STATE OF CONNECTICUT *v.* NOEL BERMUDEZ (AC 41864)

Elgo, Moll and Devlin, Js.

Syllabus

Convicted of the crime of felony murder in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that certain of the trial court's evidentiary rulings constituted harmful error that entitled him to a new trial, and that other evidentiary rulings by the court deprived him of his constitutional rights to present a defense and to confront witnesses. The defendant and his brothers, B and S, robbed the victim when he returned home at night after closing the bar that he owned. The defendant then shot and killed the victim. Twelve years later, A, the estranged wife of S, gave the police a written statement that implicated the defendant, B and S in the victim's death. A, who knew that the defendant, B and S were affiliated with gangs, delayed providing information to the police out of fear that the defendant and S would retaliate against her or her family. S, who had regularly abused A throughout their relationship, beat her on the night of the shooting and threatened to kill her mother. While the defendant was incarcerated on unrelated charges during the twelve years after the shooting, he instructed A to write intimate and salacious letters to him so that he could discredit her in the event that she were to testify against him. The trial court admitted evidence that the defendant and S were affiliated with gangs, and that A and her children had been relocated out of state multiple times after A gave her statement to the police. The court refused to permit defense counsel to introduce the letters into evidence, limited his inquiry into A's birth control practices and precluded him from cross-examining her about the termination of her employment. *Held*:

1. The trial court did not abuse its discretion by admitting into evidence A's testimony that the defendant and S were affiliated with gangs or that she and her children were relocated after she gave her statement to the police:

   a. Evidence that the defendant and S were affiliated with gangs was relevant and highly probative to explain why A delayed twelve years before informing the police about the victim's murder, as she testified that she deeply feared gang reprisals and was afraid for her safety and that of family members, the court carefully balanced the probative value of her testimony against its potential for unfair prejudice, the court's limiting instructions to the jury after A testified minimized the prejudicial impact of her testimony, and the court instructed the jury in its final charge that the purpose of her testimony was to show why she was afraid to disclose information about the murder or why she disclosed it at the time that she did; moreover, A's testimony was not cumulative in establishing that she feared the defendant, B and S, as S's threats

and history of physical abuse of A was a distinct and separate basis for her fear, and evidence of the defendant's gang affiliation was pertinent to establish that her fear extended to the defendant and B, and illustrated the extent to which she feared retaliation by other gang members.

b. Evidence of A's relocation was highly probative and relevant with respect to her delay in providing information to the police about the shooting, which was a central issue in the case, as the jury reasonably could have concluded that A's willingness to subject herself to the upheaval and disruption of moving herself and her children multiple times was credible evidence of her belief that she and her family were not safe; moreover, the probative value of A's relocation testimony was not outweighed by its prejudicial impact on the defendant, as the court restricted the prosecutor from referencing the state's witness protection program (§§ 54-82t and 54-82u), A testified without referencing the witness protection program or the phrase, "at state expense," and, although the prosecutor's use of the phrase, "was relocated," in closing argument to the jury was prejudicial to the defendant, it did not have the same unduly prejudicial impact as "witness protection program" or "at state expense"; furthermore, references to the witness protection program were passive and infrequent, and the prosecutor did not exploit that evidence.

2. The trial court improperly refused to admit into evidence the letters that A wrote to the defendant but properly precluded defense counsel from questioning A about the termination of her employment and limited his inquiry of her as to her birth control practices:

a. Contrary to the defendant's assertion that the trial court's rulings violated his rights to present a defense and to confront witnesses, the defendant's claims were evidentiary, rather than constitutional, as the record demonstrated that he was afforded multiple avenues of impeachment in cross-examining A, who was the state's key witness, and that he took full advantage of that latitude by rigorously cross-examining her with respect to relevant lines of inquiry, most importantly, her fear of the defendant, B and S, and that he sought to undermine A's credibility through the testimony of other witnesses.

b. The trial court erred in refusing to admit into evidence the letters that A wrote to the defendant but the defendant did not satisfy his burden to establish that the error substantially affected the verdict and therefore was harmful; defense counsel took full advantage of the court's permission to provide the gist of the graphic content of the letters and was entitled to quote the nonsalacious details of the letters, counsel was afforded wide latitude in his cross-examination of A, which lasted one and one-half days and included examination about the veracity of her explanation for authoring the letters, the cross-examination of A sought to establish the defense theory that she was motivated to come forward to retaliate against the defendant and S for the ending of her relationship with S, and there was corroborating evidence that supported A's testimony.

c. The trial court did not abuse its discretion in refusing to allow defense counsel to examine A about the termination of her employment, as the reasons for the termination would have injected a collateral issue into the trial.

d. There was no merit to the defendant's claim that the trial court improperly restricted his ability to cross-examine A about her birth control regimen; the court allowed some inquiry into the topic but properly determined that further questioning was irrelevant because it would have inappropriately focused on a matter far too attenuated from the material issues in the case.

3. The defendant could not prevail on his claim that the prosecutor made numerous statements during closing argument to the jury that referred to facts not in evidence; the prosecutor's remark that A had testified consistently in previous proceedings was based on reasonable inferences to be drawn from the evidence and was a response to defense counsel's having highlighted a single prior inconsistency in A's testimony, the prosecutor's remark that the state had received no benefit from A's testimony was merely an inadvertent misstatement in reference to reward money that was disbursed by the governor's office for information about the shooting, as it was obvious from the context of the statement that the prosecutor meant to refer to evidence that the state's attorney's office did not provide any reward to A, the prosecutor's ambiguous statement about who was with A when she withdrew money from her bank account was not intended to suggest that A had testified consistently as to that fact at previous proceedings but that she had testified consistently as to that fact at the defendant's trial, the prosecutor's remark that A knew of the reward at the time of the prior proceedings was clearly an invitation for the jury to draw a reasonable inference from the fact that she knew of the reward before any proceedings had taken place, the prosecutor's remark that B had moved in with A, uninvited, to keep watch over her when the defendant and S were incarcerated was a reasonable inference that could be drawn from the evidence, and the record substantiated the prosecutor's statement that the letters A had written to S were a means to discredit her and was a proper summation of A's testimony about the letters.

Argued September 6, 2019—officially released February 18, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of Waterbury, where the court, *K. Murphy*, *J.*, granted the state's motion to preclude certain evidence and granted in part the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict

of guilty of felony murder; subsequently, the court declared a mistrial as to the charge of murder and dismissed the charge of murder; judgment of guilty of felony murder, from which the defendant appealed and the state, on the granting of permission, appealed; thereafter, this court dismissed the state's appeal. *Affirmed.*

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

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen, Jr.*, and *Cynthia S. Serafini*, senior assistant state's attorneys, for the appellee (state).

Opinion

ELGO, J. The defendant, Noel Bermudez, appeals from the judgment of conviction, rendered after a jury trial, of one count of felony murder in violation of General Statutes § 53a-54c. On appeal, the defendant alleges evidentiary error, claiming that the trial court improperly (1) admitted testimony that he was a member of a gang and that a state's witness had to be relocated as a result of inculpating the defendant, and (2) refused to admit into evidence letters written by a state's witness to the defendant while the defendant was incarcerated, prevented the defendant from questioning the state's witness about the termination of her employment, and prevented the defendant from questioning the state's witness about her birth control practices. Additionally, the defendant claims that the prosecutor improperly referred to facts not in evidence during closing argument to the jury. We affirm the judgment of the trial court.[1]

[1] On March 27, 2019, this court granted the defendant's motion to dismiss the state's appeal from the trial court's dismissal of the murder charge. In the order of dismissal, this court permitted the parties to file supplemental briefing on that issue, which would be addressed in the event that the defendant were awarded a new trial. Because we affirm the judgment of conviction, we need not reach that issue.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In the early hours of April 11, 1998, Wilfred Morales, the owner of Morales Café, was closing his bar for the night. As part of his routine, Morales counted the cash and checks he received from the patrons and placed the proceeds in a blue bank bag. At approximately 2:30 a.m. that morning, Morales was shot and killed on a street near his home in Waterbury.

Twelve years later, Damaris Algarin-Santiago,[2] the estranged wife of the defendant's brother, Victor Santiago, provided a written statement to the police. In that statement, Algarin implicated the defendant, Santiago, and another brother of the defendant, Thomas Bonilla, in Morales' death. The defendant ultimately was charged with the murder of Morales.

Algarin was the state's chief witness in its prosecution of the defendant. Algarin testified that she had been in a relationship with Santiago since 1993 and that they eventually married in 2004.[3] Throughout their time together, Santiago abused Algarin on a regular basis, both physically and emotionally. The couple had two children at the time of Morales' murder.

In her testimony at trial, Algarin recounted the events of April 11, 1998. At approximately 3 a.m., Algarin was awakened by Santiago, who was screaming at her to come downstairs. Upon doing so, Algarin saw a coffee table full of money, checks,[4] and a blue leather bag with a zipper. She also saw Bonilla counting the checks and cash as the defendant dismantled a pistol in the kitchen and Santiago cleaned the pistol parts with baby oil to remove fingerprints. When Algarin asked what had hap-

[2] For clarity, we refer to Algarin-Santiago as Algarin.

[3] Algarin testified that the two married so that she would not be able to testify against Santiago.

[4] Algarin testified that she recognized some of these checks as Social Security checks.

pened, Santiago immediately started to beat her. The three brothers continued to argue about what had transpired and were upset about the number of checks relative to the amount of cash. Algarin again asked what had happened, and the defendant responded that they had shot Morales.

Algarin testified that the defendant and his two brothers were in need of money and thus sought to rob Morales that night, believing that the Good Friday holiday would result in a large amount of cash. To become familiar with Morales' routine, Algarin testified that Santiago stalked Morales for some time. Thereafter, Santiago planned to act as the driver while Bonilla and the defendant would lie in wait in the bushes to commit the robbery. When Bonilla and the defendant confronted Morales on the night in question, the defendant shot him to death. The defendant gave Algarin two explanations for doing so: (1) he believed Morales was reaching for a gun, and (2) he wanted revenge due to his belief that Morales had shot Santiago some years earlier.[5]

Upon arriving at Algarin's home after the shooting, the defendant and his brothers burned the checks in the kitchen sink,[6] cleaned the weapons of fingerprints, and placed the dismantled pistol parts into three separate bags. To further conceal their crime, the three brothers burned their clothing in a barrel behind the house and cleaned the car to remove gun residue. When Santiago returned, he again started to beat Algarin after her repeated inquiries into what had transpired and threatened to kill her mother. When she refused to go with him to dispose of the bags filled with the gun parts, Santiago continued to beat Algarin until the defendant intervened. Reluctantly, she agreed and accompanied

[5] Santiago was frustrated that Morales had been acquitted of shooting him and was further enraged that his civil action against Morales was unlikely to result in a large monetary reward.

[6] The brothers decided to burn the checks after Algarin refused to deposit them in her account.

Santiago to dispose of the bags. When the third bag was thrown into the Naugatuck River, Santiago again threatened to kill Algarin, her mother, and their children, stating that "[n]ow you know what we're capable of."

Subsequently, the defendant and his brothers concocted an alibi that they and Algarin had been celebrating Bonilla's return from prison by eating fish for Good Friday at the home of Santiago's mother. Later that day, Santiago and Bonilla accompanied Algarin to deposit the cash into her bank account via an automated teller machine (ATM). Algarin testified that she deposited three separate envelopes of cash, which she believed to have totaled $3000. When the cash was cleared by the bank on the following Monday, Santiago and Bonilla went with Algarin to make a withdrawal, at which time Algarin gave the cash to Santiago.

From 1998 to 2010, Algarin was questioned by the police on approximately seven occasions. Each time, she stuck to the manufactured alibi out of fear for her safety and the safety of her family. Knowing that the defendant, Santiago, and Bonilla were affiliated with nationwide gangs,[7] Algarin was particularly afraid of reprisals should she provide the police with any information. During this period, however, she did divulge some information to three people. Approximately one year after Morales' murder, Algarin revealed to Ralph C. Crozier, an attorney whom she knew, that the defendant and his two brothers had been involved in the homicide.[8] She also provided details of the homicide to Sally

[7] Algarin testified that the defendant and Santiago were members of the Latin Kings, while Bonilla was a member of "Netas."

[8] Crozier had represented Algarin, the defendant, Santiago, and various family members on numerous matters prior to the 1998 murder of Morales. In fact, Crozier represented Santiago in his civil action against Morales. Crozier also testified that Algarin attempted to get away from Santiago on multiple occasions and that she stayed with Santiago because she feared him. He also stated that had Algarin gone to the police with information about the murder, "she would have definitely been murdered, based on who the people were."

Roden-Timko, a coworker at Waterbury Hospital, who would confirm the interaction in a statement given to the police in 2010. Algarin later discussed details about the homicide with Luis Maldonado, a person she began dating in 2009 while Santiago was incarcerated for an unrelated matter.

Despite being incarcerated throughout much of the twelve year interval, Santiago continued to threaten Algarin. After a newspaper article was published on the investigation into Morales' murder, the defendant, who was also incarcerated on an unrelated criminal matter during the twelve year interval, instructed Algarin to write to the defendant three letters that were intimate and particularly salacious in nature. The defendant had requested the letters for the purpose of discrediting Algarin in the event that she were ever to testify against him.[9]

In 2010, Maldonado was arrested in connection with an unrelated crime. Following his arrest, Maldonado provided the police with details about Morales' murder and further indicated that Algarin could provide more information. Algarin subsequently was visited by a detective from the Waterbury Police Department and taken to the police department. Fearing that Maldonado had disclosed information and concerned that he would be murdered by Santiago if he were incarcerated, Algarin abandoned the alibi and provided a seven page statement to the police detailing the events of Morales' murder.

On February 16, 2017, the defendant was charged by substitute information with one count of murder in violation of General Statutes § 53a-54a and one count of felony murder in violation of § 53a-54c. Following a jury trial, the defendant was found guilty of felony murder. When the jury became deadlocked on the charge

[9] Algarin also wrote a series of letters to Santiago during his incarceration for an unrelated matter. These letters did not contain the sexually graphic content found in the letters she wrote to the defendant.

of murder, the court declared a mistrial on that charge.[10] The court thereafter sentenced the defendant to a total effective term of sixty years of incarceration. This appeal followed.

I

On appeal, the defendant first raises two claims of error with respect to the admission of certain evidence. The defendant alleges that the court improperly admitted evidence (1) of his and Santiago's gang affiliations and (2) that Algarin was relocated by the state. According to the defendant, these allegedly improper rulings constituted harmful error. We disagree.

Before addressing each of the challenged evidentiary rulings, we first set forth the applicable standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] 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." (Internal quotation marks omitted.) *State* v. *Santiago*, 187 Conn. App. 350, 357, 202 A.3d 405, cert. denied, 331 Conn. 902, 201 A.3d 403 (2019).

A

We first address the defendant's claim that the trial court improperly admitted evidence that both he and Santiago were gang members. According to the defendant, because the crime charged was not criminal activity pursuant to gang membership, this evidence was both irrelevant and highly inflammatory.[11] In response, the state argues that those gang affiliations were highly

[10] The court would eventually dismiss the murder charge on June 9, 2017.

[11] In his brief, the defendant states, in part, that testimony of his and his brothers' gang affiliations was "irrelevant propensity" evidence. Although the defendant asserts that the state "exploited [the evidence of the defendant's gang affiliation] and used it for propensity," he concedes in his reply brief that he is not claiming such evidence would be admissible only if it

probative in explaining why Algarin waited twelve years to provide a statement to the police. We agree with the state.

The following additional facts are relevant to this claim. Prior to his trial, the defendant filed a motion in limine in response to the state's notice of its intent to introduce evidence of the gang affiliations. Specifically, the state sought to introduce testimony from Algarin that the defendant and Santiago were members of the Latin Kings gang. The purpose of this testimony, the state argued, was to illustrate the extent to which Algarin feared retaliation from Santiago, the defendant, or other gang members. According to the state, Algarin's fear of the defendant and his brothers bore directly on her reason for waiting twelve years to provide the police with inculpating evidence.

After balancing the probative value of the evidence against the danger of unfair prejudice, the court allowed the testimony for the limited purpose proposed by the state. As the court explained, "to the extent that the state is going to introduce evidence that . . . [Algarin] was afraid to disclose this [evidence] because . . . the defendant and/or Victor Santiago was a member of the Latin Kings street gang; that they are a group of people that have access to people in many places; and that they have access to weapons, I would allow it just for that purpose. I would not allow the introduction of that evidence to go to whether [the defendant] did this crime, and so I would do a limiting instruction regarding the introduction of that evidence if that comes in as an explanation for her delay in disclosing this."

During the state's direct examination of Algarin, the defendant again objected to the introduction of testimony concerning the gang affiliations. Outside the presence of the jury, the court reiterated that it would

fell within one of the exceptions set forth in § 4-5 of the Connecticut Code of Evidence. We therefore do not address that issue.

allow the testimony to establish Algarin's fear of reprisals but cautioned that it would give a limiting instruction that gang membership was not to be used for any other purpose. Algarin then testified that the delay was a result of her fear that she, her family, and Maldonado would be retaliated against by members of the gangs with which the defendant and Santiago were affiliated. Immediately after this testimony, the court provided a limiting instruction and cautioned the jury that any evidence of gang affiliations was admitted only "to show why the witness delayed or why the witness disclosed at a certain time."

The relevant legal principles governing our review of this claim are well settled. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tend[s] to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429, 64 A.3d 91 (2013); see also Conn. Code Evid. § 4-1 ("[r]elevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence" (internal quotation marks omitted)). "To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . All that is required is that the evidence tend[s] to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Citation omitted; internal quotation marks omitted.) *State* v. *Wilson*, supra, 429. "The trial court has wide discretion to determine the relevancy of evidence . . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's [rulings on these bases]." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn.

149, 181, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

Even if evidence is deemed relevant, § 4-3 of the Connecticut Code of Evidence provides that such evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . or by considerations of . . . needless presentation of cumulative evidence." "Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the [jurors]." (Internal quotation marks omitted.) *State* v. *Wilson*, supra, 308 Conn. 429–30. Therefore, "[t]o be unfairly prejudicial, evidence must be likely to cause a disproportionate emotional response in the jury, thereby threatening to overwhelm its neutrality and rationality to the detriment of the opposing party. . . . A mere adverse effect on the party opposing admission of the evidence is insufficient. . . . Evidence is prejudicial when it tends to have some adverse effect [on] a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 575–76, 46 A.3d 126 (2012). Additionally, evidence may be considered cumulative "if it multiplies witnesses or documentary matter to any one or more facts that were the subject of previous proof. . . . The court's power in that area is discretionary. . . . In precluding evidence solely because it is cumulative, however, the court should exercise care to avoid precluding evidence merely because of an overlap with the evidence previously admitted." (Internal quotation marks omitted.) *State* v. *Porfil*, 191 Conn. App. 494, 531, 215 A.3d 161, cert. granted on other grounds, 333 Conn. 923, 218 A.3d 67 (2019).

We first address the issue of relevancy. Both the defendant and the state agree that the reason for Algarin's twelve year delay in providing information to the police—and, therefore, Algarin's credibility—was a central issue at trial. To explain the delay, Algarin testified that she deeply feared that providing information to the police would result in gang reprisals. She further testified that she not only was afraid for her own safety but also was concerned that her children, Maldonado, and other family members would be subjected to retaliation.

This court has previously held that evidence of gang membership is relevant "to aid the trier to determine" why a person delayed before reporting a crime. *State* v. *Cruz*, 56 Conn. App. 763, 771–72, 746 A.2d 196 (2000), aff'd, 260 Conn. 1, 792 A.2d 823 (2002). In that case, this court noted that the victim's more than two year delay in reporting the defendant's sexual assault of her was "an issue directly involving [her] credibility." Id., 771. The victim's belief that the defendant was a gang member "was probative of that issue raised." Id., 772. There similarly is little doubt that the evidence at issue here was relevant to explain Algarin's state of mind when she delayed for twelve years before providing the police with information about Morales' murder.[12]

[12] The defendant further suggests that evidence of gang membership may be admitted only if the crime charged is related to gang activity or is probative of a defendant's motive. We believe this argument to be unavailing. First, neither of the two cases from our state cited by the defendant stands for that proposition. See *State* v. *Johnson*, 82 Conn. App. 777, 783–84, 848 A.2d 526 (2004) (trial court did not abuse its discretion in admitting evidence of gang membership to establish motive and that was further relevant to issues in case); *State* v. *Watts*, 71 Conn. App. 27, 36–37, 800 A.2d 619 (2002) (trial court did not abuse its discretion in admitting evidence of defendant's gang membership to prove motive). Second, as discussed, this court has implicitly rejected that argument. See *State* v. *Cruz*, supra, 56 Conn. App. 771–72 (no abuse of discretion in admission of testimony as to defendant's gang membership to explain delay in reporting crime, despite crime having been unrelated to gang activity).

Having concluded that the evidence was relevant, we next turn to the defendant's argument that the trial court abused its discretion by failing to properly balance the probative value of the evidence with the danger of unfair prejudice. Moreover, the defendant claims that the evidence was merely cumulative with respect to Algarin's fear of the defendant and his brothers. Upon a careful review of the record, we are satisfied with the court's cautious approach in balancing the probative value of Algarin's testimony with its prejudicial effect.

In hearing argument on the defendant's motion in limine, the court explicitly noted its need to carefully balance the probative value of the evidence to "make sure that it does not result in unfair prejudice . . . ." To quell the potential for unfair prejudice in light of the highly probative value of the evidence, the court expressed its intent to limit both the scope of Algarin's testimony and the purpose for which evidence of gang affiliation was to be admitted.[13] Immediately following Algarin's testimony on the topic, the court instructed the jury that the only purpose of this evidence was "to show why [Algarin] was afraid to disclose or why [Algarin] disclosed at the time that she did. And it's not admitted for any other purpose." In its jury charge, the court again cautioned the jury about the use of this evidence, instructing the jury that the evidence was not "admitted to prove the bad character, propensity, or criminal tendencies of the defendant, [Santiago], or

[13] We again note that, at the hearing on the motion in limine, the court expressly stated that, "to the extent that the state is going to introduce evidence, that is, Algarin . . . was afraid to disclose this because of the defendant and/or [Santiago] was a member of the Latin Kings street gang; that they are a group of people that have access to people in many places; and that they have access to weapons, I would allow it just for that purpose. I would not allow the introduction of that evidence to go to whether [the defendant] did this crime, so I would do a limiting instruction regarding the introduction of that evidence if that comes in as an explanation for her delay in disclosing this."

[Bonilla]. . . . You may consider such evidence if you believe it and further find that it logically . . . supports the issue for which it is being offered by the state, but only as it may bear on the issue of fear of [Santiago], the defendant, and [Bonilla] on the part of [Algarin] . . . .'' The court further explained that to use the evidence for any other purpose would ''predispose your mind uncritically to believe that the defendant and the others may be guilty of the offenses here charged merely because of the alleged . . . gang membership.''

Additionally, we disagree with the defendant that the evidence was merely cumulative in establishing Algarin's fear of the defendant and his brothers. First, Santiago's threats and history of physical abuse was a distinct and separate basis for her fear. It did little to establish the extent to which she feared Santiago, namely, why she would fear him despite his having been incarcerated. Second, evidence of the defendant's gang affiliation was pertinent to establish that, in addition to Santiago, Algarin's fear extended to both the defendant and Bonilla.[14] Third, this evidence illustrates the extent to which Algarin feared retaliation by other gang members against herself and family members. For those reasons, the court acted well within its ''wide and liberal discretion'' to determine that the evidence was not ''repetitious, remote or irrelevant.'' (Internal quotation marks omitted.) *State* v. *Gutierrez*, 132 Conn. App. 233, 237, 31 A.3d 412 (2011).

In sum, the evidence that the defendant and Santiago were affiliated with nationwide gangs was highly probative to explain why Algarin delayed twelve years before coming forward to the police. The court was cognizant

[14] This evidence became particularly relevant considering Algarin's later testimony. Specifically, Algarin subsequently admitted that she did not have problems with the defendant and that the defendant had, in fact, intervened on her behalf on multiple occasions when Santiago became physically abusive. In light of this testimony, the defendant's gang affiliations became especially significant to explain why Algarin continued to fear the defendant and his cohorts despite his history of acting on her behalf.

of the potential for this evidence to inflame the jurors' emotions and thus carefully balanced its probative value against the potential for unfair prejudice. Because of the inherently prejudicial nature of this testimony, we note that the court's "[l]imiting instructions serve[d] to minimize the prejudicial impact" of the evidence of gang affiliations. (Internal quotation marks omitted.) *State* v. *Brown*, 199 Conn. 47, 58, 505 A.2d 1225 (1986). We therefore conclude that the trial court did not abuse its discretion by admitting Algarin's testimony regarding the gang affiliations of the defendant and Santiago.

B

The defendant next claims that the court improperly admitted evidence that Algarin was relocated by the state immediately after providing her statement to the police. In particular, the defendant argues that this testimony unfairly bolstered her credibility, was unduly prejudicial, and suggested that he was a violent person. In response, the state argues that the evidence was properly admitted to show the hardship that Algarin endured and her fear of retaliation as a result of coming forward to testify.[15] The state further argues that, even if the evi-

[15] The state contends that at no point did it "[elicit] testimony that [Algarin] was in the 'witness protection program' or that she had relocated at state expense." See General Statutes §§ 54-82t and 54-82u (codifying state's protective services program for witnesses). According to the state, the only testimony elicited from Algarin on this issue was that "she and her family relocated outside of Connecticut multiple times" after she provided a statement to the police. The state fails to appreciate the implications of its use of the passive voice in its direct examination of Algarin, as the following exchange illustrates:

"[The Prosecutor]: After you gave the statement to the Waterbury police in April of 2010, you never continued to live in Waterbury, did you?

"[Algarin]: No.

"[The Prosecutor]: And in fact, you *were relocated* out of this state with your four children, correct?

"[Algarin]: Yes.

"[The Prosecutor]: And Mr. Maldonado was relocated as well, correct?

"[Algarin]: Yes.

"[The Prosecutor]: And you *were relocated* on more than one occasion, correct?

"[Algarin]: Yes." (Emphasis added.)

dence was improperly admitted, the error was harmless. We conclude that the court did not abuse its discretion under the particular circumstances of this case.

The following additional facts are relevant to this claim. At trial, the prosecutor asked Algarin whether she continued to live in Waterbury after giving her statement to the police. The defendant immediately objected, believing that the prosecutor was about to elicit evidence about the witness protection program. See footnote 18 of this opinion. Outside the presence of the jury, the defendant argued that any testimony regarding Algarin's placement in the witness protection program would be unduly prejudicial. The defendant further asserted that this testimony "emphasizes the fact that the government agency, whether it's a state or federal, believes [Algarin] is in danger and [has] paid for her care since the time of this so-called disclosure." In response, the state argued that evidence of Algarin's relocation was probative of her fear of retaliation. The court agreed that Algarin should not refer to the "witness protection program" but ruled that the state could elicit details on how her life has been impacted since the disclosure, including how she was relocated at the state's expense. The court thereafter instructed Algarin not to use the phrase, "witness protection program."[16] Algarin subsequently testified that she, her children, and Maldonado were relocated out of the state and had continued to be relocated numerous times. The state referenced this fact in its closing argument, noting that Algarin was "immediately relocated with her four children" after giving her statement to the police, and that she was "still in relocation, still in fear of the three individuals."

The state's posing of the question in the passive voice—that Algarin *was* relocated—clearly connotes that a third party, presumably the state, was actively involved in her relocation. Taking Algarin's testimony in its entirety, we conclude that evidence that Algarin *was* relocated alludes to her participation in the witness protection program.

[16] According to the court, using the phrase "witness protection program" had a "more official sound to it."

We now set forth the relevant legal principles governing this claim. "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." (Internal quotation marks omitted.) *State* v. *Alex B.*, 150 Conn. App. 584, 593, 90 A.3d 1078, cert. denied, 312 Conn. 924, 94 A.3d 1202 (2014). "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *State* v. *Grant*, 179 Conn. App. 81, 90, 178 A.3d 437, cert. denied, 328 Conn. 910, 178 A.3d 1041 (2018). "[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." (Internal quotation marks omitted.) *State* v. *LeBlanc*, 148 Conn. App. 503, 509, 84 A.3d 1242, cert. denied, 311 Conn. 945, 90 A.3d 975 (2014). "Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Miguel C.*, supra, 305 Conn. 578–79.

We first note that evidence of Algarin's relocation was highly probative and relevant with respect to a central issue in the case: Algarin's delay in reporting her knowledge about the murder to the police due to her fear of retaliation by the defendant and Santiago. See *State* v. *Cruz*, supra, 56 Conn. App. 771–72. The jury reasonably could conclude that Algarin's willingness to subject herself to the upheaval and disruption of moving

herself and her four children multiple times was credible evidence of her belief that, due to the defendant's gang affiliation, she and her family were not safe. Whether such evidence should have been excluded because it was unduly prejudicial is a matter of first impression in this state. "In the absence of authoritative Connecticut case law . . . we turn for guidance to federal law." *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 88, 931 A.2d 237 (2007); see also *Red Maple Properties* v. *Zoning Commission*, 222 Conn. 730, 736, 610 A.2d 1238 (1992) (looking to federal Circuit Courts of Appeals for guidance on matter of first impression).

A number of federal Circuit Courts of Appeals that have addressed the issue have cautioned that admitting evidence of a testifying witness' placement in a witness protection program "must be handled delicately." *United States* v. *Partin*, 552 F.2d 621, 645 (5th Cir.), cert. denied, 434 U.S. 903, 98 S. Ct. 298, 54 L. Ed. 2d 189 (1977); see also *United States* v. *Melia*, 691 F.2d 672, 675 (4th Cir. 1982) (evidence of witness' participation in witness protection program should be admitted "with great caution"). "Although disclosure of such participation must be handled delicately . . . so as to minimize the possibility that the jury will infer that the defendant was the source of danger to the witness, such testimony is permissible so long as the prosecutor does not attempt to exploit it." (Citation omitted; internal quotation marks omitted.) *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); see also *United States* v. *Ciampaglia*, 628 F.2d 632, 640 (1st Cir.) (risk of undue prejudice to defendant by government's reference to witness' participation in "witness protection program" generally minimal when not exploited by prosecution), cert. denied, 449 U.S. 956, 101 S. Ct. 365, 66 L. Ed. 2d 221 (1980), and cert. denied sub nom. *Bancroft* v. *United States*, 449 U.S. 1038, 101 S. Ct.

618, 66 L. Ed. 2d 501 (1980). This is especially so when testimony implies that the witness' participation in the witness protection program was predicated on threats made by the defendant. See *United States* v. *Frankenberry*, 696 F.2d 239, 242 (3d Cir. 1982) (evidence of witness' participation in witness protection program proper when prosecution "does not exploit any inference of threat from the defendant"), cert. denied, 463 U.S. 1210, 103 S. Ct. 3544, 77 L. Ed. 2d 1392 (1983); cf. *United States* v. *Vastola*, 899 F.2d 211, 235–36 (3d Cir.) (only slight potential for prejudice when testimony "only vaguely suggests" that witness was placed in witness protection program due to threats by defendant), vacated and remanded, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990). However, such evidence may be introduced "to counter any inference of improper motivation or bias and, under some circumstances, may [be presented] on direct examination in anticipation of a defense attack upon the witnesses' credibility." *United States* v. *Melia*, supra, 675; see *United States* v. *Ciampaglia*, supra, 639–40 (no reversible error when evidence of witness' participation in witness protection program brought out on direct examination). As the United States Court of Appeals for the Fourth Circuit has observed, "[t]here can be no simple formula with which to calculate how much evidence concerning the [w]itness [p]rotection [p]rogram is appropriate and permissible in a given case to counter defense attempts to discredit [g]overnment witnesses. . . . The trial court must exercise its discretion, bearing in mind the purpose of the evidence—to rebut, in appropriate circumstances, the appearance of special treatment and improper motivation or bias." *United States* v. *Melia*, supra, 676. Notably, the previously discussed authority does not hold that references to a witness protection program are per se unduly prejudicial.

We believe *Melia* sets forth a persuasive approach to balancing these considerations. In that case, the Fourth

Circuit was presented with the question of whether extensive testimony detailing two key government witnesses' participation in the federal witness protection program entitled the defendant to a new trial. Id., 674–75. During the defendant's trial on a charge of receiving stolen goods, the government presented overwhelming evidence concerning one of its key witness' participation in the witness protection program, including testimony from a number of federal agents involved with the program. Id., 675–76. The court thus concluded that the "dramatic" testimony regarding the witness protection program "was excessive—an abuse by the government of its privilege to utilize this potentially volatile evidence." Id., 676. Because the result of the trial hinged essentially on credibility, the court reasoned that "[i]t [was] quite possible that the jury considered this impressive testimony as positive evidence of [the defendant's] bad character and guilt" while also bolstering the credibility of the government witnesses. Id.

In the present case, in weighing the probative value of the relocation testimony against its prejudicial impact on the defendant, we are mindful of the principle that relevant evidence adverse to a party is always prejudicial. E.g., *State* v. *Wilson*, supra, 308 Conn. 429; see also *Chouinard* v. *Marjani*, 21 Conn. App. 572, 576, 575 A.2d 238 (1990) ("[a]ll evidence adverse to a party is, to some degree, prejudicial"). We, therefore, consider whether the evidence was *unfairly* prejudicial to the defendant. We are further guided by the principle that "the imprimatur of the [state] . . . may induce the jury to trust the [state's] judgment rather than its own view of the evidence." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015).

Here, the court restricted the state from explicitly referencing the witness protection program, although it allowed the state to question Algarin about her relocation at "state expense . . . ." As we noted previously,

Algarin testified that she, her four children, and Maldonado "were relocated," without referencing either the witness protection program or the phrase, "at state expense . . . ." In its summation to the jury, the state argued that Algarin was "immediately relocated with her four children" after she gave her statement to the police and that she was "still in relocation, still in fear of the three individuals." The prejudice to the defendant was evoked by the use of the passive voice—"was relocated," which alluded to a third party, presumably the state, as having facilitated Algarin's relocation. See footnote 15 of this opinion. The state could have elicited relevant testimony about her fear of retaliation without implicating the state's involvement by asking her why she was no longer living in Waterbury and how many times she had moved. The offending phrase, "was relocated," which we conclude was prejudicial, does not, however, have the same unduly prejudicial impact as "witness protection program" or at "state expense."

The case of *United States* v. *Deitz*, 577 F.3d 672, 689 (6th Cir. 2009), cert. denied, 559 U.S. 984, 130 S. Ct. 1720, 176 L. Ed. 2d 201 (2010), is analogous to the circumstances of the present case. In *Deitz*, the United States Court of Appeals for the Sixth Circuit addressed the question of whether evidence of various witnesses' participation in the witness protection program was prejudicial and had no relevance to a charge against the defendant of conspiracy to possess and to distribute drugs or to his involvement in a gang related shooting. Id., 688–90. The court rejected that argument, holding that the evidence "was relevant to the [gang's] history of violence and reputed practice of retaliating against witnesses and informants.'' Id., 689. In doing so, it stressed its "disapproval of such references by a prosecutor when the need for protection is not obvious, relevant, nor made an issue by defense counsel . . . ." (Internal quotation marks omitted.) Id. That the prosecutor neither used evidence of the witness protection

program to enhance the witnesses' credibility nor implied that the defendant was the source of threats to the witnesses assuaged any risk of undue prejudice. Id.

Given this guidance, we are persuaded that the probative value of the relocation testimony was not outweighed by the prejudicial impact to the defendant.[17] The court, therefore, did not abuse its discretion in permitting the testimony. We emphasize that this is so despite the court's invitation to the prosecutor to reference that Algarin was relocated "at state expense . . . ." As the record indicates, the court believed that the state was entitled to bring out how Algarin's life was drastically affected as a prophylactic measure in anticipation that Algarin would be cross-examined on her claim that she feared retaliation.[18] To the extent

[17] To support his argument, the defendant heavily relies on *State* v. *Harris*, 521 N.W.2d 348 (Minn. 1994). However, unlike the circumstances here, the prosecutor in that case "did precisely what the *Melia* court warned against" by making the witness' participation in the witness protection program "an important focus" of her direct examination. Id., 352. Accordingly, for the same reasons that *Melia* is distinguishable here, so, too, is *Harris*.

[18] We note that the record of the court's deliberations on the relocation testimony reveals some confusion between the court and defense counsel regarding the court's observation that the defendant could use the relocation testimony in his favor. In particular, the court suggested that the defendant could cross-examine the witness on the value of relocation benefits she received as animating the witness' motivation to lie. The record indicates that, in response, defense counsel appears to confirm that he would elicit testimony, for impeachment purposes, as to how much Algarin received in state benefits as to relocation, as the following colloquy demonstrates:

"The Court: All right. Remind me, what is it—is there an objection to something at this point?

"[Defense Counsel]: Yes. I think [the prosecutor is] trying to get into the witness protection program. . . .

"The Court: And what's the objection to that evidence?

"[Defense Counsel]: Because I think it's unfair to the defendant.

"The Court: Why?

"[Defense Counsel]: Because it lends credibility to her story, which is a story, I believe, at this point.

"The Court: Well, the truth is—again, you're subject to cross-examination. I instruct the jury when they evaluate witnesses to determine whether they have any motive to lie, whether they receive any benefit to, on one hand, you can argue they receive the benefit because they're relocated to another state. On the other hand, the state could argue that it has caused extreme

disruption in their life, and so therefore, it's a lack of motive to get involved in this. So, again, I think it cuts both ways, but it's certainly relevant. I don't see that it's prejudicial to the defendant.

"[Defense Counsel]: I suspect that it is unduly prejudicial to my client.

"The Court: And why?

"[Defense Counsel]: Because it emphasizes the fact that the government agency, whether it's a state or federal, believes she is in danger and have paid money, however much money they paid for her care since the time of this so-called disclosure.

"The Court: Well there is no indication of how much they paid or anything like that.

"[Defense Counsel]: We'll certainly get into it.

"The Court: If [you do], then that's your choice. But at this point for the state to say, has your life been disrupted, obviously it shouldn't be leading questions. But what's the result of this? I had to move. I mean, I don't think the state needs to say they're in witness protection. That may be something you raise and then the state can cover that on redirect. But I had to move multiple times. Is there any reason that the state has to say, isn't it true you are in witness protection. I mean, I don't see why that might be relevant.

"[The Prosecutor]: It goes to her fear of retaliation, Judge. That's why she's in that program.

"The Court: Well, then you're asking the jury to make a conclusion. If you're saying a finding that she's in witness protection, show she's in fear, I mean, I think you can say that she had to relocate a number of times and keep her identity, her relocation safe and things like that. I don't think you need to refer to the fact that she's in the witness protection program, which is your objection anyway.

"[Defense Counsel]: Yes.

"The Court: So, I mean, I think you can go into the details of how her life has been impacted since this disclosure, the negative impacts. Obviously, the defense is aware if they want to go into details as to how much money is spent or what benefits she receives, sometimes the state could break the ice and go into that, but if there's an objection to—I guess the objection is to the finding that you're in the witness protection program. So, I think you could—I don't have a problem with the state saying at state expense, you were relocated somewhere else. I think, I guess my main concern is the use of the term witness protection program.

"[Defense Counsel]: I think by saying at state expense, it's the same thing.

"The Court: Well, I disagree. If the state wants to soften the blow of an argued motive to lie by saying that the state has paid for your expenses to be relocated or whatever, I think that that's a fair inquiry. To use the witness protection program has a more official sound to it.

"[Defense Counsel]: Your Honor, will the court entertain me; the question simply is, did you leave town.

"The Court: No. That's not the question. The issue is, why would she make this thing up. You're going to say she's making it up, the state is going to say she's not. The state is entitled to bring out how her life has changed for the worse as a result of her testifying in this case or her providing this information."

that the court believed that such evidence would in fact be the subject of cross-examination, its emphasis on allowing reference to "state expense" because it "cuts both ways," has merit. See *United States* v. *Adamo*, 742 F.2d 927, 944 (6th Cir. 1984) (evidence that witness is participant in witness protection program and therefore paid and protected by government "simultaneously enhances and undermines a witness' credibility"), cert. denied sub nom. *Freeman* v. *United States*, 469 U.S. 1193, 105 S. Ct. 971, 83 L. Ed. 2d 975 (1985). Therefore, the better practice would have been for the court to instruct the state not to implicate its involvement in relocation efforts in any way on direct examination by use of the passive voice or the phrase, "at state expense . . . ." Unless and until further explication in rebuttal is triggered by the defense in cross-examination, we emphasize that the reference to state support is unnecessarily prejudicial to the defendant. Notwithstanding these concerns, and given both the passive and infrequent references to the witness protection program, as well as the absence of the prosecutor's exploitation of that evidence, we conclude that the court did not abuse its discretion in allowing testimony that Algarin had been relocated.[19]

[19] Even if it were error to admit the evidence, we conclude that it was harmless error. E.g., *State* v. *Grant*, supra, 179 Conn. App. 90. The extent to which the state utilized evidence of Algarin's relocation was relatively brief. In fact, references to her relocation occurred in only two instances and were a small part of the state's case. See *State* v. *Tony M.*, 332 Conn. 810, 825–26, 213 A.3d 1128 (2019) (considering sparse references by state to improperly admitted testimony in evaluation of whether error was harmless). These sparse and infrequent references easily distinguish this matter from *Melia*, in which extensive and detailed testimony of participation in the witness protection program was highlighted by the government throughout trial. See *United States* v. *Melia*, supra, 691 F.2d 675–76; see also *United States* v. *Martino*, 648 F.2d 367, 388–89 (5th Cir. 1981) (single instance of reference to witness' participation in witness protection program was not unfair exploitation), aff'd on rehearing en banc, 681 F.2d 952 (5th Cir. 1982), aff'd sub nom. *Russello* v. *United States*, 464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983), cert. denied, 456 U.S. 949, 102 S. Ct. 2020, 72 L. Ed. 2d 474 (1982), and cert. denied sub nom. *Lazzara* v. *United States*, 456 U.S. 943, 102 S. Ct. 2006, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom.

II

The defendant next claims that the court improperly (1) refused to admit three sexually explicit letters Algarin wrote to him, (2) precluded questions during cross-examination of Algarin regarding the termination of her employment at Waterbury Hospital, and (3) restricted inquiry into her birth control practices. The defendant argues that, as a result of these adverse evidentiary rulings, the court deprived him of his rights to present

Farina v. *United States*, 456 U.S. 943, 102 S. Ct. 2006, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Russello* v. *United States*, 456 U.S. 943, 102 S. Ct. 2006, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Macaluso* v. *United States*, 456 U.S. 943, 102 S. Ct. 2007, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Scionti* v. *United States*, 456 U.S. 943, 102 S. Ct. 2007, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Morgado* v. *United States*, 456 U.S. 943, 102 S. Ct. 2007, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Fisher* v. *United States*, 456 U.S. 943, 102 S. Ct. 2007, 72 L. Ed. 2d 465 (1982), and cert. denied sub nom. *Palermo* v. *United States*, 456 U.S. 943, 102 S. Ct. 2007, 72 L. Ed. 2d 465 (1982); *United States* v. *Caliendo*, 910 F.2d 429, 435–36 (7th Cir. 1990) (three isolated references by government to witness' participation in witness protection program not reversible error).

The state additionally relied on other evidence to establish Algarin's credibility with respect to her fear of the defendant and Santiago, including evidence of Santiago's constant physical abuse of Algarin and her testimony concerning her belief that the defendant and his brothers were affiliated with nationwide gangs. This fear was further corroborated by Crozier and Roden-Timko, thus rendering the testimony complained of cumulative. See, e.g., *State* v. *Gonzalez*, 272 Conn. 515, 528–29, 864 A.2d 847 (2005) (improperly admitted evidence that is merely cumulative does not require reversal of judgment). We further note that the defendant made several attempts, through a range of topics, to undermine Algarin's alleged fear of the defendant and Santiago.

Finally, there was additional evidence corroborating Algarin's version of events, which provided a sufficient basis for the jury to conclude that Algarin was a credible witness. This included Morales' coworker confirming that on the night of Morales' death, Morales had placed the proceeds—including cash and checks—into a blue bank bag with a zipper along the top. Additionally, Crozier testified to the various details Algarin provided him with respect to the events leading to Morales' death, including the defendant's motive for committing the murder. Roden-Timko also gave a statement to the police in 2010, in which she reported that Algarin had told her that "[Santiago] and some other people were involved in a shooting and that [Santiago] made [Algarin] go with him to throw the gun into a river. . . . When [Algarin] was telling me this story, she seemed scared for her life."

Therefore, we have a fair assurance that, even if the relocation testimony was admitted in error, it did not substantially affect the verdict.

a defense and to confrontation. In response, the state asserts that the court properly exercised its discretion in deciding all of the challenged evidentiary rulings. The state further disagrees that these rulings implicated the defendant's constitutional rights. The state asserts that, assuming any errors occurred with respect to the court's evidentiary rulings, such errors are neither constitutional in nature nor harmful. We agree with the state that the defendant's claims of error are not constitutional in nature and further conclude that any errors were harmless.[20]

We begin by setting forth the relevant legal principles governing our review. "Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . To establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial." (Citations omitted; internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 379, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

It is well established that "[t]he sixth amendment to the [United States] constitution guarantees the right of

[20] We note that, although the defendant couches these claims under both his right to confrontation and his right to present a defense, the latter "has roots in the confrontation clause [of the sixth amendment to the United States constitution] and is applicable to the states through the due process clause of the fourteenth amendment . . . ." (Citation omitted.) *State* v. *Santos*, 318 Conn. 412, 422, 121 A.3d 697 (2015). For that reason, we analyze this claim under the legal principles governing our review of alleged violations of the sixth amendment. See id., 422–25 (reviewing claims of alleged violation of rights to present defense and to confrontation concerning trial court's restrictions on lines of questioning during cross-examination and introduction of extrinsic evidence).

an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . Compliance with the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . .

"However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable. . . . [Furthermore, the] trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 510–11, 131 A.3d 1132 (2016).

"Every evidentiary ruling which denies a defendant a line of inquiry to which he thinks he is entitled is not constitutional error." *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985). Both this court and our Supreme Court have stated that, when a defendant is afforded wide latitude in cross-examining a state's witness as to credibility, claims of sixth amendment violations for restrictions on cross-examination are indicia of "the defendant [putting] a constitutional tag on a nonconstitutional claim." Id.; see also *State* v. *Jordan*, 329 Conn. 272, 287–88 n.14, 186 A.3d 1 (2018) (claim of improper

exclusion of evidence of victim's convictions not constitutional in nature when jury heard testimony that, if credited, would support theory of self-defense); *State* v. *Durdek*, 184 Conn. App. 492, 511 n.10, 195 A.3d 388 (noting that "multiple avenues of impeachment" defendant was afforded in cross-examining "important state witness" supported conclusion that claimed errors were evidentiary, not constitutional, and defendant therefore had burden of establishing harm), cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018); cf. *State* v. *Peeler*, supra, 271 Conn. 383–85 (trial court's failure to admit mental health records of state's witness precluded relevant line of inquiry into witness' ability to perceive events and was therefore of constitutional magnitude). The effect of this determination necessarily dictates the burden of proof, for if the court determines that the claimed error is constitutional in nature, the state has the burden of demonstrating harmlessness beyond a reasonable doubt, whereas a converse determination leaves the defendant with the burden to both prove an abuse of discretion and to demonstrate harm. See, e.g., *State* v. *Peeler*, supra, 384.

A

For purposes of clarity in assessing each of the three claimed errors, we believe it prudent in the first instance to assess whether these claims are constitutional in nature. Upon a careful review of the record, we conclude that they are not. The record plainly reveals that the defendant was given ample opportunity to "expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *State* v. *Leconte*, supra, 320 Conn. 512. Indeed, the defendant made numerous attempts to impeach Algarin's credibility with respect to inconsistent testimony she had provided in other proceedings related to the murder of Morales.[21]

[21] For instance, the defendant brought up instances in which Algarin had testified previously that she came downstairs with Santiago after being

Moreover, the court allowed the defendant to rigorously cross-examine Algarin with respect to relevant lines of inquiry, most importantly, her fear of the defendant and his brothers. Algarin was extensively questioned on this issue by the defendant, including two of the areas of inquiry complained of.[22] For instance, the defendant questioned Algarin about the intimate nature of the letters she sent to the defendant, the endearing letters she wrote to Santiago while he was incarcerated, about her having routinely sent Santiago money while he was incarcerated on an unrelated matter, and about her having continued to have children with Santiago. The defendant also sought to undermine her credibility through other means, particularly through his introduction of testimony from a bail bondsman whom Algarin had frequented as late as 2007 in her efforts to have Santiago released on bond in connection with charges that were unrelated to Morales' murder. In addition, defense counsel elicited testimony from Roden-Timko, who, when asked if she had an impression of Algarin's truthfulness and honesty, responded that Algarin was "unreliable, if I had to sum it up in one word." The defendant also offered testimony from Norman A. Pattis, an attorney who had represented Santiago in another criminal matter. Pattis described Algarin and Santiago's relationship as loving and testified that he had no concerns as to whether she was fearful of Santiago.[23]

awakened, as opposed to Santiago yelling at her to come downstairs; how many guns she had actually seen the defendant dismantling; whether she recalled guns ever being present; that she previously testified that the money she deposited in the bank was in bags, not envelopes; and whether she could recall the specific day that she went with Santiago and Bonilla to withdraw the money from the bank.

[22] As discussed in part II B 1 of this opinion, the trial court allowed cross-examination of Algarin with respect to the letters she wrote to the defendant. The only restriction placed on this cross-examination concerned the particularly salacious content. The court did not preclude any and all inquiries into the content of the letters.

[23] Pattis testified that he believed Algarin "seemed very much to care for [Santiago]" and described their relationship as "loving . . . ." When asked if he ever had concerns that Algarin was fearful of Santiago, Pattis responded: "No. None."

As the record demonstrates, the defendant was afforded "multiple avenues of impeachment" in his cross-examination of the state's key witness. *State* v. *Durdek*, supra, 184 Conn. App. 511 n.10; see also *State* v. *Vitale*, supra, 197 Conn. 402–403 (noting that wide latitude of cross-examination by defendant was suggestive that claimed evidentiary errors were nonconstitutional in nature). The defendant took full advantage of this latitude and attempted to undermine Algarin's explanation that her fear of the defendant and Santiago was the reason for her twelve year delay in providing information to the police about Morales' murder. We therefore conclude that the defendant's claims are nonconstitutional and are subject to the standard of review governing claims of evidentiary impropriety.

B

Having determined that the defendant's claims are evidentiary in nature, we set forth the applicable standard of review as to each claimed evidentiary impropriety. "[I]n order to establish reversible error . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003).

1

The defendant first claims that the court improperly failed to admit three letters Algarin wrote to the defendant. We agree, but, nevertheless, conclude the error to be harmless.

The following additional facts are relevant to our resolution of this claim. Prior to trial, the state filed a motion in limine to preclude the defendant from introducing letters Algarin wrote to the defendant.[24] The court initially found the letters to be irrelevant and

[24] The content was particularly graphic in nature, especially with respect to the description of salacious acts that the two had engaged in and hoped to engage in. Aside from the graphic content, the letters also referenced Algarin's affection for the defendant with remarks such as, "[b]aby I love you," "your picture is the first thing I look at, "I knew no matter what I

therefore inadmissible, but underscored that they may become relevant to counter Algarin's assertion that she was afraid of the defendant. During trial, the defendant notified the court that he still intended to go into the issue of Algarin's having sent letters to him while he was incarcerated and also expressed his intent to introduce the letters into evidence. The defendant argued that the letters served two purposes. First, the letters undercut Algarin's contention that the reason for her twelve year delay in providing information to the police was that she feared the defendant. Second, the letters went to the defense theory that Algarin was motivated by ill will toward the defendant for having informed Santiago about the letters, which allegedly resulted in the breakdown of Algarin and Santiago's relationship. The court decided against admitting the letters in their entirety, finding that their probative value was far outweighed by unfair prejudice.[25] The court, however, did rule that the defendant could question Algarin about the nature of the letters but could not recite language that was salacious in nature.[26]

could always depend on you," "my only regret is not kissing you on Burton Street," and "I love you trust I wake up to you . . . ."

[25] The court also did not allow the defendant to introduce the letters into evidence in redacted form.

[26] The following exchange provides context for the specific language that the defendant was allowed to recite during his cross-examination of Algarin:

"The Court: —that I haven't allowed in. It says [Bermudez] [b]aby, I love you.

"[Defense Counsel]: Yeah.

"The Court: Okay. You can ask her about that.

"[Defense Counsel]: Okay.

"The Court: You don't need to have the letter in. Didn't you say, I love you? What else in this letter is vital to the defense that I'm missing? I miss you, baby. Didn't you say, I miss you, baby?

"[Defense Counsel]: Okay. Baby, your picture is the first thing I look at.

"The Court: Go ahead, you can ask her that.

"[Defense Counsel]: You look blazing.

"The Court: You what?

"[Defense Counsel]: You look blazing.

"The Court: Whatever. . . . Those aren't what I would view as salacious comments. You can ask any question that goes to her affection toward [the defendant]."

During her testimony, Algarin admitted that she had sent three sexually explicit letters to the defendant while he was incarcerated. She explained that the defendant had called and requested the letters as an "insurance policy" against her in the event she were ever to testify against him. After agreeing to write the letters, Algarin went to "one of those raunchy [Internet] sites, and I wrote everything . . . I saw." After Algarin's testimony regarding the letters, the defendant again sought to admit the letters into evidence, and the court again sustained the state's objection to their introduction.[27]

We begin our legal analysis by reiterating that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . ." Conn. Code Evid. § 4-3. "In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 215–16, 24 A.3d 1218 (2011). "[T]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the jur[ors]." (Internal quotation marks omitted.) *State* v. *Sandoval*, 263 Conn. 524, 544, 821 A.2d 247 (2003).

[27] In his closing argument to the jury, defense counsel discussed the three letters, described them as "sexually explicit," and labeled Algarin's reasoning for writing the letters "nonsense."

On hearing argument regarding the admissibility of the letters, the court merely held that "[their] probative value is outweighed by unfair prejudice." The court again reiterated its determination that due to their salacious content, "the unfair prejudice outweighs [their] probative value . . . ." The state has taken the position that the court acted within its discretion "in finding that the profane language used in the letters posed a risk of undue prejudice . . . ." We disagree.

We acknowledge that evidence that is intimate or embarrassing may, in certain circumstances, "give rise to a real risk of unfair prejudice . . . ." *State* v. *Sandoval*, supra, 263 Conn. 545; see id. (trial court improperly determined that probative value of evidence of sexual assault victim's abortion was outweighed by danger of unfair prejudice). We conclude, however, that such circumstances did not exist in the present matter. The state's argument that the profane language was enough to warrant exclusion is unavailing. Contrary to this assertion, it is precisely the fact that the content of the letters was sexually graphic and intimate, and thus bore directly on Algarin's purported reason for authoring the letters. Whether that explanation was credible was a matter for the jury to decide. See, e.g., *State* v. *Davis*, 283 Conn. 280, 331, 929 A.2d 278 (2007). We therefore conclude that the court improperly refused to admit the letters into evidence.[28]

Having resolved the first inquiry, we now turn to whether the defendant has satisfied his burden to establish that the court's error was harmful. We conclude that he has not.

As discussed in part I B of this opinion, the principles of law governing our review of harmlessness with respect to nonconstitutional evidentiary claims is well

[28] We also note that the appearance of some of the letters, with writing filling the entirety of the page from left to right and top to bottom, was relevant to the jury's evaluation of the letters.

settled. See *State* v. *Calabrese*, 279 Conn. 393, 411–12, 902 A.2d 1044 (2006) ("an appellate court may conclude that a nonconstitutional error is harmless only when it has a fair assurance that the error did not substantially affect the verdict" (internal quotation marks omitted)); see also *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019) (applying same factors for harmless error analysis to adjudicate claim that evidence was improperly excluded).

First, although defense counsel could not recite verbatim the sexually explicit language in the letters, he took full advantage of the court's permission to provide the gist of their graphic content. Moreover, defense counsel was fully entitled to recite the affectionate language contained therein. The following exchanges during Algarin's cross-examination underline the extent to which the jury was exposed to the nature of the letters and defense counsel's efforts to cross-examine Algarin on the veracity of her explanation for authoring them:

"[Defense Counsel]: Okay. Do you remember sending [the defendant] a letter in the jail?

"[Algarin]: Yes.

"[Defense Counsel]: Do you remember sending him a series, three letters that were sexually explicit?

"[Algarin]: Yes.

"[Defense Counsel]: This is your husband's brother, correct?

"[Algarin]: Yes. . . .

"[Defense Counsel]: Do you remember saying I love you?

"[Algarin]: It says it there.

"[Defense Counsel]: Is that your handwriting?

"[Algarin]: Yeah.

* * *

"[Defense Counsel]: You did say that you did send sexually explicit letters to [the defendant], correct?

"[Algarin]: Yes, sir.

"[Defense Counsel]: And you sent at least three, correct?

"[Algarin]: I believe so.

"[Defense Counsel]: Now, after you sent those letters to [the defendant], isn't it true that [Santiago], after being with you for sixteen years, broke up with you in 2009?

"[Algarin]: That is not true.

* * *

"[Defense Counsel]: Now, you said something about the letter that you wrote to [the defendant], that you went to a website?

"[Algarin]: AOL.

"[Defense Counsel]: To look up what?

"[Algarin]: I went to an adult website, and I wrote down what I saw.

"[Defense Counsel]: What you saw on the adult website?

"[Algarin]: Yes, sir. . . .

"[Algarin]: [The defendant] asked me to write B-Real.

"[Defense Counsel]: Did he ask you in a letter? Did he send you a letter saying correspond with me with sexually explicit language and use the—

"[Algarin]: He asked me—he needed something for reassurance that I was not gonna snitch.

"[Defense Counsel]: That's a letter that he wrote to you?

"[Algarin]: No. That's a conversation we had.

"[Defense Counsel]: When did you have that conversation?

"[Algarin]: After [Bonilla] moved in and that article came out in the newspaper . . . .

"[Defense Counsel]: And had you used AOL to get the verbiage out of—for that letter as well?

"[Algarin]: Some of it, yeah.

"[Defense Counsel]: Some of it?

"[Algarin]: Yeah, 'cause it's not all sexual and not—not all saying, you know. Some of it's saying, hey, how are you, and some of it's very sexual.

"[Defense Counsel]: Very sexual, correct?

"[Algarin]: Yeah.

"[Defense Counsel]: Okay. And you say that that was requested at the behest of my client?

"[Algarin]: Yes, 'cause this showed up in [Santiago's] trial as insurance."

Not only did defense counsel elicit testimony from Algarin in an attempt to undermine her supposed fear of the defendant and Santiago, but he continued to question Algarin about how her relationship with Santiago ended.[29] This phase of defense counsel's cross-examination was an unquestionable attempt to establish the defense theory that Algarin was motivated to come forward in an effort to retaliate against the defendant and Santiago for the ending of her relationship with Santiago.

[29] The following colloquy occurred between defense counsel and Algarin:

"[Defense Counsel]: Now, after you sent those letters to [the defendant], isn't it true that [Santiago], after being with you for sixteen years, broke up with you in 2009?

"[Algarin]: That is not true.

Importantly, the wide latitude afforded to defense counsel in his cross-examination of Algarin—spanning nearly one and one-half days—provided the jury with other evidence that would have supported his theory that Algarin was, indeed, not afraid of the defendant or Santiago.[30] In fact, Algarin's two days of testimony provided evidence that she (1) continued to send Santiago money while he was incarcerated and during the twelve year interval, (2) married Santiago in 2004, (3) remained with him for ten years after Morales' murder, (4) received a reward for coming forward, (5) wrote warm and loving letters to Santiago during his incarceration, and (6) continued to have children with Santiago.

Given the extensive opportunity that defense counsel had to cross-examine Algarin, as well as his opportunity to quote the nonsalacious details of the letters and the extent of corroborating evidence to support Algarin's testimony, we are not persuaded that the error substantially affected the verdict. See, e.g., *State* v. *Jordan*, supra, 329 Conn. 287–88.

2

The defendant next claims that the court improperly prevented him from examining Algarin about the termination of her employment at Waterbury Hospital.

"[Defense Counsel]: When did he break up with you?

"[Algarin]: I broke up with him because he faked a stroke in federal prison and had someone call me at work to tell me that he was dying, and that's when I called the federal penitentiary and told them I do not want any more contact with him, no phone call, no e-mail, no letter, no nothing."

Defense counsel also questioned Algarin about when her relationship with Santiago ended:

"[Defense Counsel]: [Santiago] broke up with you after the—seeing those letters?

"[Algarin]: [Santiago] and I broke up in 2008. This came out in 2010, so unless there's a time travel machine, there's no way he would of known."

[30] Not only was the defendant entitled to cross-examine Algarin with regard to the letters she wrote to Santiago, but the court explicitly permitted the defendant to move for the admission of those letters into evidence.

According to the defendant, this area of inquiry was important to further undermine Algarin's supposed fear of Santiago. We disagree and conclude that the court acted well within its discretion in precluding questions on this topic.

The following additional facts are relevant for the resolution of this claim. During cross-examination, defense counsel questioned Algarin about why her relationship with Santiago ended. Algarin explained that she ended the relationship after Santiago "faked a stroke" while he was in prison. See footnote 29 of this opinion. When Algarin was asked if she felt badly for Santiago in January, 2004, when he was admitted to the psychiatric unit at Waterbury Hospital, the court sustained the state's objection to that area of inquiry. The court found that the topic was a collateral issue that was too remote in time.[31]

[31] Outside the presence of the jury, the defendant explained that he was seeking to cross-examine Algarin about the incident that led to the termination of her employment at Waterbury Hospital in 2004. When questioned by the court to establish how this area of inquiry was relevant, the defendant explained that in 2004, Algarin "became very upset—and disruptive on the unit where she was working in . . . Waterbury Hospital because [Santiago] was admitted to the psych ward at that time. She's claiming that . . . she's terrified of this guy, she doesn't want to be with him, but in 2004 she gets so worked up, yelling at people, being rude to people at the . . . hospital, and she's dismissed for that reason . . . ."

The court sustained the state's objection to this area of inquiry, finding that "[a]ny probative value is far outweighed by prejudicial impact. . . . It is totally irrelevant. . . . There's plenty of opportunity to probe her in the area . . . the letters, which we don't know what the dates are. She's admitted to sending money around—up to the time 2008. There's plenty of opportunity to do that. You don't need an incident in 2004 where she's fired for it. . . . I don't see how getting into whether her husband was in the psychiatric ward and she got fired is relevant here, and I can't imagine why you [questioned Algarin about it]."

Later at trial and prior to his cross-examination of Crozier, the defendant sought the court's permission to ask Crozier about representing Algarin with respect to the termination of her employment at Waterbury Hospital. The court sustained the state's objection to the area of inquiry, finding that (1) it was irrelevant, (2) it did not go to truth and veracity, (3) even if it was relevant, its probative value was outweighed by undue prejudice, and (4) the defendant was already able to establish a positive relationship between Algarin and Santiago.

"[I]t is well settled that [a] court . . . [may] exclude . . . evidence [that] has only slight relevance due to . . . its tendency to inject a collateral issue into the trial. . . . An issue is collateral if it is not relevant to a material issue in the case *apart from its tendency to contradict the witness*. . . . This is so even when the evidence involves untruthfulness and could be used to impeach a witness' credibility. . . . Whether a matter is collateral also is a determination that lies within the trial court's sound discretion. . . . Undoubtedly our case law permits a party to ask a witness about a collateral matter, with the limitation that the party must accept the witness' response without having the opportunity to impeach that witness with extrinsic evidence. . . . This does not mean, however, that the trial court is obligated to permit such questioning. In considering whether the court abused its discretion in this regard, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Annulli*, 309 Conn. 482, 493–95, 71 A.3d 530 (2013).

Upon a careful review of the record, we agree with the court that the reasons for the termination of Algarin's employment at Waterbury Hospital would have injected a collateral issue into the trial. Accordingly, we conclude that the court did not abuse its discretion in refusing to allow further inquiry.

3

The defendant's final claim of evidentiary error concerns the court's restriction on his ability to cross-examine Algarin about her birth control regimen. We conclude that this claim has no merit.

The following additional facts are relevant to this claim. During cross-examination of Algarin, defense

counsel asked why she continued to have children with Santiago despite her fear of him. Algarin explained that Santiago would often hide her birth control, and she therefore had no choice but to continue having children with him. When defense counsel pressed Algarin about other manners in which she could have prevented having children with Santiago, the court sustained the state's objection to continued inquiry on the topic. The following day, the court again disallowed further inquiry into Algarin's birth control practices, finding the subject matter irrelevant.[32]

We conclude that the court did not abuse its discretion in preventing the defendant from further inquiring into this subject area. Although the court allowed some inquiry into the topic, it properly found that further questioning was irrelevant, as it would have inappropriately focused on a matter far too attenuated from the material issues in the case. See, e.g., *State* v. *Crespo*, 114 Conn. App. 346, 363, 969 A.2d 231 (2009), aff'd, 303 Conn. 589, 35 A.3d 243 (2012). Accordingly, we conclude that the court's ruling was proper.

III

Last, we turn to the defendant's claim of prosecutorial impropriety. The defendant argues that the prosecutor made numerous statements during the state's rebuttal closing argument to the jury that referred to facts not in evidence. We disagree that any improprieties occurred.

We begin by setting forth the general principles under which we review claims of prosecutorial impropriety. ''[W]hen a defendant raises on appeal a claim that

[32] Frustrated with the defendant's persistence on the matter, the court stated that "[w]e are not spending the afternoon talking about her birth control practices . . . in 1998 or 2009 or whatever we're talking about. . . . We are not spending any more time on birth control, whether she was hiding the birth control in the locker or in the bottom of her purse or wherever she was hiding it. That's it."

improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012). "In analyzing whether the prosecutor's comments deprived the defendant of a fair trial, we generally determine, first, whether the [prosecutor] committed any impropriety and, second, whether the impropriety or improprieties deprived the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015).

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Grant*, 286 Conn. 499, 537, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008). With these principles in mind, we now examine each of the challenged remarks in this matter.

A

The defendant's first claim of prosecutorial impropriety concerns a remark that indicated that Algarin had testified about Morales' murder consistently at previous proceedings. In his closing argument to the jury, defense counsel underlined instances when Algarin admitted to having testified inconsistently on a number of topics

during prior proceedings.[33] Specifically, defense counsel noted that, during a 2010 proceeding, Algarin testified that she had counted the money before depositing it, thus contradicting her trial testimony that she had not. During rebuttal argument, the prosecutor stated that Algarin had testified on occasions prior to trial that she did not count the money before making the ATM deposits. After the jury was excused, the defendant argued to the court that there was no evidence that Algarin had testified that she did not count the money during proceedings subsequent to 2010. The court first noted that there was evidence before the jury that Algarin had testified in approximately five proceedings prior to trial.[34] In addressing the objection, the court concluded that a jury could properly draw an inference that if there were subsequent instances of Algarin's testimony being inconsistent other than in the 2010 proceeding, "we would have heard about it . . . ." On appeal, both parties submit that the court overruled the objection, and we thus analyze the claim accordingly. The state asserts that, contrary to the defendant's position, the evidence produced at trial provided a factual basis to argue that Algarin had consistently testified at previous proceedings that she did not count the money. We agree.

In assessing whether this statement was improper, we note that, "as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument

[33] For instance, defense counsel noted that Algarin had admitted at trial to testifying inconsistently about the number of guns she saw being dismantled in the kitchen, whether she actually saw the guns being dismantled, the date she deposited the money in the bank, the number of days that had passed before withdrawing the money from the bank, and whether she used bags or envelopes to deposit the money.

[34] During trial, defense counsel cross-examined Algarin at length about her testimony in prior proceedings. On redirect examination, the state also examined Algarin on these prior proceedings in an effort to rehabilitate her credibility with respect to her consistent testimony, with Algarin further acknowledging that she had testified in five proceedings prior to the defendant's trial.

is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 428–29, 902 A.2d 636 (2006). A review of the record indicates that the remark at issue here was an attempt to have the jury draw an inference from the testimony elicited from Algarin during trial. In particular, the inference that Algarin had testified consistently in previous proceedings on this particular issue was a response to the fact that defense counsel highlighted only a single inconsistency, which occurred during the 2010 proceeding. Importantly, one of the defendant's own exhibits—a transcript of Algarin's testimony during an August 18, 2016 proceeding—contains testimony in which she explicitly stated that it was not her, but Bonilla, who counted the cash. This evidence provided yet another factual basis for the argument that the defendant has challenged. For these reasons, the court ruled that the prosecutor's statement provided a sufficient basis for the inference that Algarin's testimony was not inconsistent in subsequent proceedings. We agree with the court's characterization and are therefore persuaded that the prosecutor's remark was based on "the reasonable inferences to be drawn" from the evidence adduced at trial. (Internal quotation marks omitted.) Id., 429.

B

The defendant next takes issue with the prosecutor's statement that "[the state's attorney's office] receive[s] no benefit from [Algarin]'s . . . testimony." The defendant claims that this statement was both unsubstantiated and untruthful. In response, the state asserts that it was obvious from the context of the prosecutor's argument that he clearly meant to refer to evidence that the state's attorney's office did not *provide* any *reward* to Algarin. According to the state, the prosecutor merely misspoke in reference to the reward money that had been offered for information about Morales' murder and disbursed by the governor's office in this case.

A fair reading of the record supports the state's contention. Importantly, the defendant excludes both the preceding and subsequent sentences of the remark with which he takes issue. The entire passage reads as follows: "You also heard that the police don't give her money. They're not in charge of the reward. The state's attorney's office isn't in charge of the reward, either. We receive no benefit from her test—testimony. That's decided by another entity." It is clear from the entire record that the prosecutor in this instance merely misspoke. Providing further context to this statement is the fact that Algarin, Crozier, and police Lieutenant Michael Slavin all testified that the reward was not disbursed by the police or the state's attorney's office. In fact, the latter two testified that the governor's office was the only entity that authorized the reward. From this testimony and the context of the statement at issue, it is clear that the remark was "merely an inadvertent misstatement. . . . Not every mistake by a prosecutor in closing argument, not every misstep, amounts to an impropriety." (Citations omitted.) *State* v. *Roberts*, 158 Conn. App. 144, 150–52, 118 A.3d 631 (2015).

C

The defendant claims that the following statement by the prosecutor was also improper: "What [Algarin] was consistent about was brought out by [another prosecutor in the case] that [Algarin]'s husband and [Bonilla] went to the bank with her. It had to be that Monday morning because she was always consistent about they were with her at the bank to take the money out." According to the defendant, there was no evidence that Algarin had testified consistently to this effect in previous proceedings. However, the state argues that this statement, although ambiguous, was not intended to refer to previous proceedings. According to the state, the intent of this statement was to indicate to the jury that Algarin was consistent during the *defendant's* trial about who was with her when she made the withdrawal.

We recognize that "closing arguments of counsel . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial [impropriety], they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 441.

The record supports the state's argument that this statement, although ambiguous, was not intended to suggest that Algarin had testified consistently to this fact at previous proceedings. Rather, during the defendant's trial, Algarin testified that Santiago and Bonilla accompanied her to withdraw the cash, and she reiterated Santiago's presence on two other occasions during trial to pinpoint the exact date of the withdrawal. Because the prosecutor's argument is supported by the evidence, we decline to assume that it referenced Algarin's testimony from other proceedings.

D

The defendant also asserts that the following statement by the prosecutor was a reference to a fact not in evidence: that Algarin had "testified at a previous proceeding, and before you, [that] the reward had been out there for years." The state argues that the remark has been taken out of context. We agree.

The following provides the proper context to the statement of which the defendant complains: "[Algarin] testified at a previous proceeding, and before you, [that] the reward had been out there for years. She knew about it. When she was questioned by the police about that incident before she came clean that night in 2010, she knew

the reward was out there and she still didn't say anything. And her reasoning—she told you why she didn't say anything. She testified because it wasn't worth her life. The money wasn't worth her life. She stuck to the alibi story as she was told to do."

On review of the record, Algarin's testimony reflects that she knew of the reward as soon as it was offered and was aware of it when she continued to provide the police with the false alibi. As the state reasonably argues, this statement, placed in its context, was a "fair, though possibly inartful, summary of Algarin's testimony . . . ." The prosecutor's remark—that Algarin knew of the reward at the time of the prior proceedings—was clearly an invitation for the jury to draw a reasonable inference from the fact that she knew of the reward before any proceedings had taken place. See *State* v. *Stevenson*, 269 Conn. 563, 587–88, 849 A.2d 626 (2004) (prosecutor's remarks in closing argument that defendant cooperated with police to receive favorable plea deal was not mere speculation but was reasonable inference for jury to draw from evidence adduced at trial).

E

The defendant next takes issue with the prosecutor's remark that, when the defendant and Santiago were incarcerated, Bonilla moved in with Algarin uninvited "to keep an eye on her." The state contends that this is a reasonable inference that can be drawn from the evidence adduced at trial. A careful review of the record clearly supports the state's argument.

During the state's redirect examination, Algarin testified that while the defendant and Santiago were incarcerated, a newspaper article reported that the investigation into Morales' murder was being reopened. After the article's publication, Bonilla moved into Algarin's apartment uninvited. The fair—if not the only reasonable—inference to extract from this series of events was that Bonilla's purpose was to watch over Algarin.

Although the court sustained the defendant's objection to Algarin speculating as to Bonilla's purpose, the prosecutor was nevertheless entitled to argue this point to the jury as a reasonable inference that could be drawn from the evidence admitted at trial.

F

The defendant's last claim of prosecutorial impropriety concerns the prosecutor's remark that "the next time [Algarin saw the letters] is in a proceeding with [Santiago] trying to discredit her. . . . They were trying to cash in their insurance policy." According to the defendant, no evidence was produced at trial to establish that Algarin had not seen the letters written to the defendant until a prior proceeding or that those letters were being used to discredit her at Santiago's trial. In response, the state asserts that this remark was a proper summation of Algarin's testimony. The record substantiates the state's position.

In her testimony, Algarin repeatedly stated that she was requested to write the letters so that they could be used against her if she ever were to testify against the defendant or Santiago. By her own words, the letters were "an insurance policy to discredit me." When asked by defense counsel whether the letters were requested by the defendant, Algarin responded "[y]es, 'cause this showed up in [Santiago's] trial as insurance." The clear import from her testimony was that (1) the letters were written at the behest of Santiago and the defendant, (2) the reason why she was asked to write the letters was to provide the defendant and Santiago with means to discredit her, and (3) Algarin was confronted with the letters while testifying against Santiago at his trial. Therefore, we conclude that the defendant's claim is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD WERNER COOK, TRUSTEE *v.* GEORGE PURTILL, EXECUTOR (ESTATE OF ADELMA GRENIER SIMMONS)

(AC 42198)

Elgo, Devlin and Harper, Js.

Syllabus

The plaintiff, the decedent's widower and trustee of a charitable trust formed by the decedent's estate, appealed to this court from the trial court's denial of his motion to open the judgment dismissing his probate appeal. *Held* that the plaintiff lacked standing to represent the trust, as he was not an attorney and he was not representing his own cause in his capacity as a trustee of the trust.

Argued November 20, 2019—officially released February 18, 2020

Procedural History

Appeal from the decree of the Probate Court for the district of Tolland-Mansfield appointing the defendant as guardian ad litem for the decedent's estate, removing the plaintiff as the executor of the estate and appointing the defendant as successor administrator of the estate, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley, J.*, dismissed the appeal and rendered judgment thereon; thereafter the court denied the plaintiff's motion to open the judgment and the plaintiff appealed to this court; subsequently, this court granted in part the defendant's motion to dismiss the appeal. *Appeal dismissed.*

Edward Werner Cook, self-represented, the appellant (plaintiff).

Kirk D. Tavtigian, Jr., with whom, on the brief, was *George M. Purtill*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Edward Werner Cook, appeals from the judgment of the trial court denying his motion to open the judgment dismissing his probate appeal. The plaintiff filed this appeal as the trustee of

a charitable trust, The Caprilands Foundation (foundation). Because the plaintiff is not an attorney and has appeared without counsel on behalf of a trust, we conclude that the plaintiff does not have the authority to represent the trust. Accordingly, we dismiss the appeal.

The following facts and procedural history are relevant to our resolution of this appeal. In 1998, the plaintiff was appointed executor of the estate of his wife, Adelma Grenier Simmons. Under her will, the plaintiff received a life estate in his wife's personal residence, and the remainder of her estate was held by the foundation. The plaintiff was appointed trustee and chairman of the board of trustees for the foundation. On May 31, 2017, the Probate Court for the district of Tolland-Mansfield appointed George Purtill as guardian ad litem for the purpose of advising the Probate Court on the status of the estate. On September 29, 2017, the Probate Court, pursuant to General Statutes § 45a-242,[1] removed the plaintiff as the executor of his wife's estate, concluding that he had failed to manage the assets of the estate properly and that he was embroiled in several conflicts of interest, including his positions as creditor, life tenant, trustee, and executor. Thereafter, the Probate Court appointed Purtill as successor administrator of the estate of the plaintiff's wife.

On November 1, 2017, the plaintiff, in his capacity as trustee for the foundation, filed an appeal with the Superior Court from the decree of the Probate Court, alleging that (1) the appointment of Purtill as guardian

[1] General Statutes § 45a-242 provides in relevant part: "The Probate Court having jurisdiction may, upon its own motion or upon the petition of any person interested . . . after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court . . . (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries . . . ."

ad litem was inappropriate in fact and law and was not in accordance with standards required, and (2) the findings and conclusions of Purtill's report on the estate are biased, unfounded, and deeply flawed. On May 15, 2018, the court, *Farley*, *J.*, dismissed the plaintiff's appeal for lack of subject matter jurisdiction, concluding that the plaintiff, as trustee, was not aggrieved in his individual capacity by his removal as executor. On September 14, 2018, well past the period for appealing the judgment of dismissal pursuant to General Statutes § 45a-186,[2] the plaintiff filed a motion to open. The court, *Farley*, *J.*, denied the motion to open on October 1, 2018. The plaintiff filed this appeal on October 16, 2018, appealing the judgment of dismissal and the denial of the motion to open judgment.

On October 19, 2018, the defendant, George Purtill, as executor of the estate of Adelma Grenier Simmons, moved to dismiss the portion of the plaintiff's appeal pertinent to the judgment of dismissal, on the ground that the May 15, 2018 appeal was untimely. On November 15, 2018, this court granted the defendant's motion. Therefore, only the plaintiff's appeal of the court's denial of the motion to open judgment is before us.

It is well established in our jurisprudence that a nonattorney does not have the authority to maintain an appeal on behalf of a trust. "Any person who is not an attorney is prohibited from practicing law, except that

[2] General Statutes § 45a-186 provides in relevant part: "(b) Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. An appeal . . . shall be filed not later than forty-five days after the date on which the Probate Court sent the order, denial or decree. Except as provided in sections 45a-187 and 45a-188, as amended by this act, an appeal from an order, denial or decree in any other matter shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree. The appeal period shall be calculated from the date on which the court sent the order, denial or decree by mail or the date on which the court transmitted the order, denial or decree by electronic service, whichever is later."

Although § 45a-186 has been amended by the legislature since the events underlying the present case; see Public Acts 2019, No. 19-14, § 10; those amendments have no bearing on the merits of the appeal. In the interest of simplicity, we refer to the current revision of the statute.

any person may practice law, or plead in any court of this state in his own cause. General Statutes § 51-88 (d) (2). The authorization to appear [self-represented] is limited to representing one's own cause, and *does not permit individuals to appear* [*self-represented*] *in a representative capacity*." (Emphasis in original; internal quotation marks omitted.) *Gorelick* v. *Montanaro*, 119 Conn. App. 785, 793, 990 A.2d 371 (2010); see also *State* v. *Hammer*, 127 Conn. App. 448, 451 n.5, 14 A.3d 425 (2011); *Expressway Associates II* v. *Friendly Ice Cream Corp. of Connecticut*, 34 Conn. App. 543, 546, 642 A.2d 62, cert. denied, 230 Conn. 915, 645 A.2d 1018 (1994).

In the present case, the plaintiff, a nonattorney, filed this appeal in his capacity as trustee of the foundation. Because the plaintiff is not representing his "own cause" in this appeal, he does not have the authority to represent the foundation, pursuant to § 51-88.[3]

The appeal is dismissed.

KOHL'S DEPARTMENT STORES, INC. *v.* TOWN OF ROCKY HILL
(AC 42021)

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

Syllabus

The plaintiff, K Co., appealed to the Superior Court from an assessment by the Board of Assessment Appeals for the defendant town in connection with certain of K Co.'s personal property declarations. The trial court sustained K Co.'s appeal, finding that K Co. was aggrieved by the tax

[3] General Statutes § 51-88 provides in relevant part: "(a) Unless a person is providing legal services pursuant to statute or rule of the Superior Court, a person who has not been admitted as an attorney under the provisions of section 51-80 . . . shall not: (1) Practice law or appear as an attorney-at-law for another in any court of record in this state . . . or (8) otherwise engage in the practice of law as defined by statute or rule of the Superior Court.

* * *

"(d) The provisions of this section shall not be construed as prohibiting . . . any person from practicing law or pleading at the bar of any court of this state in his or her own cause . . . ."

assessment. The court stated that pursuant to statute (§ 12-63 (b) (2)), the depreciation schedule set forth in § 12-63 (b) (6) can be used by an assessor only if the municipality has, by ordinance, adopted the provisions of that section, and that the defendant had not adopted any such ordinance. On appeal to this court, the defendant claimed that the court's refusal to consider its assessor's use of the statutory depreciation schedule in § 12-63 (b) (6) was incorrect and that this legal determination likely influenced the court's finding of aggrievement and its ultimate determination of valuation. *Held*:

1. The use of the statutory depreciation schedule set forth in § 12-63 (b) (6) by the defendant's assessor was legally correct; the legislature intended that the depreciation schedule set forth in § 12-63 (b) (6) was to be used by municipal assessors for purposes of standardization and uniformity, and, given the intent of the assessor in this matter to use the statutory depreciation schedule in order to achieve town wide consistency and uniformity in the valuation of business personal property, this court could not conclude that the assessor was legally barred from utilizing the statutory schedule.
2. The trial court's misinterpretation of § 12-63 (b) (2) was harmful and influenced the outcome of the case; the court's too narrow interpretation of § 12-63 (b) (2), foreclosed its consideration of the defendant's evidence bearing on value solely because that evidence was based on the statutory depreciation schedule set forth in § 12-63 (b) (6); moreover, the defendant was not required to offer an expert appraiser to counter K Co.'s opinion of value because § 12-63 (b) (2) permitted the assessor to rely solely on the depreciation schedule contained in § 12-63 (b) (6), and, accordingly, the case was remanded for a new trial.

Argued October 21, 2019—officially released February 18, 2020

Procedural History

Appeal from the decision of the defendant's Board of Assessment Appeals rejecting the valuation of certain of the plaintiff's personal property declarations, brought to the Superior Court in the judicial district of New Britain, Tax Session, where the appeal was tried to the court, *Hon. Arnold W. Aronson*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Reversed*; *new trial.*

Daniel J. Krisch, with whom were *Morris R. Borea*, and, on the brief, *Robbie T. Gerrick*, for the appellant (defendant).

Gregory F. Servodidio, with whom was *Michael J. Marafito*, for the appellee (plaintiff).

Opinion

BISHOP, J. In this tax appeal, we are required to determine whether a municipal tax assessor is permitted to utilize the depreciation schedule set forth in General Statutes § 12-63 (b) (6)[1] to assess the personal property of a taxpayer when the municipality has not adopted by ordinance the statutory depreciation schedule as provided in § 12-63 (b) (2).[2] We answer that question in the affirmative. The defendant, the town of Rocky Hill (town), appeals from the judgment of the

[1] General Statutes § 12-63 (b) (6) provides: "The following schedule of depreciation shall be applicable with respect to all tangible personal property other than that described in subdivisions (3) to (5), inclusive, of this subsection:

"Assessment Year Following Acquisition	"Depreciated Value As Percentage Of Acquisition Cost Basis
"First year	Ninety-five per cent
"Second year	Ninety per cent
"Third year	Eighty per cent
"Fourth year	Seventy per cent
"Fifth year	Sixty per cent
"Sixth year	Fifty per cent
"Seventh year	Forty per cent
"Eighth year and thereafter	Thirty per cent"

[2] General Statutes § 12-63 (b) (2) provides in relevant part: "Any municipality may, by ordinance, adopt the provisions of this subsection to be applicable for the assessment year commencing October first of the assessment year in which a revaluation of all real property required pursuant to section 12-62 is performed in such municipality, and for each assessment year thereafter. If so adopted, the present true and actual value of tangible personal property, other than motor vehicles, shall be determined in accordance with the provisions of this subsection. If such property is purchased, its true and actual value shall be established in relation to the cost of its acquisition, including transportation and installation, and shall reflect depreciation in accordance with the schedules set forth in subdivisions (3) to (6), inclusive, of this subsection. If such property is developed and produced by the owner of such property for a purpose other than wholesale or retail sale or lease, its true and actual value shall be established in relation to its cost of development, production and installation and shall reflect depreciation in accordance with the schedules provided in subdivisions (3) to (6), inclusive, of this subsection. . . ."

trial court sustaining the appeal of the plaintiff, Kohl's Department Stores, Inc., from the town's assessment of personal property located at 1899 Silas Deane Highway, Rocky Hill (store). On appeal, the town claims that the court erred in determining that the town's tax assessor (assessor) could not utilize the depreciation schedule set forth in § 12-63 (b) (6) because the town had not adopted the statutory schedule by ordinance, which likely influenced the court's conclusion that the town had overassessed the plaintiff's personal property.[3] We agree and, accordingly, reverse the judgment of the trial court.

The following factual and procedural background is relevant to our resolution of this appeal. As required by law,[4] the plaintiff prepared and filed personal property declarations with the town as of October 1, 2014, October 1, 2015, October 1, 2016, and October 1, 2017, in which it declared the value of its retail fixtures, equipment, furniture, signage, and other items of personal property located in the store. Its declarations varied from the town's declarations with regard to the depreciation schedules used by each party to assess the value of the plaintiff's personal property.[5] The assessor rejected the plaintiff's valuation, as did the Rocky Hill Board of Assessment Appeals (board).[6] After the plain-

[3] We note that the town argues, in the alternative, that the court's reliance on the plaintiff's expert appraiser was improper because his assessment was based on market values of property for which there was no actual market and, thus, was unreliable. We do not reach this argument at this junction because its resolution is fact laden and better addressed by the court on remand.

[4] See General Statutes §§ 12-43, 12-57a, and 12-71.

[5] The plaintiff and the town calculated the following depreciated valuations of the plaintiff's business personal property:

	Town's Value	Plaintiff's Amended Value
October 1, 2014	$632,457	$546,300
October 1, 2015	$856,629	$678,700
October 1, 2016	$911,345	$589,600
October 1, 2017	$847,500	$512,400

[6] Pursuant to General Statutes § 12-111, a taxpayer claiming to be aggrieved by the assessor of the municipality may file an appeal with the municipal

tiff's unsuccessful appeal to the board, it filed a complaint with the trial court, appealing from the assessment made by the assessor and the subsequent action of the board, pursuant to General Statutes §§ 12-117a and 12-119.[7] In its complaint, the plaintiff asserted that the assessor improperly had overvalued and overassessed the true and actual value of its personal property located in its store. The dispute centered on the different depreciation schedules employed by the parties, which resulted in dissimilar values for each year in question.

The personal property in dispute consisted of showcases used by the plaintiff in its store to display merchandise. To value the showcases, the assessor utilized the depreciation schedule set forth in § 12-63 (b) (6). The plaintiff, however, retained an outside appraisal company, Valcon Partners, Ltd. (Valcon). Douglas R. Krieser was an appraiser for Valcon. Krieser developed a depreciation schedule based on a study he conducted that related to the value of used retail showcases without regard to whether the plaintiff's showcases had been designed specifically for their approach to retail presentation.

The matter was tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, on November 29 and 30, 2017. At trial, Krieser testified about his approach to

board of assessment appeals for relief. Here, the plaintiff filed its appeal with the board.

[7] While the complaint was brought pursuant to both §§ 12-117a and 12-119, the plaintiff made no argument at trial and makes none on appeal relating to § 12-119. Thus, we conclude that the plaintiff, having, relied solely on § 12-117a as the basis of its complaint and in this appeal, has abandoned any claim premised on the provisions of § 12-119. See *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 426 n.2, 849 A.2d 382 (2004) (plaintiff's failure to address claims in posttrial brief resulted in abandonment of those claims); *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 814 n.6, 74 A.3d 474 (2013); *Peck* v. *Milford Hunt Homeowners Assn., Inc.*, 110 Conn. App. 88, 91 n.5, 953 A.2d 951 (2008).

the valuation of the showcases, in which he considered three components to be essential in the depreciation calculation: physical deterioration, functional obsolescence, and economic obsolescence. Krieser relied on information he had received from out-of-state fixture furniture dealers in the business of reselling used showcases. He provided these dealers with a sample of the fixtures used in one of the plaintiff's typical stores and instructed them to use their experience and sales history and to consider relevant economic factors to estimate what the fixtures would sell for in a transaction between a typical buyer and seller. Although he acknowledged that he had learned that there was, in fact, no market for used custom showcases, he used the information on the market for generic showcases as a factor in determining the value of the plaintiff's showcases.

In response, the town offered no evidence as to the value of the showcases; rather, the assessor testified that he took the historic costs of the showcases, a calculation not in dispute, and applied to that cost the depreciation schedule set forth in § 12-63 (b) (6). Although he acknowledged that he was not aware if the town had enacted an ordinance adopting the statutory schedule, the assessor testified that, as a matter of fact, he assesses all personal property in the town in the same way, by taking the original cost of an asset and applying a uniform depreciation schedule to that asset.

Following trial, the court issued its memorandum of decision sustaining the plaintiff's appeal. At the outset of its analysis, the court stated that, pursuant to § 12-63 (b) (2), the depreciation schedule set forth in § 12-63 (b) (6) can be used by a municipal assessor only if the municipality has, by ordinance, adopted the provisions of that section. The court found that the town had not adopted any such ordinance. The court further observed: "The town did not offer an expert appraiser

to counter Valcon's opinion of value. The only credible evidence related to fair market value that was introduced at the time of trial was that made by Valcon's appraiser and its appraisal report. Valcon's appraisal report was based on a study of factors dealing with the depreciation of in-store personal property." On the basis of the Valcon evidence and the lack of any appraisal from the town, the court found that the plaintiff was aggrieved by the tax assessment. The court's findings make clear that it did not give any weight to the assessor's evidence based on the statutory depreciation schedule solely because it concluded that the assessor was not legally permitted to utilize the statutory depreciation schedule. On appeal, the town argues that the court's refusal to consider the assessor's use of the statutory depreciation schedule was incorrect and that this legal determination likely influenced the court's finding of aggrievement and its ultimate determination of valuation.

We begin our analysis with the applicable standard of review and a discussion of the legal principles that guide our decision. "A trial court hears tax appeals pursuant to § 12-117a de novo and must arrive at [its] own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and [its] own general knowledge of the elements going to establish value . . . . We are bound by the trial court's findings of facts unless those findings are clearly erroneous, but we invoke a plenary review of any legal conclusions. We must, therefore, decide whether the conclusions are legally and logically correct, and find support in the record." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Westport*, 61 Conn. App. 834, 840, 767 A.2d 1237 (2001).

"[A]n aggrieved taxpayer may appeal to the Superior Court. In a § 12-117a appeal, the court potentially performs two functions. Initially, the court determines

whether the board's action aggrieved the taxpayer. . . . A taxpayer satisfactorily demonstrates aggrievement where the board's action will require the payment of an unjust and, therefore, illegal tax. . . . An affirmative finding of aggrievement is an absolute condition precedent to the second function, which involves the court's broad discretionary power to grant appropriate relief. . . . In exercising its discretion, the court should correct the valuation. . . . The issue of aggrievement involves a two part analysis, which entails both factual determinations and a question of law. Whether a specific action that the assessor takes in his valuation has aggrieved a taxpayer is a question of law. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 842. "[T]he trial court first must determine whether the plaintiff has offered sufficient, credible evidence that the subject property has been overvalued. If the trial court concludes that the plaintiff has not met [this] burden, the trial proceeds no further, and the town's assessment stands. . . . If the trial court finds that the taxpayer has failed to meet his burden because, for example, the court finds unpersuasive the method of valuation espoused by the taxpayer's appraiser, the court may render judgment for the town on that basis alone. . . . With respect to appeals by taxpayers, we have regularly affirmed such judgments without a showing that the town adduced affirmative evidence sufficient to demonstrate that the assessor's determination of market value was not unjust." (Citations omitted; internal quotation marks omitted.) *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 9, 151 A.3d 358 (2016).

Having set forth the principles that guide our review, we now turn to the issue of whether a municipal tax assessor may use the depreciation schedule provided in § 12-63 (b) (6) for purposes of assessing personal property when the municipality has not adopted it by

ordinance. The court, in its memorandum of decision, concluded that, "before § 12-63 (b) (6) can come into play, § 12-63 (b) (2) requires that a municipality *must*, by ordinance, adopt the provisions" thereof. (Emphasis added.) Thus, in order to determine whether the court's conclusion regarding the provision was correct, we must carefully construe the language of § 12-63 (b) (2).

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Mickey* v. *Mickey*, 292 Conn. 597, 613–14, 974 A.2d 641 (2009). Furthermore, "[t]he words of a statute are to be given their commonly approved meaning, unless a contrary intent is expressed." *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 308, 521 A.2d 1017 (1987). Finally, we note that, if the otherwise plain and unambiguous language of a statute reveals a latent ambiguity when the statute is sought to be applied to a particular situation, the court may turn for guidance to the purpose

of the statute and its legislative history to resolve that ambiguity. See *Conway* v. *Wilton*, 238 Conn. 653, 665, 680 A.2d 242 (1996).

Under § 12-63 (b) (2), a municipality is vested with discretion in determining whether to adopt the depreciation schedule. The statute provides in relevant part that "[a]ny municipality *may*, by ordinance, adopt the provisions of this subsection to be applicable for the assessment year . . . ." (Emphasis added.) The plain language unmistakably gives to the municipality the authority to adopt the depreciation schedule to assess the personal property of taxpayers. We note, however, that the statute does not explicitly limit the use of the statutory depreciation schedules only to those municipalities which have adopted them by ordinance. Thus, the statute does not answer our central question of whether the depreciation schedules devised by the legislature may be used by individual tax assessors in municipalities that have not adopted the schedules by ordinance. Because that question raises an ambiguity not apparent from the clear language of the statute, we turn to the purposes of the statute as revealed by its legislative history.

Although the legislative history does not directly answer our question, it clearly reveals that the statute's overarching purpose is to equip municipalities with the ability to adopt standardized assessment criteria. This history reflects an interest in regulating the approach to personal property assessment. During the 1999 session of the legislature when subsection (b) was first added to § 12-63, Representative Belden remarked that the bill "will start on a process of hopefully having more standardized assessment criteria for municipalities to use." 42 H.R. Proc., Pt. 17, 1999 Sess., p. 6107, remarks of Representative Richard Belden. Additionally, during discussion of the bill that would become Public Act 99-290, Representative McDonald remarked that the "bill provide[d] for uniform depreciation schedules" and that

it was "not mandatory that [anyone] follow these schedules." Id., p. 6104, remarks of Representative Anne McDonald. This history supports a conclusion that the legislature intended that the depreciation schedules set forth in § 12-63 (b) were to be used by municipal assessors for purposes of standardization and uniformity, and that, although adoption of the schedules by municipalities was not being mandated, the creation of a vehicle for a standardized approach to personal property assessment was a core purpose of the legislation. Given that purpose and the intent of the assessor in this matter to use the statutory depreciation schedule in § 12-63 (b) (6) in order to achieve town wide consistency and uniformity in the valuation of business personal property, we cannot conclude that the assessor was legally barred from utilizing the statutory schedule. Indeed, it would appear that his use of the schedule is entirely consistent with the core purpose of the statute.

On this basis, we conclude that the assessor's use of the statutory depreciation schedule was legally correct. Whether the values set forth in the statute can fairly be applied to the property in question was a question of fact not reached by the trial court.

We next turn to the question of whether the court's legal determination of aggrievement and its refusal to consider the statutory depreciation schedule as proffered by the town in response to the plaintiff's valuation claims likely influenced the outcome of this case. "The trial court's legal conclusions are subject to plenary review. [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *Amica Mutual Ins. Co.* v. *Muldowney*, 166 Conn. App. 831, 837, 142 A.3d 439 (2016), aff'd, 328 Conn. 428, 180 A.3d 950 (2018).

In the present case, the court's legal conclusion regarding the town's appraisal directly affected the out-

come. As stated previously in this opinion, when determining a tax appeal under § 12-117a, the trial court performs two functions. See *Nutmeg Housing Development Corp.* v. *Colchester*, supra, 324 Conn. 9. First, the burden is on the taxpayer to demonstrate to the court that it has been aggrieved by the decision of the board in that its property has been overassessed. When determining whether the taxpayer has been aggrieved, the court considers the reports of the parties, including evidence bearing on value. If the taxpayer fails to show that it has been aggrieved, the court may enter judgment for the municipality solely on that basis. In its second function, the court, on the basis of its finding of aggrievement, has the discretion to grant appropriate relief to the aggrieved party. See *Davis* v. *Westport*, supra, 61 Conn. App. 842.

Here, the court precluded itself from properly performing these functions. First, by too narrowly interpreting § 12-63 (b) (2), the court foreclosed consideration of the town's evidence bearing on value, namely, its appraisal report, solely because it was based on the statutory depreciation schedule set forth in § 12-63 (b) (6).[8] Additionally, when considering the evidence bearing on value, the court noted that the town did not offer an expert appraiser to counter the plaintiff's opinion of value. Thus, from the court's optic, it confronted a situation in which the taxpayer offered credible evidence of valuation and the town, in turn, offered no evidence. In our view, however, the town was not required to offer an expert appraiser because § 12-63 (b) (2) permitted the assessor to rely solely on the depreciation schedule contained in § 12-63 (b) (6). Whether, in fact, those values reflect the true value of the property in question is a question the court, on remand, must determine.

[8] We have stated that it is harmful for a court to discount evidence bearing on value. See *Grossomanides* v. *Wethersfield*, 33 Conn. App. 511, 515–17, 636 A.2d 867 (1994).

Accordingly, we conclude that the court's misinterpretation of § 12-63 (b) (2) was harmful and it influenced the outcome of this case.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

U.S. BANK, N.A., TRUSTEE *v.* ANTHONY R. ARMIJO ET AL.
(AC 42254)

Elgo, Devlin and Harper, Js.

Syllabus

The plaintiff bank, U Co., sought to foreclose a mortgage on certain real property owned by the defendants A and C. A and C were defaulted for failure to plead and the trial court rendered a judgment of strict foreclosure. Thereafter, the court denied C's postjudgment motion to dismiss, which alleged that U Co. did not have standing. The court granted C's motion to reargue and ordered that the motion to dismiss be reheard. The court subsequently denied C's motion to dismiss and C's motion to reargue that decision. C then filed a second motion to dismiss for lack of standing, which the court denied, and A and C appealed to this court. This court thereafter granted in part U Co.'s motion to dismiss this appeal. *Held* that this court could not review A and C's challenge to the judgment from which they had appealed; A and C failed to brief, or even mention, the trial court's judgment denying their second motion to dismiss, the defendants' brief was limited to their challenge of the court's findings of standing and jurisdiction, which were decided in earlier rulings from which a timely appeal was never taken, and the defendants failed to challenge the bases on which the court denied the second motion to dismiss, which were the law of the case doctrine and the denial of C's motion to reargue.

Argued November 20, 2019—officially released February 18, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. were

defaulted for failure to plead; thereafter, the court, *Hon. David R. Tobin*, judge trial referee, rendered judgment of strict foreclosure; subsequently, the court, *Lee*, *J.*, denied the defendant Cynthia Armijo's motion to dismiss, and the named defendant et al. appealed to this court; thereafter, this court granted in part the plaintiff's motion to dismiss the appeal. *Affirmed*.

Thomas W. Moyher, with whom, on the brief, was *James M. Nugent*, for the appellants (named defendant et al.).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

DEVLIN, J. In this foreclosure action, the defendants Anthony R. Armijo and Cynthia Armijo[1] appeal from the judgment of the trial court denying their postjudgment motion to dismiss. The defendants claim on appeal that the court erred in rejecting their claim that it lacked jurisdiction over this action because the plaintiff, U.S. Bank, N.A., as Trustee for Citigroup Mortgage Loan Trust, Inc., did not have standing to bring it. We affirm the judgment of the trial court.

The following procedural history is relevant to the defendants' claims on appeal. The plaintiff filed a complaint in November, 2016, to foreclose a mortgage on certain real property owned by the defendants in Weston. The defendants, who filed appearances as self-represented parties, were defaulted for failure to plead, and the court rendered a judgment of strict foreclosure on September 25, 2017, setting a first law day of January 30, 2018.

[1] The complaint also named the Connecticut Housing Finance Authority (CHFA) as a defendant. CHFA was defaulted for failure to plead, and is not a party to this appeal. Therefore, any references herein to the defendants are to Anthony R. Armijo and Cynthia Armijo.

On October 4, 2017, Cynthia Armijo filed a motion to dismiss the action for lack of standing, in which she argued that the original lender, Coldwell Banker Mortgage, was not a valid legal entity. The plaintiff objected to that motion to dismiss. While that motion was pending, the plaintiff moved to open and extend the law day, which the trial court granted on January 2, 2018, resetting the law day for April 3, 2018. By way of a memorandum of decision issued on January 22, 2018, the trial court denied Cynthia Armijo's motion to dismiss, concluding that the plaintiff had standing to bring this action.

On February 9, 2018, Cynthia Armijo moved to reargue her motion to dismiss. On March 7, 2018, the trial court granted the motion to reargue, voided its January 22, 2018 decision nunc pro tunc, and ordered that the motion to dismiss would be heard by another judge. The parties were ordered to reclaim the motion to dismiss to be assigned to the foreclosure short calendar. On March 21, 2018, the plaintiff filed a caseflow request to have the motion to dismiss written onto the March 26, 2018 short calendar. Cynthia Armijo objected to that caseflow request, but the trial court granted the request on March 23, 2018.[2]

By way of a memorandum of decision issued on June 21, 2018, the trial court concluded that the plaintiff had standing to bring this action against the defendants and, therefore, denied Cynthia Armijo's motion to dismiss. On July 26, 2018, the trial court denied Cynthia Armijo's July 10, 2018 motion to reargue. The defendants did not appeal the June 21, 2018 denial of the October 4, 2017 motion to dismiss or the denial of the motion to reargue.

[2] On March 26, 2018, the defendants filed their first appeal, Docket No. AC 41494, from the judgment of strict foreclosure, the initial denial of the October 4, 2017 motion to dismiss, and the March 7, 2018 order on the February 9, 2018 motion to reargue. The plaintiff filed a motion to dismiss that appeal as moot and, in part, untimely. On May 16, 2018, this court granted the plaintiff's motion to dismiss the defendants' first appeal without prejudice to the defendants raising their claims in a subsequent appeal following a final disposition of the motion to dismiss dated October 4, 2017, and the resetting of the law days.

On September 6, 2018, Cynthia Armijo filed another motion to dismiss for lack of standing and lack of subject matter jurisdiction, in which she asserted the same standing argument that she argued in her October 4, 2017 motion to dismiss. The trial court denied that second motion to dismiss on October 22, 2018. The court did so "under the law of the case on the merits and the motion to reargue." This appeal followed.

The plaintiff moved to dismiss this appeal on the grounds that it was moot because the law days had passed and that the appeal was, in part, untimely. This court granted in part the plaintiff's motion to dismiss, holding that the appeal was untimely as to all decisions prior to the trial court's order of October 22, 2018, which denied the defendants' September 6, 2018 motion to dismiss.

In accordance with that ruling, the defendants properly indicated on their appeal form that they are challenging the trial court's October 22, 2018 denial of the September 6, 2018 motion to dismiss. The defendants, however, failed to brief, or even mention, the trial court's October 22, 2018 judgment. The defendants' brief is limited to their challenge to the trial court's findings of standing and jurisdiction, which were decided in earlier rulings from which a timely appeal was never taken. Because the defendants failed to challenge the bases on which the court denied the September 6, 2018 motion to dismiss—the law of the case doctrine and the denial of the July 10, 2018 motion to reargue—we cannot review their challenge to the October 22, 2018 judgment from which they have appealed. See *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 438–39, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.

JESUS RUIZ *v.* COMMISSIONER OF CORRECTION (AC 41947)

Alvord, Bright and Flynn, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree, sexual assault in the fourth degree and risk of injury to a child, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. He claimed, inter alia, that his trial counsel were deficient in representing him at a pretrial hearing on a motion in limine filed by the state, which sought permission to videotape the testimony of the child victim in the petitioner's absence, pursuant to *State* v. *Jarzbek* (204 Conn. 683). The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. The habeas court had found that the petitioner failed to show that he was prejudiced by the allegedly deficient performance of his trial counsel. This court thereafter reversed in part the habeas court's judgment and remanded the case to the habeas court for further proceedings. This court concluded that the habeas court's prejudice analysis was improper. This court's remand order directed the habeas court to consider prejudice and, if necessary for the ultimate resolution of the petitioner's ineffective assistance claim, to consider the petitioner's allegations of deficient performance. Thereafter, on remand, the habeas court denied the petition for a writ of habeas corpus, from which the petitioner, on the granting of certification, appealed to this court. He claimed, inter alia, that the habeas court improperly concluded that his right to effective assistance of counsel was not violated by the performance of his trial counsel in challenging the reliability of the state's witness, G, at the *Jarzbek* hearing. *Held* that the habeas court correctly determined that the petitioner failed to demonstrate deficient performance of his trial counsel: trial counsel challenged G's testimony on multiple grounds, including, inter alia, reliability and G's qualifications; moreover, trial counsel's performance was not deficient for not asking specific questions or inquiring more extensively into certain areas, as the cross-examination strategy was tactical in nature and this court would not second-guess counsel's strategy; furthermore, trial counsel's failure to present the testimony of a defense expert at the *Jarzbek* hearing was not deficient performance, as the trial court had denied the petitioner's motion to have the expert interview the victim pursuant to *State* v. *Marquis* (241 Conn. 823), and counsel's decision not to present that testimony without the court having granted the *Marquis* motion constituted sound trial strategy.

Argued October 21, 2019—officially released February 18, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court, *DiPentima*, *C. J.*, and *Sheldon* and *Flynn*, *Js.*, which reversed in part the judgment of the habeas court and remanded the case for further proceedings; subsequently, the court, *Kwak*, *J.*, denied the petition and rendered judgment thereon, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Rebecca A. Barry*, supervisory assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. The petitioner, Jesus Ruiz, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that his right to effective assistance of counsel was not violated by the performance of his trial counsel in challenging the reliability of the state's witness at a pretrial hearing on the state's motion in limine seeking permission to videotape the testimony of the child victim, N,[1] in the petitioner's absence pursuant to *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988).[2] We affirm the judgment of the habeas court.

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

[2] The petitioner also argues that the court improperly determined that he failed to prove that he suffered prejudice. Because we conclude that the

This appeal comes to us following a remand by this court in *Ruiz* v. *Commissioner of Correction*, 156 Conn. App. 321, 113 A.3d 485, cert. denied, 319 Conn. 923, 125 A.3d 199 (2015), and cert. granted, 319 Conn. 923, 125 A.3d 199 (2015) (appeal withdrawn January 28, 2016), directing the habeas court to conduct further proceedings relating to the petitioner's claims of ineffective assistance of trial counsel at a *Jarzbek* hearing.

At the outset of this procedurally complex case, we briefly discuss the legal principles underlying a *Jarzbek* hearing. In certain circumstances, the videotaping of the testimony of an alleged child victim of sexual assault, outside the physical presence of the defendant, is constitutionally permissible. See *State* v. *Jarzbek*, supra, 204 Conn. 704–705; see also General Statutes § 54-86g (a). In deciding whether the state has met its burden of establishing, by clear and convincing evidence, a compelling need to exclude the defendant, the trial court balances, on a case-by-case basis, the defendant's sixth amendment right of confrontation with the state's interest in obtaining reliable testimony. See *State* v. *Jarzbek*, supra, 704–05. To demonstrate a compelling need, the state must show that the trustworthiness of the testimony of the child complainant seriously would be called into question because he or she would be so intimidated, or otherwise inhibited, by the physical presence of the defendant. See id.

We do not repeat all of the underlying facts concerning the petitioner's sexual abuse[3] of N, set forth in this

court properly determined that the petitioner did not prove deficient performance, we need not address prejudice. See *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

[3] Following a jury trial, the petitioner was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21 (a) (2), and one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2003) § 53a-73a (a) (1) (A). *State* v. *Ruiz*, 124 Conn. App. 118, 119–20, 3 A.3d 1021, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010).

court's opinion in the petitioner's direct appeal from his conviction. See *State* v. *Ruiz*, 124 Conn. App. 118, 120, 3 A.3d 1021, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010). The relevant facts and procedural history set forth on direct appeal concerning the *Jarzbek* hearing are as follows: "The state filed a motion to videotape N's testimony outside the presence of the [petitioner] pursuant to § 54-86g (a) and *State* v. *Jarzbek*, supra, 204 Conn. 704–705. The court held a hearing to determine whether N had the ability to testify reliably in the presence of the [petitioner]. Pamela Goldin, a licensed clinical social worker employed by the Child Guidance Clinic for Central Connecticut, Inc., for more than twenty-seven years, testified that she had been treating N for two years. According to Goldin, N has 'weak language skills,' '[h]er ability to express herself is below average for her age,' she has poor self-esteem, she becomes 'overwhelmed with anxiety' and she is 'very easily intimidated.'

"Goldin discussed a specific experience with N. She testified that N was distraught that her mother did not believe the accusations that she had made about the [petitioner]. When Goldin and N prepared for a session at which N's mother also would be present, Goldin testified that N talked at length about all the things she wanted to make sure she told her mother. Goldin testified that N 'froze' when the time came for N to speak to her mother. She could not speak and said very little of what she wanted to say, even though she was in a 'secure, familiar setting with a number of people there with whom she was comfortable and felt supported.' Goldin testified that this behavior occurred at two separate sessions. She testified that during her work with N, she and N discussed the allegations that N had made against the [petitioner] 'so that if she wanted to discuss at length what happened with [the petitioner] that she could. And she did tell me a little bit, but she was clearly uncomfortable discussing it at

great length. And I didn't press her.' She stated that testifying in the [petitioner's] presence, in addition to being a 'real hardship for [N]' that would 'set her back emotionally,' would cause N to 'freeze.' Goldin testified: 'I don't think she'd speak—I think she'd just be totally intimidated.' 'I doubt that she would . . . speak in the way that people are going to need her to speak in order to give the information you'll be asking of her.'

"Following the hearing, the [trial] court found: '[Goldin] observed [the] child for almost two years. How [N] reacts when this incident would come up. How, when she confronted the mother, she became [mute and] left the room. . . . [K]nowing this young girl for two years, [Goldin testified that N] could not testify truthfully and reliably in front of the [petitioner]. [Goldin gave] her reasons why, based upon her anxiety level, she'd be frightened, she'd be intimidated, her lower level of education, her low level of esteem . . . . I find [that] the state has met its burden by clear and convincing evidence pursuant to *Jarzbek*. . . . [Goldin] also said that [N] would be so stressed . . . I just can't take two years of treatment and ignore it. She didn't meet this young girl a week or a month ago.' Accordingly, the court granted the state's motion." (Footnote omitted.) Id., 122–24.

On direct appeal, the petitioner claimed, inter alia, that the trial court improperly had permitted N to testify outside the petitioner's presence because the state had failed to show, by clear and convincing evidence, that N's testimony would have been less reliable if she had been required to testify in the petitioner's presence. Id., 121–22. The petitioner also claimed that his sixth amendment right to confrontation had been violated. Id., 122. This court disagreed with the petitioner and concluded that "the [trial] court's finding that the state showed, by clear and convincing evidence, that if N testified in the [petitioner's] presence, her testimony would be less reliable or accurate was not clearly erroneous. The [petitioner's] right to confrontation is not

violated when the state makes that showing.'' Id., 127–28.

The petitioner filed the operative petition for a writ of habeas corpus on October 2, 2012. The claim relevant to this appeal is that the petitioner's trial counsel, John Ivers and Robert Casale,[4] provided ineffective assistance at the *Jarzbek* hearing by failing to (1) conduct an adequate cross-examination of the state's expert witness, and (2) present an expert witness. The habeas court, *Sferrazza*, *J.*, denied the claim and, in so doing, addressed only the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On appeal from the court's decision in the first habeas proceeding, the petitioner claimed, inter alia, that the court improperly rejected his claim that his trial counsel had rendered ineffective assistance at the *Jarzbek* hearing. See *Ruiz* v. *Commissioner of Correction*, supra, 156 Conn. App. 327. This court concluded that the first habeas court's prejudice analysis was improper but disagreed ''with the petitioner's contention that a presumption of prejudice arises any time the right to confrontation is violated.'' Id., 328. Instead, this court held that the prejudice analysis of the first habeas court was improper because it focused on whether the witness' testimony would have been different had confrontation occurred. Id., 337. This court held that ''this case must be remanded to the habeas court for consideration of prejudice . . . and, if necessary for the ultimate resolution of the petitioner's ineffective assistance claim, consideration of the petitioner's allegations of deficient performance, and any applicable special defenses filed by the respondent, the Commissioner of Correction.'' Id., 338.

On remand from this court, the second habeas court, *Kwak*, *J.*, rejected the petitioner's claim that his trial

[4] Ivers testified before the first habeas court that he asked Casale to be cocounsel because of Casale's criminal trial experience.

counsel rendered ineffective assistance during the *Jarzbek* hearing. Concerning the cross-examination of Goldin, the court found: "Goldin's testimony during the *Jarzbek* hearing was not extensive, spanning less than thirty pages. . . . Goldin, who has a master's degree in social work and had been employed as a licensed clinical social worker for approximately three decades, had a therapeutic relationship with N. Goldin treated N for approximately two years preceding the *Jarzbek* hearing. Attorney Ivers conducted voir dire, raised objections on direct examination, and conducted cross-examination of Goldin. The cross-examination elicited from Goldin that her therapeutic relationship came about through efforts to assist N to deal with her problems, in particular with her estranged mother. However, N eventually also discussed the sexual abuse during their sessions. The discussions regarding the sexual abuse and the petitioner were a minor component of the therapeutic sessions. Attorney Ivers effectively highlighted through his questioning that the therapeutic sessions primarily focused on N and her mother. According to Goldin, N was very nervous and concerned about potentially testifying in juvenile court proceedings and the criminal case. Attorney Ivers also elicited from Goldin that there are no professional guidelines to follow when determining if a child is too intimidated to testify, that it is a 'judgment call' by the person assessing the child." (Citation omitted.)

The second habeas court further found: "The petitioner contends that counsel failed to adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Goldin during the *Jarzbek* hearing. The evidence presented to the prior habeas court and this court does not support that contention. A careful review of the transcripts from the prior habeas proceedings and the testimony presented to this court after the remand fail to show how counsel was deficient. Nor has the petitioner demonstrated what counsel should

have done differently in the cross-examination of Goldin, nor has the petitioner proven that counsel could have more effectively impeached and challenged Goldin's *Jarzbek* testimony. The petitioner failed to prove that Goldin was not qualified to conduct the evaluation, that she did not conduct an adequate evaluation, and that her opinions were not reliable."

The second habeas court concluded: "It has already been established that the trial court's ruling after the *Jarzbek* hearing, which permitted the videotaped testimony of N in the petitioner's absence, was based on clear and convincing evidence presented by the state and not clearly erroneous. *State* v. *Ruiz*, supra, 124 Conn. App. 127–28. . . . After reviewing the *Jarzbek* hearing transcript, this court concludes that counsel's performance did not fall below that of a reasonably competent criminal defense attorney. . . . Based upon the foregoing, the court concludes that the petitioner has failed to prove that Goldin was not qualified to conduct the evaluation, that she did not conduct an adequate evaluation, that her opinions were unreliable, and that it was necessary for the defense to conduct an evaluation of N. The court further concludes that there is no evidence that trial counsel rendered deficient performance regarding the *Jarzbek* hearing." (Citations omitted.) The court further concluded that the petitioner had failed to prove the prejudice prong of *Strickland* v. *Washington*, supra, 466 U.S. 668. The court granted the petitioner's certification to appeal. This appeal followed.

The following standard of review is applicable. To succeed on his claim of ineffective assistance of counsel, the petitioner must demonstrate both that (1) his trial counsel made errors so serious that they were not functioning as counsel as guaranteed by the sixth amendment to the United States constitution, and (2) there is a reasonable likelihood that the result would have been different but for counsel's unprofessional

errors. See *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). A court may decide against the petitioner on either ground. See id., 713. When determining whether the representation received by the petitioner was constitutionally adequate, we employ a plenary standard of review. *Hickey* v. *Commissioner of Correction*, 329 Conn. 605, 617, 188 A.3d 715 (2018).

The petitioner claims that the court improperly concluded that his trial counsel did not perform deficiently during the *Jarzbek* hearing. He argues that his trial counsel failed to undermine adequately the reliability of Goldin's conclusion that N was unable to testify reliably in the petitioner's presence. He contends that the combination of counsel's failure to adequately impeach, cross-examine, and challenge Goldin's testimony and the failure to present expert testimony to undermine Goldin's testimony constituted deficient performance. We disagree.

We first address the petitioner's argument that his trial counsel failed to conduct an adequate impeachment, cross-examination, and challenge of the reliability of Goldin's testimony. He lists five areas of claimed importance, of which he contends trial counsel were deficient for failing to either inquire into or inquire into more extensively: Goldin's role as N's therapist was antithetical to conducting an independent evaluation necessary for a *Jarzbek* assessment; Goldin failed to engage in therapy to assist N in testifying in the petitioner's presence; Goldin failed to conduct an adequate background assessment of N's ability to speak in the petitioner's presence; Goldin's opinion was not based on scientific method; and Goldin lacked the qualifications necessary to conduct a *Jarzbek* assessment. The petitioner stresses that his argument hinges on trial

counsel's failure to challenge adequately the reliability, not the admissibility, of Goldin's testimony.

After carefully reviewing the record, we agree with the conclusion of the second habeas court that the petitioner has failed to demonstrate that his trial counsel's performance was deficient. Trial counsel challenged Goldin's testimony on multiple grounds, including that Goldin's therapy sessions with N were focused on N's personal life and her relationship with her mother rather than her relationship with the petitioner; Goldin based her opinion on two therapy sessions wherein N tried to talk to her mother, not the petitioner; Goldin's assessment was based on N's personal difficulties rather than on her ability to testify reliably in the petitioner's presence; Goldin had not been educated in forensic analysis in sexual assault cases; and Goldin did not conduct a special meeting with N to determine if N could testify in the petitioner's presence.

The record reveals that counsel thoroughly challenged the reliability of Goldin's testimony. The petitioner, however, in hindsight, argues that counsel should have asked certain questions and should have inquired more extensively in certain areas. What the petitioner's argument fails fully to appreciate is that there are many ways to provide effective assistance of counsel and that we not only give counsel the benefit of the doubt, but we affirmatively must entertain possible reasons for why counsel may have proceeded as they did. See *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

The petitioner argues that counsel did not effectively show that Goldin had failed to conduct an adequate background evaluation. He specifically argues that Goldin did not seek out information regarding N's behavior toward the petitioner during the time period from when the abuse occurred to when N reported the abuse. Although counsel did not specifically inquire into N's

behavior toward the petitioner, reasonable explanations exist for this decision. Counsel could have determined that N's behavior toward the petitioner prior to her revealing the abuse was not especially relevant, particularly in light of Goldin's testimony on direct examination as to N's emotional state regarding the possibility of seeing the petitioner in court. Goldin testified that N was "very frightened" about testifying in court and was "anxious" about seeing the petitioner again.

The petitioner contends that counsel were deficient in failing to show that Goldin had failed to engage in therapy to assist N in testifying in the petitioner's presence. The petitioner argues that such an inquiry is necessary to make a proper *Jarzbek* assessment according to *State* v. *Bronson*, 258 Conn. 42, 55, 779 A.2d 95 (2001). The petitioner misinterprets *Bronson*, which is factually dissimilar to the present case. In *Bronson*, when the victim was questioned on direct examination regarding the sexual assault, she began crying and was removed from the courtroom by her advocate. Id., 47. The state had represented to the court that the victim's therapist had opined, prior to the victim taking the stand, that the victim would be able to testify, and a *Jarzbek* hearing was not requested before trial. Id., 47 n.6. At the state's request, the court held a *Jarzbek* hearing shortly after the victim was removed from the stand, wherein the victim's father testified that she was uncomfortable, and the victim's advocate testified that the victim was "mad" at the defendant and scared to return to the courtroom. (Internal quotation marks omitted.) Id., 54–55. Based on this testimony, the court denied defense counsel's motion for an expert evaluation of the victim and ordered the victim's testimony to be videotaped. Id., 49.

Our Supreme Court held that the trial court had abused its discretion in denying the defendant's motion for an expert evaluation and reasoned that the evidence

relied on by the trial court came from persons interested in the victim's needs, that there was no inquiry into whether the victim could recover during the weekend, and that the circumstances that occurred were not sufficient to rebut her therapist's opinion that she was able to testify. Id., 55. Under those specific facts, the court concluded that the trial court abused its discretion in denying the defendant's request for a second expert to assess the victim's ability to testify in his presence. Id. In the present case, however, a *Jarzbek* hearing was conducted in *advance* of N's testimony and Goldin testified that N would be "frightened" and "intimidated" and thus unable to testify reliably in the petitioner's presence. There was no requirement that Goldin conduct therapy sessions to assist N to testify, and a failure to do so does not negate her opinion.

The petitioner also argues that trial counsel failed to challenge Goldin's testimony on the ground that her opinion was not based on scientific method and that she lacked the qualifications necessary to make a *Jarzbek* assessment. Our Supreme Court in *State* v. *Spigarolo*, 210 Conn. 359, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989), established that expert opinion evidence is not necessary and that no special qualifications are necessary for a witness to testify at a *Jarzbek* hearing. In *Spigarolo*, the court held that the trial court did not abuse its discretion in admitting the testimony of the victims' father and his wife that, based on their observations of the victims' behavior following the sexual abuse, the victims would be less candid if they were to testify in the defendant's presence. Id., 369–71. The court concluded that: "The family or guardians of a sexually abused child obviously occupy a unique position to assess the mental and emotional impact of a courtroom confrontation on the minor. We have no doubt that the testimony of such individuals may provide critical insight on a minor's ability or inclination to speak truthfully in the physical

presence of an alleged perpetrator. We therefore refuse to construe *Jarzbek* as requiring the state to present expert testimony in order to meet its burden of proof." Id., 372. If the victims' father and his wife in *Spigarolo* were able to provide "critical insight" on the victims' ability to testify reliably based on their observations of the victims' emotional and mental states despite that parent/child relationship, then, a fortiori, Goldin, as N's therapist, who had treated N for two years, had the requisite knowledge of N to offer testimony as to the ability of N to testify in the petitioner's presence. Goldin's testimony at the second habeas proceeding revealed that her impression of N's emotional state was based on her interactions with and observations of N made during therapy sessions. Goldin testified that she "used [her] knowledge of the client and [her] experience in treatment with [N]" to arrive at her assessment that N would be unable to testify in the petitioner's presence. Her testimony revealed that the primary basis for her conclusion was N's anxiety, low self-esteem, and an inability to explain to her mother, who had tried to make N recant her allegations of sexual abuse, her feelings regarding "everything that had happened" despite being in a supportive environment and wanting to do so.

Counsel, nevertheless, challenged the reliability of Goldin's testimony from the viewpoint of her qualifications. Counsel elicited from Goldin that there are no guidelines in her profession for assessing whether a child could testify reliably in the presence of a defendant, and that her opinion was a "judgment call." Goldin further testified on cross-examination that, although she addressed N's ability to testify in the petitioner's presence during a therapy session, she did not conduct a special meeting for that purpose. During voir dire of Goldin at the start of the *Jarzbek* hearing, counsel elicited testimony that she had not been educated in forensic analysis for sexual assault cases.

The petitioner argues that counsel failed to challenge Goldin's testimony on the basis that her role as N's therapist was antithetical to conducting an independent evaluation that was necessary to make an accurate *Jarzbek* assessment. The petitioner highlights the testimony of Goldin at the second habeas proceeding that it was antithetical to her role as N's therapist to try to push N to testify in the petitioner's presence and, that if she did so, N likely would have lost trust in Goldin. The trial court, however, was aware of Goldin's role as N's therapist and counsel adequately established on cross-examination that Goldin had a close professional relationship with N. On direct examination, Goldin testified that N was frightened and anxious to speak in court in the petitioner's presence, that she already had relayed the events of the sexual assault to multiple individuals and did not want to do so again. On cross-examination, Goldin answered the following question of counsel affirmatively: "Your job was to do the best you could to help [N] get over whatever problems she was going through." The court sufficiently was aware of any bias in N's favor that a therapeutic connection might engender. Defense counsel attempted to undermine Goldin's testimony by objecting to the state's question asking Goldin for her opinion as to whether N would be able to participate in the court proceedings, on the ground that the question called for a forensic conclusion and that Goldin's connection with N was with respect to "basic therapy" and was not for the purpose of "a forensic evaluation." Furthermore, the court was aware of *State* v. *Spigarolo*, supra, 210 Conn. 372, in which our Supreme Court held that the parents of the victims brought "insight" to the question of whether the victims could testify reliably in the presence of the alleged perpetrator. See *State* v. *Outlaw*, 179 Conn. App. 345, 353, 179 A.3d 219 (in absence of contrary evidence, judges presumed to know law and apply it correctly), cert. denied, 328 Conn. 910, 178 A.3d 1042 (2018).

The petitioner's argument is grounded in the notion that counsel should have asked certain questions and should have inquired into other areas more deeply. Ivers testified at the first habeas proceeding that part of his strategy was to highlight that Goldin's sessions with N primarily concerned N's relationship with her mother, not the petitioner, and therefore the state could not meet its burden. Ivers cross-examined Goldin on this point, and his decision to not ask questions that the petitioner on appeal now deems relevant does not establish deficient performance. A claim such as this, which concerns the ambit of cross-examination, falls short of establishing deficient performance. See *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Citation omitted; internal quotation marks omitted.) Id. Trial counsel's line of questioning of Goldin during cross-examination at the *Jarzbek* hearing was tactical in nature and we will not second-guess counsel's strategy.

The petitioner argues that his trial counsel's errors in cross-examination of Goldin were compounded by his counsel's failure to present the testimony of David Mantell, a forensic psychologist, at the *Jarzbek* hearing, in order to challenge the reliability of Goldin's testimony. He contends that the court improperly concluded that counsel's failure to present the testimony of Mantell did not constitute deficient performance. He further argues that Mantell would have testified as to the proper procedure by which to determine whether a complainant could testify reliably, demonstrating that Goldin did not conduct an adequate evaluation and that she was, therefore, unreliable. We are not persuaded.

Trial counsel filed in the trial court a motion pursuant to *State* v. *Marquis*, 241 Conn. 823, 699 A.2d 893 (1997), seeking to have N examined by the petitioner's expert. Following the *Jarzbek* hearing, the trial court determined that the state had met its burden under *Jarzbek*. It denied the *Marquis* motion, reasoning that Goldin had a two year therapeutic relationship with N, which it was not willing to ignore, and that to have N examined pursuant to a *Marquis* motion would further traumatize and intimidate N.

Ivers testified at the first habeas proceeding that he had contacted Mantell prior to the *Jarzbek* hearing and that his strategy was to file a *Marquis* motion so that Mantell could examine N to see whether she would be able to testify reliably in the presence of the petitioner. Ivers stated that he eventually retained Mantell. Mantell testified before both habeas courts. Regarding Mantell's testimony, Judge Kwak stated: "Dr. Mantell also testified before this court. . . . Dr. Mantell reiterated his criticism of the therapeutic relationship between Goldin and N, and how that relationship resulted in Goldin's *Jarzbek* assessments being too subjective because she was advocating for N, her patient/client. A forensic assessment such as one Dr. Mantell would have conducted on N, according to his testimony, would have been more objective and not influenced by therapeutic goals. Dr. Mantell described his own protocol for *Jarzbek* assessments, as well as steps that can be taken, including therapeutic treatment, to assist a child to become capable of testifying in a defendant's presence when the initial conclusion is to the contrary. Because Dr. Mantell has never conducted an assessment of N, he acknowledged that he cannot form an opinion whether or not N would have been able to testify reliably in the petitioner's presence." (Citation omitted.)

It is the petitioner's burden to overcome the strong presumption that his trial counsel's conduct constituted sound trial strategy that falls within the wide range of

reasonable professional assistance.[5] See *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 449, 119 A.3d 607 (2015). Without permission from the court to interview N, Mantell would have testified, as his testimony before the habeas courts reveals, in a generalized way to the procedures he uses to make *Jarzbek* evaluations. This testimony was unlikely to undermine the reliability of Goldin's *Jarzbek* assessment because, as Mantell acknowledged in his testimony at the first habeas proceeding, there is "no published protocol . . . within the psychological field for" performing a *Jarzbek* evaluation. Furthermore, expert testimony is not required at a *Jarzbek* hearing. See *State* v. *Spigarolo*, supra, 210 Conn. 372. Casale testified at the first habeas proceeding that "in the real world the [trial] court is going to go with the testimony of [Goldin who] say[s] that this child cannot testify in an open courtroom over and above a defense expert who may not have even seen the child, but is going to talk, in generalized theory." The petitioner has not overcome the presumption that trial counsel's decision not to present Mantell's testimony without the court first granting his *Marquis* motion constituted sound trial strategy.

Accordingly, we agree with the second habeas court that the petitioner has not shown that his trial counsel rendered deficient performance either during the cross-examination of Goldin or in declining to present the testimony of Mantell at the *Jarzbek* hearing.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] The petitioner also argues that viewing Ivers' decision not to present Mantell's testimony as a reasonable strategic decision is inconsistent with Casale's testimony at the first habeas proceeding that he did not recall if Ivers' decision not to present Mantell's testimony was strategic and that if Ivers were to have presented Mantell's testimony at the *Jarzbek* hearing that "the defense wouldn't lose anything. . . . I[t] wouldn't hurt." There is no inconsistency in Casale's inability to recall if Ivers' decision was strategic and Casale's admission that Mantell's testimony would not harm the defense with Ivers' strategic decision not to present Mantell's testimony.

STATE OF CONNECTICUT *v.* SCOTT R. PALMENTA (AC 42048)

Lavine, Bright and Flynn, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crimes of attempt to commit criminal mischief in the third degree and attempt to commit criminal trespass in the third degree, appealed to this court from the judgment of the trial court denying his petition for a writ of error coram nobis. In his petition, the petitioner sought to vacate his conviction, claiming, inter alia, that there had been no probable cause for his arrest on the initial charges of attempt to commit burglary in the third degree and attempt to commit larceny in the sixth degree. The court concluded that it did not have subject matter jurisdiction and denied the petition. *Held* that the trial court properly determined that it lacked subject matter jurisdiction over the petitioner's petition for a writ of error coram nobis: the petitioner could have filed a petition for a new trial, as opposed to the petition for a writ of error coram nobis, but the record reflects that he failed to do so, and, therefore, the petitioner failed to avail himself of an alternative legal remedy available to him, which deprived the court of jurisdiction to consider the merits of his petition; accordingly, because the court lacked jurisdiction over the petition for a writ of error coram nobis, it should have rendered judgment dismissing rather than denying the petition.

Argued November 20, 2019—officially released February 18, 2020

Procedural History

Substitute information charging the petitioner with the crimes of attempt to commit criminal mischief in the third degree and attempt to commit criminal trespass in the third degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the petitioner was presented to the court, *Hernandez*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *McLaughlin*, *J.*, denied the petitioner's petition for a writ of error coram nobis, and the petitioner appealed to this court. *Improper form of judgment*; *judgment directed.*

David B. Bachman, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, former state's attorney, and *Justina Moore*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The petitioner, Scott R. Palmenta, appeals from the judgment of the trial court denying his petition for a writ of error coram nobis.[1] The question with which we are presented is whether the trial court erred in concluding that it lacked subject matter jurisdiction over the petition. We conclude that the court properly determined that it lacked jurisdiction but that it should have dismissed the petition, rather than deny it. The form of the judgment is improper and, therefore, we reverse the judgment and remand the case with direction to dismiss the petition.

The record reveals the following relevant facts and procedural history. The petitioner was arrested on November 16, 2016, and charged with attempt to commit burglary in the third degree and attempt to commit larceny in the sixth degree. On March 22, 2017, the petitioner pleaded guilty, under the *Alford* doctrine,[2] to the substitute charges of attempt to commit criminal mischief in the third degree in violation of General Statutes §§ 53a-49 and 53a-117 and attempt to commit criminal trespass in the third degree in violation of

[1] The self-represented petitioner filed two petitions for a writ of error coram nobis, both dated April 22, 2018, on May 7, 2018. There is no substantive difference between the two petitions. Because the trial court treated them as one petition, we will do the same in this opinion. Although the petitioner filed the petitions in his capacity as a self-represented litigant, he was represented by counsel at the trial court hearing on the petition and is represented by counsel in the present appeal.

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

General Statutes §§ 53a-49 and 53a-109. The court sentenced him to a total effective sentence of six months of incarceration. The record does not reflect the date on which the petitioner was released from the custody of the Commissioner of Correction.

On May 7, 2018, the petitioner filed a petition for a writ of error coram nobis in which he alleged that there had been no probable cause for his 2016 arrest related to the initial charges of attempt to commit burglary in the third degree and attempt to commit larceny in the sixth degree. In support of the petition, he argued that there had been no probable cause for his arrest because there was no victim identified in the police report and the location of his arrest was in a public park, not a private one.[3] The petitioner also claimed that he only recently learned of these purportedly new facts because he previously was denied a copy of the police report by the court. Accordingly, he requested that the court vacate his conviction.

The court held a hearing on July 12, 2018. At the hearing, the petitioner argued that it was his "genuine belief that . . . the facts of the case to which he plead[ed] guilty . . . were new and different to him and not what he had believed that he agreed to at the time that he entered his guilty plea." After review of the transcript from the petitioner's plea proceeding, the court stated that the petitioner had "stipulated to the factual basis of his guilty plea" and that "[t]he factual basis upon which [he pleaded] support[s] the plea . . . ." The petitioner's attorney conceded: "I have spoken to [the petitioner], and I did indicate that, based on my understanding, this might have been an issue

[3] Apparently, the petitioner believes that, because he was on public property and the witness who reported his activity was not a victim of that activity, he could not be charged with the property crimes of burglary and larceny. Because the court determined that it lacked jurisdiction to consider the petitioner's writ of error, it did not address the merits of the petitioner's dubious claim.

that could have been presented in the habeas court, however, [the petitioner has exhausted] his habeas [relief] because he has satisfied his sentence on this case . . . .'' The court stated that, pursuant to *State* v. *Stephenson*, 154 Conn. App. 587, 108 A.3d 1125 (2015), it did not have jurisdiction over the writ because the petitioner had the alternative legal remedy of habeas corpus available to him at the time he was incarcerated. In response, the petitioner himself argued that he ''just found this stuff out and that's why because [he] couldn't file—[he] did file a habeas. They denied it.'' The court stated in response that, ''based on the evidence before the court, that's not accurate.'' Accordingly, the court concluded that it did not have jurisdiction and denied the petition. This appeal followed.

We first set forth the applicable standard of review. ''[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .'' (Internal quotation marks omitted.) *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 696, 6 A.3d 52 (2010).

''A writ of error coram nobis is an ancient common-law remedy which authorized the trial judge, within three years, to vacate the judgment of the same court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable. . . . The facts must be unknown at the time of the trial without fault of the party seeking relief. . . . A writ of error coram nobis lies only in the unusual situation [in which] no adequate remedy is provided by law. . . . Moreover, when habeas corpus affords a proper and complete remedy the writ of error coram nobis will not lie.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Das*, 291 Conn. 356, 370–71, 968 A.2d 367 (2009).

Similarly, when a petition for a new trial pursuant to General Statutes § 52-270 is available, a writ of error coram nobis will not lie. See *State* v. *Brown*, 179 Conn. App. 337, 344, 179 A.3d 807, cert. denied, 328 Conn. 914, 180 A.3d 594 (2018).

"The errors in fact on which a writ of error can be predicated are few. They must be assigned on facts not appearing on the face of the record which, if true, prove the judgment to have been erroneous. This can be only where the party had no legal capacity to appear, or where he had no legal opportunity, or where the court had no power to render judgment." (Internal quotation marks omitted.) *Hubbard* v. *Hartford*, 74 Conn. 452, 455, 51 A. 133 (1902). "[T]he relevant question is not whether the [petitioner] took advantage of [alternative legal remedies available to him, such as a writ of habeas corpus or a petition for a new trial] but, rather, whether he could have pursued them." *State* v. *Brown*, supra, 179 Conn. App. 341.

The petitioner claims on appeal that the court erred in concluding that it lacked subject matter jurisdiction over his petition. The petitioner argues, in essence, that if the court had heard evidence and found that he had learned of the allegedly new facts only after his release from incarceration, then it also would have determined that habeas relief had not been practically available to him because he was no longer in custody when he learned of those facts.[4] Therefore, he argues, the court would have concluded that it had jurisdiction to consider the merits of his petition. In response, the state argues that the court properly concluded that it lacked jurisdiction because the petitioner could have raised his claims at trial, on direct appeal, or through a petition

[4] "[P]ursuant to General Statutes § 52-466 (a) (1), the remedy of a writ of habeas corpus is only available while the petitioner is in custody on the conviction under attack at the time the habeas petition is filed . . . ." (Footnote omitted; internal quotation marks omitted.) *State* v. *Brown*, supra, 179 Conn. App. 342.

for a new trial, a petition for a writ of habeas corpus, or a motion to withdraw his guilty plea. We agree with the state, insofar as the petitioner had an alternative legal remedy available to address the claim that he raised in his petition.[5]

Connecticut courts lack jurisdiction to consider a petition for a writ of error coram nobis when a petitioner has failed to avail himself of alternative legal remedies available to him. See *State* v. *Das*, supra, 291 Conn. 372. In the present case, the petitioner instead could have filed a petition for a new trial, pursuant to § 52-270,[6] as opposed to the petition for a writ of error coram nobis, but the record reflects that he failed to do so.[7] The petitioner, therefore, failed to avail himself

[5] The state also argues on appeal that (1) the court properly concluded that it lacked jurisdiction because the writ of error coram nobis does not exist under Connecticut law, (2) the petitioner has not provided an adequate record for appellate review, and (3) the petitioner waived his claim of "false arrest," on the basis of no probable cause, by entering unconditional guilty pleas with respect to his charges. Because we determine that the record is adequate for our determination that the trial court lacked jurisdiction to consider the petition, we need not address the state's remaining arguments, including the viability of the writ of error coram nobis in Connecticut. See *State* v. *Sienkiewicz*, 177 Conn. App. 863, 869, 173 A.3d 955 (2017) ("[w]e decline the state's invitation to announce the demise of the writ of error coram nobis"), cert. denied, 327 Conn. 997, 176 A.3d 558 (2018); see also *State* v. *Stephenson*, supra, 154 Conn. App. 590 n.4 ("The state argues that, because of more recently created remedies, such as the petition for a new trial, the writ of coram nobis should be jettisoned . . . . We need not decide this issue, however, because even if the remedy does exist, the prerequisites for granting relief were not met here.").

[6] General Statutes § 52-270 (a) provides in relevant part that the trial court "may grant a new trial of any action that may come before it, for . . . the discovery of new evidence or . . . for other reasonable cause," provided it is brought within three years after the judgment is rendered. See General Statutes § 52-582 (a) ("[n]o petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment"); see also *State* v. *Brown*, supra, 179 Conn. App. 343–44.

[7] We note that the requirements for a petition for a new trial are substantially the same as those for a petition for a writ of error coram nobis: both must be brought within three years of when the judgment was rendered and must be based on facts not known at that time. In fact, during argument before this court, counsel for the petitioner could not identify any difference between the two remedies, nor could he explain why a petition for a new trial was not an adequate legal remedy.

of an alternative legal remedy available to him and, thus, failed to demonstrate that there was no adequate legal remedy available to him other than a writ of error coram nobis. On this sole basis, we conclude that the trial court properly determined that it lacked jurisdiction over the petition.

At the hearing on the petition, however, the court ruled from the bench that, pursuant to *State* v. *Stephenson*, supra, 154 Conn. App. 590–92, it did not have jurisdiction to consider the petition because the petitioner could have pursued a petition for a writ of habeas corpus while he was incarcerated. Because our review of the trial court's determination regarding jurisdiction is plenary, and because we have independently determined that the petitioner could have filed a petition for a new trial, instead of a petition for a writ of error coram nobis, we need not also determine whether the petitioner could have pursued habeas relief while he was incarcerated.

On the basis of the foregoing, we conclude that the trial court properly determined that it lacked jurisdiction over the petition.[8] The petition, however, should have been dismissed, not denied, because jurisdiction was lacking.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to render judgment dismissing the petition.

In this opinion the other judges concurred.

[8] We note that resort to a writ of error coram nobis appears to be wholly improper given the facts of the present case. As stated previously in this opinion, "[t]he errors in fact on which a writ of error can be predicated are few. They must be assigned on facts not appearing on the face of the record which, if true, prove the judgment to have been erroneous. This can be only where the party had no legal capacity to appear, or where he had no legal opportunity, or where the court had no power to render judgment." (Internal quotation marks omitted.) *Hubbard* v. *Hartford*, supra, 74 Conn. 455. The petitioner's claim does not seem to fall within any of the usual narrow circumstances in which a judgment would be rendered void or voidable.