STATE OF CONNECTICUT *v.* DENNIS G. HAZARD (AC 43384)

DiPentima, C. J., and Moll and Harper, Js.*

Syllabus

Convicted of the crime of robbery in the first degree, the defendant appealed, claiming, inter alia, that the evidence was insufficient to establish his identity as the perpetrator and that he proved his affirmative defense of inoperability of the weapon used during the robbery. The perpetrator had pointed a gun at the employee on duty at a storage facility, took cash from her and then fled. Police officers searching the nearby area encountered a vehicle that came toward them but then reversed direction and left the area before crashing in a yard. The defendant fled from the crash scene before the police arrived and found cash, a gun and other items in the vehicle, which had been lent to the defendant by his girlfriend hours before the robbery. The storage facility employee described to the police what the defendant was wearing but was unable to identify him when the police brought her to a nearby store where he was arrested shortly after the robbery for a one-on-one identification. *Held*:

1. There was sufficient evidence from which the jury reasonably could have found that the defendant was the person who robbed the storage facility; the defendant owned and wore clothing and items similar to that worn by the perpetrator, some of which the police found in bushes near the crime scene and which contained the defendant's DNA, video surveillance showed an individual driving to a bush in a vehicle matching that which was owned by the defendant's girlfriend, exiting the vehicle and retreating behind the bush before returning to the vehicle wearing clothing that matched that of the defendant at the time of his arrest, and the police found in the vehicle, which belonged to the defendant's girlfriend, a gun and money that approximated the amount stolen from the storage facility.
2. The defendant could not prevail on his claim that his conviction of first degree robbery should be reversed because he proved the affirmative defense that the gun was inoperable at the time of the robbery; there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery, contrary to the defendant's claim that it was reasonable to infer that the gun was in the same condition at the time of the robbery as it was when the police tested it six months later and found it unable to discharge, the police officer who tested the gun was unable to testify about its operability prior to its recovery by the police or to state whether dirt found in the gun was the same type

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

of dirt that was found on the defendant's clothes at the time of his arrest or the type of dirt that surrounded the items found in the bushes, the jurors were free to infer that the gun was not in the same condition at the time of testing as it was during the robbery, and, accordingly, the jury reasonably could have found that the defendant failed to prove his affirmative defense of inoperability.

3. The trial court did not abuse its discretion when it denied the defendant's motion for a mistrial, which was based on his claim that a police officer's testimony constituted improper lay opinion under the applicable provision of the Connecticut Code of Evidence (§ 7-1) and an improper opinion on the ultimate issue of identity in violation of the applicable provision of the Connecticut Code of Evidence (§ 7-3):

a. The police officer's testimony that the defendant's clothing appeared to be the same as that worn by the perpetrator in the surveillance footage did not constitute an improper lay opinion, as nonexpert opinion testimony about the appearance of persons or things was admissible in the discretion of the court.

b. The police officer did not give an opinion on the ultimate issue of identity when she testified that the defendant was wearing pants similar to those of the perpetrator in the surveillance video and that the defendant was the individual seen at the storage facility in that surveillance video; the trial court ordered the identification testimony stricken from the record and instructed the jurors twice not to consider it in their deliberations, the defendant did not demonstrate that the stricken testimony was so prejudicial that the jury could not reasonably be presumed to have disregarded it, and, even if the identification testimony was improper, this court was not persuaded that it was harmful, as the jury was presented with significant other circumstantial evidence that connected the defendant to the robbery and provided a reasonable basis on which to conclude that he was the individual in the surveillance footage.

4. The defendant could not prevail on his claim that the trial court erred in failing to give the jury his requested instruction on identity, as the case did not involve issues of misidentification or lack of clarity and inconsistencies in identification, the jury instructions that were given were not incorrect, insufficient or misleading to the jury, and the defendant's reliance on the requirement that juries be given specific instructions with regard to eyewitness identifications was unavailing, as the sole potential eyewitness to the robbery was unable to identify the defendant.

Argued May 18—officially released October 27, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of robbery in the first degree and robbery in the second degree, and, in

the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Ansonia-Milford, where the first part of the information was tried to the jury before *Brown*, *J.*; thereafter, the court denied the defendant's motion for a mistrial; verdict of guilty; subsequently, the defendant was presented to the court on a plea of guilty to the second part of the information; thereafter, the court denied the defendant's motions for a judgment of acquittal and for a new trial, vacated the verdict of guilty of robbery in the second degree, and rendered judgment in accordance with the verdict and the plea, and the defendant appealed. *Affirmed*.

James B. Streeto, senior assistant public defender, with whom was *Susan Brown*, public defender, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Cornelius P. Kelly*, supervisory assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Dennis G. Hazard, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4).[1] On appeal, the

[1] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. . . ."

The jury also found the defendant guilty of robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B). The court, however, vacated the defendant's conviction of robbery in the second degree because it concluded that a conviction of first and second degree robbery would violate the prohibition against double jeopardy.

defendant claims that (1) there was insufficient evidence to establish his identity as the person who committed the robbery, (2) he established the affirmative defense of inoperability of a gun that was found in the car he had been driving, (3) the trial court erred in denying his motion for a mistrial, and (4) the trial court erred in failing to give the jury his requested instruction on identification. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On May 5, 2016, at or about 12:06 p.m., a robbery occurred at the Public Storage (storage facility) on Bull Hill Lane in West Haven. Renae Luginbuhl was the sole storage facility employee on duty at that time. The perpetrator was described as an African-American man wearing a dark hooded sweatshirt with a portion of a white undershirt hanging out, a baseball cap with a yellow brim and a light colored emblem, dark pants, and dark shoes with white soles. Upon entering the storage facility, the man mumbled something that Luginbuhl did not understand. Then the man pointed a gun at Luginbuhl and stated, "give me all your fucking money." Luginbuhl gave the man all of the money in the register and, additionally, the $50 and $100 bills she stored underneath the register. After receiving the money, the man warned Luginbuhl not to call anyone and then fled.

As soon as the man left the storage facility, Luginbuhl reported the robbery to the police. She described to the police what the man was wearing and informed them that the man had run across Bull Hill Lane. Luginbuhl, however, was unable to describe the man's facial features.

Detectives William Conlan and Craig Casman of the West Haven Police Department were among the first police officers to respond to the scene. They arrived

at or about 12:24 p.m., in an unmarked vehicle, and searched the immediate area surrounding the storage facility, including a nearby dirt access road behind the Orange Landing Condominiums complex (complex). Once behind the complex, Conlan and Casman encountered a white or tan Chevy Malibu (vehicle) with a partially open passenger side door driving toward them from the opposite direction. At or about 12:25 p.m., the driver of the vehicle reversed direction and exited the access road, only to head north on Bull Hill Lane. Suspicious of the driver's actions, Conlan directed other police officers to stop the vehicle. Officer Minh Pham spotted the vehicle and began pursuit. Pham observed that the driver of the vehicle was a black man with a distinctive haircut. Pham also observed the man driving erratically throughout Bull Hill Lane, Knight Lane, and then Valley Brook Road, where the vehicle hit stop signs, mailboxes, a utility pole, and ultimately crashed in a backyard on Valley Brook Road. By the time Pham arrived at the scene of the crash, the driver had exited the vehicle and escaped on foot.

Contemporaneous with Pham's pursuit of the vehicle, Detectives Sean Faughnan and Tammy Murray, along with Officer Justin Standish and his tracking dog, Cody, arrived at the storage facility to investigate. Standish directed Cody to the front door of the storage facility, where Cody picked up the scent of the perpetrator and, thereafter, led Standish across Bull Hill Lane and toward the complex. Once Standish and Cody reached the area of the complex, Cody lost the scent of the perpetrator. The police, however, found a black sweatshirt and baseball cap, similar to the one worn by the perpetrator, hidden in a bush by the complex. Thereafter, Faughnan, Murray, and Standish decided to continue their search at the crash site on Valley Brook Road, approximately two minutes away from the complex. They searched the vehicle and found approximately $479 scattered

loosely over the floor of the passenger seat, a black revolver style pellet gun, two cell phones, and a pair of white sneakers.

While at the scene of the crash, Standish prepared Cody to continue tracking by using the scent obtained from the front seat of the vehicle. Cody began leading the officers on a scent trail from the crash site to a nearby parking lot where several construction workers reported seeing a black male running. From there, Cody led the officers across Carlson Road, up a short access road, and then toward a Dollar Tree store (store) on Boston Post Road in Orange.

A black male, later identified as the defendant, entered the store at or about 12:33 p.m. and was observed not wearing shoes. The defendant asked Stacey Sorrells, a store employee, if shoes were sold in the store, and she directed him to the area where he could purchase flip-flops. The defendant picked out a pair of flip-flops and, while checking out with a cashier, kept looking out the window and tapping his fingers. Upon completing his transaction, the defendant went to leave; however, after observing several police officers approaching the store at or about 12:36 p.m., he turned around and walked further into the store. Once Cody had entered the store, at or about 12:37 p.m., he led Standish past the other officers, employees, and customers, and alerted Standish to the defendant. The defendant was arrested and escorted from the store at or about 12:44 p.m.

At the time of his arrest, the defendant was wearing a blue and white shirt, jeans, and socks covered in dirt or mulch. Shortly after his arrest, Luginbuhl was brought to the store by the police in order to make an identification; however, she was unable to identify the defendant as the person who robbed the storage facility.

Following his arrest, the defendant was charged with robbery in the first degree and robbery in the second

degree. The trial began on November 28, 2017, and concluded December 5, 2017. On November 30, 2017, the state called Detective Murray, who testified, among other things, that the perpetrator was wearing the same clothing as the defendant at the time of his arrest and that the defendant was the perpetrator on the surveillance footage at the storage facility. Immediately following Murray's statement, the defendant orally moved for a mistrial, arguing that Murray's testimony was irreparably prejudicial. That motion was denied. On December 4, 2017, the defendant filed a written motion for a mistrial, challenging the court's rulings regarding allegedly prejudicial statements made by Murray. That motion was denied. Following the jury trial, on December 6, 2017, the defendant was found guilty of robbery in the first degree and robbery in the second degree.

Two months later, on February 8, 2018, the defendant filed a motion for a judgment of acquittal, arguing that the evidence adduced at trial did not reasonably permit a finding of guilty beyond a reasonable doubt. He also filed, that same day, a motion for a new trial. Specifically, he argued that (1) the court erred when it allowed testimony by Murray that the pants the perpetrator had worn and the pants the defendant had worn at the time of his arrest were the same pants, (2) Murray had testified erroneously about an essential element of the crime charged, (3) the court improperly denied the defendant's request for a mistrial on the basis of that issue, and (4) the court refused to instruct the jury on the issue of making an identification based on clothing. The court denied both of the defendant's motions.

On February 16, 2018, the court sentenced the defendant to a total effective term of twenty-eight years of incarceration, execution suspended after fifteen years, followed by five years of probation. On March 21, 2018, the defendant filed another motion for a judgment of acquittal and a new trial, arguing that the verdict of

guilty of both robbery in the first degree and robbery in the second degree was legally inconsistent. More specifically, he argued that the difference between first and second degree robbery was the issue of the operability of the firearm and that a firearm cannot simultaneously be operable and inoperable. The defendant's motion was denied.[2] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence of identity was insufficient to sustain his conviction, and that the trial court erred in denying his motion for a judgment of acquittal. The state counters that the cumulative impact of all the evidence and the inferences the jury reasonably could have drawn therefrom support the jury's finding that the defendant was the perpetrator. We agree with the state.

We begin our analysis by setting forth the well settled standard of review applicable to a sufficiency of the evidence claim, wherein we apply a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty

[2] Consistent with Connecticut case law, we conclude that the trial court should have dismissed rather than denied the defendant's March 21, 2018 motion for acquittal and a new trial due to lack of jurisdiction. See *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019) ("a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority").

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

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

"[T]here is a fine line between the making of reasonable inferences and engaging in speculation—the jury is allowed only to do the former. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes

so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. . . .

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Richards*, 196 Conn. App. 387, 395–97, 229 A.3d 1157, cert. granted, 335 Conn. 931, A.3d (2020).

Additionally, "[r]eview of any claim of insufficiency of the evidence introduced to prove a violation of a criminal statute must necessarily begin with the skeletal requirements of what necessary elements the charged statute requires to be proved. . . . The state has the burden of proving beyond a reasonable doubt the defendant's identity as the perpetrator of the crime." (Citation omitted; internal quotation marks omitted.) *State* v. *Pugh*, 190 Conn. App. 794, 802–803, 212 A.3d 787, cert. denied, 333 Conn. 914, 217 A.3d 635 (2019). "[T]he issue of the identity of the defendant as [the] perpetrator of the robbery is one of fact for the jury." *State* v. *Morgan*, 274 Conn. 790, 798, 877 A.2d 739 (2005).

The defendant does not dispute that the storage facility was robbed. Rather, the defendant contends only

that the evidence of his identity as the perpetrator was insufficient to support the jury's inference linking him to the crime. He contends that the evidence of identity was insufficient because (1) there was no eyewitness who identified him as the perpetrator, (2) there was no physical evidence that tied him to the storage facility, (3) there was no confession, and (4) there was no testimony from an informant. The defendant further argues that the state relied, in large part, on the use of a montage of surveillance footage—from the storage facility, the complex, and the store—that contained gaps in time, was of poor quality, and purportedly showed the defendant approaching, robbing, and fleeing the storage facility. He further contends that, by concluding that the person in the video is the defendant, the jury engaged in speculation. We conclude that there was sufficient evidence presented at trial to satisfy the state's burden of proving identity and, ultimately, to support the defendant's conviction.

First, Luginbuhl testified that the perpetrator was an African-American man wearing a black hooded sweatshirt pulled over a baseball cap with a yellow brim and dark pants. The police investigating the robbery found a black hooded sweatshirt and a baseball cap with a yellow brim abandoned in a bush near the storage facility. Shanae Lucky, the defendant's girlfriend at the time, testified that the defendant owned a black hooded sweatshirt and a black hat with a yellow brim, and that both items of clothing looked similar to those found by the police near the storage facility. Furthermore, forensic analysis revealed that the defendant's "entire genetic profile" was detected and that he was "a potential contributor to the major DNA mixture profile" found on the sweatshirt and the cap that were found near the storage facility. Forensic analysis further revealed that the expected frequency of individuals who could be a contributor to the major DNA mixture profile from the hat is less than

1 in 7 billion in the African-American, Caucasian, and Hispanic populations, and that the expected frequency of individuals who could be a contributor to the major DNA mixture profile from the sweatshirt is less than approximately 1 in 6100 in the African-American population, approximately 1 in 5900 in the Caucasian population, and approximately 1 in 6500 in the Hispanic population.

Second, Lucky testified that, on the morning of May 5, 2016, a few hours prior to the robbery, she lent the defendant her tan 2002 Chevy Malibu so that he could get the front passenger door repaired, which, at that time, required tying a seat belt to the door in order to keep it closed. Conlan testified that, while both he and Casman were driving on a dirt access road close to the storage facility, they encountered a man driving a tan Chevy Malibu. According to Conlan, after the driver saw the officers, the driver began backing his car in the opposite direction. Conlan further testified that when the vehicle eventually turned around, he noticed that the passenger side door was partially open. Furthermore, he testified that the vehicle that crashed on Valley Brook Road was the same vehicle he and Casman encountered on the dirt access road.

Third, after the police commenced pursuit of the vehicle that subsequently crashed on Valley Brook Road, the vehicle was searched and the contents therein were inventoried. Murray testified that the contents of the car included, among other things, $479 that was loosely scattered over the floor of the passenger seat,[3] a black

[3] Luginbuhl did not recall the exact amount of money stolen from the storage facility. She testified that she began the day with $250 in a drawer and gave the robber what was in the drawer, plus the $50 and $100 bills that she kept underneath the drawer. During cross-examination, defense counsel showed Luginbuhl a report she had given to the police indicating the amount of money stolen. After reading the report, she testified that there was $347 underneath the register. She did not clearly state, however, the total amount of money inside the drawer, including the original $250. To the extent that there is a discrepancy with regard to the amount of

revolver style pellet gun, and white shoes. Additional forensic and DNA analysis revealed that the defendant could not be eliminated as a contributor to the DNA found on the trigger and handle grip of the gun that was found in the vehicle. Last, the defendant's fingerprints matched those found on the vehicle.

Fourth, Officer Standish testified about the results of the deployment of his K-9 tracking dog, Cody. Specifically, Standish testified that, after he led Cody to the entrance of the public storage and "casted" Cody,[4] Cody led Standish out of the storage facility and south across Bull Hill Lane toward the complex. When Cody and Standish reached the area surrounding the complex, however, a loud noise from an adjacent construction site interrupted Cody's tracking. At that point, Standish had received information via his radio that the pursuit of the vehicle resulted in a crash on Valley Brook Road; therefore, he and Cody left the scene of the robbery to begin a search at the scene of the crash. He further testified that he had directed Cody to the scent on the vehicle's driver seat and that Cody then began to track that scent. According to Standish, Cody led a team of police officers past several construction workers, through several streets, and into the store where he alerted Standish to the defendant, indicating that the defendant was the source of the scent obtained by Cody from the driver's seat of the vehicle. As a result of Cody's tracking efforts, the defendant was located.

Fifth, as noted, surveillance camera footage collected from the day of the robbery from three primary locations—the storage facility, the complex, and the store—

money found in the vehicle as compared to that having been taken from the storage facility, this court has held that "a possible discrepancy in the evidence does not necessarily outweigh the evidence tending to show guilt." *State* v. *Ingram*, 132 Conn. App. 385, 392, 31 A.3d 835 (2011), cert. denied, 303 Conn. 932, 36 A.3d 694 (2012).

[4] "Casting" is the process of bringing a trained tracking dog to an area where a suspect was last seen in order to have the dog pick up the suspect's scent.

was presented to the jury. That footage was compiled and showed the following: The perpetrator was wearing a dark hooded sweatshirt, an undershirt with white on the bottom, a dark cap with a yellow emblem, dark pants with rips on the front and back, and dark colored shoes when he robbed the storage facility; an individual wearing clothing similar to that which the perpetrator wore during the robbery exited a tan Chevy Malibu, ran to a bushy area where the sweatshirt and cap were found, and then returned to the vehicle no longer wearing the sweatshirt or cap; when that individual emerged from the bushes, he was wearing a "two-toned" shirt that was dark on top and white on bottom and dark, ripped jeans; the defendant entered the store with no shoes, wearing a "two-toned" shirt and pants similar in color and pattern to those worn by the perpetrator; when buying flip-flops in the store, the defendant kept tapping his hand and looking out the window of the store; and, after completing his purchase, the defendant went to exit the store but then turned around and went further into the store until several police officers entered the store and arrested him. The clothes the defendant was wearing in the surveillance footage at the store, after having been tracked down by Cody, were the same clothes he was wearing earlier that day when he left Lucky's home.[5]

[5] The defendant contends that the surveillance footage is unreliable. Specifically, he argues that the footage contained inaccurate time stamps and that to render any conclusions therefrom would require speculation. He further argues that, because the time stamps are inaccurate, "it cannot be said, without speculation, that they show events happening at or around the time of the robbery." We find the defendant's arguments unavailing.

During trial, Detective Murray testified that the surveillance footage from 155 Bull Hill Lane—the footage covering the back service road area—"was approximately five hours and twenty minutes later than what the time is on the display. So, the time would say, like, 06:45 because it's in military time, but it's actually at five hours and twenty minutes [later] . . . ." Murray further testified that the "video from 157 Bull Hill Lane that—the actual time with respect to that video is actually three minutes later than the display time. So, if it says 12:07, [then] the video was actually 12:10." Murray's testimony, which the jury was free to accept, clarified the time stamps

Last, the defendant's actions immediately following the robbery are indicative of his consciousness of guilt. "[Consciousness of guilt] is relevant to show the conduct of an accused . . . subsequent to an alleged criminal act, which may be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . ." (Internal quotation marks omitted.) *State* v. *Crafter*, 198 Conn. App. 732, 744, 233 A.3d 1227 (2020). "Flight, when unexplained, tends to prove a consciousness of guilt. . . . Flight is a form of circumstantial evidence. . . . The probative value of evidence of flight depends upon all the facts and circumstances and is a question of fact for the jury." (Internal quotation marks omitted.) *State* v. *Grajales*, 181 Conn. App. 440, 448–49, 186 A.3d 1189, cert. denied, 329 Conn. 910, 186 A.3d 707 (2018). In the present case, the driver of a vehicle, which was similar to that owned by the defendant's girlfriend and lent to the defendant, was captured on surveillance footage reversing direction after the appearance of an unmarked police vehicle; that same vehicle was pursued by other police officers until it ultimately crashed a few streets away from the crime scene; the driver fled on foot; Cody, the tracking dog, followed the scent of the driver and led the police officers to the defendant in the store; and, the defendant, who originally was attempting to exit the store, upon seeing the police approach the store, turned around and went further into the store where he was subsequently arrested.

In support of his claim, the defendant relies on this court's decision in *State* v. *Billie*, 123 Conn. App. 690, 696, 2 A.3d 1034 (2010), and the dissenting opinion in *State* v. *Osman*, 21 Conn. App. 299, 573 A.2d 743 (1990)

provided to the jury and, furthermore, established that the robbery of the storage facility, the pursuit of the Chevy Malibu, and the arrest of the defendant all took place between 12:05 and 12:45 p.m.

(*Berdon*, *J.*, dissenting in part and concurring in part), rev'd, 218 Conn. 432, 589 A.2d 1227 (1991), as well as our Supreme Court's decision in *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991). The defendant's reliance on these cases is misplaced.

In *Billie*, an anonymous informant had notified the police of suspected criminal activity in an area known for drug trafficking. *State* v. *Billie*, supra, 123 Conn. App. 692. Specifically, "[t]he informant stated that he had witnessed a 'black male' placing narcotics underneath the rear porch of a certain house but did not provide any further information that could be used to identify the individual observed." Id. As a result, the police had removed all but one package of narcotics and setup surveillance over the area that the informant described. Id. Later that evening, the police noticed the defendant as he approached the porch and removed the hidden narcotics; shortly thereafter, he was arrested. Id., 693.

On appeal, the defendant in *Billie* argued that the state did not produce sufficient evidence to prove beyond a reasonable doubt that he possessed the narcotics that were removed previously by the police or that he had the requisite intent to sell; this court agreed. Id., 694–95. Because the remaining narcotics were not on the defendant's person and because the defendant was not in exclusive possession of the premises, in order to obtain a conviction, the state needed to "show incriminating statements or circumstances that support an inference that [the defendant] knew of the presence of the narcotics and had control of them . . . ." (Internal quotation marks omitted.) Id., 698. The state argued that it met its burden because knowledge and control of the remaining narcotics could have been inferred from the correlation between the informant's observations and the defendant's actions. Id. This court was not persuaded: "[T]he . . . informant's statement to the . . .

police was limited to his witnessing a 'black male' placing narcotics underneath the rear porch of a certain house. This general description alone, totally devoid of any additional identifying characteristics or traits, did not provide sufficient information for the jury reasonably to have concluded that the defendant was the individual observed by the informant. The individual observed very well may have been the defendant or just as readily a drug dealer or user hiding his stash of narcotics. The evidence simply does not make this clear. Thus, in the absence of additional identifying information, the jury could not have concluded that the defendant was the individual observed by the informant without resorting to speculation." (Footnote omitted.) Id., 698–99.

Similar to *Billie*, there was no eyewitness identification of the defendant in the present case; rather, a general description was provided to the police. Unlike in *Billie*, however, that description was not limited to the defendant's skin color or gender—it also included the clothing he was wearing at the time, the fact that he was armed with a gun, and an approximation of how much money was stolen from the storage facility. As previously noted, evidence was also presented to the jury that the defendant owned clothing similar to that of the perpetrator; the clothing worn by the perpetrator during the robbery was found near the crime scene and contained the defendant's "entire genetic profile"; a gun and an amount of money similar to that taken from the storage facility were found in the vehicle belonging to the defendant's girlfriend, who also testified that she had lent the defendant her vehicle earlier that day; and the police had pursued that vehicle from the area of the crime scene to where it eventually crashed, near the store where the defendant was arrested. Accordingly, unlike in *Billie*, there was additional identifying information, as set forth previously in this opinion, from

which the jury could have concluded that the defendant was the perpetrator.

Equally unpersuasive is the defendant's reliance on the dissent in *State* v. *Osman*, supra, 21 Conn. App. 314, as well as our Supreme Court's decision in *State* v. *Osman*, supra, 218 Conn. 437. In *Osman*, the defendant was convicted of robbery in the first degree and conspiracy to commit robbery in the first degree. *State* v. *Osman*, supra, 218 Conn. 433. The defendant appealed to this court, arguing that there was insufficient evidence to identify him as the perpetrator or as a conspirator in the robbery of a convenience store. A majority of this court disagreed with the defendant on his claim that the evidence was insufficient to find him guilty of robbery in the first degree, found that the evidence was nevertheless sufficient to find him guilty of robbery in the third degree in violation of General Statutes § 53a-133 and affirmed his conviction of conspiracy to commit robbery in the first degree. One judge dissented in part and concurred in part. *State* v. *Osman*, supra, 21 Conn. App. 314. Our Supreme Court, however, reversed the judgment of this court. *State* v. *Osman*, supra, 218 Conn. 437–38. The evidence presented at trial included the following: the defendant lived within two miles of the crime scene; the defendant possessed a pellet gun, a Halloween costume with red hair, and gray pants, all of which were similar to those described by the victims; the defendant tried to borrow money on the day of the robbery; the defendant and his accomplice were similar in height to the robbers; and, after the robbery had occurred, the defendant brought home an expensive stereo, leather jacket, and leather sneakers, despite having been unemployed. *State* v. *Osman*, supra, 21 Conn. App. 301–304.

In the present case, the defendant relies on the dissent in *Osman*, which opined that the conviction in *Osman* "was upheld on proof of identification based

solely upon circumstantial evidence of mere similarities not bolstered by similarities of a distinctive nature that connect the defendant to the crime." *State* v. *Osman*, supra, 21 Conn. App. 314 (*Berdon*, *J.*, dissenting in part and concurring in part). Without citing to the dissent, our Supreme Court concluded, in a per curiam opinion, that the "cumulative effect of the evidence elicited at . . . trial was insufficient to establish beyond a reasonable doubt the defendant's identity . . . . To have arrived at its decision that the defendant was one of the robbers, the jury would have had to resort to speculation and conjecture and to have drawn unwarranted inferences from the facts presented." *State* v. *Osman*, supra, 218 Conn. 437.

From our review of the evidence presented at trial in the present case, we are not persuaded that there were just "mere similarities" without a "distinctive nature" that connected the defendant to the crime. On the contrary, unlike in *Osman*, the evidence in this case showed not only that the defendant owned clothing similar to that worn by the perpetrator, but also that clothing similar to that worn by the perpetrator was found abandoned in the bushes near the scene of the crime and that clothing contained the defendant's DNA. Furthermore, video surveillance showed an individual driving up to the bush in a vehicle matching that which was owned by Lucky, exiting the vehicle and retreating behind the bush, and then returning to the vehicle wearing clothing matching that of the defendant at the time of his arrest. Additionally, as previously noted, a gun and an amount of money approximating the amount stolen from the storage facility were found near the scene of the crime, strewn in a vehicle belonging to Lucky, who had lent the defendant her vehicle several hours prior to the crime.

The defendant concludes his claim by making a series of arguments aimed at reviewing the evidence and

arguing that, together, it demonstrates his innocence. He further argues that evidence necessary to convict him was not provided by the state. We are mindful, however, of our scope of review: "[W]e give deference not to the hypothesis of innocence posed by the defendant, but to the evidence and the reasonable inferences drawable therefrom that support the jury's determination of guilt. On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Richards*, supra, 196 Conn. App. 407.

On the basis of the foregoing evidence presented at trial and mindful of our standard of review, we conclude that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant was the person who robbed the storage facility.

II

Next, the defendant claims that this court must reverse his conviction of robbery in the first degree because he established the affirmative defense of inoperability. The state contends that the defendant failed to satisfy his burden of proving the affirmative defense of inoperability by a preponderance of the evidence. We agree with the state.

The following legal principles are relevant to our disposition of this claim. "The state meets its burden of proof regarding robbery in the first degree by proving beyond a reasonable doubt that, inter alia, the defendant displayed or threatened the use of what he represented to be a firearm. . . . If the defendant so chooses and the evidence permits, he may assert the affirmative defense of inoperability. . . . Because inoperability is

an affirmative defense, the defendant was required to raise and prove it by a preponderance of the evidence. . . . Proving the defense by a preponderance of the evidence results in a conviction of robbery in the second degree." (Citations omitted; internal quotation marks omitted.) *State* v. *Seay*, 128 Conn. App. 518, 523 n.4, 16 A.3d 1278, cert. dismissed, 302 Conn. 907, 23 A.3d 1246 (2011); see also General Statutes § 53a-134 (a) (4). On appeal, the standard for reviewing the defendant's affirmative defense claim is the same standard used for a sufficiency of the evidence claim. See *State* v. *D'Antuono*, 186 Conn. 414, 421, 441 A.2d 846 (1982); see also part I of this opinion.

In this case, the jury necessarily found that the state met its burden of proving the elements of robbery in the first degree and that the defendant did not prove the affirmative defense of inoperability by a preponderance of the evidence. Evidence was presented during trial that a gun was used by the perpetrator during the robbery and that a gun later was found in the vehicle that the defendant had borrowed from his girlfriend. Shortly after the defendant's arrest, the gun was recovered from the passenger side floor of the vehicle, inventoried, and placed in the police evidence room. During trial, Detective Murray testified about a test that was performed to determine if the gun had been operable. Despite the three attempts that were made, the gun was unable to discharge, even after the cylinder in the gun was replaced. Murray was unable to testify about the operability of the gun prior to its recovery or during the robbery. In fact, there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery.

According to the defendant, the gun was seized on May 5, 2016, and tested on November 17, 2016. He argues that because it is reasonable to infer that the

gun was stored in such a manner as to prevent deterioration, the only reasonable inference is that the gun was in the same condition on the day it was tested as it was during the robbery. We are not persuaded.

During trial, Murray testified that a close examination of the gun revealed that there was dirt inside of it. Murray, however, was unable to state whether the dirt found in the gun was the same type of dirt found on the defendant's clothes at the time of his arrest or if it was the same type of dirt that surrounded the sweatshirt and hat hidden in the bushes. Furthermore, evidence also was presented to the jury that the vehicle in which the gun was found crashed prior to the defendant's arrest. On the basis of the evidence presented at trial, the jurors were free to infer that the gun was not in the same condition at the time of testing as it was during the robbery. Regardless of the weight of that evidence, however, there was no evidence provided during the trial that addressed the operability of the gun at the time of the robbery. Accordingly, the jury reasonably could have found that the defendant failed to meet his burden of proving the affirmative defense of inoperability by a preponderance of the evidence.

In support of his claim, the defendant also cites to *State* v. *Ortiz*, 71 Conn. App. 865, 804 A.2d 937, cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002), and discusses *State* v. *Seay*, supra, 128 Conn. App. 518. Neither case assists him in this appeal.

In *Ortiz*, unlike in the present case, evidence showed that the gun at issue was inoperable both *before and after* the robbery. *State* v. *Ortiz*, supra, 71 Conn. App. 876. As previously noted, in the present case there was no evidence proffered at trial that addressed the operability of the gun before or during the robbery; therefore, *Ortiz* is inapposite.

The defendant also seems to make the same argument that the *Seay* defendant attempted to make—that because there was no evidence that the gun was operable, the defendant met his burden.[6] See *State* v. *Seay*, supra, 128 Conn. App. 523. In *Seay*, the defendant was convicted of robbery in the first degree after he robbed a liquor store. Id., 520. During the robbery, he had held a duffel bag with "some kind of firearm" inside but never actually removed it from the bag. Id. After the robbery, the police searched the defendant's property and found broken pieces of what, when put together, was described to be a " 'facsimile firearm' . . . ." Id., 524. Additionally, "[d]uring closing argument, the prosecutor suggested that the facsimile firearm likely was used by the defendant during the robbery."[7] Id.

On appeal, the defendant in *Seay* argued that his conviction of robbery in the first degree should be replaced by the lesser included offense of robbery in the second degree because he had met his burden of proving the affirmative defense of inoperability. Id., 523. More specifically, he argued that there was no evidence that the facsimile firearm was operable and that there was no evidence that a gun other than that one was used during the robbery. Id. Despite the prosecutor's argument that the facsimile firearm was likely the one used during the robbery, this court held that "[a]lthough

[6] The defendant argues in his brief that *Seay* should be overruled. As we have often stated, however, "[i]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . The reversal may be accomplished only if the appeal is heard en banc." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017); see also Practice Book § 70-7.

[7] In *Seay*, the prosecutor argued that "[w]e've introduced a facsimile firearm into evidence. We can't prove beyond a reasonable doubt that that's the one that's in the bag, but it's a reasonable likelihood that that is the one that was in the bag. I think common sense would tell you that that probably was." (Internal quotation marks omitted.) *State* v. *Seay*, supra, 128 Conn. App. 524.

the jury reasonably could have found that the firearm found by the police was the same item used by the defendant during the robbery, the jury was not obligated so to find. It was within the province of the jury not to believe . . . that the facsimile firearm found by the police was used by the defendant during the robbery. . . . We note that [the victim] did not testify that the facsimile firearm found by the police was the same weapon used during the robbery. Operability is not an element of robbery in the first degree. It was the defendant's burden to prove inoperability and the jury reasonably could have determined that the defendant had not proven the affirmative defense of inoperability by a preponderance of the evidence." Id., 524.

As previously noted, in the present case, there was no evidence presented that the gun was operable, which the state was not required to prove. There also, however, was no evidence that the gun was inoperable at the time of the robbery, which the defendant was required to prove in order to meet his burden with respect to the affirmative defense of inoperability. The evidence presented to the jury was that the gun seized from the vehicle contained dirt, that it was found in the vehicle of the defendant's girlfriend after that vehicle was crashed by the defendant, and that the gun was inoperable several months after the robbery when it was tested by the police. Just as this court held in *Seay*, in the present case, it was within the province of the jury to disbelieve that the gun was inoperable during the robbery. Indeed, under *Seay*, the jury could have found that the gun recovered from the Chevy Malibu was not the same gun the defendant used during the robbery. The defendant offered no affirmative evidence that the firearm used during the robbery was inoperable. Accordingly, the jury reasonably could have determined that the defendant did not prove the affirmative

defense of inoperability by a preponderance of the evidence.

III

The defendant next claims that the trial court erred in denying his motion for a mistrial. Specifically, he contends that a mistrial should have been granted after Detective Murray testified that the defendant's clothing appeared to be the same as the perpetrator's and after she identified the defendant as the perpetrator in the surveillance footage. The defendant argues that such testimony constituted improper lay opinion under § 7-1 of the Connecticut Code of Evidence and an opinion on the ultimate issue of identity in violation of § 7-3 of the Connecticut Code of Evidence. The state argues that the trial court properly exercised its discretion and that, even if Murray's testimony was improper, it did not violate the defendant's right to a fair trial. We agree with the state.

We begin with our standard of review. "In our review of the denial of a motion for mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 602, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

Additionally, "[t]o the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . It is axiomatic that [if premised on a correct view of the law, the] trial court's ruling on the admissibility of evidence is entitled

to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . [I]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Petersen*, 196 Conn. App. 646, 663–64, 230 A.3d 696, cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

The following facts are relevant to this claim. Murray testified about many facets of the case, including the defendant's attire as compared to that of the perpetrator portrayed in sequenced video surveillance footage. More specifically, during her testimony, she stated that "[t]his . . . footage from [the store] . . . shows an individual entering the store wearing no footwear and appearing to be clad in the same clothing that the individual in the footage from [the complex] was wearing." Murray then testified that the individual in the store was arrested and also identified the person who was arrested as being the defendant. Shortly thereafter, the state questioned Murray about the locations from which she obtained the defendant's fingerprints, including at the counter of the storage facility, to which Murray stated: "I did not process the [storage facility] counter for fingerprints because, in the video, you could see [the defendant] actually doesn't touch . . . ." Before Murray could finish her statement, defense counsel objected and asked that the statement be stricken from the record. The court ordered the statement stricken and admonished the jurors not to consider it in their deliberations. Following the remainder of Murray's testimony, defense counsel orally moved for a mistrial,

arguing that Murray's statements were prejudicial, that they were induced by the state's witness, and that, because this is a case of identification, the incident was irreparable. The court, without explanation, denied the defendant's motion.

On December 5, 2017, defense counsel renewed his motion for a mistrial with respect to Murray's testimony that the perpetrator had worn the same clothing as that worn by the defendant. The court denied the defendant's motion. On February 9, 2018, prior to sentencing, defense counsel moved for a new trial, arguing, again, that Murray was unqualified to testify to the sameness or similarities of the perpetrator's clothing compared to that of the defendant's, and that she had testified to the ultimate issue of identity. The court denied the defendant's motion and provided the following reason: "[T]he defendant has not met the test under [§ 42-53] of the Practice Book, either . . . for an error by reason of which the defendant is constitutionally entitled to a new trial, or . . . for any other error which the defendant can establish was materially injurious to him or her. . . . [T]hose standards have not been met."[8]

In his challenge to the court's denial of his motion for a mistrial, the defendant posits that Murray's testimony constituted improper lay opinion and an opinion on the ultimate issue of identity. We disagree and address both in turn.

[8] Practice Book § 42-53 provides in relevant part: "(a) Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the error, the judicial authority shall grant the motion:

"(1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or

"(2) For any other error which the defendant can establish was materially injurious to him or her. . . ."

A

Section 7-1 of the Connecticut Code of Evidence provides: "If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." The defendant argues that Murray's testimony about the defendant's clothing represented layperson testimony and that Murray was not established as an expert in fashion or clothing.

Our Supreme Court analyzed § 7-1 extensively in *State* v. *Holley*, 327 Conn. 576, 175 A.3d 514 (2018). On appeal in that case, the defendant challenged the admission of testimony by the police that identified marks on the defendant's body as bite marks. Id., 604. The defendant claimed that this testimony violated § 7-1, arguing that the testifying officer was not an expert capable of making such an identification. Id., 607–608. In its analysis, the court recounted the language of § 7-1 and stated that "the commentary to the rule cites as illustrative matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property . . . *the appearance of persons or things* . . . sound . . . the speed of an automobile . . . and physical or mental condition." (Emphasis in original; internal quotation marks omitted.) Id., 608–609. Our Supreme Court then proceeded to recount several cases in which it concluded that the challenged testimony constituted "the appearance of persons or things" and was, thus, admissible at the discretion of the trial court. Id., 609; see *State* v. *Schaffer*, 168 Conn. 309, 318–19, 362 A.2d 893 (1975) ("It is permissible to admit into evidence *the opinions of common observers in regard to common appearances*, facts and conditions . . . . [I]t is indispensable that the opinions be founded on

their own personal observation, and not [on] the testimony of others, or on any hypothetical . . . .'' (Citations omitted; emphasis added; internal quotation marks omitted.)).

Given our Supreme Court's conclusions in *Holley*, we are not persuaded that Murray's testimony, in the present case, as to the defendant's pants violated § 7-1.

B

We now address the defendant's claim that Murray's testimony constituted an opinion on the ultimate issue of identity and that it was harmful. Section 7-3 (a) of the Connecticut Code of Evidence provides: ''Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.'' The defendant argues that Murray's testimony that the defendant was wearing similar pants as the perpetrator and that the defendant was the individual at the storage facility counter on the surveillance footage went to the ultimate issue of identity. In support of his argument, he cites to *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005). Specifically, he argues that our Supreme Court concluded in *Finan* that the identification of a perpetrator on the video surveillance was an ultimate issue for the jury and that the admission of testimony from four police officers as to that defendant's identity on the video was harmful error.

In *Finan*, our Supreme Court stated that an ultimate issue is characterized ''as one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact].'' (Internal quotation marks omitted.) Id., 66. The court concluded that, on the facts of the case, ''the identification of the defendant as one

of the perpetrators shown on the videotape was an ultimate issue . . . .'' Id., 67. The court further concluded that ''[t]he identification of the defendant . . . on the videotape was fundamental to the jury's conclusion that the defendant was one of the perpetrators of the robbery. Accordingly . . . [it was] improperly determined that the lay witness testimony [of the four police officers] correctly was admitted.'' Id., 68–69.

Even if we assume that Murray's statement identifying the defendant was improper opinion testimony, we are not persuaded that it was harmful. ''In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . When an [evidentiary impropriety] . . . is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Bermudez*, 195 Conn. App. 780, 797, 228 A.3d 96, cert. granted on other grounds, 335 Conn. 908, 227 A.3d 521 (2020).

It is noteworthy that, after Murray identified the person in the surveillance footage as the defendant, defense counsel objected immediately, and the court ordered the statement stricken from the record. Additionally, the court admonished the jurors and instructed

them, twice, to disregard Murray's statement and not to consider it in their deliberations. "If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . [A]s a general matter, the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary. . . . [T]he burden is on the defendant to establish that, in the context of the proceedings as a whole, the stricken testimony was so prejudicial, notwithstanding the court's curative instructions, that the jury reasonably cannot be presumed to have disregarded it." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 167 Conn. App. 298, 302–303, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016).

Furthermore, the jury in this case, unlike in *Finan*, was presented with significant other circumstantial evidence that connected the defendant to the robbery, separate and distinct from that of Murray's singular stricken statement. See part I of this opinion. That other evidence, taken together, provided the jury with a reasonable basis on which to conclude that the defendant was the individual in the surveillance footage. Additionally, the defendant has not demonstrated that the stricken testimony was so prejudicial that the jury reasonably cannot be presumed to have disregarded it.

Accordingly, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

IV

Last, the defendant claims that the court erred in failing to give the jury his requested instruction on identification. More specifically, the defendant argues that the requested instruction was crucial to his defense of misidentification and to the central issue of identification. We disagree.

The following additional facts are relevant to this claim. With regard to identity, the court gave the jury the following instruction: "The state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the crime. You, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime or you must find the defendant not guilty. The defendant denies that he is the person who was involved in the commission of the alleged offense." The court's instruction is only a portion of what the defendant had requested; specifically, the defendant requested that the court include the following additional language as part of its identity instruction: "If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. . . . In this case, Renae Luginbuhl, the employee at the Public Storage, and the only person in the facility at the time of the incident . . . did not identify [the defendant] as the perpetrator of this offense. In a one-on-one identification procedure, she did not make an identification."

We turn now to the relevant legal principles that guide our review of this claim. "It is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 560–61, 747 A.2d 487 (2000). "[T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient

for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Leroy*, 232 Conn. 1, 8, 653 A.2d 161 (1995).

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

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Citation omitted; internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 410–11, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018). "A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Internal quotation marks omitted.) Id., 411. "Significantly, our Supreme Court [has] . . . emphasized that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions

on eyewitness testimony are warranted. . . . In reviewing the discretionary determinations of a trial court, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) Id., 416.

The defendant cites two cases in support of his claim. First, he relies on our Supreme Court's holding in *State* v. *Cerilli*, 222 Conn. 556, 567, 610 A.2d 1130 (1992), that a "specific instruction on identification was warranted because [the defendant's] theory of defense was misidentification and because there were sufficient instances of lack of clarity and sufficient inconsistencies in the identification testimony of the victim and [a witness]." Because the present case did not involve issues of misidentification or a lack of clarity and sufficient inconsistencies in identification, we conclude that the defendant's reliance on *Cerilli* is misplaced.[9]

[9] In *Cerilli*, our Supreme Court concluded that a specific identification instruction was necessary because the defendant's theory of defense was misidentification and, as noted, there were inconsistencies and a lack of clarity in the identification testimony. *State* v. *Cerilli*, supra, 222 Conn. 567. Specifically, the victim "[i]n a forty-two page typewritten statement given to the police on October 26, 1987 . . . described her assailant as a white man between 5'10" and 6' tall, a little flabby or pouchy, thirty-five to forty years old or older. She described his skin as having 'little holes and cratering in his face,' and she stated that the blemishes on his face 'looked like somebody had acne.' In response to the question by the police whether it was '[h]eavy acne or just light acne?' she responded, 'Yeah, and they was red.' In response to the question, 'Red in complexion?' she responded, 'Mm hmm, real pale.' In this statement, the victim described the assailant's hair as 'long, dark . . . brown . . . feathered up . . . and it came down to about his shoulders [and] neck and he had it curled . . . .' She also described it as 'real dark brown, almost . . . black' with 'light brown, brown/blond . . . streaks . . . mixed in . . . .' She described his nose as 'funny shape[d],' 'real round . . . skinny and . . . round, real curved . . . pointed at the end . . . .' " Id., 564 n.6. Further, "[s]he described his car as dark brown, square, with a light tan interior, and with nothing unusual about the rearview mirror." Id. During trial, however, the victim described the defendant as follows: "[T]he assailant [had], inter alia, acne and a pock-marked face, and a prominent, hawk-like nose." Id. Additionally, "[s]he . . . recalled describing the assailant's car as dark brown with a tan interior and a vinyl roof." Id. Another witness, however, prior to trial, described the

Second, the defendant relies on our Supreme Court's analysis in *State* v. *Guilbert*, 306 Conn. 218, 246, 49 A.3d 705 (2012). Specifically, he emphasizes the court's focus on the scientific developments as to eyewitness identification instructions and that instructions reflecting the substance of those scientific findings were important to assuring a fair trial. He also relies on the court's conclusion in *Guilbert* that "a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence . . . would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. . . . [A]ny such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; *broad, generalized instructions on eyewitness identifications . . . do not suffice*." (Citations omitted; emphasis added; footnote omitted.) Id., 257–58.

This court, however, already has concluded that "*Guilbert* concerned the admissibility of expert testimony, *not a challenge to jury instructions*. Although the court in *Guilbert* did acknowledge the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror . . . it did not mandate that such factors

defendant as "having light brown or blond curly hair that reached down to about his neckline and was combed back. She described his face as having 'little holes' in it that looked 'like craters,' and his nose as 'funny shaped.' " Id.

Unlike *Cerilli*, in the present case, there was a single and consistent description by Luginbuhl as to what the perpetrator was wearing during the commission of the crime. Additionally, Luginbuhl was unable to describe the facial features or other physical characteristics of the perpetrator; rather, she provided only a description of his clothing. Accordingly, we conclude that the factual scenario underlying our Supreme Court's decision to require a more specific jury instruction on identification in *Cerilli* is inapplicable in the present case.

be included in jury instructions." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Crosby*, supra, 182 Conn. App. 411–12. Additionally, to the extent that *Guilbert* requires more specific jury instructions with regard to eyewitness identifications, we find the defendant's reliance thereon unavailing because, in the present case, *there were no eyewitness identifications*. As previously noted, the sole potential eyewitness was unable to identify the defendant.

After our careful review of the evidence and the jury instructions, we cannot conclude that those instructions were incorrect, insufficient, or misleading to the jury.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE XAVIER H.*

(AC 43770)
(AC 43774)

Bright, C. J., and Prescott and Alexander, Js.

Syllabus

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, who had previously been adjudicated neglected. The respondents claimed, inter alia, that the trial court improperly concluded that they had failed to achieve the requisite degree of personal rehabilitation as would encourage the belief that within a reasonable time they could assume responsible positions in the child's life as required by the applicable statute (§ 17a-112). *Held*:

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

1. The respondent father's claim that the trial court made clearly erroneous subordinate factual findings and applied those findings in reaching its decision that there was sufficient evidence to terminate the father's parental rights was unavailing; contrary to the father's claim that the evidence demonstrated that he complied with each of the specific steps ordered by the court, there was ample evidence in the record that the Department of Children and Families was unsuccessful in offering therapy service providers to the father because the father rejected those providers and, instead, chose his own providers and lied to his chosen providers, which made his therapy unsuccessful, the father admittedly did not participate in mediation or couples counseling and was untruthful about his continuing relationship with the respondent mother, and, although the court's factual finding that the father was in the courtroom and had seen a video that showed him entering the mother's apartment at 1:55 a.m. prior to his testimony that he had arrived at the apartment at 5:15 a.m., was in error, such error was harmless because it did not undermine the court's principal finding that the father lied to the court about his time of arrival at the apartment.
2. The respondents could not prevail on their claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), the respondents had each failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that within a reasonable time they could assume a responsible position in the child's life: although the court did not employ the precise statutory language, it correctly set forth the legal standard at the beginning of its analysis and found by clear and convincing evidence that the department provided reasonable efforts for reunification of the child with the respondents but that the respondents did not achieve the required level of rehabilitation, the court having found that the father had made no progress on the key issue on which the court relied for termination, domestic violence in the relationship between the father and the mother, and concluded that he failed to understand and to address this issue, and lied to the department, his therapist and the court about the status of his relationship with the mother; moreover, the trial court found that the mother had consistently shown resistance to participating in any domestic violence counseling program, and, despite the violence in the relationship, continued a relationship with the father and continued to lie about it, she had not gained an understanding of the deleterious effects of such violence and lacked the ability to care for the needs of the child as those needs relate to the issues surrounding domestic violence, she repeatedly undermined the child's relationship with the foster mother, she abused medications and she self-discharged from an intensive inpatient care program.
3. The respondent father could not prevail on his claim that the trial court failed to apply in a proper manner the factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in the child's

best interest: the court listed and made written findings on each of the seven factors set forth in § 17a-112 (k) and found that the father had not fulfilled his obligation under the terms of the court-ordered specific steps; moreover, any lack of clarity on the specific statutory factor directing the court to consider the child's emotional ties was harmless because, when the court's memorandum of decision was read as a whole, this court concluded that, although the court did not explicitly address the child's emotional ties to the father, it discussed their relationship, as well as the child's bond with his foster family, and found that the child, only three years, ten months old, had been out of his parents' care for more than thirty-four months, and, even if the child had strong emotional ties to the father, the court's determination that termination of the father's parental rights was in the child's best interest was factually supported and legally sound.

4. The respondent mother could not prevail on her claim that the trial court failed to employ the proper standard in assessing whether she had failed to rehabilitate; although the court did not employ precise statutory language, it correctly set forth the legal standard at the beginning of its analysis and found by clear and convincing evidence that the department provided reasonable efforts for reunification of the child with the mother and set forth sufficient factual and legal findings to meet the statutory standard for the adjudicatory requirements of § 17a-112 (j) (3) (B) (i).

5. The trial court's written findings and conclusions that the minor child's best interest would be served by granting the petition to terminate the respondent mother's parental rights sufficiently complied with § 17a-112 (k) and, accordingly, the court's ultimate conclusion that it was in the child's best interest to terminate the mother's parental rights was factually supported and legally sound: the court listed and made written findings on each of the seven factors set forth in § 17a-112 (k) and found that the mother had not fulfilled her obligation under the terms of the court-ordered specific steps; moreover, any ambiguity in the court's findings concerning the child's emotional ties with the mother did not undermine the court's determination that termination of the mother's parental rights was in the child's best interest, as there was evidence that the court considered the mother's relationship with the child and the dangers presented by it, and that the child had developed significant emotional ties with his foster family; furthermore, the court made sufficient findings addressing the mother's efforts to adjust her circumstances, as the court considered evidence that the mother resisted participation in domestic violence counseling, repeatedly undermined the child's relationship with his foster mother, repeatedly sought modifications of protective orders for herself issued against the father on the father's behalf, lied about her ongoing relationship with the father and failed to make meaningful changes in her life.

Argued September 8—officially released October 22, 2020**

** October 22, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hon. Michael A. Mack*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondents filed separate appeals to this court. *Affirmed.*

Joseph Jaumann, assigned counsel, for the appellant in Docket No. AC 43770 (respondent father).

Mildred Doody, assistant public defender, for the appellant in Docket No. AC 43774 (respondent mother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee in Docket Nos. AC 43770 and AC 43774 (petitioner).

Don M. Hodgdon, for the minor child in Docket Nos. AC 43770 and AC 43774.

Opinion

BRIGHT, C. J. In Docket No. AC 43770, the respondent father appeals from the judgment of the trial court terminating his parental rights as to his son, Xavier H. He claims that the trial court (1) made clearly erroneous factual findings, (2) failed to employ the proper standard in assessing whether, pursuant to General Statutes § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life, and (3) failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest.

In Docket No. AC 43774, the respondent mother appeals from the judgment of the trial court terminating her parental rights as to her son, Xavier H. The respondent mother claims that the trial court (1) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in Xavier's life, (2) erred in finding that she had failed to rehabilitate, and (3) failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k) when considering whether termination was in Xavier's best interest. We disagree with the claims in each appeal and, accordingly, affirm the judgment of the trial court.[1]

Initially, we briefly set forth some of the facts found by the trial court and the procedural history that are relevant to both appeals. Both parents have significant issues that led to the petitioner, the Commissioner of Children and Families, taking Xavier into her custody. Those issues have been present from Xavier's birth through the date of the court's judgment in this matter. The Department of Children and Families (department) has had involvement with the respondent mother dating back to 2005, when issues involving domestic violence, substance abuse, and criminal activities were addressed. Ultimately, on March 28, 2008, the respondent mother's parental rights as to another child were terminated after the petitioner filed a petition, and guardianship of that child was transferred to the child's maternal grandparents. Those same issues exist with respect to Xavier, but, this time, they include the respondent father of Xavier, as well. Those issues include unresolved substance abuse, mental health concerns, domestic violence, lack of housing, and criminal involvement.

[1] In both appeals, the attorney for Xavier has adopted the brief of the petitioner, the Commissioner of Children and Families.

On January 10, 2017, the department invoked a ninety-six hour hold on Xavier, and, on January 11, 2017, the petitioner filed with the court a motion for an order of temporary custody and a neglect petition with respect to Xavier. The court granted the order of temporary custody, and it found that the department had made reasonable efforts to prevent or to eliminate the need for removal. On April 18, 2017, the court adjudicated Xavier neglected and committed him to the care and custody of the petitioner until further order of the court. The court ordered specific steps for each respondent to take. On December 12, 2017, the court approved a concurrent permanency plan of termination of parental rights and adoption or reunification with the respondents.

Via a petition filed on June 8, 2018, the petitioner sought the termination of the parental rights of the respondent father and the respondent mother as to Xavier. In the petition, the petitioner alleged that Xavier had been adjudicated neglected in a prior proceeding and that neither the respondent father nor the respondent mother had achieved a degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of Xavier, either of them could assume a responsible position in Xavier's life. The court, pursuant to § 17a-112 (j) (3) (B) (i),[2] granted that petition in a November 25, 2019 memorandum of decision. This appeal followed.

[2] General Statutes § 17a-112 (j) (3) (B) (i) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . the child . . . has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"We begin with the applicable standard of review and general governing principles. Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of [§ 17a-112 (j) (3)] or its applicability to the facts of this case, however, our review is plenary. . . .

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3) (B) (i)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be

accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–23, 222 A.3d 83 (2019).

"[I]n order to prevail on a petition for the termination of parental rights pursuant to § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence the department's reasonable efforts or the parent's inability or unwillingness to benefit therefrom, and that termination is in the best interest of the child. In addition, under . . . § 17a-112 (j) (3) (B) (i), the petitioner must prove by clear and convincing evidence that 'the child . . . has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .' " *In re Jayce O.*, 323 Conn. 690, 711–12, 150 A.3d 640 (2016).

I

AC 43770

The respondent father claims that the trial court (1) made clearly erroneous subordinate factual findings, (2) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life, and (3) failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest. After setting forth the relevant

facts as found by the trial court concerning the respondent father, we will consider each of these claims in turn.

The respondent father has a criminal history that includes, but is not limited to, assault in the third degree, violation of a protective order, violation of a restraining order, carrying a dangerous weapon, failure to appear, breach of the peace, and battery; he alsowas found in violation of the conditions of his probation. He has been incarcerated. The department attempted to engage him in services but had little success. Attempts to engage him in substance abuse evaluations and screenings failed at least ten times before he finally engaged, after which it finally was discovered that he did not meet the criteria for substance abuse disorder, and that treatment was not recommended. Nancy Randall, a psychologist who is an expert in clinical and forensic psychology, diagnosed the respondent father with adjustment disorder and personality disorder (not otherwise specified) with antisocial and narcissistic features. He is in need of therapy to work toward accepting personal responsibility, anger control, relationship issues, and to get a better understanding of Xavier's needs, including the impact on Xavier of being exposed to conflict, violence, and/or substance abuse.

The court further found that the respondent father had denied to Randall that there had been any physical violence between the respondent mother and him, but he could not explain the existence of nine protective or restraining orders placed against him to protect the respondent mother. Although he persisted in his contention that there had been no violence, the respondent mother acknowledged that domestic violence started six months after their relationship began more than ten years ago, as of the date of the trial in this case. The court found that the respondent father was neither honest with the department nor with Randall when he

maintained that he and the respondent mother were no longer in a relationship. It took the persistence of a department employee to observe the respondent father going to the respondent mother's home late at night and staying for long hours on multiple occasions to establish the falsity of the respondent father's claim. The court concluded that honesty was not a strong point in the respondent father's management of his situation with the department. The court further noted that, although the father is still in a relationship with the respondent mother, he has not participated in any couples therapy with the respondent mother or in mediation, and Randall thought it likely that continued contact between them would result in further violence and conflict.

The court further found that the respondent father intentionally did not reveal to his therapists that he still was involved with the respondent mother. The respondent father completed an intake at United Community and Family Services (family services) for individual therapy and attended regularly with Joseph LaBrecque, a licensed professional counselor. He was working on improving and/or fostering healthy relationships with others. Although the respondent father was supposed to be receiving dialectical behavior therapy, as had been recommended and encouraged by Randall, LaBrecque is not a trained dialectical behavior therapy clinician.[3] The respondent father, however, also received therapy services from Joyce LeCara. The court specifically pointed out that LeCara testified, in response to questions by counsel for the petitioner, that, if the respondent father was having contact with the respondent mother, he would be putting himself at risk.

[3] The court explained that "[d]ialectical [b]ehavior [t]herapy is an evidence-based psychotherapy to treat borderline personality disorder and is useful in treating patients seeking change in behavioral patterns such as substance abuse and domestic or non-domestic violence against others. It is a process in which the therapist helps the patient find and employ strategies and ultimately synthesize them to accomplish consistently the defined ultimate goal and is used to treat borderline personality disorders and

Additionally, the court also discussed a video that had been introduced into evidence by the petitioner, showing the respondent father arriving at the home of the respondent mother on April 27, 2019 at 1:55 a.m. The court noted that the respondent father "was in the courtroom when [the video] exhibit . . . was introduced with much discussion as to where it came from and what it showed. Knowing that, [the respondent] father still took the stand to testify under oath and included in that testimony that he did indeed go to [the respondent] mother's apartment on April 27, 2019, arriving at 5:15 a.m. [The video, however] is the security monitor . . . video which shows [the respondent] father arriving at [the respondent] mother's apartment at 1:55 a.m. that morning and the two of them departing after 6:00 a.m. that morning." The court then found: "If [the respondent] father cannot be honest with the court while under oath knowing that the court has access to the [video] exhibit which shows the actual time he arrived, the court must conclude and does conclude that [the respondent father] has terrible difficulty with managing the truth in any aspect of his interactions with others in every other aspect of his life, including with clinicians who are trying to help him improve his mental disposition. Clinicians depend on the honesty of their patients while trying to improve their patient's mental health. Without honesty, they can do nothing. Veracity cannot be noted as a strong point of [the respondent] father's character in any aspect of this case. The evidence established that [the respondent] mother and [the respondent] father were together five consecutive days in April, 2019 (23rd through and including the 27th) after they had disengaged from coparenting training because the relationship was too toxic."

After making these subordinate factual findings, the court found, by clear and convincing evidence, that the

addictive personality disorders. To be successful, it demands honesty both from the patient and the clinician."

department had provided reasonable efforts for and on behalf of the respondent father to reunite him with his child but that the respondent father was "unwilling to engage with the resources offered by the [department] and chose to make his own way with providers of his choice and then attempted to deceive each of them by failing to be truthful with them. The result was that he failed to benefit from their efforts." The court then found that the respondent father had not "achieved any level of rehabilitation [that] might encourage the belief that within a reasonable time [he] might reach a point where reunification with Xavier was in Xavier's best interest." In the dispositional portion of its decision, the court examined the seven factors set forth in § 17a-112 (k), and concluded that it was in Xavier's best interest for the respondent father's parental rights to be terminated. Additional facts relevant to the respondent father's appeal will be set forth as necessary.

A

First, the respondent father claims that the trial court made clearly erroneous subordinate factual findings. He argues that the court made "several clearly erroneous subordinate factual findings and then applied said findings" in reaching its decision that "there was sufficient evidence to terminate [the respondent] father's parental rights."

"A finding is clearly erroneous when either there is no evidence in the record to support it, or [if] the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Sarah O.*, 128 Conn. App. 323, 336, 16 A.3d 1250, cert. denied, 301 Conn. 928, 22 A.3d 1275 (2011).

The respondent father first argues that the court's factual finding that the department had "attempted to engage him . . . in services, but [had] little success"

was unsupported by the evidence, which, he argues, demonstrated that he had "substantially if not completely complied with every specific step listed on the January, 2017 specific steps ordered by the court." He argues that the evidence demonstrates that he complied with Randall's recommendations, engaged in domestic violence services, individual therapy with LaBrecque, dialectical behavior therapy with LeCara, and coparenting therapy. He contends that he provided drug testing samples, a substance abuse evaluation, consistent visitation with Xavier, and that all of the clinicians indicated that he had made progress and the department admitted that he was compliant with all specific steps and services.

We conclude that the court's factual finding that the department had "attempted to engage him . . . in services, but [had] little success" was not clearly erroneous. There is ample evidence in the record that the department was unsuccessful in offering service providers to the respondent father because he rejected those providers and, instead, chose to find his own providers. Additionally, the court heard extensive evidence that the respondent father repeatedly lied to his chosen providers, which made his therapy unsuccessful.

The respondent next argues that the court's factual finding that the respondent father "has not participated in mediation or couple counseling" was clearly erroneous. The respondent father then argues that he was not in a relationship with the respondent mother so such services were not required and the department never asked him to engage in such services. We conclude that the court's finding was not clearly erroneous. Regardless of whether these services specifically were required by the department, the respondent father admits that he did not participate in such services, which was the finding of the court. The respondent father continually told the department and his service providers that he

and the respondent mother were not in a relationship. The evidence, however, tends to demonstrate otherwise. There also is evidence that if the respondent father had been honest with the department and his providers, additional therapy would have been required.

Next, the respondent challenges the court's factual finding that the respondent father was in the courtroom when the video of his stay at the respondent mother's home was played and that he had lied to the court about not getting to the home until 5:15 a.m. He contends that the video showing his arrival at the respondent mother's home at 1:55 a.m. and leaving her home at 6 a.m. was not played before his testimony but that it was introduced during the petitioner's rebuttal, which occurred after his testimony. He argues: "The court's findings . . . lead the court to conclude erroneous[ly] that the respondent [father] is untruthful because he testified after being aware and seeing video about when he arrived [and departed] the [respondent] mother's residence." Although part of the court's factual finding may have been in error, it appears that the respondent father misses the import of the whole of the court's finding, which was that the respondent father lied to the court during his testimony. We conclude that the court's finding that the respondent father had seen the video before he lied during testimony was in error, but the error was harmless because it did not undermine the court's principal, and undisputed, finding that the respondent father had been untruthful to the court about the time of his arrival at the respondent mother's home.

The respondent father makes several additional arguments concerning alleged clearly erroneous factual findings. We have reviewed and considered each of them, but find them to be meritless, and we conclude that they do not warrant discussion. Accordingly, we conclude that the court's subordinate factual findings were not clearly erroneous.

B

The respondent father next claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), he failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life. He contends that this failure requires reversal of the court's judgment. We are not persuaded.

The consideration of whether the court applied an incorrect legal test presents a question of law, which requires our plenary review. See *In re Jacob W.*, 330 Conn. 744, 754, 200 A.3d 1091 (2019). "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations [if any] that the court provides." (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016). "[W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012).

In the present case, the court, in its memorandum of decision, specifically stated that it found "by clear and convincing evidence that the [department] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [the

respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so and [the respondent] father was unwilling to engage with the resources offered by the [department] and chose to make his own way with providers of his choice and then attempted to deceive each of them by failing to be truthful with them. The result was that he failed to benefit from their efforts.

"Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within a reasonable time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest."

The respondent father argues that the court improperly failed to apply its subordinate factual findings to the statutory requirement that he had not rehabilitated *to such a degree as would encourage a belief that he could assume a responsible position in Xavier's life in the future*. See General Statutes § 17a-112 (j) (3) (B) (i). Rather, he argues, the court found that it was not encouraged to believe that the respondent father had or *could reach a point where reunification with Xavier would be in Xavier's best interest*, and he argues that this does not meet the required legal finding necessary in the adjudicatory phase of a termination of parental rights proceeding under § 17a-112 (j) (3) (B) (i).

The petitioner responds that the respondent father's "claim fails, as the record in this case makes clear that [although] the court did not use the exact words of the statute, its analysis, factual findings, and JD-JM-31 form[4] conform with the statutory requirements." (Footnote added.) She further argues that the court's factual

[4] Form JD-JM-31 is a Judicial Branch form entitled "ORDER, TERMINATION OF PARENTAL RIGHTS AND APPOINTMENT OF STATUTORY PARENT/GUARDIAN." In this case, the form contains the required statutory language. However, it was signed by the deputy chief clerk on behalf of the trial judge and not by the trial judge.

findings demonstrate, when viewed in their entirety, that it made the statutory legal finding that the respondent father had failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life. The petitioner points to the court's findings that there was nothing to indicate that the respondent father had benefited from any services or that anything had changed, and that the respondent father still could not place Xavier's needs "before his own anger and need to have things the way he believes is right." The petitioner contends that, read as a whole, the court's decision demonstrates that it found that the respondent father had failed to rehabilitate to such a degree as to reasonably encourage a belief that he could assume a responsible position in Xavier's life.[5] We agree with the petitioner.

We conclude that, although the court did not use the talismanic phrasing of the statute, its framing of the legal question before it, and its findings, taken as a whole, nonetheless, satisfy the statute. The court began its decision by properly explaining: "This matter comes to the court by way of a petition dated June 7, 2018, filed by the [d]epartment . . . seeking the termination of the parental rights of [the respondent mother and the respondent father] . . . . The petition alleges that the child had been adjudicated in a prior proceeding to have been neglected and that mother and father each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child."

[5] The petitioner also argues that if there is ambiguity in the court's judgment, this court should read the decision to support the judgment, especially in light of the respondent father's failure to file a motion for articulation. See Practice Book § 66-5.

The court then proceeded to provide its analysis for granting the petition. It specifically found that the department had little success in engaging the respondent father in services, that the respondent father found his own therapists rather than engage with the ones recommended by the department, that he then lied to those therapists, that he refused to admit that he had engaged in physical violence against the respondent mother, despite nine protective or restraining orders placed against him to protect her from his violent episodes, that he repeatedly lied about his ongoing relationship with the respondent mother, that both Randall and LeCara thought it likely that continued contact between the respondent mother and the respondent father would result in more violence and that it was risky, that the respondent father minimized the significance of the many protective and restraining orders issued against him, that, according to Randall, the respondent father continued to show a pattern of angry, controlling, and intimidating behaviors when he was not being monitored closely, that the respondent father is unlikely to be able to control his anger or place Xavier's needs above his own, that nothing had changed as a result of therapy, that the respondent father lied to the court while under oath, that the respondent father had made no progress toward any reform related to domestic violence, and that the respondent father's persistent dishonesty left the court with little hope that he would change.

Although the court did not recite the precise language of the statute in the concluding sentence of the adjudicatory section of its memorandum of decision, we conclude, on the basis of the court's full decision, that it found that the department had proven, by clear and convincing evidence, the allegations specifically alleged in its petition, namely, that the respondent mother and the respondent father each individually have failed to

achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child. See *In re James O.*, supra, 322 Conn. 653–55 (considering challenged portion of trial court's "memorandum of decision within the context of the trial court's overall analysis").

In *In re Shane M.*, the only case relied on by the respondent father to support his claim, our Supreme Court explained that "[t]he trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . *such rehabilitation must be foreseeable within a reasonable time*. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, *a court may consider whether the parent has corrected the factors that led to the initial commitment*, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). The standard we employ on appeal, as set forth previously in this opinion, is the following: "As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative

factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed." (Internal quotation marks omitted.) *In re James O.*, supra, 322 Conn. 649.

Although it would have been preferable for the trial court to conclude the adjudicatory section of its decision with a legal finding that specifically employed the precise statutory language, we conclude that the court's decision in this case, when read as a whole, sets forth sufficient factual and legal findings to meet the statutory standard for the requirements of the adjudicatory phase of the proceedings, as set forth in § 17a-112 (j) (3) (B) (i). See id., 655; *In re Shane M.*, supra, 318 Conn. 585–86. Significantly, this is not a case in which the question was the degree of progress the respondent father was making. The court found that the respondent father had made no progress on the key issue on which the court relied for termination—domestic violence in the relationship between the respondent father and the respondent mother. Furthermore, the court concluded that the respondent father not only had made no progress to understand and to address this issue, he also lied to the department, his therapist and the court about the status of his relationship with the respondent mother. Given these factual findings and the fact that the court correctly set forth the legal standard at the beginning of its analysis, we are not persuaded that the court's imprecision in its conclusory statement reflects the application of an incorrect legal standard.

C

The respondent father finally claims that the trial court failed to apply in a proper manner the statutory factors set forth in § 17a-112 (k) when conducting its analysis of whether termination was in Xavier's best interest. Specifically, he argues that the court "fail[ed]

to consider and articulate the proper findings necessary under . . . § 17a-112 (k) (3) and (4).[6] In failing to do so, the court's findings are clearly erroneous." (Footnote added.) The petitioner argues that the respondent father's "claim is based on a misunderstanding of the trial court's obligation to consider those statutory factors, as they serve simply as guidelines for the trial court to consider when deciding the best interest of the child and are not mandatory." We conclude that the trial court properly considered the required statutory factors and that its finding as to Xavier's best interest is factually supported and legally sound.

To the extent that the respondent father's claim requires us to interpret the requirements of § 17a-112 (k), our review is plenary. See *In re Nevaeh W.*, 317 Conn. 723, 729, 120 A.3d 1177 (2015). Additionally, "[t]he best interest determination . . . must be supported by clear and convincing evidence. . . . [O]ur function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 487–88, 940 A.2d 733 (2008).

[6] General Statutes § 17a-112 (k) provides in relevant part: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding . . . (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; [and] (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties . . . ."

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript. . . . [A]lthough a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citation omitted; internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 740.

1

In the present case, the court listed each of the seven factors set forth in § 17a-112 (k) and included its written findings under each. Specifically, on the factor set forth in § 17a-112 (k) (3), which directs the trial court to consider "the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order," the court stated: "The court finds that [the department] made reasonable efforts to reunite the child with [the respondent mother and/or the respondent father] as extensively discussed in the adjudication portion of the memorandum of decision but neither parent was either willing to nor capable of accomplishing the necessary

results of those offers of help, assistance, care, guidance and instruction."

The respondent father argues that the court improperly failed to "indicate whether [he had] fulfilled . . . his obligation under the terms of the court-ordered specific steps. In fact, the court does not . . . indicate at any time in its memorandum of decision that [the respondent father] has substantially complied with the steps that were ordered by the court." We are not persuaded.

The court ordered the respondent father to adhere to the following specific steps: (1) keep all appointments set by or with the department, and cooperate with home visits, (2) take part in counseling and make progress toward the identified treatment goals, (3) submit to a substance abuse evaluation and follow the recommendations about treatment, (4) submit to random drug testing, (5) do not use illegal drugs or abuse alcohol, (6) cooperate with service providers recommended for parenting/individual/family counseling, (7) participate in a substance abuse evaluation and urine screen, (8) follow any and all recommendations, (9) cooperate with court-ordered evaluations or testing, (10) sign necessary releases, (11) get or maintain adequate housing, (12) notify the department about changes in living conditions, (13) cooperate with restraining and/or protective orders to avoid more domestic violence incidents, (14) attend and complete an appropriate domestic violence program, (15) do not get involved further with the criminal justice system and cooperate with probation or parole officers, (16) visit your child as often as the department permits, (17) provide information to the department about possible placement resources for your child, if any, and (18) provide to the department information about the child's grandparents.

In its memorandum of decision, the court specifically found that the respondent father failed to engage in services, that it took ten attempts by the petitioner to engage him in substance abuse evaluations and screenings, that he minimized the significance of the many protective and restraining orders issued against him, that he repeatedly lied to his therapists and that he lied to the court while under oath, that he missed nine of his scheduled appointments with Randall, that nothing had changed despite his participation in services, and that he had failed to achieve any benefit whatsoever from those services. Reading the court's decision as a whole; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court clearly found that the respondent father had not fulfilled his obligation under the terms of the court-ordered specific steps.

2

Section 17a-112 (k) (4) "directs the trial court to consider the [child's] emotional ties with a long list of people in determining whether the termination of the respondent's parental rights is in [his] best interest." Id., 731; see footnote 6 of this opinion. In the present case, the court specifically found: "Xavier has developed significant emotional ties to his current caregivers. He is truly part of the family which has been his family for all of his life less approximately ten months." The respondent father argues that the court's finding "does not even attempt to consider the require[d] statutory language . . . ." We are not persuaded.

As explained in *In re Nevaeh W.*, "[n]othing in [§ 17a-112 (k) (4)] . . . require[s] the trial court to consider only the [child's] emotional ties with the respondent [father]. To the contrary . . . it [is] appropriate for the trial court to consider the [child's] emotional ties to the preadoptive foster family in considering whether termination of the [respondent father's] parental rights

[is] in the [child's] best interest. . . . Furthermore, in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Citations omitted; internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 731–33.

Reading the trial court's memorandum of decision as a whole; see id., 733; we conclude that, although the court did not explicitly address Xavier's emotional ties to the respondent father, it did discuss their relationship, as well as Xavier's bond with his foster family. Specifically, the court found that "Xavier has been out of his parents' care for over thirty-four months. He is only three years ten months old. Dr. Randall stated in testimony in this case her recommendation that Xavier be placed permanently with someone other than [the respondent] mother and/or [the respondent] father. He has been placed in a legal risk foster home where he is making excellent strides and has developed an attachment to his caregivers, a couple who also have a three year old son who has formed a bond with Xavier as Xavier has with him and with his parents. He is healthy and all of his medical, dental, psychological and educational needs are being met. This couple wishes to adopt Xavier. This clearly is in Xavier's best interest."

The court found that "[the respondent] father grabbed [the respondent] mother's arm with such strength that it left marks on her arm noticeable to the police when they arrived and [the respondent] mother was holding Xavier in her arms when this event happened." It also found that the respondent father's therapist believed that the respondent father was unable to place the needs of Xavier before his own anger and his need to have things done his way. The court also found that the respondent father "is in need of therapy to work toward accepting personal responsibility, anger

control, relationship issues, and a better understanding of his son's needs including the impact on his son of being exposed to conflict, violence, and/or substance abuse." We find our Supreme Court's decision in *In re Nevaeh W.* to be instructive. In that case, the trial court's entire finding regarding the "emotional ties" requirement of § 17a-112 (k) (4) was: "Both children have been placed together with a preadoptive resource who has expressed a willingness to adopt both girls. They are comfortable, secure and safe." (Internal quotation marks omitted.) *In re Nevaeh W.*, supra, 317 Conn. 731. This court reversed the judgment of the trial court because the trial court's finding pursuant to § 17a-112 (k) (4) was " 'utterly unresponsive to the mandatory statutory requirement . . . .' " Id. Our Supreme Court reversed the decision of this court, opining that a discussion of the respondent's relationship with the children, found earlier in the trial court's memorandum of decision, was sufficient to meet the "emotional ties" requirement of § 17a-112 (k) (4). Id., 733. Specifically, the court stated: "Reading the trial court's memorandum of decision in the present case as a whole, we conclude that the trial court did consider the factor set forth in § 17a-112 (k) (4), including the children's emotional ties to the respondent. Specifically, the trial court explained at the beginning of the memorandum that 'Nevaeh . . . has been in [the petitioner's] care on three separate occasions. On September 4, 2008, Nevaeh . . . was placed [on a ninety-six hour hold because the respondent] was homeless and had no way to care for the child. She was committed to [the petitioner] in October, 2008 and reunified to the [respondent's] care in January, 2009. In April, 2009, the child was placed in another [ninety-six] hour hold and again committed to [the petitioner] after [the respondent] was discharged from a drug treatment program for noncompliance. The child was reunified with [the respondent] in December, 2010.

On July 2, 2012, Nevaeh was removed from [the respondent] for a third time.' The trial court continued: '[Janiyah] resided with [the respondent] until [Janiyah was] removed with Nevaeh . . . on July 2, 2012. On November 30, 2012, both children were placed in a preadoptive foster home. Nevaeh . . . has previously been placed with this family for [more than one] year.' These findings by the trial court demonstrate that the trial court did consider the children's relationship with the respondent." Id., 733–34.

After concluding that the trial court had satisfied § 17a-112 (k) (4) through the findings in its memorandum of decision, our Supreme Court, in an effort to clarify any perceived ambiguity in the trial court's reasoning, then went on to review the trial court's articulations, in which it more directly addressed the emotional ties of the respondent and the children. Id., 734–38. The Supreme Court, though, in no way suggested that any ambiguity in the trial court's judgment would require reversal in the absence of an articulation. To the contrary, the Supreme Court relied on the well settled law that "we read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) Id., 733.

Finally, the court in *In re Nevaeh W.* addressed the petitioner's claim that the trial court was not required to make explicit findings as to each aspect of the seven factors enumerated in § 17a-112 (k). In doing so, the court reaffirmed its holding in *In re Eden F.*, 250 Conn. 674, 741 A.2d 873 (1999), that the factors in § 17a-112 (k) serve as a guide to the trial court when making its decision whether to grant a petition to terminate parental rights: "As we explained in *In re Eden F.*, 'the fact that the legislature [had interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing

of evidence . . . by the legislature. Where . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . .' " *In re Nevaeh W.*, supra, 317 Conn. 739–40. The court further stated that, "although a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." Id., 740.

In the present case, as did the trial court in *In re Nevaeh W.*, the court specifically addressed the respondent father's relationship with Xavier although it did not address explicitly the "emotional ties" between the two. See id., 733. Although we do not have an articulation to further clarify any perceived ambiguity, we conclude that any lack of clarity on this specific factor was harmless because the record reveals that, even if Xavier had strong emotional ties to the respondent father, the court's determination that termination of the respondent father's parental rights was in Xavier's best interest is factually supported and legally sound.

II

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On appeal,[7] the respondent mother claims that the trial court (1) failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably

[7] The initial facts and relevant procedural history, as well as our standard of review and general governing principles regarding a challenge to the trial court's decision on a termination of parental rights petition, were set forth previously in this opinion.

encourage a belief that she could assume a responsible position in Xavier's life, (2) erred in finding that she had failed to rehabilitate, and (3) failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k) when considering whether termination was in Xavier's best interest.

After setting forth the trial court's relevant factual findings related to the respondent mother, we will consider each of her claims in turn. Xavier was born in early 2016, and, in August, 2016, the Norwich Police contacted the department because the respondent father had grabbed the respondent mother's arm, while she was holding Xavier, with such strength that it left marks on her arm noticeable to the police. The department, thereafter, referred her to various appropriate services in an attempt to engage her in rehabilitative and guidance services that she needed so that she could be reunited with Xavier. The respondent mother engaged in services and obtained medication, which she admitted to abusing. She also admitted to abusing another medication that was not prescribed to her. She continued to test positive for unprescribed medications in 2017. The respondent mother was criminally charged with risk of injury to a child and operation of a motor vehicle while under the influence of alcohol and/or drugs.[8]

On February 14, 2017, the respondent mother completed a substance abuse evaluation at Care Plus, where she was recommended for intensive outpatient care for

[8] The record reveals that in January, 2017, the respondent mother was living with Xavier at the Covenant Shelter (shelter). A worker at the shelter notified the department that the respondent mother was intoxicated while caring for Xavier. The respondent father also telephoned the department to say that he had been with the respondent mother and that she may have been intoxicated when she returned to the shelter. The respondent mother was arrested for risk of injury to a child, and the department removed Xavier from her care. Then, on June 7, 2017, the respondent mother was arrested for driving while under the influence. Both of those charges were pending at the time of the termination proceedings.

opioid dependence. She discharged herself from the program, however, after having a conflict with the providing physician. The respondent mother consistently has shown resistance to participating in any domestic violence counseling program. The counselors to whom she went for treatment could not ascertain whether she understood the cycle of domestic violence. The court found that the respondent mother wants nothing to do with domestic violence counseling, although domestic violence has been an ongoing issue for her. Such violence played a large part in the removal of her other child, which led to the termination of her parental rights as to that child in 2008. The court concluded that the respondent mother clearly is unwilling to engage in such counseling even though that was an issue leading to the prior termination and is again an issue in this case. The department, nevertheless, continued to offer her necessary services, despite her unwillingness.

The respondent mother was diagnosed by Randall with post-traumatic stress disorder, generalized anxiety disorder and alcohol use disorder in remission. She noted that the respondent mother was in need of continued therapy to work on her mood and anxiety, decision making, conflict resolution skills, emotional controls, and to get a better understanding of Xavier's needs. The respondent mother had shared with Randall that the respondent father had been physically abusive to her beginning just six months into their relationship, which had lasted more than ten years at the time of trial.

The court credited Randall's opinion that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first. The court quoted Randall as opining that the respondent mother "was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to

view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son." (Internal quotation marks omitted.)

Additionally, the court found that during the time of the respondent mother's relationship with the respondent father, nine restraining or protective orders had been issued to protect her. The court also found that despite all the violence, the respondent mother and the respondent father continued to maintain a relationship, as demonstrated by the respondent father's overnight visits to the respondent mother's home, which lasted until the morning, but that neither would admit to it. The court also found that the respondent mother lied to the department about her relationship with the respondent father. One of the respondent mother's service providers, Child and Family Services, recommended that she engage in individual therapy with a provider who specialized in domestic violence intervention as part of her treatment, but she refused to consider it. The court found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time."

The court then concluded the adjudicatory section of its memorandum of decision by finding "by clear and convincing evidence that the [department had] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [that the respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so . . . . Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within

a reasonable time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest." In the dispositional portion of its decision, the court examined the seven factors set forth in § 17a-112 (k), and concluded that it was in Xavier's best interest for the respondent mother's parental rights to be terminated. Additional facts relevant to the respondent mother's appeal will be set forth as necessary to address her claims.

A

The respondent mother claims that the trial court failed to employ the proper standard in assessing whether, pursuant to § 17a-112 (j) (3), she failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in Xavier's life. We are not persuaded.

As we explained in part I B of this opinion, the consideration of whether the court applied an incorrect legal test presents a question of law, which requires our plenary review. See *In re Jacob W.*, supra, 330 Conn. 754. "[A]n opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, supra, 306 Conn. 453.

The trial court found "by clear and convincing evidence that the [department] provided reasonable efforts for and on behalf of each parent to reunite them or either of them with their child, but [the respondent] mother was either unwilling or unable to derive from those efforts the benefits necessary to be able to do so . . . . Neither [the respondent] mother nor [the respondent] father achieved any level of rehabilitation which might encourage the belief that within a reasonable

time each or either of them might reach a point where reunification with Xavier was in Xavier's best interest."

The respondent mother argues that the court used an "improper standard for rehabilitation." She contends that the court's finding employed a higher, more stringent standard for the respondent mother to meet than is mandated under § 17a-112 (j) (3) (B) (i). She contends that the court failed to find that she had not rehabilitated to such a degree as would encourage a belief that she could assume a responsible position in Xavier's life in the future. As with the respondent father's appeal setting forth essentially the same claim, we conclude that the court, although using less than precise language in its concluding sentence of the adjudicatory section of its decision, employed the proper standard under § 17a-112 (j) (3) (B) (i). See *In re James O.*, supra, 322 Conn. 655; *In re Shane M.*, supra, 318 Conn. 585–86; see also part I B of this opinion.

The court began its decision by properly explaining: "This matter comes to the court by way of a petition dated June 7, 2018, filed by the [petitioner] . . . seeking the termination of the parental rights of [the respondent mother and the respondent father] . . . . The petition alleges that the child had been adjudicated in a prior proceeding to have been neglected and that mother and father each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, *each or either could assume a responsible position in the life of the child*." (Emphasis added.) The court then proceeded to set forth factual findings and to provide its analysis for granting the petition.

The court found that the respondent mother engaged in services and obtained medication, which she then admitted to abusing, in addition to another medication

that she was not prescribed, and she continued to test positive for unprescribed medications in 2017. The court found that the respondent mother completed a substance abuse evaluation at Care Plus, where she was recommended for intensive outpatient care for opioid dependence, and, although she attended the intensive program, she discharged herself after having a conflict with the providing physician. The court additionally found that the respondent mother consistently has shown resistance to participating in any domestic violence counseling program and that she wants nothing to do with domestic violence counseling, although such violence has been an issue for her since at least 2006. The court found that Randall had opined that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first. The court quoted Randall as opining that the respondent mother " 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court further found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she had lied about it. The court found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time."

Although the court did not follow the language of the statute in the concluding sentence of the adjudicatory section of its memorandum of it decision, on the basis of our review of the court's full decision, it is apparent

that the court found that the petitioner had proven, by clear and convincing evidence, the allegations of its petition, namely, that Xavier had been adjudicated in a prior proceeding to have been neglected and that the respondent mother and the respondent father "each individually have failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the child, each or either could assume a responsible position in the life of the child." See *In re James O.*, supra, 322 Conn. 653–55 (considering challenged portion of trial court's "memorandum of decision within the context of the trial court's overall analysis"). As with the respondent father, the court's findings as to the respondent mother were that the respondent mother had essentially ignored the domestic violence issue that was the basis of the court's conclusion that she failed to rehabilitate and that she has no intention to address the issue. We conclude that the court's decision in this case, when read as a whole, sets forth sufficient factual and legal findings to meet the statutory standard for the adjudicatory requirements of § 17a-112 (j) (3) (B) (i). See id., 655; *In re Shane M.*, supra, 318 Conn. 585–86.

B

The respondent mother next claims that the trial court erred in finding that she had failed to rehabilitate. She contends that the court's error, at least in part, was due to its clearly erroneous subordinate factual finding that she had refused or was unwilling to address the issue of domestic violence. We are not persuaded.

"We review the trial court's subordinate factual findings for clear error, and review its finding that the respondent [mother] failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire whether the trial court could have reasonably concluded, upon the

facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . We emphasize that [i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the [judgment], whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citations omitted; internal quotation marks omitted.) *In re Jayce O.*, supra, 323 Conn. 715–16.

1

We first consider the respondent mother's claim that the court's subordinate factual finding, that she had refused or was unwilling to address the issue of domestic violence, was clearly erroneous. She argues that she had attended domestic violence programs, including the Survivor Project and Safe Futures, and that the department had acknowledged that she successfully had completed the domestic violence work that had been recommended by the department. The petitioner argues that the evidence clearly demonstrates that the respondent mother "failed to rectify the most significant deficiency present in her life both before and after Xavier's birth, specifically, her domestic violence history with [the respondent] father . . . and her inability to resolve their toxic and conflictual relationship, which impaired her ability to care for Xavier." We agree with the petitioner.

The record reveals that Randall testified that the respondent mother "had a history of relationships with

domestic violence in them, including the relationship with [the respondent] father." She testified that the respondent mother told her that she and the respondent father were no longer together and that she, therefore, "did not see a need . . . to participate in domestic violence treatment . . . [but that] she was willing to do so because it was required by [the department]." Randall further testified that, in her professional opinion, the continued relationship between the respondent mother and the respondent father "puts Xavier at risk for being exposed to continued conflict and violence in the home."

Carolyn Ryan, a social worker with the department, testified that, "given the evidence . . . that [the respondent mother and the respondent father] are in a relationship [that] means that they haven't addressed the core issue in their relationship, which was . . . intimate partner violence." She also agreed that, although the respondents had attended therapy, it did not mean that they actually had derived any benefit from the services rendered, in part, because they were not honest with respect to their relationship. Ryan explained: "There was a—the bigger issue is dealing with the domestic violence and being fully forthcoming and honest with your providers, and that's something that neither [of the respondents] have done throughout the time that they've been involved with the department. So in terms of—our assessment is that . . . [the respondent mother] has not made the progress needed based on the fact that during this time, while she made progress, she went to services, but she wasn't honest with the people that are working with her, her therapeutic providers. That included her individual therapist. That included the clinician that [was] doing coparenting."

Ryan also explained: "The main concern [of the department] is the [respondents'] complete lack of honesty throughout this entire case, and that is because of their extremely long history, documented history of intimate

partner violence [to] which their child, Xavier, was exposed . . . . And that while they—presumably in services . . . did make some progress . . . there wasn't—the progress wasn't made. They didn't work on the very issue that is the issue, [namely] . . . the intimate partner violence . . . . [T]hey're not working on the issue that is of the main—of the most concern, [namely] . . . the violence and the [presumption that if] the child's placed back in their care that Xavier could be exposed to once again."

Lorraine Thomas, a social work supervisor with the department, testified that "the department believes that the [respondent] parents remain engaged in a relationship and that there has been significant domestic violence in that relationship. The department believes that [the respondent mother] is a victim of domestic violence and that [she] does not clearly understand the risk of being a victim, and so she would do [what] the abuser is telling her to do, which is lie to the department so that their child can be reunified and then put in a—possibly put in a situation that's going to retraumatize this child." Thomas also testified: "The issue is, is that we removed the child because of domestic violence, because of substance abuse, and the domestic violence piece, even though [the respondents have] engaged in services, they weren't truthful to the providers in order to work on the appropriate services for them. They have not been truthful to the department . . . . But as a supervisor of the case with a young child under the age of five, significantly concerned that we would do nothing. The parents have not engaged in appropriate services because they have not been truthful, so the providers could not treat them accordingly in order to reunify their child with them." She agreed that "there is every indication from the department's perspective that the pattern of domestic violence, the pattern of

volatile interaction and engagement and then disengagement, is continuing . . . .''

On the basis of the clear, foregoing testimony, we conclude that the court's finding that the respondent mother refused or was unwilling to address the issue of domestic violence was not clearly erroneous.

2

We next address the respondent mother's claim that the evidence at trial was not sufficient to support the trial court's conclusion that the petitioner met its burden of proof, by clear and convincing evidence, that the respondent mother failed to achieve rehabilitation. She argues that ''[t]he trial court's findings that [the respondent] mother was unwilling to benefit from the department's efforts and that she refused to address the issue of domestic violence are belied by [her] participation in the numerous programs to which she was referred, including parenting services and domestic violence treatment, by her progress in achieving sobriety and stability, and by her positive relationship with Xavier.'' We disagree.

The trial court found that the respondent mother consistently has shown resistance to participating in any domestic violence counseling program, and that she wants nothing to do with domestic violence counseling, although domestic violence has been an issue for her over the course of many years. The court also relied on Randall's assessments that the respondent mother's interactions were indicative of a continued inability to place Xavier's needs first, and that the respondent mother '' 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear

anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she continued to lie about it. The court also made the explicit finding that the respondent mother had not "gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time." Additionally, the court made findings about the respondent mother's abuse of medications, finding that she continued to test positive for unprescribed medications in 2017, and that she self-discharged from an intensive outpatient care program because she was having a conflict with the providing physician. Although the court certainly noted some positive things about the respondent mother, those do not minimize the findings that led the court to conclude that she had failed to rehabilitate. Our law is quite clear; on appeal, we can neither weigh the evidence nor substitute our judgment for that of the trial court. See *In re Shane M.*, supra, 318 Conn. 593 and n.20; see also *In re Jayce O.*, supra, 323 Conn. 716.

After reviewing the evidentiary sufficiency of the court's ultimate finding that the respondent mother failed to rehabilitate, we conclude, on the basis of the subordinate facts found and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence is sufficient to support the court's ultimate conclusion.

C

The respondent mother's final claim is that the trial court erred in concluding that termination of her parental rights was in Xavier's best interest because the court

failed to make complete written findings concerning the statutory factors set forth in § 17a-112 (k). She argues that the court failed to make sufficient findings under three of the statutory factors, namely, "the extent to which [the respondent] mother fulfilled her obligations under the specific steps, the child's emotional ties with [her], and [her] efforts to adjust her circumstances."[9] We conclude that the court's findings complied with § 17-112 (k).

To the extent that the respondent mother's claim requires us to interpret the requirements of § 17a-112 (k), our review is plenary. See *In re Nevaeh W.*, supra, 317 Conn. 729. Additionally, as we explained in part I C of this opinion: "[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript. . . . [A]lthough a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citation omitted; internal quotation marks omitted.) Id., 740.

[9] The respondent mother concedes in her brief that "[t]he seven factors serve simply as guidelines for the court and are not statutory prerequisites. There is no requirement that each factor be proven by clear and convincing evidence."

1

The respondent mother first argues that the court failed to make sufficient findings under § 17-112 (k) (3), which requires the court to address "the extent to which [the respondent] mother fulfilled her obligations under the specific steps . . . ."

In the present case, in its memorandum of decision, the court listed each of the seven factors set forth in § 17a-112 (k) and included its written findings under each. Specifically, on the factor set forth in § 17a-112 (k) (3), which directs the trial court to consider "the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order," the court stated: "The court finds that [the department] made reasonable efforts to reunite the child with [the respondent mother and/or the respondent father] as extensively discussed in the adjudication portion of this memorandum of decision but neither parent was either willing to nor capable of accomplishing the necessary results of those offers of help, assistance, care, guidance and instruction."

The respondent mother now argues that the court "failed to consider whether all parties had fulfilled their obligations, as it did not make any written finding regarding whether, and to what extent, [the respondent] mother had actually fulfilled her obligations under the relevant court orders, i.e., the specific steps." We disagree.

The court ordered the following specific steps for the respondent mother: (1) keep all appointments set by or with the department, and cooperate with home visits, (2) take part in counseling and make progress toward the identified treatment goals, (3) submit to a substance abuse evaluation and follow the recommendations about treatment, (4) submit to random drug testing, (5) do not

use illegal drugs or abuse alcohol or medication, (6) cooperate with service providers recommended for counseling, in-home support services and substance abuse assessment and treatment, following any and all recommendations and participate in a substance abuse evaluation and urine screen, (8) cooperate with court-ordered evaluations or testing, (9) sign necessary releases, (10) get or maintain adequate housing, (11) notify the department about changes in living conditions, (12) obtain and/or cooperate with restraining and/or protective orders to avoid more domestic violence incidents, (13) attend and complete an appropriate domestic violence program, (14) do not get involved further with the criminal justice system and cooperate with probation or parole officers, (15) visit your child as often as the department permits, (16) provide information to the department about possible placement resources for your child, if any, and (17) provide to the department information about the child's grandparents.

In its memorandum of decision, the court specifically found that the respondent mother had engaged in services and obtained medication, which she then admitted to abusing, in addition to another medication that she had not been prescribed, and she continued to test positive for unprescribed medications in 2017. The court found that the respondent mother discharged herself from an extensive outpatient treatment program that had been recommended, that she has demonstrated a resistance to participating in domestic violence counseling programs, and that she wants nothing to do with domestic violence counseling, although she has been in violent relationships, including during her ten year relationship with the respondent father. In its memorandum of decision, the court also relied on Randall's opinion that the respondent mother's continued interactions with the respondent father were indicative of an ongoing inability to place Xavier's needs first, and that the

respondent mother " 'was angry and argumentative with the foster mother, in the presence of Xavier, and she repeatedly undermined Xavier's relationship with his foster mother. She demonstrated no understanding of Xavier's need to view his foster parents in a parental role, and she did not acknowledge that her own clear anger and disagreement with the foster mother could cause emotional disruption for her son.' " The court further found that, despite all the violence, the respondent mother continued to maintain a relationship with the respondent father and that she lied about it. The court also specifically found that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence and she has no intention to address the issues at any time." Reading the court's decision as a whole, as we must; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court did consider and make findings as to the respondent mother's efforts to fulfill her obligation under the terms of the court-ordered specific steps.

2

The respondent mother next argues that the court failed to make sufficient findings concerning Xavier's emotional ties with her. We conclude that the court sufficiently addressed § 17a-112 (k) (4), but, even if the court's decision could be considered ambiguous as to this finding, its ultimate conclusion is sufficiently supported by the evidence and is legally sound.

Section 17a-112 (k) (4) "directs the trial court to consider the [child's] emotional ties with a long list of people in determining whether the termination of the respondent's parental rights is in [his] best interest." *In re Nevaeh W.*, supra, 317 Conn. 731; see footnote 6 of this opinion. Here, the court specifically found:

"Xavier has developed significant emotional ties to his current caregivers. He is truly part of the family which has been his family for all of his life less approximately ten months."[10]

In *In re Nevaeh W.*, our Supreme Court stated that "[n]othing in [§ 17a-112 (k) (4)] . . . required the trial court to consider only the [child's] emotional ties with the respondent [mother]. To the contrary . . . it was appropriate for the trial court to consider the [child's] emotional ties to the preadoptive foster family in considering whether termination of the [respondent mother's] parental rights was in the [child's] best interest." *In re Nevaeh W.*, supra, 317 Conn. 731. "Furthermore, in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) Id., 733.

Reading the trial court's memorandum of decision as a whole, as we must; see id.; we conclude that the court's findings were sufficient to comply with § 17a-112 (k) (4). The court found that "Xavier has been out of his parents' care for over thirty-four months. He is only three years ten months old. Dr. Randall stated in testimony in this case her recommendation that Xavier be placed permanently with someone other than [the respondent] mother and/or [the respondent] father. He has been placed in a legal risk foster home where he is making excellent strides and has developed an attachment to his caregivers, a couple who also have a three year old son who has formed a bond with Xavier as Xavier has with him and with his parents. He is healthy and all of his medical, dental, psychological and educational needs are being met. This couple wishes to adopt

[10] The respondent mother states that Xavier was not placed with this foster family until December, 2017. We conclude that this misstatement is not relevant to the court's decision.

Xavier. This clearly is in Xavier's best interest." The court also found that the respondent mother was unable to put Xavier's needs first, and that "she has not gained an understanding of the deleterious effects of domestic violence nor the lack of [her] ability to care for the needs of Xavier as those needs relate to the issues surrounding domestic violence." Guided by our Supreme Court's decision in *In re Nevaeh W.*, supra, 317 Conn. 733–34, we conclude that these subordinate factual findings by the trial court, although not explicitly addressing Xavier's emotional ties to the respondent mother, demonstrate that the court considered the respondent mother's relationship with Xavier and the possible dangers presented by it, as well as his relationship and bond and emotional ties to his foster family. See our further discussion of *In re Nevaeh W.* in part I C 2 of this opinion. Furthermore, to the extent that the court's findings under § 17a-112 (k) (4) could be considered ambiguous as to Xavier's emotional ties with the respondent mother, we conclude that the court's overall decision supports its ultimate conclusion that termination of the respondent mother's parental rights was in Xavier's best interest. See *In re Nevaeh W.*, supra, 740 ("although a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound"); see also *In re Eden F.*, supra, 250 Conn. 691.

3

The respondent mother also argues that the court failed to make sufficient findings about her efforts to adjust her circumstances, as required under § 17a-112 (k) (6).[11] She argues that the court "did not make any

[11] General Statutes § 17a-112 (k) (6) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and

findings at all with respect to [her] *efforts* in its response to this factor. Rather, the court [spoke only] to [her] making 'minimal progress' . . . and that it would be inappropriate to consider reunification since [she] has not made any meaningful changes to her life . . . ." (Emphasis in original.) We conclude that the court's findings sufficiently address this factor.

In its decision, the court specifically found that the respondent mother "*resisted* participating in any domestic violence counseling program . . . [and] that she clearly is *unwilling to engage* in such counseling . . . ." (Emphasis added.) The court also found that "she repeatedly undermined Xavier's relationship with his foster mother." (Internal quotation marks omitted.) Additionally, the court found that, "[d]uring the time of their relationship, nine restraining or protective orders ha[d] been issued by various judicial authorities trying to protect [her] from [the respondent] father . . . [and] [i]t was [she] who repeatedly sought the courts to modify those orders on behalf of [the respondent] father. Although both [respondents] now maintain that the relationship is over and they no longer see each other, that seems not to be the truth and raises a question as to the honesty of each [respondent] on a critical issue of the case—domestic violence. . . . Recognizing that domestic violence was a prominent factor causing this case to arise and recognizing that [the respondent] mother *has refused* to address in any way this serious issue which was present at the beginning of this case causes the court to have *grave concern about the sincerity of* [*the respondent*] *mother's intentions* as she

shall make written findings regarding . . . the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child . . . ."

goes through the motions to address the various issues noted by [the department]." (Emphasis added.) Furthermore, the court found that "it would be inappropriate to consider reunification . . . since [the respondent] mother *has not made any meaningful changes* to her life . . . ." (Emphasis added.) We conclude that all of these facts address the respondent mother's efforts or the lack thereof. Reviewing the court's findings as a whole; see *In re Nevaeh W.*, supra, 317 Conn. 733; we conclude that the court's factual findings were more than sufficient to address § 17a-112 (k) (6).

On the basis of the foregoing analysis, we conclude that the court's ultimate conclusion that it was in Xavier's best interest to terminate the respondent mother's parental rights is factually supported and legally sound.

The judgment is affirmed.

In this opinion the other judges concurred.

NORTHWEST HILLS CHRYSLER JEEP, LLC, ET AL. *v.* DEPARTMENT OF MOTOR VEHICLES ET AL. (AC 42899)

Lavine, Alvord and Cradle, Js.

Syllabus

The plaintiffs, four automobile dealerships, sought to preclude the defendant franchisor from establishing a certain new automobile dealership in the relevant market area of each plaintiff. The defendant Department of Motor Vehicles, after a hearing, found that good cause existed, pursuant to statute (§ 42-133dd (c)), to establish the proposed dealership. The plaintiffs appealed to the trial court, claiming, inter alia, that the department's decision was inconsistent and not supported by substantial evidence. The trial court dismissed the plaintiffs' appeal. On the plaintiffs' appeal to this court, *held* that the trial court properly dismissed the appeal and rendered judgment for the defendants; because the claims raised by the plaintiffs in this court essentially reiterated the claims they raised in the trial court, this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued September 8—officially released October 27, 2020

Procedural History

Appeal from the decision of the named defendant finding that good cause existed to allow the defendant FCA US, LLC, to establish a certain automobile dealership, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Huddleston*, *J.*; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Jason T. Allen, pro hac vice, with whom were *James J. Healy* and, on the brief, *Richard N. Sox*, pro hac vice, for the appellants (plaintiffs).

Eileen Meskill, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (named defendant et al.).

George W. Mykulak, pro hac vice, with whom were *Charles D. Ray* and, on the brief, *Shawn S. Smith*, for the appellee (defendant FCA US, LLC).

Opinion

PER CURIAM. In this administrative appeal, the plaintiffs, Northwest Hills Chrysler Jeep, LLC, Gengras Chrysler Dodge Jeep, LLC, Crowley Chrysler Plymouth, Inc., doing business as Crowley Chrysler Jeep Dodge Ram, and Papa's Dodge, Inc., challenge the judgment of the trial court dismissing their appeal. The plaintiffs had appealed from the decision of a hearing officer for the defendants Commissioner of Motor Vehicles and the Department of Motor Vehicles (collectively, department), which found that good cause existed to allow the defendant FCA US, LLC (FCA), to establish a new Jeep dealership at the defendant Mitchell Dodge, Inc. (Mitchell), in Canton. We affirm the judgment of the trial court.

The record reveals that the four plaintiffs operate Chrysler, Dodge, Jeep and Ram dealerships in Connecticut, where they engage in the sale of new motor vehicles

and hold valid franchises from FCA for such activities. Mitchell operates a Chrysler, Dodge and Ram dealership. FCA manufactures, assembles, imports and/or distributes new motor vehicles to each of the plaintiffs and to Mitchell.

In May, 2016, FCA provided notice to the department and to the plaintiffs, pursuant to General Statutes § 42-133dd (a),[1] that it intended to establish a new Jeep dealership at Mitchell, which would be located within the relevant market area[2] of each plaintiff. The plaintiffs timely protested FCA's proposal to establish the new Jeep dealership, and a hearing was held by the department to determine whether good cause existed to establish the proposed dealership pursuant to § 42-133dd (*c*).[3]

[1] General Statutes § 42-133dd (a) provides in relevant part: "In the event that a manufacturer or distributor seeks to enter into a franchise establishing a new dealer or relocating an existing dealer within or into a relevant market area where the same line make is then represented, the manufacturer or distributor shall in writing, by certified mail, first notify the commissioner and each dealer in such line make in the relevant market area of its intention to establish a new dealer or to relocate an existing dealer within or into that market area. . . ."

[2] General Statutes § 42-133r (14) defines " '[r]elevant market area' " as "the area within a radius of fourteen miles around an existing dealer or the area of responsibility defined in a franchise, whichever is greater."

[3] General Statutes § 42-133dd (c) provides: "In determining whether good cause has been established for not entering into a franchise establishing a new dealer or relocating an existing dealer for the same line make, the commissioner shall take into consideration the existing circumstances, including, but not limited to: (1) The permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area; (2) growth or decline in population and new car registrations in the relevant market area; (3) effect on the consuming public in the relevant market area; (4) whether it is injurious or beneficial to the public welfare for a new dealer to be established; (5) whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel; (6) whether the establishment of a new dealer would increase or decrease competition; (7) the effect on the relocating dealer of a denial of its relocation into the relevant market area; (8) whether the establishment or relocation of the proposed dealership appears

Following an evidentiary hearing and the submission of posthearing briefs, the department issued its decision, dated January 19, 2018, concluding that, "[b]ased upon the evidence presented, and taking into consideration [the] criteria set forth in . . . § 42-133dd, good cause exists for permitting the establishment of a new Jeep dealer . . . in Canton . . . ."

The plaintiffs appealed from the department's decision to the trial court, alleging that the department (1) failed to comply with its statutory mandate to consider the existing circumstances of two of the dealers, (2) made findings that are not supported by substantial evidence with respect to three statutory factors, and (3) made irreconcilable findings with respect to two of the statutory factors. The court rejected the plaintiffs' arguments, concluding that the department's decision "is neither incomplete nor inconsistent and is supported by substantial evidence," and, accordingly, dismissed the plaintiffs' appeal.

The plaintiffs now challenge the trial court's dismissal of their appeal from the department's decision, essentially reiterating the claims that they raised during trial. We carefully have examined the record of the proceedings before the trial court, in addition to the parties'

to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes; (9) the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory; (10) the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership; and (11) the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice."

appellate briefs and oral arguments. Applying the well established principles that govern our review of a court's decision to dismiss an administrative appeal; see, e.g., *Meriden* v. *Freedom of Information Commission*, 191 Conn. App. 648, 654, 216 A.3d 847, cert. granted on other grounds, 333 Conn. 926, 217 A.3d 994 (2019); we conclude that the judgment of the trial court should be affirmed. We adopt the court's thorough and well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *Northwest Hills Chrysler Jeep, LLC* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-18-6042924-S (April 15, 2019) (reprinted at 201 Conn. App. 132, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011); *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, 112, 213 A.3d 542 (2019).

The judgment is affirmed.

APPENDIX

NORTHWEST HILLS CHRYSLER JEEP, LLC, ET AL. *v.* DEPARTMENT OF MOTOR VEHICLES ET AL.*

Superior Court, Judicial District of New Britain
File No. CV-18-6042924-S

Memorandum filed April 15, 2019

Proceedings

Memorandum of decision on plaintiffs' appeal from decision by named defendant. *Appeal dismissed.*

James J. Healy, *Jason T. Allen*, pro hac vice, and *Richard N. Sox*, pro hac vice, for the plaintiffs.

* Affirmed. *Northwest Hills Chrysler Jeep, LLC* v. *Dept. of Motor Vehicles*, 201 Conn. App. 128, A.3d (2020).

Eileen Meskill, assistant attorney general, and *George Jepsen*, former attorney general, for the named defendant et al.

Charles D. Ray, *Shawn S. Smith*, *George W. Mykulak*, pro hac vice, and *Caitlin W. Monahan*, pro hac vice, for the defendant FCA US, LLC.

Jay B. Weintraub, *John L. Bonee* and *Eric H. Rothauser*, for the defendant Mitchell Dodge, Inc.

Opinion

HUDDLESTON, J. In this administrative appeal, four automobile dealers assert that the defendants Department of Motor Vehicles and its commissioner, Michael R. Bzdyra (collectively, department), improperly denied their protest to the decision of the defendant FCA US, LLC (FCA), to establish a new Jeep dealership in Canton. They assert that the department (1) failed to comply with its statutory mandate to consider the existing circumstances of two of the dealers, (2) made findings that are not supported by substantial evidence with respect to three statutory factors, and (3) made irreconcilable findings with respect to two of the factors. FCA and the department, in separate briefs, disagree. After considering all the arguments of the parties, and reviewing the entire administrative record, the court concludes that the department's decision is neither incomplete nor inconsistent and is supported by substantial evidence. Accordingly, for the reasons stated below, the appeal is dismissed.

LEGAL FRAMEWORK

In Connecticut, the relationships between manufacturers and dealers of motor vehicles are governed by General Statutes §§ 42-133r through 42-133ee. These provisions recognize the "need for intra-brand competition." *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, 192

Conn. 558, 569 n.14, 473 A.2d 1185 (1984). Section 42-133r (14) defines " '[r]elevant market area' " as "the area within a radius of fourteen miles around an existing dealer or the area of responsibility defined in a franchise, whichever is greater." The law "does not guarantee an exclusive right to operate a dealership within a fourteen mile radius, but rather requires the [C]ommissioner of [M]otor [V]ehicles to demonstrate good cause, as defined in the statute, for denying the addition or relocation of a dealer in the objecting dealer's relevant market area." (Internal quotation marks omitted.) *McLaughlin Ford, Inc.* v. *Ford Motor Co.*, supra, 569 n.14.

If a manufacturer wants to add a new dealer or to relocate an existing dealer within the relevant market area of an existing dealer, General Statutes § 42-133dd (a)[1] requires the manufacturer to notify the Commissioner of Motor Vehicles and each existing dealer of its intention. If an existing dealer files a protest with the commissioner, the manufacturer cannot proceed until the commissioner has held a hearing and has determined whether there is good cause for denying the manufacturer's plan. The manufacturer bears the burden of proving that good cause exists for permitting the

[1] General Statutes § 42-133dd (a) provides in relevant part: "In the event that a manufacturer or distributor seeks to enter into a franchise establishing a new dealer or relocating an existing dealer within or into a relevant market area where the same line make is then represented, the manufacturer or distributor shall in writing, by certified mail, first notify the commissioner and each dealer in such line make in the relevant market area of its intention to establish a new dealer or to relocate an existing dealer within or into that market area. Within twenty days of receiving such notice or within twenty days after the end of any appeal procedure provided by the manufacturer or distributor, any such dealer may file with the commissioner a protest concerning the proposed establishment or relocation of such new or existing dealer. When such a protest is filed, the commissioner shall inform the manufacturer or distributor that a timely protest has been filed, and that the manufacturer or distributor shall not establish or relocate the proposed dealer until the commissioner has held a hearing, nor thereafter, if the commissioner determines that there is good cause for denying the establishment or relocation of such dealer. In any hearing held pursuant to this section, the manufacturer or distributor has the burden of proving that good cause exists for permitting the proposed establishment or relocation. . . ."

proposed establishment or relocation. Section 42-133dd (c) sets out eleven nonexclusive "circumstances" or factors to be considered in determining whether good cause exists.[2]

DEPARTMENT'S FINDING OF FACTS AND CONCLUSIONS OF LAWS[3]

Mitchell Dodge, Inc., doing business as Mitchell Chrysler Dodge (Mitchell), operates a Chrysler, Dodge,

[2] General Statutes § 42-133dd (c) provides: "In determining whether good cause has been established for not entering into a franchise establishing a new dealer or relocating an existing dealer for the same line make, the commissioner shall take into consideration the existing circumstances, including, but not limited to: (1) The permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area; (2) growth or decline in population and new car registrations in the relevant market area; (3) effect on the consuming public in the relevant market area; (4) whether it is injurious or beneficial to the public welfare for a new dealer to be established; (5) whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel; (6) whether the establishment of a new dealer would increase or decrease competition; (7) the effect on the relocating dealer of a denial of its relocation into the relevant market area; (8) whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes; (9) the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory; (10) the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership; and (11) the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice."

[3] Over seven days in May, 2017, a department hearing officer conducted the required hearing. He heard testimony from four FCA managers, a representative of each of the protesting dealers, the president of Mitchell [Dodge, Inc.], two expert witnesses for FCA, and two expert witnesses for the protesting dealers. FCA and the protesting dealers introduced some 190 exhibits and submitted posthearing briefs. The hearing officer subsequently

Ram (CDR) dealership presently located at 416 Hopmeadow Street in Simsbury. There are thirty CDR dealerships in Connecticut; all but four of them also sell the Jeep line. Mitchell is one of the four dealers currently without the Jeep line.

The four plaintiffs operate Chrysler, Dodge, Jeep, Ram (CDJR) dealerships in Connecticut. Northwest Hills Chrysler Jeep, LLC (Northwest), operates a CDJR dealership in Torrington. Gengras Chrysler Dodge Jeep, LLC (Gengras), operates a CDJR dealership in East Hartford. Crowley Chrysler Plymouth, Inc., doing business as Crowley Chrysler Jeep Dodge Ram (Crowley), operates a CDJR dealership in Bristol. Papa's Dodge, Inc. (Papa's), operates a CDJR dealership in New Britain. Each of their dealerships is within fourteen miles of Mitchell's present location.

In 2007, FCA's predecessor, DaimlerChrysler Motors Company, LLC, looked to add the Jeep line to Mitchell's franchise at its present location. It gave the statutorily required notice to the dealers in the relevant market area. Northwest, Gengras, Crowley, and Papa's filed a protest pursuant to § 42-133dd (a), and the proposal to establish the Jeep line at Mitchell's present location was withdrawn on March 5, 2007.

On May 5, 2016, FCA gave notice to the department and to affected existing Jeep dealers that Mitchell intended to construct a facility at 71 Albany Turnpike in Canton, where it would relocate its existing CDR dealership, and requested to add the Jeep line. On May 23, 2016, Northwest, Gengras, Crowley, and Papa's protested the establishment of the Jeep line. They did not protest the relocation of Mitchell's CDR dealership.[4]

issued a final decision on January 19, 2018, from which these facts are drawn. (The decision is misdated January 19, 2017, on the first page, but correctly dated on page 11.)

[4] Pursuant to § 42-133dd (b) (1), the protest provisions of § 42-133dd (a) do not apply to "the relocation of an existing dealer within that dealer's area of responsibility under its franchise, provided that the relocation shall

In FCA's dealer agreements, a "sales locality" is a geographic area of responsibility defined by specific census tracts. These are nonexclusive areas. Mitchell and the protesting dealers are located within three sales localities. Mitchell's present location, Gengras, and Papa's are located within the FCA's Hartford sales locality. Mitchell's proposed location is also within the Hartford sales locality. Crowley is within the FCA's Bristol sales locality, and Northwest is within the FCA's Torrington sales locality.

FCA further divides sales localities into "trade zones," also defined by census tracts. The Hartford sales locality is divided into five trade zones: Enfield, East Hartford, New Britain, Rockville, and Simsbury. Of the five trade zones, two—Enfield and Simsbury—do not presently have Jeep dealerships, and are known in the trade as "open points."

Section 42-133dd (c) requires the commissioner or his designee to "take into consideration the existing circumstances," which "includ[e], but [are] not limited to," eleven circumstances. The final decision addressed each of the eleven specified circumstances.

Section 42-133dd (c) (1) requires consideration of the "permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area . . . ." As to this consideration, the department found that the existing motor vehicle dealers "have made significant and permanent investments, and have incurred financial obligations in their dealership facilities, located in the respective relevant market area." The department acknowledged FCA's argument that the

not be at a site within six miles of a licensed dealer for the same line make of motor vehicle . . . ."

Mitchell's proposed relocation was within its area of responsibility and was more than six miles from the protesting CDJR dealers.

dealers' investments had been made over a period of years, that the protesting dealers "are strong dealers who have successfully completed and succeeded against other dealers," including Mitchell in its present location, and that the dealers' agreements with FCA are expressly " 'non-exclusive' . . . ."

Section 42-133dd (c) (2) requires consideration of the "growth or decline in population and new car registrations in the relevant market area . . . ." As to this consideration, the department found that between 2000 and 2015, the population in the Hartford sales locality grew by over 40,000, or 4.9 percent. In the Simsbury trade zone, where the proposed Jeep location would be established, the population grew by 9.1 percent, which the department found to be the highest percentage of growth of all trade zones in the Hartford sales locality and higher than the growth in the Torrington and Bristol sales localities. The department found that both population and household growth is projected to be less than 1 percent between 2015 and 2020, rising slightly but remaining stable. Vehicle registrations in Connecticut rose by a significant percentage from 2010 through 2015, with Jeep registrations increasing by 172.5 percent. The department noted, however, that sales "peaked and plateaued in 2016," a nationwide trend that may continue. The department observed that the protesting dealers saw this slowing growth as support for their position that another Jeep dealership is not needed.

Section 42-133dd (c) (3) requires consideration of the "effect on the consuming public in the relevant market area . . . ." The department found that the consuming public would benefit from the addition of the Jeep line at the proposed location. Route 44 (Albany Turnpike) in Canton has evolved into an "auto row"—an area where numerous vehicle brands have established dealership locations and compete within the vicinity of each

other. Presently located near the proposed location are competitors of Jeep, including Chevrolet, Acura, Subaru, Volkswagen, Nissan, Toyota, Land Rover, and Honda dealers. The department found that "[a]uto rows are now common, and provide a convenience to consumers in having the ability to shop and compare competing brands at dealerships in close proximity." The department also found that drive time is significant to consumers. Although the parties disagreed as to the amount of time consumers would save if a new Jeep line were added at the proposed location, the department found that distances and drive times from the proposed location to the protesting dealers' locations are not insignificant, and that location on such an auto row would increase interbrand and intrabrand competition, to the consumer's benefit.

Section 42-133dd (c) (4) requires consideration of "whether it is injurious or beneficial to the public welfare for a new dealer to be established . . . ." The department found that the addition of construction and dealership based jobs, payroll and property taxes, and sales and use tax revenue would be beneficial to the public welfare in the Simsbury trade zone and particularly in Canton, the site of the proposed location. The department acknowledged the protesting dealers' argument that the benefit in construction jobs was only speculative, as there were only projections by Mitchell and one of the FCA experts as to what expenditures Mitchell would make if it were granted the Jeep dealership. The department observed that Mitchell could not be expected to have a detailed proposal in place, since it did not know if or when it would be allowed to add the Jeep line, and its ability to obtain the necessary approvals and financing for the project required the approval of the Jeep line at the proposed location. The department concluded that approval of the Jeep vehicle line "is not injurious to the public welfare."

Section 42-133dd (c) (5) requires consideration of "whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel . . . ." As to this consideration, the department found that the protesting dealers have adequate service facilities, equipment, supply of motor vehicle parts, and qualified service personnel. The protesting dealers already compete successfully with Mitchell in a number of segments and franchises, including new CDR vehicles, the sale of used, certified preowned vehicles, including CDR and Jeep, warranty and out of warranty service on CDR and Jeep vehicles, and sales of parts for CDR and Jeep vehicles. As the department observed, however, the Simsbury trade zone has never had a Jeep dealership, and sales of new Jeeps in that trade zone have to be handled by in-selling. The only option for consumers in that area is to search for and purchase a new Jeep from a dealership outside the area, which, with Internet advertising, could be a dealer other than the protesting dealers. Television and Internet advertising by the protesting dealers reaches far beyond their relevant market areas, into adjoining states.

In considering § 42-133dd (c) (5), the department discussed registration effectiveness, a measure used by the automotive industry to assess brand performance. Registration effectiveness compares brand registrations within a territory to the expected number of registrations. It is distinct from dealer performance, which is calculated on "[m]inimum [s]ales [r]esponsibility," or MSR. As the department observed, "[d]ealer performance measures whether a dealer has captured the opportunity for sales assigned to it." FCA's dealers in the Hartford sales locality meet their MSRs, but the

Hartford sales locality is only 84 percent registration effective. This indicates lost sales for the brand and supports the need for another Jeep dealer.

Section 42-133dd (c) (6) considers "whether the establishment of a new dealer would increase or decrease competition . . . ." FCA argued that a new Jeep dealer would result in better prices, better choices, and better service as a result of the visibility of the proposed location, additional expected advertising by Mitchell, and increased interbrand competition. FCA also argued that existing dealers were not selling enough Jeeps to meet their expected market share. On the other hand, the protesting dealers argued that Jeep parts and service are already available in the Simsbury trade zone at Mitchell's existing location, and the addition of the Jeep line for sales would result in only "[minimally improved] convenience." The department found that, on balance, the addition of the Jeep line at the proposed location would increase competition.

Section 42-133dd (c) (7) requires consideration of "the effect on the relocating dealer of a denial of its relocation into the relevant market area . . . ." The department observed that, although this case involves the establishment of a new Jeep dealer rather than the relocation of an existing Jeep dealer, consideration of the eleven circumstances set out in § 42-133dd (c) are not exclusive. Considering the effect of a denial of the Jeep line on Mitchell, the department found that Mitchell had been losing money for years in its present location, and the possibility that it would have to relinquish its CDR dealership was relevant in terms of Mitchell's overall financial health. Loss of Mitchell's CDR dealership would adversely affect the customers who currently use Mitchell's services at its present location.

Section 42-133dd (c) (8) requires consideration of "whether the establishment or relocation of the proposed dealership appears to be warranted and justified

based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes . . . .'' The department made extensive findings with respect to this issue. It found that the annual number of new vehicle sales for all manufacturers increased significantly from 2009–2010, when it was approximately twelve million units, to 2016, when sales were in excess of seventeen million units. In Connecticut, the Jeep line, measured by registrations, increased from 3945 in 2010 to 10,751 in 2015.

The department further found that when Chrysler emerged from bankruptcy in 2009 and FCA acquired certain of its assets, one of FCA's goals was to establish Chrysler, Dodge, Jeep, and Ram as a unified franchise under one roof. This consolidation plan was presented to the Bankruptcy Court both as a plan of survival for the brand and a plan that would benefit dealers and consumers. Approximately 60 to 70 percent of FCA's sales in the United States come from Jeep. In light of the greatly increased consumer preference for sport utility vehicles (SUVs), FCA is increasing production of Jeeps and introducing new models, with the expectation of selling 24 percent more Jeeps by 2020 than are currently sold. Existing dealers have benefited from this trend and will continue to benefit from planned new products and increased production volume.

The department found that the protesting dealers do sell Jeeps into the Simsbury trade zone, but most of their sales are made near their dealerships. It is a priority of FCA to establish dealerships, including the Jeep line, in auto rows such as the one in Canton to encourage cross-shopping and to be competitive with non-FCA brands.

The department found that Northwest's auto group includes a Chevrolet, Buick, GMC, Cadillac dealership

in Torrington that competes with Davidson Chevy, which is less than a mile from Mitchell's proposed location in Canton. In addition, the family that owns Northwest also owns O'Neill Chevrolet Buick in Avon, approximately three and a half miles from Davidson Chevy, and also owns a Honda dealership in Torrington that competes with Hoffman Honda in West Simsbury.

The department found that Crowley's dealership group includes Nissan Crowley in Bristol, which competes with Hoffman Nissan in Canton. Hoffman Nissan is located near Mitchell's proposed location. Crowley also owns a Volkswagen dealership in Plainville that competes with Mitchell Volkswagen in Canton, less than a mile from Mitchell's proposed location for adding the Jeep line.

The department found that Mitchell owns both 71 and 91 Albany Turnpike in Canton. Mitchell currently operates a Subaru dealership at 71 Albany Turnpike. If granted a Jeep dealership, Mitchell plans to build a new facility for Subaru at 91 Albany Turnpike and to renovate the proposed location at 71 Albany Turnpike for the CDJR dealership. The proposed location is already zoned for an auto dealership. The expert for the protesting dealers admitted that it is very difficult to find dealership locations in the Northeast that are not severely constrained by space or zoning.

The department acknowledged that a June, 2014 Hartford Market Study by FCA listed Simsbury as one of FCA's lowest market priorities in the greater Hartford market. After Mitchell advised FCA of its plan for the proposed location, however, FCA changed its priorities. The department found that such a change was to be expected.

The department concluded that the increased popularity of SUVs; intense marketing on television, the Internet, and in print media; and heightened interbrand

competition justify allowing the Jeep line at the proposed location. The department found that it is necessary to balance the interests of consumers, the local community, the establishing dealer, the vehicle manufacturer, and the existing dealers.

Section 42-133dd (c) (9) requires consideration of "the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory . . . ." As to this consideration, the department explained that "[m]arket penetration is the share a particular brand gets of a competitive set. Market penetration is the same as market share: how much business is transacted relative to the business available. Registration effectiveness is how well a brand does relative to what is expected from the brand." The department found that in the Hartford sales locality, Jeep's existing market share is less than its expected market share, using 2015 numbers. In that year, Jeep's expected market share in the Hartford sales locality was 9.85 percent, but its actual market share was 8.24 percent. If Jeep had achieved its expected market share in 2015, it would have sold 2086 vehicles in the Hartford sales locality, but in fact it sold only 1744 vehicles.

Section 42-133dd (c) (10) requires consideration of "the economic impact of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership . . . ." The department found that the addition of a Jeep dealership

at the proposed location would result in some financial loss to the existing dealers. Although FCA's expert contended that there is sufficient lost opportunity from interbrand competition to have the new dealership established and not take any sales from the existing dealers, the protesting dealers testified that the proposed location would cause a financial loss to them and might result in a reduction of employees, with a corresponding loss in customer service. The department found that the protesting dealers all have well established Jeep dealerships with well regarded sales and service departments. It found that "[o]ne cannot say that the consumer will abandon the [protesting dealers'] dealerships and patronize a new dealership such as the [p]roposed [l]ocation based solely on convenience for the purchasing of a new Jeep." The department observed that both FCA and the protesting dealers acknowledge the significance of Jeep sales to a CDJR dealership. It found that although motor vehicle sales have leveled off, Jeep sales are expected to remain strong, providing continued opportunity for both the protesting dealers and Mitchell.

Section 42-133dd (c) (11) requires consideration of "the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice." As to this consideration, the department found that Jeep registration effectiveness in the Hartford sales locality indicated lost Jeep sales in the years preceding the notice. In 2015, the Hartford sales locality had the third lowest registration effectiveness in the state, at 83.6 percent, and the Bristol RMA was at 85.7 percent. The department found that the protesting dealers have been in-selling into the Simsbury trade zone, where there is no new Jeep dealership. It further found that

the establishment of a new Jeep dealership in the Simsbury trade zone would not prevent the protesting dealers from continuing to in-sell into the Simsbury trade zone.

The department concluded that, "[b]ased upon the evidence presented, and taking into consideration criteria set forth in . . . § 42-133dd, good cause exists for permitting the establishment of a new Jeep dealer at 71 Albany Turnpike in Canton . . . ." It accordingly dismissed the protests of the protesting dealers and ordered that FCA may establish a new Jeep dealer at 71 Albany Turnpike in Canton. This appeal followed.

SCOPE OF REVIEW

The plaintiffs appeal pursuant to General Statutes § 4-183.[5] "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act . . . General Statutes §§ 4-166 through 4-189 . . . and the scope of that review is very restricted . . . ." [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Citation

[5] General Statutes § 4-183 (j) sets out the statutory scope of review for administrative appeals. It provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment."

omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Schallenkamp* v. *DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action." (Internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 676, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). "In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of witnesses. . . . The reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . ." (Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 411–12, 94 A.3d 588 (2014).

Our Supreme Court has repeatedly stated that "administrative tribunals are not strictly bound by the rules of evidence and . . . may consider exhibits [that] would normally be incompetent in a judicial proceeding, [as] long as the evidence is reliable and probative." *Lawrence* v. *Kozlowski*, 171 Conn. 705, 710, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977). "It is axiomatic, moreover, that it is within the province of the administrative hearing

officer to determine whether evidence is reliable . . . and, on appeal, the plaintiff bears the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion . . . . Neither this court nor the [Appellate Court] may retry the case or substitute its own judgment for that of the [hearing officer with respect to] the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 667–68, 200 A.3d 681 (2019).

Section 4-183 (j) requires affirmance of an agency's decision unless the court finds that substantial rights of the person appealing have been prejudiced by the claimed error. "The complaining party has the burden of demonstrating that its substantial rights were prejudiced by the error." (Internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 266, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, supra, 254 Conn. 343–44.

DISCUSSION

The plaintiffs advance three arguments in support of their appeal. First, they assert that the department committed legal error by failing to make specific findings as to each of the eleven statutory considerations for each protesting dealer. Second, they assert that certain factual findings are not supported by substantial evidence and that two of the findings are inconsistent with

each other. Third, they argue that the department's legal conclusion does not follow legally and logically from certain undisputed facts. More generally, they argue that the protesting dealers were successful Jeep dealers and consistently exceeded FCA's goals; that FCA's decision to add a Jeep dealer in Canton was based on the personal preference of a single manager who had formerly worked for Toyota and wanted Jeep to be located near Toyota; and that the evidence showed a contracting automobile market, a stagnant population, "extreme" Jeep competition, and an insufficient supply of Jeeps for current dealers.

In response, FCA argues that the plaintiffs' arguments are waived, contradict the arguments they made before the department, misconstrue the dealer statute, and are legally immaterial. FCA also argues that substantial evidence supports the department's decision. The department argues that the hearing officer properly considered all the statutory factors as to all of the plaintiffs, that the findings are not inconsistent and are supported by substantial evidence, and that the department is afforded considerable discretion in weighing the statutory factors.

The court has reviewed the entire administrative record, including the transcripts, the exhibits, the post-hearing briefs, and the final decision. Based on its review, it concludes that the plaintiffs have not met their burden of showing any prejudicial error.

A

The plaintiffs' first argument is that the hearing officer failed to make specific findings as to each dealer on each statutory point, thereby depriving certain of the plaintiffs of their right to a decision based on their own circumstances. Similar arguments have been rejected at least twice in the past. See *A-1 Auto Service, Inc.* v.

Dept. of Motor Vehicles, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-96-0558549 (July 18, 1996) (*Maloney, J.*) (basis of hearing officer's decision was clear despite failure to state subordinate conclusions as to some factors); *Mario D'Addario Buick, Inc.* v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-01-0505960-S (October 12, 2001) (*Schuman, J.*) (hearing officer not required to make specific findings on each factor but merely to consider them all). Courts have considered whether the basis for the ultimate conclusion is clear and reflects consideration of the statutory factors. In *A-1 Auto Service, Inc.*, the court observed that the hearing officer's ultimate conclusion was simply that " 'existing circumstances'. . . do not establish good cause for denying the new franchise. As noted, the findings of fact are explicit and thorough; they completely cover the circumstances as required by the statute; and they provide an understandable and reasonable basis for the ultimate decision. If the hearing officer failed to label some subordinate conclusions as such or failed to state some subordinate conclusions explicitly, the plaintiff has not demonstrated any material prejudice as a result."

The plaintiffs here claim that the department failed to make findings about Northwest and Crowley as to the fifth, ninth, and eleventh statutory factors. The fifth factor directs the department to consider "whether the dealers of the same line make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line make in the market area including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel . . . ." General Statutes § 42-133dd (c) (5). Contrary to the plaintiffs' claim, the department expressly found that all of the protesting dealers have

adequate service facilities, equipment, supply of motor vehicle parts, and qualified service personnel. Final Decision, ¶ 25. Turning from service to sales, the department observed that the Simsbury trade zone has never had a new Jeep dealership, with the result that consumers in that trade zone had to search for and purchase new Jeeps outside the area. It further observed that while the dealers in the Hartford sales locality met their minimum sales requirements, registration effectiveness (a measure of market share) was only 84 percent. In sum, the department found that dealers of the same line make were providing adequate competition in service but not adequate or convenient competition in sales of new Jeeps in the proposed location. This conclusion was supported by substantial evidence in the record.

The plaintiffs also claim that the department failed to make necessary findings about the ninth factor, which directs the department to consider "the reasonably expected market penetration of the line-maker motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory . . . ." General Statutes § 42-133dd (c) (9). The plaintiffs claim that the department erred in failing to focus on Canton, the proposed location, as "the community or territory involved." The court disagrees. The statute employs undefined alternatives—"community or territory involved"—rather than the statutorily defined "relevant market area." By using broad, undefined alternative terms, the statute clearly affords the department substantial discretion to determine the most relevant "community or territory involved." The department did not abuse its discretion in focusing on the Hartford sales locality in which the proposed

location was located. Substantial evidence supports the department's finding that Jeep's market share in the Hartford sales locality was 8.24 percent, lower than its expected market share of 9.85 percent, with sales of only 1744 vehicles as compared to expected sales of 2086 vehicles.

The plaintiffs also claim that the department erred by failing to make specific findings concerning the retail sales of Jeeps in Canton and in Northwest's relevant market area, as they claim is required by the eleventh factor. That factor requires the department to consider "the retail sales and service business transacted by the existing dealers of the same line make in the market area to be served by the proposed new or relocated dealer as compared to the business available to them during the three-year period immediately preceding notice." General Statutes § 42-133dd (c) (11). The plaintiffs claim that the department was required to make specific findings as to market penetration in the "Canton/Simsbury market" as well as the Bristol and Northwest sales localities. The department and FCA disagree. They argue that the hearing officer correctly discussed the Hartford sales locality as "the market area to be served by the proposed new or relocated dealer." The court agrees with the defendants. Subsection (c) (11) requires consideration of the market area to be served by the proposed new Jeep dealer. The department reasonably focused on the Hartford sales locality in which the new dealership would be established. It observed that registration effectiveness, an industry measure of market share, indicated lost sales in the Hartford sales locality and in the Bristol relevant market area as well. It further noted that the protesting dealers had been in-selling into the Simsbury trade zone for years and could continue to do so after a new Jeep dealership was established.

As FCA argues, many of the statutory factors overlap with each other. By focusing on alleged failures with respect to specific factors, the plaintiffs ignore the fact that many of the findings relate to more than one factor. Review of the decision as a whole demonstrates that the department considered each protesting dealer's sales and service activities in its relevant market area. It identified each of the protesting dealers and their relevant market areas. Final Decision, ¶¶ 1, 12 and 13. It acknowledged their significant and permanent investments in their dealerships. Id., ¶ 15. It found that all the protesting dealers provided adequate competition in the service of vehicles and met their minimum sales responsibility under their agreements with FCA. Id., ¶¶ 25 and 28. It found, however, that registration effectiveness in the Hartford sales locality was only 84 percent, despite the fact that all protesting dealers advertised in, and made sales into, that sales locality. Id., ¶¶ 26 through 28 and 37.

The department construed § 42-133dd (c) as requiring the department to balance "the interests of consumers, the local community, the establishing dealer, the vehicle manufacturer, and the existing dealers . . . ." Id., ¶ 43. This was clearly correct. Section 42-133dd (c) evidences concern for existing dealers in subdivisions (1), (5), (8), (10) and (11). Concern for the consuming public, and for competition generally, is explicitly addressed in subdivisions (3), (4) and (5) and implicit in several other subdivisions. Concern for fairness to the manufacturer is explicit or implicit in subdivisions (2), (3), (5) and (9). Concern for relocating dealers is expressly addressed in subdivision (7). Section 42-133dd (c) does not exist solely to protect the interests of existing dealers, but to assure healthy competition in the market. Healthy competition, the statute assumes, is good for the consuming public and ultimately benefits manufacturers and dealers as well. The final decision as a whole

reflects the department's consideration of the factors set out in the statute.

B

The plaintiffs next argue that the department's findings as to subdivisions (6), (7) and (8) are not supported by substantial evidence, and that the findings as to subdivisions (3) and (10) are irreconcilable. "In determining whether an administrative finding is supported by substantial evidence, a court must defer . . . to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in whole or in part." (Internal quotation marks omitted.) *Bancroft* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 391, 400, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

Under subdivision (6), the department found that on balance, allowing the addition of a Jeep dealership at the proposed location would increase competition. Final Decision, ¶ 31. The plaintiffs dispute this finding, arguing that the evidence demonstrated that vehicle pricing is at historically low levels in the relevant market areas. They also argue that there were not enough Jeep vehicles to meet demand. Finally, they argue that competition for Jeep service cannot be enhanced because Mitchell already performs Jeep service at its present location.

The plaintiffs' arguments are not well founded. There was substantial evidence that locating a dealership in an auto row near dealerships of competing brands increases interbrand competition. Such evidence came not only in the testimony of FCA's dealer placement managers and its expert witness, but also in the admissions of some of the protesting dealers on cross-examination. Jonathan Gengras, for instance, admitted that being in an auto row "stimulates competition to be among a number of dealerships where consumers can

cross-shop." Transcript, May 22, 2017, p. 155. He further admitted that the proposed location was part of an auto row and was a "great location to shop for a vehicle." Id., pp. 155–56. Domenic Papa admitted that competition provides consumers with better prices, better choices, and better attention from the dealers. Transcript, May 19, 2017, pp. 14–15.

The plaintiffs' claim that there were not enough Jeeps to meet demand was countered by evidence that FCA was building a second plant for Jeep Wranglers, one of the most popular models, and expected to increase production enough to increase sales by 24 percent within a couple of years. The hearing officer credited this evidence. See Final Decision, ¶ 36.

The plaintiffs' claim that competition for Jeep service would not be enhanced because Mitchell already services Jeeps is not persuasive. There was evidence that Mitchell was at a disadvantage in getting Jeep service work because many customers choose to service their vehicles at the dealership where they purchased it. Indeed, there was evidence that dealers use the point of sale to try to sell service contracts to enhance the likelihood that purchasers will return to that dealership for service.

The plaintiffs also claim that the department's findings with regard to subdivision (7) are not relevant to the analysis and not supported by substantial evidence. Subdivision (7) directs the department to consider the effect of a denial of a relocation request on a relocating dealer. The department acknowledged, in the final decision, that it was not required to address subdivision (7) because the protests before it involved the establishment of a new Jeep dealer rather than the relocation of an existing one. It noted, however, that the list of factors in § 42-133dd (c) is nonexclusive and deemed it appropriate to consider the effect of denying the Jeep

line to Mitchell. It found that the negative financial impact on Mitchell was well documented; Mitchell had been losing money at its present location for years. It also considered the possibility that Mitchell would be forced to relinquish its CDR franchise if not granted Jeep. It considered that termination of Mitchell's CDR franchise would adversely affect consumers who are presently using Mitchell's services at its present location.

The plaintiffs assert that the department's finding was not supported by substantial evidence because Mitchell's president admitted that Mitchell had remained in business throughout the recession and that, if he decided to stop operating the existing CDR franchise, he could sell it. But, as before, the plaintiffs discuss only the evidence that was favorable to their position and ignore the substantial evidence that supports the department's findings. The plaintiffs do not dispute that Jeep sales constitute 60 to 70 percent of the new vehicle sales at their dealerships. As demand for SUVs has increased, there has been a corresponding decrease in the demand for sedans. FCA managers testified that Jeep and light truck sales have driven the success of the business in recent years. Without the ability to sell new Jeeps, Mitchell is at a substantial disadvantage in relation to the dealers who sell all the CDJR lines. Mitchell testified that his CDR dealership had been losing money for at least six years and that if he was not allowed to add Jeep he would have to think "long and hard" about whether to continue to operate it. William Doucette, the dealer placement manager for FCA's Northeast region, testified that Mitchell was at a substantial disadvantage without Jeep. He testified that Mitchell had been unable to make needed upgrades to its Simsbury facility because it lacked the revenue from Jeep sales to support such an investment. Doucette thought it likely that Mitchell would voluntarily termi-

nate his CDR franchise if he could not add Jeep. The department did not err in considering that denying the Jeep line to Mitchell would adversely affect its business.

The plaintiffs also argue that the department's findings as to subdivision (8) are not supported by substantial evidence. Section 42-133dd (c) (8) requires the department to consider "whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes . . . ." The plaintiffs first argue that the department improperly focused on historical conditions and failed to give adequate attention to "anticipated future changes . . . ." More specifically, they claim that the automotive industry is expected to contract, that there are no "growth projects" in Canton, and school enrollment is decreasing. They next argue that the department failed to reconcile FCA's evolving "justifications" for the new Jeep dealership. They point to a June, 2014 market study which showed that FCA did not believe there was a market justification for adding Jeep in Canton at that time, and then assert that FCA reversed course in August, 2014, when Mitchell first proposed to relocate to Canton and add the Jeep brand there. The plaintiffs claim that the only thing that changed was the availability of the Canton property and an FCA manager's desire to be near Toyota.

The claim that the department failed to consider existing economic and marketing factors and anticipated future changes is refuted by the decision. Although some of the findings are addressed under headings other than the heading specifically discussing subdivision (8), it is clear that the hearing officer considered the slowing population growth (¶ 18), the peak and plateau of vehicle sales in 2016 (¶ 19), the plaintiffs' argument that the slowing

of population and household growth supported denial of the Jeep addition (¶ 20), the marketing advantages of locating a dealership on an auto row (¶ 21), the increase in new vehicle sales between 2009 and 2016, with a 172.5 percent increase in the sale of Jeeps (¶ 34), the importance of the Jeep line to FCA dealers, contributing 60 to 70 percent of all FCA's sales in the United States (¶ 36), FCA's intention to increase production of Jeeps and to introduce new Jeep models, with its expectation of increasing Jeep sales by 24 percent by 2020 (¶ 36), and the recognition that while existing dealers sell into the Simsbury trade zone, most of their sales are made near their dealerships (¶ 37). The department further observed that the existing dealers who had dealerships for brands other than FCA brands were already competing with dealers in Canton—for instance, Northwest's auto group includes a Chevrolet dealership in Torrington that competes with a Chevy dealership less than a mile from the proposed location for Mitchell's Jeep dealership, and Crowley's Nissan dealership in Bristol competes with Hoffman Nissan in Canton. The department cited to specific testimony and exhibits that supported its findings. The department did not fail to conduct a proper analysis of economic and marketing conditions, including anticipated future changes; it simply disagreed with the plaintiffs' view of the evidence. That it chose to credit FCA's witnesses and expert more often than the plaintiffs' was its prerogative as the finder of fact. As our Supreme Court and Appellate Court have observed, " 'weighing the accuracy and credibility of the evidence' is the province of the administrative agency. *Connecticut Natural Gas Corp.* v. *Public Utilities Control Authority*, 183 Conn. 128, 136, 439 A.2d 282 (1981). Reviewing courts thus 'must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any

witness, even an expert, in whole or in part.' *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989); see also *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016) (reviewing court cannot 'substitute its own judgment for that of the administrative agency on the weight of the evidence' . . .); *Tarasovic* v. *Zoning Commission*, 147 Conn. 65, 69, 157 A.2d 103 (1959) ('[i]t is not the function of the court to pass upon the credibility of the evidence heard' by administrative agency)." *Fagan* v. *Stamford*, 179 Conn. App. 440, 458, 180 A.3d 1 (2018).

The plaintiffs' emphasis on FCA's June, 2014 market study is equally unavailing. The hearing officer acknowledged that in a June, 2014 study, FCA ranked four communities as higher priorities for improved performance than Canton/Simsbury, but a follow-up study in August of 2014 recommended relocating Mitchell to the proposed location and adding the Jeep line.[6] Final Decision, ¶ 39. The hearing officer concluded that it was reasonable for FCA to adjust its priorities, in light of the popularity of the Jeep line, when Mitchell offered it the opportunity to locate a CDJR dealership at a highly visible location, on a busy thoroughfare, in close proximity to competing dealerships, that was already zoned for an auto dealership. Id., ¶¶ 21, 36, 38, 42 and 44. As the plaintiffs' own expert admitted, in the Northeast it

[6] FCA's national head of market representation, Bashar Cholagh, testified that the June, 2014 analysis was a preliminary study, based primarily on data from 2013, and the August, 2014 study was updated to reflect data through April and May of 2014, as well as insights gained from driving the market area in July, 2014. Notably, the June, 2014 study identified lost sales opportunities in the Hartford market area and recommended putting a CDJR dealership in the Simsbury trade zone. See Exhibit R2, Bates Stamp 9656. The June, 2014 study also included a trade zone map that indicated the importance of locating CDJR dealerships in auto rows near their main competitors. Id., Bates Stamp 9686.

is very difficult to find dealership locations with good frontage and good buildings that are not severely constrained by space or zoning. Id., ¶ 42. The plaintiffs disagree with the department's judgment, but it is one that was well supported by the evidence and well within the discretion afforded the department.

The plaintiffs repeatedly argue that the sole reason for FCA's change in priorities was that its market representative, Dan Cantrell, had previously been employed by Toyota and personally desired to locate Jeep dealerships near Toyota dealerships. Plaintiffs' Brief, pp. 3, 4, 15, 16, 20, 22 and 23. This argument ignores the testimony of FCA national and regional dealer placement managers, who testified about the importance of locating dealerships near their competitors, a fact acknowledged by the plaintiffs' witnesses as well. It also ignores the analysis in FCA's expert report, which the hearing officer cited frequently throughout the final decision. The hearing officer was entitled to reject the plaintiffs' argument and to credit the substantial evidence presented by FCA as to the competitive importance of locating dealerships near their main competitors.

The plaintiffs also argue that two of the department's subordinate findings are "incompatible." Under § 42-133dd (c) (3), which considers the effect on the consuming public, the department found that the consuming public would benefit from the addition of the Jeep line at the proposed location because it is convenient to shop and compare competing brands in an auto row and because it would reduce drive times to a dealership. Final Decision, ¶¶ 21 and 22. Under § 42-133dd (c) (10), which considers the economic impact of a new dealership on existing dealers, the department found that consumers would not abandon existing dealers solely based on convenience. Id., ¶ 50. These findings are not inconsistent. As the department found, both

FCA and the protesting dealers presented evidence that there would be some financial loss to existing dealers as the result of the addition of a Jeep dealership at the proposed location, but the probable amount of the loss was vigorously disputed. Id., ¶ 47. FCA presented evidence that there was sufficient lost opportunity to have the proposed location come into business and not take any sales from the existing dealers, while the protesting plaintiffs presented evidence that the proposed location would affect them economically and possibly require them to reduce the number of their employees. Considering the conflicting evidence, the department found that the protesting dealers "all have well established Jeep dealerships, with [well regarded] sales and services departments. One cannot say that the consumer will abandon the [protesting dealers'] dealerships and patronize a new dealership such as the [p]roposed [l]ocation based solely on convenience for the purchasing of a new Jeep." Id., ¶ 50. The department concluded that because Jeep sales are expected to remain strong, there would be "ample opportunity" for both the protesting dealers and Mitchell. Id., ¶ 51.

Under subdivision (3), the department found that addition of a Jeep dealership at the proposed location would be convenient for the consuming public and would reduce drive times to Jeep dealerships. Under subdivision (10), however, it found that convenience would not be the sole factor considered by consumers. It found that the protesting dealers had well established and well regarded dealerships. It is not unreasonable to infer that some consumers may prefer to continue to do business with dealers they know and trust even if a new dealer is more convenient. Moreover, a principal reason for locating a dealership in an auto row is to increase interbrand competition. There was substantial evidence to support the finding that Jeep sales were expected to remain strong and that there was "ample

opportunity" for both the protesting dealers and for Mitchell, including improving Jeep's market share in comparison to other brands. The department's findings are not inconsistent. It is not unreasonable to find that consumer behavior is affected by many factors, including convenience, loyalty, and proximity to competing choices.

C

The plaintiffs' final argument is that the department's ultimate conclusion—that there is good cause to add a Jeep dealership at the proposed location—cannot follow legally and logically from the undisputed facts. The plaintiffs present a list of purported "undisputed" facts, some of which are undisputed, some of which are not material, and some of which were disputed or countered by other evidence. It is undisputed, for instance, that the protesting dealers are located within fourteen miles of the proposed location; that is what gave them the right to file a protest. Several of the purported facts deal with Jeep sales in Canton. Even if undisputed, those facts would not be dispositive because the relevant market areas were larger than Canton. The plaintiffs assert that there is no FCA policy to place Jeep near Toyota; even if true, this assertion certainly ignores abundant evidence that FCA preferred to locate dealerships in auto rows, in close proximity to competing brands, to enhance interbrand competition. The plaintiffs assert that they all met their minimum sales requirements and had not been told they needed to improve their sales in their assigned markets or in Canton. But, as the department found, the manufacturer had wanted to establish a Jeep dealership in the Simsbury trade zone since 2007, when it first proposed to add Jeep to the Mitchell franchise in Simsbury. Its previous effort to add Jeep in the Simsbury trade zone provided notice that it believed that the Jeep brand was not adequately represented there.

In sum, the department did its job: it considered the evidence presented by the plaintiffs, it considered the evidence presented by FCA and Mitchell, and it decided which evidence to credit. It cited frequently to the testimony and report of FCA's expert, indicating that it found that evidence to be credible. It weighed the interests of the existing dealers, the consuming public, the community affected, the manufacturer, and the dealer to be most affected by its decision, Mitchell. Despite the plaintiffs' efforts to recast these matters as legal issues, the issues identified by the plaintiffs are factual in character, and the ultimate conclusion is one in which the department is afforded considerable discretion. It is not the role of this court to second-guess the factual findings and discretionary decisions of an administrative agency. See *Frank* v. *Dept. of Children & Families*, supra, 312 Conn. 411–12 ("[t]he reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (internal quotation marks omitted)).

CONCLUSION

The department's decision adequately addressed the statutory circumstances it was directed to consider. Its factual findings are supported by substantial evidence and are not inconsistent or incomplete. Accordingly, the department's decision must stand, and the plaintiffs' appeal is dismissed. Judgment shall enter for the defendants.