "You want me to come get [N]?" He responded immediately: "She's good! She's chilling, keeping me company." After he had asked Kim when she would be home, the defendant, at 2:31 p.m., texted: "She is feisty!!!!" Then, six minutes later, the defendant wrote: "Should I give her medicine? She worries me because that bump takes so long to go away. It's like another came or something and the bruising too! She should be ok!" At 2:40 p.m., the defendant texted: "She feels [warm] ma!" Kim responded at 2:41 p.m., with two separate messages: "The heater is

[6] This text appears to reference the injury that N sustained on June 22, 2013. See footnote 5 of this opinion.

on remember, [because you're] sick," followed by: "So that is prob[ably] why she feels warm." Approximately ten minutes later, the defendant wrote: "Her head still looks swollen should I put ice [on it]?" Kim responded: "Yes." The defendant then, at 2:52 p.m., texted: "And her eye is like a [little] swollen too. But she won't let me!" He then sent a text at 3:05 p.m., which read: "I'm putting ice [on it] now!" Approximately twenty minutes later, the defendant wrote: "Put [N] in the [tub] to cool her off she's having fun!"

The defendant sent Kim a text at 4:05 p.m., in which he wrote: "[N] and I just puked." One minute later, Kim responded: "You both puked? Omg." Then, at 4:10 p.m., Kim asked: "Did you make it to the bathroom at least?" At 4:11 p.m., the defendant replied: "[N's] left eye is strai[ght] but the [right] eye [is] still a [little] swollen, another couple of days [and] she'll be good!!!" Approximately ten minutes later, Kim asked: "Is she okay? Did she puke a lot?" Immediately, the defendant answered: "[A little] bit."

At 5:34 p.m., the defendant texted: "Ok, I think [N] is getting better because her eye is all swollen!" Then, five minutes later, he wrote: "[N] and I took [a] hot bath!!!" Approximately an hour later, the defendant sent the following text: "Kim, I can't take it. I'm in fucking pain!!!!!" Kim responded four minutes later: "Let's go to the hospital. [I'll] drop [N] off at my mom's." The defendant wrote back immediately: "Give it a [little] more. It's [my] fucking throat." At 7:45 p.m., the defendant texted: "[Damn], I can't even eat my throat hurt[s] that much!!!!!" Four minutes later, Kim responded: "I don't want you to stop breathing I'm worried."

Approximately an hour later, the defendant wrote: "[N] threw up again!!!!! All over the bed!!!" Then, a few minutes later, he texted: "She's pale I'm pale!!!! Wtf." Twenty minutes later, at 9 p.m., he wrote: "Hurry." One

minute later, Kim responded: "I think we need to go to the emergency room." Immediately, the defendant replied: "[N] has too many bruises." Later, at 9:23 p.m., the defendant wrote: "She's eating oranges [a]nd talking." Four minutes later, he texted: "Now that I think about it that sh[it] look[s] like Lyme [disease]!"

Sometime after 9 p.m., Kim arrived back at the defendant's apartment. The defendant met her at the top of the stairs leading to the basement and gave her money to buy Tylenol for N. At this time, Kim did not go downstairs to check on N. She drove to a local pharmacy, purchased Tylenol, and drove back to the apartment. When she arrived back, she went downstairs and found N lying on the defendant's mattress in the bedroom. N was "badly bruised from head to toe," and the mattress was covered in vomit. Kim noticed that N was wearing a different outfit than the one she had dressed her in before she left for work. Concerned that there might be more injuries in addition to the ones she could see, Kim undressed N and found a large mark on her stomach. To Kim, it appeared as though something had bitten N. She observed bruises and scratches on her feet and "marks all over her body," and her head was swollen and bruised on the right side.[7] Kim testified that N felt cold and clammy, and that she noticed that the child was having trouble breathing.

Kim dressed N in fresh clothes and carried her outside to the car to go to the hospital. As she put her in the car, Kim realized that N had stopped breathing. Kim took her out of the car and ran to the sidewalk in front of the apartment. She put N on the ground and attempted to perform cardiopulmonary resuscitation (CPR) but stopped when she started to panic. Kim

[7] Kim saw that the bruising to the right side of N's head was different from the bruising that the child had sustained from purportedly hitting her head on the baseboard heater several days earlier.

screamed for help, and, hearing her cries, one of the defendant's roommates, Robert Trevorrow, came outside to assist her. Trevorrow resumed CPR while Kim dialed 911 and requested an ambulance. At some point, the defendant joined Kim and Trevorrow outside on the sidewalk and attempted to assist in the efforts to resuscitate N. When the ambulance arrived, Kim handed N to the responding emergency personnel and joined them in the back of the ambulance. The defendant, at some point, also entered the rear of the ambulance; however, he was told to ride up front with the driver in order to give more space to the treating technicians.

Christopher Reddy, a paramedic, arrived on scene at 10:23 p.m., shortly after the ambulance. He entered the back of the ambulance and observed that N had no pulse and was not breathing and that emergency personnel had started to perform CPR. He also noticed that N had bruises all over her body, including bruising and swelling in the area around her right eye, and that her abdomen appeared "distended" and "rigid," which was unusual for a three year old child. After being on scene for approximately two minutes, the ambulance left for Windham Hospital and arrived there approximately three minutes later.

At Windham Hospital, N was transferred to the care of Max Goldstein, a physician working in the emergency department that evening. Goldstein observed that N had sustained numerous injuries. He testified that bruises were scattered diffusely throughout her body; she had what appeared to be bite marks on her skin; there was trauma to her vaginal, perineal, and anal areas, and "the vagina itself had trauma"; and there was extensive swelling behind her face. Goldstein and medical personnel continued resuscitation efforts but ultimately were

unsuccessful in reviving N, who was pronounced dead at 11:15 p.m.[8]

Notified of N's death, state police detectives from the eastern district major crimes squad arrived at the hospital and interviewed Kim and the defendant separately. During the interview, the defendant claimed that N had been sick for a couple of days and that she had been vomiting periodically during this time. When asked about the bruises to N's face and body, he said that she had rolled off her mattress and hit her head on a baseboard heater several days earlier, and that she had caused the other bruises to herself during a temper tantrum. With regard to the specific events that took place on June 27, 2013, the defendant stated that N was not acting herself, "she was out of it," and she was throwing up all day and crying a lot. He stated that he gave her a bath at around 6 p.m., dressed her in new clothes, and then watched a movie with her. Throughout the interview, the defendant repeatedly denied hitting or abusing N in any manner.

In the early morning hours of June 28, 2013, the defendant was arrested in connection with N's death and transported to Troop K in Colchester. After he read and waived his *Miranda*[9] rights, the defendant agreed to an interview with detectives. During this interview, the defendant expressed suicidal feelings and invoked his right to counsel. The detectives stopped questioning him and told him that if he wanted to speak with them again, he would have to initiate the conversation. A short while later, the defendant requested to speak with the detectives, and he again read and waived his

[8] An autopsy conducted on June 28, 2013, by Susan Williams, an associate medical examiner, concluded that N died from fatal child abuse syndrome with blunt abdominal trauma.

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

Miranda rights. The defendant claimed, during this second interview, that he was playing with N, swinging her around by her arms, and that she hit her head on a metal pole in the middle of the bedroom. Although he initially denied hitting her, after further questioning, he admitted that he spanked her because she would not stop crying. When asked about the injuries to N's vaginal, perineal, and anal areas, he said he was "spanking the shit out of her there . . . on her ass," "slapping [her] ass" and that he "might" have hit her in the vaginal, perineal, and anal areas. He also told the detectives that "she was kicking and moving and that he was just spanking away." When detectives inquired about the bite marks all over N's body, he replied: "I think I overdid it with the biting."

Following his arrest, the defendant was charged by long form information with assault in the first degree in violation of § 53a-59 (a) (3), aggravated sexual assault of a minor in violation of §§ 53a-70c (a) (3) and 53a-70 (a) (2), risk of injury to a child in violation of § 53-21 (a) (1), and manslaughter in the first degree in violation of § 53a-55 (a) (3). The defendant waived his right to a jury trial. After an eight day trial, the court found the defendant guilty on all counts and sentenced him to a total effective term of thirty years of incarceration, followed by fifteen years of special parole.[10] From this judgment the defendant now appeals. Additional facts will be set forth as necessary.

[10] The court imposed a mandatory sentence of ten years of incarceration on count one, the assault in the first degree conviction, to be served concurrently with count two. The court imposed a mandatory sentence of twenty-five years of incarceration on count two, the aggravated sexual assault of a minor conviction. With respect to count three, the risk of injury conviction, the court imposed a ten year sentence to be served concurrently with the sentence on count two. On count four, the manslaughter in the first degree conviction, the court imposed a sentence of five years of incarceration followed by fifteen years of special parole, to be served consecutively to the sentence on count two.

I

The defendant first claims that the evidence presented at trial was insufficient to convict him of aggravated sexual assault of a minor.[11] Specifically, the defendant argues that the state failed to prove that he engaged in sexual intercourse with N, within the meaning of §§ 53a-70c (a) (3) and 53a-70 (a) (2), because there was no evidence of penetration. We disagree.

The following facts are relevant to our resolution of this claim. During the defendant's second interview at Troop K, detectives asked him to explain the injuries to N's vaginal and anal regions. The defendant responded that he "was spanking the shit out of her . . . ass" and that he "might have hit her right there." When asked if he spanked N "in the front too," the defendant said: "[S]he was kicking and moving, and [he] was just spanking away." When asked to admit whether he sexually assaulted the child, the defendant replied: "I didn't sexually assault her. I spanked her there. I don't know if that's the same thing, [or] if you guys are going to classify it as that." Finally, the defendant denied that any of his semen would be found on the child.[12]

[11] General Statutes § 53a-70c (a) provides in relevant part: "A person is guilty of aggravated sexual assault of a minor when such person commits a violation of subdivision (2) of subsection (a) of section 53-21 or section 53a-70, 53a-70a, 53a-71, 53a-86, 53a-87 or 53a-196a and the victim of such offense is under thirteen years of age, and . . . (3) such person used violence to commit such offense against the victim . . . ."

General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[12] Vaginal and perineal swabs taken from N's body were negative for the presence of semen. Swabs taken from N's anal area were positive for proteins that are present in semen; however, the swabs were negative for the presence of spermatozoa and male DNA.

At trial, Susan Williams, an associate medical examiner with the Office of the Chief Medical Examiner, testified that on June 28, 2013, she had performed an autopsy of N's body. During her examination, Williams observed injuries to N's vaginal, perineal, and anal areas. With respect to the injuries to N's vagina, Williams noted bruising and a "small laceration" to the labia majora and a contusion to the soft tissue "on the inner portion of the labia majora." Williams opined that these injuries were the result of blunt force trauma. Additionally, Williams testified that she performed an internal examination of N's rectum, in which she found that the pelvic soft tissue was hemorrhagic. In Williams' opinion, because this area is protected by the pelvic ring, the only way that it could be injured is with "something being up there adjacent to it," i.e., the insertion of some object into the vagina or rectum. When asked whether these injuries were consistent with a child being spanked, Williams testified: "I wouldn't expect spanking to cause the deep tissue and soft tissue, fat, muscle hemorrhage that I saw. I [examined] the section in the rectum which is above the anus. I would not expect that to have bled way up there."

In providing the evidentiary basis for its conclusion that the defendant engaged in sexual intercourse as defined by §§ 53a-70c (a) (3) and 53a-70 (a) (2), the court stated the following: "The court thus finds that the defendant was the person who inflicted the injuries and contusions to [N's] inner thighs, the area over her pubic bone, and the outside and inside of the labia majora, and that those injuries were inflicted by the application of physical force on those areas by the defendant. The court further finds, however, that there is insufficient evidence to conclude that the defendant caused the hemorrhaging of the deep tissue between the anus and the vagina.

"At the time of her death, [N] was three years old. As stated before, the defendant is an adult male well in excess of two years older than the victim. The court concludes therefore that the state has proven beyond a reasonable doubt that the defendant engaged in vaginal intercourse as defined in our statutes and our case law with [N], a person not married to him; that at the time of the act, [N] was less than thirteen years of age and that the defendant was more than two years older than her. Furthermore, the court finds that the defendant used violence to commit the sexual intercourse."

On appeal, the defendant argues that the court's evidentiary basis for concluding that he engaged in vaginal sexual intercourse with N is insufficient. We do not agree.

We begin by setting forth the applicable standard of review. "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. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a [trier's] factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State*

v. *Hector M.*, 148 Conn. App. 378, 384, 85 A.3d 1188, cert. denied, 311 Conn. 936, 88 A.3d 550 (2014).

"While the [trier of fact] 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 [trier of fact] to conclude that a basic fact or an inferred fact is true, the [trier] 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, [i]n evaluating evidence that could yield contrary inferences, the [trier] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . As 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 [trier], 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 [trier's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Torres*, 242 Conn. 485, 489–90, 698 A.2d 898 (1997).

For the purposes of §§ 53a-70c (a) (3) and 53a-70 (a) (2), sexual intercourse is defined as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. *Penetration, however slight, is sufficient to complete vaginal intercourse,*

anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." (Emphasis added.) General Statutes § 53a-65 (2). Our Supreme Court in *State* v. *Albert*, 252 Conn. 795, 809, 750 A.2d 1037 (2000), recognized that "there is nothing to suggest that the term genital opening was intended to require that penetration occur beyond the labia majora to at least the labia minora . . . ." *State* v. *Hector M.*, supra, 148 Conn. App. 386.

"Under common usage of the language, the term genital opening means an opening associated with the genitals. The word genitals means genitalia . . . which means the organs of the reproductive system; [especially]: the external genital organs. . . . Similarly, Taber's Cyclopedic Medical Dictionary defines genitals and genitalia as organs of generation; reproductive organs, and states that the female external genitalia collectively are termed the vulva or pudendum and include the . . . labia majora and that the internal genitalia are the two ovaries, fallopian tubes, uterus, and vagina. . . . Thus, as the term genitals refers especially to the external genital organs, which include the labia majora, it would be unreasonable to conclude that when the legislature used the term genital opening, it meant to exclude the external genital organs and refer only to the internal genital organs such as the vagina.

"Opening is defined in common usage as something that is open . . . . Open, in turn, is defined as spread out: unfolded: having the parts or surfaces laid back in an expanded position: not drawn together, folded, or contracted . . . . We previously noted that the labia majora are defined as the outer fatty folds bounding the vulva. . . .

"From these definitions, it can be deduced that: (1) the term genitals commonly refers to the external reproductive organs, which include, on a female, the labia majora; (2) the term opening means something that is unfolded or spread out; and (3) the labia majora are folds. Thus, we conclude that the opening between the folds, i.e., labia majora, is the genital opening and that the labia majora form the boundaries of the genital opening. Moreover, because we have construed the term vaginal intercourse, as that term is used in § 53a-65 (2), to include digital penetration, however slight, of the genital opening . . . we conclude that digital penetration, however slight, of the labia majora is sufficient penetration to constitute vaginal intercourse under § 53a-65 (2)." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Albert*, supra, 252 Conn. 807–809.

In *Albert*, our Supreme Court determined that the evidence was sufficient to convict a defendant of sexual assault in the first degree on the basis of the victim's testimony that the defendant "touched '[i]nside' her crotch," and two scrapes that were observed on the victim's labia majora, which a pediatrician testified were consistent with penetration of the genital opening. Id., 813–14. In rejecting the defendant's argument that there was no evidence to infer that the defendant "did anything other than touch the surface of [the victim's] labia majora," the court concluded that a reasonable jury could infer from the evidence that "the defendant's finger entered the victim with some force and passed beyond the actual location of the scrapes on the victim's labia major." (Internal quotation marks omitted.) Id., 814. Applying the language of § 53a-65 (2) and *Albert*'s judicial gloss, this court has upheld sexual assault convictions predicated on similar circumstantial proof of penetration. See, e.g., *State* v. *Gerald A.*, 183 Conn. App. 82, 94, 191 A.3d 1003 ("jury was free to infer, on the

basis of this record and its common sense, that if [the victim] flinched and clenched because [i]t hurt when the defendant tried to put his finger inside of her vagina, that the defendant digitally penetrated, at the very least, [the victim's] labia majora." [internal quotation marks omitted]), cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018); *State* v. *Elmer G.*, 176 Conn. App. 343, 354, 170 A.3d 749 (concluding that jury could infer that when defendant forced victim to put her "mouth on his penis," that defendant did so "in a manner that caused his penis to enter into her mouth"), cert. granted on other grounds, 327 Conn. 971, 173 A.3d 952 (2017); *State* v. *Edwin M.*, 124 Conn. App. 707, 725–26 and n.7, 6 A.3d 124 (2010) (evidence that anal injury consistent with penile penetration sufficient for the purposes of affirming sexual assault conviction), cert. denied, 299 Conn. 922, 11 A.3d 151 (2011).

Here, the defendant contends that the application of physical force on N's vagina and labia majora was insufficient to support a conviction of sexual assault because there was no evidence that he penetrated N's genital opening. This argument, however, misapprehends the evidence, the court's explication of its verdict, and the controlling principles discussed previously. Most significantly, the court credited the testimony of Williams that N had suffered, inter alia, a small laceration that started outside the right labia majora and extended inside the labia majora, as well as a contusion inside the labia majora, and found that the defendant had caused such injuries. Consistent with the principles set forth in *State* v. *Albert*, supra, 252 Conn. 809, such evidence demonstrates sufficient penetration of the labia majora to constitute vaginal intercourse under § 53a-65 (2). See id., 812 ("slight penetration does not require vaginal penetration"); see also id., 813 ("we disagree with the defendant's suggestion that a defendant must put his finger or his fingers 'beyond the labia

majora' for his conduct to fall within the definition of sexual intercourse in § 53a-65 [2]'"). With regard to the defendant's challenge to the court's statement that "those injuries were inflicted by the application of physical force on those areas by the defendant," the defendant effectively ignores that such finding was relevant to and necessary for the court's finding that the defendant was guilty of *aggravated* sexual assault of a minor pursuant to § 53a-70c (a) (3), namely, that the defendant "used *violence* to commit [the] offense" of sexual assault in violation of § 53a-70 (a) (2). The court had explained previously that because "violence" is not a defined term for purposes of § 53a-70c (a) (3), it was using a dictionary definition, i.e., "exertion of physical force so as to injure or abuse." On the basis of the foregoing, we conclude that there was sufficient evidence to support the defendant's conviction of aggravated sexual assault of a minor.

Accordingly, construing the evidence in the light most favorable to sustaining the court's finding of guilt, we conclude that there was sufficient evidence from which the court reasonably could have found beyond a reasonable doubt that the defendant was guilty of aggravated sexual assault of a minor.

II

Next, the defendant claims on appeal that his conviction of both assault in the first degree and manslaughter in the first degree violates the constitutional guarantee against double jeopardy. Specifically, the defendant argues that his conviction of those charges arises out of the same transaction and that the assault charge is a lesser included offense of the manslaughter charge. Accordingly, the defendant submits that, under a *Blockburger*[13] analysis, his conviction of assault in the first degree should be vacated. We agree.

[13] See *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

As a threshold matter we must determine whether this claim was preserved for review. The defendant argues that because it was raised prior to sentencing, the claim was preserved. We agree with the state, however, that the claim was not preserved because it was not raised distinctly at trial. See *State* v. *Smith*, 100 Conn. App. 313, 320 n.6, 917 A.2d 1017 ("[a] party cannot preserve grounds for reversing a trial court decision by raising them for the first time in a postverdict motion" [internal quotation marks omitted]), cert. denied, 282 Conn. 920, 925 A.2d 1102 (2007). Irrespective of the fact that the claim was unpreserved, it is still reviewable pursuant to *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). "Under *Golding*, a defendant may prevail on an unpreserved claim only if 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." (Internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 688–89, 127 A.3d 147 (2015). Because the record is adequate for our review, and the defendant's claim that his conviction violated his right against being placed in double jeopardy is of constitutional magnitude, our inquiry focuses on whether the violation alleged by the defendant exists and deprived him of a fair trial. See id., 689.

The following additional facts and procedural history are relevant to our analysis of this issue. The defendant was charged by long form information with, inter alia, one count of assault in the first degree and one count of manslaughter in the first degree. With respect to the

assault charge, the state alleged: "[O]n or about June 27, 2013 . . . [the defendant] acting under circumstances evincing an extreme indifference to human life, did recklessly engage in conduct which created a risk of death to another person, to wit: [N] . . . and did thereby cause serious physical injury to [N] . . . ."[14] As to the charge of manslaughter in the first degree, the state alleged: "[O]n or about June 27, 2013 . . . [the defendant] under circumstances evincing an extreme indifference to human life, did recklessly engage in conduct which created a grave risk of death to another person, to wit: [N] . . . and did thereby cause the death of [N] . . . ."[15] At sentencing, the trial court, sua sponte, questioned whether the defendant could be convicted of both manslaughter in the first degree and assault in the first degree.

"The Court: It would seem to the court that the assault conviction on the first count is a lesser included offense of the manslaughter conviction on the fourth count. . . .

"[The Prosecutor]: Your Honor, the state's position with respect to the assault and the manslaughter [convictions] . . . is that they are two separate offenses. . . .

"[O]ur position is that the defendant is to be sentenced separately on the assault in the first degree and the manslaughter because we have the head injury

[14] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (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 . . . ."

[15] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

which is separate from the forceful poking which caused the injuries to the bowel and the mesentery which are the cause of death. But we have the trauma to both sides of the head and the 100 milliliters of blood pooling in the child's skull cavity, as opposed to the 300 milliliters of blood pooling in her abdominal cavity. So it's our position that we have a separate incident and, therefore, separate sentencing. . . .

"The Court: All right. Well, I'm convinced by the state's argument that the assault in the first degree—more specifically, the head injury—did not contribute to the cause for death and so that may be a valid consideration. Accordingly, the court will not vacate the conviction on the assault in the first degree."

In concluding, however, that the defendant's conviction of assault in the first degree and manslaughter in the first degree arose from separate transactions, the court failed to consider that the state, during closing argument, relied on the injuries to N's abdomen to support its position that the defendant was guilty of both counts.[16] In its appellate brief, the state concedes that, in light of its closing argument, the assault conviction

[16] During closing argument the state argued: "As to count one, Your Honor, the state has proven beyond a reasonable doubt each and every element of the offense, and he is guilty. When the defendant inflicted blunt force trauma to [N's] head, that was reckless conduct and that was conduct in and of itself that created a risk of [N's] death. The head trauma did not cause her death, per se, but it did create the risk of her death, and it was reckless. And this repetitive trauma to her abdomen was also reckless and that indeed did, not only cause, but create a risk in [N's] death as well.

* * *

"And, finally, Your Honor, as to count four, manslaughter in the first degree, we have proven each and every element beyond a reasonable doubt.

"When the defendant engaged in repetitive trauma to [N's] abdomen, he engaged in reckless conduct. And that conduct also created a grave risk of death and ultimately caused her death. Dr. Williams testified that she ruled the cause of death was fatal child abuse syndrome with blunt trauma, and she called it a homicide, and she indicated that there were hemorrhagic and necrotic injuries and that she bled to death, which caused her death."

and manslaughter conviction did arise out of the same transaction.[17] Nonetheless, the state contends that we should still affirm the defendant's conviction of assault in the first degree because it is not a lesser included offense of the manslaughter conviction. In response, the defendant argues that one cannot commit manslaughter, as it is charged in this case, without also committing an assault and, therefore, the conviction for assault in the first degree violates his constitutional right against double jeopardy.

Before addressing this claim, we note that "[o]ur standard of review for analyzing constitutional claims such as double jeopardy violations prohibited by the fifth amendment to the United States constitution presents an issue of constitutional and statutory interpretation over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Arokium*, 143 Conn. App. 419, 434, 71 A.3d 569, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013). "The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. . . . Although the Connecticut constitution has no specific double jeopardy provision, we have held that the due process guarantees of [the Connecticut constitution] include protection against double jeopardy. . . . We have further recognized that the [d]ouble [j]eopardy [c]lause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And

[17] "The state agrees with the defendant that the conduct alleged in count one and count four arose out of the same act or transaction because the state, in closing argument, relied on the injuries to N's abdomen to support both the assault and manslaughter convictions."

it protects against multiple punishments for the same offense." (Internal quotation marks omitted.) *State* v. *Underwood*, 142 Conn. App. 666, 681, 64 A.3d 1274, cert. denied, 310 Conn. 927, 78 A.3d 146 (2013).

"Double jeopardy analysis in the context of a single trial is a [two step] process, and, to succeed, the defendant must satisfy both steps. . . . First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met. . . . At step two, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 655, 182 A.3d 625 (2018). "The test used to determine whether one crime is a lesser offense included within another crime is whether it is not possible to commit the greater offense, in the manner described in the information . . . without having first committed the lesser . . . . This . . . test is satisfied if the lesser offense does not require any element which is not needed to commit the greater offense. . . . Therefore, a lesser included offense of a greater offense exists if a finding of guilt of the greater offense necessarily involves a finding of guilt of the lesser offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 538, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017).

"When conducting the first inquiry, however, it is not uncommon that we look to the evidence at trial and to the state's theory of the case." *State* v. *Schovanec*, 326 Conn. 310, 327, 163 A.3d 581 (2017). The second step of the *Blockburger* test, however, "is a technical one and examines only the statutes, charging documents, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 254, 267, 154 A.3d 572, cert. denied, 324 Conn. 926, 155 A.3d 1269 (2017). As we have already acknowledged, the state concedes that the defendant's conviction of the charges at issue arises from the same transaction. We limit our inquiry, therefore, to the second step in the analysis: Whether assault in the first degree, as charged, is a lesser included offense of manslaughter in the first degree, and, thus, the two crimes constitute the same offense under *Blockburger*.

The defendant argues that his conviction of assault in the first degree and manslaughter in the first degree constitutes the same offense because one cannot commit manslaughter without also committing assault in the first degree as it was charged in this case. In asserting his claim, the defendant acknowledges that there is an obvious difference with respect to the result element for both crimes. Specifically, to be convicted of manslaughter, the state must show that the defendant caused the death of another person, whereas a conviction of assault in the first degree only requires proof of serious physical injury.[18] Nevertheless, the defendant submits that one cannot cause the death of another in the manner described in the information, without first causing serious physical injury to that person. We agree.

[18] General Statutes § 53a-3 (4) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ."

The state argues that this case is controlled by *State* v. *Alvarez*, 257 Conn. 782, 783, 778 A.2d 938 (2001), in which our Supreme Court affirmed a defendant's conviction of both manslaughter and assault in the first degree arising from the same transaction. Upon review, however, we believe that *Alvarez* is inapposite. Although the defendant in *Alvarez* was charged with both manslaughter in the first degree and assault in the first degree, he was charged with assault under § 53a-59 (a) (1) and (4). Pursuant to this charge, the state was required to prove that "the defendant with intent to cause serious physical injury to [the victim] *while aided by two or more persons actually present did cause serious physical injury* [*to the victim*] . . . *by means of a dangerous instrument* . . . ." (Emphasis added; internal quotation marks omitted.) Id., 790. Here, the defendant was charged with assault in the first degree under subsection (a) (3), which only requires proof that the defendant "under circumstances evincing an extreme indifference to human life . . . recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ." As the defendant in this case correctly contends, proof that he caused the victim serious physical injury is subsumed within the evidentiary requirement, under the manslaughter charge, that he caused the victim's death. Unlike *Alvarez*, the state was not required to prove an additional element, e.g., the assistance of two or more persons or the use of a dangerous instrument, to convict the defendant of assault in the first degree.

Additionally, the state argues that the defendant's double jeopardy claim fails because there is no legal requirement that a defendant actually inflict serious physical injury in order to be held criminally liable for causing the death of another. We believe that this

assertion conflates the principle that one can be responsible for a person's death without physically striking the victim; see, e.g., *State* v. *Spates*, 176 Conn. 227, 232, 405 A.2d 656 (1978) (finding trial court did not err when it instructed that jury "could convict the defendant of manslaughter if [it] found that the defendant inflicted emotional injury, stress or trauma which proximately caused [victim's] death" [internal quotation marks omitted]); with the present issue of whether one can cause another's death without also causing that person serious physical injury. Considering the theoretical possibilities in this case, and not the evidence, as we are required to do in the second step of the *Blockburger* analysis, we are aware of no conceivable circumstance in which the defendant could have caused N's death without also having caused her serious physical injury as it is defined under § 53a-3 (4). Accordingly, we conclude that a constitutional violation exists that deprived the defendant of a fair trial.[19]

As to *Golding*'s fourth prong, we further conclude, and the state does not argue to the contrary, that the error is not harmless. Although we acknowledge that the court sentenced the defendant to serve a concurrent sentence for the lesser and greater offenses, we recognize that the conviction of both of the separate offenses, in their own right, impermissibly harms the defendant. See *State* v. *Nelson*, 118 Conn. App. 831, 855, 986 A.2d

[19] We note that "[t]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. . . . Where there is no clear indication of a contrary legislative intent, however, the *Blockburger* presumption controls." (Internal quotation marks omitted.) *State* v. *Vasquez*, 66 Conn. App. 118, 125, 783 A.2d 1183, cert. denied, 258 Conn. 941, 786 A.2d 428 (2001). The state cites no authority, nor are we aware of any, that supports the conclusion that the legislature intended to permit multiple punishments for a single transaction involving the offenses charged in this case. We defer, therefore, to the *Blockburger* presumption that the defendant's conviction of assault in the first degree, as charged, is a lesser included offense of manslaughter in the first degree.

311, cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010). Thus, pursuant to *State* v. *Polanco*, 308 Conn. 242, 255, 61 A.3d 1084 (2013), we remand the case to the trial court with direction to vacate the conviction of the lesser included offense of assault in the first degree.[20]

The judgment is reversed only as to the conviction of assault in the first degree and the case is remanded with direction to vacate that conviction; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BILLY RAY JONES (AC 41584)

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

Syllabus

Convicted of the crimes of murder, carrying a pistol without a permit and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed. On appeal, he claimed, inter alia, that the trial court erred in its charge to the jury by failing to provide a special credibility instruction with respect to a witness, S, regarding the jailhouse informant exception to the general rule that a criminal defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely. S was incarcerated at the time he provided certain information to the police about a confession the defendant had made to him the day after the shooting while they were watching television, and in consideration for talking to the police about the defendant's confession and what he had seen on the night of the shooting incident, S was released

[20] In vacating the defendant's conviction of assault in the first degree, we note that the sentence imposed for this conviction was to run concurrent with the sentence imposed for the conviction of aggravated sexual assault of a minor. Accordingly, it is unnecessary to remand this case to the trial court for resentencing. See *State* v. *Graham S.*, 149 Conn. App. 334, 346, 87 A.3d 1182 ("we have held that when some of a defendant's convictions are reversed, and the trial court clearly intended that a nonreversed conviction control its sentencing scheme, remand for resentencing is not necessary where . . . vacating the accompanying sentences will not frustrate the trial court's intent" [internal quotation marks omitted]), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

from jail without having to make a bond payment and later received a favorable sentence on his felony charge. *Held*:

1. The trial court did not err in denying the defendant's request for a special credibility instruction regarding jailhouse informants with respect to the testimony of S: although S was incarcerated when he initiated contact with the police, he was not a jailhouse informant, as he testified about events that he had witnessed and a confession that took place while he and the defendant were socializing outside of the prison environment, and he was not a fellow inmate of the defendant and did not testify as to a confession that the defendant made while they were fellow inmates, and although the defendant, who conceded that S was not a jailhouse informant, claimed that S's testimony was similar to that of a jailhouse informant, this court declined to extend to the present case the jailhouse informant exception, which applies only where a prison inmate has been promised a benefit by the state in return for his or her testimony regarding incriminating statements made by a fellow inmate; moreover, the jury was aware of S's involvement in the criminal justice system and his expectation that he would receive consideration in exchange for talking to the police, and, therefore, the general credibility instruction given by the trial court was sufficient.

2. The defendant's claim that the trial court erred with respect to its jury instruction on eyewitness identification was unavailing; it was not reasonably probable that the jury was misled by the court's instructions, as two witnesses who had made identifications of the defendant knew the defendant prior to seeing him on the night of the crime, and, as a result, their identifications of the defendant did not give rise to the risk of misidentification that the defendant's requested instructions were specifically designed to address, and the trial court properly tailored the instructions to adapt to the issues of the case.

Argued November 28, 2018—officially released February 5, 2019

Procedural History

Two part information charging the defendant, in the first part, with the crimes of murder and carrying a pistol without a permit, and, in the second part, with criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Mark Rademacher, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Billy Ray "BJ" Jones, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). On appeal, the defendant claims that the trial court erred in its charge to the jury by failing to provide (1) a special credibility instruction and (2) a specific instruction on the dangers of eyewitness identification. We disagree, and accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 21, 2010, the defendant was outside of the Charles F. Greene Homes housing complex (Greene Homes), a federally funded housing project located in Bridgeport. The victim, Michael "Booman" Williams, and several other people, including children, were in the playground area of the Greene Homes. Just before 11 p.m., the defendant approached the victim from behind while in the playground area and shot at the victim at least twice, killing him.[1]

Martin Vincze, a Bridgeport police officer, responded to a 911 call that had reported the shooting. When Officer Vincze arrived at the Greene Homes, he found the victim lying on the ground with a gunshot wound to the head. Although there were twenty to thirty people at the scene, only one person was willing to speak to

[1] The victim died from a gunshot wound to the head. Another bullet grazed the victim's right forearm.

Officer Vinzce.[2] James Kennedy, a Bridgeport police detective, recovered a nine millimeter spent cartridge casing from the playground area.

On June 22, 2010, the following day, the defendant was with Larry Shannon watching television at the Marina Village housing project in Bridgeport. A news story about the shooting came onto the television, at which point the defendant confessed to Shannon. The defendant, while holding a nine millimeter Ruger handgun,[3] told Shannon that he had walked up to the victim, said "what's poppin' now?," then fired his gun.

On June 25, 2010, John Tenn, a Bridgeport police detective, questioned the defendant about the victim's death. The defendant told Detective Tenn that he did not know the victim and had never heard the name "Booman." In addition, the defendant stated that he was with Benjamin Beau at the Washington Village housing complex in Norwalk on the night of June 21, 2010. Later that same day, however, Detective Tenn questioned Chanel Lawson, the mother of the defendant's son, who lived in the Greene Homes. Lawson told Detective Tenn that the defendant knew the victim. A few weeks later, Beau was questioned by Detective Tenn and denied being with the defendant on the night of June 21, 2010.[4]

In September, 2012, over two years later, police officers approached Angela Teele while she was at work

[2] Officer Vincze explained at trial that he was not surprised that "people just walked away from [him]" because "[i]t's a common thing in housing complexes."

[3] Marshal Robinson, a firearms expert, testified that the nine millimeter spent cartridge casing found at the scene could have been fired by at least fifty types of guns, including a nine millimeter Ruger handgun.

[4] The police first talked to Beau on July 5, 2010. Beau denied that he was with the defendant on that night and denied knowing the defendant. At trial, Beau acknowledged that he had met the defendant while they were in school together, but maintained that he was not with the defendant on the night of June 21, 2010.

and asked to speak to her about the defendant.[5] Teele had lived in the Greene Homes in June, 2010, and had witnessed the defendant shoot the victim. Specifically, Teele recalled seeing the defendant in the vicinity of building three of the Greene Homes between 10 and 11 p.m. on the night of June 21, 2010.[6] She observed that the defendant was wearing a black hoodie and blue shorts. Teele also recalled seeing the victim play with two children in the playground area of the Greene Homes, which was located at the side of building three. Teele briefly lost sight of the defendant as he walked around one of the buildings, then watched him throw on his hood as he went into the playground area. Once the defendant went into the playground area, Teele witnessed the defendant approach the victim, whose back was turned, and shoot the victim in the head.[7] Teele observed that the defendant was about two or three feet away from the victim when he shot the victim with a pistol. Teele saw the defendant run out of the playground area toward the back of building three after the shooting.

In February, 2013, Shannon contacted the police. Although Shannon previously had not wanted to talk to the police,[8] he was arrested and incarcerated on an unrelated felony charge and sought to give information to police in the hope of receiving favorable treatment in his case. In addition to telling the police about the

[5] Detective Tenn's investigation was prolonged due to a lack of forthcoming witnesses willing to speak to the police about what they had seen. Teele explained that she did not talk to police until September, 2012, because "[she] was told if [she] said something that things was gonna happen," and that she feared for her safety. Similarly, Shannon explained that it was "not acceptable" to talk to police and that he feared retaliation.

[6] Although the shooting occurred at night, several witnesses, including Teele, described the lighting at the Greene Homes as "spotlight" or "stadium" lighting.

[7] Specifically, Teele stated that the defendant "walked up on Booman, Booman back was turned, and [the defendant] shot him."

[8] See footnote 2 of this opinion.

defendant's confession, Shannon also explained that he saw the defendant on the night of June 21, 2010. Shannon was at the Greene Homes and walked to Junco's, a nearby market, to get food. After eating at Junco's, Shannon walked back toward building four of the Greene Homes. During his walk back, Shannon saw the defendant in the area between buildings two and three. He observed that the defendant was wearing blue jeans and a hoodie, with the hood up on his head, and was walking toward the back of building three. After seeing the defendant, Shannon continued to walk toward building four, and shortly thereafter heard two or three gunshots. Shannon tried to run because he did not know where the gunshots were coming from, but he had difficulty running due to a recent surgery, and ended up falling to the ground. Shannon got up, walked around the corner of building four, and saw the victim slumped over in the playground area.

In June, 2015, the defendant was arrested, and he was subsequently charged with murder, carrying a pistol without a permit, and criminal possession of a firearm. A jury trial followed and the defendant was found guilty of all charges. The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of fifty years of imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court erred when it failed to provide a special credibility instruction regarding Shannon's testimony. Specifically, the defendant argues that the jailhouse informant instruction, recognized in *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), should extend to cases like his, where a witness such as Shannon is incarcerated at the time he provides information to the police for the purposes

of getting out of jail and receiving a favorable disposition of his pending criminal charges.[9] We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. At trial, Shannon was questioned at length about the benefits he received as a result of talking to police and testifying at the defendant's trial. Shannon explained that he decided to talk to the police in February, 2013, because he had been arrested on an unrelated felony charge and was being held at the Bridgeport Correctional Center. Shannon testified that, in consideration for talking to the police about the defendant's confession and what he had seen on the night of June 21, 2010, he was released from the Bridgeport Correctional Center without having to make a bond payment. In addition, Shannon stated that he received a favorable sentence on his felony charge.[10]

[9] The defendant also claims that, "whether or not it was error to fail to give a special credibility instruction, it was error for the court to fail to give the jurors guidance on assessing Shannon's credibility by telling them about the nine factors contained in [the] defendant's request to charge." See footnote 10 of this opinion. Because we conclude that the defendant was entitled only to a general credibility instruction under *State* v. *Diaz*, 302 Conn. 93, 25 A.3d 594 (2011), and *State* v. *Salmond*, 179 Conn. App. 605, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018), we reject the defendant's claim.

[10] In addition to Shannon's testimony during direct examination about the benefits he received in consideration for talking to the police, defense counsel cross-examined Shannon regarding his motive to talk to the police and testify at trial. On cross-examination, the following colloquy took place:

"[Defense counsel]: Jail is not a place that you like to be, right?

"[Shannon]: Yes.

"[Defense counsel]: And you wanted to get out of jail, right?

"[Shannon]: Yes.

"[Defense counsel]: Okay. And so it's at that point that you reached out to detectives and said that you have some information about this homicide that occurred on June 21, 2010, right?

"[Shannon]: Yes.

"[Defense counsel]: And you reached out to them because you were hoping that they could give you some favorable treatment on your jail situation or your criminal . . . charge, right?

"[Shannon]: Yes.

"[Defense counsel]: In fact, at the time you were . . . charged with a felony, right?

"[Shannon]: Yes.

On January 23, 2017, the defendant submitted a written request to charge. He requested a special credibility instruction with respect to Shannon's testimony.[11] The defendant conceded that there was no controlling legal authority requiring such an instruction, but nonetheless argued, as he does on appeal, that the jailhouse informant exception recognized in *Patterson* should extend to cases such as his. Specifically, he argued that "Larry

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"[Defense counsel]: And shortly after that, you were released from jail without having to pay a bond, right?

"[Shannon]: Yes.

"[Defense counsel]: And a bond is money that you have to pay to get out of jail, if you're facing pending charges?

"[Shannon]: Yes.

"[Defense counsel]: You didn't have the money to . . . get out of jail, right?

"[Shannon]: No.

"[Defense counsel]: Okay. So you were hoping to trade the information that you have in order to . . . accomplish that, right?

"[Shannon]: Yes.

"[Defense counsel]: And, in fact, you were also looking for some favorable treatment on your case, right?

"[Shannon]: Yes."

[11] The defendant requested the following instruction: "A witness who testified in this case, Larry Shannon, was incarcerated and was awaiting trial for some crimes other than the crime involved in this case at the time he first provided information to police. You should look with particular care at the testimony of the witness and scrutinize it very carefully before you accept it. You should consider the credibility of this witness in the light of any motive for testifying falsely and inculpating the accused.

"In considering the testimony of Larry Shannon, you may consider such things as: (1) [t]he extent to which his testimony is confirmed by other evidence; (2) [t]he specificity of the testimony; (3) [t]he extent to which the testimony contains details known only by the perpetrator; (4) [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; (5) [t]he informant's criminal record; (6) [a]ny benefits received in exchange for the testimony or providing information to the police or prosecutor; (7) [w]hether the witness expects to receive a benefit in exchange for the testimony or providing information to the police or prosecutor, regardless of whether such an agreement actually exists; (8) [w]hether the witness previously provided reliable or unreliable information; [and] (9) [t]he circumstances under which the witness initially provided the information to the police or the prosecutor, including whether the witness was responding to leading questions." The nine factors that the defendant cited were set forth in *State* v. *Arroyo*, 292 Conn. 558, 570, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), a case involving jailhouse informants.

[Shannon's testimony] is no less suspect than the testimony of an accomplice or jailhouse snitch, given the unique circumstances of how and when it was disclosed, and the potential motivations for the witness to provide information he believes will be helpful to the state regardless of whether that information is accurate or based on personal knowledge."

The trial court declined to provide the jury with the special credibility instruction. Rather, in its final charge to the jury, the court provided the jury with a general witness credibility instruction. The court instructed in relevant part: "You should consider their appearance, conduct and demeanor while testifying and in court, and any interest, bias, prejudice or sympathy which a witness may apparently have for or against the state, or the accused or in the outcome of the trial. . . ."

We turn to the legal principles that guide our review of the defendant's claim. "It is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it 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. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Citation omitted; internal quotation marks omitted.) *State* v. *Salmond*, 179 Conn. App. 605, 627–28, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018).

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses

and highlighting his or her possible motive for testifying falsely." *State* v. *Ortiz*, 252 Conn. 533, 561, 747 A.2d 487 (2000); accord *State* v. *Colon*, 272 Conn. 106, 227, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). Our Supreme Court has recognized three exceptions to this general rule, including the jailhouse informant exception. See *State* v. *Diaz*, 302 Conn. 93, 101–102, 25 A.3d 594 (2011).

Our Supreme Court adopted the jailhouse informant exception in *Patterson*, holding that a defendant is entitled to a special credibility instruction in cases where a prison inmate "has been promised a benefit by the state in return for his or her testimony" regarding incriminating statements made *by a fellow inmate*. *State* v. *Patterson*, supra, 276 Conn. 469; see also *State* v. *Diaz*, supra, 302 Conn. 102 ("a jailhouse informant is a prison inmate who has testified about confessions or inculpatory statements made to him *by a fellow inmate*" [emphasis added]).

"In *Diaz*, our Supreme Court declined to interpret its decision in *Patterson* as [requiring] a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that [he] witnessed outside of prison . . . reasoning that such an exception would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Salmond*, supra, 179 Conn. App. 630.

In the present case, the defendant concedes that Shannon was not a jailhouse informant. Although Shannon was incarcerated at the Bridgeport Correctional Center when he initiated contact with the police, he was not a fellow inmate of the defendant. Shannon did not testify as to a confession that the defendant made while they were fellow inmates. See *State* v. *Diaz*, supra,

302 Conn. 102 ("*Patterson* has not been applied to require a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that he or she witnessed outside of prison, as distinct from confidences that the defendant made to the witness while they were incarcerated together"). Rather, Shannon testified about events that he had witnessed and a confession that took place while both of them were socializing outside of the prison environment.

Moreover, the defendant recognizes that requiring a special credibility instruction for Shannon's testimony would be an expansion of the exception recognized in *Patterson*. The defendant nonetheless argues that, although a special credibility instruction is not required under existing law, the trial court's failure to provide such an instruction was in error because Shannon's testimony was "similar to [that of] a classic jailhouse informant," and presented "[t]he same concerns that require . . . [a] special credibility instruction for such a witness . . . ." Specifically, he argues that Shannon's testimony was unreliable because of "[t]he pressure of the prison environment" and "[t]he introduction of benefits in exchange for testimony . . . [which] has an undeniable corrupting influence on the criminal process by encouraging those with little to lose to fabricate damaging testimony in order to reap the government's reward of freedom."

Following the appellate guidance in *Diaz* and *Salmond*, we decline to extend the jailhouse informant exception to the facts of the present case.[12] In *Diaz*

[12] The defendant attempts to distinguish the present case from *Diaz* by pointing out that the claims involving nonjailhouse informants in *Diaz* were not preserved and were therefore reviewed by the court under the plain error doctrine. We are not persuaded. In *Diaz*, our Supreme Court concluded that, in cases involving nonjailhouse informants, defendants are not entitled to a special credibility instruction. The court in *Diaz* concluded that "the trial court's failure to give a special credibility instruction concerning the testimony of [the nonjailhouse informants] pursuant to *Patterson* or *Arroyo*

and *Salmond*, the courts explained that "when the jury [is] aware of the [nonjailhouse informant] witness' involvement in the criminal justice system and their expectations that they would receive consideration in exchange for their testimony, a general credibility instruction is sufficient." (Internal quotation marks omitted.) *State* v. *Salmond*, supra, 179 Conn. App. 630; see *State* v. *Diaz*, supra, 302 Conn. 103.

In the present case, the jury was repeatedly advised that Shannon was incarcerated at the Bridgeport Correctional Center at the time he initiated contact with the police and that, in consideration for his cooperation, he was released from jail without having to make a bond payment and later received a favorable sentence on his felony charge. Shannon testified at trial regarding his motive to talk to the police, as well as the benefits he received, on both direct examination and cross-examination. See footnote 9 of this opinion. Moreover, during closing arguments, defense counsel told the jury how Shannon's motivations and favorable treatment

would not have been improper *even if the defendant had requested such an instruction*." (Emphasis added.) *State* v. *Diaz*, supra, 302 Conn. 104. Moreover, a preserved claim was subsequently considered and rejected by this court in *Salmond*.

The defendant also attempts to distinguish *Salmond* from the present case because *Salmond* involved a witness' testimony about events he had personally witnessed from his "front row seat." (Internal quotation marks omitted.) *State* v. *Salmond*, supra, 179 Conn. App. 630. The defendant argues that his case is different because, at his trial, Shannon testified about a confession in addition to events that he had personally witnessed. We are not persuaded. The defendant's confession to Shannon on June 22, 2010, like the events that Shannon had witnessed the night before, had taken place outside of the prison environment.

Simply put, there is no law to support the defendant's contention that he was entitled to a special credibility instruction under the circumstances of this case. Although the defendant cites to *State* v. *Arroyo*, supra, 292 Conn. 558, in support of his argument that this court should extend *Patterson*, his argument is misplaced. *Arroyo* involved jailhouse informants. Moreover, our Supreme Court, when it had the opportunity to do so, declined to extend *Arroyo* in *Diaz*. See *State* v. *Diaz*, supra, 302 Conn. 103–104.

could be taken into consideration when determining his credibility.[13] Accordingly, we conclude that the jury was aware of Shannon's involvement in the criminal justice system and his expectation that he would receive consideration in exchange for talking to the police. Therefore, under *Diaz* and *Salmond*, a general credibility instruction is sufficient.[14]

The court, in its charge to the jury, gave a general credibility instruction. In that instruction, the jury was told to consider "any interest, bias, prejudice or sympathy which a witness may apparently have for or against the state, or the accused or in the outcome of the trial." See *State* v. *Salmond*, supra, 179 Conn. App. 631. We therefore conclude that the court did not err in denying the defendant's request for a jailhouse informant instruction.

[13] Defense counsel told the jury: "[T]his case . . . is a case that really comes down to the reliability and believability or the lack thereof of two witnesses; Angela Teele and Larry Shannon . . . . I think you have to consider Larry Shannon's motivations as well in this case. Larry Shannon's a multiple time convicted felon and you can take that into account in assessing his credibility. Like Angela Teele, he doesn't come forward in this case for more than two years. I think it's about two and a half years at the point when he comes forward and provides information to the police. He contacts police only when he has something to gain for himself. He's in jail, he doesn't like to be in jail, he told you that. He's already been arrested for a felony charge. He's already on probation for a felony charge. He talks to police and then all of a sudden he's let out of jail, gets a favorable disposition on his criminal cases, he never has to go back to jail. Things work out pretty well for Larry Shannon. And those are the sorts of things that you can consider when you're sizing up his credibility and his believability and whether he's really telling the truth or whether he's coming forward two and a half years later just to try and help himself out at that point. You also heard that currently he's on probation. He has a five year sentence suspended that's hanging over his head. It's up for you guys to consider whether that's motivating him in any way now."

[14] The defendant requests that we "reject [this court's] crimped approach [in *Salmond*]." It is this court's policy to decline to overrule a decision made by another panel of this court absent en banc consideration. *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

II

The defendant additionally claims that the trial court erred with respect to its jury instruction on eyewitness identification. Specifically, the defendant argues that "[a] specific instruction on the dangers of eyewitness identification was required in this case . . . ." We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. In September, 2012, Teele was at work when the police approached her and asked her whether she would be willing to speak to them. Once Teele said that she was willing to talk, the police introduced the case to her using the defendant's nickname, "BJ." When Teele later met with the police and told them what she had witnessed on the night of June 21, 2010, the police presented her with a photographic array. From that photographic array, Teele identified the defendant as the individual that she saw shoot the victim.[15] When

[15] On appeal, the defendant claims that this identification procedure was suggestive because the police had referred to "BJ" before conducting the photographic array. At trial, during the defendant's cross-examination of Detective Tenn, the following colloquy took place:

"[Defense counsel]: [O]ne of the things you're trained on is the proper way to conduct a witness identification procedure?

"[Detective Tenn]: Yes.

"[Defense counsel]: And one of the things that you're trained is that when you're conducting an interview with a potential witness, you never want to tell the witness the name of the . . . suspect, right?

"[Detective Tenn]: Right.

"[Defense counsel]: Cause . . . you don't want to tip your hand or do anything that might influence the witness to pick the suspect out as the perpetrator, right?

"[Detective Tenn]: Correct.

"[Defense counsel]: You want to make sure that if they pick somebody out of identify somebody, that you're not influencing them in any way and that it's actually coming from them, right?

"[Detective Tenn]: That's right.

"[Defense counsel]: Okay. Because otherwise, it could lead to a mistake and a false identification, right?

"[Detective Tenn]: Right."

Shannon spoke to the police in February, 2013, he viewed a series of photographs and identified the defendant as the individual who confessed to the shooting and whom Shannon saw in the Greene Homes on the night of June 21, 2010.

Both Teele and Shannon knew the defendant prior to seeing him in the Greene Homes on June 21, 2010.[16] Teele had known the defendant for a "couple [of] months" and had seen him around the Greene Homes a "couple [of] times" per week during that time. Similarly, Shannon had known the defendant for "two [to] three months" and had seen him in the Greene Homes on "five [or] six different occasions." Accordingly, both Teele and Shannon had known the defendant before making their identifications in September, 2012, and February, 2013.

In the defendant's written request to charge, the defendant requested instructions regarding specific factors affecting the accuracy of eyewitness identifications. Specifically, the defendant requested that the

During his closing argument, the defendant highlighted Detective Tenn's testimony and how it related to Teele's identification of the defendant: "[Y]ou heard from Detective Tenn that police are trained when they're interviewing a witness to a crime, that they're not to sort of tip their hand or tell the witness who it is they believe the perpetrator of the crime is, because that could lead to a mistaken identification. It could lead to . . . the witness identifying the person that the witness believes the police want the witness to identify, and that's what happened here. I mean, they said to her, we want to talk to you about the BJ case. Maybe they meant to say, Booman. But the bottom line is, they . . . provided the name to her. So I think you have to ask yourself did that suggest to her in any way who or what they . . . wanted her to say or identify in the case. Detective Tenn told you that that's where a procedure is completely improper."

[16] The defendant suggests that the witnesses did not know the defendant, and merely "knew of" him through other people. This assertion is not supported by the record. Both Teele and Shannon testified that they personally had seen the defendant on multiple occasions. Although Teele did, at one point, say that she "knew of" the defendant, she shortly thereafter stated that she had "seen him around in [the Greene Homes]."

court instruct the jury about the capacity and opportunity of a witness to observe the perpetrator, including the length of time available to the witness to make the observations, the distance between the witness and the perpetrator, the lighting conditions at the time of the offense, whether the witness had seen or known the person in the past, the history, if any, between them, including any degree of animosity, and whether anything distracted the attention of the witness during the incident. The defendant also requested that the court instruct the jury to consider the length of time that elapsed between the occurrence of the crime and identification of the defendant by the witness, and the suggestibility of the procedure used when the witness first viewed and identified the defendant.[17]

In its final charge to the jury, the court instructed: "In this case, the state has presented evidence that certain witnesses identified the defendant in connection with the crime charged. These included Angela Teele, who testified she saw the defendant shoot the decedent, and Larry Shannon, who testified he saw the defendant in close proximity to the shooting location shortly before he heard gunshots. . . .

[17] In his written request to charge, the defendant also requested an instruction that the jury may "take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness." On appeal, the defendant claims that "[w]hen Shannon spoke with police in jail, they showed him a single photograph of the defendant rather than an array." The defendant, however, mischaracterizes the identification procedure. Shannon was not shown just a single photograph of the defendant. Rather, the police showed Shannon a *series* of photographs. This identification procedure is known as a sequential photographic array. See *State* v. *Williams*, 146 Conn. App. 114, 129 n.16, 75 A.3d 668 (2013) ("In a simultaneous array, all of the photographs are shown to the witness at one time. In a sequential array, the photographs are shown to the witness one at a time."), aff'd, 317 Conn. 691, 119 A.3d 1194 (2015). Thus, the identification procedure did not involve "the presentation of the defendant alone" as his requested jury charge suggested. Accordingly, by omitting the defendant's requested instruction, the trial court merely tailored the instruction to adapt to the evidence of the case.

"In arriving [at] a determination as [to] the matter of identification, you should consider all the facts and circumstances that existed at the time of the observation of the perpetrator by each witness. In this regard, the reliability of each witness is of paramount importance. Since identification testimony is an expression of belief or impression by the witness, its value depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later. It is for you to decide how much weight to place upon such testimony. In short, you must consider the totality of the circumstances affecting any identification.

"Remember, the state has the burden to not only prove every element of the crime, but also the identity of the defendant as the perpetrator of the crime. You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty."

We turn to the legal principles that guide our review of the defendant's claim. "Our Supreme Court has held that identification instructions are not constitutionally required and [e]ven if [a] court's instructions were less informative on the risks of misidentification . . . the issue is at most one of instructional error rather than constitutional error. A new trial would only be warranted, therefore, if the defendant could establish that it was reasonably probable that the jury was misled. . . . The ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present the case to a jury in such a way that injustice is not done to either party under the established rules of law.

"We review nonconstitutional claims of instructional error under the following standard. While a request to

charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Citations omitted; internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 410–11, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018). "Significantly, our Supreme Court in [*State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012)] emphasized that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on eyewitness testimony are warranted. . . . In reviewing the discretionary determinations of a trial court, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) Id., 416.

Our Supreme Court has recognized that, "although there are exceptions, identification of a person who is well known to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not well known to the eyewitness." *State* v. *Guilbert*, supra, 306 Conn. 259–60. Moreover, our Supreme Court has acknowledged that reviewing courts in other jurisdictions "have found no impropriety in trial courts' failures to give specialized jury instructions on eyewitness identifications when a witness had previous contact with the defendant." See

State v. *Williams*, 317 Conn. 691, 705 n.14, 119 A.3d 1194 (2015).

In the present case, both Teele and Shannon had known the defendant prior to seeing him on the night of June 21, 2010. Therefore, their identifications of the defendant did not give rise to the risk of misidentification[18] that the defendant's requested instructions were specifically designed to address.[19] By omitting the defendant's requested instructions, the trial court tailored the instructions to adapt to the issues of the case. See *State* v. *Crosby*, supra, 182 Conn. App. 411 ("as long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper" [internal quotation marks omitted]). Accordingly, we conclude that it is not reasonably probable that the jury was misled by the court's instructions.

The judgment is affirmed.

In this opinion the other judges concurred.

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[18] Rather, as the state emphasizes in its appellate brief, the issue would have been one of *false* identification, not *mis*identification. As defense counsel argued in his closing argument, "the case entirely hinges, in our view, on the credibility or lack thereof of Angela Teele and Larry Shannon." We note that the court sufficiently addressed witness credibility in its instruction to the jury. See part I of this opinion.

[19] The defendant argues that his "request to charge substantially tracked the language of the model [charge in *United States* v. *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)], which our state's judges have incorporated into the Judicial Branch's criminal charge on identification . . . to warn juries about the dangers inherent in eyewitness identification." He concedes that our Supreme Court "has never required that a *Telfaire* instruction must be given verbatim in order to ensure that the jury is properly guided . . . ." Nonetheless, the defendant argues that "the main principles of the court's charge must adequately cover the dangers of *mis*identification." (Emphasis added.)

JOHN MOSBY *v.* BOARD OF EDUCATION OF THE CITY OF NORWALK (AC 39959)

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

Syllabus

The plaintiff sought to recover damages for, inter alia, alleged discrimination from the defendant Board of Education of the City of Norwalk. After receiving a release of jurisdiction from the Commission of Human Rights and Opportunities on February 18, 2016, to file a complaint in the Superior Court, the plaintiff delivered the process to be served to a constable on May 27, 2016, who then served the defendant on May 31, 2016. Thereafter, the trial court granted the defendant's motion to dismiss the action on the ground that it was untimely because the plaintiff had failed to commence the action within ninety days of receiving the release of jurisdiction from the commission, as required by statute (§ 46a-101 [e]). On appeal to this court, the plaintiff claimed that his action was timely and, in the alternative, that it fell within the remedial savings statute (§ 52-593a). *Held* that the trial court properly dismissed the plaintiff's action as untimely: having received the release of jurisdiction on February 18, 2016, the plaintiff was required to commence his action by May 18, 2016, and although the plaintiff claimed that his action was timely because the complaint was dated May 9, 2016, and the summons was signed by the clerk on May 9, 2016, 2016, the record indicated that the defendant was not served until May 31, 2016, which commenced the action and occurred after the expiration of the statute of limitations; moreover, the action could not be saved by application of the remedial savings statute, which required that process be delivered to the constable by May 18, 2016, ninety days from the date of the release of jurisdiction from the commission, as the constable averred in his affidavit that he did not receive the process from the plaintiff until May 27, 2016, after the expiration of the statute of limitations, which made the remedial savings statute inapplicable.

Argued October 25, 2018—officially released February 5, 2019

Procedural History

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

John Mosby, self-represented, the appellant (plaintiff).

M. Jeffry Spahr, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, John Mosby, appeals from the judgment of the trial court dismissing his action against the defendant, the Board of Education of the City of Norwalk, alleging discrimination in violation of General Statutes §§ 46a-58, 46a-64 and 46a-82, and retaliation in violation of General Statutes § 46a-60. On appeal, the plaintiff claims that the court improperly dismissed his complaint as untimely. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On February 18, 2016, the plaintiff received a release of jurisdiction from the Commission on Human Rights and Opportunities (commission), with which he had filed a complaint. On May 27, 2016, the plaintiff delivered the process to be served to Constable Ernie Dumas, who then served the defendant on May 31, 2016. The plaintiff's complaint was returned to the court on June 13, 2016. On July 8, 2016, the defendant filed a motion to dismiss the complaint, arguing that the plaintiff had failed to commence his action within ninety days of receiving the release of jurisdiction from the commission as required by General Statutes § 46a-101 (e).[1] By order dated November 8, 2016, the court granted the defendant's motion to dismiss. From that judgment, the plaintiff now appeals.

[1] General Statutes § 46a-101 (e) provides: "Any action brought by the complainant in accordance with section 46a-100 shall be brought not later than ninety days after the date of the receipt of the release from the commission."

In its motion to dismiss, the defendant also argued that its motion to dismiss should be granted because the plaintiff had failed to return the process in a timely fashion and had failed to serve the appropriate individual. In its appellate brief, the defendant argues that the court could have dismissed the claim on the alternative ground that the plaintiff failed to make proper service of process. Because we agree with the court that the plaintiff did not commence his action in a timely manner, we need not address this issue.

"Before addressing the plaintiff's claims on appeal, we address the applicable standard of review, which is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 10–11, 12 A.3d 865 (2011).

On appeal, the plaintiff argues that his action was commenced in a timely manner. Additionally, the plaintiff indicates that he believes his action falls within the remedial savings statute, General Statutes § 52-593a,[2] which would render his action timely commenced if process had been delivered to the constable prior to the expiration of the statute of limitations and served within thirty days. The defendant disagrees, arguing that the commencement of an action under Connecticut law occurs with the service of the writ upon the defendant and that the defendant was served after the expiration of the statute of limitations. The defendant also

[2] General Statutes § 52-593a provides in relevant part: "(a) . . . [A] cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery.

"(b) In any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section."

argues that the remedial savings statute does not apply to the plaintiff's case because the plaintiff delivered the service to the constable after the expiration of the statute of limitations. We agree with the defendant.

Pursuant to General Statutes §§ 46a-100 and 46a-101 (e),[3] the plaintiff had ninety days from the date in which he received the release of jurisdiction from the commission to commence his action in the Superior Court. The plaintiff received the release of jurisdiction from the commission on February 18, 2016. The plaintiff, therefore, was required to commence his action by May 18, 2016. In his brief, the plaintiff indicates that his action was filed and served on May 9, 2016, and it was, thus, commenced in a timely manner. Although the plaintiff's complaint is dated May 9, 2016, and the summons was signed by a clerk of court on May 9, 2016, the record indicates that neither was the action filed nor was the defendant served on May 9, 2016.

It is well established that, in Connecticut, "an action is commenced not when the writ is returned but when it is served upon the defendant." (Internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004); see General Statutes § 52-45a.[4] The return of service indicates that Constable Dumas served

[3] General Statutes § 46a-100 provides in relevant part: "Any person who has filed a complaint with the commission in accordance with section 46-82 and who has obtained a release of jurisdiction in accordance with section 46a-83a or 46a-101, may bring an action in the superior court for the judicial district in which the discriminatory practice is alleged to have occurred, the judicial district in which the respondent transacts business or the judicial district in which the complainant resides . . . ." Pursuant to General Statutes § 46a-101(e), such action must be brought within ninety days of the receipt of the release of jurisdiction. See footnote 1 of this opinion.

[4] General Statutes § 52-45a provides: "Civil actions shall be commenced by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day, the date and place for the filing of an appearance and information required by the Office of the Chief Court Administrator. The writ shall be accompanied by the plaintiff's complaint. The writ may run into any judicial district and shall be signed by a commissioner of the Superior Court or a judge or clerk of the court to which it is returnable."

the defendant on May 31, 2016. Accordingly, the plaintiff commenced his action on May 31, 2016, after the expiration of the statute of limitations.

The plaintiff is correct in that, pursuant to the remedial savings statute, his action would not be lost if he had delivered the process to be served to Constable Dumas by May 18, 2016, ninety days from the date he received the release of jurisdiction from the commission. See General Statutes § 52-593a. In his affidavit, however, Constable Dumas averred that he received the summons and complaint from the plaintiff on May 27, 2016. As such, the plaintiff delivered the process to Constable Dumas after the expiration of the statute of limitations, making the remedial savings statute inapplicable to his case. We conclude, therefore, that the court properly dismissed the plaintiff's action.[5]

The judgment is affirmed.

[5] In its order granting the defendant's motion to dismiss, the court concluded that its "lack of jurisdiction . . . is a result of untimely service of the summons and complaint by [the] plaintiff." While the plaintiff has not challenged this determination, we note that our Superior Court has been divided over whether the time limit in § 46a-101 (e) is jurisdictional. See *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 616 n.8, 184 A.3d 761 (2018) (comparing Superior Court cases). "Although . . . mandatory language may be an indication that the legislature intended a time requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar. In the absence of such a showing, mandatory time limitations must be complied with absent an equitable reason for excusing compliance, including waiver or consent by the parties. Such time limitations do not, however, implicate the subject matter jurisdiction of the agency or the court." *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 269–70, 777 A.2d 645, aff'd after remand, 67 Conn. App. 316, 786 A.2d 1283 (2001). Because the plaintiff presents no argument as to whether the time limit of § 46a-101 (e) is either mandatory or jurisdictional and presents no claim of waiver, consent, or equitable tolling, we conclude that "the court properly dismissed . . . the [plaintiff's] claim regardless of whether the time limit is jurisdictional." *Sempey* v. *Stamford Hospital*, supra, 616; see *White* v. *Dept. of Children & Families*, 136 Conn. App. 759, 767, 51 A.3d 1116 (trial court properly dismissed complaint because failure to comply with ninety day deadline renders action "barred by the statute of limitations"), cert. denied, 307 Conn. 906, 53 A.3d 221 (2012).