STATE OF CONNECTICUT *v.* JOHN PJURA
(AC 41869)

Prescott, Elgo and Devlin, Js.

Syllabus

The defendant, who had been convicted of the crimes of assault in the second degree and larceny in the sixth degree, appealed to this court from the judgment of the trial court, claiming that he was deprived of his right to a fair trial because of prosecutorial impropriety and that the evidence was insufficient to prove that he intended to cause the victim, H, serious injury when he punched H in the head and fractured his skull. The defendant had attempted to leave a shoe store with a pair of sneakers he had not paid for. H, an assistant manager at the store, and R, a cashier there, observed the defendant leave the store without paying for the sneakers. H followed the defendant into a neighboring store, where he confronted him and told him that he would not call the police if he returned the sneakers. The defendant complied and, as they headed back to the shoe store, H became uncomfortable and radioed R to call the police. The defendant then used his dominant right hand to punch H in the head with a closed fist, after which the defendant fled in his car. D, a shopper at the neighboring store, heard the impact of the punch about fifteen to twenty feet away. *Held*:

1. There was sufficient evidence from which the jury could have reasonably found that the act of punching H directly in the head and with great force was strongly corroborative of the defendant's intention to cause

serious physical injury in an effort to facilitate his escape; the punch caused a life-threatening injury, as it fractured H's skull in multiple places, rendered him unconscious and was heard by D fifteen to twenty feet away, and, although the defendant claimed that his intent was not to cause serious injury but to escape, he testified that he could have shoved H in the chest, punched him in the stomach, tripped him or tried running away rather than engaging in physical contact with H.

2. The defendant could not prevail on his claim that he was denied his right to a fair trial as a result of prosecutorial impropriety, as none of the challenged remarks was improper:

a. The prosecutor did not place evidence of the defendant's postarrest silence before the jury in violation of the trial court's orders, as the prosecutor asked C, a police detective, only about the defendant's conduct in response to C's request to photograph the defendant's hands during his detention by the police, the record was insufficient to determine if the prosecutor intended to elicit improper evidence as to postarrest silence, the question was open-ended, the type of evidence the prosecutor attempted to elicit was ambiguous, the court issued no formal ruling on a motion the defendant had filed to preclude evidence of his postarrest silence and instructed the jury that questions by the attorneys were not evidence; moreover, the prosecutor had a proper motive for asking the defendant on cross-examination if he felt remorse about the incident with H, as defense counsel's questions to the defendant on direct examination opened the door for the prosecutor's follow-up questions, and the prosecutor had a good faith basis to ask the defendant additional questions on recross-examination about his remorse, as the court previously had permitted the prosecutor on cross-examination to impeach the defendant's credibility as to his purported remorse.

b. The prosecutor invited the jury to draw reasonable inferences from the evidence and did not argue facts not in evidence during closing argument about the defendant's intent to cause H serious injury, as defense counsel did not object to the prosecutor's arguments, the defendant's testimony that he could have taken other action to get away and avoid arrest instead of punching H in the head supported the prosecutor's arguments, the prosecutor's arguments as to the defendant's motivation for shopping at H's store were not presented to the jury as facts but, instead, as a submission of a reasonable inferences the jury could draw from the facts and evidence, and the prosecutor's argument about the differing accounts of the incident by H and the defendant merely asked the jury to make a credibility determination.

c. The prosecutor did not frame his statements to the jury by suggesting that it would need to find that R and D lied about the location of the defendant's punch in order to find the defendant not guilty: the prosecutor's statements, to which defense counsel did not object, asked the jury to weigh the credibility of each witness and did not force the jury to find the defendant not guilty only if first concluded that R and

D had lied; moreover, even if R and D had lied, the jury could have found the defendant guilty on the basis of his testimony alone that he punched H in the head.

(*One judge concurring separately*)

Argued May 22—officially released October 20, 2020

Procedural History

Substitute information charging the defendant with one count each of the crimes of robbery in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of Litchfield at Torrington and tried to the jury before *Danaher*, *J.*; verdict and judgment of guilty of assault in the second degree and the lesser included offense of larceny in the sixth degree, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, assistant public defender, with whom, on the brief, was *MarcAnthony Bonanno*, certified legal intern, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *David R. Shannon*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, John Pjura, appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (1) and one count of larceny in the sixth degree in violation of General Statutes § 53a-125b. The defendant claims on appeal (1) that there was insufficient evidence to prove beyond a reasonable doubt that he intended to cause serious physical injury to the victim, and (2) that he was denied his right to a fair trial because the prosecutor committed improprieties during the trial by (a) attempting to place evidence of the defendant's postarrest silence

before the jury, (b) arguing facts not in evidence, and (c) arguing to the jury that, in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our discussion. On September 11, 2016, the defendant attended church with his girlfriend, her son, and her friends, Kim Barnard and Jay Barnard. At some point, Kim Barnard came up with the idea of going to a fair in Bethlehem. The defendant was reluctant to go to the fair because he had a hole in his shoes and was not comfortable with the idea of walking around a muddy fairground with them. Upon hearing this, Kim Barnard suggested that the defendant buy new shoes at a nearby Payless Shoes store. The defendant did not have the ability to pay for his own shoes, so Kim Barnard gave the defendant's girlfriend her credit card so the defendant could buy shoes.

Following the church service, the defendant left with his girlfriend and her son to buy some sneakers. They went to the Famous Footwear store in Torrington. The defendant found a pair of sneakers he liked, and he tried them on. The defendant believed that he could sneak out of the store without paying for the sneakers. To accomplish this, he put his old shoes into the shoe box, left the store, and entered the neighboring Target store.

The victim, Andrew Howe, an assistant store manager at Famous Footwear, observed the defendant trying on the shoes. He then saw the defendant put his old shoes into the shoe box and place the box back on the shelf. The victim and Anna Rogers, a cashier, saw the defendant leave the store without paying for the sneakers. The victim followed the defendant out of the store and

into Target. He confronted the defendant, told him that there were cameras everywhere within the store and that if the defendant returned the stolen shoes that he would not call the police. The defendant complied with the victim's directions, and the two headed back to Famous Footwear without a struggle or argument. While heading back to the store, however, the victim, sensing that the mood had changed, became uncomfortable and radioed Rogers to call the police. The defendant then punched the victim in the head with his dominant right hand, sprinted to his vehicle, and drove away. The force of the punch was so strong that Mark Dalessandro, a shopper at Target, heard its impact from approximately fifteen to twenty feet away. The victim was unable to brace himself and immediately collapsed to the ground. He suffered serious injuries, including a depressed skull fracture and a subarachnoid hemorrhage. He underwent surgery to reconstruct his skull. As a result of his injuries, he had to relearn to walk and to talk and was unable to drive.

After the incident, Torrington police sent out a "be on the lookout" alert with a description of the suspect. They also published a photograph of the suspect on their Facebook page. On September 18, 2016, several members from the Barnards' church approached Jay Barnard with the photograph of the suspect from the Facebook page. Jay Barnard recognized the defendant from the photograph. He confronted the defendant later that day and asked him either to turn himself in to the police or to clear up the matter. The defendant denied that the photograph was of him. Following this conversation, the defendant began walking in the direction of the police department. He did not, however, turn himself in to the police and instead began wandering around the area.

Later that day, the Torrington police were dispatched after a concerned citizen reported the presence of a

suspicious person in her backyard. The police located the defendant, but he managed to flee from them. Later that evening, the Torrington police were dispatched to a house where a suspicious person was reported to have been sleeping on a pantry floor. The officers located the suspicious person, who was identified as the defendant, and arrested him.

The defendant was charged with robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and assault in the second degree in violation of § 53a-60 (a) (1). The jury found the defendant not guilty of robbery but returned a guilty verdict on the lesser included offense of larceny in the sixth degree. The jury also found the defendant guilty of assault in the second degree. The court, *Danaher*, *J.*, sentenced the defendant to six years of imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to prove beyond a reasonable doubt that he intended to cause serious physical injury to the victim. Specifically, the defendant asserts that there was no direct or circumstantial evidence from which the jury reasonably could infer that he acted with the necessary intent. The defendant further argues that the evidence established only his intent to flee the scene to avoid being taken into police custody. We disagree.

We begin our analysis with the well established standard of review for assessing an insufficiency of the evidence claim. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative

force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011).

"A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, the actor causes such injury to such person or to a third person . . . ." General Statutes § 53a-60 (a). "Serious physical injury" is statutorily defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4). "Assault in the second degree under § 53a–60 (a) (1) is a specific intent, rather than a general intent, crime." *State* v. *Perugini*, 153 Conn. App. 773, 780 n.7, 107 A.3d 435 (2014), cert. denied, 315 Conn. 911, 106 A.3d 305 (2015). "Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . [T]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical

conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading up to and immediately following the incident. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citations omitted; internal quotation marks omitted.) *State* v. *Andrews*, 114 Conn. App. 738, 744–45, 971 A.2d 63, cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009).

Next, we examine the circumstantial evidence presented at trial from which the state contends a jury reasonably could infer that the defendant punched the victim with the intent to cause serious injury. The victim caught the defendant stealing the sneakers from Famous Footwear and instructed him to return them. While heading back to the store, the defendant became fearful of the prospect of going to jail and wanted to flee to evade responsibility for his actions. The defendant believed that the victim would continue to follow him if he tried to continue walking. As a result, the defendant threw a closed-fisted punch at the victim's head with his dominant right hand and fled the scene. The sound of the punch was audible to a bystander standing fifteen to twenty feet away. The punch was so hard that it knocked the victim unconscious and caused him to collapse to the ground without the ability to brace himself. The punch fractured the victim's skull in multiple places and was a life-threatening injury. Given these facts presented at trial, the jury reasonably could have found that the act of punching the victim directly and with great force in the head is strongly corroborative

of an intention to cause serious physical injury. See *State* v. *Mendez*, 154 Conn. App. 271, 279, 105 A.3d 917 (2014) (rejecting defendant's insufficiency of evidence claim and holding that jury could have reasonably inferred that defendant intended to cause serious physical injury when defendant punched victim in jaw).

The defendant further argues that when he punched the victim, his intent was not to cause serious physical injury but, rather, that his sole intent was to escape. We are not persuaded. "The existence of an intent to escape does not necessarily negate the existence of an intent to cause serious physical injury when making the escape." *State* v. *Andrews*, supra, 114 Conn. App. 746. Under the factual circumstances of this case, the jury reasonably could have inferred that the defendant intended to cause the victim serious physical injury in an effort to facilitate his escape. The defendant testified that he intended only to avoid capture when he punched the victim. He also admitted, however, that he could have tried shoving the victim in the chest, punching him in the stomach, or tripping him to avoid going to jail. He further stated that he could have tried running away rather than engaging in any physical contact with the victim, although he noted that the victim might have chased him if he attempted to flee because the victim appeared to be in good shape. From these facts, the jury reasonably could infer that the defendant believed it necessary to severely injure the victim in order to escape successfully. Such evidence permits a reasonable inference that, while the defendant was contemplating fleeing in order to avoid police involvement, he made an intentional decision to punch the victim in the head with great force in order to effectuate his escape. See id. (evidence permitted reasonable inference that defendant made intentional decision to turn car in direction of victim and to drive directly at him with intent to cause serious physical injury when attempting to

escape). We therefore conclude that there was sufficient evidence from which the jury could have reasonably found that the defendant intended to cause serious physical injury to the victim.

II

The defendant next claims that he was denied his right to a fair trial because the prosecutor committed improprieties during the trial by (1) attempting to place evidence of the defendant's postarrest silence before the jury, (2) arguing facts not in evidence, and (3) arguing to the jury that in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying. Because we conclude that none of the challenged remarks was improper, we reject the defendant's claim.[1]

"The standard we apply to claims of prosecutorial impropriety is well established. In analyzing claims of

[1] As a preliminary matter, we note that the defendant did not preserve some of his claims of prosecutorial impropriety by objecting to the alleged improprieties at trial. Specifically, the defendant failed to object to the alleged improprieties that the prosecutor made during his closing argument by arguing facts not in evidence and by arguing to the jury that in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying, in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002). Although the defendant did not preserve these claims, "[o]nce prosecutorial impropriety has been alleged . . . it is unnecessary for a defendant to seek to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) [as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], and it is unnecessary for an appellate court to review the defendant's claim under *Golding*." (Internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 174, 133 A.3d 921 (2016). "The reason for this is that . . . appellate review of claims of prosecutorial [impropriety involves] a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by [our Supreme Court] in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). . . . The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test." (Citation omitted; internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 110, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . . [If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . .'' (Internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 573, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019). ''The defendant also has the burden to show that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process.'' (Internal quotation marks omitted.) Id.

''To determine whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams* [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that misconduct was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case.'' (Internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 52, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017). With these principles in mind, we turn to

whether the prosecutor's challenged remarks in the present case were improper.

A

The defendant first contends that the prosecutor improperly attempted to elicit evidence of the defendant's postarrest silence in direct violation of prior orders or rulings of the court that the state would not be permitted to question witnesses about the defendant's postarrest silence. Specifically, the defendant argues that the prosecutor violated these orders during his examination of Detective James Crean, who testified regarding the defendant's arrest and detention with the police, and during the prosecutor's cross-examination of the defendant in which he asked the defendant about whether he felt any remorse following the incident. The state responds that no impropriety occurred because the question to Detective Crean was open-ended, no answer was suggested, and no answer was elicited. Moreover, the state contends that defense counsel opened the door to the topic of remorse during direct examination, and that the prosecutor had a good faith basis for asking those questions due to the defendant's testimony on direct and redirect examination. On the basis of our review of the challenged remarks, we conclude that the prosecutor's conduct did not rise to the level of an impropriety.

The following additional facts are relevant to this claim. Prior to trial, the defendant filed a motion in limine seeking to bar the state from eliciting evidence of the defendant's postarrest silence pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The prosecutor acquiesced and indicated that he did not intend to offer such evidence. He stated that he intended to offer only evidence that the defendant initially failed to comply with Detective Crean's request

to photograph his hands. The prosecutor further represented that he intended to ask Detective Crean questions relating only to the defendant's conduct, rather than any statements he made or did not make. In light of the prosecutor's representation, the court did not enter an order on the defendant's motion in limine, stating that "no other action is necessary regarding this motion."

During the state's presentation of evidence, the prosecutor called Detective Crean to testify. During Detective Crean's direct examination, the prosecutor asked, "[w]ell, did you attempt to speak with—did you attempt to interview [the defendant]?" Defense counsel immediately objected to this question and asked to approach the bench. After a sidebar discussion, questioning resumed without the prosecutor pursuing the question to which counsel had objected, from which it can be inferred that the court sustained the objection. In any event, no answer was ever provided in response to the objectionable question.

With respect to the issue of the defendant's remorse, defense counsel, during her direct examination of the defendant, asked him what his reaction was when he learned of the extent of the victim's injuries after he had been arrested. The defendant responded that he was "[d]evastated" and "shocked" because he "didn't think that [he] could ever do that much damage, it's crazy." On cross-examination, the prosecutor followed up on this testimony by asking, "[n]ow, you would agree with me, in regard to that video, you showed no signs of remorse in a sense you didn't look back to see if he was okay, right?" Defense counsel objected to that question, and the prosecutor responded that his question was meant to impeach the credibility of the defendant's purported remorse. The court overruled the objection. The prosecutor then posed the question again, and the defendant responded, "I just wanted to

get away at that point, I was just scared, I just ran to the car."

On redirect examination, defense counsel asked the defendant if he had any remorse for his actions, and the defendant answered, "I'm deeply, deeply sorry about it. And I would never wish that upon anybody." On recross-examination, the prosecutor returned to this subject by asking the defendant, "at what point in time did you apologize to the manager?" The court sustained an objection to this question. The prosecutor then asked, "[a]nd don't answer this, there may be an objection; did you ever apologize to the manager?" The court sustained an additional objection, and then issued a limiting instruction to the jury regarding the questions concerning the defendant's remorse.[2]

It "is well settled that prosecutorial disobedience of a trial court order, even one that the prosecutor considers legally incorrect, constitutes improper conduct. . . . In many cases, however, this black letter principle is easier stated than applied. A prosecutor's advocacy obligations may occasionally drive him or her close to the line drawn by a trial court order regarding the use of certain evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 533, 122 A.3d 555 (2015). "Even when it is determined that a prosecutor has breached a trial court order, it can be difficult to distinguish between a mere evidentiary misstep and a potential due process violation. . . . Not every misstep by a prosecutor that exceeds the bounds of a trial court order rises to the level of prosecutorial impropriety that implicates a defendant's due process rights, thus requiring resort to the second step in the

[2] It is unclear from the record why the court sustained the objections to the prosecutor's additional questions about the defendant's remorse. Defense counsel did not state a reason for the objection, and the court did not explain why it sustained the objections, after having previously allowed the state to pursue this line of inquiry.

prosecutorial impropriety analysis." Id., 534. "Whether a prosecutorial question or comment that runs afoul of a trial court order implicates a defendant's due process rights is a case specific determination. This determination turns on the degree to which the breach undermines a trial court's ruling that protects the integrity of the fact-finding process by restricting the admission of unreliable or unduly prejudicial evidence." Id.

We turn first to the defendant's argument that the prosecutor committed an impropriety by asking Detective Crean if he had interviewed the defendant. We conclude that the objectionable question posed by the prosecutor, under the circumstances here, did not constitute impropriety.

We note at the outset that there was no formal order on the defendant's motion in limine. On the basis of the prosecutor's representation that he intended to offer only evidence of the defendant's conduct in response to Detective Crean's request to photograph his hands, the court concluded that no further action was necessary on the motion in limine. Any attempt by the prosecutor to ask a question eliciting evidence of the defendant's postarrest silence, albeit objectionable, would thus not constitute a direct violation of a court order.

"It would be a rare trial, indeed, if counsel for one side or the other did not pose an objectionable question . . . . Our rules of practice provide a means to prevent improper questions from being answered. The rules of practice [work] . . . when defense counsel's objection to [a] question [is] sustained by the court." *State* v. *Camacho*, 92 Conn. App. 271, 297, 884 A.2d 1038 (2005), cert. denied, 276 Conn. 935, 891 A.2d 1 (2006). In the present case, defense counsel immediately objected to the challenged question, which resulted in a sidebar during which the court either sustained the objection or the prosecutor agreed to withdraw the question. The

court also issued general instructions to the jury at the start of trial and after closing arguments in which it emphasized that questions, objections, arguments, and statements made by the attorneys were not evidence. Because we presume that jurors "follow the instructions given by a judge," we assume that the jury did not consider this question as evidence during its deliberation. (Internal quotation marks omitted.) *State* v. *Perez*, 147 Conn. App. 53, 111, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016). Accordingly, the prosecutor's question did not result in the jury hearing any evidence regarding the defendant's postarrest silence.[3] Moreover, the prosecutor immediately turned to a different subject and did not ask additional questions that risked eliciting evidence regarding the defendant's postarrest silence.

Additionally, it is unclear whether the prosecutor intended to elicit evidence regarding the defendant's postarrest silence by asking the challenged question to Detective Crean. The prosecutor's question was open-ended, and the type of evidence that he was attempting to elicit from Detective Crean was ambiguous. Although there is no direct evidence of the prosecutor's intent, it is possible that the prosecutor had a tangible, good faith basis for asking the question. For example, the prosecutor had indicated at the hearing on the motion in limine that he intended to elicit testimony regarding the defendant's conduct in response to Detective Crean's request to photograph his hands. It is thus possible that the question regarding whether Crean had interviewed the defendant was nothing more than a poorly phrased and ill-advised attempt to place a legitimate line of inquiry before the jury.[4] The prosecutor, therefore, may not necessarily have had any improper motive

[3] Indeed, the defendant has not raised any claim on appeal that a *Doyle* violation actually occurred.

[4] It is clear that such evidence would have been permissible. Both the court and defense counsel stated that they did not believe such evidence would violate *Doyle* and was thus permissible.

for asking such a question. Indeed, this is not a case in which we have direct evidence of the prosecutor's intent to ask a question in direct violation of a court order. See *State* v. *Reynolds*, 118 Conn. App. 278, 293, 983 A.2d 874 (2009) (concluding that prosecutor's questions improperly violated trial court order because prosecutor's representations to court revealed that she intended to elicit evidence court had expressly disallowed), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010). On the basis of the record, we have no way of determining the prosecutor's actual motive for asking this question, and we need not engage in needless speculation as to the reason the objectionable question was asked in the absence of direct evidence of the prosecutor's intent. See *State* v. *Camacho*, supra, 92 Conn. App. 297. Because the record is unclear as to what the prosecutor's motive was for asking the challenged question, the record is insufficient to determine whether the prosecutor was attempting to elicit improper evidence regarding the defendant's postarrest silence.[5]

[5] Even if we were to assume that the prosecutor's question constituted impropriety, we are not persuaded that the defendant was deprived of his due process right to a fair trial. Under our review of the *Williams* factors, we first note that the prosecutor's question was not invited by the defense. The first factor thus favors the defense.

We conclude, however, that the remaining factors favor the state. In regard to the severity and frequency factors, "the severity of the impropriety is often counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) *State* v. *Daniel W.*, supra, 180 Conn. App. 113. "Improper statements that are minor and isolated will generally not taint the overall fairness of an entire trial." (Internal quotation marks omitted.) Id. Here, the alleged impropriety concerning the defendant's postarrest silence was not pervasive throughout the trial but was confined to a single question during the course of twenty-one transcribed pages of direct examination of Detective Crean. Thus, the potential impropriety, a single question to which the court appears to have sustained an objection, cannot be classified as "frequent" or "severe" given the lengthy direct examination and the absence of any evidence elicited. Moreover, the question was not central to the critical issue of whether the defendant intended to cause serious physical injury to the victim. The curative measures that the court took were also strong. Defense counsel immediately objected to the question, and no evidence was elicited. Although the

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

court did not issue a specific curative instruction to the jury concerning this question, we conclude that any potential improper effect was diminished by the court's general instructions to the jury at the start of trial and before closing argument. In those instructions, the court emphasized that questions, objections, arguments, and statements made by the attorneys were not evidence. The strength of the curative measures factor thus weighs in favor of the state. See *State* v. *Ross*, 151 Conn. App. 687, 702–703, 95 A.3d 1208 (court's general instructions to jury that arguments made by counsel were not evidence diminished any improper effect of instances of claimed impropriety), cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

Finally, the last *Williams* factor, which assesses the overall strength of the state's case, also weighs in favor of the state. As previously observed, there was sufficient evidence from which the jury could have reasonably found that the defendant intended to cause serious physical injury to the victim. Specifically, the defendant acknowledged his belief that the victim would continue to follow him if he tried to continue walking. He then admitted to punching the victim with a closed fist using his dominant right hand and fleeing the scene. The force of his punch immediately knocked the victim unconscious and fractured his skull in multiple places. The state's case was thus strong. We therefore conclude that the prosecutor's question concerning Detective Crean's attempt to interview the defendant, even if improper, did not deprive the defendant of his due process right to a fair trial.

further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 479, 72 A.3d 48 (2013).

Here, the defendant, when asked during direct examination by his counsel about his reaction to learning the extent of the victim's injuries, testified that he was "[d]evastated" and "shocked." Such testimony opened the door for the prosecutor to ask him follow-up questions about his remorse. In response to an objection from defense counsel, the prosecutor stated that his question was meant to examine the credibility of the defendant's purported remorse. It is thus clear from the record that the prosecutor had a proper motive for asking the defendant about his remorse for this particular question and that he was not attempting to elicit evidence of the defendant's postarrest silence. As a result, it cannot be said that he acted improperly in asking this question.

Although the trial court later sustained defense counsel's objections to two additional questions asked by the prosecutor during recross-examination regarding the defendant's remorse, when considered in context, neither of these questions constitutes prosecutorial impropriety. The issue of remorse arose again during the redirect examination of the defendant, and the prosecutor's questions on recross-examination were in direct response to that testimony. Although the court ultimately sustained the objections to the questions, we conclude that the prosecutor did not engage in impropriety by asking them, particularly in light of the fact that the court had earlier permitted the prosecutor to

impeach the defendant's credibility as to his purported remorse during cross-examination.

During argument conducted in the absence of the jury, defense counsel asked the court to issue a curative instruction as to the prosecutor's questions concerning remorse. In response, the prosecutor told the court that he believed his questions during recross-examination were fair game because the defendant had testified that he was remorseful and that he was merely trying to test the defendant's credibility in making these statements. On the basis of these representations, and the consideration that the defendant had opened the door to the issue of his remorse on direct and redirect examination, the prosecutor had a good faith basis for asking additional questions on the subject. See *Edwards* v. *Commissioner of Correction*, 141 Conn. App. 430, 441, 63 A.3d 540 (no prosecutorial impropriety when prosecutor had good faith basis for asking questions to impeach defendant's credibility), cert. denied, 308 Conn. 940, 66 A.3d 882 (2013). Accordingly, the prosecutor's questioning did not constitute impropriety because he had good faith reasons for asking these questions and was not trying to improperly elicit evidence of the defendant's postarrest silence. In light of these considerations, we conclude that none of the prosecutor's questions concerning the defendant's remorse were improper.

In sum, we conclude (1) that no improper evidence was presented to the jury when the prosecutor asked Detective Crean if he had attempted to interview the defendant, (2) that the record is unclear regarding whether the prosecutor intended to offer evidence of the defendant's postarrest silence, (3) that, even if we assume that the question was improper, the defendant was not deprived of his due process right to a fair trial, and (4) that the prosecutor's questions concerning the defendant's remorse were not improper. Therefore, we conclude that the prosecutor did not improperly place

evidence concerning the defendant's postarrest silence before the jury.

B

We next turn to the defendant's contention that the prosecutor engaged in impropriety by arguing facts not in evidence during his closing argument and rebuttal. Specifically, the defendant claims that the prosecutor argued facts not in evidence during his closing argument by (1) speculating about what the defendant could have done to evade arrest instead of punching the victim in the head, (2) arguing that the defendant knew he had to do something serious to get away from the victim and that he could strike the victim to accomplish this, (3) arguing that the defendant stole the sneakers because he wanted the new, popular model that he took, and (4) distorting the facts by arguing to the jury that the victim's and the defendant's accounts of what happened as they walked back to Famous Footwear from Target contradicted each other. The state argues in response that the prosecutor did not argue facts not in evidence and instead urged the jury to draw reasonable inferences from the evidence presented at trial. We are not persuaded that the prosecutor's remarks were improper.

The following additional facts are relevant to our consideration of this aspect of the defendant's prosecutorial impropriety claim. During trial, the victim testified that, after he witnessed the defendant stealing the shoes, he followed him into Target, confronted him, and the defendant agreed to return to Famous Footwear with him. On the walk back, he told the defendant that he would not call the police if the defendant returned the shoes, and that he could retrieve his old shoes. The victim also testified that the brand of Nike shoes that the defendant took were new and in demand. Rogers further testified that the shoes at Famous Footwear

were generally more expensive than those at the Payless Shoes store. The defendant later testified, however, that he did not recall passing a Payless Shoes store when he was trying to find a place to purchase sneakers, and that he decided to go to Famous Footwear first because he figured, on the basis of the store's name, that it sold shoes. The defendant stated that, prior to the date of the incident, he had never heard of Famous Footwear.

The issue of the defendant's intent to cause serious physical injury to the victim arose later during cross-examination. On cross-examination, the defendant testified that, after he agreed to return to Famous Footwear with the victim, he kept pleading with the victim to let him return the shoes he stole and asked to have his old shoes back. Although the defendant and the victim proceeded back to Famous Footwear amicably at first, the victim then radioed Rogers, asking her to call the police, and the defendant reacted by punching the victim in the head. The defendant testified that he intended only to avoid capture when he punched the victim. As previously discussed, the defendant also admitted during cross-examination that he could have tried shoving the victim in the chest, punching him in the stomach, tripping him, or simply running away to avoid going to jail. The defendant testified, however, that the victim might have chased him if he attempted to flee because the victim appeared to be in good shape.

During closing argument, the prosecutor revisited this theme, and made the following comments to the jury: "And when you deliberate to reach your verdict on that and you consider that element, did he intend to cause serious physical injury, just go through all the question[s] I asked him. What he could have done, he could have pushed him, he could have shoved him, he could [have] just tried to run away with the sneakers, he could have punched him in his stomach. I didn't ask him, but I think it's common sense, he could have kicked

him in the groin, right? So, there's a lot of things he could have done but, instead, he chose to close his right fist, his dominant hand, his strong hand, he chose to throw a punch, he chose to throw that punch at his skull . . . . He knew that walking away wasn't enough to get away with the sneakers, he knew that he had to do something to seriously take [the victim] out of the equation, and that's what he did." The prosecutor also argued that, "the state submits to you, the reasonable inference that you can draw from the facts and the evidence, is that he didn't want to shop at Payless, he didn't want the knockoff or off brands sold by Payless, he wanted to go to pay more, Famous Footwear, and that's where they went. He wanted the Nike SBs, the new hot sneaker."

During his rebuttal argument, the prosecutor made additional arguments concerning the defendant's intent to cause serious physical injury and the defendant's credibility. First, the prosecutor followed up on the theme that the defendant knew he needed to use significant force to escape from the victim by stating that "[the defendant] knew he could strike [the victim], knock him unconscious and get out of there." Second, the prosecutor attempted to bring the defendant's credibility into question by comparing his version of the events with the victim's. Specifically, the prosecutor noted that "[the defendant] says he pleaded with [the victim], just give me my old sneakers back. And [the victim] says the opposite. [The victim] says, I said to him, just come back to the store, give me your sneakers, give me those sneakers, I'll give you your sneakers, I don't have to call the police. So, who do you believe there? The defendant who testified he—obviously, the outcome of this case is important to him. Or [the victim] who said, I remember saying, 'call the police,' and I woke up in Hartford Hospital. That was, really, the sum and substance of his testimony. Who do you believe there? Whose version of

events do you believe?" The defendant did not object to any aspect of the prosecutor's closing or rebuttal arguments.

"Certainly, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Brett B.*, supra, 186 Conn. App. 573–74. In fulfilling his duties, however, a prosecutor "must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . Our case law reflects the expectation that jurors will not only weigh conflicting evidence and resolve issues of credibility as they resolve factual issues, but also that they will consider evidence on the basis of their common sense. Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct. . . . A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Marrero*, 198 Conn. App. 90, 119, A.3d (2020).

We agree with the state that the prosecutor's comments invited the jury to draw reasonable inferences from the evidence presented at trial rather than arguing

facts not in evidence. We note at the outset that defense counsel failed to object to any aspect of the prosecutor's closing argument. "A defendant's failure to object to an alleged impropriety strongly suggests that his counsel did not perceive the argument to be improper. If counsel did not believe that the argument was improper at the time, it is difficult for this court, on review, to reach a contrary conclusion." Id., 121–22. "We emphasize the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time." (Internal quotation marks omitted.) Id., 122. Accordingly, the failure of defense counsel to object to the prosecutor's closing arguments indicates that she did not perceive his arguments to be unfair.

Additionally, there was ample evidence presented at trial to support the prosecutor's arguments. In response to the prosecutor's questions, the defendant expressly admitted that he could have tried shoving the victim, tripping him, or punching him in the stomach in order to get away and evade arrest. He also testified that, although he could have tried running away rather than engaging in any physical contact with the victim, the victim might have chased him if he attempted to flee because the victim appeared to be in good shape. The prosecutor, in discussing the defendant's intent to cause serious physical injury to the victim during his closing argument, reiterated these themes. Rather than engaging in speculation unconnected to the evidence produced at trial, the prosecutor was instead inviting the jury to draw the reasonable inference that the defendant intended to cause serious physical injury to the victim because he chose to initiate the type of direct physical

contact that was more likely to cause such injury. The prosecutor's comments were, therefore, proper.

Furthermore, the prosecutor's comments concerning the defendant's motivation for shopping at Famous Footwear were also derived from the evidence. Although the defendant testified that he had never heard of Famous Footwear, the prosecutor introduced evidence that the retail prices of shoes at Famous Footwear were generally higher than those at Payless Shoes and that the sneakers the defendant took, Nike SBs, were popular and in demand at the time of the incident. On the basis of this evidence, the prosecutor argued to the jury that the defendant wanted to shop at Famous Footwear because he wanted to pay more and that he wanted the new popular sneaker. The prosecutor did not present these statements as established facts and, instead, noted that he was "submitting" them to the jury as a reasonable inference it could draw from the facts and the evidence. The "submitting" language, along with appropriate evidence produced at trial from which the jury could have reasonably inferred the prosecutor's submission, indicates that the prosecutor was not arguing facts not in evidence. See *Williams* v. *Commissioner of Correction*, 169 Conn. App. 776, 787, 153 A.3d 656 (2016) (prosecutor's use of restrictive "I submit" language indicated that he was raising inferences rather than expressing his own opinion or providing facts not in evidence). We thus conclude that such comments were not improper.

Finally, contrary to the defendant's contention, we conclude that the prosecutor did not engage in impropriety by arguing to the jury that the victim's and the defendant's accounts of what happened as they walked back to Famous Footwear from Target were contradictory. The victim testified that he told the defendant that he would not call the police if the defendant returned

the sneakers that he had taken. In contrast, the defendant testified that he had been the one to raise the issue of returning the sneakers without police involvement. Thus, although both accounts were similar in content, they differ on the issue of who stated that no police involvement was necessary if the defendant returned the sneakers and took back his old ones. By noting that the accounts were opposites and asking the jurors to assess which version they believed, the prosecutor was merely asking the jury to make a credibility determination on the basis of the testimony of the victim and the defendant. We therefore conclude that these comments were not improper.

C

Finally, the defendant contends that the prosecutor engaged in impropriety by arguing to the jury that, in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying, in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002). We do not agree.

The following additional facts are relevant to this claim. During closing argument, defense counsel highlighted an inconsistency in the testimony of some of the state's witnesses. Specifically, Rogers and Dalessandro told the police after the incident that the defendant had punched the victim in the face, but Rogers later testified at trial that the defendant hit the victim in the head. On rebuttal, the prosecutor responded to defense counsel's argument by remarking, "[t]he first thing I'll say is, if the punch was to the face, why are there no injuries to the face? You heard the doctor testify there was a small hematoma in the area of where the fracture was, that's where the punch was. So, a seventeen year old girl and Mr. Dalessandro tell the police what they saw, the police write it out and they sign it. And they say the punch was in the face, but now they come here and

say it was in the head. Are they lying? Does that call their credibility into question in your minds? We'll talk about credibility in a minute, but that is a nonissue." When later discussing the witnesses' credibility, the prosecutor stated: "And when you assess credibility, remember [the defendant] took the [witness] stand; were Dalessandro and Anna Rogers, were they lying about what they saw? Yes, assess their credibility, but assess his as well." As previously observed, the prosecutor also commented on the defendant's and the victim's accounts of the incident, stating that their versions were opposites and asking the jurors whose version they believed.

"[C]ourts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof. . . . Statements of this type create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 50, 100 A.3d 779 (2014). "[C]losing arguments providing, in essence, that in order to find the defendant not guilty, the jury must find that witnesses had lied, are . . . improper." *State* v. *Singh*, supra, 259 Conn. 712. "[W]hen [however] the prosecutor argues that the jury must conclude that one of two versions of directly conflicting testimony must be wrong, the state is leaving it to the jury to make that assessment. Moreover, by framing the argument in such a manner, the jury is free to conclude that the conflict exists due to mistake (misperception or misrecollection) or deliberate fabrication." *State* v. *Albano*, 312 Conn. 763, 787, 97 A.3d 478 (2014).

Here, the prosecutor's comments that the defendant challenges on appeal did not implicate a core justification for the *Singh* rule because they did not force the jury to find the defendant not guilty only if it first concluded that the other witnesses had lied. The defendant expressly stated during cross-examination that he punched the victim in the head. The jury was thus not required to find that Rogers and Dalessandro were lying about the location of the punch to find the defendant not guilty because, even if they were lying, the defendant himself admitted to punching the victim in the head. The jury thus could have found the defendant guilty on the basis of his testimony alone. Moreover, the prosecutor did not frame his statements in a manner that suggested to the jury that it would need to find that the state's witnesses had lied in order to find the defendant not guilty. The prosecutor instead framed his arguments by asking the jury to weigh the credibility of each witness. Such arguments concerning witness credibility are entirely permissible. See *State* v. *Dawes*, 122 Conn. App. 303, 312, 999 A.2d 794 (prosecutor's comments were proper when based on evidence adduced at trial and reflect prosecutor's effort to invite jury to draw reasonable credibility inferences), cert. denied, 298 Conn. 912, 4 A.3d 834 (2010). Defense counsel also failed to object to any of these statements challenged on appeal. Such a failure indicates that she did not believe these comments to be improper in light of the record at that time. *State* v. *Marrero*, supra, 198 Conn. App. 122. In light of these considerations, we conclude that the prosecutor did not violate *Singh*.

The judgment is affirmed.

In this opinion ELGO, J., concurred.

DEVLIN, J., concurring in the judgment. I agree with parts I, and II B and C of the majority opinion, as well as that portion of part II A discussing the prosecutor's

questions regarding the defendant's remorse. I write separately because I believe that the prosecutor's default on his express commitment not to inquire as to the defendant's postarrest assertion of his *Miranda*[1] rights amounted to prosecutorial impropriety. I do not, however, believe that this impropriety deprived the defendant of his due process right to a fair trial and therefore agree that the judgment should be affirmed.

The relevant factual and procedural history are aptly stated in the majority opinion. The defendant, John Pjura, was arrested and charged, inter alia, with assault in the second degree in violation of General Statutes § 53a-60 (a) (1) for allegedly punching the unsuspecting victim, Andrew Howe, in the side of the head, causing catastrophic injuries.

Prior to trial, defense counsel filed, inter alia, a motion in limine styled: "Motion in Limine to Preclude Evidence of the Defendant's Postarrest Silence or Invocation of Right to Counsel." The motion stated that, following the defendant's arrest, the police reportedly read him his *Miranda* rights and, when asked if he understood those rights, the defendant remained silent. He also remained silent when asked routine booking questions. The motion further asserted that, when Detective James Crean, who was investigating the allegations in the captioned matter, approached the defendant in the holding area and explained that he wanted to speak to the defendant about the incident at Famous Footwear, the defendant stated, "I want a lawyer."

On February 28, 2018, the court held a hearing on, inter alia, the defendant's pretrial motions. On March 12, 2018, the trial court issued a comprehensive written "Ruling Re: Pretrial Motions" that, inter alia, addressed the defendant's motion in limine regarding his postarrest silence or invocation of his right to counsel. The trial court stated: "The

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

defendant moved, on February 21, 2018, to preclude the state from offering as evidence the defendant's postarrest silence and/or invocation of his right to counsel. At the hearing on February 28, 2018, the *state indicated that it had no intention of offering such evidence.*

"The court concludes that no other action is necessary regarding this motion." (Emphasis added.)

At that February 28, 2018 hearing, the prosecutor told the court that he did not intend to offer evidence of the defendant's failure to cooperate with the booking process. With respect to the testimony of Detective Crean, the following colloquy occurred:

"The Court: No statements, simply that he didn't put his hands out when asked to?

"[The Prosecutor]: Yeah. Did he initially comply with your request to photograph his hands?

"The Court: [Defense counsel]?

"[Defense Counsel]: I don't think that goes to the [issue pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)].

"The Court: All right. So long as there are no statements, that's conduct, the conduct would be offered. All right.

"[The Prosecutor]: That's an accurate way of—

"[Defense Counsel]: Conduct.

"[The Prosecutor]: —summarizing what I intend to offer, conduct.

"[Defense Counsel]: —conduct other than silence.

"[The Court]: Understood."

On March 22, 2018, Detective Crean was called to testify before the jury during the state's case-in-chief. During the

prosecutor's direct examination of Detective Crean, the following exchange occurred:

"[The Prosecutor]: And when you came into work that following Monday did anyone convey any information to you regarding the Famous Footwear robbery?

"[Detective Crean]: That would have been the 19th?

"[The Prosecutor]: Yes.

"[Detective Crean]: Yeah, on the 19th, yes, I was notified that [the defendant] was in our lockup. . . .

"[The Prosecutor]: What did that mean to you, though?

"[Detective Crean]: What they said was, is—

"[Defense Counsel]: Objection, Your Honor.

"The Court: Sustained.

"[The Prosecutor]: *Well, did you attempt to speak with—did you attempt to interview* [*the defendant*]*?*

"[Defense Counsel]: Objection, Your Honor. May we approach?

"The Court: Yes." (Emphasis added.)

The majority opinion categorizes this question as objectionable but not prosecutorial impropriety because (1) there was no formal court order that the prosecutor violated, (2) it may be inferred that, at the sidebar, the trial court sustained the objection to the question, (3) the question was not answered, (4) the trial court instructed the jury that unanswered questions are not evidence, and (5) it is unclear what the prosecutor's intent was in asking the challenged question. I respectfully disagree.

Our Supreme Court has stated that, "[i]n analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance;

and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Footnote omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 524, 122 A.3d 555 (2015). The defendant has the burden of satisfying both of these analytical steps. Id.

It "is well settled that prosecutorial disobedience of a trial court order, even one the prosecutor considers legally incorrect, constitutes improper conduct." *State* v. *Ortiz*, 280 Conn. 686, 704, 911 A.2d 1055 (2006). "In many cases, however, this black letter principle is easier stated than applied. A prosecutor's advocacy obligations may occasionally drive him or her close to the line drawn by a trial court order regarding the use of certain evidence." *State* v. *O'Brien-Veader*, supra, 318 Conn. 533.

Our Supreme Court has acknowledged that, "[e]ven when it is determined that a prosecutor has breached a trial court order, it can be difficult to distinguish between a mere evidentiary misstep and a potential due process violation. . . . Not every misstep by a prosecutor that exceeds the bounds of a trial court order rises to the level of prosecutorial impropriety that implicates a defendant's due process rights, thus requiring resort to the second step in the prosecutorial impropriety analysis." Id., 534.

"Whether a prosecutorial question or comment that runs afoul of a trial court order implicates a defendant's due process rights is a case specific determination. This determination turns on the degree to which the breach undermines a trial court's ruling that protects the integrity of the fact-finding process by restricting the admission of unreliable or unduly prejudicial evidence." Id.

Applying these principles to the present case requires resolution of three questions: (1) Was there a court order? (2) What interest was the trial court seeking to protect with its order? And (3) did the prosecutor's conduct undermine the trial court's ruling to such a degree that it can

fairly be characterized as impropriety as opposed to an evidentiary misstep?

It is true that, on the formal motion in limine filed by the defense seeking to preclude evidence of the defendant's postarrest silence or invocation of his right to counsel, the court concluded that no action was necessary. This, of course, was predicated on the court's finding that, "[a]t the hearing on February 28, 2018, the state indicated that it had no intention of offering such evidence." But for this representation by the prosecutor, it is virtually certain that the trial court would have granted the motion in limine, as the defendant's custodial silence and "I want a lawyer" statement are classic invocations of *Miranda* rights. It seems to me wrong that a prosecutor can avoid the consequences of violating a court order by making a promise to a judge that obviates the need for a formal order—and subsequently breaking that promise. I would conclude that the situation with respect to the ruling on the motion in limine is tantamount to a court order and that the prosecutor's question should be analyzed in that context.

Even, however, if one construes the written ruling on the motion in limine not to be a court order, as the majority does, there still was an order that was based on the February 28, 2018 colloquy. It is clear that the trial court directed that the only subject matter that the prosecutor could permissibly inquire about was the defendant's postarrest *conduct* in refusing to show his hands for photographing, as evidenced by the following colloquy:

"The Court: No statements, simply that he didn't put his hands out when he was asked to?

"[The Prosecutor]: Yeah. . . .

"The Court: All right. So long as there are no statements, that's conduct, the conduct would be offered. All right.

"[The Prosecutor]: That's an accurate way of—

"[Defense Counsel]: Conduct—

"[The Prosecutor]: —summarizing what I intend to offer, conduct.

"[Defense Counsel]: —conduct other than silence.

"The Court: Understood."

In my view, one cannot reasonably construe that exchange as anything other than the court's crystal clear ruling that the prosecutor's inquiry should be limited to the defendant's conduct and that he should not inquire about any statements the defendant may or may not have made postarrest. It was an order, and the prosecutor was required to comply with it.

So, what interest was the trial court trying to protect with this ruling? On the basis of the portion of Detective Crean's police report that was recited in the motion in limine, the defendant's only response when asked to be interviewed was, "I want a lawyer." The defendant had been arrested, was in police custody, and given his *Miranda* rights—that included his right to counsel. For almost one-half century it has been the law in our country that a person who exercises his or her right to silence or counsel will not be penalized for such exercise. *Doyle* v. *Ohio*, supra, 426 U.S. 610. The trial court's ruling sought to prevent the fundamentally unfair deprivation of due process that arises when one's assertion of the right to silence or counsel is used against him.

The question then becomes: Did the prosecutor's conduct undermine the court's ruling to a degree that rises to the level of impropriety? When Detective Crean sought to speak to the defendant about the incident at Famous Footwear, the defendant stated that he wanted a lawyer. In front of the jury, the prosecutor asked: "Well, did you attempt to *speak* with—did you attempt to *interview* this [defendant]?" (Emphasis added.) The most foreseeable response to this question would be

for the witness to testify in accordance with his police report, namely, that the defendant stated that he wanted a lawyer and was otherwise silent.

Now, as the majority correctly observes, the question was not answered and the defendant is not asserting that, in fact, a *Doyle* violation occurred. But that was not due to anything the prosecutor did. The whole purpose of the motion in limine and the trial court's direction to counsel was to avoid the situation that did occur—the jury being left to wonder: What exactly did the defendant say when the police tried to interview him?

It should not be too much to expect prosecutors to keep their word. When they make an express promise to a trial judge that is relied on by the court and opposing counsel, they should abide by it. In the present case, the prosecutor did not do that. I see that as improper.

I fully join in the majority's cogent analysis that this one improper question did not deprive the defendant of a fair trial. See footnote 5 of the majority opinion.

I concur in the judgment.

AMERICAN TAX FUNDING, LLC *v.* DESIGN LAND DEVELOPERS OF NEWTOWN, INC., ET AL.
(AC 42074)

Keller, Elgo and Eveleigh, Js.

Syllabus

The plaintiff, A Co., sought to foreclose municipal tax liens on certain real property owned by the defendant estate. After A Co. had commenced this action, R Co. was substituted as the plaintiff and filed an amended complaint. Thereafter, the estate was defaulted for failure to plead, and the trial court granted R Co.'s motion for judgment and rendered judgment in part in favor of R Co. as against the estate as to certain counts of the amended complaint. On the estate's appeal to this court, *held* that the estate's appeal was dismissed as moot, there having been

no practical relief that that this court could grant, as the judgment as against the estate was a nullity because the estate was not a legal entity that could be sued, and, therefore, the trial court did not have jurisdiction to render a judgment against it; moreover, vacation of the judgment as against the estate was appropriate under the circumstances of this case because the estate did not cause the appeal to be moot and it would prevent the judgment from spawning legal consequences and clear the path for future relitigation of the issues.

Argued December 4, 2019—officially released October 20, 2020

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Danbury, where Reoco, LLC, was substituted as the plaintiff; thereafter, the substitute plaintiff filed an amended complaint; subsequently, the defendant estate of Francis D. D'Addario et al. were defaulted for failure to plead; thereafter, the court, *Russo*, *J.*, granted the substitute plaintiff's motion for judgment and rendered judgment in part for the substitute plaintiff; subsequently, the substitute plaintiff withdrew the remaining count of the amended complaint, and the defendant estate of Francis D. D'Addario appealed to this court. *Appeal dismissed*; *judgment vacated.*

Paul N. Gilmore, for the appellant (defendant estate of Francis D. D'Addario).

David L. Gussak, with whom, on the brief, was *Gary J. Greene*, for the appellee (substitute plaintiff).

Opinion

EVELEIGH, J. The defendant estate of Francis D. D'Addario (estate)[1] appeals from the judgment of the

[1] The named defendant, Design Land Developers of Newtown, Inc., and the estate were the record owners of the property at issue in 2004. The University of Bridgeport, Evergreen National Indemnity Company, Design Landfill Developers of Milford, Inc., Red Knot Acquisitions, LLC, and the Department of the Treasury-Internal Revenue Service, were also named as defendants in this action as subsequent encumbrancers in interest. The estate, however, is the only defendant involved in this appeal.

trial court rendered in favor of the substitute plaintiff, Reoco, LLC (Reoco).[2] On appeal, the estate claims, inter alia, that the court improperly granted Reoco's motion for judgment on default with respect to two counts of the amended complaint, which sought an in personam money judgment against the estate for the 2005 and 2006 taxes due on the subject property. For the following reasons, we dismiss the appeal and vacate the judgment of the trial court as against the estate.

The following facts and procedural history are relevant to our resolution of this appeal. The estate owned a 120.26 acre parcel of land located at 2 Buttonshop Road in Newtown (property). The estate failed to pay municipal property taxes to the town of Newtown (town) for the 2004, 2005 and 2006 tax years. Consequently, the town imposed tax liens on the property and recorded them in the town land records. The town subsequently assigned the tax liens to American Tax Funding, LLC (American Tax Funding), which recorded the assignments in the town land records.

American Tax Funding commenced this foreclosure action on May 4, 2011. The complaint contained three counts, which sought the foreclosure of a tax lien for each of the respective tax years. The summons listed the estate as a defendant, and on the address line, it included "c/o F. Lee Griffith, III, Co-Executor, 1 Canterbury Green, 201 Broad Street, Stamford, CT 06901;c/o Albert F. Paolini, Co-Executor, 551 Morehouse Road, Easton, CT 06612; c/o David D'Addario, Lawrence D'Addario & Lawrence Schwartz, Co-Executors, 10 Middle St., #1402, Bridgeport, CT 06604." The return of service indicates that service on the estate was executed by service on David D'Addario, as coexecutor.[3]

[2] The original and named plaintiff in this case, American Tax Funding, LLC, filed a motion to substitute Reoco as the party plaintiff on January 13, 2012, which was granted by the trial court.

[3] The return of service also listed service on Albert Paolini as coexecutor. Paolini, however, was deceased at the time of service.

On June 23, 2014, Reoco filed a withdrawal of counts two and three of the complaint and, subsequently, filed a request to amend the complaint on July 23, 2014. The amended complaint sought the foreclosure of the 2004 tax lien and the collection of the 2005 and 2006 taxes. On September 2, 2014, Reoco filed a motion for default for failure to plead with respect to the estate, which was granted on September 10, 2014. Thereafter, Reoco filed a motion for a default judgment regarding counts two and three only—the collection counts for tax years 2005 and 2006. On November 20, 2014, the estate filed a motion to set aside the default and an answer containing special defenses to counts two and three. On November 26, 2014, the estate filed an objection to Reoco's motion for a judgment on the default.

The court granted Reoco's motion for a default judgment on December 4, 2014, and rendered judgment in favor of Reoco as against the estate as to counts two and three of the amended complaint.[4] The estate filed a motion to reargue on which the trial court did not rule. Reoco subsequently withdrew the remaining count of the complaint seeking the foreclosure on the 2004 municipal tax lien. The estate timely filed this appeal.

After the parties filed their appellate briefs[5] and oral argument was held, on March 19, 2020, this court, sua sponte, ordered the parties to file supplemental briefs

[4] The judgment was rendered against the estate, as well as Design Land Developers of Newtown, Inc., and the University of Bridgeport. The judgment amount was entered as follows: "Count Two Principal: $34,518.82"; "Count Two Interest: $25,126.27"; "Count Two Fees: $24"; "Count Three Principal: $37,163.94"; "Count Three Interest: $53,075.81"; "Count Three Fees: $24"; "Additional Fees: $7175.58"; "Reasonable Attorney's Fees: $3000"; "Costs of Collection: $1361"; "Total Judgment Amount: $161,469.42."

[5] On appeal, the estate claims that the trial court erred in rendering judgment for Reoco because Reoco did not have standing to pursue an in personam action, and, thus, the trial court lacked subject matter jurisdiction. In light of our determination that the appeal is moot and that the trial court lacked subject matter jurisdiction to render judgment against the estate, we do not address this claim.

addressing the following questions: "[1] whether the estate . . . as opposed to a representative of the estate, has standing to invoke the jurisdiction of this court, and, [2] if not, what the remedy should be with regard to the trial court judgment." After the parties filed supplemental briefs,[6] this court, on July 14, 2020, ordered the parties to file further supplemental briefs with respect to the follow question: "Did the trial court lack subject matter jurisdiction over this case because the [estate] is not a legal entity that has the capacity to be sued?" On August 13, 2020, the parties filed their second set of supplemental briefs. In its brief, Reoco claims that this case "presents a factual situation [that] may be addressed under the statutory umbrella of [General Statutes] § 52-123, which provides for the correction of a circumstantial defect such as" the one presented in this case.[7] In contrast, the estate argues that, even

[6] In its first supplemental brief, the estate claimed that because it is not a legal entity, the judgment rendered against it by the trial court is a nullity. It further claimed that, because there is no practical relief that this court could provide, this court lacked jurisdiction over the appeal on the ground of mootness. Reoco asserted in its first supplemental brief that the estate lacked standing to bring this appeal and claimed that this court has several options for disposing of this appeal. Specifically, Reoco claimed that this court could dismiss the appeal and remand the matter to the trial court "for such disposition as that forum may determine." Reoco suggested that that action would likely result in the estate filing a motion to dismiss and, ultimately, result in another appeal. Reoco also claimed that the appeal could be stayed and the case remanded to the trial court to dispose of the matter. Although that action, Reoco explained, would also likely result in another appeal after the trial court's decision, "the matter, if still viable, would be reactivated in this forum with such supplemental briefing and argument as the trial court's disposition may require."

[7] In support of this claim, Reoco relies on *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 636 A.2d 808 (1994). In that case, the administrator of the estate of the decedent, who was killed in a motor vehicle accident, brought a highway defect action. Id., 345. The issue on appeal was whether a defect in the civil summons form, which listed the defendant as the state of Connecticut, Department of Transportation (department), deprived the trial court of subject matter jurisdiction when the caption in the complaint identified the defendant as the Commissioner of Transportation (commissioner), and the commissioner was named as the party responsible for highway maintenance. Id., 344. It was "undisputed that the commissioner

though the trial court did not lack subject matter jurisdiction to render a judgment against the estate, this court should determine that the trial court's judgment against the estate is a nullity. The estate further claims,

was properly named in the complaint, that the department was served, and that statutory notice had been provided to [the] then commissioner . . . . The department argue[d], nevertheless, that the defect in the civil summons form that identified the commissioner of the department 'as an agent for service' served to strip the trial court of subject matter jurisdiction." (Footnote omitted.) Id., 349. Our Supreme Court disagreed, concluding that the case presented "a classic example of a common defect in process involving the designation of the defendant," that the designation of the defendant by an incorrect name was a misnomer, and that it was "a circumstantial defect anticipated by . . . § 52-123 that can be cured by amendment. A misnomer must be distinguished from a case in which the plaintiff has misconstrued the identity of the defendant . . . ." (Footnote omitted.) Id., 350. We conclude that *Lussier* is distinguishable from the present case. Here, the original plaintiff did not merely designate the defendant by an incorrect name; it commenced an action against a nonlegal entity that does not have the capacity to be sued. Although David D'Addario, as coexecutor of the estate, had been served, a representative of the estate was never named in the complaint or other pleadings, including the judgment. The action was never brought against a representative of the estate, nor is it clear from the record that a representative acted on behalf of the estate throughout the proceedings. We conclude that the present case is more akin to *Just Restaurants* v. *Thames Restaurant Group, LLC*, 172 Conn. App. 103, 158 A.3d 845 (2017), in which this court addressed a situation similar to the one in the present case. In *Just Restaurants*, the primary issue was whether the trial court lacked subject matter jurisdiction over the action, which was commenced by the named plaintiff using a fictitious or assumed business name, or a trade name. Id., 104. The trial court rendered judgment in favor of the substitute plaintiff, and the defendant appealed to this court, claiming that the trial court erred by granting a motion to substitute the party plaintiff and by failing to dismiss the action for lack of subject matter jurisdiction. Id., 107. Specifically, it claimed that, because the named plaintiff was a trade name and was without a separate legal existence from the substitute plaintiff, the named plaintiff did not have the legal capacity to bring the action solely in its name, which deprived the trial court of subject matter jurisdiction. Id. On appeal, this court concluded that, "[p]ursuant to our law, the initiation of the action solely by the named plaintiff, which is not a legal entity and does not have a separate legal existence, cannot confer jurisdiction on the court; a dismissal, therefore, is required." Id., 108. Although, in the present case, the estate is named as a defendant and did not commence the action, the same reasoning applies. The action was wrongly commenced against a nonlegal entity, which deprived the trial court of jurisdiction over that entity.

in both of its supplemental briefs, that, because the judgment against it is a nullity, no practical relief can be provided by this court and that, therefore, this court lacks subject matter jurisdiction over the appeal on the ground of mootness. We conclude that, because the present action was brought against the estate itself and not a representative of the estate, there was nothing in the record clearly indicating that the executor, and not the estate, was the real party in interest, and no motion to substitute has ever been filed, the trial court lacked jurisdiction to render judgment against the estate.

We begin our analysis by setting forth the relevant standard of review. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . [T]his court has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 273–74, 231 A.3d 386 (2020). "[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . [and] [t]he court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bialobrzeski*, 123 Conn. App. 791, 798, 3 A.3d 183 (2010); see also *Carten* v. *Carten*, 153 Conn. 603, 610, 219 A.2d 711 (1966). "If it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." (Internal quotation marks omitted.) *M.U.N. Capital, LLC* v. *National Hall Properties, LLC*, 163 Conn. App. 372, 374, 136 A.3d 665, cert. denied, 321 Conn. 902, 136 A.3d 1272 (2016).

Moreover, because mootness implicates this court's subject matter jurisdiction, it may be raised at any time, including by this court sua sponte, and is a threshold matter that must be resolved first. See *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013); *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 703, 894 A.2d 259 (2006). "This is so because [i]t is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575, 953 A.2d 868 (2008). "Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *In re Kamari C-L.*, 122 Conn. App. 815, 823, 2 A.3d 13, cert. denied, 298 Conn. 927, 5 A.3d 487 (2010).

For this court to determine whether there is any practical relief that can be afforded the estate in its appeal from the judgment rendered against it, we must first examine the issue of whether the trial court had jurisdiction to render the judgment against the estate.[8] "It is elemental that in order to confer jurisdiction on the court the [party] must have an actual legal existence,

[8] We note that "[t]his court has jurisdiction to determine whether a trial court had subject matter jurisdiction to hear a case." *State* v. *Martin M.*, 143 Conn. App. 140, 144 n.1, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013); see also *Gemmell* v. *Lee*, 42 Conn. App. 682, 684 n.3, 680 A.2d 346 (1996) (appellate court has jurisdiction to determine whether trial court had subject matter jurisdiction); *Vincenzo* v. *Warden*, 26 Conn. App. 132, 133, 599 A.2d 31 (1991) ("[t]his court has jurisdiction to determine whether a trial court had jurisdiction"). Furthermore, "it is axiomatic that this court has jurisdiction to determine whether it has jurisdiction. *Castro* v. *Viera*, [207 Conn. 420, 430, 541 A.2d 1216 (1988)]; *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 301, 521 A.2d 1017 (1987)." *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 610, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002).

that is he or it must be a person in law or a legal entity with legal capacity to sue. . . . An estate is not a legal entity. It is neither a natural nor artificial person, but is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." (Citations omitted; internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985); see also *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 32, 144 A.3d 420 (2016); *Ellis* v. *Cohen*, 118 Conn. App. 211, 215, 982 A.2d 1130 (2009).

In the present case, American Tax Funding brought this action and named the estate as a defendant in the complaint. The summons lists the estate as a party, and the return of service demonstrates that service on the estate was executed by serving David D'Addario, as coexecutor.[9] The complaint, however, did not name any of the coexecutors of the estate as parties in their representative capacities. Additionally, Reoco never amended the complaint to name the coexecutors of the estate in the action, and the coexecutors have not been named in the estate's appeal to this court, nor do their names appear on any of the appellate materials. This appeal was filed by Attorney Paul N. Gilmore on behalf of the estate.[10] All materials filed by the appellant have been submitted under the name, and on behalf, of the estate. Accordingly, the present case does not present a situation in which the file is replete with references to

[9] See footnote 3 of this opinion.

[10] The estate does not dispute these facts. In its first supplemental brief, it asserts: "The complaint demonstrates that the defendants are the estate and a corporate defendant (not an estate fiduciary). . . . Judgment was entered against the estate and the corporate defendant. . . . The estate, as a defendant against which judgment entered, lodged and briefed the appeal before this honorable court. No estate fiduciary was sued by the plaintiff; no estate fiduciary was made a defendant in this civil action." (Citations omitted.)

the coexecutors,[11] or where the coexecutors effectively were treated as parties by the other parties or the court, such that this court can conclude that the coexecutors were the real parties in interest. See *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 706 n.1, 159 A.3d 1149 (2017) (although coexecutors were not named in complaint, action was clearly maintained on estate's behalf by coexecutors), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018); *In re Probate Appeal of Kusmit*, 188 Conn. App. 196, 198 n.1, 204 A.3d 776 (2019) (although summons listed named plaintiff as estate of Connor Kusmit, it was undisputed that action was maintained by coadministrators of estate); *Estate of Machowski* v. *Inland Wetlands Commission*, 137 Conn. App. 830, 832 n.1, 49 A.3d 1080 ("Although bringing the action in the name of the estate raised a substantial question [regarding this court's subject matter jurisdiction], in the circumstances of this case, we conclude that the executors were the real parties in interest, were named in operative documents,

[11] Our review of the record discloses that the names of the coexecutors do not appear on any documents until 2015, when the Reoco filed a form titled "Financial Institution Execution Proceedings-Judgment Debtor Who Is Not A Natural Person, Application and Execution," as well as a form titled "Exemption Claim Form Financial Institution Execution." On both forms, Reoco named the estate and indicated that the forms were in care of the coexecutors. On June 7, 2016, David D'Addario and Lawrence D'Addario, as coexecutors of the estate, filed a motion for a protective order with respect to postjudgment depositions. Although the motion primarily discusses the protective order, it contains a discussion that is relevant to our analysis. The coexecutors stated that "*none of the coexecutors of the estate are named as individual defendants in this action*, so they are not judgment debtors. *The named defendant is the estate.*" (Emphasis added.) The coexecutors then explained that they are the only executors of the estate and that two of the executors named on the summons, Schwartz and Paolini, are deceased and have been so since 1993 and 2000, respectively. The other executor named on the summons, Griffith, resigned as a coexecutor of the estate more than twenty-five years earlier and his whereabouts are not known to the current coexecutors. Subsequently, the court ordered argument to be scheduled. Counsel for David D'Addario and Lawrence D'Addario then requested the motion for a protective order be marked off, which the court granted that same day.

and were effectively treated as parties by the other parties and the court. In these circumstances, dismissal would result in substantial injustice.), cert. denied, 307 Conn. 921, 54 A.3d 182 (2012).

"No principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment . . . may always be challenged." (Internal quotation marks omitted.) *Highgate Condominium Assn., Inc.* v. *Miller*, 129 Conn. App. 429, 435, 21 A.3d 853 (2011); see also *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576; *Thompson Gardens West Condominium Assn., Inc.* v. *Masto*, 140 Conn. App. 271, 277, 59 A.3d 276 (2013); *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 16, 6 A.3d 163 (2010); *Bicio* v. *Brewer*, 92 Conn. App. 158, 167, 884 A.2d 12 (2005). "It is well established that a court is without power to render a judgment if it lacks jurisdiction and that everything done under the judicial process of courts not having jurisdiction is, ipso facto, void. . . . A judgment void on its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification . . . . It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. . . . A void judgment is without life and will be ignored everywhere. . . . A court is without power to render a judgment if it lacks jurisdiction of the parties or of the [subject matter], one or both. In such cases, the judgment is void, has no authority and may be impeached." (Citations omitted; internal quotation marks omitted.) *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 25-26, 682 A.2d 1046 (1996); see also *In re DeLeon J.*, 290 Conn. 371, 377, 963 A.2d 53 (2009) ("[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also

may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.)); *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 535, 911 A.2d 712 (2006) ("a judgment rendered without subject matter jurisdiction is void"); *Selby* v. *Building Group, Inc.*, 129 Conn. App. 599, 603, 19 A.3d 1289 (2011) ("It is axiomatic that a court does not have personal jurisdiction over a nonparty. If a court lacks jurisdiction over a person . . . the court has no authority to award a judgment against that person . . . ." (Internal quotation marks omitted.)); *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 713, 927 A.2d 312 ("[i]f a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack" (internal quotation marks omitted)), cert. denied, 284 Conn. 927, 934 A.2d 243 (2007); *Bicio* v. *Brewer*, supra, 92 Conn. App. 167 (same).

Because the estate was not a legal entity that could be sued, the trial court did not have jurisdiction to render a judgment against the estate. See *Freese* v. *Dept. of Social Services*, 176 Conn. App. 64, 84-85, 169 A.3d 237 (2017). Its judgment as to the estate, therefore, is a nullity and was void ab initio. Accordingly, it follows that there is no practical relief that this court can grant with respect to the appeal from a judgment that is a nullity and has no force and effect. See *Koennicke* v. *Maiorano*, supra, 43 Conn. App. 25-26. The appeal from that judgment, therefore, is moot[12] and must be dismissed.[13] See *Barber* v. *Barber*, 193 Conn. App. 190, 216, 219 A.3d 378 (2019).

[12] As we noted previously in this opinion, the estate claimed, in both of its supplemental briefs, that, because the judgment against it was a nullity, no practical relief could be provided by this court and that, therefore, this court lacks subject matter jurisdiction over the appeal on the ground of mootness.

[13] In light of our determination that the appeal must be dismissed for lack of jurisdiction due to mootness, we need not address the standing issue

We further conclude that, under the circumstances of this case, the judgment of the trial court against the estate should be vacated.[14] "Our law of vacatur is scanty and has been developed [almost] entirely in the context of civil litigation." (Internal quotation marks omitted.) *State* v. *Boyle*, 287 Conn. 478, 488, 949 A.2d 460 (2008). In making this determination, we are guided by case law from our Supreme Court. In *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 142, the defendant hospital appealed from a judgment of the trial court requiring it to comply with a certain subpoena. After this court affirmed the trial court's judgment, our Supreme Court granted the petition for certification to appeal. Id. Thereafter, the underlying case was settled and the state no longer sought to enforce the subpoena. Id. Our Supreme Court determined that the appeal was moot because there was no practical relief that could be

raised in the first question posed to the parties, which would provide an independent basis for the determination regarding jurisdiction. See *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, supra, 197 Conn. App. 271 n.2; see also *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 602 n.10, 119 A.3d 1153 (2015) ("We recognize that the mootness doctrine is implicated in this appeal and likely provides an independent basis for our subject matter jurisdiction determination. Because we decide the case on the basis of aggrievement, however, we need not reach the mootness issue."); *Kelly* v. *Kurtz*, 193 Conn. App. 507, 539 n.13, 219 A.3d 948 (2019) (because Appellate Court agreed with trial court's determination regarding plaintiff's lack of standing, it did not address mootness argument).

[14] Although this court is dismissing the appeal as moot, it is appropriate for this court to vacate the judgment of the trial court as well. See *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 146 ("[t]he appeal is dismissed and the judgments of the Appellate Court and the trial court are vacated); *State* v. *Boyle*, 287 Conn. 478, 491, 949 A.2d 460 (2008) ("[t]he appeal is dismissed and the judgment of the Appellate Court is vacated"); *In re Candace H.*, 259 Conn. 523, 527, 790 A.2d 1164 (2001) ("[t]he appeal is dismissed and the judgment of the Appellate Court is vacated"); *In re Jessica M.*, 250 Conn. 747, 748, 738 A.2d 1087 (1999) ("[t]he appeal is dismissed and the judgments of the Appellate Court and the trial court are vacated"); *Amalgamated Transit Union Local 1588* v. *Laidlaw Transit, Inc.*, 33 Conn. App. 1, 6, 632 A.2d 713 (1993) ("[t]he appeal is dismissed in part and the judgment is vacated as to that portion that states that the defendant had complied with the arbitration award").

granted, and it dismissed the appeal sua sponte. Id., 143. The court went on to vacate the judgments of this court and the trial court for two reasons: "First, the hospital is not responsible for the mootness of its certified appeal. Second, the Appellate Court's unreviewable judgment may have preclusive effects against the hospital in subsequent litigation." Id. The court explained: "Although the remedy of vacatur is rooted in our supervisory authority, we have generally followed the federal courts' approach in applying that doctrine. . . . In *United States* v. *Munsingwear*, *Inc.*, 340 U.S. 36, 40, 71 S. Ct. 104, 95 L. Ed. 36 (1950), the United States Supreme Court explained that vacatur of a mooted case clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." (Citation omitted; internal quotation marks omitted.) *State* v. *Charlotte Hungerford Hospital*, supra, 143. Because the hospital did not voluntarily forfeit its appeal by participating in the settlement between the state and the claimant, the settlement was " 'happenstance' . . . with respect to the hospital, and vacatur [was] appropriate" in that case. (Citation omitted.) Id., 145. Our Supreme Court also determined that this court's unreviewable judgment could have preclusive, rather than merely precedential, effect against the hospital in future litigation, and that "[v]acatur of the trial court decision will further aid in the antipreclusionary aspect of the vacatur remedy. See *In re Jessica M.*, [250 Conn. 747, 749, 738 A.2d 1087 (1999)]." *State* v. *Charlotte Hungerford Hospital*, supra, 146 n.8.

State v. *Boyle*, supra, 287 Conn. 486–87, involved similar circumstances in which the appeal was rendered moot during its pendency and was, therefore, dismissed. Our Supreme Court next addressed the state's contention that the judgment of this court, which had reversed the judgment of the trial court, should be

vacated because it was likely to spawn legal consequences. Id., 487–88. The court in *Boyle* explained: "In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." (Internal quotation marks omitted.) Id., 489. Our Supreme Court vacated the judgment of this court "to [eliminate] a judgment, review of which was prevented through happenstance and to [clear] the path for future relitigation of the issues . . . ." (Internal quotation marks omitted.) Id., 490–91; see also *In re Candace H.*, 259 Conn. 523, 527 and n.5, 790 A.2d 1164 (2002) (vacatur of judgment of Appellate Court was appropriate "when public interest is served" and to prevent judgment "from spawning any legal consequences" (internal quotation marks omitted)).

In the present case, the judgment of the trial court is a nullity and as such, it is not subject to review on appeal, although it is subject to vacation. See *Angiolillo* v. *Buckmiller*, supra, 102 Conn. App. 713 ("[i]f a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack" (internal quotation marks omitted)). The estate did not cause the appeal to be moot, as it was the original plaintiff that commenced the action against a nonlegal entity, and no party ever sought a substitution of the proper party. The estate " 'ought not in fairness be forced to acquiesce in' " a judgment that is a nullity and which the trial court never had jurisdiction to render against the estate. *State* v. *Boyle*, supra, 287 Conn. 489. Vacating the judgment would prevent it from spawning legal consequences and would clear the path for future

relitigation of the issues. See id., 491; see also *In re Candace H.*, supra, 259 Conn. 527 n.5.

The appeal is dismissed and the judgment against the estate is vacated.

In this opinion the other judges concurred.

SUSANNE P. WAHBA *v.* JPMORGAN CHASE BANK, N.A.
(AC 42389)

Lavine, Alvord and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant bank for violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) that she alleged occurred in its handling of the modification process with respect to her mortgage. The plaintiff had obtained a mortgage loan from W Co. that was secured by certain real property. The plaintiff and W Co. thereafter engaged in discussions regarding a mortgage modification and eventually reached an agreement. A few days prior to the consummation of the modification agreement, W Co.'s assets, including the plaintiff's existing loan, were acquired by the defendant after W Co. was deemed a failed financial institution and was taken over by the Federal Deposit Insurance Corporation. The plaintiff continued to submit applications for various loan modifications or programs but failed to obtain new loan terms until several years later, when the plaintiff and the defendant executed a new loan agreement. The plaintiff commenced the present action alleging that the defendant engaged in deceptive and unfair trade practices with respect to the loan modification process and the defendant filed a counterclaim, seeking to foreclose on the mortgage. After a jury trial, the jury found in favor of the defendant on the plaintiff's CUTPA claim. After a bench trial on the counterclaim, the court found in favor of the defendant and rendered a judgment of strict foreclosure. From the judgment, the plaintiff appealed to this court. *Held*:

1. This court declined to review the plaintiff's claim of error as to the trial court's judgment of strict foreclosure, the plaintiff having failed to adequately brief that claim; the plaintiff's briefs contained no citation to any evidentiary rulings made within the bench trial on the defendant's foreclosure counterclaim that the plaintiff claims were in error and, therefore, any claim that the judgment of strict foreclosure was made in error was deemed abandoned.

2. The plaintiff's claim that the trial court improperly granted the defendant's motion in limine to preclude evidence of W Co.'s conduct pertaining to the 2008 modification agreement was dismissed as moot, the plaintiff having failed to challenge both of the court's independent bases for its evidentiary ruling; the court granted the motion in limine because W Co.'s conduct was not pleaded in the plaintiff's complaint and because the defendant could not be held liable for W Co.'s purported conduct without the plaintiff first having exhausted her administrative remedies pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) but, on appeal, the plaintiff challenged only the court's interpretation and application of FIRREA and, therefore, this court could grant no practical relief to the plaintiff.

3. The trial court did not abuse its discretion in granting the defendant's motion in limine to preclude evidence of a consent order between the defendant and the federal government on the basis that it was not relevant to the pleadings: the consent order made no reference to the plaintiff or her mortgage loan and the plaintiff did not allege in her pleadings the activity of the defendant that the government had identified as being improper; moreover, because the plaintiff failed to adequately brief how the preclusion of two other documents was harmful, this court declined to consider the plaintiff's claim of error as to the court's evidentiary ruling regarding these two documents.

4. The trial court did not abuse its discretion in denying the plaintiff's request to amend her complaint; the request to amend was filed the morning that the jury trial was to begin and the court noted its concern that allowing the amendment would cause an undue delay of the trial due it its substantial changes to the pleadings.

Argued February 10—officially released October 20, 2020

Procedural History

Action to recover damages for violations of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim seeking to foreclose a mortgage on certain real property owned by the plaintiff; thereafter, the court, *Povodator*, *J.*, granted the defendant's motions in limine to preclude certain evidence and denied the plaintiff's request to amend her complaint; subsequently, the plaintiff's claim was tried to the jury before *Povodator*, *J.*; verdict for the defendant; thereafter, the defendant's counterclaim was tried to the court, *Povodator*, *J.*; judgment for the defendant on the complaint and on the

counterclaim, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed*.

Thomas P. Willcutts, for the appellant (plaintiff).

Brian D. Rich, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Susanne P. Wahba, appeals from the judgment of the trial court rendered in favor of the defendant, JPMorgan Chase Bank, N.A., after a jury trial on the plaintiff's complaint and a court trial on the defendant's counterclaim.[1] On appeal, the plaintiff

[1] The court conducted two trials in this matter and rendered judgment in favor of the defendant; a jury trial was held in March, 2017 as to the plaintiff's claim under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and a court trial was held in October, 2017 as to the defendant's counterclaim seeking foreclosure. In the concluding sentence of the plaintiff's principal appellate brief, the plaintiff maintains that "both the jury's verdict [on her complaint] and the court's judgment on the defendant's counterclaim, which was substantially linked to the jury's verdict, should be set aside and the case remanded for a new trial." The defendant contends that the plaintiff has failed to brief any claim of error with respect to the court's judgment of strict foreclosure. We agree with the defendant and, accordingly, consider only the plaintiff's claims of error as to the court's judgment with respect to her CUTPA claim.

"It is well settled that claims on appeal must be adequately briefed . . . . Claims that are inadequately briefed generally are considered abandoned." (Citations omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259 (2004). The plaintiff's briefs are limited to challenging the trial court's orders granting the defendant's motions in limine and denying the plaintiff's request to amend her complaint, which orders were issued only in connection with the jury trial. Although the court considered the evidence admitted during the jury trial and took guidance from the jury's verdict in adjudicating the defendant's counterclaim seeking foreclosure, the court did not accept the jury's verdict as determinative of the plaintiff's equitable defenses in the court trial. Furthermore, the court expressly allowed the plaintiff to offer additional evidence during the court trial on the defendant's counterclaim, recognizing that considerations regarding the admissibility of evidence excluded for the purposes of the jury trial might have been different during the court trial. Because the plaintiff provides no citation to any evidentiary ruling made within the foreclosure trial that she contends was in error, the

claims that the court improperly (1) granted the defendant's March 15, 2017 motion in limine precluding evidence regarding a 2008 modification agreement (March 15 motion in limine), (2) granted the defendant's March 16, 2017 motion in limine precluding evidence regarding government regulatory action taken against the defendant (March 16 motion in limine), and (3) denied the plaintiff's request to amend her complaint. We dismiss the plaintiff's first claim as moot because the plaintiff has not challenged both of the trial court's bases for its evidentiary ruling. With regard to the plaintiff's remaining claims, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In the 1970s, the plaintiff and her husband purchased property located at 111 Byram Shore Road, Greenwich, which has been subject to different mortgages over the years.[2] Prior to any involvement by the defendant, the plaintiff had most recently obtained a mortgage loan from Washington Mutual (WaMu) in 2003.

In 2008, immediately before WaMu was determined to be a failed financial institution and was taken over

plaintiff's claim of error as to the trial court's judgment of strict foreclosure has been inadequately briefed and, therefore, abandoned.

[2] The plaintiff's husband, Mahmoud Wahba, at times was a joint owner of the property, but not during a time relevant to this appeal. In the defendant's counterclaim of strict foreclosure, the following third parties were identified as junior lienholders on the subject property and named as counterclaim defendants: Mortgage Electronic Registration Systems, Inc.; Bridge Funding, Inc.; Dr. Magdy A. Wahba; American Express Centurion Bank; and Midland Funding, LLC. On May 24, 2016, Dr. Magdy A. Wahba filed an appearance. On May 26, 2016, the court granted the defendant's motion for default for failure to appear against Mortgage Electronic Registration Systems, Inc., American Express Centurion Bank, and Midland Funding, LLC. On June 7, 2016, the court granted the defendant's motion for default for failure to appear against Bridge Funding, Inc. On February 7, 2017, the court granted the defendant's motion for default for failure to disclose defense against Dr. Magdy A. Wahba. None of those rulings is challenged on appeal. Accordingly, none of the aforementioned counterclaim defendants is a participating party in this appeal.

by the Federal Deposit Insurance Corporation (FDIC), there had been discussions between the plaintiff and WaMu and an application for a new loan arrangement with WaMu. On September 25, 2008, the defendant acquired the assets of WaMu from the FDIC, including the existing loan to the plaintiff. On September 29, 2008, within four days of the defendant's acquisition of the plaintiff's mortgage, the plaintiff and the defendant consummated a modification agreement (2008 modification agreement), which, inter alia, raised the fixed interest rate of the existing WaMu note.

Following the execution of the 2008 modification agreement, the plaintiff submitted to the defendant three applications for various loan modifications or programs between 2008 and 2012, seeking more advantageous terms for her mortgage loan. She failed to obtain approval of new loan terms until August 29, 2012, when the plaintiff and the defendant executed the currently operative loan agreement.

The plaintiff commenced this action in September, 2013, alleging that the defendant engaged in deceptive and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq.[3] The plaintiff's CUTPA claim against the defendant was tried to the jury in March, 2017. At trial, the plaintiff presented two arguments in support of her claim. First, the plaintiff argued that the defendant modified the WaMu note, pursuant to the terms of the 2008 modification agreement, knowing that the plaintiff had been induced to sign the agreement on the basis of false and deceptive representations, namely, that the 2008 modification agreement was a necessary precondition for the plaintiff to qualify for

[3] In count two of the plaintiff's complaint, she also sought to have the court quiet title to the property, but the court entered summary judgment in favor of the defendant on that count. The plaintiff does not challenge that decision on appeal.

more favorable mortgage modification terms. Second, the plaintiff argued that the defendant engaged in a deceptive mortgage modification scheme that was designed to purposefully extend the modification process without any intention of finalizing a favorable modification agreement. The jury returned a verdict for the defendant, finding that the plaintiff failed to prove that the defendant violated CUTPA.

This appeal stems from the court's rulings on several motions filed on the eve of trial.[4] On appeal, the plaintiff challenges the court's rulings on (1) the defendant's March 15 motion in limine seeking to preclude evidence regarding the conduct of WaMu pertaining to the 2008 modification agreement, (2) the defendant's March 16 motion in limine seeking to preclude evidence regarding government regulatory action taken against the defendant, and (3) the plaintiff's March 16, 2017 request to amend her complaint seeking to include allegations concerning the conduct of WaMu pertaining to the 2008 modification agreement. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff's first claim on appeal is that the court improperly granted the defendant's March 15 motion in limine precluding evidence of WaMu's conduct pertaining to the 2008 modification agreement.[5] We conclude that this claim is moot because the plaintiff has not challenged both of the trial court's bases for its evidentiary ruling.

[4] The parties filed the motions after jury selection had been completed. The jury trial on the plaintiff's CUTPA claim was scheduled to begin on March 16, 2017. On that morning, the court heard oral argument on the motions immediately prior to the scheduled start of trial. Due, in part, to the court's need to hear additional argument on the parties' motions, the court delayed the start of trial until the next morning, March 17, 2017.

[5] The defendant's March 15 motion in limine sought to preclude evidence of the foundation of the 2008 modification agreement, namely, negotiations by and between the plaintiff and WaMu.

Our review of the record indicates that the court granted the defendant's March 15 motion in limine on two independent bases: (1) WaMu's conduct pertaining to the 2008 modification agreement was not pleaded in the plaintiff's complaint; and (2) WaMu's conduct was not relevant because, under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821 (d) (2018), the defendant cannot be held liable for the purported conduct of WaMu without the plaintiff first exhausting her administrative remedies.[6] The defendant's March 15 motion in limine was argued before the court on March 16 and 17, 2017. On March 17, 2017, the court stated its concerns with admitting the evidence of WaMu's conduct pertaining to the 2008 modification agreement as follows: "Aside from the fact that none of this is in the [c]omplaint . . . I also have a problem . . . about FIRREA . . . having a requirement that before you can assert a claim against a successor, whether it's the FDIC or the bank that takes over, you need to go through the administrative process." Ultimately, the court found that "[t]here [was] nothing [alleged] in the complaint that suggested

[6] "FIRREA provides an administrative review process for all claims asserted against assets of a failed institution. . . . The administrative review process provided by FIRREA is a prerequisite to judicial review." *Aber-Shukofsky* v. *JPMorgan Chase & Co.*, 755 F. Supp. 2d 441, 445 (E.D.N.Y. 2010).

Title 12 of the United States Code, § 1821 (d) (13) (D), provides: "Except as otherwise provided in this subsection, no court shall have jurisdiction over—

"(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

"(ii) *any claim relating to any act or omission of such institution* or the Corporation as receiver." (Emphasis added.)

"Given FIRREA's clear language, the Second Circuit has consistently held that courts lack subject matter jurisdiction to hear a claim against a failed bank taken into receivership by the FDIC unless the plaintiff has exhausted the administrative claims process." *Aber-Shukofsky* v. *JPMorgan Chase & Co.*, supra, 446.

anything about antecedent conduct during the life of WaMu" and, accordingly, precluded evidence of the plaintiff's discussions with WaMu preliminary to the 2008 modification agreement.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on [her] claim, even if this court were to agree with the appellant on the issues that [she] does raise, we still would not be able to provide [her] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

On appeal, the plaintiff argues only that the court's interpretation and application of FIRREA in granting the defendant's March 15 motion in limine was in error.[7] The plaintiff does not challenge the trial court's exclusion of evidence on the basis that it was not pleaded in the complaint.[8] Because the plaintiff on appeal has

[7] In her principal appellate brief, the plaintiff also suggested that the defendant employed "trial by ambush" tactics in timing its March 15 motion in limine and injecting FIRREA into the case. The plaintiff expressly abandoned that claim at oral argument before this court. Therefore, we do not consider that claim. See *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 65 n.1, 223 A.3d 85 (2019), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020).

[8] In her brief, the plaintiff contends that the defendant's March 15 motion in limine did not argue that evidence concerning WaMu should be precluded because it was not properly within the scope of the allegations of the plaintiff's complaint and only sought to preclude such evidence on the basis of FIRREA. The plaintiff states that, in light of the arguments or lack thereof presented in the defendant's March 15 motion in limine, it is her understanding and position that the WaMu evidence was precluded on the sole basis of FIRREA. The record reveals that the plaintiff's understanding and position is incorrect. First, during oral argument on the March 15 motion in limine, the defendant objected to the plaintiff offering evidence of the plaintiff's discussions with WaMu predating the 2008 modification agreement on the ground that such evidence was not within the allegations of the plaintiff's complaint. Second, the court expressly stated in its ruling that "[t]here [was]

not challenged one of the two independent bases for the trial court's exclusion of the evidence, even if this court were to conclude that the trial court improperly applied FIRREA, we can grant no practical relief to the plaintiff. See *State* v. *Lester*, supra, 324 Conn. 528. Accordingly, we conclude that the plaintiff's claim is moot and this court lacks subject matter jurisdiction to consider it.

II

The plaintiff's second claim on appeal is that the court improperly granted the defendant's March 16 motion in limine precluding evidence regarding government regulatory action taken against the defendant. The plaintiff argues that such evidence was improperly precluded because it is relevant to the defendant's decision to approve the plaintiff's requested loan modification in August, 2012.[9] The defendant contends that the court properly precluded the evidence because it lacks relevance to the plaintiff's specific claims, would cause undue prejudice to the defendant, and lacks any probative value relative to the claims or defenses in this case. We agree with the defendant that the court properly granted its March 16 motion in limine.

The following additional facts and procedural history are relevant to this claim. After the 2008 modification

nothing [alleged] in the [plaintiff's] complaint that suggested anything about antecedent conduct during the life of WaMu."

[9] In her objection to the defendant's March 16 motion in limine, the plaintiff also argued that such evidence is relevant to "the public policy that was adopted by our government in the aftermath of the banking/mortgage crisis of 2008 and whether or not the defendant engaged in conduct that was . . . violative of the public policy considerations attaching to the parties' dealings." At trial, however, the court provided a charge to the jury on public policy as follows: "With respect to mortgage modifications specifically, public policy requires a mortgage servicer to treat a borrower fairly during the course of the modification process. Further during this period of time, there was an evolving policy encouraging solutions to homeowner mortgage problems that did not require foreclosure." The plaintiff does not challenge the propriety of this charge on appeal.

agreement and until 2012, the plaintiff submitted to the defendant three unsuccessful applications for various modifications or programs, seeking more advantageous terms for her mortgage loan. On the first occasion, the defendant told the plaintiff that her income was too high to qualify for a program to which she had applied. On the second occasion, substantially later in time, the defendant told the plaintiff that her income was too low to qualify. On the third occasion, "senior management" initially instructed that the plaintiff's application be denied and, several months later, the plaintiff's mortgage loan had been referred out to pursue foreclosure proceedings. However, the defendant ultimately approved the plaintiff's request for a modification in August, 2012 "per management." On August 29, 2012, the plaintiff and the defendant executed the currently operative loan agreement.

At trial, the plaintiff included on her exhibit list an April 13, 2011 consent order (consent order) between the defendant and the United States Department of the Treasury, Office of the Comptroller of the Currency, under which the defendant "committed to taking all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the [Office of the Comptroller of the Currency], and to enhance the [defendant's] residential mortgage servicing and foreclosure processes." One such step, the foreclosure review, required the defendant to "retain an independent consultant . . . to conduct an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the [defendant's] mortgage servicing portfolio . . . includ-[ing] residential foreclosure actions or proceedings . . . for loans serviced by the [defendant] . . . that have been pending at any time from January 1, 2009 to December 31, 2010 . . . ." Among other things, the independent consultant was charged with determining

"whether any errors, misrepresentations, or other deficiencies identified in the [f]oreclosure [r]eview resulted in financial injury to the borrower," which would require the defendant to submit "a plan, acceptable to the [Office of the Comptroller of the Currency] to remediate all financial injury to borrowers caused by any errors, misrepresentations or other deficiencies identified . . . ."[10]

On March 16, 2017, the defendant filed a motion in limine seeking to preclude the plaintiff from offering into evidence three documents: (1) the consent order, (2) an FDIC press release, and (3) a printout of a website posting from the Department of the Treasury relating to the Troubled Asset Relief Program, as well as any other similar document or testimony relating to government regulatory action taken against the defendant. On March 17, 2017, the court heard oral argument on the defendant's March 16 motion in limine. The court found that, so far as the plaintiff stated in her argument, such evidence was not relevant to the plaintiff's claims. The court granted the defendant's March 16 motion in limine without prejudice to the plaintiff seeking review of that ruling as the evidence was presented at trial.

We first set forth our standard of review. "A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision

[10] In 2013, the defendant entered into an agreement with the Office of Comptroller of the Currency and the Board of Governors of the Federal Reserve System, resolving the foreclosure review required by regulators. Thereafter, the plaintiff was notified that she was eligible to receive a payment as a result of that agreement. By letter dated April 26, 2013, the plaintiff received a payment of $500, an amount determined by regulators "based on the stage of [the plaintiff's] foreclosure process and other considerations related to [her] foreclosure."

thereon until a later time in the proceeding. . . . [T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . 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. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 377–78, 28 A.3d 272 (2011).

"[E]vidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The proffering party bears the burden of establishing [relevance]." (Citation omitted; internal quotation marks omitted.) Id., 378.

Before turning to the plaintiff's arguments, we note that in her appellate brief the plaintiff claims harmful error only as to the court's preclusion of the consent order and the related communications pertaining to the foreclosure review. The plaintiff's brief does not

adequately set forth an analysis of how the court's preclusion of evidence of the two other documents, an FDIC press release or a printout of a website posting from the Department of the Treasury, affected the final result of the proceeding. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Lane* v. *Cashman*, 179 Conn. App. 394, 435, 180 A.3d 13 (2018). Faced with the plaintiff's failure to adequately brief how the court's exclusion of evidence of an FDIC press release or a printout of a website posting from the Department of the Treasury was harmful, we therefore decline to consider the plaintiff's claim of error related to the challenged evidentiary ruling. See *Lane* v. *Cashman*, supra, 435. Accordingly, we only consider the plaintiff's claim as to the court's ruling on the consent order.

By its terms, the consent order made no reference to the plaintiff or to her mortgage loan. During oral argument on the defendant's March 16 motion in limine, the court noted that regardless of whether the Office of the Comptroller of the Currency identified some deficiencies in the defendant's loan servicing at large, it bears no relevance to whether there were any such deficiencies in the defendant's servicing of the plaintiff's mortgage loan. Although the plaintiff had applied, on the basis of the status of her mortgage loan and the defendant's handling of the same, to collect on any deficiencies identified by the Office of the Comptroller

of the Currency during the foreclosure review process, the plaintiff was not notified of her eligibility and in receipt of compensation until April 26, 2013—approximately eight months after the plaintiff and the defendant executed the currently operative loan agreement in August, 2012. Furthermore, the court found that the plaintiff did not allege in her pleadings the significant activity that the Department of the Treasury identified as being improper, namely, that the defendant deviated from loan documents. "What is in issue is determined by the pleadings and, once they have been filed, the evidence proffered must be relevant to the issues raised in the pleadings." (Internal quotation marks omitted.) *KMK Insulation, Inc.* v. *A. Prete & Son Construction Co.*, 49 Conn. App. 522, 527–28, 715 A.2d 799 (1998). The court properly precluded the consent order on the basis that it was not relevant to the pleadings. We therefore find no abuse of discretion in the court's ruling granting the defendant's March 16 motion in limine.

III

The plaintiff's third claim on appeal is that the court improperly denied the plaintiff's request to amend her complaint, which sought to include allegations concerning WaMu's conduct pertaining to the 2008 modification agreement. Specifically, the plaintiff argues that, because it was apparent to the defendant that at least a portion of the plaintiff's claim rested on WaMu's conduct pertaining to the foundation of the 2008 modification agreement, the requested amendment did not unfairly prejudice the defendant and, therefore, the court improperly denied her request to amend. The defendant responds that the court properly denied the plaintiff's request to amend as the amendment sought to include new allegations relating to the 2008 modification agreement at a belated stage of trial. We agree with the defendant that the court properly denied the plaintiff's request to amend her complaint.

The following additional facts and procedural history are relevant to this claim. On the morning of March 16, 2017, after jury selection had been completed and immediately prior to anticipated opening statements and the presentation of evidence, the plaintiff filed a request to amend her complaint. On that morning, the court heard oral argument on the request. The plaintiff's requested amendment sought to include, inter alia, allegations concerning the communications leading up to the 2008 modification agreement. Specifically, the plaintiff's requested amendment alleged that "the plaintiff contacted [WaMu] . . . concerning a possible modification of the mortgage . . . . Said communications continued with [the defendant] upon its acquiring [WaMu]."[11]

During oral argument on the request to amend, the plaintiff argued that "the evidence would be . . . that essentially the same [WaMu employees] who would have made representations leading up to the execution of that [2008 modification agreement] in favor of [the defendant] were the people who . . . then became [the defendant's] employees and continued to be involved in the execution of that agreement." The plaintiff further maintained that "given the facts that lead up to the sign-of that agreement, I think, the elements are there to have a duty to speak. I think, fraudulent nondisclosure

[11] The plaintiff's original complaint alleged: "After the plaintiff skipped three months of payments on her mortgage, as instructed by [the defendant] in order to qualify for a mortgage modification, [the defendant] informed the plaintiff that she was in default of her mortgage and [the defendant] threatened that if [the plaintiff] did not accept [the 2008 modification agreement], then it would pursue foreclosure proceedings against the property. Under the threat of foreclosure, the plaintiff [entered into the 2008 modification agreement], as demanded by [the defendant], while continuing to negotiate with [the defendant] for a mortgage modification . . . consistent with [the defendant's] original representations concerning the benefits available for the plaintiff in pursuing [the 2008] mortgage modification . . . ." Notably, the plaintiff's original complaint made no reference to WaMu's conduct pertaining to the 2008 modification agreement.

kicks in when a person makes a representation that they know is not true and they know is being relied upon." The court characterized the plaintiff's amendment as including "substantial changes" to the pleadings, articulating a concern for the already selected jury and a delay of trial. Due, in part, to the court's need to hear additional argument on the plaintiff's request to amend, the court delayed the start of trial until the next morning, March 17, 2017.

On March 17, 2017, the court denied the plaintiff's amendment insofar as it concerned the plaintiff's communications with WaMu leading up to the 2008 modification agreement. In so doing, the court stated: "We have to get this going. The case is going to start. . . . The [defendant's] objection is sustained to the [plaintiff's] amendment. We are dealing with a situation where we are talking about misrepresentations made by [the defendant] concerning . . . the [2008 modification agreement]." "This is what the complaint was and is . . . staying as."

We first set forth our standard of review. "Our standard of review of the [plaintiff's] claim is well defined. A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion. . . .

"A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the

delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Billy & Leo, LLC* v. *Michaelidis*, 87 Conn. App. 710, 714, 867 A.2d 119 (2005).

During oral argument on the plaintiff's request to amend her complaint, the court noted its concern for an undue delay of trial in light of the "substantial changes" to the pleadings and the defendant's argument that the amendment contained wholly new allegations that would require additional preparation. Although the plaintiff contends that the defendant was on notice of the new allegations because of evidence brought out in discovery, the defendant was not on notice that such information would be allowed at trial. See *Billy & Leo, LLC* v. *Michaelidis*, supra, 87 Conn. App. 715. "[T]he plaintiff filed the motion to amend only a day or two before the trial was to commence, and such a late amendment would have prejudiced the defendant in his case. We can find no reason to conclude that the court abused its discretion in making that ruling." Id., 715–16; see *Beckman* v. *Jalich Homes, Inc.*, 190 Conn. 299, 303, 460 A.2d 488 (1983) (trial court did not abuse its discretion by denying request to amend that was filed day before trial and would have added new bases of liability); see also *Connecticut National Bank* v. *Douglas*, 221 Conn. 530, 549, 606 A.2d 684 (1992) ("[w]e have not previously found an abuse of discretion when a trial court, on the eve of trial, concluded that prejudice and delay would result from a substantial amendment to the [pleadings], and we decline to do so in the present circumstances" (internal quotation marks omitted)). Accordingly, we conclude that the court did not abuse

its discretion in denying the plaintiff's request to amend her complaint.

The appeal is dismissed with respect to the defendant's March 15, 2017 motion in limine; the judgment is affirmed and the case is remanded solely for the purpose of setting new law days.

In this opinion the other judges concurred.