DEPARTMENT OF SOCIAL SERVICES *v.* JUSTIN FREEMAN (AC 41561)

Keller, Bright and Sheldon, Js.

Syllabus

The plaintiff, the Department of Social Services, sought to recover damages from the defendant attorney for conversion in connection with the defendant's failure to comply with a child support lien against settlement proceeds of his client R's personal injury action. Because R owed child support arrearages for the children, the plaintiff sent notice to the defendant of a child support lien, directing him not to distribute any proceeds from the personal injury action without first complying with the lien. The lien notice was addressed to the defendant's correct street address but listed an incorrect zip code. Following the settlement of R's personal injury action, the defendant distributed the proceeds to himself, R and R's creditors, but did not pay any proceeds to the plaintiff toward R's child support arrearages. The plaintiff commenced this statutory (§ 52-362d) conversion action against the defendant to recover $9500.70 in child support still owed by R as a result of the defendant's failure to withhold that amount from the settlement proceeds to satisfy the lien. The defendant denied that he had received notice of the child support lien. In December, 2017, the plaintiff submitted its trial management report, which listed, as a fact witness, C, who was described as being the supervisor for customer service support with the United States Postal Service in Hartford. In the report, the plaintiff explained that C would testify that a letter mailed to the correct street address but the wrong zip code within Hartford would be delivered to the stated address but that it would take longer. In March, 2018, the defendant filed a motion in limine to preclude C's proposed testimony as improper expert testimony because the plaintiff had not filed an expert witness disclosure. Following a hearing on the motion held the day before the start of evidence, the trial court determined that, although C must be considered an expert witness, the plaintiff could file a late disclosure of expert witness, naming C as its expert. The court reasoned that the disclosure of C had been accomplished by the trial management report, and, therefore, there was no prejudice to the defendant. In addition, the court noted that, if the defendant were to find a rebuttal expert, it would permit him to file a late disclosure of that expert. The court thereafter permitted the defendant to name J as a rebuttal expert witness in a late disclosure. Following the trial, at which C and J testified, the jury returned a verdict in favor of the plaintiff, awarding it $9500.70, the amount of R's child support arrearages. On the defendant's appeal to this court, *held*:

1. The trial court did not abuse its discretion in permitting the plaintiff to file a late disclosure of C as an expert witness: contrary to the defendant's claim that that court ignored the requirements for expert witness disclosure set forth in the applicable rule of practice (§ 13-4) by allowing C to testify despite the late disclosure and that he was prejudiced thereby, the court, applying Practice Book § 13-4 (g) (4), considered the defendant's substantive knowledge of C's testimony, which had been conveyed to him three months before the trial in the plaintiff's trial management report, and, on that basis, concluded that the defendant was not prejudiced by the late disclosure of C as an expert; moreover, the defendant, who never sought to depose C or move for a continuance for that purpose after the disclosure was filed, failed to identify any aspect of the plaintiff's proof or his ability to meet it that was adversely affected by the late filing of the expert witness disclosure.
2. This court declined to review the defendant's claim that the trial court erred in allowing the plaintiff's counsel to question him, in the presence of the jury, as to a prior withdrawn conversion action that had been brought against him by an unrelated third party, the defendant having failed to preserve this claim for appellate review.
3. The trial court did not abuse its discretion in allowing the biological mothers of R's two minor children to testify as to R's child support arrearages, the record having indicated that both mothers' testimony was relevant to an essential element of the plaintiff's case, as their testimony bore directly on the contested issue of whether child support arrearages were actually owed to each of them.

Argued November 13, 2019—officially released May 12, 2020

Procedural History

Action to recover damages for conversion, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, denied the defendant's motion to preclude certain testimony; thereafter, the matter was tried to the jury; verdict and judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Jade Baldwin, with whom, on the brief, was *Gerald M. Beaudoin*, for the appellant (defendant).

Joan M. Andrews, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, Justin Freeman, a Hartford attorney, appeals from the judgment of the trial court rendered against him, after a jury trial, finding him liable for conversion and awarding damages to the plaintiff, the Department of Social Services. The judgment was based on the defendant's failure to comply with a child support lien against the settlement proceeds of a client's personal injury action, of which he allegedly had been given due notice, before distributing such proceeds to himself, his client's other creditors, and his client. The defendant, who claimed at trial that he had never been served with the notice of lien that the plaintiff alleged it had sent to him, asserts that the trial court erred by (1) allowing the plaintiff to disclose an expert witness immediately before the start of trial to support its claim that the notice of lien had likely been delivered to him because it had been mailed to the correct address, albeit not to the correct zip code, (2) allowing the plaintiff's counsel to question him before the jury as to a prior conversion action that had been brought against him by an unrelated third party, and (3) allowing the biological mothers of his client's two minor children to testify that his client owed them child support. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On May 8, 2010, Pedro Rivera was involved in a motor vehicle accident in which he sustained serious physical injuries. Rivera retained the defendant to represent him in a civil action against the driver of the motor vehicle that was involved in the accident. During the pendency of the action, Rivera was under a court order to pay child support for his two minor children.[1] As of May 12, 2012,

[1] The court order to pay child support for his two minor children arose from two separate family court cases: (1) a dissolution action involving a custodial parent named Margo Rivera; and (2) a paternity petition involving a custodial parent named Maribel Diaz.

Rivera had a combined child support delinquency of $12,500.70. Because Rivera owed child support arrearages for his two minor children, the plaintiff's Bureau of Child Support Enforcement sent notice to the defendant of a child support lien, directing him not to distribute any proceeds from the civil action without first complying with the lien.[2] The lien notice was addressed to the defendant's correct street address but listed an incorrect zip code. The notice was not returned to the sender.

In September, 2013, the defendant settled Rivera's civil action for $82,500. Upon receiving the proceeds of that settlement, the defendant paid $27,500 in attorney's fees, $2569.58 in litigation expenses, $5825.40 in insurance provider costs, and $12,700 in repayments to creditors for loans that Rivera had taken out while the action was pending. The defendant then paid the remaining $33,905.02 in settlement proceeds to Rivera, without paying anything to the plaintiff toward Rivera's child support arrearages.

As a result, the Support Enforcement Services Unit of the Judicial Branch, working in cooperation with the plaintiff to enforce delinquent parents' child support obligations, filed a motion in the Superior Court requesting that Rivera be held in contempt for failure to pay child support for his minor children. At the conclusion of the contempt proceeding, Rivera was found in contempt for failure to pay child support, and the state collected $3000 from him toward his arrearages, leaving him with a combined balance of $9500.70

[2] The lien notice stated: "Pursuant to § 52-362d (d) of the Connecticut General Statutes this is notification to immediately withhold any monies due to the obligor PEDRO JUAN RIVERA from the distribution of a lump sum settlement or award.

"This notice certifies that the above referenced obligor is subject to a child support order of the Superior Court or Family Support Magistrate and the order is payable through this State of Connecticut IV-D Agency. The child support lien shall be paid to the full extent of the proceeds that are due PEDRO JUAN RIVERA."

in outstanding child support.[3] Thereafter, the plaintiff issued a demand to the defendant that he pay the balance of Rivera's combined child support arrearage, which the defendant refused.

Pursuant to General Statutes § 52-362d,[4] the plaintiff commenced the present action against the defendant to recover the remaining $9500.70 in child support still owed by Rivera because the defendant had failed to withhold that sum from the settlement proceeds of Rivera's civil action to satisfy the lien. In his amended answer and special defenses, the defendant denied, inter alia, that he ever received notice of the child support lien from the plaintiff.

On May 18, 2016, after the pleadings were closed, the defendant demanded a jury trial. On December 6, 2017, the plaintiff submitted its trial management report. The trial management report listed, as a fact witness, Michael Chiaro, whom it described as follows: "United States Postal Service, Supervisor, Customer Service

[3] The $3000 collected by Support Enforcement Services was split equally between the two mothers, $1500 each.

[4] General Statutes § 52-362d provides in relevant part: "(a) Whenever an order of the Superior Court or a family support magistrate for support of a minor child or children is issued and such payments have been ordered to be made to the state acting by and through the IV-D agency and the person against whom such support order was issued owes past-due support in the amount of five hundred dollars or more, the state shall have a lien on any property, real or personal, in which such person has an interest to enforce payment of such past-due support. . . .

"(d) Whenever an order of the Superior Court or a family support magistrate of this state . . . for support of a minor child or children is issued and such payments have been ordered through the IV-D agency, and the obligor against whom such support order was issued owes overdue support under such order in the amount of five hundred dollars or more, the IV-D agency . . . or Support Enforcement Services of the Superior Court may notify . . . (2) any person having or expecting to have custody or control of or authority to distribute any amounts due such obligor under any judgment or settlement . . . . Upon receipt of such notice, such . . . person . . . shall withhold delivery or distribution of any such property, benefits, amounts, assets or funds until receipt of further notice from the IV-D agency. . . ."

Support, Hartford, CT." In the report, the plaintiff further explained that Chiaro, "[t]he United States Post Office Supervisor for Customer Service Support, Hartford, CT, will testify that a letter mailed to the correct street address but the wrong zip code within Hartford would still be delivered, it would just take longer."

On March 12, 2018, the defendant filed a motion in limine to preclude Chiaro's proposed testimony. The defendant argued that such testimony was inadmissible because it was "of an expert nature, offering technical and opinion testimony as an employee of the United States post office as to how he believes the mail would have been processed." The defendant argued that because no expert disclosure had been filed, he had not had an "opportunity to depose [the] expert and obtain a rebuttal *expert* . . . ." (Emphasis added.) On that basis, he argued that the testimony of Chiaro should be excluded as improper expert testimony. On March 20, 2018, the day before the start of evidence at trial, the court, *Hon. A. Susan Peck*, judge trial referee, heard oral argument on the defendant's motion to preclude Chiaro's testimony. The court ruled that Chiaro must be considered an expert witness based on the testimony that the plaintiff intended to elicit from him. It ruled, however, that the plaintiff could file a late disclosure of expert witness, naming Chiaro as its expert. The court reasoned that disclosure of Chiaro had already been accomplished through the trial management report submitted December 6, 2017, and, therefore, there was no prejudice to the defendant. The court further noted that, if the defendant were able to find a rebuttal expert, it would also permit him to file a late disclosure of that expert. Ultimately, the defendant found a rebuttal expert—Joan Coleman, a retired employee of the United States Postal Service—whom the court permitted the defendant to name as his expert in a late disclosure.

At trial, Chiaro testified that he had spent thirty-three years working as an employee of the United States Postal Service in Hartford, twenty-three years of which he had spent working as a supervisor of customer service support. He testified that, in his role as supervisor of customer service support, he oversaw delivery operations and retail operations for the post office in Hartford. He further testified that he was "[v]ery familiar" with the operations of the Hartford post office, and then explained the process by which mail in that post office is processed, sorted, and delivered. During Chiaro's testimony, he explained that permission is required from the United States Postal Inspection Service before a postal employee can testify in court. Chiaro stated that he had received such permission to testify in this case. Ultimately, Chiaro opined that a piece of mail like the notice of lien letter at issue here, which listed the correct street address of the addressee but the incorrect zip code, ultimately would be delivered to the desired address.

At trial, the defendant's expert, Coleman, testified that she had spent twenty-six years working for the United States Postal Service, both in Bloomfield and in Hartford. She explained that she had begun her career as a carrier in Hartford; then she had transitioned to Bloomfield, where she worked as a clerk for six years; finally, she had returned to Hartford, where she worked as a mail processor for the remainder of her career. As a mail processor, the role in which she had worked for most of her career, Coleman's duties included placing mail into a stamp cancelling machine to cancel stamps or to cancel mail and running a mail separating program that separated the mail by destination of delivery. Coleman testified that the most important entry on any piece of mail is the zip code because that is how mail is processed and moved about when the post office is preparing to deliver it. Coleman testified that, in her expert opinion, a letter addressed to an individual at a

business with the wrong zip code listed on it would not reach its intended destination.

On her cross-examination of Coleman, the plaintiff's counsel sought to challenge her testimony in three basic ways. First, she elicited evidence that Coleman's granddaughter was a friend of the defendant. Second, she established that Coleman, unlike Chiaro, did not have permission from the United States Postal Service to testify in this case. Third, she sought to demonstrate that Coleman had lesser credentials than Chiaro because her expertise was in the processing of mail, not in its delivery.

Ultimately, on March 28, 2018, the jury returned a verdict in favor of the plaintiff, awarding it $9500.70, the exact amount of Rivera's combined child support arrearage for his two children. This appeal followed.

I

The defendant first claims that the trial court abused its discretion by allowing the plaintiff to disclose an expert witness immediately before the start of trial. Specifically, he claims that the court ignored the requirements for expert disclosure set forth in Practice Book § 13-4 by allowing the expert to testify despite the late disclosure, and, thus, he was prejudiced because he was neither afforded an opportunity to depose the plaintiff's "newly identified expert," nor given sufficient time to find a rebuttal expert of similar qualifications. The plaintiff disagrees, arguing principally that the defendant was not prejudiced by the trial court's decision because the plaintiff had disclosed the witness and fully described his proposed testimony in its trial management report three months before the start of the trial. We agree with the plaintiff that the trial court did not abuse its discretion by permitting the late disclosure.

The following additional facts are necessary to the resolution of this claim. On December 6, 2017, the plaintiff disclosed Chiaro as a fact witness in its trial management report. It was not until March 12, 2018, however, that the defendant filed a motion to preclude Chiaro's testimony. On March 20, 2018, the trial court heard oral argument on the motion. There, the defendant's counsel argued that the defendant had not had the opportunity to "develop his case from this expert testimony and what's to be proffered." The plaintiff's counsel argued that Chiaro was not an expert but simply a "customer service guy" who would testify from personal experience about the mailing process. Further, the plaintiff's counsel asked that, if the court did consider Chiaro to be an expert, the plaintiff could be permitted to file a late expert disclosure, noting that the defendant had been aware of the substance of Chiaro's testimony since December. The court ruled on the motion to preclude as follows: "Well, I'm inclined to allow [the late disclosure of the expert witness]. Because I don't really see what the prejudice is, it's not like it's a surprise. This is an issue in the case. It apparently [has] been an issue in the case for some time. And the issues that have existed concerning, you know, the underlying issue that gave rise to this case. So, it can't—it doesn't come as any great surprise that mailing, and the difference between—there wouldn't be some testimony concerning mailing or mail procedures. So, I don't really see what the prejudice is. Plus this person was disclosed back in December."

"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. . . . To the extent the trial court makes factual find-

ings 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. . . .

"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).

Practice Book § 13-4 provides in relevant part: "(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial . . . . (b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial . . . . (g) . . . (4) . . . A party who wishes to modify the approved Schedule for Expert Discovery or other time limitation under this section without agreement of the parties may file a motion for modification with the court stating the reasons therefor. Said motion shall be granted if: (A) the requested modification will not cause undue prejudice to any other party; (B) the requested modification will not cause undue interference with the trial schedule in the case; and (C) the need for the requested modification was not caused by bad faith delay of disclosure by the party seeking modification. . . . (h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an

expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction . . . ."

"Whether to allow a late disclosure is clearly within the discretion of the trial court." *Baxter* v. *Cardiology Associates of New Haven, P.C.*, 46 Conn. App. 377, 389, 699 A.2d 271, cert. denied, 243 Conn. 933, 702 A.2d 640 (1997). An examination of the record in this case leads us to conclude that the trial court did not abuse its discretion in allowing the plaintiff to file an untimely expert disclosure.

The central issue in this case was whether the defendant had received the child support lien notice. In this regard, we note that the defendant was aware of the substance of Chiaro's testimony in December, 2017, three months before trial. From December, 2017 to March, 2018, however, the defendant's counsel did nothing to prepare to meet that testimony. They did not depose Chiaro or seek out their own expert to rebut his expected testimony. It was not until days before trial that the defendant's counsel finally moved to preclude Chiaro from testifying.

During argument on the motion to preclude, the court clearly weighed the factors for determining whether Chiaro was an expert. The court stated: "I do think that his testimony does require some specialized knowledge. And for that reason, I think he—it's pretty close, I have to say. But it does require some specialized knowledge of the processes employed by the United States Postal Service. Although, I mean, I have to say, it's you know, March 20th and when was that trial management report filed?"

Thereafter, applying Practice Book § 13-4 (g) (4), the court explained that Chiaro's testimony could not have come as a surprise to the defendant because of the disclosure in December, 2017. It explicitly stated, "I don't really see what the prejudice is, it's not like it's a surprise," and it noted that mailing procedures undoubtedly concerned the principal issue in the case. The court, indisputably, considered the defendant's substantive knowledge of Chiaro's testi mony, which had been conveyed to him in the plaintiff's trial management report, and decided that the defendant was not prejudiced by the late expert disclosure. The defendant, who never sought to depose Chiaro or move for a continuance for that purpose after the expert disclosure was filed, has not pointed to any aspect of the plaintiff's proof or the defendant's ability to meet it that was adversely affected by the late filing of the expert witness disclosure.

Indulging every reasonable presumption in favor of upholding the court's ruling, we cannot conclude that the court abused its discretion in permitting the plaintiff to make a late disclosure of Chiaro as an expert witness.

II

The defendant next claims that the trial court erred in allowing the plaintiff's counsel to question him, in the presence of the jury, regarding a prior withdrawn action against him, which included a claim for conversion. Specifically, the defendant claims that all evidence relating to the prior action was inadmissible as evidence of bad character, propensity, or criminal tendency under § 4-5 of the Connecticut Code of Evidence.[5]

[5] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) General rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b). . . .

"(c) 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. . . ."

He further contends that the evidence was not relevant and that its prejudicial effect outweighed its probative value, making it inadmissible under §§ 4-1 and 4-3 of the Connecticut Code of Evidence.[6] The plaintiff disagrees, arguing that the defendant failed to preserve this claim for appeal. We agree with the plaintiff that the defendant failed to preserve this claim for appeal, and, thus, it is not reviewable.

The following additional facts are necessary for the resolution of this claim. During the plaintiff's direct examination of the defendant, the following colloquy occurred:

"[The Plaintiff's Counsel]: I understand now. This isn't the only case where you're currently being sued for conversion, is it?

"[The Defendant]: Yes, it is.

"[The Plaintiff's Counsel]: Don't you have a case pending with Brignole & Bush?

"[The Defendant]: No, I do not.

"[The Plaintiff's Counsel]: Oh, that settled?

"[The Defendant]: How is it relevant? I mean—

"[The Defendant's Counsel]: Objection. Relevance."

Following the objection by the defendant's counsel, a sidebar was held, and the jury was then excused. The defendant's counsel then explained to the court as follows: "Your Honor, if I may, as you're going through

[6] Section 4-1 of the Connecticut Code of Evidence provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.)

Section 4-3 of the Connecticut Code of Evidence provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

[the complaint], I'm looking up the case right now, it was withdrawn by the plaintiff as to all defendants on March 20th of this year." The court requested that the question at issue be read back. After hearing the question again, the following colloquy occurred:

"The Court: Okay. Well, you want to answer the—the question . . . or do you want to—I mean—or do you want to have her rephrase the question?

"[The Defendant]: No, I want to—

"[The Defendant's Counsel]: Yeah, he—he did answer that it was—

"The Court: When this trial started on March 20th, you know, this—when the jury was selected in this case, this case was pending.

"[The Defendant]: It's no longer pending. You can't—they've heard—

"The Court: I mean, I'll have her rephrase the question.

"[The Defendant's Counsel]: *Oh, yeah. I want to get into it.* They heard—they heard— they heard what they heard, so now it calls for an explanation. It was taken completely out of context.

"The Court: I'm sorry?

"[The Defendant's Counsel]: It was—it's—it was taken completely out of context.

"The Court: Well—

"[The Plaintiff's Counsel]: You mean the case was actually, pending.

"The Court: —that's not the answer to the question, so let's get—I'll ask you to rephrase the question.

"[The Plaintiff's Counsel]: Okay.

"The Court: And let's see what happens." (Emphasis added).

The jury then returned and the plaintiff's counsel rephrased the question as follows:

"[The Plaintiff's Counsel]: Did you recently resolve another pending case you had for conversion?

"[The Defendant]: Yes.

"[The Plaintiff's Counsel]: What happened in that case?"

The defendant then explained what had happened in the conversion case as follows: "That case involved a lawyer that I took on in 2014 . . . who left his former firm, Brignole, Bush & Lewis. Upon leaving that firm he took over, roughly, twenty-five files from that firm that were his personal files that—that clients who came in to see him, with permission, all the proper documentation in order, he brought those over to my firm, and then there was a fee dispute as to the [attorney's] fees on those cases.

"As the principal, meaning the owner of my law firm, and [the attorney] . . . now worked for me, I was sued in that capacity; so, really, I had no—no involvement whatsoever in any of the twenty-five files at all. . . . [W]e eventually came to an agreement as to the fee division of the [attorney's fees] that were in escrow, and the case was withdrawn." At no point after the question was rephrased did the defendant's counsel put on the record that he was maintaining or renewing his objection. Further, he did not request a limiting instruction.

We review evidentiary claims pursuant to an abuse of discretion standard. "Generally, [t]rial courts have wide discretion with regard to evidentiary issues and their rulings will be reversed only if there has been an abuse of discretion or a manifest injustice appears to have occurred. . . . Every reasonable presumption will be made in favor of upholding the trial court's ruling, and it will be overturned only for a manifest

abuse of discretion." (Internal quotation marks omitted.) *State* v. *O'Neil*, 67 Conn. App. 827, 831, 789 A.2d 531 (2002).

At the outset, we must address the plaintiff's claim that the defendant failed to preserve this claim for appellate review. "Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 540, 846 A.2d 847 (2005). The standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. "In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . Our rules of practice make it clear that counsel must object to a ruling [on] evidence [and] state the grounds upon which objection is made . . . to preserve the grounds for appeal." (Internal quotation marks omitted.) *State* v. *Sun*, 92 Conn. App 618, 630, 886 A.2d 1227 (2005). "Once counsel states the authority and ground of his objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 30, 807 A.2d 955 (2002). Furthermore, "[a]n objection to a question on a specific ground is not an objection to a similar question later. *Sears* v. *Curtis*, 147 Conn. 311, 313, 10 A.2d 742 (1960); *State* v. *Rios*, 171 Conn. App. 1, 38–39, 156 A.3d 18, cert. denied, 325 Conn. 914 [159 A.3d 914] (2017)." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) §1.25.2, p. 89.

The defendant's claim on appeal is unpreserved for two reasons. First, after the initial objection by the defendant's counsel, the defendant insisted from the

witness stand that he be allowed to answer the question by the plaintiff's counsel about the other conversion action to explain what had led to the action and how it was resolved. In so doing, he expressly indicated his agreement with the court's proposed course of action, which was to allow the plaintiff's counsel to rephrase her question, correctly noting that the action was no longer pending. At no point after the question was rephrased did the defendant's counsel object.

Second, assuming, arguendo, that the defendant's counsel did properly object to the initial question by the plaintiff's counsel concerning the other conversion action, the defendant's claim on appeal is, nonetheless, unpreserved. "Our review of evidentiary rulings made by the trial court is limited to the specific legal ground raised in the objection. . . . To permit a party to raise a different ground on appeal than was raised during trial would amount to 'trial by ambuscade,' unfair both to the trial court and to the opposing party." (Citations omitted.) *State* v. *Sinclair*, 197 Conn. 574, 579, 500 A.2d 539 (1985). Moreover, our Supreme Court has held that an objection to proffered evidence on the ground of relevance is insufficient to raise or to preserve a claim that it is inadmissible as improper evidence of prior misconduct. See id., 578–80. In the present case, the objection before the trial court was on the ground of relevance. On appeal, by contrast, the defendant claims that the question concerning the conversion action was inappropriate because "evidence of prior misconduct cannot be used to suggest that a defendant has a bad character or propensity for criminal behavior."

The present claim is not the same claim that the defendant initially raised in the trial court concerning the plaintiff's questioning of him as to the other conversion action. To consider that claim on appeal would be to allow a trial by ambuscade. For this reason as well, we decline to review this claim on appeal.

III

Finally, we turn to the defendant's claim that the trial court erred in allowing the biological mothers of Rivera's two minor children to testify as to Rivera's child support arrearages. Specifically, the defendant contends that the testimony of both mothers was "irrelevant and immaterial to the factual issues surrounding the case" and, thus, that it was admitted in violation of § 4-1 of the Connecticut Code of Evidence. He further contends that allowing both mothers to testify was "unfairly prejudicial, confusing, and constitut[ed] needless presentation of cumulative evidence" and, thus, that it was admitted in violation of § 4-3 of the Connecticut Code of Evidence.[7] The plaintiff disagrees, arguing that the challenged testimony was not only relevant but essential to proving the disputed allegations of the complaint. We agree with the plaintiff.

Certain additional facts are necessary to the resolution of this claim. On March 15, 2018, the defendant filed motions in limine requesting that the trial court prohibit Maribel Diaz and Margo Rivera, the biological mothers of Rivera's two minor children, from testifying as fact witnesses as to the arrearages owed to them by

[7] At trial, however, the defendant failed to raise a claim or object on the basis that the probative value of the testimony of either mother was outweighed by the danger of unfair prejudice, and, thus, the defendant failed to preserve this claim on appeal.

In order to preserve this claim for appeal, the defendant's counsel should have argued that, even if the mothers' testimony was relevant, it should, nonetheless, have been excluded because its probative value was outweighed by the danger it posed of unfair prejudice; however, they did not. Moreover, the defendant's motions in limine to preclude the testimony of Margo Rivera and Maribel Diaz argued that their testimony was irrelevant and should be excluded under § 4-1 of the Connecticut Code of Evidence, and, therefore, the motions in limine also did not preserve for appeal a claim pursuant to § 4-3 of the Connecticut Code of Evidence.

We, therefore, decline to review that portion of the defendant's claim in which he argues that the probative value of the testimony was outweighed by its danger of unfair prejudice.

Rivera. The defendant claimed generally that the only contested issue at trial was whether the lien notice allegedly sent to him by the plaintiff in fact had been delivered to him, as the plaintiff had alleged. On that basis, the defendant argued that the mothers should be prohibited from testifying because their testimony was irrelevant to the issue of delivery and would only confuse the issues before the jury. On March 20, 2018, the court held a hearing on the motions in limine. There, the plaintiff argued that the mothers' testimony was relevant because the defendant, in his amended answer and special defenses, had not admitted its allegation that Rivera owed child support for the two children but, instead, had left the plaintiff to its proof.[8] Therefore, the plaintiff argued, the mothers' testimony was necessary to establish that Rivera actually owed them child support, as it had alleged. Ultimately, the trial court denied the defendant's motion to preclude the mothers' testimony, and the mothers testified at trial.

During the plaintiff's direct examination of Margo Rivera, the following colloquy took place:

[8] Practice Book § 10-46 provides in relevant part: "The defendant in the answer shall specially deny such allegations of the complaint as the defendant intends to controvert, admitting the truth of the other allegations . . . ."

Practice Book §13-23 (a) provides in relevant part: "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable an admission or denial. . . ."

On this basis, the rules of practice provide three ways in which to respond to allegations in a complaint: to admit, to deny, or to allege lack of information. See generally Practice Book §§ 10-46 and 13-23 (a).

In the defendant's answer, he stated: "[T]he defendant . . . has insufficient knowledge to form a belief as to the truth and, therefore, denies same and leaves the plaintiff to [its] proof." This statement conveys both that he denies the allegation and that he has a lack of information to either admit or deny the allegation. Regardless of whether the defendant denied or asserted a lack of knowledge, the end result is the same: the defendant left the plaintiff to its proof.

"[The Plaintiff's Counsel]: And, [Margo] Rivera, did you end up with a child support order as part of your divorce [from Rivera]?

"[Margo Rivera]: Yes. . . .

"[The Plaintiff's Counsel]: Are you receiving the court-ordered child support?

"[Margo Rivera]: No. . . .

"[The Plaintiff's Counsel]: And do you recall what he owed you at the time the case settled, his personal injury case?

"[Margo Rivera]: I think it was, like, $10,000 or 9000. I don't really—I don't recall the specific amount.

"[The Plaintiff's Counsel]: It's a lot more than that now, though, isn't it?

"[Margo Rivera]: Yes."

During the plaintiff's direct examination of Diaz, the following colloquy occurred:

"[The Plaintiff's Counsel]: And do you have any children?

"[Diaz]: Yes, I have one son. . . . Austin Rivera.

"[The Plaintiff's Counsel]: Who's Austin's father?

"[Diaz]: Pedro Rivera. . . .

"[The Plaintiff's Counsel]: Had you been to court with . . . Rivera to get an initial order of child support?

"[Diaz]: Yes.

"[The Plaintiff's Counsel]: Do you have a current order of child support?

"[The Defendant's Counsel]: Your Honor, I'm going to object to this line of questioning as to relevance . . . .

"The Court: Yeah, I'm going to—I'm going to sustain the objection. . . .

* * *

"[The Plaintiff's Counsel]: Did you receive anything toward your past due child support from the personal injury settlement?

"[Diaz]: No, I did not.

"[The Plaintiff's Counsel]: How much child support is currently owed to you by . . . Rivera? . . .

"[Diaz]: Close to $8000."

"The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . 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. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 328–29, 838 A.2d 135 (2004).

"The law defining the relevance of evidence is well settled. Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . The trial court has wide discretion to determine the relevancy of evidence . . . . Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether

there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) Id., 332; see also Conn. Code Evid. § 4-1.

A review of the record shows that both mothers' testimony was relevant to an essential element of the case, specifically, whether Rivera owed child support for the children of Margo Rivera and Diaz. The defendant argued, both at trial and in his appellate brief, that he did not deny the allegation that child support arrearages were owed by Rivera. In his amended answer and special defenses, however, the defendant neither admitted nor denied the allegation, but left the plaintiff to its proof. On that basis, the mothers' testimony bore directly on the contested issue of whether child support arrearages were actually owed to each of them, which was an *essential element* of the plaintiff's case. Consequently, the court did not abuse its discretion when it allowed the mothers to testify as to the arrearages owed to them by Rivera.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DARRELL TINSLEY
(AC 41975)

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

Syllabus

The defendant, who previously had been convicted of the crimes of manslaughter in the first degree and risk of injury to a child, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claimed that the trial court improperly concluded that his conviction did not violate the constitutional guarantee against double jeopardy because the defendant failed to demonstrate that both offenses occurred during the same transaction and the crime of risk of injury to a child was not a lesser included offense of manslaughter in the first degree as charged. *Held* that the trial court improperly denied the defendant's motion to correct an illegal sentence because his right to be free from double jeopardy was violated,

the offenses of manslaughter in the first degree and risk of injury to a child arose from the same act or transaction, the long form information having alleged that both crimes occurred on the same day, at the same location, and were perpetrated on the same victim, all of the victim's wounds were recent, were inflicted in the same short period of time, and occurred not long before the victim's death, including the fatal laceration to the victim's liver, and the state's theory of the case, presented during trial and its closing argument, was that the defendant inflicted multiple blows to the head, chest and abdomen of the victim over a short period of time, in a single, continuous attack; moreover, the offenses of manslaughter in the first degree and risk of injury to a child constituted the same offense, as risk of injury to a child was a lesser included offense of manslaughter in the first degree as charged because it was not possible for the defendant to have committed manslaughter in the first degree as charged by causing the death of the victim by blunt trauma to the abdomen without also impairing the health of the victim by inflicting trauma to his abdomen, as charged in the risk of injury to a child offense; furthermore, there was no authority that would support a conclusion that the legislature intended to specifically authorize multiple punishments under the statutes in question.

Argued December 3, 2019—officially released May 12, 2020

Procedural History

Information charging the defendant with the crimes of capital felony and risk of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Barry, J.*; verdict and judgment of guilty of manslaughter in the first degree and risk of injury to a child, from which the defendant appealed to this court, *Lavery, C.J., and Shaller and Zarella, Js.*, which affirmed the judgment of the trial court; thereafter, the trial court, *Schuman, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed; further proceedings.*

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

DiPENTIMA, C. J. The defendant, Darrell Tinsley, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred in denying his motion to correct because his conviction for manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1)[1] and risk of injury to a child in violation of General Statutes (Rev. to 1995) § 53-21,[2] as amended by No. 95-142 of the 1995 Public Acts, violated the constitutional prohibition against double jeopardy. We agree with the defendant and, therefore, reverse the judgment of the trial court.

In affirming the defendant's conviction on direct appeal, we concluded that the jury reasonably could have found the following facts. "[T]he victim's mother, and the defendant met at an office building in downtown Hartford, where they worked as security personnel. Although the defendant and [the victim's mother] had an unstable relationship, they cohabited in a one bedroom apartment along with the [fifteen month old] victim . . . . During the course of the adults' relationship, individuals who knew the victim noticed a marked change in his behavior when he was in the presence of the defendant. At such times, the victim was timid, withdrawn and afraid of the defendant. The defendant's

[1] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

[2] General Statutes (Rev. to 1995) § 53-21, as amended by No. 95-142 of the 1995 Public Acts, provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony." All references to § 53-21 in this opinion are to the 1995 revision of the statute as amended by No. 95-142 of the 1995 Public Acts.

attitude toward the victim ranged from indifference to dislike. When [the victim's mother] was no longer able to avail herself of professional child care, the defendant sometimes took care of the victim while [the victim's mother] worked.

"Prior to his death, the victim was in good health. On December 8, 1996, between 8 and 8:30 a.m., the defendant drove [the victim's mother] to her place of employment. According to [the victim's mother], there was nothing wrong with the victim when she went to work. During the morning, [the victim's mother] and the defendant spoke by telephone several times concerning the victim. At approximately 11:15 a.m., the defendant telephoned [the victim's mother], stating that there was something wrong with the victim and that he did not know what was the matter. The defendant then drove the victim to [the victim's mother's] place of employment, and, from there, all three proceeded to the Connecticut Children's Medical Center (medical center) in Hartford. They were involved in a motor vehicle accident en route.

"When he arrived at the medical center, the victim was in critical condition because he was not breathing and had little heart activity. The victim died when resuscitation efforts failed. An autopsy revealed bruises on the victim's right cheek, left leg and chest, which an associate medical examiner from the [O]ffice of the [C]hief [M]edical [E]xaminer determined occurred shortly before the victim's death. The injuries were inconsistent with an automobile accident, a twelve inch fall into a bathtub, cardiopulmonary resuscitation or bumping into a fire door, which were explanations offered by the defendant. The victim also suffered significant internal injuries, namely, multiple fresh cranial hemorrhages, a broken rib and a lacerated liver that caused three quarters of his blood to enter his abdominal cavity. According to the associate medical examiner,

the victim's liver was lacerated by blunt trauma that occurred within [one] hour of death and was the cause of death.

"After the victim died, the defendant was taken to the police station, where he gave a statement and repeatedly denied injuring the victim. The police inspected the apartment where the defendant and victim were alone prior to the victim's death. They found vomit and feces on the victim's clothes, a bedspread and the floor. The victim's blood was found on the bathroom door. When he was informed of the autopsy results, the defendant insisted that the doctors were wrong, a position he maintained throughout trial." *State* v. *Tinsley*, 59 Conn. App. 4, 6–7, 755 A.2d 368, cert. denied, 254 Conn. 938, 761 A.2d 765 (2000).

The state charged the defendant with capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (9), as amended by No. 95-16 of the 1995 Public Acts,[3] and risk of injury to a child in violation of § 53-21. The jury found the defendant guilty of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1)[4] and risk of injury to a child. On February 6, 1998, the court sentenced the defendant to twenty years of incarceration on the manslaughter count and ten years of incarceration on the risk of injury count with the sentences to run consecutively.

On August 14, 2017, the self-represented defendant filed a motion to correct an illegal sentence pursuant

[3] General Statutes (Rev. to 1995) § 53a-54b, as amended by No. 95-16 of the 1995 Public Acts, provides in relevant part: "A person is guilty of a capital felony who is convicted of . . . (9) murder of a person under sixteen years of age." All references to § 53a-54b in this opinion are to the 1995 version of the statute, as amended by No. 95-16 of the 1995 Public Acts.

General Statutes § 53a-54a provides in relevant part that "[a] person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

[4] The court also had instructed the jury on manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3), manslaughter in the second degree in violation of General Statutes § 53a-56 and criminally negligent homicide in violation of General Statutes § 53a-58.

to Practice Book § 43-22.[5] The defendant alleged that his sentence violated his federal and state constitutional rights to be free from double jeopardy. On March 8, 2018, the defendant, now represented by counsel, filed a second motion to correct an illegal sentence and an accompanying memorandum of law, reasserting his double jeopardy claim. The state filed its memorandum in opposition on March 26, 2018, and the court, *Schuman, J.*, held a hearing on April 12, 2018. Pursuant to the court's order, the parties submitted supplemental memoranda.

On May 15, 2018, the court issued its memorandum of decision denying the defendant's motion to correct an illegal sentence. At the outset of its analysis, the court observed that the double jeopardy clause protects against multiple punishments for the same offense. It then stated: "In determining whether a defendant has been placed in double jeopardy under the multiple punishments prong, the court applies a two step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.)

With respect to the first step of the analysis, the court noted that the homicide and risk of injury charges involved the same time, place and victim. The homicide count charged that the victim's death had resulted from blunt force trauma to the abdomen, whereas the risk of injury count alleged that the defendant had inflicted multiple traumas to the face, head, chest and abdomen, which caused the laceration of the liver, internal bleeding in the abdomen, a fracture of the tenth rib, and multiple contusions of the face, head, chest and abdomen. The court also observed that the laceration of

[5] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

the liver occurred within one hour of death while the bruises on the victim's cheek, leg and chest occurred shortly before death. "While it is possible that all of these injuries occurred at the same time, it is not certain. Based on the Appellate Court's recital of the facts, it is also possible that the bruising to the cheek, leg, and chest took place at a different time in the morning from the lethal trauma to the liver. It is simply speculative to conclude, based on the existing record, that . . . the victim here incurred injuries in one continuous, uninterrupted assault occurring in a matter of a few minutes." (Citation omitted; internal quotation marks omitted.)

As an alternative and additional analysis, the court also considered whether the crimes of manslaughter in the first degree and risk of injury constituted the same offense. The court specifically identified the issue as "whether risk of injury as charged was a lesser included offense of manslaughter in the first degree as charged. Stated differently, the issue is whether it was possible to commit manslaughter in the first degree in the manner charged without necessarily committing risk of injury as charged." The court concluded that such a possibility existed. It explained that the jury could have found that the defendant violated the risk of injury statute as a result of striking the victim in the face, leg or chest. For these reasons, the court denied the defendant's motion to correct an illegal sentence.

On June 4, 2018, the defendant filed a motion to reargue and for reconsideration. The defendant claimed, inter alia, that the parties should be afforded the opportunity to address (1) our Supreme Court's decision in *State* v. *Porter*, 328 Conn. 648, 182 A.3d 625 (2018),[6]

[6] In *State* v. *Porter*, supra, 328 Conn. 661–62, our Supreme Court expressly held that a reviewing court may consider the evidence and the state's theory of the case, along with the information, as amplified by a bill of particulars, in determining whether two charges arose from the same act or transaction.

which had been released after the hearing on the defendant's motion to correct an illegal sentence and (2) the evidence underlying the recital of facts by this court in the defendant's direct appeal. See *State* v. *Tinsley*, supra, 59 Conn. App. 6–7. On June 19, 2018, the court granted the defendant's motion to reargue.

The court held a hearing on July 5, 2018. After hearing from the parties, the court denied the relief requested by the defendant. It maintained its conclusion that the defendant had failed to meet his burden of demonstrating that both offenses occurred during the same transaction. Specifically, the court stated: "It still seems to me entirely possible that the fatal blows to the ribs, liver, and abdomen could have occurred from a separate blow that was interrupted perhaps by a minute or so before or after trauma was inflicted to the child's face and head, which is also alleged in the information. And in that situation it would not clearly be one continuous uninterrupted assault. I acknowledge the defense argument that there's no way to actually parse through all this at this time twenty years later, but ultimately it's the defendant's burden, and if we can't do that then the defendant has not met his burden." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court improperly denied his motion to correct an illegal sentence. Specifically, he argues that his conviction and punishment for manslaughter in the first degree and risk of injury arose from the same transaction and that risk of injury is a lesser included offense of manslaughter in the first degree, as charged in this matter, in violation of his right to be free from double jeopardy. The state disagrees with both of these arguments. We conclude that under the facts and circumstances of the present case, the defendant's right to be free from double jeopardy was violated. Accordingly, the trial court improperly denied the defendant's motion to correct an illegal sentence.

We begin by reviewing the relevant legal principles pertaining to a motion to correct an illegal sentence, the applicable standard of review and our double jeopardy jurisprudence. A motion to correct an illegal sentence filed pursuant to Practice Book § 43-22 "constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates." (Internal quotation marks omitted.) *State* v. *Brown*, 192 Conn. App. 147, 151, 217 A.3d 690 (2019); see also *State* v. *Evans*, 329 Conn. 770, 778–79, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019); see generally *State* v. *Cator*, 256 Conn. 785, 803–804, 781 A.2d 285 (2001) (both trial and appellate courts have power to correct illegal sentence at any time). A sentence that violates a defendant's right against double jeopardy falls within the recognized definition of an illegal sentence. See *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010); see also *State* v. *Cator*, supra, 804 (sentence that punished defendant twice for same action violated prohibition against double jeopardy and, thus, was illegal and trial court had jurisdiction to correct sentence pursuant to § 43-22); *State* v. *Adams*, 186 Conn. App. 84, 87, 198 A.3d 691 (2018) (alleged double jeopardy violation constituted proper basis for motion to correct illegal sentence).

Next, we set forth our standard of review. "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . A double jeopardy claim, however, presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Bennett*, 187 Conn. App. 847, 851, 204 A.3d 49, cert. denied, 331 Conn. 924, 206 A.3d 765 (2019); see also *State* v. *Wade*, 178 Conn. App. 459, 466, 175 A.3d 1284 (2017), cert. denied, 327 Conn. 1002, 176 A.3d 1194 (2018).

We turn to the relevant principles regarding the protection against double jeopardy. The double jeopardy clause of the fifth amendment[7] prohibits both multiple trials for the same offense and multiple punishments for the same offense in a single trial. See *State* v. *Bennett*, supra, 187 Conn. App. 852; see also *State* v. *Chicano*, 216 Conn. 699, 706, 584 A.2d 425 (1990) (overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 261, 61 A.3d 1054 (2013)), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 162 (1991). The present case concerns the latter prohibition. Simply stated, "[w]ith respect to cumulative sentences imposed in a single trial, the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri* v. *Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 361, 796 A.2d 1118 (2002).

"Double jeopardy analysis in the context of a single trial is a [two step] process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Bennett*, supra, 187 Conn. App. 852. "At step one, it is not uncommon that we look to the

[7] The fifth amendment to the United States constitution provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The fifth amendment is applicable to the states through the fourteenth amendment's due process clause. See *State* v. *Brown*, 299 Conn. 640, 651, 11 A.3d 663 (2011). "Although the Connecticut constitution does not include a specific double jeopardy provision, we have held that the due process and personal liberty guarantees provided by article first, §§ 8 and 9, of the Connecticut constitution . . . encompass the protection against double jeopardy. . . . The protection afforded against double jeopardy under the Connecticut constitution mirrors, rather than exceeds, that which is provided by the constitution of the United States." (Footnotes omitted; internal quotation marks omitted.) Id.; see also *State* v. *Ferguson*, 260 Conn. 339, 360, 796 A.2d 1118 (2002).

evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger* test [see *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)] 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. . . . In applying the *Blockburger* test, we look only to the information and bill of particulars—as opposed to the evidence presented at trial . . . . Because double jeopardy attaches only if both steps are satisfied . . . a determination that the offenses did not stem from the same act or transaction renders analysis under the second step unnecessary." (Footnote omitted; internal quotation marks omitted.) *State* v. *Jarmon*, 195 Conn. App. 262, 282–83, 224 A.3d 163, cert. denied, 334 Conn. 925, 223 A.3d 379 (2020); see also *State* v. *Porter*, supra, 328 Conn. 662.

For purposes of double jeopardy analysis, a greater included offense and a lesser included offense constitute the same offense. See, e.g., *State* v. *Miranda*, 260 Conn. 93, 125, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); see also *State* v. *Goldson*, 178 Conn. 422, 425, 423 A.2d 114 (1979) ("[i]t is clear, as *Brown* v. *Ohio*, [432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)] holds, that if the two counts stand in the relationship of greater and

lesser included offenses, then [t]he greater offense is . . . by definition the same for purposes of double jeopardy as any lesser offense included in it" (internal quotation marks omitted)). Simply stated, "[t]he double jeopardy prohibition . . . is violated if one crime is a lesser included offense of the other." *State* v. *Carlos P.*, 171 Conn. App. 530, 537–38, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017).

Where the defendant claims that his or her conviction includes a lesser included offense, we employ a different analysis than the traditional *Blockburger* comparison of the elements of each offense. Id., 537–39; see, e.g., *State* v. *Greco*, 216 Conn. 282, 292, 579 A.2d 84 (1990); *State* v. *Raymond*, 30 Conn. App. 606, 610–11, 621 A.2d 755 (1993). "The test for determining whether one violation is a lesser included offense in another violation is whether it is possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser. If it is possible, then the lesser violation is not an included crime. . . . In conducting this inquiry, we look only to the relevant statutes, the information, and the bill of particulars, not to the evidence presented at trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Miranda*, supra, 260 Conn. 125; see also *State* v. *Greco*, supra, 216 Conn. 291; *State* v. *Goldson*, supra, 178 Conn. 426; *State* v. *Bumgarner-Ramos*, 187 Conn. App. 725, 749, 203 A.3d 619, cert. denied, 331 Conn. 910, 203 A.3d 570 (2019); *State* v. *Flynn*, 14 Conn. App. 10, 17–18, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988). Guided by these principles, we turn to the specifics of the present case.

The following additional facts will facilitate our analysis of the defendant's appeal. In count one of the long form information dated November 24, 1997, the state charged the defendant with "capital felony, in violation

of . . . § 53a-54b (9)" and alleged that "on or about the morning of December 8, 1996 . . . the defendant, with the intent to cause the death of [the victim] caused the death of [the victim] who was then fifteen (15) months of age, by blunt trauma to the abdomen." In count two of the information, the state charged the defendant with "violation of . . . § 53-21," risk of injury to a child, and alleged that "on or about the morning of December 8, 1996 . . . the defendant did an act likely to impair the health of [the victim] who was then fifteen (15) months of age, by inflicting multiple trauma to his face, head, chest, and abdomen and thereby causing: laceration of the liver, internal bleeding in the abdomen, fracture of the tenth right rib, and multiple contusions of the face, head, chest, and abdomen."

On December 11, 1997, the court, *Barry, J.*, instructed the jury following the presentation of evidence and closing arguments in the defendant's criminal trial. The court charged the jury regarding the crime of capital felony. It then instructed the jury on the crime of manslaughter in the first degree in violation of § 53a-55 (a) (1),[8] as well as other lesser included offenses of capital felony.[9] The jury found the defendant guilty of manslaughter in the first degree, as a lesser included offense

[8] Specifically, the court instructed the jury as follows: "For purposes of the record, § 53a-55 (a) (1) insofar as it is pertinent in this case provides as follows: A person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person he causes the death of such person. For you to find the defendant guilty of this charge the state must prove the following elements beyond a reasonable doubt: First, that the defendant caused the death of [the victim] and second that the defendant intended to cause serious physical injury to [the victim].

"The term serious physical injury means a physical injury that creates a substantial risk of death or that causes serious disfigurement, serious impairment of health or serious loss and impairment of the function of bodily organs. You will note that the basis of the charge under this statute is not that the defendant intended to kill but that he intended to inflict serious physical injury."

[9] See footnote 4 of this opinion.

of capital felony, and risk of injury to a child. The court sentenced the defendant to twenty years of incarceration on the manslaughter count and a ten year consecutive sentence on the risk of injury count.

Step one of our double jeopardy analysis involves the determination of whether the two offenses arose from a single act or transaction. "Under step one, [t]he same transaction . . . may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense. . . . [T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the [statute]. . . . When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found a separate factual basis for each offense charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jarmon*, supra, 195 Conn. App. 284; see also *State* v. *Jerrell R.*, 187 Conn. App. 537, 545, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

Our Supreme Court recently addressed step one of the double jeopardy analysis in *State* v. *Porter*, supra, 328 Conn. 648. Specifically, it considered "whether a court may look to the evidence presented at trial when determining if a defendant's conviction violated the constitutional prohibition against double jeopardy." Id., 650. In *Porter*, the defendant had argued that this court improperly considered the evidence presented at trial in determining whether a double jeopardy violation had occurred; the state countered that consideration of the evidence during step one was proper. Id., 650–51.

Briefly addressing step two of the double jeopardy analysis, our Supreme Court emphasized that "the

Blockburger test . . . is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) Id., 656. Our Supreme Court, after reviewing the relevant case law, noted that this prohibition against the review of the evidence applied only to step two of the double jeopardy analysis. Id., 658. With respect to step one, it emphasized that that it routinely had "looked beyond the charging documents [and considered the evidence] to determine whether the offenses arose from a single act or transaction." Id., 659. Further, it explicitly stated that, "[a]t step one, it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . ." (Internal quotation marks omitted.) Id., 662. Thus, in the present case, we must consider the charging documents, the evidence set forth during the trial, the state's theory of the case and the court's jury instructions, to determine whether the offenses of manslaughter in the first degree and risk of injury arose from the same act or transaction.

As we have noted previously, the state charged the defendant in a long form information, dated November 24, 1997, with capital felony and risk of injury. The state alleged that both of these crimes occurred "on or about the morning of December 8, 1996 . . . ." Additionally, the state asserted that these crimes occurred at the same location and were perpetrated on the same victim.

During the trial, the state presented the testimony of Arkady Katsnelson, an associate medical examiner who had performed the autopsy on the victim. During his external examination, Katsnelson noted multiples contusions, or bruises, on the victim's face and chest, and contusions and abrasions on the abdomen, arms, legs and back of the body.[10] There was no evidence that

[10] Katsnelson explained that a contusion or bruise "is an injury which is inflicted with a blunt object, and usually, a bruise, it is an accumulation of blood under the skin. When some kind of a hard object, a blunt object hit

these injuries had begun to heal. Katsnelson opined, to a reasonable degree of medical certainty, that these wounds were recent and had occurred not long before the death of the victim.

Katsnelson also discovered multiple areas of hemorrhage under the skin of the scalp and noted that these separate injuries were located on the right side and the back of the victim's head. He described these wounds as "fresh" and that they had occurred not long before death. As he continued the internal examination, Katsnelson discovered a substantial amount of the victim's blood in his abdominal cavity where there should be none, as well as a fractured rib and a "big laceration of the liver." The blood in the victim's abdominal cavity remained in a liquid state. Katsnelson noted the absence of any clotting, which indicated that the victim had not survived long after receiving the liver injury. Katsnelson further determined that the laceration to the liver was the cause of death[11] and that the victim's other injuries were not fatal. Katsnelson concluded that the victim could have survived only "a short period of time, which could be several minutes after he received the laceration of the liver."

The prosecutor asked Katsnelson if there was any indication that any of the injuries sustained by the victim had occurred at a different time, and he replied: "No, *all these injuries I found during my examination, I believe they* [*were*] *inflicted in the same short period of time*. They are not—I did not find any evidence of healing of these injuries, and I believe they were all

the skin, there are vessels—blood vessels under the skin, and the blood vessels will rupture due to the trauma, and they will bleed under the skin, and the skin will appear bruised." He also defined an "abrasion" as scraping of the upper layer of skin.

[11] Katsnelson later explained that the laceration to the liver resulted from blunt trauma and caused extensive bleeding into the abdominal cavity, resulting in the victim's death.

inflicted within one short period of time." (Emphasis added.) He then defined "a short period time" as "within probably minutes."

The prosecutor also called as a witness Betty Spivack, a physician trained in pediatric critical care. She indicated that bruising does not occur when an individual is in severe shock or cardiac arrest due to the fact that, in such circumstances, blood is not being pumped through the body and does not flow out of the blood vessels. Spivack agreed that the injury to the victim's liver was the sole cause of cardiac arrest[12] in this case. She classified the victim's injuries into two groups: those that had occurred before, or no more than one to two minutes after, the liver laceration, and those that had happened after the liver laceration and resulting diminished blood flow to the skin, shock and cardiac arrest. Spivack testified that all of the bruises had occurred in the first group. She further stated that the only injures that had occurred in the second group were the three curved abrasions to the victim's left groin, and fractures to the front teeth, a very common resuscitation injury.

After the conclusion of the evidence, the prosecutor presented her closing argument to the jury. In reference to Katsnelson's testimony, the prosecutor referred to the victim's injuries to the head, face, chest, abdomen, back, groin, leg and arm. The prosecutor specifically argued: "*All of those were inflicted* [Katsnelson] said

[12] Spivack also opined that the injury to the victim's liver resulted from either an uppercut type punch to the upper part of the belly, or an upward kick, as opposed to a stomp. She also indicated that after the laceration to the liver, the victim initially would have lost 80 to 100 cubic centimeters of blood per minute into the abdominal cavity and gone into shock within two to four minutes. While the rate of blood loss would have slowed down, cardiac arrest would occur a few minutes thereafter. Spivack defined cardiac arrest as "the situation when the heart no longer pumps, when there is no pulse. If you were feeling for a pulse, you wouldn't find one. If you were listening, you wouldn't hear one. . . . The heart has ceased to pump and is still."

in the same short period of time, a matter of minutes. All the injuries were recent fresh injuries." (Emphasis added.) After discussing Spivak's testimony, the prosecutor indicated to the jury that "[a]ll the bruises and particularly the larger ones on the face, the back, the upper abdomen preceded the liver laceration or were within two minutes of it according to the medical testimony." In addressing the intent element for the charge of capital felony, the prosecutor stated: "We've got—besides that blow [that caused the liver laceration] we've got the multiplicity and the nature of the injuries. There were repeated blows. There's only one fatal one. *This child was battered over and over and over again. We have the forceful upward kick or punch which lacerated the liver, caused internal bleeding and shock within three minutes and death not long after that, but there were many blows. The remainder of the injuries were inflicted in the same short period of time.* That's what the medical evidence is, multiple blows to the top of the head, the back of the head, the side of the head, the face, the chest, the abdomen, multiple puncture wounds to the groin, bruises to the leg and arm. . . . Finally, I would submit you may find evidence of the defendant's intent to kill in the fact that he didn't stop hitting [the victim] until he killed him." (Emphasis added.) The prosecutor ended her initial closing argument with the following statement: "There's only one logical conclusion, that *it was the defendant who killed* [*the victim*] *by striking him many times and continuing to strike him until he killed him* with some object or a punch or a kick with extensive force in the abdomen." (Emphasis added.)

After considering the long form information, the evidence presented at the criminal trial and the state's theory of the case, as evidenced by its closing argument, we conclude that the court erred in determining that the manslaughter in the first degree and the risk of injury offenses did not arise from the same act or transaction.

We note that our Supreme Court has held that where an information, as amplified by a bill of particulars,[13] charged a defendant with two narcotics offenses that had occurred at the same time and same place and involved the same narcotic, then those offenses arose from the same act or transaction. See *State* v. *Goldson*, supra, 178 Conn. 424–25; see also *State* v. *Nelson*, 118 Conn. App. 831, 853, 986 A.2d 311 (two kidnapping charges arose from same act or transaction where operative information alleged that crimes were committed on same date, in same location and against same victim), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010); *State* v. *Crudup*, 81 Conn. App. 248, 252–53, 838 A.2d 1053 (first prong of double jeopardy analysis met where information charged that both crimes occurred during afternoon hours of same date), cert. denied, 268 Conn. 913, 845 A.2d 415 (2004); *State* v. *Davis*, 13 Conn. App. 667, 671, 539 A.2d 150 (1988) (three offenses arose from same act or transaction where information alleged that all occurred at same time, date and location); cf. *State* v. *Miranda*, supra, 260 Conn. 120–24 (where defendant was charged with two counts of assault in first degree during same four month time period with one count charging skull fracture and other rectal tears as serious physical injury, two offenses did not arise from same transaction where medical examination revealed that rectal tearing was "fresh" wound and skull fracture was seven to ten days old).

Additionally, the evidence produced at trial supports the conclusion that the injuries to the victim occurred during the same act or transaction. See *State* v. *Nixon*, 92 Conn. App. 586, 591, 886 A.2d 475 (2005). The medical evidence introduced by the state indicated that the victim's abrasions and contusions occurred in the period of time just prior to death and there was no indication of any healing. Specifically, Katsnelson identified the bruises under the scalp and the lack of clotted blood

[13] The defendant did not file a motion for a bill of particulars in this case.

in the abdominal cavity as indicators that the victim had not survived long after receiving these injuries. He also testified that death occurred not long after the liver laceration. Indeed, he specifically stated that "all [of] these injuries which I found during my examination, *I believe they* [*were*] *inflicted in the same short period of time. They are not—I did not find any evidence of healing of these injuries, and I believe they were all inflicted within one short period of time . . .* [*and*] *I mean within probably minutes.*" (Emphasis added.)

Finally, we consider the state's closing argument to the jury and its theory of the case. The prosecutor contended that Katsnelson had testified that the bruises and abrasions found on the victim's body were "fresh" injuries and had been inflicted "in the same short period of time, a matter of minutes." She further argued that the defendant had inflicted multiple blows to the head, chest and abdomen of the victim. The prosecutor subsequently emphasized the multiple blows that had occurred in a short period of time. The state relied on this evidence as proof of the defendant's intent to kill the victim. The fact that the jury did not find such intent does not change the fact that the state relied on all of the blows to the victim as showing how the defendant acted in a single, continuous attack. Defense counsel, during his closing argument, commented on the state's insistence that all of the victim's injuries had occurred "within a short period of time, all happened at once . . . ." After considering the state's closing argument; see *State* v. *Porter*, supra, 328 Conn. 663; as well as the information and the evidence presented,[14] we conclude

[14] We note that the state acknowledged that the evidence and theory of the case advanced by the trial prosecutor indicated that the two offenses arose from the same act or transaction. Specifically, the state argued the following in its June 11, 2018 opposition to the defendant's motion to reargue and/or for reconsideration: "*The state does not challenge that the injuries that formed the basis of both the capital felony charge/manslaughter in the first degree conviction and the risk of injury count happened in the same transaction. In fact, it appears that was the trial prosecutor's theory*

that the homicide and risk of injury offenses in this case arose from the same transaction.[15] Accordingly, we proceed to step two of the double jeopardy analysis.

Step two of the double jeopardy analysis involves the determination of whether the homicide and risk of injury offenses constituted the same offense. We begin our analysis with our recent decision in *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 725, in which we addressed the defendant's claim that his conviction of manslaughter in the first degree and assault in the first degree violated the constitutional guarantee against double jeopardy. In resolving this issue, we set forth the applicable test. "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. . . . *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*

of the case. However, as this court noted in its ruling, the types of prohibited acts here formed the basis for the two distinct charges. That is to say, there were clearly acts alleged in the risk of injury count, attributed to the defendant, that could not have possibly formed the basis of the injuries which led to the child's death and, therefore, could not have formed the basis of the homicide charge." (Emphasis added.)

[15] We also note that the court's instructions to the jury did not exclude the fatal blow to the victim's abdomen from the jury's consideration of the risk of injury charge. See *State* v. *Benjamin*, 86 Conn. App. 344, 352, 861 A.2d 524 (2004). The absence of such a limitation permitted the jury to find the defendant guilty of both the risk of injury and the homicide charges on the basis of the fatal blow to the abdomen that resulted in the lacerated liver. See id.

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; emphasis added; internal quotation marks omitted.) Id., 748; see generally *State* v. *Brown*, 163 Conn. 52, 61–62, 301 A.2d 547 (1972).[16] During this step of the double jeopardy analysis, we consider only the statutes, charging documents and any bill of particulars, rather than the evidence presented at trial.[17] *State* v. *Bumgarner-Ramos*, supra, 749.

In the present case, the defendant was convicted of manslaughter in the first degree and risk of injury to a child. Each of those criminal statutes contains an element the other does not: Manslaughter in the first degree provides that the offender cause the death of the victim and risk of injury to a child provides that the victim be under the age of sixteen years old. The defendant contends, however, that one cannot cause the death of another in the manner described in the information, without first inflicting trauma to the victim's body, which is an act likely to impair the health of the minor victim. Accordingly, he maintains that, under the circumstances of this case, risk of injury to a child is a lesser included offense and, thus, the same offense for purposes of double jeopardy, as manslaughter in the first degree. We agree with the defendant.

As we have recited previously, the state charged the defendant with causing the death of the fifteen month old victim by blunt trauma to the abdomen. With respect to the risk of injury count, the state alleged that the defendant impaired the health of the fifteen month old

[16] In view of this controlling precedent, we decline to adopt the reasoning of the trial court, as set forth in its May 15, 2018 decision, that the phrase "in the manner described in the information" modifies both the greater and the lesser included offense.

[17] We iterate that the defendant did not file a motion for a bill of particulars in this case. See footnote 13 of this opinion.

victim by inflicting multiple blows to the victim's face, head, chest and abdomen, and that he caused the laceration of the victim's liver, internal bleeding in the victim's abdomen, a fracture to the victim's rib and multiple contusions of the face, head, chest and abdomen. Focusing our analysis on the theoretical possibilities, rather than the evidence, we cannot discern a scenario in which the defendant could have caused the death of the fifteen month old victim by blunt trauma to the abdomen without also impairing the health of the victim by inflicting trauma to his abdomen. Stated differently, it was not possible for the defendant to commit the homicide offense, in the manner described in the information, without first having committed risk of injury to a child. See *State* v. *Crudup*, supra, 81 Conn. App. 253; see, e.g., *State* v. *Amaral*, 179 Conn. 239, 243, 425 A.2d 1293 (1979) (defendant could not commit greater offense of possession of heroin with intent to sell by person who is not drug-dependent without, at same time, committing lesser offenses of possession of heroin with intent to sell and simple possession of heroin); *State* v. *Goldson*, supra, 178 Conn. 427 (violation of double jeopardy where defendant convicted of transportation of heroin and possession of heroin); *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 749–51 (concluding that defendant's conviction of both assault in first degree and manslaughter in first degree violated constitutional guarantee against double jeopardy because defendant could not have caused victim's death in manner charged without first having caused victim serious physical injury); *State* v. *Arokium*, 143 Conn. App. 419, 434–35, 71 A.3d 569 (violation of double jeopardy where defendant convicted of greater offense of possession of narcotics with intent to sell and lesser included offense of possession of narcotics), cert. denied, 310 Conn. 904, 75 A.3d 31 (2013); *State* v. *Cooke*, 42 Conn. App. 790, 802–803, 682 A.2d 513 (1996) (because elements of forgery in third degree must be

proven before defendant can be convicted of forgery in second degree, it is lesser included offense, and conviction of both violated double jeopardy clause); *State* v. *Flynn*, supra, 14 Conn. App. 19 (theoretically impossible to have situation where defendant, with intent to prevent performance of duties of peace officer, either causes physical injury to officer or throws or hurls bottle or other object at officer capable of causing harm without at same time obstructing, hindering, resisting or endangering that officer in performance of his duties).

In light of the cases cited herein, the defendant has demonstrated that the homicide and risk of injury offenses arose from the same act or transaction and that the risk of injury offense is a lesser included offense within the homicide offense, as charged in the information in this case.

Finally, we must consider whether the defendant's right to be free from double jeopardy was not violated because our legislature authorized multiple punishments. "Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 317, 25 A.3d 648 (2011). However, "[w]here there is no clear indication of a contrary legislative intent . . . the *Blockburger* presumption controls." (Internal quotation marks omitted.) *State* v. *Bumgarner-Ramos*, supra, 187 Conn. App. 751 n.19. In his memorandum of law in support of his motion to correct an illegal sentence, the defendant argued that there was no such intent evidenced by our legislature that would permit multiple punishments in this case. In his appellate brief, the defendant iterated this argument. This state has not provided this court with any authority

that our legislature authorized separate penalties for the defendant's criminal offenses. In the absence of any such authority that would support such a conclusion, we defer to the *Blockburger* presumption and conclude that, in this case, the defendant's punishment cannot withstand constitutional scrutiny. Id.; see also *State* v. *Flynn*, supra, 14 Conn. App. 19 ("[u]nless a clear intention to fix separate penalties for each [offense] involved is expressed, the issue should be resolved in favor of lenity and against turning a single transaction into multiple offenses" (internal quotation marks omitted)).

We conclude that the defendant's right to be free of double jeopardy was violated in this case. Accordingly, the trial court improperly denied his motion to correct an illegal sentence.

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

In this opinion the other judges concurred.

CECILIA PFISTER ET AL. *v.* MADISON BEACH HOTEL, LLC, ET AL.
(AC 41792)

Alvord, Moll and Bishop, Js.

Syllabus

The plaintiffs, residents of the town of Madison, brought an action seeking, inter alia, a permanent injunction prohibiting the defendant H Co., a hotel in Madison, and the defendant hotel property owner from hosting public outdoor summer concerts. H Co. has been in operation since before the adoption of the Madison zoning regulations in 1953 and, therefore, its operation as a hotel and a restaurant was grandfathered as a nonconforming preexisting use in a residential zone. In 2012, H Co. began sponsoring a free public summer concert series on a strip of land located immediately adjacent to the hotel property. This strip of land is part of a town park, which has existed since 1896, and was also grandfathered as a preexisting nonconforming use in a residential zone. The concert series consists of one concert per week and was scheduled, organized, and funded by H Co., which obtained the requisite permits from the town to host the concerts. During the concerts, H Co. sold

food and beverages from its property to both hotel guests and concert attendees. Since 2012, there have been numerous complaints by nearby residents regarding the noise and traffic created by the concert series. The plaintiffs thereafter brought the present action, claiming that the defendants violated Madison zoning regulations by hosting the summer concert series on the town park, thereby illegally extending and expanding nonpreexisting, nonconforming uses of the hotel property. On appeal, the defendants claimed that the trial court erred in concluding that the zoning restrictions applicable to H Co., which would prohibit it from hosting such concerts on its own property, also applied to H Co.'s ability to host a concert series on town park property. *Held*:

1. The trial court erred in concluding that H Co.'s use of the town park to host a public concert series violated the permissible uses of the park under the Madison zoning regulations because the court improperly considered the restrictions applicable to the hotel property in evaluating the legality of H Co.'s use of the town park; H Co.'s permitted use of the town park did not grant H Co. a possessory interest in the park, and H Co.'s use of its own resources to support and sponsor a free concert series, despite the commercial nature of such use, did not transform the park into part of H Co.'s property or expand H Co.'s use of the town park impermissibly, and there was no prohibition on commercial events on town property in the Madison zoning regulations.
2. The plaintiffs could not prevail on their claim that the only permissible uses of the town park are those that can be shown to have historically occurred prior to the adoption of the zoning regulations in 1953 and, therefore, because there was no evidence of concerts having occurred in the park, their occurrence improperly expanded the nonconforming use status applicable to the park; the property's classification as a park as a whole, and not merely the actual prior uses of the park, was what was grandfathered into the zoning scheme and, therefore, permissible uses of the park included all passive and recreational activities permitted in any park in Madison, the use of the park to host a free public concert series was within the bounds of the park's nonconforming use, as the town's definition of a park has no enumerated list of permissible activities, and the park has been used continuously as a park since 1896.

Argued November 21, 2019—officially released May 12, 2020

Procedural History

Action seeking, inter alia, a permanent injunction, and other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Ecker*, *J.*; judgment for the named plaintiff et al., from which the named defendant et al. appealed to this court. *Reversed*; *judgment directed.*

Damian K. Gunningsmith, with whom were *David S. Hardy* and, on the brief, *Drew J. Cunningham*, for the appellants (named defendant et al.).

Scott T. Garosshen, with whom, on the brief, was *Karen L. Dowd*, for the appellees (named plaintiff et al.).

Opinion

BISHOP, J. The defendants Madison Beach Hotel, LLC, and Madison Beach Hotel of Florida, LLC, appeal from the trial court's judgment granting a permanent injunction in favor of the plaintiffs Cecilia Pfister, Margaret P. Carbajal, Katherine Spence, Emile J. Geisenheimer, Susan F. Geisenheimer, Henry L. Platt, Douglas J. Crowley, and 33 MBW, LLC.[1] Specifically, the defendants claim that the trial court erred in holding that their use of a town owned parcel of land to host public concerts violates the zoning regulations of the town of Madison. We agree with the defendants and, accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. Madison Beach Hotel, LLC, is the owner of the Madison Beach Hotel (hotel) and the real property on which the hotel is situated, 86 and 88 West Wharf Road in Madison (hotel property). Madison Beach Hotel of Florida, LLC, is the operating entity for the hotel. The hotel sits in an R-5

[1] The town of Madison was a named defendant in the present action but the trial court dismissed the plaintiffs' claim against it for failure to exhaust administrative remedies. The plaintiffs have not cross appealed from that ruling, and the town of Madison is not otherwise participating in this appeal. We refer to Madison Beach Hotel, LLC, and Madison Beach Hotel of Florida, LLC, by name or as the defendants for purposes of this appeal.

Additionally, Schutt Realty, LLC, was a named plaintiff in the present action, but it subsequently withdrew its claims. Accordingly, we refer to Cecilia Pfister, Margaret P. Carbajal, Katherine Spence, Emile J. Geisenheimer, Susan F. Geisenheimer, Henry L. Platt, Douglas J. Crowley, and 33 MBW, LLC, as the plaintiffs for purposes of this appeal.

zone.[2] The hotel property has existed in Madison, albeit under different management, since before the adoption of the town's zoning regulatory scheme on April 10, 1953. Accordingly, the hotel's operation as a hotel and restaurant, which otherwise is not a permitted use in the residential zone in which it sits, was grandfathered as a preexisting nonconforming use.[3]

In 2006, Madison Beach Hotel, LLC, purchased the hotel property and, thereafter, the hotel began operating as it exists today. Prior to this change in ownership, previous owners of the hotel property had received approval for a number of individual variances perti nent to the property to allow for, among other things, the hotel restaurant to operate year-round instead of just seasonally, and for renovations to expand the hotel size, to reduce the number of guest rooms, and to raise the roof. In 2008, in order to address enforcement difficulties created by the numerous piecemeal variances that, at that time, were still applicable to the hotel property, the hotel applied for what it called a "comprehensive variance," which it claimed would, thereafter, be the sole authority governing the legal uses of the hotel property.

After a public hearing, the Madison Zoning Board of Appeals (board) approved the hotel's variance application. The terms of this variance, as approved by the

[2] An R-5 district is a residential zoning district established by the Madison zoning regulations. The purpose of all residential zoning districts, according to the zoning regulations, is to "set aside and protect areas to be used primarily for single family dwellings. It is intended that all uses permitted [in residential districts] be compatible with single family development . . . ." Madison Zoning Regs., § 3.1.

[3] Under the Madison zoning regulations, a nonconforming use is defined as "a [u]se of land, [b]uilding or [p]remises which is not a [u]se permitted by these [r]egulations for the district in which such land, [b]uilding or [p]remises is situated." Madison Zoning Regs., § 19. The zoning regulations also specify that "[a]ny non-conforming use or building lawfully existing at the time of the adoption of these regulations . . . may be continued . . . subject to the following regulations . . . No non-conforming use shall be extended or expanded." Id., §§ 12 and 12.3.

board, both expanded and reduced nonconformities that existed on the hotel property.[4] Furthermore, the variance placed "additional conditions and modifications" on the hotel's operation and use of the hotel property. For example, the variance limited amplification of outdoor music played on the hotel property by prohibiting any amplification louder than that which can be plainly heard within fifty feet of the hotel property.

In 2012, the hotel began sponsoring a summer concert series, known as the Grassy Strip Summer Concert Series (concert series), which consisted of one concert per week for approximately ten weeks each summer, with each concert lasting from 7 p.m. until approximately 9:30 p.m. In sponsoring the concert series, the hotel would schedule, organize, fund, and host the concerts on a strip of land located immediately adjacent to the hotel, known as the Grassy Strip. The Grassy Strip is part of a town owned parcel of land called West Wharf Beach Park. Since 1896, the Grassy Strip and West Wharf Beach Park have been owned exclusively by the town and have been used as a park since prior to the enactment of the Madison zoning regulations. Like the hotel, the park is located in a residential zone and is not considered a permitted use under the zoning regulations. Therefore, similar to the hotel property, the park was grandfathered into the Madison zoning scheme as a preexisting nonconforming use in an R-4 district.[5]

[4] The variance certificate states in relevant part: "The proposal would provide zoning-related benefits in that it would reduce nonconformities relating to coverage and to setbacks . . . reduce the number of hotel guest rooms and restaurant/lounge/bar seats, and remove unauthorized encroachments onto [t]own property. . . . Approval of the proposal as presented, and as modified by the conditions established herein, would provide a comprehensive means to defining and controlling the existing commercial use in a residential neighborhood."

[5] As of 1974, parks were a permitted use of property in residential zones under the Madison zoning regulations. Since that time, the zoning code has been revised to add the requirement that, in order to establish a park in a

The Grassy Strip is available for recreational use by any taxpaying citizen of Madison who files the appropriate facilities request form and pays the corresponding fees.[6] The evidence adduced at trial reveals that, each summer, the hotel obtains the requisite permits from the town and pays the requisite fees in order to hold the concerts on the Grassy Strip. The hotel secures the town's showmobile,[7] uses its own electricity, hires and pays the bands, reimburses the town for providing police officers to direct traffic, and advertises the concert series to the public. Although the concerts take place on the Grassy Strip, the hotel also utilizes portable bars located on the porches of the hotel to serve beverages, and the hotel restaurant is open for business during the concerts. Accordingly, patrons who attend the concerts often travel back and forth between the hotel property and the Grassy Strip during the concert to buy food and beverages, and many attendees choose to watch the concert from the hotel's balconies and railings. Although attendance at the concerts has been

residential zone, the land owner must obtain a special exception. Because West Wharf Beach Park existed in the R-4 zone prior to the special exception requirement, it was grandfathered into this requirement.

[6] The Madison zoning regulations define a park as "a tract of land reserved for active or passive recreational purposes and open to the public." Madison Zoning Regs., § 19.

The Beach and Recreation Commission is in charge of issuing permits for use of the town owned West Wharf Beach Park. The Administrative Procedures for the Use of Recreation Facilities states: "Taxpaying Madison residents and [Madison] business owners (not employees of) are eligible to utilize the [town's recreation facilities, of which West Wharf Park is one]. Permission for the use of all Beach and Recreation Department facilities must be obtained from the Beach and Recreation Director . . . . All requests are to be submitted in writing on a 'Facility Request Form' with a live signature . . . by a Madison resident." Rental fees and deposits are also required.

[7] In its memorandum of decision, the court found that "[t]he showmobile is a long rectangular trailer with retractable panels. It can be transformed hydraulically into an attractive, functional, open sided stage. The showmobile used by the hotel for the Grassy Strip Summer Concert Series was purchased by the town in 2015. The hotel pays the town a rental fee for use of the showmobile on concert nights."

estimated to average around 200 patrons per show, the evidence revealed that, for at least one of the concerts held in 2017, attendance reached close to 1000 attendees.

Since 2012, there have been a number of complaints regarding the noise and the traffic created by the concert series, which the town and the hotel have worked together to alleviate. On June 19, 2015, the plaintiffs filed a complaint in the trial court against the defendants, alleging, among other things, that the defendants had violated § 12.3 of the zoning regulations of Madison by hosting outdoor concerts and, therefore, illegally extending and expanding nonpreexisting nonconforming uses of the hotel property.[8] The defendants disagreed, arguing that the use restrictions imposed on the hotel property have no impact on their activities on the Grassy Strip. After a bench trial, the court rendered judgment for the plaintiffs, granting their request for a permanent injunction that prohibits the defendants from "organizing, producing, promoting, or sponsoring the Grassy [Strip] Summer Concert Series . . . ."[9] This appeal followed.

The defendants claim on appeal that the court erred in (1) determining that their use of the Grassy Strip violated the Madison zoning regulations, and (2) relying on *Crabtree Realty Co.* v. *Planning & Zoning Commission*, 82 Conn. App. 559, 845 A.2d 447, cert. denied, 269 Conn. 911, 852 A.2d 739 (2004), to support that determination. With regard to their first claim, the defendants argue that the trial court erred in concluding that the use restrictions applicable to the hotel property are also binding on the actions taken by the hotel

[8] Section 12.3 of the Madison zoning regulations provides that "[n]o nonconforming use shall be extended or expanded."

[9] The court's memorandum of decision additionally denied all other injunctive relief sought in the plaintiffs' operative complaint and dismissed the plaintiffs' claim for a declaratory judgment as to the enforceability of the variance with regard to certain hotel operations and functions.

on the Grassy Strip.[10] We agree with the defendants that the use restrictions that bind the hotel property, including the 2008 variance and any remaining nonconforming use,[11] are irrelevant here, as they do not apply to the activities permitted to be held by the defendants on the Grassy Strip. We also agree with the defendants' second claim that *Crabtree Realty Co.* is inapplicable in the present case. Because these two claims are intertwined, we address them together.[12]

We first set forth the relevant legal principles in reviewing a court's decision to grant a request for a permanent injunction. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . 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

[10] The defendants also argue in support of their first claim that (1) even if the 2008 variance were applicable to its use of the Grassy Strip, the Madison zoning regulations still were not violated by the use, and (2) the trial court exceeded its jurisdiction by determining that the activities occurring on the hotel property were not permitted under the terms of the variance. Because we find in favor of the defendants on other grounds, we decline to address these additional arguments.

[11] We offer no opinion as to the defendants' claim that the approval of the 2008 variance by the board eliminated, as a matter of law, any remaining nonconforming use of the property.

[12] The defendants raise as a third claim on appeal that the court's permanent injunction prohibiting them from organizing, producing, promoting, or sponsoring the concert series constitutes a violation of their rights under the first and fourteenth amendments to the United States constitution. Pursuant to the canon of constitutional avoidance, we decline to reach the merits of this claim. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the [c]ourt will decide only the latter." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring); see also *State* v. *Graham S.*, 149 Conn. App. 334, 343, 87 A.3d 1182, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014). Because we are able to resolve this matter on the basis of the text of the Madison zoning regulations and general principles of land use law, we decline to reach the merits of the defendants' constitutional claim on appeal.

an abuse of discretion." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 566, 775 A.2d 284 (2001).

Given that the defendants' claim requires us to interpret the Madison zoning regulations, "we exercise plenary review because such interpretation involves questions of law. . . . Moreover, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . [R]egulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language [or . . . the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply." (Citation omitted; internal quotation marks omitted.) *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 82, 140 A.3d 1014 (2016).

The essence of the defendants' argument is that the court's ruling—that the restrictions applicable to the hotelproperty also apply to their activities on the Grassy Strip—violates a basic principle of land use law. "It is well established that the zoning power can be exercised only to regulate land use and is not concerned with ownership." *Lord Family of Windsor, LLC* v. *Planning & Zoning Commission*, 288 Conn. 730, 740, 954 A.2d 831 (2008); see also *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 857, 670 A.2d 1271 (1996) ("zoning power may only be used to regulate the use, not the user of the land" (internal quotation marks omitted)); *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 680, 111 A.3d 473 (2015) ("[z]oning is concerned with the use of property and not primarily with its ownership" (internal quotation marks omitted)). Accordingly, the defendants argue that the court erred when it employed an analysis that considers the permissible uses of both properties together in order to determine if the actual use of one parcel would violate the

restrictions imposed on the other parcel. Instead, the defendants claim that the correct analysis for a court to use in evaluating whether a violation has occurred is as follows: "(1) [W]hat is the parcel at issue where plaintiffs claim zoning violations are occurring, i.e., the parcel being used?" "(2) [W]hat are the permissible uses of the parcel at issue under the law?" "(3) [I]s the parcel at issue being used for a permissible use under the law? If the third question is answered in the affirmative, there is no zoning violation." The defendants posit that *Thomas* v. *Planning & Zoning Commission*, 98 Conn. App. 742, 911 A.2d 1129 (2006), is factually on point with the present case and supports their proposed analytical framework. We disagree that *Thomas* is sufficiently factually analogous as to dictate a clear line of interpretation for us to follow.[13] In the absence of factually anal-

[13] In *Thomas*, an abutting neighbor brought an action against a local planning and zoning commission for approving a site application filed by a landowner to construct a parking lot in the rear of the landowner's property. *Thomas* v. *Planning & Zoning Commission*, supra, 98 Conn. App. 744–45. The property itself was a nonconforming use within its residentially zoned district. Id., 744. The plaintiff neighbor argued that the commission was permitting the illegal expansion of the landowner's nonconforming use by allowing the parking lot to be constructed. Id. The court affirmed the commission and held that the expansion of the parking lot did not expand the nonconforming use because the applicant was merely modifying an existing parking lot, and parking lots are a permitted use in that district. Id., 744–45. The defendants in the present case cite *Thomas* in support of the notion that the regulation limiting expansion of nonconforming uses does not apply to uses that are consistent with the zoning code.

With respect to *Thomas*, we agree that the import of its holding is closer to the issue presented to us today than that of *Crabtree Realty Co.*, which we discuss later in this opinion. In *Thomas*, the court held that the regulation governing the illegality of expanding nonconformities was inapplicable to an alteration on a property that constitutes a permitted use with the zoning code. *Thomas* v. *Planning & Zoning Commission*, supra, 98 Conn. App. 751. However, because *Thomas* involved the building of a parking lot on the *same* parcel of land as that owned by the landowner, we acknowledge that the application of *Thomas* in this instance is limited. To the extent that *Thomas* recognizes that developments consistent with the zoning code are, by their nature, not nonconformities, we agree. However, in the present case, the concerts are not held on the hotel property but, instead, are held on the Grassy Strip. Therefore, *Thomas* can be factually distinguished.

ogous case law to the contrary, and in conjunction with traditional notions of land use law, however, we agree that the defendants' analysis in looking only to the rules applicable to the particular parcel at issue is proper.

In proposing this analysis, the defendants explicitly reject the court's application of *Crabtree Realty Co.* v. *Planning & Zoning Commission*, supra, 82 Conn. App. 559, which held that, under the circumstances present in that case, the court could look beyond parcel borders to determine the legality of the use at issue. We conclude that *Crabtree Realty Co.* is inapplicable in the present case because the relationship between the landowners and the parcels on which they seek to take action is materially different.

In *Crabtree Realty Co.*, a defendant landowner sought to construct a parking lot on a vacant parcel of land adjacent to his own property, which he was leasing for that purpose. Id., 563. The defendant's own property, an auto dealership, was a preexisting nonconforming use within the zoning district in which it was located. Id. The defendant landowner filed a site plan application with the local planning and zoning commission, seeking approval to construct the parking lot on the leased parcel of land. Id., 561–62. The commission denied the request on the ground that his proposal would enlarge his property's preexisting nonconforming use in violation of the local zoning regulations. Id., 562. On appeal, the Superior Court affirmed the decision of the commission, and the landowner thereafter appealed to this court. Id., 561. In turn, this court affirmed the Superior Court's decision, holding that the landowner's proposed use of the leased parcel to add parking spots for the nonconforming business it operated on its own parcel would constitute an illegal expansion of the preexisting nonconforming use. Id., 565–66.

In the present case, the plaintiffs argue that the court did not err in concluding that the hotel's actions on the

Grassy Strip violate restrictions placed on the hotel property via the Madison zoning regulations. In its decision, the court here applied *Crabtree Realty Co.* as a controlling authority. In applying *Crabtree Realty Co.*, the court determined that, because the hotel would be expanding its nonconforming use if it were to host the concerts on its own property, it should not be allowed to avoid that violation simply by hosting the concerts on the adjacent Grassy Strip. It is undisputed, however, that the Grassy Strip still is, and has been, owned and operated as a park by the town of Madison since 1896. In reaching its conclusion, the court considered the facts that the hotel pays for and supplies electricity, as well as produces, organizes, and benefits from the concert series as evidence that the hotel has annexed the Grassy Strip to its own property for purposes of assessing its use of the land. We note, however, that the court cited no authority, aside from *Crabtree Realty Co.*, to support this analysis. For the reasons we outline, we conclude that *Crabtree Realty Co.* is inapposite.

Crabtree Realty Co. is readily distinguishable from the present case because the second parcel in *Crabtree Realty Co.* was a vacant lot of private property that was exclusively leased by the owner of the first parcel. The court in *Crabtree Realty Co.* stated that the commission in that case was "entitled to deny the plaintiff's application because the proposed use of [the vacant second parcel] would have *added new land* to the plaintiff's nonconforming use of [its own property]." (Emphasis added.) Id., 564. The court in *Crabtree Realty Co.* also stated that the trial court properly upheld the commission's determination that the use would result in an illegal expansion of a nonconforming use because "the proposed use of [the vacant second parcel] would result in a *physical change* of the *property under the plaintiff's control* . . . ." (Emphasis added.) Id., 565.

In the present case, the second parcel at issue, the Grassy Strip, is not a vacant private lot leased by

the defendants for future use but, instead, is a public tract of land operating as a park and owned by the town.[14] Although the hotel has received permits to use the Grassy Strip, these licenses granted to the hotel by the Madison Beach and Recreation Department do not grant the hotel the same possessory interest in the Grassy Strip as the lease in *Crabtree Realty Co.* granted to that landowner.[15] "A lease is a contract under which an exclusive possessory interest in property is conveyed." *Clean Corp.* v. *Foston*, 33 Conn. App. 197, 201, 634 A.2d 1200 (1993). A "license [however] in real property is a mere privilege to act on the land of another, which does not produce an interest in the property." Id., 203. Therefore, *Crabtree Realty Co.* is factually distinguishable from the present case because of the differences in control over the parcels at issue in each case.

Additionally, unlike *Crabtree Realty Co.*, the hotel's use of the Grassy Strip to host a public concert once a week does not constitute a physical change of the hotel's own property in the way that adding a parking lot for use by patrons of the auto dealership would have

[14] From June 13, 2012 to June 13, 2013, the defendants had a reciprocal license agreement with the town during which time the town licensed the Grassy Strip property to the hotel. Throughout the trial court proceedings in this case, this agreement was referred to as a "lease." The agreement, however, functioned as a license, and did not convey actual ownership of the Grassy Strip to the hotel. "[A] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property. . . . [It] does not convey a possessory interest in land . . . ." (Internal quotation marks omitted.) *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, 62 Conn. App. 517, 522, 772 A.2d 154, cert. denied, 256 Conn. 916, 773 A.2d 945 (2001). The agreement between the hotel and the town was for a term of one year and did not terminate the town's ongoing ownership of the Grassy Strip. In fact, the agreement itself expressly stated that the town retained ownership in the land, and merely granted exclusive rights of use to the hotel for a set term. The agreement terminated in 2013 and, accordingly, is no longer operative.

[15] We acknowledge that, since 1979, the hotel has retained exclusive responsibility for the landscaping and maintenance of the Grassy Strip. This has included cutting the grass and managing its overall appearance. This maintenance responsibility is the result of an agreement with the town.

altered the property in *Crabtree Realty Co*. Although we agree that, in the particular factual scenario at issue in *Crabtree Realty Co.*, the commission was correct in determining that permitting the construction of a parking lot would constitute an illegal expansion of the auto dealer's nonconforming use, we disagree with the court in the present case that the facts of *Crabtree Realty Co.* are parallel to those that we confront in this matter. Contrary to the conclusion of the court, the hotel's use of its own resources to support and sponsor a free concert series does not transform the Grassy Strip into part of the hotel's property, nor does it expand the hotel's use of its own property impermissibly. Accordingly, we do not agree with the court's reliance on *Crabtree Realty Co.*

The defendants also challenge the court's consideration of the nature of their use of the Grassy Strip in determining whether the zoning regulations were violated. The court stated that, because the hotel's use of the property is "commercial" in nature, the hotel has effectively executed an end run around the restrictions limiting the business it may conduct on its property and, therefore, it has violated the zoning regulations. We agree with the defendants that the court's reliance on the alleged "commercial nature" of the concert series was incorrect.

The fact that the hotel stands to benefit, financially or otherwise, from the concerts held on the Grassy Strip has no bearing on the legal determination regarding the permissible uses of the Grassy Strip by a Madison citizen under the zoning regulations. The court states in its memorandum of decision that, "[w]ith each concert . . . the hotel also generates goodwill, and draws to its doorstep hundreds of potential future customers for the hotel's lodging, banquet, and other services. Whatever other interests may be served by the concert series (promoting town spirit, supporting arts and enter-

tainment, and so forth), the event is plainly a commercial activity, which generates direct and indirect economic benefits for the hotel as a business enterprise." The court then goes on to say that, with the commerciality of the concerts in mind, the activity is clearly illegal because it undeniably exceeds the nonconforming use limitations on the hotel property under § 12.3 of the Madison zoning regulations. As noted previously in this opinion, we disagree with the court's focus on the restrictions applicable to the hotel property, as we do not think such an analysis is germane to the pivotal issue presented for adjudication.

The court additionally states, albeit in dicta,[16] that the commercial nature of the concerts creates an illegal nonconformity on the Grassy Strip. Notably, there is no prohibition of commercial events on town property codified anywhere in the Madison zoning regulations.[17] The court's determination, however, is not rooted in the permissible uses of a town owned park under the zoning regulations; rather, the court explains that, even if other Madison citizens would be permitted to hold a musical performance on the Grassy Strip, the hotel cannot do so "in a manner that temporarily annexes the

[16] The court's assertion that the hotel's use of the Grassy Strip violates the nonconforming use *of the park* is only discussed briefly in the memorandum of decision. The court writes: "Due to the commercial nature of the concerts as they are produced by the hotel, this activity also violates the Madison zoning regulations applicable to West Wharf Park, because commercial activities of this nature are not a permitted use in an R-4 zone, park or no park." The court's statement is not supported by any case law, regulation, or legal analysis, and we therefore conclude that this language is mere dictum.

[17] Within the Madison Administrative Procedures for the Use of Recreation Facilities, which are not a part of the zoning regulations, it states that "Madison facilities cannot be used for individual or corporate personal enterprise where admission fees are charged or where selling a product/service *is the purpose of the gathering* . . . ." (Emphasis added.) As the undisputed record reflects, no admission fees were charged for entry to the concerts, and the defendants' stated purpose for the concert series was to provide a form of free recreational entertainment to the public on the Grassy Strip.

town's property to extend [its own] (nonconforming) commercial activities using the town's land." The court's emphasis on the commercial nature of the defendants' events, however, serves only to prevent a specific citizen, the hotel, from using a town owned space in a manner available to other citizens.

On the basis of the foregoing, we agree with the defendants that the court erred in considering the restrictions applicable to the hotel property when evaluating the legality of the hotel's use of the Grassy Strip. In its memorandum of decision, the court cites no basis, either in the zoning regulations or in precedent, to justify disregarding the use-user distinction that serves as a cornerstone of land use law. Accordingly, we conclude that the proper inquiry for determining the legality of a use of a parcel of land is that set forth by the defendants: (1) What is the parcel being used? (2) What are the permissible uses of the parcel at issue under the law? (3) Is the parcel at issue being used for a permissible use under the law? This analytical framework properly focuses on the use of the parcel in question and not on the identity of the user of the parcel. In order to conduct this analysis on appeal, we must first determine the permissible uses of West Wharf Beach Park.

As is previously discussed in this opinion, the parcel on which the subject use is occurring is the Grassy Strip. The Grassy Strip is located in a parcel classified as a park, which the Madison zoning regulations ordinarily do not permit in residential zones. Accordingly, the Grassy Strip, as part of West Wharf Beach Park, was grandfathered into the zoning regulations as a preexisting nonconforming use *as a park*. The plaintiffs assert, and the trial court agreed, that the only permitted uses of the grandfathered Grassy Strip are those uses of the Grassy Strip that can be shown to have historically occurred prior to the adoption of the zoning regulations in 1953, and not the uses permitted in parks generally.

The defendants, however, argue that, because West Wharf Beach Park was grandfathered into the zoning scheme *as a park*, the available uses of the park are not limited to merely those activities that have actually happened in West Wharf Beach Park prior to the zoning regulations, but instead include all of the permitted uses of a park under the Madison zoning regulations. We agree with the defendants.

"A nonconforming use is merely an existing use the continuance of which is authorized by the zoning regulations. . . . To be a nonconforming use the use must be actual. It is not enough that it be a contemplated use nor that the property was bought for the particular use. The property must be so utilized as to be irrevocably committed to that use. . . . [T]o be irrevocably committed to a particular use, there must have been a significant amount of preliminary or preparatory work done on the property prior to the enactment of the zoning regulations which unequivocally indicates that the property was going to be used for that particular purpose." (Citations omitted; internal quotation marks omitted.) *Wing* v. *Zoning Board of Appeals*, 61 Conn. App. 639, 644–45, 767 A.2d 131, cert. denied, 256 Conn. 908, 772 A.2d 602 (2001).

The plaintiffs argue that, because there is no evidence of concerts having ever occurred on the Grassy Strip, their occurrence improperly expands the nonconforming use status applicable to the park. As is established by our case law, however, the "actual use" requirement for qualifying as a nonconforming use refers to the use of the parcel *as a whole* in the manner intended to be grandfathered. We repeat for clarity that West Wharf Beach Park, including the Grassy Strip, has been a town owned parcel of land continuously *used as a park* since 1896, and that the zoning regulations were enacted in 1953. Accordingly, the property had been continuously and actually used as a park for more than fifty years prior to the adoption of the zoning regulations and,

therefore, had undoubtedly been irrevocably committed to its particular use as a park. It makes no difference whether a particular recreational use—in this case, concerts—has occurred in this particular park before, because Madison's definition of a "park" has no enumerated list of permissible activities.[18] The Madison zoning regulations define a park only as "a tract of land reserved for active or passive recreational purposes and open to the public." Madison Zoning Regs., § 19. Because the West Wharf Beach Park has been *reserved for active and passive recreational purposes and open to the public* since prior to 1953, the use of the park to host a free public concert series is well within the bounds of the park's nonconforming use. The property's classification as a park, and not merely the actual prior uses of the park, is what was grandfathered into the zoning scheme.

Therefore, in applying the analytical framework appropriate here, we determine that (1) the land being utilized is the Grassy Strip, which is a part of the longstanding West Wharf Beach Park (2) the permissible uses of West Wharf Beach Park include all of those passive and active recreational activities permitted in parks in Madison, regardless of whether they have ever taken place in West Wharf Beach Park before, and (3) the recreational Grassy Strip Concert Series—a free, passive recreational activity—constitutes a permitted use of the Grassy Strip in West Wharf Beach Park. In viewing the use of the Grassy Strip for the concert series through the analysis proposed by the defendants, we conclude that the hotel's use of the Grassy Strip does not violate the permissible uses of a park under the zoning regulations in the manner asserted by the plaintiffs on appeal. Accordingly, we reverse the judgment of the court to the extent that it determined that

[18] In addition, the evidence at trial revealed that other parks in town, including Salt Meadow Park, have had musical outdoor events hosted by citizens and organizations. These parks, too, exist in residential zones.

the defendants' use of the Grassy Strip to host the concert series violated the Madison zoning regulations.

The judgment is reversed and the case is remanded with direction to deny the plaintiffs' request for a permanent injunction.

In this opinion the other judges concurred.

JORGE BENITEZ *v.* COMMISSIONER OF CORRECTION (AC 41891)

Lavine, Bright and Sheldon, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance for failing to hire or to consult with a defense expert in arson investigation before trial. The petitioner had been convicted of various offenses in connection with his role in planning and recruiting two brothers, J and F, to burn the shed of the victim, G, with whom he quarreled over used car transactions. After G had removed two cars from the petitioner's used car lot, the petitioner took various actions that G interpreted as threats to his safety and his wife's safety. G testified that the petitioner left two sealed envelopes with "funny money" inside on G's lawn, indicating to G an intent to retaliate. When he thereafter observed two men near his shed just before it burst into flames, he fired a gun at the men as they fled, striking one man in the arm. J sought treatment that evening in a Massachusetts hospital for a gunshot wound to his arm; DNA from his blood was recovered outside G's home. At the criminal trial, J testified that the petitioner had hired him and F to burn the shed, had given them the gas can containing gasoline to use, and had telephoned him twice the evening of the fire. The state presented evidence that the DNA recovered from the saliva on the envelopes left on G's lawn had come from the petitioner. The state also presented the testimony of an expert, a state chemist, that the accelerant used to start the fire was not gasoline, but a compound often found in various substances used in the car repair business. Defense counsel, who had not hired an arson investigation expert, learned for the first time at trial, through the state's expert, that the accelerant was not gasoline, after he had cross-examined G. Defense counsel, because he had not known that the accelerant was a compound that G may have used to repair autos in his shed, had not questioned G regarding his access to such an accelerant to start the fire. The habeas court denied the petition for a writ of habeas corpus. On the petitioner's

certified appeal to this court, *held* that the habeas court properly denied the petitioner's petition for a writ of habeas corpus on the basis of his failure to establish that his counsel's failure to hire or to consult with a defense expert in arson investigation before trial prejudiced his defense; the petitioner failed to prove that, if counsel had known before trial that an organic compound other than gasoline, particularly a compound used in auto repair, had been used to set fire to G's shed, his cross-examination of G would have elicited sufficient evidence to establish a reasonable probability that the result of the criminal trial would have been different, the petitioner having failed to call G to testify at the habeas trial to establish what G would or could have testified to on cross-examination at the criminal trial had he been questioned about the compound, and the state's other evidence establishing the petitioner's guilt as the person who planned and recruited others to commit the intentional burning of G's shed was overwhelming, including eyewitness testimony from G and J and DNA evidence connecting J to the scene on the night of the fire and the petitioner to the envelopes left on G's lawn.

Argued March 4—officially released May 12, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. In this certified appeal from the denial of his petition for a writ of habeas corpus, the petitioner, Jorge Benitez, contends that the habeas court erred in rejecting his claim that he was deprived of the effective assistance of counsel in his underlying criminal trial. In that trial, the jury found the petitioner guilty of five

criminal offenses in connection with his alleged role in planning and recruiting others to carry out the intentional burning of a shed owned by the complainant, Joseph Gionet, in Thompson. Those offenses included arson in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-111 (a) (4), conspiracy to commit arson in the second degree in violation of General Statutes §§ 53a-48 (a) and 53a-112 (a) (1) (A), criminal mischief in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-115 (a) (1), conspiracy to commit criminal mischief in the first degree in violation of §§ 53a-48 (a) and 53a-115 (a) (1), and inciting injury to persons in violation of General Statutes § 53a-179a. After the jury returned its guilty verdict, the trial court separately found the petitioner guilty, as alleged in a part B information, of being a persistent felony offender under General Statutes (Rev. to 2005) § 53a-40 (f). Thereafter, the trial court sentenced the petitioner to a total effective sentence of fifteen years of incarceration, execution suspended after thirteen years, followed by five years of probation. This court subsequently affirmed the petitioner's conviction on direct appeal. See *State* v. *Benitez*, 122 Conn. App. 608, 610, 998 A.2d 844 (2010).

Following his direct appeal, the petitioner commenced this habeas corpus action. On January 24, 2018, after twice amending his original habeas corpus petition, the petitioner was brought to trial before the habeas court on his second amended habeas corpus petition. After five days of evidence and posttrial briefing, the habeas court issued a memorandum of decision in which it denied the petition. The habeas court ruled that the petitioner had failed to prove either essential element of his claim of ineffective assistance of counsel under controlling state and federal case law enforcing the right to counsel provided by the sixth and fourteenth amendments. The habeas court subsequently granted the petitioner's petition for certification to appeal from its decision. This appeal followed.

A criminal defendant has a constitutional right to the effective assistance of counsel at his criminal trial. U.S. Const., amend. VI. This right is made applicable to the states through the due process clause of the fourteenth amendment. U.S. Const., amend. XIV. "In *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Internal quotation marks omitted.) *Carneiro* v. *Commissioner of Correction*, 109 Conn. App. 513, 515, 952 A.2d 80, cert. denied, 289 Conn. 936, 958 A.2d 1244 (2008). "To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary skill and training in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 835, 970 A.2d 721 (2009). "It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

In this appeal, the petitioner claims error as to the habeas court's rulings rejecting both prongs of his ineffective assistance of counsel claim. After carefully reviewing the record before us, we conclude that the habeas court's denial of the petitioner's claim of ineffective assistance of counsel must be affirmed because the petitioner failed to establish the prejudice prong of that claim by proving that his counsel's failure to hire or consult with a defense expert in arson investigation before trial prejudiced his defense.

The petitioner's claim must be evaluated in light of the evidence presented at his trial. In that trial, the state claimed and sought to prove that the petitioner had hired two brothers from Massachusetts, Jorge Delgado and Francisco "Frankie" Delgado, to burn down the complainant's shed. He did so, it was claimed, to get back at the complainant for removing two cars from the petitioner's used car lot, one of which the complainant had left with the petitioner to be sold on consignment. After the two men argued about what the complainant had done, the complainant received a threatening phone call. Later that same day, he found two envelopes stuffed with "funny money" on the lawn outside of his house, which the petitioner had previously indicated to the complainant is a method that he uses to notify people who do not comply with his wishes; he then enlists friends from Massachusetts to "[take] care of his problems." The envelopes were marked with the model years of the two cars the complainant had removed from the petitioner's lot. Put on guard by the petitioner's threat, and keeping an eye out for trouble, the complainant began to notice that, on several occasions, the petitioner drove by his house in different cars. Fearing that the petitioner might be planning to cause trouble at or near his house, and fearing for the safety of his wife, who came home from work late at night, the complainant began to wait outside the house in the dark, sometimes armed with a

gun, as the hour of his wife's return approached. On one such night, he heard footsteps of persons coming onto his property, and then saw two men near his shed before a large fireball burst above them. Chasing the men into the street, with flames shooting high in the air above them, the complainant fired several shots in their direction, striking one of them in the arm. That man, Jorge Delgado, after setting the fire, fled to Worcester, Massachusetts, to receive medical treatment for his wound in an out of state hospital. Jorge Delgado testified at the petitioner's criminal trial that the petitioner had hired him and his brother Frankie to burn down the shed, had given them a gas can containing gasoline to do the job, and had spoken with him by telephone before and after setting the fire, when he called him initially to ensure that he could establish an alibi and, later, to confirm for him that the job was done. The state also presented telephone records confirming that the two phone calls described by Jorge Delgado, in fact, had been made, DNA evidence from blood recovered outside the complainant's house that showed that Jorge Delgado had been injured in that location on that evening, and hospital records that showed that Jorge Delgado had been treated for a gunshot wound at a Worcester hospital on the evening of the fire. In addition, the state presented DNA evidence, which proved that the saliva used to seal the two envelopes of "funny money" left on the complainant's lawn before the fire had come from the petitioner. Finally, as previously noted, a state expert chemist testified that the accelerant used to start the fire was not gasoline, but a medium boiling range petroleum distillate, a substance used in the car repair business, in paint thinner and degreasers.

The evidence at the habeas trial showed that defense counsel neither hired nor consulted with an expert in arson investigation before the start of trial. As a result, he did not learn that the fire had not been started with gasoline until the state's expert testified.

The petitioner bases his claim of prejudice on counsel's alleged deficient performance in declining to hire or to consult with an expert in arson investigation before trial, which caused him not to learn the type of accelerant used to start the fire before he cross-examined the complainant, who testified before the state's expert chemist. According to the petitioner, counsel's resulting lack of knowledge prevented him from mounting an effective cross-examination of the complainant on the petitioner's alternative theory that the complainant, not the Delgado brothers, had started the fire using a medium boiling range petroleum distillate of the sort that the complainant may have used in his auto repair business and stored in his shed. The lack of such information, claims the petitioner, compromised counsel's ability to cross-examine the complainant concerning his own access to and likely use of such an accelerant to set the fire.

After thoroughly reviewing the entire record before the habeas court, we conclude that its ruling must be affirmed because the petitioner failed to establish the prejudice prong of his claim.

On this score, we note initially that, for the petitioner's claim of prejudice to be successful, he had to prove that, if counsel had known before trial that an organic compound other than gasoline, particularly a medium boiling point petroleum distillate, had been used to set fire to the complainant's shed, his cross-examination of the complainant would have elicited sufficient evidence to establish a reasonable probability that the result of his criminal trial would have been different. There are two reasons why the petitioner failed to prove his claim of prejudice in this case.

First, the petitioner failed to call the complainant to testify at the habeas trial, or otherwise to establish what the complainant would or could have testified to on cross-examination, had he been questioned about his

access to and possible use of such medium boiling range petroleum distillates to set fire to his own shed. It is axiomatic that a habeas petitioner who claims prejudice based on counsel's alleged failure to present helpful evidence from a particular witness, must call that witness to testify before the habeas court or otherwise prove what the witness would or could have stated had he been questioned at trial, as the petitioner claims he should have been. See, e.g., *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 554, 124 A.3d 1 (petitioner failed to prove prejudice when he "did not offer evidence regarding how [the witnesses] would have testified if they had been cross-examined [differently]"), cert. denied, 320 Conn. 910, 128 A.3d 954 (2015). In this case, no such showing was even attempted, much less made.

Second, apart from the petitioner's failure to establish what the complainant would have testified to had he been cross-examined as the petitioner suggested, the state's other evidence establishing the petitioner's guilt as the person who planned and recruited others to commit the intentional burning of the complainant's shed, as summarized above, was overwhelming. Two independent eyewitnesses testified to what they had seen and done on the evening of the incident. One, the complainant, testified to his long running dispute with the petitioner concerning their dealings about the repair and sale of cars, including their recent dispute about his removal of two cars from the petitioner's used car lot, one of which had been left to be sold on consignment. The petitioner reportedly had an angry, threatening reaction to the cars' removal, and the threat had involved unspecified payback to the complainant by the petitioner's friends from Massachusetts. The complainant had then seen the petitioner drive by his house on several occasions, and had found two envelopes on his lawn stuffed with "funny money" and bearing the model years of the two cars he had removed from the

petitioner's lot. On notice about the petitioner's plans for retribution, he kept watch outside of his house late at night when his wife was due to return home from work. It was in keeping such a lookout that he spotted two men near his shed when the shed went up in flames; he shot one of them with his rifle as he chased them off. The second eyewitness, Jorge Delgado, confirmed the complainant's testimony by testifying that he was shot and injured on the evening of the fire when he and his brother Frankie, two residents of Massachusetts who had been hired by the petitioner for that purpose, went to the complainant's house with a gas can and burned down his shed before shots rang out and he was struck in the arm by a bullet. The evidence confirmed that Jorge Delgado's blood had been left at the scene of the fire where the complainant had shot him, he had been treated for his injuries on that evening in a Worcester hospital, and he had twice telephoned the petitioner on that evening, once before and once after setting the fire. Finally, the evidence showed that the threatening envelopes filled with "funny money" had been sealed shut by the petitioner. In light of this wealth of highly damning evidence, there is no reasonable probability that, if his trial counsel had conducted his defense as the petitioner claims he should have, the result of the petitioner's criminal trial would have been different.

Accordingly, we affirm the denial of the petitioner's habeas corpus petition on the basis of his failure to establish the prejudice prong of his ineffective assistance of counsel claim.

The judgment is affirmed.