J. B. *v.* K. B.*
(AC 46764)

Cradle, C. J., and Clark and Keller, Js.

Syllabus

The plaintiff, whose marriage to the defendant had previously been dissolved, appealed from the trial court's judgment ordering the plaintiff to reimburse the defendant for certain medical and dental expenses incurred by their child after she had reached the age of majority. The plaintiff claimed that the court erred when it ordered him to pay 96 percent of those expenses in the absence of any express language in the parties' separation agreement requiring the parties to pay postmajority medical and dental expenses. *Held*:

The trial court erred in construing the parties' separation agreement unambiguously to require the plaintiff to reimburse the defendant for the child's postmajority medical and dental expenses because, as there was more than one reasonable interpretation of the agreement, the agreement was ambiguous as to whether the parties were obliged to pay those expenses, and, accordingly, the case was remanded for the trial court to make a factual determination regarding the intent of the parties, after consideration of any extrinsic evidence presented by the parties concerning that issue.

Argued April 24—officially released August 5, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Klatt*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Moses*, *J.*, denied the defendant's motion for contempt and entered a remedial order regarding certain expenses to be paid by the plaintiff; subsequently, the court, *Moses*, *J.*, denied the plaintiff's motion to reargue and the plaintiff appealed to

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

this court; thereafter, the court, *Moses*, *J.*, sua sponte issued an order correcting the remedial order, and the plaintiff amended his appeal. *Reversed in part*; *further proceedings.*

Richard W. Callahan, for the appellant (plaintiff).

K. B., self-represented, the appellee (defendant).

Opinion

CLARK, J. This appeal arises from a postjudgment motion for contempt filed by the self-represented defendant, K. B., alleging that the plaintiff, J. B., wilfully failed to comply with a prior court order modifying certain provisions of the parties' separation agreement, which had been incorporated into their judgment of dissolution, concerning the parties' obligation to pay for the unreimbursed medical and dental expenses for their daughter, K. The plaintiff claims that the court erred by entering a remedial order requiring him to reimburse the defendant for the cost of unreimbursed medical and dental expenses incurred after K reached the age of majority. We reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married on August 29, 1998, and had two children: G, born in April, 2001, and K, born in May, 2003. On October 21, 2011, the court, *Klatt*, *J.*, rendered a judgment of uncontested dissolution, incorporating by reference the terms of a separation agreement executed by the parties on the same date (separation agreement).

Article III of the separation agreement governs alimony and child support. Section 3.2 governs child support and provides in relevant part: "(a) In light of the shared custody arrangement, neither party shall pay child support to the other. . . . (b) In the event the shared custodial arrangement is no longer feasible due

to the [plaintiff's] procurement of employment, the [defendant] shall be entitled to seek a modification of said agreement, and may petition the court for child support. . . . (c) The parties shall equally share in the cost of all agreed upon extracurricular activities of the children, and . . . equally share the cost of all unreimbursed medical [and] dental expenses."

Article VII of the separation agreement, titled "Medical and Hospitalization Insurance and Expenses," governs the parties' obligations to provide health insurance and to pay for the health care expenses of the children. Two provisions of article VII are relevant to this appeal. First, section 7.3 provides: "The parties' obligation to maintain insurance coverage for the children shall extend until each of them attains the age of nineteen (19) or, if either or both attend college, through the age of twenty-three (23)." Second, section 7.4 provides: "All unreimbursed medical, dental, orthodontic, psychological, [and] psychiatric expenses incurred on behalf of the children shall be shared equally by the parties."[1]

In the years since the judgment of dissolution, the court has entered several orders pertaining to the parties' obligation to pay for the children's unreimbursed medical and dental expenses. On October 2, 2013, the

[1] Section 7.1 of the separation agreement provides in relevant part: "The [plaintiff] shall maintain the existing medical, dental, major medical and hospitalization insurance, on behalf of the children, for so long as his COBRA coverage is available. . . ."

Section 7.2 of the separation agreement provides: "Upon the [plaintiff's] procurement of employment, if health insurance coverage for the children is available, he will pay for same. In the event he remains unemployed at the termination of COBRA coverage, or if health insurance coverage for the children is not available in his new employment, the parties shall share the cost of said health insurance coverage. This provision is subject to modification by either party."

Section 7.5 of the separation agreement provides: "Prior to incurring any additional voluntary, i.e. nonemergency, unreimbursed medical expenses on behalf of the children, each party shall obtain the consent of the other, which consent shall not be unreasonably withheld."

defendant filed a motion to modify the allocation of unreimbursed medical expenses and extracurricular activity expenses on the basis that the plaintiff, who was unemployed at the time of dissolution, had since obtained employment. On January 7, 2014, the court, *Owens*, *J.*, granted the defendant's motion and ordered that "[t]he extracurricular activities and unreimbursed medical expenses are divided 67 percent to the plaintiff . . . and 33 percent to the defendant . . . ." The plaintiff moved for reargument on January 24, 2014. The court agreed to hear reargument but, on May 14, 2014, reaffirmed the January 7, 2014 order.

On September 18, 2014, the plaintiff filed a motion for modification of the court's January 7, 2014 order regarding the division of unreimbursed medical expenses and extracurricular activity expenses. On October 30, 2014, following a hearing, the court, *Owens*, *J.*, granted the plaintiff's motion. The court ordered that "[t]he unreimbursed expenses shall be divided 60 percent to the [plaintiff] and 40 percent to the [defendant]." The plaintiff filed motions for articulation and reargument on November 12, 2014, both of which were denied.

On December 12, 2014, the plaintiff appealed from the judgment denying his motion for reargument. On June 26, 2015, however, the parties entered into a stipulated agreement (2015 agreement) that resolved the plaintiff's appeal. The parties agreed, inter alia, that "[t]he current allocation of extracurricular and unreimbursed medical expenses . . . shall remain 60 percent to the plaintiff and 40 percent to the defendant as ordered by the court on October 30, 2014," and that "[n]either party shall file a request to modify the current allocation of extracurricular and unreimbursed medical expenses without a substantial change in circumstances."

On May 8, 2019, the plaintiff filed a motion for an order regarding postsecondary education expenses for

G.[2] On June 20, 2019, the parties appeared before the court, *E. Rodriguez*, *J.*, at which time they indicated that they had come to an agreement concerning their respective obligations with respect to G's postsecondary education expenses (2019 agreement).[3] The court canvassed the parties and entered the 2019 agreement as an order of the court. The 2019 agreement provides, inter alia, that the defendant would "continue to maintain health insurance for the benefit of [G] pursuant to the . . . separation agreement" and that "[t]he current orders that obligate the plaintiff to pay for 60 percent and the defendant to pay for 40 percent of the reason-

[2] Section 11.3 of the separation agreement provides that "[t]he court shall retain jurisdiction over the parties for the purpose of entering educational support orders pursuant to [General Statutes] § 46b-56c."

General Statutes § 46b-56c provides in relevant part: "(a) For purposes of this section, an educational support order is an order entered by a court requiring a parent to provide support for a child or children to attend for up to a total of four full academic years an institution of higher education or a private career school for the purpose of attaining a bachelor's or other undergraduate degree, or other appropriate vocational instruction. An educational support order may be entered with respect to any child who has not attained twenty-three years of age and shall terminate not later than the date on which the child attains twenty-three years of age.

"(b) (1) On motion or petition of a parent, the court may enter an educational support order at the time of entry of a decree of dissolution, legal separation or annulment, and no educational support order may be entered thereafter unless the decree explicitly provides that a motion or petition for an educational support order may be filed by either parent at a subsequent date. . . .

* * *

"(g) The educational support order may include support for any necessary educational expense, including room, board, dues, tuition, fees, registration and application costs, but such expenses shall not be more than the amount charged by The University of Connecticut for a full-time in-state student at the time the child for whom educational support is being ordered matriculates, except this limit may be exceeded by agreement of the parents. An educational support order may also include the cost of books and medical insurance for such child. . . ."

[3] The parties initially appeared for a hearing on the plaintiff's motion on June 6, 2019. At that time, the defendant requested additional time to consider the draft agreement because she had just received a copy of it the day before the hearing. The court granted that request.

able and necessary unreimbursed medical and dental expenses incurred for the benefit of [G] shall remain in effect."[4]

On January 22, 2021, the defendant filed a motion to modify various aspects of the parties' obligations under the separation agreement and subsequent orders. As relevant to this appeal, the defendant first requested that the court modify the separation agreement by requiring the plaintiff to pay monetary child support for K retroactive to March, 2020, and "through the date she begins college . . . ." The defendant also requested that the court modify the allocation of unreimbursed medical and dental expenses and extracurricular activity expenses that the parties were required to pay on behalf of the children, as established by the 2015 agreement, on the basis that "the plaintiff's income has increased substantially and is well in excess of [the defendant's] current salary and capacity to earn."[5] (Emphasis omitted.) The defendant did not reference any time period in connection with her request to modify the allocation of expenses.

While the defendant's motion for modification was pending, on June 10, 2021, the plaintiff filed a motion for an order regarding postsecondary education expenses for K. In his motion, the plaintiff noted that K was eighteen years old and would be starting college later

[4] The 2019 agreement also set forth the amount each party was required to contribute toward G's tuition and other expenses she incurred while attending college.

[5] The defendant also asked the court to modify the 2019 agreement concerning G's postsecondary education expenses by adjusting the parties' respective obligations to contribute to G's tuition and other expenses "to more appropriately reflect [their] individual means," to order the plaintiff to provide an accounting of the college savings account the parties had established for G during their marriage, to excuse the defendant from paying her share of any past due expenses, and to require the plaintiff to pay 100 percent of certain dental expenses incurred on behalf of K. Those requests are not relevant to this appeal.

that year, and that the parties had been unable to reach an agreement concerning her postsecondary education expenses. The plaintiff requested that the court enter an order pursuant to General Statutes § 46b-56c concerning the parties' obligations with respect to K's postsecondary education expenses.

Beginning on December 20, 2021, the court, *M. Moore*, *J.*, held a trial on the defendant's motion for modification and the plaintiff's motion for an order regarding K's postsecondary education expenses.[6] Prior to trial, on December 15, 2021, the defendant filed proposed orders regarding the issues raised in her motion. With respect to her request that the court modify the allocation of unreimbursed medical expenses, the defendant requested that the court enter the following order: "For so long as the defendant is employed and her employer provides family coverage for health insurance, the defendant will continue to provide health insurance for the children until they reach the age of twenty-three, or obtain employment which provides them health insurance benefits (whichever occurs first). While the children are insured under [the defendant's] health insurance coverage, the plaintiff will reimburse the defendant 93 percent of all premiums paid by the defendant for the children's health insurance coverage, together with 93 percent of unreimbursed medical expenses."

On September 9, 2022, Judge Moore entered an order on the defendant's motion for modification (2022 order). Addressing first the defendant's request for monetary child support, the court noted that "[t]he motion for modification was served [on] the defendant on April 27, 2021," and that "[K] [had] turned [eighteen] on May 18, 2021." The court then noted that, at the

[6] The trial before Judge Moore also concerned two motions, a motion for contempt that had been filed by the plaintiff and a motion for attorney's fees that had been filed by the defendant. Those two motions are not relevant to this appeal.

time of the separation agreement, both parties were unemployed and "neither party was to pay child support to the other based on the shared custody arrangement for the children." The court found that the plaintiff's income had increased substantially since the time of the separation agreement and that his change in income constituted "a substantial change in circumstances which justifies modification of child support." On the basis of those findings, the court ordered the plaintiff to pay child support in the amount of "$454 per week for a period of April 27, 2021 . . . [through] the date [K] turned [eighteen] for a total of [three] weeks for a total of $1362 owed to the defendant."

With respect to the defendant's request to modify the allocation of unreimbursed medical expenses, the court noted that, pursuant to the 2015 agreement, which was the last order concerning the division of such expenses, "the parties were to pay extracurricular and unreimbursed medical expenses for the children 60 percent to be paid by the plaintiff and 40 percent to be paid by the defendant . . . ." (Citation omitted.) The court found that there was "a substantial change in circumstances to justify a modification of the payment of expenses for the children as agreed in the 2015 agreement" on the basis that the plaintiff's income had increased substantially since the time of the 2015 agreement. The court ordered: "The plaintiff shall pay 96 percent and the defendant shall pay 4 percent of the unreimbursed medical and dental expenses and agreed upon extracurricular expenses. Said modification is retroactive to the date of the service upon the plaintiff of the motion for modification (April 27, 2021)." The order did not indicate the date on which the parties' obligation to pay those expenses would terminate.[7]

[7] On the same date as the 2022 order, Judge Moore issued a separate order on the plaintiff's motion for an order regarding K's postsecondary education expenses. The court ordered the plaintiff to pay 96 percent, and the defendant to pay 4 percent, "of the maximum amount pursuant to [§] 46b-56c of [K's] educational expenses . . . after the application of grants,

On October 5, 2022, the defendant filed a motion for clarification of several aspects of the 2022 order. As relevant to this appeal, the defendant requested that the court clarify, with respect to the portion of the order modifying the allocation of unreimbursed medical and dental expenses and extracurricular activity expenses, "whether the subject expenses include only those expenses incurred for the [children] prior to their eighteenth . . . birthdays." The court denied the defendant's motion for clarification on October 24, 2022.

On December 7, 2022, the defendant filed a motion for contempt. In that motion, the defendant claimed that the plaintiff had violated the 2022 order by failing to pay 96 percent of the children's unreimbursed medical and dental expenses for the period April 27, 2021 (the retroactive date in the 2022 order), through October 31, 2022, and by failing to reimburse the defendant for 96 percent of the cost of health insurance for the children during the same period.

While the defendant's motion for contempt was pending, on March 29, 2023, the plaintiff filed a motion for clarification of the 2022 order. The plaintiff asserted that "[t]here is no clear and unambiguous order regarding either party's obligation to contribute to any expenses for the benefit of [K] now that she has aged out of child support," and requested that the court clarify whether the 2022 order required the parties to pay for K's postmajority unreimbursed medical and dental expenses.[8] On April 3, 2023, the court, *M. Moore*, *J.*, denied the plaintiff's motion.

loans and college savings accounts. . . . The expenses to be paid for [K] are pursuant to [§] 46b-56c. This order shall remain in effect until [K] attains twenty-three years of age." Nothing in this order addresses the parties' obligations to pay for K's unreimbursed medical expenses.

[8] The plaintiff did not ask the court to clarify whether the 2022 order required him to pay for any of G's unreimbursed medical and dental expenses. As we explain subsequently in this opinion, the plaintiff has conceded before this court that the 2019 agreement required the parties to pay for such expenses on behalf of G until she reached the age of twenty-three.

On July 6, 2023, following a two day trial, the court, *Moses*, *J.*, entered an order on the defendant's motion for contempt. In the order, the court first summarized the parties' positions as follows: "The defendant . . . alleges that [the 2022 order] was clear and unambiguous in its requirement that the plaintiff . . . pay 96 percent of the unreimbursed medical and dental expenses and extracurricular activities retroactive to April [27], 2021.[9] She argued that [the 2022 order] modified [sections 7.2 and 7.4 of the separation agreement]. Section 7.2 provides in relevant part that 'if health insurance coverage for the children is not available in [the plaintiff's] new employment, the parties shall share the cost of said health insurance coverage.' Section 7.4 provides that '[a]ll unreimbursed medical, dental, orthodontic, psychological, [and] psychiatric expenses incurred on behalf of the children shall be shared equally by the parties.' She also argues that [the 2022 order's] modification of the amount of unreimbursed expenses each party should pay must be read in conjunction with section 7.3 of the separation agreement, which provides: 'The parties' obligation to maintain insurance coverage for the children shall extend until each of them attains the age of [nineteen] or, if either or both attend college, through the age of twenty-three . . . .'" (Footnote added.) The court further explained that, "[w]hile there is no dispute that the children . . . were attending college when the relevant costs were incurred and under the age of twenty-three, the plaintiff . . . disagrees that [the 2022 order] was clear and unambiguous as to whether he was required to pay 96 percent of the unreimbursed medical and dental [expenses] after the children turned the age of eighteen years old, even if they were in college, and whether [the 2022 order] modifies

[9] The initial order on the motion for contempt indicated that the retroactive date was April 21, 2021. In response to an order of this court, however, the trial court issued an articulation clarifying that, consistent with the 2022 order, the retroactive date was April 27, 2021.

sections 7.2 and 7.4 [of the separation agreement]. He also argues that [any alleged violation of the 2022 order was not willful because] he filed a motion for clarification on [the 2022 order] that was denied by the court."[10]

With respect to the allocation of unreimbursed medical expenses, the court found "by clear and convincing evidence that the plaintiff . . . was in violation of a clear and unambiguous court order requiring him to pay 96 percent of the unreimbursed medical and dental expenses and extracurricular activities retroactive to April [27], 2021, and until his children turned 'the age of [nineteen] or, if either or both attend college, through the age of twenty-three . . . .' This order clearly modified the requirement that the parties 'equally share' unreimbursed medical and dental expenses as provided in section 7.4 [of the separation agreement]." The court further found, however, that the plaintiff's violation of that order was not wilful. Specifically, although the court "[did] not find ambiguity in [the 2022 order] requiring the [plaintiff] to pay 96 percent of the unreimbursed medical and dental expenses until his children turn twenty-three," it found "that the [plaintiff] sincerely was unsure about his obligation, and correctly sought clarification."

With respect to the allocation of the cost of health insurance premiums for the children, the court "disagree[d] that [the 2022 order] was clear and unambiguous as it pertains to a modification of section 7.2 [of the separation agreement]. It is not clear what, if any court order modified the requirement that the parties

[10] The plaintiff also argued before the trial court that, even if the 2022 order did require him to pay 96 percent of the children's unreimbursed medical expenses after they reached the age of majority, he did not violate that order because the expenses were incurred without his knowledge or consent in violation of section 7.5 of the separation agreement. The court rejected that argument, however, and the plaintiff does not challenge that portion of the court's decision on appeal.

'share the cost of said health insurance coverage,' and the percentage share."

The court therefore denied the defendant's motion for contempt, but entered a remedial order requiring the plaintiff "to reimburse the [defendant] for 96 percent of the unreimbursed medical and dental expenses and [the cost of] extracurricular activities retroactive to April [27], 2021, and until his children turn the 'age of [nineteen] or, if either or both attend college, through the age of twenty-three . . . .' The [plaintiff] is also responsible for any late fees, interest, and other charges accrued." The plaintiff filed a motion for reargument on July 19, 2023, which the court denied the following day.

The plaintiff filed the present appeal on August 7, 2023. On November 2, 2023, the court, *Moses*, *J.*, sua sponte, entered an order correcting the July 6, 2023 remedial order (corrected order). The corrected order provides: "As a remedial order, the plaintiff . . . is ordered to comply with paragraph 2 of the [2022 order] . . . . The second paragraph [of the 2022 order], titled 'Modification of Division of Costs for the Expenses of the Children,' provides that the plaintiff is ordered to pay 96 percent of all unreimbursed medical and dental expenses and agreed upon extracurricular activities for 'the children.' . . . The only issue before this court on the defendant's motion for contempt . . . was the plaintiff's compliance with [the 2022 order] as it related to the payment of unreimbursed medical and dental expenses the defendant paid on behalf of the children during the relevant time period. To make the defendant whole, the court orders the plaintiff to, in accordance with [the 2022 order], reimburse the defendant for 96 percent of the unreimbursed medical and dental expenses she has incurred, including late fees, interest, and penalties." On November 30, 2023, the plaintiff filed an amended appeal to challenge the corrected order.[11]

[11] On August 20, 2024, the plaintiff again amended his appeal to challenge two additional orders of the court entered on July 31, 2024. First, in connec-

On October 2, 2024, this court, sua sponte, ordered the court to articulate, inter alia, "what it meant when it stated in [the corrected order] that the second paragraph of Judge Moore's [2022 order] required the [plaintiff] to pay 96 percent of all unreimbursed medical and dental expenses and agreed upon extracurricular activities for 'the children.' " On October 7, 2024, the court articulated that "[t]he language [of the corrected order] should have tracked [the 2022 order] . . . [which] states the following, in relevant part: 'The plaintiff shall pay 96 [percent] and the defendant shall pay 4 [percent] of the unreimbursed medical and dental expenses and agreed upon extracurricular expenses. Said modification is retroactive to the date of the service upon the plaintiff of the motion for modification (April 27, 2021).' "

On appeal, the plaintiff claims that the court erred in entering the remedial order requiring him to reimburse the defendant for 96 percent of K's unreimbursed medical and dental expenses that were incurred after K reached the age of majority. The plaintiff concedes that, pursuant to the 2019 agreement, the parties agreed to pay for such expenses on behalf of G, and, therefore,

tion with a motion for contempt filed by the defendant, the court entered a remedial order requiring the plaintiff to pay for a portion of K's college textbooks. Second, in connection with a motion by the defendant for an order requiring the plaintiff to reimburse her for health insurance premiums she paid on behalf of the children, the court entered an order denying the plaintiff's claim that the motion was barred by collateral estoppel. Although the plaintiff filed an amended appeal form in which he indicated that he intended to appeal both orders, he failed to present any argument or analysis with respect to either issue in his principal appellate brief or his reply brief. Accordingly, to the extent that the plaintiff claims that the court erred in entering these orders, we decline to review such claims. See *Buchenholz* v. *Buchenholz*, 221 Conn. App. 132, 142 n.6, 300 A.3d 1233 ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.)), cert. denied, 348 Conn. 928, 304 A.3d 860 (2023).

he does not challenge the remedial order to the extent that it requires him to reimburse the defendant for expenses incurred on behalf of G. The plaintiff argues, however, that "[t]here is nothing in the history of the parties' agreements or the court's orders that supports the trial court's finding that the 2022 order . . . required the plaintiff to pay for the postmajority [medical and dental] expenses of his adult child [K]." The defendant contends that the court properly concluded that the 2022 order required the plaintiff to reimburse her for 96 percent of K's unreimbursed medical and dental expenses until she reached the age of twenty-three. Specifically, she argues that the separation agreement requires the parties to pay for the children's medical and dental expenses through the age of twenty-three, and that "[n]owhere in [the 2022] order [did] Judge Moore specify that the healthcare expenses made subject to retroactive reallocation were limited to 'premajority' medical or dental expenses." (Emphasis omitted.)

Before addressing the plaintiff's claim, we clarify the issue that is before us in this appeal. Although the court entered the remedial order based on its conclusion that the plaintiff had violated the 2022 order, we do not construe the court's rulings as determining that the 2022 order expressly required the plaintiff to pay for K's postmajority medical and dental expenses. As stated previously, the 2022 order was silent on the issue of whether the parties were obligated to pay for the children's unreimbursed medical expenses past the age of majority, and the defendant did not argue before the trial court that the 2022 order expressly required the plaintiff to pay such expenses. Rather, as the court explained in its ruling on the defendant's motion for contempt, the defendant argued that the 2022 order "must be read in conjunction with section 7.3 of the separation agreement, which provides: 'The parties'

obligation to maintain insurance coverage for the children shall extend until each of them attains the age of [nineteen] or, if either or both attend college, through the age of twenty-three . . . .'' Moreover, although the court found that the 2022 order ''clear[ly] and unambiguous[ly] . . . require[d] [the plaintiff] to pay 96 percent of the unreimbursed medical and dental expenses and extracurricular activities retroactive to April [27], 2021, *and until his children turned the 'age of* [*nineteen*] *or*, *if either or both attend college*, *through the age of twenty-three*,' '' the italicized portion of the court's ruling does not appear in the 2022 order. Rather, that language appears in section 7.3 of the separation agreement. In addition, during oral argument before the trial court, when the plaintiff argued that ''nowhere in [the 2022] order . . . does Judge Moore say that her orders [reallocating the parties' obligation to pay for the children's unreimbursed medical and dental expenses] continue past the age of majority,'' the court responded: ''I get that, but . . . the [separation] agreement does say that.'' Finally, on appeal, the parties focus on whether the separation agreement requires them to pay for K's unreimbursed medical and dental expenses through the age of twenty-three.[12] Accordingly, we focus our analysis on the question of whether, in entering the remedial order, the court correctly construed the parties' separation agreement.

The following legal principles and standard of review guide our resolution of this appeal. ''It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judg-

[12] Although the defendant argues on appeal that ''[a] plain reading of [the 2022 order] indicates Judge Moore's intention to modify the parties' obligation to contribute towards unreimbursed medical and dental expenses and to make that modification effective'' until K reaches the age of twenty-three, she does not argue that the 2022 order contains any language expressly addressing that issue. Rather, the defendant's argument is based on her contention that the separation agreement requires the parties to pay for K's unreimbursed medical and dental expenses through the age of twenty-three,

ment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract

and that "[n]owhere in her order does Judge Moore specify that the healthcare expenses made subject to retroactive reallocation were limited to 'premajority' medical and dental expenses." (Emphasis omitted.)

must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous. . . . The threshold question of whether contractual language is itself ambiguous is a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *Simpson* v. *Simpson*, 352 Conn. 81, 94–96, 335 A.3d 472 (2025).

Two provisions of the separation agreement concern the parties' obligation to pay for the children's unreimbursed medical and dental expenses. First, section 3.2 (c) provides that "[t]he parties shall equally share in the cost of all agreed upon extracurricular activities of the children, and . . . equally share the cost of all unreimbursed medical [and] dental expenses." Second, section 7.4 provides that "[a]ll unreimbursed medical, dental, orthodontic, psychological, [and] psychiatric expenses incurred on behalf of the children shall be shared equally by the parties." Although neither provision expressly addresses when the parties' obligation to pay for the expenses in question terminates, both parties claim that the language of the separation agreement unambiguously supports their respective positions. For the following reasons, we conclude that both parties have set forth a reasonable interpretation of the separation agreement, and, therefore, that the agreement is ambiguous.

First, as the plaintiff argues, it would be reasonable to infer from the absence of any express language requiring the parties to pay postmajority unreimbursed medical and dental expenses that the parties did not intend for the separation agreement to impose such an obligation. As the plaintiff notes, the default rule in this

state is that, in the absence of an agreement to the contrary, "[t]he obligation of a parent to support a child [generally] terminates when the child attains the age of majority, which, in this state, is eighteen."[13] (Internal quotation marks omitted.) *Barbour* v. *Barbour*, 156 Conn. App. 383, 400, 113 A.3d 77 (2015). Because unreimbursed medical expenses are a component of child support; see General Statutes § 46b-84 (f) (2) (C);[14] if the parties did not agree to pay such expenses that were incurred past the age of majority, that obligation would terminate as a matter of law once the children reached the age of majority.

Moreover, when one provision of a contract contains a specific term, that may indicate that the exclusion of the same term from another provision was intentional. See, e.g., *Dolan* v. *Dolan*, 213 Conn. App. 112, 128, 277 A.3d 829 (2022) (where separation agreement provided "that the duration of alimony payments 'shall be nonmodifiable,' " absence of similar language from another provision indicated that parties did not intend latter provision to be nonmodifiable); *Ceddia* v. *Ceddia*, 164 Conn. App. 266, 274, 137 A.3d 830 (2016) ("[w]hen the parties wished to preclude one aspect of possible periodic alimony modification, they knew how to do so"). Here, section 7.3 of the separation agreement—which immediately precedes section 7.4—expressly provides that the parties' "obligation to maintain [health] insurance coverage for the children shall extend until each

[13] Although the age of majority in this state is eighteen; see General Statutes § 1-1d; pursuant to General Statutes § 46b-84 (b), the obligation of a parent to support his or her child after the dissolution of a marriage or legal separation extends "until such child completes the twelfth grade or attains the age of nineteen, whichever occurs first."

[14] General Statutes § 46b-84 (f) (2) (C) provides in relevant part: "An order for payment of the child's medical and dental expenses . . . that are not covered by insurance or reimbursed in any other manner shall be entered in accordance with the child support guidelines established pursuant to section 46b-215a."

of them attains the age of nineteen . . . or, if either or both attend college, through the age of twenty-three . . . .'' As the plaintiff argues, the absence of similar language in section 7.4 may indicate that the parties did not intend for their obligation to pay for the children's unreimbursed medical expenses to extend past the age of majority.

The plaintiff's interpretation of the agreement is a reasonable one. Under his interpretation, the separation agreement would require the parties to maintain health insurance for their children until they reached the age at which they would be likely to enter the workforce—either after high school or, if they attend college, after completing their undergraduate education—but would not require the parties to pay for any medical or dental expenses that were not covered by insurance after the children reached the age of majority. The parties reasonably may have agreed to maintain health insurance for their children until they entered the workforce and were able to obtain coverage through an employer, while not obligating themselves to pay for any medical expenses that were not covered by insurance once the children reached the age of majority.

As the defendant argues, however, it also would be reasonable to read sections 7.3 and 7.4 of the separation agreement together, such that the parties' obligation to pay for the children's unreimbursed medical expenses is coextensive with their obligation to provide them with health insurance. According to the defendant, section 7.4 of the separation agreement cannot be read in isolation, but, rather, must be read in conjunction with section 7.3, which requires the parties to maintain health insurance for the children until they reach the age of either nineteen or twenty-three, depending on whether they attend college. The defendant argues that the inclusion of section 7.4 immediately following section 7.3 reflects a deliberate choice that ''clearly evinces

[the parties'] intent to pay [the] unreimbursed medical and dental expenses while insurance is also being provided."

It is well established that "a contract must be viewed in its entirety, with each provision read in light of the other provisions . . . ." (Internal quotation marks omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 248, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). "The law is clear that a contract includes not only what is expressly stated therein but also what is necessarily implied from the language used. . . . No special form of words, but that the promise appears upon a fair interpretation, is the essential." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 439, 927 A.2d 843 (2007). Here, section 7.4 is situated in article VII of the separation agreement, which generally addresses the parties' obligation to provide for their children's medical care. It also appears immediately following section 7.3, which expressly requires the parties to maintain health insurance for the children until the age of twenty-three if they attend college. As the defendant argues, the inclusion of section 7.4 immediately following that provision may indicate that the parties "intended to pay for unreimbursed medical and dental expenses for the [children] during the same time period, as any part-time college jobs they might find would almost certainly not provide adequate income which would allow them to pay those costs independent of [the parties'] support." Thus, although section 7.4 does not expressly state that the parties are obligated to pay for the children's postmajority unreimbursed medical expenses, it would be reasonable to infer that, by including that section immediately following section 7.3, the parties intended to pay for the unreimbursed expenses during the time the children are covered by their parents' insurance.

In arguing that the separation agreement unambiguously does not require the parties to pay for postmajority unreimbursed medical expenses, the plaintiff relies on the fact that section 10 of the 2019 agreement, which concerns payment of expenses for G's postsecondary education, provides that "[t]he current orders that obligate the plaintiff to pay for 60 percent and the defendant to pay for 40 percent of the reasonable and necessary unreimbursed medical and dental expenses incurred for the benefit of [G] shall remain in effect." Specifically, he argues that, if the separation agreement already required the parties to pay for G's unreimbursed medical expenses while she was in college, there would have been no reason for the 2019 agreement to include that requirement.

As the defendant argues, however, that provision of the 2019 agreement may also be construed to mean that the parties had a preexisting obligation to pay for G's unreimbursed medical expenses through the age of twenty-three, and that this obligation was not being modified by the 2019 agreement. By providing that the "current orders" requiring the parties to pay for G's unreimbursed medical expenses "shall remain in effect," section 10 of the 2019 agreement implies that the parties had an existing obligation to pay for G's unreimbursed medical expenses, and that that obligation would continue after the entry of the 2019 agreement. The parties entered that 2019 agreement on June 20, 2019.[15] As of that date, G already had turned eighteen years old, and there is no evidence in the record as to whether G was

[15] We note that, although the first page of the 2019 agreement is dated June 6, 2019, the parties did not enter the agreement on that date. Rather, as mentioned previously; see footnote 3 of this opinion; when the parties appeared in court on that date, the defendant requested a continuance because she had just received a draft of the 2019 agreement from the plaintiff the night before. The court accepted the parties' agreement and entered it as an order of the court on June 20, 2019.

still in high school at that time. Under the plaintiff's interpretation of the separation agreement, however, the parties' obligation to pay for G's unreimbursed medical expenses terminated as a matter of law either when she turned eighteen or when she graduated from high school, whichever occurred later. See footnote 13 of this opinion and accompanying text. Thus, under the plaintiff's interpretation of the separation agreement, if G had already graduated from high school at the time the parties entered the 2019 agreement, it would make no sense to say that the "current orders . . . shall remain in effect," because there would have been no such order in effect at that time.

In fact, another provision of the 2019 agreement seems to support the defendant's argument that section 10 was intended to reaffirm an existing obligation. Specifically, even though both parties agree that the separation agreement required them to maintain health insurance for the children through the age of twenty-three, section 9 of the 2019 agreement—which immediately precedes the provision relating to unreimbursed medical expenses—provides that "[t]he defendant shall continue to maintain health insurance for the benefit of [G] *pursuant to the parties' separation agreement*." (Emphasis added.) That the 2019 agreement contains at least one other provision reaffirming a preexisting obligation under the separation agreement undercuts the plaintiff's contention that the parties would have had no reason to include a provision reaffirming their obligations with respect to unreimbursed medical expenses. Accordingly, we disagree with the plaintiff's contention that the 2019 agreement supports his interpretation of the separation agreement.

Because both parties have set forth reasonable interpretations of the separation agreement that is grounded in the language used in that agreement, we conclude

that the agreement is ambiguous.[16] We further conclude, therefore, that the trial court erred in construing the separation agreement unambiguously to require the plaintiff to reimburse the defendant for K's postmajority medical and dental expenses. Because the agreement is ambiguous with respect to that issue, the proper interpretation of the agreement is a question of fact that must be resolved by the trial court. See *Simpson* v. *Simpson*, supra, 352 Conn. 100. Accordingly, this case must be remanded to the trial court to make a factual determination regarding the intent of the parties, after consideration of any extrinsic evidence presented by the parties concerning that issue.[17] See id. (where separation agreement was ambiguous, court reversed remedial order and remanded case for "trial court to resolve the ambiguity in the parties' agreement through a determination of their intent after consideration of all available extrinsic evidence and the circumstances surrounding the entering of the agreement").

[16] We recognize that our analysis does not address the significance, if any, of the fact that the separation agreement contains two separate provisions—sections 3.2 (c) and 7.4—that contain substantially similar language addressing the parties' obligation to pay for the children's unreimbursed medical expenses. As a general matter, "the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *Halperin* v. *Halperin*, 196 Conn. App. 603, 616, 230 A.3d 757 (2020). In the present case, however, neither party offers a convincing explanation for the inclusion of both provisions in the agreement or for whether or how section 3.2 (c) should affect our analysis of whether the parties intended to pay for the children's postmajority unreimbursed medical expenses. To the extent the parties believe that extrinsic evidence may shed additional light on the meaning of these two provisions, they may present such evidence to the trial court on remand.

[17] "We recognize . . . that none of the parties on remand has an obligation to present extrinsic evidence, whether testimonial or documentary, to resolve this ambiguity. Nor does any party have an obligation to present evidence as to who drafted the agreement, such that, in the event that extrinsic evidence did not resolve the ambiguity, the contra proferentem rule could properly be applied. We simply note that a [party] who fails to present any evidence that would permit the fact finder to resolve a material ambiguity risks failing to satisfy [their] burden of proof." *Murchison* v. *Waterbury*, 218 Conn. App. 396, 415 n.19, 291 A.3d 1073 (2023).

The judgment is reversed as to the remedial order and corrected order and the case is remanded for further proceedings in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JOHN C. RETTMAN *v.* MAURA L. RETTMAN
(AC 46429)

Moll, Clark and Wilson, Js.

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed from, inter alia, the trial court's judgment denying her motion to open the judgment denying her motions to open the dissolution judgment with respect to financial orders. She claimed, inter alia, that the court abused its discretion in denying her motion to open because the court had abused its discretion in denying the motions to open the dissolution judgment after depriving her of her right to complete the hearing on those motions that had begun before a different trial court judge and was never concluded. *Held*:

This court concluded, on the basis of the unique circumstances presented, including the unusual procedural history of the case, that the trial court abused its discretion in denying the motion to open the judgment denying the motions to open the dissolution judgment, as the hearing held on the defendant's motions to open the dissolution judgment on the basis of fraud did not conclude because the trial judge conducting the hearing was later reassigned and, despite the defendant's efforts to comply with that judge's orders to take steps to ensure that the hearing would conclude at a later date at which the defendant would be able to present evidence and be heard with respect to the merits of her motions to open, the hearing never resumed, and a different trial judge thereafter denied the motions to open, without an evidentiary hearing, on the basis of facts that were not in evidence.

Contrary to the plaintiff's claim, this court did not lack subject matter jurisdiction over the defendant's claim that the trial court abused its discretion in denying her motion for contempt because there was practical relief that this court could afford to the defendant in connection with that claim, and, thus, this court was not persuaded that this portion of the appeal should be dismissed on mootness grounds.

The trial court did not abuse its discretion in denying the defendant's motion for contempt with respect to the plaintiff's failure to comply with his obligation to pay alimony, as the court reasonably concluded, in light of the

totality of the circumstances, that the plaintiff's conduct was not wilful and reasonably declined to impose the harsh penalty of contempt in favor of requiring the plaintiff to pay the unpaid portion of his alimony obligation.

The trial court did not abuse its discretion in denying the defendant's motion for contempt with respect to the plaintiff's failure to timely comply with the court's order that he quitclaim the marital home to the defendant, as the order was unclear and ambiguous and the court properly considered the plaintiff's rationale for his alleged noncompliance, which supported the court's finding that the plaintiff's failure was not wilful.

Argued March 19—officially released August 5, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Maureen M. Murphy*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Price-Boreland*, *J.*, denied the defendant's motions to open the judgment; subsequently, the court, *Price-Boreland*, *J.*, denied the plaintiff's motion to open the judgment denying the motions to open, and the defendant appealed to this court; thereafter, the court, *Price-Boreland*, *J.*, denied the defendant's motion for contempt, and the plaintiff filed an amended appeal. *Reversed in part*; *vacated*; *further proceedings*.

Jeffrey D. Brownstein, for the appellant (defendant).

John C. Rettman, self-represented, the appellee (plaintiff).

Opinion

WILSON, J. In this marital dissolution action, the defendant, Maura L. Rettman, brings this amended appeal from the judgment of the trial court denying her motion to open the court's denial of several motions to open the financial orders entered at the time of its final decree. The defendant also appeals from the judgment of the trial court denying her motion for contempt that was based on the alleged noncompliance of the

plaintiff, John C. Rettman,[1] with the financial orders. The defendant claims that the court abused its discretion in denying (1) the motion to open, (2) the motion for contempt insofar as it was based on (a) the plaintiff's failure to comply with his obligation to pay alimony, and (b) the plaintiff's failure to timely comply with the court's order that he quitclaim the marital home to her. We reverse the judgment denying the motion to open and remand the case to the trial court for further proceedings. We affirm the judgment denying the motion for contempt.

It is useful to set forth at the outset of this opinion the following procedural history relevant to the claims raised on appeal. On February 5, 2013, the court, *Maureen M. Murphy, J.*, rendered a judgment dissolving the parties' marriage and incorporating into its judgment the terms of the parties' written dissolution agreement, with some modifications made directly by the court. Pursuant to the terms of the judgment, the plaintiff was required, among other things, (1) to make alimony payments of $600 per month to the defendant for two years, and (2) to "quitclaim [the marital home] to the defendant."

Thereafter, the defendant filed several motions to open the judgment based on the plaintiff's alleged failure, during the dissolution proceeding, to disclose on his financial affidavit the existence of his military pension. On October 5, 2022, the court, *Price-Boreland, J.*, denied three such motions on the ground that they were untimely. On March 8, 2023, the defendant filed a motion to open the judgment denying her motions to open, which Judge Price-Boreland denied on that same day. Thereafter, the defendant appealed from Judge Price-Boreland's March 8, 2023 ruling.

[1] The plaintiff is a self-represented party before this court and, at times, appeared as a self-represented party during the relevant proceedings before the trial court.

On December 14, 2022, before the court had finally disposed of the defendant's motions to open the dissolution judgment, the defendant filed a motion for contempt in which she alleged that the plaintiff had violated the court's financial orders by failing to pay alimony from February, 2013, until February, 2015; failing to timely comply with the order that he quitclaim the marital home to her; and failing to pay certain household bills. On May 30, 2024, following an evidentiary hearing, Judge Price-Boreland denied the motion for contempt. Thereafter, the defendant amended her existing appeal to include the judgment rendered on the motion for contempt. Additional facts and procedural history will be set forth as necessary.

I

First, we address the defendant's claim that the court abused its discretion in denying her motion to open. We agree with the defendant.

The following additional procedural history is relevant to this claim. On June 30, 2016, September 9, 2019, February 28, 2020, and July 26, 2021, the defendant filed motions to open the judgment.[2] On August 17, 2021, the parties appeared remotely before the court, *Tindill*, *J.*, who was then sitting at the Superior Court in Meriden, for a hearing that addressed pending matters before the court, including the defendant's outstanding motions to open. The defendant was represented by an attorney, but the plaintiff appeared as a self-represented litigant. At the beginning of the hearing, the plaintiff stated that the attorney he intended to represent him had recently returned from a deployment and the attorney intended to file an appearance on his behalf, but he was unable to do so because he had contracted COVID-19. The plaintiff stated, however, that he wished to proceed

[2] On July 16, 2021, the court, *Tindill*, *J.*, dismissed the motion to open that was filed on September 9, 2019. That ruling is not at issue in this appeal.

that day as a self-represented litigant because he desired to put this case to rest.

Thereafter, the defendant presented evidence in support of the motions to open, which included her own testimony. After the defendant's attorney concluded his direct examination of the defendant, the plaintiff stated that he "would like to postpone [the hearing] until I get my lawyer involved and he files his appearance." The defendant's attorney responded by reminding the court that, at the beginning of the hearing, the plaintiff stated that he wished to proceed without the assistance of an attorney. Judge Tindill asked the plaintiff when his attorney would be able to file an appearance on his behalf. The plaintiff replied that he believed that could occur "by the end of the week . . . ." Judge Tindill notified the parties that, as of September 7, 2021, she would be assigned to another judicial district and would be sitting at the Superior Court in Milford. Judge Tindill stated that her reassignment would require the caseflow coordinator at the Superior Court in Meriden to coordinate scheduling the matter with the caseflow coordinator at the Superior Court in Milford. The proceeding then was adjourned.

Consistent with what transpired at the hearing, on August 17, 2021, Judge Tindill issued an order stating: "A remote hearing was held on August 17, 2021, regarding the defendant's motions to open judgment . . . and the plaintiff's objection . . . . The plaintiff appeared pro se; the defendant appeared with counsel.

"The plaintiff testified that his attorney has returned from his deployment in Jordan, but was ill with COVID-19. The plaintiff expects his counsel to file an appearance on his behalf when he is well and no longer in quarantine. The plaintiff indicated that he wanted to proceed with the hearing in his counsel's absence since

there has been such a delay in the postjudgment proceedings.

"Both parties testified. The defendant submitted eight exhibits into evidence and the court took judicial notice of its July 16, 2021 order . . . the parties' February 5, 2013 financial affidavits . . . and the judgment file . . . and the transcript of the divorce proceedings . . . .

"The hearing did not conclude. The plaintiff indicated that he did not wish to continue without the assistance of his attorney with whom he expected to be able to communicate this week. The plaintiff completed cross-examination of the defendant's direct testimony; counsel for the defendant indicated [that] he had additional questions on redirect examination." Judge Tindill ordered the plaintiff to have his attorney file an appearance as soon as was practicable and ordered the parties to arrange with the court caseflow clerk to schedule a hearing date to complete the hearing on the motions to open.

The record reflects that, following the hearing, the defendant made several attempts to schedule a hearing date to complete the hearing on the motions to open. For example, on October 24, 2021, the defendant filed a caseflow request for that purpose, noting that the matter needed to be scheduled as soon as possible. On October 28, 2021, Judge Tindill denied the request. On May 23, 2022, the defendant requested a status conference and a date to resume the hearing that had begun before Judge Tindill. The court, however, did not act on this request. Attached to the request were emails to show correspondence between the defendant's attorney and the attorney who was then representing the plaintiff, in which the defendant's attorney discussed his attempts to have the matter heard. Attached to the request was also a copy of an email, dated September 12,

2021, that the defendant's attorney sent to the caseflow coordinator at the Superior Court in Meriden in an attempt to schedule a date on which the hearing could resume. The email shows that the caseflow coordinator at that court had instructed the defendant's attorney simply to await contact from the caseflow coordinator at the Superior Court in Milford. Attached to the request was also a copy of a fax, dated November 19, 2021, sent by the defendant's attorney to the caseflow coordinator at the Superior Court in Milford, seeking the continuation of the hearing before Judge Tindill. In the motion, counsel noted that "[t]here is nothing more I can [possibly] do" to have the matter heard and avoid a judgment of dismissal.

Eventually, a hearing on the outstanding motions was scheduled in the Superior Court in Meriden for September 22, 2022. The parties appeared before the court, *Price-Boreland*, *J.*, on that date. At the hearing, the defendant was represented by an attorney and the plaintiff appeared in a self-represented capacity.

From the onset of the proceeding, there was confusion between the court and the parties as to whether the defendant's motions to open were properly before the court for consideration. Specifically, Judge Price-Boreland questioned whether Judge Tindill had declared a mistrial with respect to the motions to open, whether the parties were before the court to "complete the . . . hearing on the [motions] to open," or whether the parties were before the court to "start" a new hearing on the motions.[3] The court expressed its belief that, if the

[3] At one point during the court's colloquy with the defendant's attorney, the defendant's attorney referred to a "note" in the file indicating that Judge Tindill had declared a mistrial with respect to a motion for contempt. He stated that he was concerned that this note might lead to "confusion" about what had been disposed of by Judge Tindill. The record reflects that, on November 3, 2021, Judge Tindill declared a mistrial with respect to a motion for contempt that the defendant filed on September 9, 2019. The defendant's counsel further represented to the court that Judge Tindill's November 3, 2021 ruling only pertained to the September 9, 2019 contempt motion and

motions to open were properly before it, it could not resume the hearing that began on August 17, 2021, but that it would need to conduct a new hearing. The defendant's attorney emphatically represented that he had not received notice that Judge Tindill had declared a mistrial with respect to the motions to open and that the matter had merely been continued at the request of the plaintiff. After a lengthy discussion with the parties, Judge Price-Boreland stated that it was necessary that she receive additional information directly from Judge Tindill. The court stated that "[w]e need to put some closure on how this file's being handled for the court to even step in and move forward." The court further stated: "There are too many moving parts and too many unanswered questions. And I think the best person to probably give us what we need is Judge Tindill." Judge Price-Boreland stated that, in the interest of not leaving the motions to open unresolved, she would dismiss the motions with prejudice "subject to [Judge Tindill's] decision" as to whether Judge Tindill had afforded the parties an expectation that their hearing would continue before Judge Tindill.

On September 23, 2022, Judge Price-Boreland issued an order stating: "A hearing was held on September [22], 2022,[4] regarding all pending motions before the court . . . . The court refers the matter to Judge Erika Tindill for review, subject to continuing of hearing the matters that were previously before Her Honor. The court enters separate orders on the motions to open judgment."

By order dated October 3, 2022, Judge Price-Boreland denied the defendant's motions to open as untimely.[5]

did not pertain to any of the pending motions to open the judgment of dissolution.

[4] The court, in its order, referred to a hearing date of September 23, 2022, but we consider this to be a scrivener's error as the record unequivocally reflects that the hearing occurred on September 22, 2022.

[5] We note that, although the court's order is dated October 3, 2022, the record reflects that it was filed on October 5, 2022.

The court stated: "The defendant has filed four motions to open in this dissolution [action], which went to judgment on February 5, 2013, by stipulation. The first motion was filed on June 30, 2016 . . . but was not pursued due to alleged issues with serving the plaintiff while he was residing in Turkey. This motion alleged that the plaintiff committed fraud by failing to disclose his vested military retirement on the financial affidavit he submitted at the time of dissolution.

"Over three years later, subsequent motions to open were filed on September 9, 2019 . . . February 28, 2020 . . . and July 26, 2021 . . . . All three of these motions are exactly the same, with the exception of a different heading date. These motions also relate to the plaintiff's alleged failure to disclose his military pension to the court on his financial affidavit at the time of judgment.

"After careful consideration of the relevant pleadings, case law, and statutory authority, the court denies the motions to open . . . for failure to comply with the requirements of General Statutes § 52-212 and Practice Book § 17-43 relating to timeliness of bringing a claim.

"Public policy favors the finality of judgments. *LaPenta* v. *Bank One, N.A.*, 101 Conn. App. 730, 763 n.3, [924 A.2d 868], cert. denied, 284 Conn. 905, [931 A.2d 264] (2007). More specifically, '[our courts] have strongly disfavored [collateral] attacks upon judgments because such belated litigation undermines the important principle of finality. . . . The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown.' [(Citations omitted; internal quotation marks omitted.)] *Meinket* v. *Levinson*, 193 Conn. 110, 113, 474 A.2d 454 (1984). In addition, it is

well cited that the court has an inherent authority to manage its docket as it sees fit.

"In the instant action, the defendant was aware of and/or was of the belief that the plaintiff had a military pension at the time of the dissolution and was also aware that the plaintiff was not disclosing this pension on his financial affidavit . . . . The defendant did not file a motion to open regarding the plaintiff's alleged failure to disclose these assets until three years later, in 2016. That motion was not prosecuted, and the defendant states that this was because she was unable to effectuate service on the plaintiff while he was living in Turkey . . . . To the court's knowledge, no additional steps were taken to attempt to effectuate or remedy the issue of service of this motion. Indeed, the defendant did not refile her motion to open for the same issue until over three years later, in 2019.

"The court does not find that the defendant diligently attempted to serve her 2016 motion to open because it has no objective evidence showing that she attempted to remedy the issue of effectuating marshal service on the plaintiff in Turkey. Even if the court accepted the [defendant's] claim that she was unable to serve the [plaintiff] until he returned to the United States in December of 2018, the [defendant] was still remiss in diligently prosecuting her claim in that she did not file her subsequent motions to open until over nine months later . . . .

"In light of the aforementioned, the court finds that the defendant does not have good cause for the delay in prosecuting her claim. More specifically, the court does not find that the defendant was prevented by mistake, accident or other reasonable cause from prosecuting her action or making her defense. The amount of time that elapsed between the defendant's filings is not timely and is contrary to the public policy that upholds

the importance of maintaining the integrity of the finality of judgments." (Citations omitted; footnote added.)

On October 5, 2022, Judge Tindill issued an order stating: "A hearing was held on August 17, 2021, regarding the defendant's motions to open judgment . . . and the plaintiff's objection . . . . The hearing did not conclude on those motions on that day. No further hearing was held on these motions until [thirteen] months later, at which time the judge that was overseeing the proceedings was no longer assigned to the [Superior Court in] Meriden [in the] judicial district [of New Haven].

"In light of the aforementioned, the court hereby declares a mistrial regarding the above motions."

On October 24, 2022, the defendant filed a motion to reargue Judge Price-Boreland's order of October 3, 2022. The defendant argued, in part, that Judge Price-Boreland was mistaken about the fact that Judge Tindill had declared a mistrial with respect to the pending motions to open. In this regard, the defendant relied on what transpired at the unfinished hearing before Judge Tindill on August 17, 2021, as well as her attorney's ensuing correspondence with the caseflow coordinator at the Superior Court in Meriden. The defendant also challenged the court's finding that the defendant had not pursued the motions to open with due diligence.

On November 9, 2022, Judge Price-Boreland issued an order denying the defendant's motion to reargue the court's denial of the motions to open. The court stated in its order that it "clarifies one of the misstatements within the motion claiming that a mistrial has not been declared by Judge Tindill on the motion to open." In its order, the court specifically referred to Judge Tindill's order of October 5, 2022.

On March 8, 2023, the defendant filed a motion to open the judgment denying her motions to open. Among

the myriad grounds and arguments set forth in the motion, the defendant asserted that it was improper for Judge Price-Boreland to have relied on the fact that Judge Tindill had declared a mistrial with respect to her motions to open because the defendant lacked notice of that ruling until she received Judge Tindill's order of October 5, 2022, which occurred well after the hearing that took place before Judge Price-Boreland on September 22, 2022. The defendant argued that she was not afforded an opportunity to be heard with respect to Judge Tindill's ruling. She also argued that the ruling plainly contradicted the terms of Judge Tindill's order of August 17, 2021, which directed the parties to have the matter scheduled for purposes of completing the hearing on the motions to open. Moreover, the defendant argued that, among other attempts made by her to have the motions to open heard, she had filed caseflow requests for a new hearing date following the August 17, 2021 unfinished hearing, which undermined Judge Price-Boreland's observation that she had not diligently pursued the motions for thirteen months following the uncompleted hearing in August, 2021. According to the defendant, she believed that the hearing that was scheduled before Judge Price-Boreland on September 22, 2022, was to be a continuation of the hearing that had occurred on August 17, 2021. The defendant argued that she was prepared to continue the hearing either before Judge Tindill or before Judge Price-Boreland and that it was unreasonable for Judge Price-Boreland to expect that the parties would begin the hearing anew when they appeared before her on September 22, 2022. The defendant also argued that the court's reliance on § 52-212 and Practice Book § 17-43 was erroneous in light of the fact that she had not failed to appear and had not been either defaulted or nonsuited. The defendant argued that "there was no basis for a mistrial in this matter and certainly no basis for a dismissal of the

action." On March 8, 2023, the same day on which the motion was filed, Judge Price-Boreland denied the motion to open the October 3, 2022 judgment.

Thereafter, the defendant filed a motion for articulation of the March 8, 2023 ruling. On April 4, 2023, Judge Price-Boreland set forth the following articulation: "A judgment rendered may be opened after four months if it is shown that the judgment was obtained by fraud, in the absence of actual consent, or because of mutual mistake.

"The parties' marriage was dissolved on February 5, 2013, pursuant to an agreement.

"This court has reviewed the pleadings in the file to include the transcript of hearings. The court takes judicial notice of all the relevant pleadings in the file. Of note, the court has reviewed the transcript of the dissolution hearing with Judge Maureen Murphy, dated February 5, 2013. The parties were divorced through an agreement.

"The initial agreement of the parties allowed for the plaintiff and the defendant to both retain the marital home as joint property for four years, with the payment of the expenses similar to what they had practiced for years. After four years, the property would be transferred by the plaintiff to the defendant and the defendant would assume all [of] the expenses of the property. Judge Murphy rejected the agreement as not being fair and equitable.

"Nonetheless, pursuant to the parties' subsequent request, the matter was recalled after the parties informed the court that they had a revised agreement and [were] ready to proceed. The matter was passed at 10:48 a.m. and recalled at 12:30 p.m. The agreement now allowed for the defendant to receive alimony of $600 per month for two years and that the plaintiff

would also cover all the expenses for the property during the two years. The parties were both fully canvassed, and the agreement was approved, adopted by the court, and went to judgment.

"The court is limited in granting relief from a dissolution judgment secured by fraud if (1) [t]here are no laches or unreasonable delay by the injured party after the fraud was discovered . . . (2) [t]here must be clear proof of fraud [and] . . . (3) [t]here is a substantial likelihood that the result of the new trial will be different.

"After an exhaustive review of the file, the transcripts on . . . file, and all the relevant pleadings within the file, the court found, pursuant to its order . . . dated October 3, 2022, that the defendant has filed the motion to open with undue delays, there is no clear proof of fraud as the defendant was aware at the time of dissolution of the plaintiff's military service, and there is no likelihood that a new trial will have a different result. The court's decision on the motion to open the judgment is final."

We begin by setting forth the legal principles that govern our review. "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed [as] long as the court could reasonably conclude as it did. . . .

"Pursuant to General Statutes § 52-212a, a civil judgment or decree rendered in the Superior Court may not

be opened or set aside unless a motion to open or set aside is filed within four months following the date on which [the notice of judgment or decree was sent]. . . . An exception to the four month limitation applies, however, if a party can show, inter alia, that the judgment was obtained by fraud. . . .

"There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there [must be] a [reasonable probability] that the result of the new trial [would] be different." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Conroy* v. *Idlibi*, 343 Conn. 201, 204–205, 272 A.3d 1121 (2022).

Further, it is well established that "[a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 727, 147 A.3d 188 (2016).

In her March 8, 2023 motion to open, the defendant argued that the court had abused its discretion because it denied the motions to open the dissolution judgment after depriving her of her right to complete the hearing

that had begun before Judge Tindill in August, 2021, improperly relied on Judge Tindill's October 5, 2022 ruling declaring a mistrial with respect to the motions to open, and ultimately resolved material factual issues concerning the motions to open in the absence of any evidence. The defendant argued that she was denied due process and that the court's judgment could not stand. The defendant reiterates these same arguments before this court in support of her challenge to the court's March 8, 2023 ruling denying the motion to open.[6]

It is undisputed that an evidentiary hearing related to the allegations of fraud set forth in the motions to open began at the trial held before Judge Tindill on August 17, 2021.[7] "When a court's exercise of discretion depends on disputed factual issues, such as the existence of fraud, due process requires an evidentiary hearing." *Davis* v. *Fracasso*, 59 Conn. App. 291, 299–300, 756 A.2d 325 (2000). Our careful review of the record reflects that, when the parties appeared before Judge Tindill on August 17, 2021, the court began to hear evidence in support of the defendant's motions to open the dissolution judgment on the basis of fraud. The

[6] In articulating her arguments, the defendant invokes the bypass doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The defendant's reliance on *Golding* is unnecessary because, in substance, she amply articulated before the trial court her belief that the denial of the motions to open in the absence of a completed hearing and in reliance on Judge Tindill's October 5, 2022 ruling deprived her of her right to due process. To the extent that the defendant's invocation of *Golding* is an attempt to raise a constitutional claim that is distinct from her claim that the court abused its discretion in denying her motion to open, it is unnecessary for us to resolve it because we conclude that the ruling reflected an abuse of discretion and should be reversed on that legal basis.

[7] Thus, this is not a case in which the court determined that the information included in the motions to open was insufficient to constitute the necessary threshold showing to entitle the defendant to an evidentiary hearing. Cf., e.g., *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App. 800, 809, 201 A.3d 511 (2019).

hearing did not conclude. Judge Tindill, both at the hearing and in her written order of August 17, 2021, directed the parties to take steps to ensure that the hearing would conclude at a later date, after she had been reassigned to the Superior Court in Milford. The defendant did so by sending several caseflow requests and other correspondence to the court, to no avail.

The record clearly reflects Judge Tindill's written order of August 17, 2021, in which she states that the hearing that began before her would continue. The record further reflects that, on September 22, 2022, the date of the proceeding before Judge Price-Boreland, no mistrial had been declared with respect to the motions to open. Indeed, Judge Tindill's ruling of October 5, 2022, reveals that she had not, prior to the date of her ruling, declared a mistrial. When the parties appeared before Judge Price-Boreland on September 22, 2022, however, the entirety of the proceeding was devoted to discussing what motions were properly before the court and, specifically, whether it was appropriate for the parties to be afforded an opportunity to conclude the hearing that began on August 17, 2021. When the proceeding was adjourned on September 22, 2022, Judge Price-Boreland made it clear that she would obtain more information from Judge Tindill. Judge Price-Boreland denied the motions on October 3, 2022, two days *before* notice was sent that Judge Tindill had declared a mistrial. On this record, we agree with the defendant that she not only lacked notice that Judge Tindill had declared a mistrial, but that Judge Tindill, in her ruling of August 17, 2021, expressly afforded her an expectation that she would be able to present evidence and be heard with respect to the merits of her motions to open.

Moreover, the defendant correctly argues that, in denying the motions to open, Judge Price-Boreland made factual findings despite the fact that the court

did not hear any evidence related to the motions to open during the proceeding on September 22, 2022.[8] At that proceeding, the court noted that, in order to reach the merits of the motions to open, it "would need to start an entire new . . . hearing" in light of the fact that it had "not been privy to the first day of the testimony" that took place before Judge Tindill. These comments make clear that Judge Price-Boreland did not have access to the evidence that the defendant presented at the uncompleted hearing before Judge Tindill, let alone that she had relied on it. Nonetheless, in ruling on the motions to open, Judge Price-Boreland, without an evidentiary hearing, specifically found that, at the time of the dissolution judgment, the defendant was aware of both the plaintiff's military pension and the fact that he was not disclosing its existence to the court. In addition, in her articulated decision of her March 8, 2023 denial of the motion to open the October 3, 2022 judgment denying the motions to open, the court once again, without having heard any evidence, stated that it had found "no clear proof of fraud . . . ." The court also found that, at the time of the dissolution judgment, "the defendant was aware . . . of the plaintiff's military service and there is no likelihood that a new trial will have a different result." It is well settled that a finding of fact that is not based on the evidence cannot withstand appellate scrutiny and, thus, a decision based entirely on such findings reflects an abuse of the court's

[8] We note that, at the outset of the proceeding, the parties were sworn in by the clerk, but the court and the parties thereafter discussed what matters were properly before the court, and neither party presented evidence with respect to the pending motions to open. Near the end of the proceeding, the court turned to a different topic by asking the parties about a pending motion for contempt that had been filed by the defendant. Specifically, the court briefly asked the parties questions about the plaintiff's history of making alimony payments, to which they responded. We note, however, that hearings on the defendant's motion for contempt did not take place until September 7 and December 1, 2023, and March 1, 2024.

discretion. See, e.g., *Ferraro* v. *Ferraro*, supra, 168 Conn. App. 727.

This case reflects an unusual procedural history. On the basis of the unique circumstances presented, we conclude that the denial of the defendant's March 8, 2023 motion to open the judgment denying the motions to open the judgment of dissolution was a clear abuse of the court's discretion. Accordingly, we conclude that the proper remedy is to set aside the judgment denying that motion and remand the case for a new hearing on the defendant's motions to open the judgment of dissolution.

II

Next, we address the defendant's claim that the court abused its discretion in denying the motion for contempt insofar as it was based on the plaintiff's failure (1) to comply with his obligation to pay alimony and (2) to quitclaim his rights to the marital home to her within the time specified in the judgment of dissolution. We are not persuaded by either subpart of this claim.

The following additional facts and procedural history are relevant to this claim. On December 14, 2022, before the court disposed of the defendant's motions to open the dissolution judgment, the defendant filed a motion for contempt in which she alleged that the plaintiff had violated the court's financial orders by failing to pay alimony from February, 2013, until February, 2015; to timely quitclaim his interest in the marital home to her; and to pay household expenses. The plaintiff filed a written objection to the motion. The court, *Price-Boreland*, *J.*, held a hearing on the motion for contempt on September 7 and December 1, 2023, and March 1, 2024. On May 30, 2024, the court rendered a judgment denying the motion for contempt. In its memorandum of decision, the court noted the relevant portions of the dissolution judgment rendered on February 5, 2013. First, the

court noted that section 8 of the dissolution agreement provided that alimony would be paid to the defendant in the amount of $600 per month for two years. Next, the court noted that section 10 of the dissolution agreement provided that the parties' marital home in Meriden "will remain joint property of the plaintiff and the defendant for four years." Finally, the court noted that section 10 was modified by the court at the time of the dissolution judgment to include the following language: "Sentence one shall be an order of the court. . . . [Sentence two of section 10 now states that the] plaintiff shall quitclaim this property to the defendant. The defendant shall be responsible for all household bills from the date of the [quitclaim] deed."

The court thereafter made findings with respect to the alleged instances of contempt. With respect to alimony, the court concluded that the order requiring the plaintiff to pay the defendant alimony in the amount of $600 per month for two years was clear and unambiguous. The court then made the following additional findings: "Pursuant to the parties' actions and relevant to the overall disposition of the issues before the court, the court finds it credible that, subsequent to the dissolution, the parties practiced a financial arrangement that was complicit and blurred the lines between the court orders and compliance with those court orders.

"The first notable incident was, despite the orders of the court, pursuant to the dissolution, requiring the plaintiff to quitclaim the property to the defendant in four years, the parties jointly refinanced the home in August of 2013, six months postdissolution. The refinancing provided for a reduction in the monthly mortgage payments to $660.

"The plaintiff's record on alimony paid to the defendant is found in his exhibits 1 and 6. Within those exhibits, the plaintiff summarized alimony payments made

to the defendant. The summary reflects payments made from [his bank account] in the amount of $8174 from February, 2013, [through] May, 2018, labeled as alimony payments. The total alimony payments that should have been paid over the two years was $14,400, however, based on the evidence, the amount paid by the plaintiff was $8174, with no other direct evidence that the remaining $6226 was paid directly towards alimony. The court finds this accounting credible. The court also takes judicial notice that the plaintiff never filed a motion for modification of alimony and so the [order] of the court at the time of dissolution stands."

With respect to the allegation that the plaintiff failed to comply with his obligation to pay household bills, the court credited evidence that, during the relevant time period, the plaintiff had paid certain sewer expenses, real estate taxes, mortgage payments, cable expenses, gas expenses, and electric expenses. The court found that, between February, 2013, and November, 2020, the plaintiff paid $95,785 in household bills. The court acknowledged the defendant's claim that she had paid $32,000 in household expenses that should have been paid by the plaintiff but noted weaknesses in the evidence upon which the defendant relied to support this claim. Among the court's detailed findings, it also noted that "[t]here was testimony from both parties that each of them had their family members living in the [marital] home at various times, either consuming resources and not contributing or staying there to supplement the expenses of the home." In particular, the parties presented conflicting evidence with respect to an agreement, pursuant to which the plaintiff's sister allegedly lived at the home on the condition that she would assist the defendant with household bills. The court found "the merit and pertinent details of either parties' argument on this issue to be inconsequential within the larger context of the parties' ongoing complicit modification of the court orders."

Finally, with respect to the allegation that the plaintiff failed to quitclaim his interest in the marital home to the defendant in a timely manner, the court stated: "The court takes judicial notice that the plaintiff filed a motion to compel sale of the property . . . [on] July 29, 2020. The motion was never ruled on by the court and by that date he had already quitclaimed the property to the defendant.

"The plaintiff quitclaimed the property to the defendant on September 16, 2019, and recorded it on June 29, 2020 . . . . The court recognizes the quitclaim date of September 16, 2019, as the operative date of the plaintiff officially complying with the court orders. The original order of the court was not qualified with a date of recording, but a date to quitclaim. The court also finds it credible that, given the history of the parties' practice subsequent to the dissolution in meeting the financial obligations of the marital home, the timing of the quitclaim was perfunctory and, thus, the date that the quitclaim was recorded is not significantly distinguishable from the quitclaim date."

The court then summarized its findings, as follows: "The court, pursuant to its findings above, finds that the plaintiff has not paid the defendant alimony in the amount of $6226 of the $14,400 he was obligated to pay. The court does not find his actions wilful, however [it] enters remedial orders below.

"Regarding the bifurcated agreement/order on the real estate, the court finds that the orders were not clear and unambiguous, therefore the plaintiff's noncompliance with the court order was not wilful.

"Generally, an execution of orders to quitclaim property is subject to the party or parties who are obligated to the financial institution for paying the mortgage, disentangling their financial obligations, thus allowing for the party who quitclaims the property to no longer

be held accountable as a [mortgagor]. Unless stated otherwise, in order to fully effectuate a quitclaim of property, the party who receives the quitclaim deed should have the capacity to independently assume the outstanding mortgage on the property. That party is subject to a lender qualifying them for said mortgage. The plaintiff as a [mortgagor] made a convincing argument that his vested interest in preserving his credit was a defense that precluded his strict compliance with the deadline to quitclaim the property. He, however, continued to pay for household bills associated with the marital property for a protracted period of time.

"The court finds the plaintiff's testimony credible that the defendant was unable to meet the conditions for an independent mortgage. This is supported by the parties' actions when they refinanced the property in August of 2013, with them both signing the documents to execute the refinance. Additionally, there was no evidence or testimony to support the defendant's preparedness to independently assume the mortgage.

"The plaintiff continued to pay the primary household expenses such as the mortgage, real estate taxes, sewer, gas, and electric bills through 2019, two years post the ordered quitclaim date of February, 2017. While the defendant also paid some expenses towards the household bills prior to the property being quitclaimed to her, the court finds that the plaintiff significantly and substantially met his required obligations, over and above any limited payments that the defendant may have made. A quitclaim deed was executed on September 16, 2019 . . . and, according to testimony of the defendant, recorded on June 29, 2020. The date of the quitclaim is the recognized date of final execution of the pertinent court order.

"The defendant sold the property on June 8, 2021 . . . with all the net proceeds going to her in the amount of $125,561.

"The court finds that, in light of the parties' actions that modified the court orders, the significant payments of court-ordered expenses made by the plaintiff, the defendant's sale of the marital home in 2021 receiving net proceeds of $125,561, the court denies both the defendant's motion for contempt and request for reimbursement therein." The court ordered the plaintiff to satisfy his outstanding alimony obligation by paying the defendant $6226 within forty-five days and denied the motion for contempt "as it relates to the real property and the quitclaim deed . . . and the request for any and all reimbursement . . . ."

The following legal principles and standard of review govern the defendant's claim that the plaintiff was in contempt of the orders entered pursuant to the judgment of dissolution when he failed to comply with his obligation to pay alimony and failed to quitclaim his interest in the marital home.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . .

"To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful

noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . [I]f we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Trent* v. *Trent*, 226 Conn. App. 791, 797–98, 321 A.3d 454 (2024).

"We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 187 Conn. App. 375, 393–94, 202 A.3d 458 (2019).

A

Before we may consider the merits of the defendant's claim, in which she challenges the denial of her motion for contempt, it is necessary that we resolve a jurisdictional issue raised by the plaintiff in his appellate brief. Specifically, the plaintiff argues that the present claim is moot because, as of the time of this appeal, he has

paid the defendant the $6226 alimony arrearage as ordered by the court and the marital home has been sold and he "no longer has any interest in it . . . ."

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021).

For several reasons, we are not persuaded that the payment of the alimony arrearage by the plaintiff and the sale of the marital home support the conclusion that there is no practical relief that we may afford the defendant in connection with this claim. First, we observe that the defendant argues in connection with this claim that she was entitled to *more* than the $6226 in alimony awarded to her by the court. In this regard, the defendant argues that, because the plaintiff did not make any monthly payments in the amount of $600 between February, 2013, and February, 2015, she was

entitled to an award of all of the alimony that should have been paid to her, $14,400, plus an award of 10 percent in statutory interest on that amount of $15,100, for a total award of $29,500. Second, with respect to the order requiring the plaintiff to quitclaim his interest in the marital home to her, the defendant argues that the court erroneously concluded that the plaintiff complied with this order on September 16, 2019, when he executed a quitclaim deed. The defendant argues that the plaintiff did not comply with his obligation to quitclaim his interest in the marital home until at least June 29, 2020, when the deed was recorded, and that the court failed to require him to pay for household expenses until that later date. Finally, in connection with her motion for contempt, the defendant sought, but was not awarded, attorney's fees. If this court were to grant her relief in connection with either subpart of this claim, the defendant may be able to recover not only an additional alimony payment or an additional payment for household expenses, but an award of attorney's fees.

For the foregoing reasons, we are not persuaded that this portion of the appeal should be dismissed on the ground that this court lacks subject matter jurisdiction over this claim. Having resolved the threshold jurisdictional issue raised by the plaintiff, we now reach the merits of the defendant's claim that the court abused its discretion in denying her motion for contempt.

B

With respect to the portion of the claim that pertains to alimony, the defendant argues that, despite the fact that, at the time of the dissolution judgment, the court ordered the plaintiff to pay her $600 per week in alimony between February, 2013, and February, 2015, the plaintiff failed to make any such alimony payments to her during that period of time. The defendant argues that it would be improper for the plaintiff to satisfy his

alimony obligation by relying on amounts that he overpaid to meet household expenses because the order to pay alimony did not include an offset provision and "[he] never filed a motion for modification and/or never otherwise informed the court or the defendant that he was intending to satisfy his alimony obligation by making overpayments of his household expense obligations. Significantly, per the judgment, neither the term of the two years nor the amount of $600 was modifiable. His alleged overpayments should arguably be considered gifts." The defendant, apparently acknowledging that the evidence supports a finding that the plaintiff made some alimony payments to her, in amounts less than $600 beginning in February, 2013, nonetheless argues that "[t]he plaintiff's unilateral decision to pay his alimony obligation in a manner of his choosing without the defendant's consent usurped her right to control the manner in which she would receive and allocate and/or spend her alimony funds." The defendant also argues that there was no evidence to suggest that the plaintiff lacked the ability to comply with his alimony obligation.

The defendant also argues that the court improperly found that the plaintiff had "labeled" some of the payments that he made to her as "alimony." According to the defendant, "[t]here is nothing in the exhibits that state that the payments were labeled as alimony payments. None of the columns [in these exhibits] even use the word alimony." Alternatively, the defendant argues that "[a]ny reference to alimony payments . . . [was] self-serving and the court abused its discretion in crediting the plaintiff with any such alimony payments." Finally, the defendant argues that, even if the court properly found that she and the plaintiff "were complicit in the manner in which they dealt with each other post-divorce, as evidenced by them agreeing to refinance the marital home in 2013, this is hardly a basis for

crediting the plaintiff with over $8000 in alimony payments as [it] did."

First, we address the defendant's challenge to the court's finding that the plaintiff paid her $8174 in alimony and its finding that the plaintiff characterized any of the payments that he made to her as "alimony." In its memorandum of decision, the court referred to exhibits 1 and 6 introduced into evidence by the plaintiff. Exhibit 1 includes an itemized list, apparently created by the plaintiff, of "payments" made by him to the defendant's bank account, between February, 2013, and May, 2018, totaling $8174.84. The exhibit also includes a record of amounts paid by the plaintiff to the defendant for "water and sewer" and "real estate taxes." The plaintiff testified that exhibit 1 reflects payments that he made to the defendant. Exhibit 6 is titled "John Rettman Alimony Payments Transferred From His . . . Bank . . . Account . . . Directly To Maura Rettman's . . . Bank Account . . . ." Similar to the information contained in exhibit 1, exhibit 6, also generated by the plaintiff, contains an itemized list of payments made by him, totaling $8174.84, between February, 2013, and May, 2018. The plaintiff testified that exhibit 6 reflects alimony that he paid to the defendant. The plaintiff agreed with the court that these exhibits did not reflect $600 payments between the period of February, 2013, and February, 2015, but rather a series of multiple payments in lesser amounts that were made beginning in February, 2013, until May, 2018, totaling $8174.84. Exhibit 6 also contains the following notation: "Claimed alimony amount total is $14,400. Less the amount paid into [the defendant's] accounts of $8174.84 equals a balance of $6225.16. The plaintiff is now retired and living on a fixed income and cannot afford $600 a month or it will bankrupt him." This evidence, which the court expressly found to be credible, supports the court's

reference to payments labeled by the plaintiff as "alimony" and its finding that the plaintiff had paid the defendant $8174 in alimony as of the time of the hearing on the motion for contempt. Accordingly, the defendant has failed to demonstrate that the court's findings with respect to these matters were clearly erroneous.

Second, we address the defendant's contention that the court improperly found that the plaintiff's failure to pay her alimony in accordance with the court's 2013 clear and unambiguous alimony order was not wilful. Many of the defendant's arguments, however, overlook the reasoning in the court's memorandum of decision. The court found that the plaintiff did not make payments as were required by the court's order, resulting in a deficit in alimony payments of $6226. The court did not excuse the plaintiff's failure to make such payments on the ground that the plaintiff had overpaid household expenses, nor did the court find that the plaintiff was excused from paying his alimony obligation because he lacked the financial means to do so. Indeed, although the court denied the motion for contempt, it nonetheless entered a remedial order requiring the plaintiff to pay the defendant $6226.

In concluding that the plaintiff's failure to pay alimony was not wilful, the court relied on its finding, the correctness of which the defendant does not challenge in any meaningful way in this appeal, that from the time of the parties' dissolution, the parties had "practiced a financial arrangement that was complicit and blurred the lines between the court orders and compliance with those court orders." For example, the parties jointly refinanced the marital home in August, 2013, the parties consented to their family members living in the marital home at various times, and the plaintiff continued to pay household expenses into 2019, well past the time

at which he was obligated to quitclaim his interest in the property to the defendant.[9]

The defendant essentially urges us to conclude that, because the court's alimony order was clear and unambiguous and the plaintiff did not comply with it, the court necessarily erred in finding the noncompliance to not be wilful. This logic is faulty. "Motions for contempt implicate the court's inherent equitable authority to effectuate and vindicate its judgments." *Brody* v. *Brody*, 153 Conn. App. 625, 635, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). "Whether to find a party in contempt is ultimately a matter within the trial court's discretion." *Eldridge* v. *Eldridge*, 244 Conn. 523, 532, 710 A.2d 757 (1998). Simply because the plaintiff did not comply with the order, it did not necessarily mean, in light of the totality of the circumstances, that the court could not exercise its discretion and find that the plaintiff's conduct was not wilful. Instead, we conclude that the court reasonably declined to impose the harsh penalty of contempt in favor of requiring the plaintiff to pay the defendant an amount equaling the unpaid portion of his alimony obligation.[10]

[9] Although the court's findings with respect to the parties' mutual lack of strict compliance with the court's financial orders supports its conclusion that the plaintiff did not wilfully fail to comply with his alimony obligation, we emphasize that such a pattern of noncompliance by the parties is disfavored. "[T]his court and our Supreme Court previously have determined that a party's decision to use self-help instead of judicial resources to modify an obligation under a judgment in a family matter could be a basis for granting a motion for contempt against that party . . . ." (Internal quotation marks omitted.) *Lynch* v. *Lynch*, 153 Conn. App. 208, 240, 100 A.3d 968 (2014), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, 577 U.S. 839, 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015). "A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in 'self-help' by disobeying a court order to achieve the party's desired end." *O'Brien* v. *O'Brien*, 326 Conn. 81, 97, 161 A.3d 1236 (2017). If the plaintiff was unsure of what the court's order required of him, it was incumbent upon him to seek clarification from the court.

[10] In light of our conclusion that the court did not abuse its discretion in finding that the plaintiff did not wilfully violate the alimony order in light of the parties' conduct following the entry of the financial orders, we are

C

We next address the portion of the defendant's claim that relates to the plaintiff's obligation to quitclaim his interest in the marital home to the defendant.[11] The defendant argues that the court improperly denied her motion for contempt on the ground that the plaintiff failed to quitclaim his interest in the marital home to her by February 5, 2017, an obligation that, in her view, is clearly and unambiguously set forth in the court's financial orders. The defendant argues that the court erroneously concluded that the effective date of the plaintiff's transfer of his interest in the marital home to her occurred on September 16, 2019, the undisputed date on which he signed the quitclaim deed. According to the defendant, on that date the quitclaim deed had neither been delivered to her nor accepted by her. The defendant argues that "the earliest effective date" of the transfer of the plaintiff's interest in the home was on June 29, 2020, the undisputed date on which he recorded the deed on the land records. Alternatively, the defendant argues that the transfer of the marital home to her by way of the quitclaim deed "was never actually effective" because she did not accept the terms set forth in the deed, some of which required her to release the plaintiff from any financial obligations related to the marital home, and she filed an objection to the deed after she was in possession of it.

The defendant argues that the court improperly agreed with the plaintiff's argument that he was not required to transfer his interest in the marital home until such time as the defendant was in a financial

not persuaded by the defendant's claim that the court's remedial order did not sufficiently compensate her for the plaintiff's failure to pay all of his alimony obligation in a timely manner.

[11] A quitclaim deed is "an ordinary and primary instrument of conveyance and conveys to the grantee whatever interest the grantor has in the property." *Hoyt* v. *Ketcham*, 54 Conn. 60, 62, 5 A. 606 (1886).

position to refinance it, thereby removing the plaintiff's name from the mortgage on the home. The defendant asserts that, even if the plaintiff acted under a good faith belief, his failure to comply with the court's order did not preclude a finding of contempt. The defendant posits that she was prejudiced because "[t]he plaintiff, by refusing to quitclaim the deed to [her] until she was financially able to refinance the home essentially usurped her ability to put the home up for sale which, when sold, would have removed the plaintiff's name from the mortgage." Moreover, the defendant argues that, by failing to find the plaintiff in contempt, the court erroneously "modified and/or augmented the [parties' dissolution] agreement when it essentially decided that the agreement meant to say that the plaintiff did not have to quitclaim the marital property to the defendant until she was in a financial position to refinance it."

In denying the motion for contempt, the court concluded that the order with respect to the plaintiff's obligation to quitclaim his interest in the marital home to the defendant was not clear and unambiguous because it did not specify whether compliance with the order occurred upon execution of the deed, the recording of the deed, or some other occurrence. Thus, the court determined that, for purposes of determining whether the plaintiff was in contempt of the dissolution order, the date on which the plaintiff executed the deed was "not significantly distinguishable" from the date on which it had been recorded on the land records. Having also found that "the defendant was unable to meet the conditions for an independent mortgage," the court was persuaded by the plaintiff's argument that his failure to act with respect to the quitclaim deed within four years was the result of the defendant's inability to assume sole responsibility of the mortgage on the marital home, and, therefore, was not wilful. The court determined that the plaintiff, who at the time of the dissolution judgment was a mortgagor of the marital home

together with the defendant, had made "a convincing argument that his vested interest in preserving his credit was a defense that precluded his strict compliance with the deadline to quitclaim the property."

As stated previously, we review de novo the court's legal determination that the order at issue was not clear and unambiguous. See *Trent* v. *Trent*, supra, 226 Conn. App. 797. "As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Perry* v. *Perry*, 156 Conn. App. 587, 593, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015). "The language of a judgment must be given its ordinary meaning unless a technical or special meaning is clearly intended." *Brewer* v. *Gutierrez*, 42 Conn. App. 421, 424, 681 A.2d 345 (1996).

The order, dated February 5, 2013, stated that "the plaintiff shall quitclaim [the marital home] to the defendant. The defendant shall be responsible for all household bills from the date of the [quitclaim] deed." The dissolution court also ordered that the marital home "will remain joint property of the plaintiff and the defendant for four years." We reach the same conclusion as Judge Price-Boreland, that the order at issue is unclear and ambiguous. The order reasonably could be interpreted to mean that the plaintiff and the defendant were required to continue to jointly own the marital home for at least four years following the date of the dissolution judgment. Under such a construction of the order, it would have been improper for the plaintiff to have

quitclaimed his interest in the marital home prior to February 5, 2017, and there is no readily identifiable deadline for the plaintiff to take any action with respect to a quitclaim deed by any particular date thereafter. Moreover, the orders do not specify what specific conduct constitutes compliance with the order beyond the requirement that the plaintiff "quitclaim" the marital home to the defendant. The ambiguity that arises from the court's use of the colloquial phrase "quitclaim" is readily reflected in the parties' arguments before this court. The plaintiff believes that compliance occurred upon his execution of the quitclaim deed. The defendant argues that compliance with the order occurred, at the earliest, once the quitclaim deed had been recorded and, in the alternative, that the plaintiff could not have complied with the order until the quitclaim deed was both delivered to her and accepted by her.[12]

Our conclusion that the order was not clear and unambiguous is a sufficient basis on which to uphold the court's denial of the motion for contempt to the extent that it is based on the plaintiff's alleged failure to quitclaim the marital home to the defendant in a timely manner. We also note that, in determining that a wilful violation of a court order did not occur, the court credited the evidence that the defendant was unable to meet the conditions of an independent mortgage, as well as the plaintiff's testimony that his alleged noncompliance was the result of his own interest in protecting his credit. These additional findings further support the court's finding that the plaintiff did not wilfully fail to comply with his obligation to quitclaim his interest in a timely manner. It was proper for the

[12] In light of our conclusion that the order was not clear and unambiguous, we are not persuaded by the defendant's argument that the court improperly failed to require the plaintiff to pay household expenses until June 29, 2020, the date on which the plaintiff recorded the quitclaim deed, rather than September 16, 2019, the date on which the plaintiff executed the quitclaim deed.

court to consider the plaintiff's rationale for his alleged noncompliance and exercise its discretion to deny the motion for contempt, particularly in light of the unclear and ambiguous order at issue. Contrary to the defendant's arguments, the court, in denying the motion for contempt, did not in any way augment or modify the terms of the dissolution judgment. Instead, the court merely declined to find the plaintiff in contempt for failing to comply with an order that the court found to be unclear and ambiguous. We are not persuaded that the ruling reflects an abuse of the trial court's discretion.

The judgment denying the motion to open the judgment denying the motions to open the dissolution judgment is reversed, the judgment denying the motions to open the dissolution judgment is vacated, and the case is remanded for further proceedings on the defendant's motions to open the dissolution judgment; the judgment denying the defendant's motion for contempt is affirmed.

In this opinion the other judges concurred.

JANE DOE #1 *v.* KYLE FASOLD ET AL.

JANE DOE #2 *v.* KYLE FASOLD ET AL.

JANE DOE #3 *v.* KYLE FASOLD ET AL.

JANE DOE #4 ET AL. *v.* KYLE FASOLD ET AL.

JANE DOE #5 *v.* KYLE FASOLD ET AL.

JANE DOE #6 *v.* KYLE FASOLD ET AL.

JANE DOE #8 *v.* KYLE FASOLD ET AL.

(AC 47269)

Alvord, Elgo and Pellegrino, Js.

Syllabus

The plaintiffs jointly appealed from the trial court's rendering of summary judgment, in each of seven cases, for the defendant town with respect to the plaintiffs' claims of negligence and negligent supervision. The plaintiffs

claimed that the court improperly rendered summary judgment in each case despite the existence of a genuine issue of material fact as to whether a work order request for maintenance made by a town employee created a ministerial duty to perform that maintenance in a prescribed way, thereby abrogating the town's governmental immunity protection and exposing the town to liability pursuant to statute (§ 52-557n) for its failure to complete the requested maintenance. *Held*:

The plaintiffs failed to establish that a genuine issue of material fact existed with respect to the nature of the town's duty because it was legally and logically correct for the trial court to conclude that the acts and omissions alleged in each complaint with respect to the requested maintenance were discretionary in nature, rather than ministerial, and, accordingly, the court properly determined that the town was entitled to judgment as a matter of law on its governmental immunity defense in each action.

Argued March 11—officially released August 5, 2025

Procedural History

Action, in each case, to recover damages for, inter alia, invasion of privacy, brought to the Superior Court in the judicial district of New Britain, where the cases were consolidated; thereafter, in each case, the defendant town of Plainville filed an apportionment complaint; subsequently, in each case, the court, *Morgan*, *J.*, granted the motion for summary judgment filed by the defendant town of Plainville and rendered judgment thereon, from which the plaintiffs filed a joint appeal to this court. *Affirmed*.

Ryan K. Sullivan, with whom were *Julianne Lombardo Klaassen* and, on the brief, *Paul M. Iannaccone*, for the appellants (plaintiffs).

Thomas R. Gerarde, with whom was *Eric E. Gerarde*, for the appellee (defendant town of Plainville).

Opinion

PER CURIAM. The plaintiffs, three adults and four minors, in seven underlying consolidated tort actions,[1]

[1] The plaintiffs, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4 PPA John Doe, Jane Doe #5 PPA John Doe, Jane Doe #6 PPA Jane Doe #7, and Jane Doe #8 PPA Jane Doe #9, were granted permission to proceed under pseudonyms due to the nature of the allegations in their complaints. "Per proxima amici, or [PPA], means by or through the next friend, and is employed when an adult brings suit on behalf of a minor, who was unable

appeal from the judgments of the trial court, *Morgan*, *J.*, rendered in favor of the defendant town of Plainville[2] following the granting of its motions for summary judgment as to the third and fourth counts of the plaintiffs' respective complaints in each action.[3] The plaintiffs' sole claim on appeal is that the court improperly rendered summary judgments despite the existence of a genuine issue of material fact as to whether a work order request for maintenance, made by an employee of the defendant, created a ministerial duty to perform the maintenance in a prescribed way, thereby abrogating the defendant's governmental immunity protection and exposing the defendant to liability pursuant to General Statutes § 52-557n[4] for its alleged failure to do so.

to maintain an action on his own behalf at common law." (Internal quotation marks omitted.) *Marciniszyn* v. *Board of Education*, 230 Conn. App. 592, 594 n.1, 330 A.3d 883 (2025).

[2] The plaintiffs also named Kyle Fasold as a defendant in their actions, and their claims against him are still pending in the trial court. Moreover, in the actions commenced by Jane Doe #4 and Jane Doe #5, the court granted the plaintiffs' respective motions to cite in Angela Lastrina as a defendant. Thereafter, the plaintiffs in those actions withdrew all claims against Lastrina. Because Fasold and Lastrina are not parties to this appeal from the partial summary judgments rendered by the trial court; see, e.g., *Tryon* v. *North Branford*, 58 Conn. App. 702, 703 n.1, 755 A.2d 317 (2000); in this opinion, we refer to the town of Plainville as the defendant and to Fasold by name.

[3] The plaintiffs' claims against Fasold, set forth in counts one and two of their respective complaints, sound in invasion of privacy and negligent infliction of emotional distress.

[4] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . ."

Although § 52-557n has been amended since the events underlying this case; see Public Acts 2023, No. 23-83, § 1; those amendments have no bearing

We disagree and, accordingly, affirm the judgments of the trial court.

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history. From September, 2017, through approximately March, 2020, the seven plaintiffs were either members of and/or coaches for the Plainville Blue Dolphins Swim Club (swim club)[5] and/or lifeguards at the Plainville High School (high school) pool. The swim club used the aquatic facilities at the high school. Kyle Fasold was a parent volunteer for the swim club and a board member and/or vice president of its Parents' Association. The high school aquatic facilities included a pool, recreation staff facilities, and locker rooms. The recreation staff facilities shared a door with the girls' locker room and housed a recreation staff locker room/closet area that had a door with a clear glass paned window with a view directly into the girls' locker room. That window had been covered with poster boards, which prevented the ability to see through it. At some point, however, a square piece had been cut from the poster boards, which left a small opening that allowed a view into the girls' locker room.

As a member of the swim club, Fasold had access to the recreation staff locker room/closet area and, on numerous occasions during the aforementioned time period, he manipulated the covering on its window in order to gain visual access to the girls' locker room. Using a cellular device and/or a digital camera, Fasold took photographs and/or recorded videos of the plaintiffs, through that window, while they were in various

on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] The swim club was made an apportionment defendant in each underlying action by the defendant, but it was not a party to the summary judgment motions, and it is not participating in this appeal.

stages of undress and/or were toileting. Fasold's actions were discovered in or about February, 2020, after he uploaded images with identifiable metadata to the Internet and an investigation ensued. Fasold was charged with crimes related to his actions, and he ultimately entered into an agreement with the United States Attorney's Office for the District of Connecticut whereby he pleaded guilty to certain of those charged crimes.

The defendant and its officers, agents, servants and/or employees, owned, controlled, possessed, operated and/or maintained the high school, and it allowed the swim club and its members to use and have access to the high school's pool and aquatic facilities. On February 5, 2018, Scott Martin, who was the custodial manager for the defendant's board of education, prepared a work order that requested that "General Maintenance" be performed at the high school "girls locker room/pool." The "Description" section of the work order stated: "Cut and fit colored/textured plexiglass in door from team coach office that leads to team locker room off pool area. Time Available: anytime." The request was deemed a "Medium" priority and the "Req. Completion Date" section of the form was left blank. Martin assigned the work order request to Terry Archer, who was employed by the defendant's board of education as a maintainer in the physical services department. Neither Martin nor Archer was a policy maker or an executive decision maker for the defendant.

The work order request reflects, at the top of the form, a "Completion Date" of February 8, 2018, and its "Status" reads "Closed Work Orders."[6] The window in

[6] The plaintiffs maintain, and the summary judgment evidence viewed in the light most favorable to them suggests, that the work order request was issued in response to a concern that a parent relayed to Kim Crowley, who, at the time, was the assistant director of the defendant's recreation department, that the poster board that covered the window was torn and that someone may have been manipulating it. Crowley then submitted an "order . . . to the school administration . . . the school facilities people" to have "the hole in the . . . covering of the window . . . repaired." There

the door, however, was not replaced with "colored/textured plexiglass . . . ." Rather, a March, 2020 inspection of the high school girls' locker room revealed that a small square piece of black construction paper had been taped to the poster boards to cover the hole that previously had been cut therein.

On various dates between September, 2020, and March, 2021, the plaintiffs brought actions for damages related to Fasold's conduct; see footnote 2 of this opinion; and the court, *Morgan*, *J.*, sua sponte consolidated the actions. See Practice Book § 9-5.[7] Each respective complaint states claims against the defendant for negligence pursuant to § 52-557n in count three and negligent supervision in count four.[8] The plaintiffs alleged, inter alia, that they suffered injuries and losses arising from Fasold's "inappropriate and disturbing conduct" and that those injuries and losses were caused by the negligence and carelessness of the defendant because its officers, agents, servants and/or employees "failed to ensure that minor and adult females, including the plaintiff[s], had a safe, secure and private dressing area . . . ."

is no evidence in the record, however, regarding the nature of the work order, the internal discussions, if any, that preceded its creation or the duties and expectations of the custodial staff in relation thereto.

[7] Practice Book § 9-5 provides in relevant part: "(a) Whenever there are two or more separate actions which should be tried together, the judicial authority may . . . upon its own motion, order that the actions be consolidated for trial. . . .

"(c) The court files in any actions consolidated pursuant to this section shall be maintained as separate files and all documents submitted by counsel or the parties shall bear only the docket number and case title of the file in which it is to be filed."

[8] The fourth counts of the complaints in the actions brought by Jane Doe #4, Jane Doe #5, Jane Doe #6, and Jane Doe #8 allege that they are brought pursuant to § 52-557n, whereas the fourth counts of the complaints in the actions brought by Jane Doe #1, Jane Doe #2, and Jane Doe #3, do not reference that statute. In all other material respects, however, the allegations against the defendant in each action are identical.

In its answers to each of the plaintiffs' complaints, the defendant denied the plaintiffs' negligence allegations and raised governmental immunity as a special defense to the third and fourth counts. Thereafter, on April 28, 2023, the defendant filed in each action a motion for summary judgment. The defendant claimed that it was entitled to judgment on counts three and four of the plaintiffs' complaints as a matter of law because (1) discretionary governmental act immunity barred the plaintiffs' negligence claims, (2) the plaintiffs could not show that they were identifiable persons subject to imminent harm, as required to fall within the relevant exception to governmental immunity, and (3) the defendant could not be held liable for the intentional, criminal acts of Fasold.[9]

On July 24, 2023, the plaintiffs filed memoranda in opposition to the defendant's motions for summary judgment in their respective cases.[10] Each plaintiff argued that there were genuine issues of material fact with respect to whether the defendant had violated ministerial duties (1) to repair and maintain the glass window in the storage room door and (2) to report Fasold's suspicious conduct. The plaintiffs further argued that, even if the defendant's alleged acts or omissions were discretionary in nature, there remained genuine issues of material fact as to whether the plaintiffs were identifiable persons subject to imminent harm and, thus, whether an exception to governmental immunity applied. The plaintiffs did not respond to or address

[9] In support of each motion, the defendant submitted a memorandum of law and sixteen exhibits, which included excerpts from several deposition transcripts and an affidavit from Ben Dalena, who was employed by the defendant as its assistant recreation director.

[10] In support of their memoranda in opposition, each plaintiff submitted, as an exhibit, an excerpt of her deposition transcript and the same thirteen other exhibits, which included, among other things, excerpts from several other deposition transcripts, a redacted police report, and a copy of the February 5, 2018 work order request.

the defendant's claim that it could not be held vicariously liable for the intentional, criminal acts of Fasold.

On August 23, 2023, the defendant filed a reply memorandum in support of its motion for summary judgment in each action, and it attached to each one an affidavit of Robert E. Lee, the defendant's chief executive officer and town manager between 2017 and 2020. Lee averred in his affidavit that Martin and Archer were not policy makers or executive decision makers for the defendant at any time during their employment.[11]

[11] The plaintiffs filed motions to strike "and/or disregard the defendant's reply brief[s] in resolving the merits of the . . . motion[s] for summary judgment" on grounds that they were untimely filed and because they sought to introduce new evidence and arguments that should have been raised in the defendant's initial filings. The plaintiffs argued, among other things, that Lee's affidavit constituted "new and untimely evidence" as to "whether the February 8, 2018 work order constituted a ministerial duty," that the defendant should not be able to introduce and rely upon it and that the court should not consider the merits of the replies. The court denied the plaintiffs' motions to strike, explaining that the "tardy filing[s] did not work undue prejudice or injustice to the plaintiff[s]" and that the "reply brief[s] appropriately respond[ed] to evidence and arguments made by the plaintiff[s] in [their] objection[s] to the defendant's summary judgment motion[s]." The plaintiffs have not challenged on appeal the court's denial of their motions to strike. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 (claim raised by party at trial is abandoned if it is not raised on appeal), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023). Nevertheless, in their brief to this court, the plaintiffs now characterize Lee's affidavit as "[e]xtratextual evidence [that] is not required for this court's analysis and [claim that it] should not have been relied on by the trial court." As the plaintiffs raise this claimed error by the trial court for the first time on appeal, after abandoning their challenge to the court's denial of their motions to strike, we will not review its merits. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 489–90; see also *Capital for Change, Inc.* v. *Wall Street Associates, LLC*, 232 Conn. App. 646, 655–56, A.3d (2025), petition for cert. filed (Conn. June 3, 2025) (No. 240392). Moreover, this claim is inadequately briefed. See *U.S. Bank Trust, National Assn.* v. *Shuey*, 232 Conn. App. 618, 620 n.2, A.3d (2025) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), petition for cert. filed (Conn. June 9, 2025) (No. 240395).

On December 28, 2023, the court issued memoranda of decision rendering summary judgments in favor of the defendant on counts three and four of each complaint. The court concluded, on the basis of the pleadings and the evidence submitted by the parties, that the defendant was entitled to governmental immunity as a matter of law. With respect to the work order, in particular, the court determined that it was "simply evidence of the discretionary nature of the defendant's duties with respect to inspection, maintenance, and repairs, rather than evidence of the existence of a ministerial duty."[12] This appeal followed.[13] Additional facts will be set forth as necessary.

Before turning to the plaintiffs' claim on appeal, we set forth the standard of review applicable to a trial

[12] In rendering summary judgments, the court also concluded that there was no genuine issue of material fact that (1) "none of the defendant's officials had reasonable cause to suspect or believe that Fasold was abusing the plaintiffs or subjecting them to an imminent risk of serious harm and, therefore, the mandatory duty to report [suspected harm pursuant to General Statutes (Rev. to 2017) §§ 17a-101 and 17a-101a] was not triggered," (2) "the plaintiffs were not identifiable persons subjected to imminent harm" and, thus, that exception to governmental immunity was not applicable, and (3) "Fasold's conduct was intentional rather than negligent" and "the exclusionary language of § 52-557n (a) (2) would shield the defendant from vicarious liability to the plaintiffs" on the basis of such conduct. The plaintiffs have not challenged on appeal the court's conclusions in these regards, and we deem any such claims abandoned. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 ("claims of error not briefed are considered abandoned" (internal quotation marks omitted)), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

[13] The court's decision to grant the defendant's motions for summary judgment did not dispose of all the counts in each complaint, and counts one and two against Fasold remain pending in each of the consolidated actions. Even so, the court's decisions "dispose[d] of all causes of action in [the plaintiffs' respective complaints] . . . brought . . . against [the defendant]," such that they are final judgments. Practice Book § 61-3; see also *Asnat Realty, LLC* v. *United Illuminating Co.*, 204 Conn. App. 313, 319 n.6, 253 A.3d 56 (decision that "disposed of all causes of action against those particular defendants . . . constituted an appealable final judgment under Practice Book § 61-3"), cert. denied, 337 Conn. 906, 252 A.3d 366 (2021). The plaintiffs, therefore, have appealed from final judgments, and this court has jurisdiction to hear their appeal.

court's decision to grant a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle [it] to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 620, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019).

We next set forth the well settled law of this state regarding the liability of municipalities. "According to our Supreme Court, [a] municipality itself was generally immune from liability for its tortious acts at common law . . . . [The court] also [has] recognized, however, that governmental immunity may be abrogated by statute. . . . [Section] 52-557n (a) (1) provides in relevant part: Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to

person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . [Our Supreme Court] previously [has] concluded that [t]his language clearly and expressly abrogates the traditional common-law doctrine in this state that municipalities are immune from suit for torts committed by their employees and agents. . . .[14]

"Subdivision (2) of § 52-557n (a) lists two exceptions to the statutory abrogation of governmental immunity. The exception relevant to this appeal provides: Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . The statute, thus, distinguishes between discretionary acts and those that are ministerial in nature, with liability generally attaching to a municipality only for negligently performed ministerial acts, not for negligently performed discretionary acts. . . .

"The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner. . . .

[14] "Our Supreme Court has cautioned that '[s]tatutes that abrogate or modify governmental immunity are to be strictly construed' because if 'a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of construction.' . . . *Rawling* v. *New Haven*, 206 Conn. 100, 105, 537 A.2d 439 (1988)." *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 223 n.5, 131 A.3d 771 (2016).

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity. . . . A municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs. . . . Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases where it is apparent from the complaint. . . . [W]hether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52-557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions *necessarily* involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citations omitted; emphasis in original; footnote in original; internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 223–25, 131 A.3d 771 (2016).

In their complaints, the plaintiffs allege that the defendant "failed to ensure that minor and adult females, including the plaintiff[s], had a safe, secure and private dressing area" at the high school. They claim that Archer's failure to maintain or repair the window in the manner described in the work order "constitutes a violation of a ministerial duty" because the work order was a "directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Emphasis omitted; internal quotation marks omitted.) The defendant claims, in response, that the "work order request is not a mandate of legal authority" but is, rather, "evidence of the defendant's officials exercising

judgment in handling a maintenance and repair issue." (Emphasis omitted.) We agree with the defendant.

The work order itself provides the sole basis for the plaintiffs' claim that the defendant's otherwise discretionary duty to repair and maintain the window and provide them with "a safe, secure and private dressing area" was ministerial in nature. The plaintiffs rely on the "plain language" of the work order to support their argument that it "prescribed the manner in which the work was to be performed" and did not "afford . . . Archer discretion in the way in which he was to remedy the problem." The work order, however, expressly pertains to "General Maintenance," it lists Martin as the "Requester," it had a "Request Date" of February 5, 2018, and there was no "Req. Completion Date," thereby leaving the time for performance open-ended and within Archer's discretion. Cf. *Doe* v. *Madison*, 340 Conn. 1, 32, 262 A.3d 752 (2021) ("[s]pecificity is required in all aspects of [a] directive").

Moreover, although the description of the requested maintenance states "[c]ut and fit colored/textured plexiglass" into the window of the door to the recreation staff locker room/closet area, the work order does not state that Archer had no discretion in this regard, and there is no other evidence in the record to support the plaintiffs' argument that he had none. Cf. *Cole* v. *New Haven*, 337 Conn. 326, 342, 253 A.3d 476 (2020) (police sergeant's testimony, in combination with police department's general order and Department of Public Safety's statewide policy, established existence of ministerial duty as matter of law). Indeed, there is no evidence regarding the nature of the work order, the internal discussions, if any, that preceded the work order's creation or the duties and expectations of the custodial staff in relation thereto.[15] To this end, there is no evidence that the "Description" set forth in the work order

[15] In fact, there is no evidence, by way of deposition testimony or affidavits, from Martin or Archer, themselves.

constituted "instructions" or a "directive," as the plaintiffs argue, let alone evidence that the work order was a mandate of legal authority that Archer failed to follow. See *Borelli* v. *Renaldi*, 336 Conn. 1, 12, 243 A.3d 1064 (2020) ("[a] ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the *mandate of legal authority*, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the action being done" (emphasis added; internal quotation marks omitted)). This evidentiary lacuna is particularly significant in the present case because, as our Supreme Court has recognized, "there ordinarily is no legal directive mandating the specific manner in which officials must perform [inspection, maintenance and repair] tasks"; *Northrup* v. *Witkowski*, 332 Conn. 158, 170, 210 A.3d 29 (2019); and the language of the work order upon which the plaintiffs' rely simply does not establish an exception to this rule. See *Doe* v. *Madison*, supra, 340 Conn. 32 ("descriptions of general practices or expectations that guide an employee's exercise of discretion do not create a ministerial duty").

Furthermore, Martin and Archer were not policy makers or executive decision makers for the defendant. Rather, they were employees, working for the defendant's board of education in its physical services department. Martin was the "custodial manager," and Archer was a "maintainer . . . ." Although Martin had the authority to create the work order and to assign it to Archer, there is no evidence that Martin was not using his discretion and engaging in day-to-day decision-making regarding maintenance and repairs when he did so. The mere fact that Martin delegated the task to Archer by way of the work order in no way altered the task's discretionary nature. See, e.g., *Grignano* v. *Milford*, 106 Conn. App. 648, 657, 943 A.2d 507 (2008) (discretionary

duty is not rendered ministerial merely because municipality codifies it as ordinance where nature of duty remains unchanged). The work order reflected the discretionary nature of the defendant's duties with respect to inspection, maintenance and repairs, not the existence of a ministerial duty.

"If we were to conclude otherwise, virtually *any* attempt by a municipal agency to ensure that its discretionary duties are regularly and properly carried out would convert its discretionary duty into a ministerial duty, thereby creating a disincentive for municipal agencies to make such attempts and undermining the very policy considerations that the doctrine governmental immunity was intended to advance. See *Violano* v. *Fernandez*, [280 Conn. 310, 319, 907 A.2d 1188 (2006)] ('[d]iscretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury' . . .)." (Emphasis in original.) *Northrup* v. *Witkowski*, supra, 332 Conn. 188.

On the basis of our plenary review of the pleadings and the parties' submissions, we conclude that the plaintiffs have failed to establish that a genuine issue of material fact exists with respect to the nature of the defendant's duty in this case. Because it was legally and logically correct for the court to conclude that the acts and omissions alleged in each complaint were discretionary in nature, and not ministerial as the plaintiffs' claim, the court properly determined that the defendant was entitled to judgment as a matter of law on its governmental immunity defenses in each of these consolidated actions.

The judgments are affirmed.

STATE OF CONNECTICUT *v.* HENRY B.-A.*
(AC 46967)

Clark, Seeley and DiPentima, Js.

Syllabus

Convicted, following a jury trial, of sexual assault in the second degree and risk of injury to a child, the defendant appealed. He claimed that he was deprived of his due process right to a fair trial as a result of improper remarks the prosecutor made during closing and rebuttal arguments to the jury. *Held*:

The prosecutor did not improperly vouch for the victim's credibility when he referred to the defendant by his nickname, "Zeus," as that reference was based on the victim's testimony, as well as a message and a video the defendant had sent her that was admitted into evidence, and the prosecutor never made a statement that could be construed as his personal opinion concerning the victim's veracity.

The defendant's assertion that the prosecutor's statements that the defendant had threatened the victim and that she cried when he sexually abused her were comments on facts that were not in evidence and improperly appealed to the jurors' emotions was unavailing, as those statements were based on the evidence or reasonable inferences that could be drawn therefrom.

This court was not persuaded that the prosecutor's statement that the victim "got victimized in the hospital," made during the prosecutor's discussion of the medical examination that the victim underwent at the hospital after disclosing the sexual abuse, improperly appealed to the jurors' emotions, as the jury reasonably could have inferred from the prosecutor's statement that the defendant had continued to victimize the victim while she was at the hospital, in that his presence there compounded the vulnerable state she was in while undergoing an invasive medical examination.

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* 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 use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

There was no merit to the defendant's unsupported claim that the prosecutor injected the trial with sarcasm by referring to the defendant by his nickname, "Zeus," which was based on the victim's testimony, and the trial transcript demonstrated that the prosecutor merely substituted the nickname in place of referring to the defendant.

Although the prosecutor improperly stated that the victim's mother had known that the defendant had been referring to himself as "Zeus," that single, isolated transgression did not substantially prejudice the defendant or deprive him of a fair trial, as it was not severe when considered in the context of the entire trial, defense counsel did not perceive it as warranting an objection, it was neither egregious nor inexcusable, and the prosecutor's improper statement was not, as the defendant contended, central to the victim's credibility but was one aspect of her extensive, detailed testimony about the defendant's sexual abuse of her that did not affect the jury's consideration of the evidence.

Argued April 16—officially released August 5, 2025

Procedural History

Substitute information charging the defendant with three counts of the crime of risk of injury to a child and one count of the crime of sexual assault in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Gary A. Mastronardi, assigned counsel, for the appellant (defendant).

Heather M. Mansfield, certified legal intern, with whom were *Ronald G. Weller*, senior assistant state's attorney, and, on the brief, *Joseph T. Corradino*, state's attorney, *Joseph J. Harry*, senior assistant state's attorney, and *Alexander O. Kosakowski*, certified legal intern, for the appellee (state).

Opinion

SEELEY, J. The defendant, Henry B.-A., appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), risk of injury to a

child in violation of General Statutes § 53-21 (a) (1), and two counts of risk of injury to a child in violation of § 53-21 (a) (2). On appeal, the defendant claims that he was deprived of his due process right to a fair trial as a result of prosecutorial improprieties that allegedly occurred during the prosecutor's closing and rebuttal arguments. We disagree and affirm the judgment of the court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. The victim, who was from Puerto Rico, came to New York in September, 2015, with her mother and two siblings when she was twelve years old. Upon arriving in New York, the victim and her family initially lived with the defendant and his family, which included the defendant's mother, Brenda A., and his brother, Joshua A. Brenda A. is the victim's aunt, and the defendant and the victim are cousins, although their relationship was more akin to that of uncle and niece. Shortly thereafter, the victim and her family lived part-time with a different aunt in Connecticut and continued to reside in New York at the residence of the defendant's family on weekends until December, 2015, when the victim and her family moved to a residence in Bridgeport. Throughout this time and afterward, the two families continued to socialize and visit with one another.

The victim met the defendant for the first time when she came to New York. She testified that she initially got along with the defendant, who referred to the victim by the nickname "Negrita."[1] The victim testified that by January, 2016, her relationship with the defendant had changed in that "[h]e treated [her] with more love than normal." She explained that "the relationship [of]

[1] According to the victim, with the exception of some of her family members who live in Puerto Rico, only the defendant referred to her by this nickname.

uncle-niece became closer and it was more affectionate when we got to know each other," although she was not becoming more affectionate with the defendant. According to the victim, in or about January and February, 2016, the defendant also gave the victim the nickname of "Athena," while referring to himself as "Zeus, the God."

In March, 2016, the defendant came to the victim's thirteenth birthday party at her residence in Connecticut. During that visit, the defendant gave the victim a chain with a heart and the initial of her first name. The victim also received a cell phone as a gift from her mother. The victim testified that, after she received the cell phone, the defendant would communicate with her via Snapchat and acted "with more affection than normal" toward her.

In the beginning of April, 2016, the victim and her family went to the defendant's house in New York to celebrate his twenty-sixth birthday and stayed overnight. As part of the sleeping arrangements for that evening, the victim was supposed to sleep in the living room with Brenda A. on an inflatable mattress. Brenda A., however, just prior to falling asleep on a couch, told the victim to go sleep in the bedroom of the defendant, who had left the residence briefly to take a friend home. Because the door to the defendant's bedroom was locked, the victim waited for him to come home, and when he did so, she explained that his mother had told her to sleep in his bedroom. They entered the defendant's bedroom, he locked the door, and the victim began to fall asleep when the defendant started to touch her legs and tried to pull down her pants. When the victim asked the defendant what he was doing, he responded that "nothing bad would happen to [her]." After the defendant pulled down the victim's pajamas and panties, she started to cry and asked what he was doing, and the defendant told her not to scream because

her mother would "scold" her. Thereafter, the defendant stood up, retrieved a condom, and took out a gun and put it on top of a shelf in the bedroom, after which he told the victim that, if she "said something or . . . screamed, something would happen to [her] and [her] family." The victim continued to cry as the defendant forcefully opened the victim's legs and penetrated her vagina with his penis. He also forced his penis into the victim's mouth. While this occurred, the victim continued to struggle and cry out loud, and the defendant placed his hand over her mouth. When the defendant was finished, he made the victim promise that she would not say anything and allowed her to go to the bathroom, where she discovered that she was bleeding. The victim testified that she was scared the next morning and did not tell her mother what had happened.

The victim's mother testified that, on the morning after the defendant's birthday party, she noticed that the victim woke up in the defendant's bedroom, that the victim explained that Brenda A. had told her to sleep there, and that the victim was acting "scared" and "was not being herself." Subsequently, through the rest of April and continuing to October, 2016, the defendant, along with his mother and brother, frequently visited the victim's home in Connecticut on weekends, staying overnight. The victim testified that, during many of those overnight stays, the defendant sexually assaulted her by penetrating her vaginally and anally, and forcing her to perform oral sex.[2] The defendant also continued

[2] For example, the victim testified regarding a visit to her home by the defendant's family on the weekend of May 14, 2016. That evening, the victim went to sleep in her bedroom with her brother and sister. The defendant came into the bedroom and pulled on the victim's feet to get her attention, and when she indicated that she did not want to go with him, he pointed his finger at her younger sister, which frightened the victim, who did not want anything to happen to her sister. The victim thus went with the defendant to her brother's bedroom, where the defendant was sleeping by himself for that evening. The defendant showed the victim a pornographic video on his cell phone, stating that that was what he was going to do to the victim. Thereafter, he pushed the victim onto the bed, took her clothes off, and

to communicate with the victim via Snapchat, reminding her not to tell anyone what had happened. He also would tell her that there was nothing wrong with what he was doing and that "he was just loving" the victim.

By May, 2016, the victim's mother had noticed a change in the victim's demeanor. She recalled that, prior to that time, the victim "was a happy girl, kind, she was always dancing, she loved modeling and singing, she was always singing. She was respectful, [a] good daughter, [and a] good sister." The victim also previously never had night terrors or issues with sleeping, school, or bodily functions such as defecating or urinating.[3] By May, 2016, however, the victim's mother noticed that the victim "was always sad, she always wore a hoodie, she covered herself. She was not the same. She had panic attacks. She didn't comb her hair." Between April and September, 2016, the victim also began to have panic attacks at school.

In October, 2016, the defendant spent the Columbus Day weekend at the victim's home in Bridgeport, staying until Monday. On Monday, October 10, 2016, after the victim's mother went to work, the defendant penetrated the victim anally, made the victim perform oral sex on him, and gave the victim a hickey on her neck. When the victim's mother returned from work, she discovered the hickey on the victim's neck. The victim initially told her mother that she got the mark when she was playing and roughhousing with her brother. Thereafter, the victim's mother took her into the bathroom and demanded to be told the truth. Ultimately, the victim acknowledged that the defendant was abusing her and was

inserted his penis into her vagina. Afterward, the defendant threatened to take the victim away to Canada "because in Canada he would be able to marry a minor," and he stated that he "was able to do to [the victim] whatever he wanted."

[3] The victim testified that, following the sexual assaults by the defendant, she had difficulty urinating and having bowel movements, and she had trouble sleeping and experienced nightmares.

responsible for the hickey on her neck. By the time the victim exited the bathroom, the defendant was gone. The victim's mother called the police, who came to her home and took a statement from the victim's mother, and the victim went to the emergency department at Bridgeport Hospital the next day, where she underwent a medical examination.[4] While the victim was at the hospital, the defendant came to the hospital and tried to talk with Sergeant Paul Scillia of the Bridgeport Police Department, who had gone to the hospital to provide assistance regarding the victim's complaint of sexual abuse. Specifically, the defendant wanted to talk with Scillia about a crime of which he thought he might be accused. Scillia obtained information from the defendant, including his phone number and driver's license, of which he made a photocopy, and passed the information to the police officer who was investigating the matter. The victim was informed of the defendant's presence at the hospital while she was there. When a doctor was asking her questions at the hospital, the victim was "[n]ervous, she was crying."

Subsequently, the victim met with Brenda L. Concepcion, a licensed clinical school social worker, for a forensic interview. During that interview, the victim reported that her cousin, the defendant, had been sexually abusing her, and she described the first sexual assault that occurred in New York the night of the defendant's birthday party. The victim also was examined by Janet L. Murphy, a registered nurse who specializes in child sexual abuse. In her report regarding that

[4] At the hospital, the victim was examined by Nurse Emma Myers, who conducted a preexamination of the victim, and Dr. Thomas Lamonte, who conducted an examination of the victim's genital area. At that time, the victim had bruising and bite marks on her neck, and had complained of pain while urinating and having bowel movements. The victim also reported pain "[a]nally, vaginally, and orally." Myers testified that the victim had "physical indicators of sexual abuse," even though the rest of her examination of the victim's body appeared to be normal. Following his examination of the victim, Lamonte did not document any abnormal findings.

examination, Murphy noted the concerns of the victim's mother that, for the past four to five months, the victim had been "staying in her room, was not eating, stopped making herself look pretty with makeup, [has been] having panic attacks . . . [and] was having problems with constipation and bleeding from her rectal area with [bowel movements]." In her assessment set forth in her report, Murphy, after noting the victim's allegations of sexual abuse by her cousin, stated that the examination revealed "normal genitalia and anus," and that "[a] normal exam neither confirms not refutes the possibility of sexual abuse," as "[m]ost children or teens who have experienced sexual abuse, including those having experienced penetration, will have a normal exam." She also noted that the victim's "[g]enital and anal complaints" could "be a consequence of the alleged sexual trauma." Claudia King, an employee with the Department of Children and Families (department), also met with the victim and her family for the purpose of assisting the family with any services it needed.

After October 10, 2016, the defendant no longer went to the victim's home for weekend visits, and the victim had no communication with the defendant until he contacted her in December, 2017, via Snapchat. The victim was in a classroom at school when she received the communication, which came in the form of a text message and a short, five second video of the defendant, both of which were admitted into evidence. The message referred to the victim by her nickname, Negrita, stating, "it's Zeus. I saw you, you're beautiful. Take care a lot. And I only ask you not to say that it was me or to say that it was not me." When the victim saw the video and message, she had an anxiety attack and was taken to the hospital by ambulance.

The defendant subsequently was arrested and charged in an amended substitute information with sexual assault in the second degree in violation of § 53a-71 (a)

(1), risk of injury to a child in violation of § 53-21 (a) (1), and two counts of risk of injury to a child in violation of § 53-21 (a) (2). The case was tried to a jury. The state presented testimony from a number of witnesses, including, inter alia, the victim; the victim's mother; Scillia; Concepcion; Murphy; and King.

The state also presented expert testimony from Lisa Melillo, a nationally certified school psychologist and forensic interviewer. Melillo never interviewed or examined the victim; she presented expert testimony regarding behavioral characteristics of children after they had been sexually abused and aspects of forensic interviewing. She testified that it is "extremely difficult for a child to report sexual abuse," and that the child's abuser is often someone very well known to the child and who is in a position of trust and authority with respect to the child. When asked whether, if the abuser is a relative of the child, the child can have both a respectful relationship and a hateful relationship, she responded in the affirmative, stating that the sexual abuse is one aspect of the relationship and does not define it, and that the child can still have loyalty to his or her abuser, yet also, at times, be fearful of the abuser. Additionally, the state introduced various exhibits into evidence, including, inter alia, the copy of the defendant's driver's license Scillia had made at the hospital, various photographs, the Snapchat message and video, medical records of the victim, a transcript of the victim's forensic interview and a report summarizing the interview prepared by Concepcion, and a report by Murphy.

The jury returned verdicts of guilty on all four counts. On June 14, 2023, the court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after fifteen years, nine months of which were mandatory, and ten years of probation with conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant claims that he was deprived of his due process right to a fair trial as a result of prosecutorial improprieties that allegedly occurred during the prosecutor's closing and rebuttal arguments. Specifically, he contends that certain remarks of the prosecutor improperly vouched for the credibility of the victim, appealed to the passions and emotions of the jurors, and referred to facts not in evidence. The defendant further contends that the cumulative effect of these improprieties deprived him of his due process right to a fair trial. We address these contentions in turn.

We first set forth general principles governing our review of claims of prosecutorial impropriety. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 557, 187 A.3d 454 (2018), aff'd, 334 Conn. 660, 224 A.3d 129 (2020); see also *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012). "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety]

was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . . The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude [that] the defendant has failed to establish either prong. . . . *State* v. *Pernell*, 194 Conn. App. 394, 403–404, 221 A.3d 457, cert. denied, 334 Conn. 910, 221 A.3d 44 (2019).

"Because the claimed prosecutorial improprieties occurred during [closing and] rebuttal . . . argument[s], we also set forth the following legal principles. It is well established that prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider. . . . *State* v. *Courtney G.*, 339 Conn. 328, 341–42, 260 A.3d 1152 (2021)." (Internal quotation marks omitted.) *State* v. *Maurice B.*, 228 Conn. App. 720, 726–28, 324 A.3d 850, cert. denied, 350 Conn. 929, 326 A.3d 249 (2024).

Furthermore, in cases in which defense counsel did not object to any of the remarks that form the basis of a claim of prosecutorial impropriety on appeal, "[o]ur Supreme Court has explained that a defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time.[5] . . . *State*

[5] "[U]nder settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding*

v. *Ross*, 151 Conn. App. 687, 694–95, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014)." (Footnote in original; internal quotation marks omitted.) *State* v. *Maurice B.*, supra, 228 Conn. App. 728–29. Keeping these principles in mind, we turn to the defendant's claims.

I

The defendant first claims that, during closing and rebuttal arguments, the prosecutor improperly vouched for the credibility of the victim when the prosecutor repeatedly referred to the defendant as "Zeus." In particular, the defendant asserts that, "on no less than eight separate occasions[6] during the course of the state's

test. . . . *State* v. *Courtney G.*, supra, 339 Conn. 340 n.4." (Internal quotation marks omitted.) *State* v. *Maurice B.*, supra, 228 Conn. App. 729 n.12.

[6] The defendant describes the eight instances as follows:

"(1) In addressing, during summation, [the victim's] claim in her testimony that, on October 10, 2016, she was alone with the defendant at her residence in Connecticut because the defendant's mother and brother, who had come to Connecticut with the defendant, had left without him and returned to New York, the prosecutor sarcastically remarked: 'Brenda [A.] [took] Joshua [A.] [and they went] home . . . leaving *Zeus* with [the victim]' . . . .

"(2) In suggesting to the jury that the defendant had intimidated [the victim] because the notable difference in size and stature between the defendant and [the victim] had prevented [the victim] from even thinking about resisting the defendant's sexual advances, the prosecutor sarcastically asked the jury: 'What do you think *Zeus* is going to do to her [if she resisted him]?' . . .

"(3) In addressing the purported physical injuries [the victim] claimed the defendant's alleged sexual abuse had inflicted on her, the prosecutor sarcastically observed: '[The victim] said she had no physical problems before April [of 2016]. No nightmares, no urinary problems, no defecation problem. And all of a sudden in April, *after Zeus went at her*, she started getting nightmares, urinary problems, defecation, stomach issues, issues in school.' . . .

"(4) At the trial, the defense presented to [the victim], during cross-examination, a video and some spring and summer vacation photographs, all of which had been generated during the relevant period between April and October of 2016. The photographs and video depicted [the victim], with either the defendant, or with members of both families, and the individuals depicted, including [the victim], all, obviously, were shown to be happy and smiling, and having a good time together. In commenting on the evidentiary weight to which the prosecutor believed the jury should give that photo-

summation, the prosecutor sarcastically 'gave the defendant a title,' i.e., 'Zeus,' which painted [the complainant] as a victim and the defendant as a groomer and sexual abuser of children, thereby improperly planting in the minds of the jurors the state's endorsement that the defendant was guilty as charged. Clearly, each time, during his summation, that the prosecutor labelled the defendant 'Zeus,' the prosecutor's undeniable intent was to indirectly, and improperly, vouch for the credibility of [the victim's] testimony." (Footnote added; footnote omitted.) We are not persuaded.

"[Although a] prosecutor is permitted to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is

graphic evidence, he sarcastically remarked: '[I]f you notice . . . those photos and their video [were] shot during the daytime, okay, *when there* [*were*] *other people around and Zeus didn't have, you know, access to her.*' . . .

"(5) In addressing the defense argument that [the victim] never reported any of the threats which she now claimed the defendant had made to her and her family, the prosecutor sarcastically stated: '[N]ow, defense counsel has repeatedly asked [the victim], you never told [anybody] about [your] fear . . . . I submit to you on pages 7, 15, 24 and 33 [of Concepcion's report] [the victim] exhibits *the fear that Zeus put her through.*' . . .

"(6) Toward the end of his initial argument in summation, he stated: '[The victim] got victimized for six months. She got victimized in the hospital. And for three days, we questioned her on the most private areas . . . [a]nd at no time did she waver. . . . We have the medical evidence; we have her in therapy. . . . It's your decision whether to believe her or not because the elements are there.' He then remarked, sarcastically: 'You only have to find if he has sexual contact—*Zeus had sexual contact with* [*the victim*] between April and September of 2016. . . . You find that, the defendant is guilty as charged.' . . .

"(7) The prosecutor then concluded the initial portion of his argument by first reminding the jury that its verdict must be based on the evidence and, then, by telling the jury: '[Y]ou look at the defendant and you *find Zeus guilty*' . . . .

"(8) Finally, in his rebuttal argument, in response to a claim by the defense attacking the adequacy of the police investigation based upon, inter alia, the failure of the police to photograph the alleged crime scenes, the prosecutor sarcastically asked: 'Who cares [if the police took pictures of] the room[s]? *Does that affect whether Zeus violated* [*the victim*]?' " (Citations omitted; emphasis in original.)

not permitted *to vouch personally* for the truth or veracity of the state's witnesses." (Emphasis added; internal quotation marks omitted.) *State* v. *Hinds*, 344 Conn. 541, 558, 280 A.3d 446 (2022); see also *State* v. *Baltas*, 311 Conn. 786, 826–27, 91 A.3d 384 (2014) ("[a] prosecutor may not impermissibly vouch for a witness' credibility by expressing his or her own *personal opinion* as to the credibility of a particular witness" (emphasis added)). "Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . We have held, however, that [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Citation omitted; internal quotation marks omitted.) *State* v. *Elmer G.*, 176 Conn. App. 343, 376, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019); see also *State* v. *Gary S.*, 345 Conn. 387, 411–12, 285 A.3d 29 (2022) ("A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Internal quotation marks omitted.)).

We disagree with the defendant's assertion that the prosecutor impermissibly vouched for the victim's credibility when he referred to the defendant by his nickname "Zeus" during closing and rebuttal arguments. First, the victim testified at trial that the defendant gave her the nickname of "Athena" and referred to himself as "Zeus, the God," and the Snapchat message to the victim from "Zeus," along with the video from the sender, were admitted into evidence. The prosecutor's references to the defendant as "Zeus," therefore, were based on that testimony and evidence. Second, in the eight instances that the prosecutor referred to the defendant as Zeus to which the defendant directs our attention; see footnote 6 of this opinion; the prosecutor never once made a statement that can be construed as a statement of *his personal opinion* concerning the veracity of the victim's testimony, either directly or indirectly. We do not agree that these references by the prosecutor to a nickname attributed to the defendant, alone, constituted improper vouching for the veracity of the victim's testimony. See, e.g., *State* v. *Michael T.*, 338 Conn. 705, 730–31, 259 A.3d 617 (2021) (prosecutor's rhetorical question and statements appealing to jury to evaluate victim's credibility—stating that " '[t]he state submits to you [that the victim's emotions] absolutely . . . were [real],' " and that " 'it is [hard] to fake emotion like you saw [in] the forensic [interview] and on that witness stand' "—were not improper, as "the statements appealed to the jurors' common sense and life experiences, and referred to evidence that had been presented at trial"); *State* v. *Ciullo*, 314 Conn. 28, 42, 100 A.3d 779 (2014) ("four claimed instances of vouching in the prosecutor's closing argument [did] not purport to convey the prosecutor's *personal opinion* of the credibility of the witnesses; instead, the prosecutor's statements, when placed in the context in which they were made, are reasonable inferences the jury could have drawn from the evidence adduced at trial" (empha-

sis in original)); *State* v. *Baltas*, supra, 311 Conn. 826–27 (The prosecutor did not impermissibly vouch for the witness' credibility during closing argument but, rather, "merely urged the jury not to disbelieve [the witness'] testimony solely because of her lifestyle. Such a comment did not suggest that the prosecutor 'may have access to matters not in evidence . . . which the jury may infer to have precipitated the personal opinions' . . . which is the evil this rule is designed at preventing. A prosecutor is always free 'to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom' . . . which is what the prosecutor did here." (Citations omitted.)).

Finally, we note that the nickname Zeus does not intrinsically have a negative connotation such that its use by the prosecutor was inherently improper.[7] See, e.g., *State* v. *Huckabee*, 41 Conn. App. 565, 573, 677 A.2d

[7] We note that the defendant has not directed our attention to any Connecticut authority to support his claim that the prosecutor's references to his nickname were improper. Rather, he asserts that, "just as it would be improper for a defendant to be called a criminal or guilty person [at] trial, giving a [defendant] a title that assumes the defendant's guilt tends to undermine the principle that the state has the burden to prove guilt beyond a reasonable doubt." (Emphasis omitted; internal quotation marks omitted.) In his principal appellate brief, the defendant mistakenly attributes this quoted language to our Supreme Court's decision in *State* v. *Thompson*, 266 Conn. 440, 472–73, 832 A.2d 626 (2003). The language, instead, derives from a decision of the Supreme Court of Oregon in *State* v. *Sperou*, 365 Or. 121, 133–34, 442 P.3d 581 (2019), in which the court stated that, "giving *a complaining witness* a title that assumes a defendant's guilt" undermines the state's burden to prove guilt beyond a reasonable doubt. (Emphasis added.) The defendant also cites *State* v. *Albino*, 130 Conn. App. 745, 762, 24 A.3d 602 (2011), aff'd, 312 Conn. 763, 97 A.3d 478 (2014), for the proposition that, "in a case where there is a challenge as to whether a crime occurred, repeated use of the [word] victim . . . is improper." We find *Albino* to be factually inapposite to the present case, in which the term victim was not used and the nickname attributed to the defendant in no way painted the complainant as a victim. In other words, referring to the defendant by a nickname that was supported by testimony at trial is not the same as referring to a complaining witness as a victim in a case in which a dispute exists as to whether a crime occurred. Moreover, the prosecutor did not give the defendant a title; rather, he referred to the defendant by a nickname, which came into evidence through the testimony of the victim.

452 (defendant's nickname " 'Snake' " was not sufficiently negative to warrant limiting instruction), cert. denied, 239 Conn. 903, 682 A.2d 1009 (1996). But see *State* v. *Santiago*, 269 Conn. 726, 755–56, 850 A.2d 199 (2004) (The prosecutor's repeated use of the defendant's nickname, " 'Danger,' " during closing argument was improper, especially because the prosecutor did not use it "merely to refer to the defendant, but also incorporated it into his argument when he stated: '[R]eal danger lurked around the corner in the name of Daniel Santiago. That's who it is. That's Danger.' "); *State* v. *Thompson*, 266 Conn. 440, 472–73, 832 A.2d 626 (2003) (prosecutor's repeated references to defendant as " 'killer' " stigmatized defendant and "were improper comments on the defendant's guilt"); *State* v. *Couture*, 194 Conn. 530, 561, 562–63, 482 A.2d 300 (1984) (prosecutor's statements that defendant and codefendant were " 'murderous fiends,' 'rats,' 'utterly merciless killers' and 'inhumane, unfeeling and reprehensible creatures' " were stigmatizing, egregious and improper), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985); *State* v. *Holloway*, 116 Conn. App. 818, 842, 977 A.2d 750 (prosecutor's "inappropriate and inflammatory language" referring to defendant as "rapist" was improper), cert. denied, 294 Conn. 902, 982 A.2d 646 (2009); *State* v. *McCarthy*, 105 Conn. App. 596, 630, 939 A.2d 1195 (prosecutor's two references to witnesses "as 'bums' was improper and inappropriate" because "[t]he term 'bum' is pejorative and disrespectful"), cert. denied, 286 Conn. 913, 944 A.2d 983 (2008). We, therefore, reject the defendant's first claim.[8]

II

Next, the defendant claims[9] that the prosecutor improperly appealed to the passions and emotions of

[8] "Because we conclude that there was no prosecutorial impropriety as claimed by the defendant, we need not address the *Williams* factors." *State* v. *Robert B.*, 200 Conn. App. 637, 650, 240 A.3d 1077 (2020).

[9] We address the defendant's claims in an order different from the one presented in his principal appellate brief.

the jurors, and, at the same time, referred to facts not in evidence. This claim is premised on the prosecutor's statements during closing argument that (1) "[the defendant] was [the victim's] uncle and she's Latino, she's supposed to respect him. . . . She cried, no one heard. He threatened her, no one heard," and (2) the victim "got victimized in the hospital." The defendant also asserts that "the prosecutor's references during summation to the defendant as 'Zeus' involved a distinct element of 'sarcasm,' " citing *State* v. *Rizzo*, 266 Conn. 171, 263–64, 833 A.2d 363 (2003), for the proposition that "the use of needless sarcasm by the state's attorney called upon the jurors' feelings of disdain, and likely sent them the message that the use of sarcasm, rather than reasoned and moral judgment, as a method of argument was permissible and appropriate for them to use. . . . It is the responsibility of the state's attorney, however, in the exercise of his high office, to attempt to avoid expressing those feelings in needless and inappropriate ways. That responsibility [is] not met when [a] state's attorney engag[es] in excessive sarcasm in his final argument to the jury . . . ." We address these alleged instances of impropriety in turn.

We first set forth relevant legal principles that guide our resolution of these claims. "It is well established that a prosecutor should not appeal to the emotions, passions and prejudices of the jurors. . . . [S]uch appeals should be avoided because they have the effect of diverting the [jurors'] attention from their duty to decide the case on the evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . It must be acknowledged that the line between comments that risk invoking the passions and prejudices of the

jurors and those that are permissible rhetorical flourishes is not always easy to draw. The more closely the comments are connected to relevant facts disclosed by the evidence, however, the more likely they will be deemed permissible. . . . By contrast, statements that have no reasonable connection to evidence offered or issues presented in a case are more likely to be deemed improper." (Citations omitted; internal quotation marks omitted.) *State* v. *Sullivan*, 351 Conn. 798, 812, 334 A.3d 446 (2025).

"[T]he prosecutor [also] has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . [Although] the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider. . . . When making closing arguments to the jury, [however] [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." (Citation omitted; internal quotation marks omitted.) *State* v. *Dabate*, 351 Conn. 428, 451, 331 A.3d 1159 (2025).

We do not agree with the defendant that the prosecutor improperly appealed to the emotions of the jurors and commented on facts not in evidence when he made the statements that the victim was supposed to respect the defendant because he was her uncle and that "[s]he

cried, no one heard. He threatened her, no one heard . . . .'' First, the defendant asserts in a conclusory fashion that those statements appealed to the emotions of the jurors, without providing an explanation or analysis of how they did so. Second, he asserts that ''there was no evidence that [the victim] had ever cried out, wanting to be heard, or that she had been threatened in a way that people might have been able to hear her.'' (Internal quotation marks omitted.) We disagree with the defendant's characterization of the prosecutor's statements and conclude that the statements were based on the evidence in the record or reasonable inferences therefrom.

The jury had before it testimony that the victim and the defendant had an ''uncle-niece relationship.'' The state also presented expert testimony from Melillo regarding sexual abuse of a child when the abuser is a family member. Melillo testified that the child who is being sexually abused can have a respectful relationship during the daytime with the family member who is perpetrating the abuse but can be fearful of that person and feel threatened at night. Additionally, the victim testified that she cried during some of the sexual assaults and that the defendant had covered her mouth with his hand. There also was testimony that the sexual assaults occurred when a number of other individuals were sleeping in the homes at the time, and no witness testified to having heard anything during the incidents of sexual abuse described by the victim. The victim also testified concerning various threats that the defendant had made to her about keeping quiet regarding the sexual abuse. Thus, the prosecutor's statement that the victim cried and no one heard her was supported by the testimony in the record and did not suggest that the victim cried because she wanted to be heard. The same is true regarding the prosecutor's statement about the defendant's threats; the victim testified that the

defendant had threatened her during the assaults, when family members were in nearby bedrooms, and there was no testimony from anyone who was in the homes at the time of the sexual assaults that such threats were heard.

We also are not persuaded by the defendant's claim that the prosecutor improperly appealed to the jurors' emotions and commented on facts not in evidence when he told the jury that the victim "got victimized in the hospital . . . ." We examine this statement in the context in which it was made, namely, while the prosecutor was discussing the invasive medical examination that the victim underwent at the hospital, after having been sexually abused for six months. Also, while at the hospital, the victim was made aware that the defendant was there as well, and she testified that, at that time, she was still afraid to tell people what had happened to her. Under these circumstances, we conclude that the jury reasonably could have inferred from the prosecutor's statement that the defendant continued to victimize the victim while she was at the hospital, in that his presence there compounded the vulnerable state she was in while undergoing an invasive medical examination.

Finally, we find no merit to the defendant's claim that there was an element of sarcasm in the prosecutor's references to the defendant as Zeus. We are unable to discern any sarcastic tone in those references from the transcripts of the trial. The references were based on the victim's testimony that the defendant used the nickname Zeus, and the transcript demonstrates that the prosecutor, in a number of instances, merely substituted the nickname Zeus in place of referring to the defendant.

"It is well settled that [a] prosecutor may not seek to sway the jury by unfair appeals to emotion and prejudice . . . . [O]ur Supreme Court has recognized that

repetitive and excessive use of sarcasm is one method of improperly swaying the fact finder. . . . Additionally, we have recognized that the excessive use of sarcasm may improperly influence a jury. . . . A prosecutor's frequent and gratuitous use of sarcasm can [call on] the jurors' feelings of disdain, and likely sen[d] them the message that the use of sarcasm, rather than reasoned and moral judgment, as a method of argument [is] permissible and appropriate for them to use." (Internal quotation marks omitted.) *State* v. *Turner*, supra, 181 Conn. App. 565. The present case, however, does not present such a situation. There is no support in the record for the defendant's claim that the prosecutor improperly injected the trial with sarcasm. This claim, therefore, fails.[10]

III

The defendant's next claim is that the prosecutor improperly commented on facts that were not in evidence when he suggested that the victim's mother knew that the defendant called himself Zeus. We are not persuaded that the challenged comment of the prosecutor deprived the defendant of a fair trial.

The following additional facts are relevant to our resolution of this claim. At trial, King, a department employee, testified as a witness for the state. During her testimony, King stated that, as part of her investigation into the allegations of sexual abuse of the victim, she spoke with the victim's mother, who had relayed to King information regarding the defendant and Brenda A. Specifically, the victim's mother mentioned to King that, in May or June, 2016, she had warned Brenda A. about the defendant and the victim. The victim's mother also testified about this issue, stating that, sometime in May or June, 2016, she had told King that she was worried about the defendant and asked Brenda A. to

[10] See footnote 8 of this opinion.

watch out for her daughter. During his closing argument, the prosecutor summarized King's testimony and stated: "Now, you heard . . . King . . . . King testified . . . that she interviewed . . . [the victim's mother] . . . . And she also indicated that . . . in May and June of 2016 . . . [the victim's mother] warned Brenda [A.] [to] watch the relationship of Zeus—she didn't say Zeus, *but knew he was calling himself Zeus* other than [the victim]." (Emphasis added.)

The defendant asserts that "nowhere in King's testimony does she ever say that [the victim's mother] had reported to [the department] a conversation with [Brenda A.] in which [the victim's mother] warned her to '*watch the relationship of Zeus*.' " (Emphasis in original.) The defendant further contends that, "[n]ever once, during either the prosecutor's direct examination or the [defense] cross-examination, did [the victim's mother] ever even hint that she had *any* knowledge whatsoever, must less *personal* knowledge, that the defendant had, in the past, referred to himself as 'Zeus.' " (Emphasis in original.) The state counters by arguing, inter alia, that, even if the prosecutor's comment did refer to facts not in evidence, "it was an isolated misstatement that did not rise to the level of an impropriety."

It is well established that "[a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he . . . may not invite sheer speculation unconnected to evidence. . . . A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record." (Citation omitted; internal quotation marks omitted.) *State* v. *Turner*, supra, 181 Conn. App. 560. "Statements as to facts [that] have not been proven amount to unsworn testimony . . . . [W]hen a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has

independent knowledge of facts that could not be presented to the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Michael T.*, supra, 338 Conn. 720.

"There is [however] a distinction between misstatement and misconduct. *State* v. *Dawes*, 122 Conn. App. 303, 314, 999 A.2d 794, cert. denied, 298 Conn. 912, 4 A.3d 834 (2010); see also *State* v. *Orellana*, [89 Conn. App. 71, 105, 872 A.2d 506] (isolated misstatement not prosecutorial impropriety) [cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005)]. . . . [W]e do not scrutinize each individual comment in a vacuum, but rather we must review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Chankar*, 173 Conn. App. 227, 255, 162 A.3d 756, cert. denied, 326 Conn. 914, 173 A.3d 390 (2017). "This court previously has recognized that closing argument and closing rebuttal argument can require counsel to think on [their] feet and quickly recall and comment on evidence that was presented at trial, all while also reacting to arguments advanced by opposing counsel. Under such circumstances, it is appropriate that counsel be afforded some leeway for minor misstatements . . . in order to not impede counsel from zealously advocating for clients. . . . [I]n the heat of argument, counsel may be forgiven for hitting the nail slightly off center but not wholly inventing facts. To conclude that [an] isolated [misstatement] constitute[s] a prosecutorial impropriety and that the defendant suffered harm from [it], we would need to minutely examine the prosecutor's word choice in a vacuum, ignoring the broader context of the whole trial. This is not an appropriate approach to such considerations. . . . Not every misstatement constitutes impropriety." (Citations omitted; internal quotation marks omitted.) *State* v. *Harris*, 198 Conn. App. 530, 552–53, 233 A.3d 1197, cert. denied, 335 Conn. 961, 239 A.3d 1214 (2020).

We agree with the defendant that the prosecutor improperly commented on facts not in evidence when he suggested that the victim's mother knew, in 2016, that the defendant had been referring to himself as Zeus. "We long have held that a prosecutor may not comment on evidence that is not a part of the record and may not comment unfairly on the evidence in the record. . . . A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . The rationale for the rule prohibiting the state from making such a reference is to avoid giving the jury the impression that the state has private information, not introduced into evidence, bearing on the case. . . . *State* v. *Stevenson*, 269 Conn. 563, 587, 849 A.2d 626 (2004)." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 103 Conn. App. 406, 424–25, 931 A.2d 298, cert. denied, 284 Conn. 937, 937 A.2d 695 (2007). In the present case, the prosecutor's statement was not grounded on any evidence in the record. Moreover, not only did the statement "wholly [invent] facts"; (internal quotation marks omitted) *State* v. *Harris*, supra, 198 Conn. App. 552; but it also offered corroboration for the victim's testimony that the defendant had used the nickname Zeus. Accordingly, we conclude that the prosecutor improperly commented on facts not in evidence. See *State* v. *Santiago*, supra, 424–25.

Although we agree with the defendant that the prosecutor improperly commented on facts not in evidence, the defendant "is not entitled to a new trial on this ground unless the prosecutor's impropriety caused him to suffer substantial prejudice." *State* v. *Batista*, 101 Conn. App. 623, 637, 922 A.2d 1116, cert. denied, 284 Conn. 918, 933 A.2d 721 (2007). Following our review of the relevant factors as applied to the circumstances

of this case, we are not persuaded that the defendant's due process rights were violated.

In order to demonstrate substantial prejudice, the defendant "must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties. . . .

"To aid us in determining whether prosecutorial impropriety so infected the proceedings with unfairness as to deprive a defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540]. These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Hinds*, supra, 344 Conn. 563–64.

Applying these factors to the present case, we conclude that the prosecutor's one, isolated improper statement did not deprive the defendant of a fair trial. The impropriety, which was not invited by defense conduct or argument, was not severe when considered in the context of the entire trial. Notably, the impropriety "was [not] perceived by defense counsel as being so severe as to warrant an objection. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 558, 212 A.3d 208 (2019)

(defense counsel's failure to object to allegedly improper comments is 'a strong indication that they did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm') . . . ." (Citation omitted.) *State* v. *Hinds*, supra, 344 Conn. 564. Moreover, the impropriety was neither egregious nor inexcusable. See *State* v. *Sullivan*, supra, 351 Conn. 823 (when defense counsel does not object, request curative instructions or ask for mistrial, "only instances of grossly egregious [prosecutorial impropriety] will be severe enough to mandate reversal" (internal quotation marks omitted)); *State* v. *Sinclair*, 173 Conn. App. 1, 23, 162 A.3d 43 (2017) ("[b]eyond defense counsel's failure to object, in determining the severity of prosecutorial impropriety, we look to whether the impropriety was blatantly egregious or inexcusable" (internal quotation marks omitted)), aff'd, 332 Conn. 204, 210 A.3d 509 (2019). It is also significant that the impropriety was isolated and made only once.

Given the lack of eyewitnesses and physical evidence, the central issue in this case concerned the credibility of the victim's testimony about the sexual abuse. Although the defendant contends that the impropriety was central to boosting the victim's credibility, we are not convinced. At best, to the extent that the prosecutor's statement provided support for the victim's testimony about the nickname, the impropriety was tangentially related to the central issue. We reach this determination giving due consideration to the fact that the victim's testimony that the defendant referred to himself as Zeus was but one aspect of her extensive and detailed testimony regarding the defendant's alleged sexual abuse, which spanned more than three days of trial. After the victim's initial testimony about the nickname, the reference to Zeus did not arise during the trial until the state introduced the Snapchat message and video sent by the defendant to the victim in December, 2017. Although

the message said it was from Zeus and the defendant disputes that he sent the message, it was accompanied by a video, which the jurors were able to view and determine for themselves whether the defendant was the person in the video and, thus, the sender who identified himself as Zeus. We do not perceive the prosecutor's isolated misstatement about the victim's mother's knowledge of the nickname Zeus as affecting the jury's consideration of that evidence. Thus, the defendant's claim to the contrary notwithstanding, our review of the transcript of the entire trial demonstrates that the testimony about the defendant's nickname was not central to the state's case or to the elements of any of the crimes of which he was convicted. Moreover, even if we were to conclude that it was central to a critical issue in the case, when viewed in the context of the entire trial, the impact of the prosecutor's improper comment was minimal. See *State* v. *Courtney G.*, supra, 339 Conn. 365.

Although no curative measures were taken by the trial court, "the absence of such measures is attributable to [defense counsel's] failure to object or request any curative instruction from the court." (Internal quotation marks omitted.) *State* v. *Hinds*, supra, 344 Conn. 564; see also *State* v. *Sullivan*, supra, 351 Conn. 824 ("the defendant bears much of the responsibility for the fact that [the] claimed improprieties went uncured because defense counsel did not object to the prosecutor's statements at trial" (internal quotation marks omitted)). The court, however, in its instructions to the jurors, stated that they were "the sole judges of the facts" and of the credibility of the witnesses, that they had to determine the facts on the basis of the testimony and exhibits that had been received into evidence, and that arguments and statements of counsel are not evidence, and our Supreme Court has found similar instructions to be "more than adequate to counteract any harm resulting

from . . . alleged improprieties." *State* v. *Hinds*, supra, 564; see also *State* v. *Kenneth K.*, 232 Conn. App. 657, 667, A.3d (2025) (" '[b]arring contrary evidence, we must presume that juries follow the instructions given them by the trial judge' "). In addition, the prosecutor, in his closing remarks, reminded the jurors multiple times that his arguments were not evidence and that the jurors should rely on their memories.

Finally, with respect to the strength of the state's case, although "a sexual assault case lacking physical evidence" can be regarded as "not particularly strong"; *State* v. *Ritrovato*, 280 Conn. 36, 57, 905 A.2d 1079 (2006); we must be mindful that "[t]he sexual abuse of children is a crime [that], by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . . [Our Supreme Court has] never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 365–66.

In the present case, despite the lack of physical evidence, the jury had before it other evidence in addition to the testimony of the victim. The victim's mother testified regarding changes in the victim that corresponded with the defendant's birthday party in New York, as well as about a warning she had given to Brenda A. regarding the defendant and the victim, which was corroborated by King's testimony about the warning. The state also presented expert testimony from Melillo about common behaviors of children who have been

sexually abused, including how it is "extremely difficult for a child to report sexual abuse," and that when the child's abuser is a relative, the child can have both a respectful relationship and a hateful relationship with the abuser in that the child can still have a sense of loyalty to his or her abuser, yet also, at times, be fearful of the abuser, which was consistent with the victim's behaviors during the time of the sexual abuse. Additionally, the state introduced a photocopy of the defendant's driver's license taken by Scillia at the hospital, as well as Scillia's testimony that the person who gave him the license, the defendant, wanted to discuss a crime of which he thought he might be accused, and the Snapchat message from Zeus and the video of the sender were admitted into evidence for the jury to review. The jury also had before it a transcript of the victim's forensic interview and Concepcion's report summarizing that interview, as well as Murphy's report of her examination, all of which included the victim's accounts of the sexual abuse by her cousin, the defendant. Thus, although the evidence presented by the state in the present case was not overwhelming, we conclude "that the state's case was 'not so weak as to be overshadowed' by" a single improper comment made by the prosecutor. *State* v. *Courtney G.*, supra, 339 Conn. 366; see also *State* v. *Sullivan*, supra, 351 Conn. 825; *State* v. *Gary S.*, supra, 345 Conn. 420; *State* v. *Carlos E.*, 158 Conn. App. 646, 669, 120 A.3d 1239, cert. denied, 319 Conn. 909, 125 A.3d 199 (2015).

Accordingly, we conclude that the occurrence of this single, isolated impropriety, coupled with the failure of defense counsel to object to the impropriety or to request curative instructions or a mistrial, did not substantially prejudice the defendant or deprive him of a fair trial. See *State* v. *Sullivan*, supra, 351 Conn. 825–26.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAYSON CALDERON-PEREZ (AC 46643)

Alvord, Suarez and Seeley, Js.

Syllabus

Convicted, following a jury trial, of the crimes of assault in the second degree and breach of the peace in the second degree, the defendant appealed. He claimed, inter alia, that the trial court improperly excluded as irrelevant a uniform arrest report that included evidence of his physical appearance six months after the crime. *Held*:

The trial court abused its discretion in excluding the uniform arrest report as irrelevant, as the central question before the jury was the identity of the perpetrator of the assault, it was vital to the defendant's theory of defense of mistaken identification that he be able to dispute the notion that he was the person depicted in a video of the perpetrator admitted into evidence, which necessarily involved a comparison of the appearance of the perpetrator in the video to that of the defendant, and the fact that the uniform arrest report was prepared six months after the assault was a matter concerning the weight of the evidence to be afforded by the jury, not its admissibility, and it did not diminish its relevance to the issue of the identity of the perpetrator.

The trial court's erroneous exclusion of the uniform arrest report rose to the level of a constitutional violation of the defendant's right to present a defense, as the information pertaining to the defendant's appearance in the uniform arrest report was highly probative, material and potentially exculpatory, the record suggested that the excluded evidence was the most compelling evidence available to the defendant to establish his misidentification defense because it was the only evidence from an independent, objective party that the defendant could have offered at trial concerning his appearance closer to the time of the incident, the defendant took the steps necessary to exercise his right to present a defense, and nothing in the record indicated that there were other means by which the defendant was permitted to adequately present his misidentification defense.

The state failed to meet its burden of demonstrating, beyond a reasonable doubt, that the trial court's erroneous evidentiary ruling was harmless and, thus, the defendant was entitled to a new trial, as there was no independent overwhelming evidence of the defendant's guilt, the uniform arrest report was substantially the only evidence regarding the lack of tattoos on the defendant that he sought to present in support of his defense of mistaken identity, and the harm resulting from the court's exclusion of the evidence was compounded by the prosecutor's remarks during closing argument

about the defendant's appearance, some of which were based on facts that were not in evidence.

Argued November 20, 2024—officially released August 5, 2025

Procedural History

Substitute information charging the defendant with the crimes of assault in the second degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number seventeen, and transferred to the Superior Court in the judicial district of New Britain, geographical area number fifteen; thereafter, the case was tried to the jury before *Baldini*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *new trial.*

Hope J. Estrella, deputy assistant public defender, for the appellant (defendant).

Olivia M. Hally, deputy assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *Devant Joiner*, senior assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Jayson Calderon-Perez, appeals from the judgment of conviction, rendered after a jury trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (6) and breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). On appeal, the defendant claims that the trial court deprived him of his right to present a defense under the sixth and fourteenth amendments to the federal constitution by (1) excluding, as irrelevant, evidence of his physical appearance six months after the crime, (2) prohibiting a defense witness from testifying due to late disclosure, (3) preventing the defense from presenting testimony from an expert in

video graphics, and (4) limiting the defendant's cross-examination of a state's witness. In addition, the defendant claims that the prosecutor engaged in impropriety during the state's rebuttal closing argument, thereby depriving the defendant of his due process right to a fair trial under the fifth and fourteenth amendments to the federal constitution. We conclude that the trial court's exclusion of evidence of the defendant's appearance six months after the crime violated the defendant's constitutional right to present a defense.[1] Accordingly, we reverse the judgment and remand the case for a new trial.

The jury reasonably could have found the following facts on the basis of the evidence presented. Early in the morning on August 11, 2018, the victim, Bryan Spickle, was present at a Denny's restaurant in Southington (restaurant). The victim was seated at a table with a group of three other people: Ryan McHale, Miriah Tatro and Julie Henderson. A man (perpetrator) was seated at a nearby table with a group of seven other people. At some point, a verbal altercation ensued between Henderson and members of the perpetrator's group. Eventually, this escalated into a physical altercation when a woman from the perpetrator's group approached Henderson and struck her. Henderson stood up and began fighting with the woman that attacked her; meanwhile, the victim also stood up and was accosted by three members of the perpetrator's group, including the perpetrator, but did not physically engage with them. The victim then made his way toward the women who were fighting and began to reach toward Henderson, at which point the perpetrator "sucker punched" the victim in the side of the head "from behind." The punch knocked the victim unconscious, and he fell face-first onto a table occupied by two other restaurant patrons, Michelle Yaglowski and

[1] See footnote 18 of this opinion.

Dahnis-Shay Houser-Riley. The perpetrator then punched the unconscious victim in the head a second time. As a result of the assault, the victim suffered a concussion, lacerations to both eyebrows, significant swelling to his right eye and cheek, and bubbling and blistering on his chest due to a skin burn.[2] A few minutes later, the perpetrator and his group left the restaurant.

Around the time the perpetrator and his group exited the restaurant, police officers from the Southington Police Department were dispatched to the restaurant in response to a report of a fight.[3] Upon arriving at the scene, the responding officers approached two women standing in the restaurant's parking lot: Robin Angeloni, a waitress who was attempting to point out to the officers certain vehicles that had just left the parking lot, and Tatro, who was "hysterical" and "yelling" racial slurs. The officers spoke with Angeloni before entering the restaurant, and, around the same time, the victim was transported by paramedics to a hospital. Inside the restaurant, the officers took a statement from Houser-Riley and learned that the assault likely was captured by security cameras, which also would have captured footage of the perpetrator and his group exiting the restaurant. The investigating officer, Chad Michaud of the Southington Police Department, obtained this security camera footage (video) shortly thereafter.

On the basis of his review of the video, Michaud identified the woman who had attacked Henderson and the man who had punched the victim as suspects in the investigation. On September 10, 2018, as part of Michaud's investigation, the Southington Police Department made a post on its public Facebook page soliciting

[2] The jury reasonably could have found that the skin burn to the victim's chest was caused by hot coffee that spilled on him during the assault.

[3] Yaglowski had called 911 as the verbal altercation between Henderson and the woman at the perpetrator's table escalated. Megan McElhone, a restaurant employee, also had called 911 after the physical altercation began.

tips regarding the assault. The post contained still images from the video of both suspects leaving the restaurant. One month later, on October 10, 2018, Michaud received a voicemail from an anonymous caller stating that an employee at Henry's Garage, in Bethany, "looks like the male suspect . . . ." Because Bethany was outside the jurisdiction of the Southington Police Department, Michaud contacted the Connecticut State Police for assistance in following up on the tip.

On October 12, 2018, after being briefed by Michaud, David Merriam of the Connecticut State Police went to Henry's Garage to follow up on the tip. At Henry's Garage, Merriam spoke with Henry Sarbieski,[4] the owner of the business, showed him three photographs of the male suspect that had been taken from the video, which Michaud had provided to him, and asked Sarbieski if he knew the person in the photographs. Sarbieski identified the person in the photographs as the defendant and informed Merriam that the defendant was present at work. Merriam then spoke with the defendant, showed him the photographs that Michaud had provided to him, and asked the defendant if he was the person in the photographs. Although the defendant replied affirmatively, he expressed confusion about being at the restaurant's Southington location, telling Merriam that he had been to the restaurant's Waterbury location. Merriam told the defendant to contact Michaud and collected his contact information, which he then emailed to Michaud.

After learning from Merriam that the defendant had identified himself as the person in the photographs, Michaud determined that "the investigation was basically concluded" and, subsequently, applied for a warrant to arrest the defendant, which was reviewed and

[4] Throughout the trial court record, Sarbieski's name is occasionally spelled as Sabieski.

issued by the court on January 9, 2019. The defendant was arrested on February 11, 2019. Following his arrest, the defendant was charged in a substitute long form information with assault in the second degree in violation of § 53a-60 (a) (6) and breach of the peace in the second degree in violation of § 53a-181 (a) (1). A jury trial followed, at which the state presented testimony from Michaud; McHale; Yaglowski; Sarbieski; Merriam; Jessica Nocera, a legal technology specialist at the Office of the Chief State's Attorney; and the victim. The defendant presented testimony from Suzanne Bobrowiecki, an investigator at the New Britain public defender's office, and from three waitresses at the restaurant who had witnessed the assault: Angeloni, Megan McElhone and Lindsay Matthews. At trial, Angeloni testified that she saw the perpetrator and that the individual was not the defendant, but she could not otherwise describe the perpetrator. McElhone testified that she saw the perpetrator and that he was not the defendant. She described the perpetrator as "maybe Dominican, Jamaican, but he was darker skinned, probably about my height, five six, five five, not heavy, in pretty good shape but a smaller gentleman. He was not very tall but he was definitely dark skinned . . . ." Matthews also testified that she saw the perpetrator and that he was not the defendant, and she described the perpetrator as "[p]robably about six two, I mean very, very tall gentleman, darker complexion." In summary, the three waitresses at the restaurant who had witnessed the assault all affirmatively testified that the defendant was not the perpetrator, and no other eyewitness identified the defendant as the perpetrator.

At the conclusion of trial, the case was submitted to the jury, which found the defendant guilty of both charges. On May 11, 2023, the court, *Baldini*, *J.*, sentenced the defendant to a total effective term of five years and ten months of incarceration and four years

and two months of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims that the court abused its discretion when it ruled that "evidence of the defendant's height and weight . . . and whether he had tattoos on his forearms was irrelevant . . . ." In support of his claim that the court improperly excluded that evidence, the defendant argues that such evidence was "relevant and material" because it "would have corroborated [his] assertion that he was not the perpetrator . . . ." He further asserts that "the court's conclusion that [such evidence] was irrelevant is wrong and violated his right to present a defense." The essence of the defendant's argument is that, because his defense was a claim of misidentification, evidence of his appearance during his arrest was highly relevant and material to his defense. Finally, he contends that, because the court's erroneous evidentiary ruling rose to the level of a constitutional violation, the state bore the burden of proving that the ruling was harmless beyond a reasonable doubt and that the state failed to do so.[5] We agree with the defendant that the court abused its discretion in precluding the proffered evidence and that the ruling deprived him of his constitutional right to present a defense. Furthermore, we also agree that the state failed to prove that the ruling was harmless beyond a reasonable doubt, and, therefore, the defendant is entitled to a new trial.

We first set forth the legal principles governing our resolution of this claim. "It is fundamental that the defendant's [right] . . . to present a defense [is] guaranteed by the sixth amendment to the United States

[5] The defendant also asserts that, to the extent that the court's ruling did not rise to the level of a constitutional violation, it nevertheless constituted harmful error warranting reversal and a new trial.

constitution[6] . . . [which is] made applicable to state prosecutions through the due process clause of the fourteenth amendment.[7] . . . A criminal defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Citation omitted; footnotes added; internal quotation marks omitted.) *State* v. *Torres*, 343 Conn. 208, 217, 273 A.3d 163 (2022). "[T]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." (Internal quotation marks omitted.) *State* v. *Tony M.*, 332 Conn. 810, 831, 213 A.3d 1128 (2019).

"A [criminal] defendant has a constitutional right to present a defense, but he is [nonetheless] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded. . . . Thus, the

[6] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

"A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . ." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 272 n.3, 96 A.3d 1199 (2014).

[7] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

question of the admissibility of the proffered evidence is one of evidentiary, but not constitutional, dimension. . . .

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence, including issues of relevance and the scope of cross-examination. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Mark T.*, 339 Conn. 225, 231–32, 260 A.3d 402 (2021). "If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail." (Internal quotation marks omitted.) *State* v. *Espinal*, 208 Conn. App. 369, 379, 264 A.3d 1003, cert. denied, 340 Conn. 916, 266 A.3d 886 (2021). With these general principles in mind, we turn to the defendant's first claim.

I

The first issue we must decide with respect to this claim is whether the court abused its discretion in excluding the challenged evidence relating to the defendant's appearance as not relevant. The state argues that "the court reasonably concluded that the proffered evidence was not relevant because [information about the defendant's appearance] from six months after the crime is not accurate of [his] appearance at the time of the crime." We do not agree with the state.

The following additional facts guide our analysis of this issue. At trial, the state's theory was that the defendant was the perpetrator of the assault of the victim at

the restaurant depicted in the video, as evidenced by the fact that the defendant and Sarbieski had identified the defendant as the person in the still photographs taken from the video. To counter this, the defendant's theory of defense was that he and Sarbieski mistakenly had identified the defendant as the person in the still photographs.[8] That theory was supported by the fact that Sarbieski later retracted his identification. Specifically, during direct examination of Sarbieski by the prosecutor, Sarbieski testified that, although he initially had identified the defendant as the person in the photographs presented to him by Merriam, upon later inspection, he "saw tattoos" on the person in the photographs and noted that the defendant does not have such tattoos. At the request of the prosecutor, Sarbieski identified the left and right arms of the person in the photographs of the video as being tattooed.

After the close of the state's case-in-chief and during a discussion with the court regarding the defense's witnesses, defense counsel stated that the defense planned on eliciting testimony from Bobrowiecki concerning an investigation of the defendant's case she had performed as an investigator for the New Britain public defender's office. Specifically, defense counsel sought to elicit testimony about "[i]dentifying information regarding [the defendant]," in particular, his "height and weight at a time more contemporaneous to the incident" and "whether . . . [the defendant] has any tattoos on his forearms." Defense counsel asserted that Bobrowiecki had acquired personal knowledge of this information by reviewing a uniform arrest report regarding the defendant's arrest, which Bobrowiecki had obtained

[8] In his principal appellate brief, the defendant asserts that, although he did not testify, "the defense maintained throughout trial that [he] was not pictured in the photographs or the [video] and that any identification made by the defendant was incorrect and based on the poor quality of the video and the lack of information from [Merriam]." In support of this assertion, he cites to Sarbieski's testimony and to the closing argument of defense counsel.

during the course of her investigation and which the defendant sought to admit into evidence through her testimony. The uniform arrest report, which was prepared on February 11, 2019, approximately six months after the incident at the restaurant, provided that the defendant was five feet, ten inches tall, weighed 240 pounds, and did not have any tattoos.

The prosecutor objected to the admission of this evidence on the ground of relevance.[9] In arguing against the objection, defense counsel emphasized that the evidence was "essential information to provide [to] the trier of fact in assessing whether or not the individual in the video is [the defendant]" and that it was "essential to the defense's case . . . [to be] able to present testimony as to the tattoo status of [the defendant]." After hearing from the prosecutor and defense counsel regarding the objection, the court ruled: "[T]here's the issue of what [the defendant] looked like six months after the incident that forms the basis of the charges against him. Certainly . . . I think we talked about the fact that someone can change their appearance in that amount of time and . . . I understand the issue you brought up about tattoos. People can also get tattoos removed. So, in terms of offering testimony about [the defendant's] appearance six months after this incident through this witness, that request is denied."

Following the court's exclusion of this evidence, the jury heard testimony from several witnesses concerning

[9] Specifically, the prosecutor argued in relevant part: "[Y]ou can put on 1000 pounds in six months. Maybe not 1000, but you can put on a significant amount of weight and your body can change in six months. . . . What [the defendant's] height and weight looked like . . . in February of 2019, I do not believe is relevant. The jury can watch the video and make a determination that if the gentleman they see on the video is in fact [the defendant]. Having someone come in and say the person . . . that was arrested appears to be fifty pounds heavier than the other is not relevant . . . . There is a passage of time. We can't say what this gentleman did over that six month period and how he may have changed. That's a question for the jury to decide . . . and not for their investigator to testify to."

the height and weight of the perpetrator and whether he had any tattoos; that is, McElhone described the perpetrator as "[m]aybe Dominican, Jamaican . . . darker skinned, probably about . . . five six, five five [in height], not heavy, in pretty good shape but a smaller gentleman" and "not very tall"; and Matthews described the perpetrator as "[p]robably about six two, I mean very, very tall gentleman, darker complexion." Defense counsel asked Matthews if she remembered "whether [the person who threw the punch] had tattoos on their forearms," to which she replied: "Yes, I think so."

The defendant's theory of defense is apparent from the arguments of defense counsel and the prosecutor during closing and rebuttal closing arguments, as the subjects of the height and weight of the perpetrator, and whether the perpetrator had any tattoos on his forearms, were repeatedly referenced by defense counsel and the prosecutor in their summations of the evidence adduced at trial and their theories of the case. For example, defense counsel stated in relevant part: "[Sarbieski] testified that he had been shown pictures on October 12, [2018] . . . . And on that day, he said that he told [Merriam] that the pictures look like [the defendant]. . . . But all he looked at, he told us, was the face of the person in the pictures. The face. He later noticed that the . . . person in the images, the suspect, looked like they had tattoos on their arms and that [the defendant] doesn't have any tattoos on his arms. And when he was asked to look at the video . . . [w]hat he said was see, tattoos [on] both arms."

In rebuttal closing argument, the prosecutor summarized the testimony of the eyewitnesses, noting specifically their testimony about the height of the perpetrator several times. The prosecutor then stated: "What can you reasonably infer from these three witnesses? The person who did this is between six feet, four inches and . . . five feet, five inches. [The defendant] was

definitely there, maybe not there, definitely not there. Do any of these things match what you've seen and heard during testimony and in evidence? If the person who punched [the victim] is six feet, two inches, [or] six feet, four inches, watch the video at the end. There's a guy standing next to the person who assaults [the victim]. We say it's [the defendant]. That guy has to be seven foot if the person standing next to him is six feet, two inches, six feet, four inches. Or does he look as short as five feet, five inches [or] five feet, six inches?"

The prosecutor then turned to the issue of tattoos, stating: "Sarbieski says he—[Merriam] says he showed [Sarbieski] all three photos, and he says it's [the defendant] and he [identifies] him here in court. Now [Sarbieski] testified he doesn't think it's [the defendant] now because the guy in the video has tattoos down both arms. Watch state's exhibit 2, camera six, when the assault takes place. Immediately before and immediately after. I want you each to sit in front of that laptop and watch that scene right before he's punched and immediately after. Pause it, stop it. Pause it, stop it. You are going to get a . . . clear look at both of his arms. The right and left. There will be clear photos. There are no tattoos on his arms, members of the jury, and you can see that in the video. Watch it closely. Take the time to look at it.

"And you heard [Sarbieski say that he has] known [the defendant] for six to eight years. [The defendant] does not have tattoos. He's a good friend, a great mechanic, and, probably assuming, a good employee. So yeah, maybe for [Sarbieski] it's not [the defendant] now. But, who pointed out to [Sarbieski] about those tattoos? Who told him hey, look at the picture, look at the tattoos? [The defendant] showed him those pictures. The one person who benefits the most from [Sarbieski] changing his identification shows him tattoos that don't exist."

The prosecutor continued: "Four and a half years have passed since this incident, members of the jury. People change in time. I want you all to take a close look at [the defendant] now. Look at his face. Commit it to memory. What you're looking at is not [the defendant] from 2018. You're looking at him now. The video is [the defendant] four and a half years ago. As counsel stated, we had a pandemic.[10] The pandemic thirty was a real thing. Right? Some of us are still trying to take that weight off. So, look at his face. Commit it to memory. Members of the jury, it is not the state who will have to look at that video and decide if the person who assaulted [the victim] on August 11, 2018, is [the defendant]. It is going to be your responsibility." (Footnote added.)

We next set forth the legal principles governing this issue. "Section 4-1 of the Connecticut Code of Evidence provides that ' "[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.' This court has noted that '[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial . . . .' " *State* v. *Kenneth B.*, 223 Conn. App. 270, 281–82, 308 A.3d 82, cert. denied, 348 Conn. 952, 308 A.3d 1038 (2024); see also Conn. Code Evid. § 4-2 (providing that

[10] The prosecutor was alluding to the fact that, during the defense's closing argument, defense counsel mentioned that the assault took place four years ago and that "COVID has happened since then."

"[a]ll relevant evidence is admissible" unless there is legal basis for its exclusion); *State* v. *Isabelle*, 107 Conn. App. 597, 607, 946 A.2d 266 (2008) ("[i]t is a reasonable exercise of judicial discretion to exclude . . . evidence the relevancy of which appears to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case" (internal quotation marks omitted)).

" ' "Relevance" does not exist in a vacuum. Under traditional definitions, to be relevant, a fact must be "*material*," a term which [Federal Rule of Evidence] 401 replaces with the phrase, "fact that is *of consequence* to the determination of the action." ' . . . 2 C. Fishman, Jones on Evidence (7th Ed. 1994) § 11:3, p. 260. 'Relevant evidence,' according to § 4-1 of the Connecticut Code of Evidence, is '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.' . . . 'To determine whether a fact is "material" or "consequential," it is necessary to examine the issues in the case, as defined by the underlying substantive law, the pleadings, applicable pretrial orders, and events that develop during the trial. Thus, the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or *defenses* at issue in the trial. The connection to an element need not be direct, so long as it exists. Once a witness has testified to certain facts, for example, his credibility is "a fact that is of consequence to [or material to] the determination of the action," *and evidence relating to his credibility is therefore relevant—but only if the facts to which the witness has already testified are themselves relevant to an element of a crime, cause of action, or defense in the case.*' . . . 2 C. Fishman, supra, pp. 260–61." (Emphasis altered.) *State* v. *Fasano*, 88 Conn. App. 17, 36–37, 868 A.2d 79, cert. denied, 274

Conn. 904, 876 A.2d 15 (2005), cert. denied, 546 U.S. 1101, 126 S. Ct. 1037, 163 L. Ed. 2d 873 (2006).

Additionally, "[i]t is black letter law that in any criminal prosecution, the state bears the burden of proving beyond a reasonable doubt the defendant's identity as . . . the [perpetrator] of the crime charged. . . . *State* v. *Jackson*, 179 Conn. App. 40, 47, 177 A.3d 1190 (2017), cert. denied, 328 Conn. 910, 178 A.3d 1041 (2018). [T]he question of identity of a perpetrator of a crime is a question of fact that is within the sole province of the jury to resolve. . . . *State* v. *Honsch*, 349 Conn. 783, 811, 322 A.3d 1019 (2024)." (Internal quotation marks omitted.) *State* v. *Makins*, 232 Conn. App. 199, 208–209, 335 A.3d 67 (2025), petition for cert. filed, (Conn. June 10, 2025) (No. 240398); see also *State* v. *Honsch*, supra, 811 ("[t]he question of identity of a perpetrator of a crime . . . [is an] essential element" (internal quotation marks omitted)); *State* v. *Jackson*, 37 Conn. App. 491, 499, 656 A.2d 1056 (1995) ("[i]dentity is always an issue in any criminal case, and the burden [is always] on the prosecution to prove the element of identification beyond a reasonable doubt" (internal quotation marks omitted)).

Evidence that is probative of identity is especially relevant when identity is in dispute, as it was in the present case. See *State* v. *Reese*, 77 Conn. App. 152, 166, 822 A.2d 348 (noting that "[t]he photograph [of the defendant taken approximately six weeks before the crime] was relevant to show [his] appearance" where "identification . . . was an issue"), cert. denied, 265 Conn. 910, 831 A.2d 252 (2003). Thus, in such cases, evidence of a defendant's appearance is generally considered to have strong probative value with respect to the issue of identity.[11]

[11] See, e.g., *Shiflett* v. *State*, 52 Ala. App. 476, 480, 294 So. 2d 444 (1973) (photograph of defendant showing his appearance one month after crime had probative value on issue of identity), cert. denied, 292 Ala. 749, 294 So. 2d 448, cert. denied, 419 U.S. 867, 95 S. Ct. 124, 42 L. Ed. 2d 105 (1974);

Significantly, courts routinely have considered evidence regarding whether a defendant is tattooed to be relevant to the issue of identity.[12] See, e.g., *State* v. *Buck*, 100 N.E.3d 118, 140 (Ohio App. 2017) ("Courts have found evidence that a defendant has a particular tattoo to be relevant for various purposes. For example, tattoo evidence may be relevant to the identification of the defendant."), review denied, 152 Ohio St. 3d 1444, 96 N.E.3d 299 (2018).[13] Furthermore, evidence regarding

State v. *Jamison*, 163 S.W.3d 552, 560 (Mo. App. 2005) ("[e]vidence demonstrating the identity of the person charged with the commission of the crime is logically relevant"); *People* v. *Chiari*, 220 App. Div. 2d 316, 316, 632 N.Y.S.2d 564 ("[w]here defendant argued that this was a case of mistaken identity and that he was not the man who had sold cocaine to the undercover [police officer], his arrest photo was properly admitted to establish his appearance at the time of the crime"), appeal denied, 87 N.Y.2d 899, 663 N.E.2d 1259 (1995).

[12] Similarly, evidence regarding a defendant's appearance is also relevant to identification. For example, this court previously has concluded that a defendant's "physical description," which necessarily includes height and weight, "may be used for identification purposes . . . ." *State* v. *Davis*, 160 Conn. App. 251, 268, 124 A.3d 966, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015). In *Davis*, the issue before this court concerned whether the evidence was sufficient to demonstrate that the defendant, who had been convicted of operating a motor vehicle while under the influence of intoxicating liquor in connection with an incident in November, 2010, and of being a third time offender, was the same person who previously had been convicted of operating a motor vehicle while under the influence to support his conviction as a third time offender. Id., 266–67. In concluding that the record contained ample evidence to support the defendant's conviction, this court pointed out that the record contained a certified copy of a judgment of conviction in 2007, which listed a name, date of birth, and home address matching the defendant's information. Id., 267–68. That document also included an attached motor vehicle summons and complaint that listed a physical description matching that of the defendant. Id., 269. This court also noted that the physical description of the defendant's height, weight, and color of his hair and eyes in the 2007 summons and complaint matched the physical description of the defendant in his uniform arrest report. Id., 269 n.8.

[13] See also *People* v. *Skinner*, 53 P.3d 720, 723 (Colo. App. 2002) ("evidence of tattoos can be relevant to the issue of identity"); *Belmar* v. *State*, 279 Ga. 795, 798, 621 S.E.2d 441 (2005) ("We have upheld the admission of a photograph of a tattoo on the body of the defendant . . . when it is used for purposes of identification. . . . Other courts also have admitted evidence of tattoos . . . to aid in identification." (Citations omitted.)).

a defendant's tattoos, such as from a photograph or testimonial description, is generally considered relevant to the issue of identity, regardless of when it was created or perceived. See *State* v. *Carpenter*, 232 N.C. App. 637, 642, 754 S.E.2d 478, review denied, 367 N.C. 518, 762 S.E.2d 443 (2014); *Stone* v. *State*, 635 S.W.3d 763, 770 (Tex. App. 2021); see also *State* v. *Rios*, 171 Conn. App. 1, 41, 156 A.3d 18 ("[n]umerous courts have upheld the admission of tattoo evidence after weighing the probative value of the evidence versus its prejudicial effects"), cert. denied, 325 Conn 914, 159 A.3d 232 (2017). To be sure, such evidence is generally considered to be relevant to the issue of identity even if it comes in the form of an in-person display before the jury during trial. See, e.g., *State* v. *Hubbard*, 659 S.W.2d 551, 559 (Mo. App. 1983) (rejecting defendant's argument that "trial court erred in requiring him to expose his tattooed arms during the trial because such display had no probative value, was immaterial and prejudicial" and concluding, instead, that "[e]vidence of [his] tattoos was relevant as corroboration of [a witness'] identification of [his] other physical features"); *State* v. *Meade*, 196 W. Va. 551, 557, 474 S.E.2d 481 (1996) ("ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused's tattoos to a witness and to the jury at trial, where the accused's tattoos are relevant to the question of the identification of the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice").[14]

[14] The state argues that we should not be persuaded by cases in which, unlike the present case, the jury was not presented with a video of the perpetrator. We find this argument unavailing given that a determination of whether the person in the video had tattoos is not easily discernable and that identity was disputed. As a result, the excluded evidence could have assisted the jury, at least to some degree, in determining whether the defendant was correctly identified as the person in the still photographs taken from the video.

In the present case, the central question before the jury was the identity of the perpetrator; that is, whether the defendant was the person depicted in the video. As we have stated, the three waitresses at the restaurant who had witnessed the assault all testified affirmatively that the defendant was not the perpetrator. This meant that the only identifications of the defendant as the perpetrator consisted of (1) the defendant's self-identification, which was made on the basis of the still photographs, not the video of the incident, and (2) Sarbieski's initial identification of the defendant as the person in the still photographs, which he retracted at trial, testifying that he was mistaken because the perpetrator, unlike the defendant, had tattoos on his arms. It was vital to the defendant's theory of defense of mistaken identification, therefore, that he be able to dispute the notion that he was the person depicted in the video of the perpetrator, which, necessarily, involves a comparison of the appearance of the perpetrator in the video to that of the defendant.

There was testimony before the jury about the height and build, or weight, of the perpetrator, as well as whether the perpetrator had tattoos on his arms. Moreover, the height, weight, and tattoos of the perpetrator undeniably were connected to the defendant's theory of defense that he was not the person depicted in the video, which rendered them material to the issue of identity in this case. See *State* v. *Mark T.*, supra, 339 Conn. 242 ("[t]he degree to which any evidence is material and relevant must be assessed in light of the fact or issue that it was intended to prove" (internal quotation marks omitted)). As we have stated, evidence is relevant when it tends to support a relevant fact, even to a slight degree; see *State* v. *Kenneth B.*, supra, 223 Conn. App. 282; it "is not rendered inadmissible just because it is circumstantial or not conclusive"; *State* v. *Hamilton*,

352 Conn. 317, 354, A.3d (2025); and its relevance must be assessed against, inter alia, the elements of the defense at issue in the trial. See *State* v. *Fasano*, supra, 88 Conn. App. 36–37. The defendant's defense was that he was not the person who committed the assault because, primarily, the perpetrator had tattoos on his forearms and the defendant does not have tattoos on his forearms. To support that defense, he wanted to present evidence demonstrating that he did not have any such tattoos six months after the incident at the restaurant.

Moreover, not only did the prosecutor in this case utilize the testimony about the height, weight, and tattoos of the perpetrator in his closing argument to assert the state's position that the defendant's appearance matched that of the perpetrator, but he also specifically pointed out that the trial was taking place four and one-half years after the incident at the restaurant and that the jury should, thus, account for weight gain due to the COVID-19 pandemic, which occurred in the interim. Consequently, evidence of the defendant's height and weight, and whether he had tattoos on his forearms when he was arrested six months after the incident, which was much closer in time to the assault than when the trial occurred, was relevant to the issue of identity and the defendant's theory of defense. The court's ruling precluding the evidence was based on its conclusion that the proffered evidence was not relevant because, within six months, a person's appearance can change and tattoos can be removed. The fact that the information was recorded six months following the assault, however, was a matter concerning the weight of the evidence to be afforded by the jury, not its admissibility, and that does not diminish its relevance to the issue of the identity of the perpetrator, which was the central issue at trial.

The court's concern that, during the course of six months, a person's appearance can change and tattoos can be removed, also involves a reasonable, common-sense inference that the jury could have drawn when considering the evidence. See *State* v. *Patrick M.*, 344 Conn. 565, 576, 280 A.3d 461 (2022) ("[t]he jury is permitted to rely on its common sense, experience and knowledge of human nature in drawing inferences . . . and may draw factual inferences on the basis of already inferred facts" (internal quotation marks omitted)); *State* v. *Torres*, 82 Conn. App. 823, 831, 847 A.2d 1022 ("Jurors do not live in a fishbowl. . . . In considering the evidence . . . [j]uries are not required to leave common sense at the courtroom door . . . ." (Internal quotation marks omitted.)), cert. denied, 270 Conn. 909, 853 A.2d 525 (2004); see also, e.g., *People* v. *Harland*, 251 P.3d 515, 519 (Colo. App. 2010) (rejecting "argument that [the victim's] description of the [defendant's] teddy bear tattoo was not probative of identity" and recognizing that "[a]ny discrepancy between [the victim's] description of the tattoo . . . and the [other] evidence [about the tattoo] . . . was for the jury to weigh"), cert. denied, Docket No. 10SC563, 2011 WL 51758 (Colo. January 3, 2011). Because the issue of whether the perpetrator had tattoos on his arms was raised before the jury through the testimony of Sarbieski and Matthews, it follows that whether *the defendant* had tattoos on his arms was highly relevant to the issue of identity. See, e.g., *Stone* v. *State*, supra, 635 S.W.3d 770 ("[e]vidence of [the defendant's] back tattoos," namely, "a photograph of [his] back tattoos" taken at undisclosed time, "was relevant to his identity because no witness at the crime scene could identify [him], and the witness . . . described a tattooed man"); see also *State* v. *Carpenter*, supra, 232 N.C. App. 642 (photographs of defendant's tattoo taken six months after his arrest "were relevant to proving his identity as the perpetrator").

Evidence tending to show that the perpetrator's appearance was inconsistent with the defendant's appearance, including whether the former had tattoos whereas the latter did not, was, therefore, "relevant and material to" a "defense theory [that] related to a central and critical question before the jury," namely, whether the defendant was correctly identified as the perpetrator. *State* v. *Wright*, 320 Conn. 781, 821, 135 A.3d 1 (2016).

It is also significant that the three waitresses who witnessed the assault all testified that the defendant was not the person who assaulted the victim. See *Thomas* v. *State*, 811 P.2d 1337, 1343 (Okla. Crim. App. 1991) ("in light of the witness' inability to identify [the defendant] . . . the testimony concerning the [defendant's] tattoo must be considered relevant evidence"), cert. denied, 502 U.S. 1041, 112 S. Ct. 895, 116 L. Ed. 2d 798 (1992). Therefore, at a minimum, the admission of the uniform arrest report, which stated that the defendant did not have tattoos on his arms at the time of his arrest, would have had at least a slight logical tendency to aid the jury in its determination of whether the defendant was correctly identified as the person in the video. See *State* v. *Kenneth B.*, supra, 223 Conn. App. 282. The uniform arrest report also may have influenced the jury's determination of guilt given that the state lacked any physical or direct evidence implicating the defendant in the assault of the victim. Again, the issue of whether the defendant had tattoos removed between the time of the incident at the restaurant and his arrest six months later was a matter for the jury to consider in determining what weight, if any, to give such evidence.

We, therefore, conclude that the court abused its discretion in determining that the proffered evidence of the defendant's appearance, as described in the uniform arrest report, was not relevant and excluding it on that basis.

II

Having determined that the court abused its discretion in excluding the evidence as irrelevant, we next must determine whether the improper evidentiary ruling rose to the level of a constitutional violation of the defendant's right to present a defense. See *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985).

The following legal standards guide our resolution of this issue. "[W]hether a trial court's [exclusion of evidence offered by a criminal defendant] deprives [him] of his [constitutional] right to present a defense is a question that must be resolved on a case by case basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial. . . . Moreover, [a] defendant may not successfully prevail on a claim of a violation of his right to present a defense if he has failed to take steps to exercise the right or if he adequately has been permitted to present the defense by different means." (Citation omitted; internal quotation marks omitted.) *State* v. *Leniart*, 198 Conn. App. 591, 603–604, 233 A.3d 1183, cert. denied, 335 Conn. 971, 240 A.3d 1055 (2020).

Although "[i]t is well established that [t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense," our appellate courts have not expressly set forth what that guarantee entails. (Internal quotation marks omitted.) *State* v. *Hedge*, 297 Conn. 621, 634, 1 A.3d 1051 (2010). A review of our case law indicates that this right encompasses, at least, the presentation of evidence that is exculpatory, material, or otherwise central to a claim raised by the defendant at trial; see, e.g., *State* v. *Wright*, supra, 320 Conn. 821 (trial court's exclusion of evidence that was relevant and material

to "defense theory [that] related to a central and critical question before the jury" violated defendant's constitutional right to present defense); *State* v. *Cerreta*, 260 Conn. 251, 264, 796 A.2d 1176 (2002) (trial court's erroneous exclusion of evidence amounted to constitutional violation because "[t]he excluded evidence not only was relevant to the primary issue at trial, namely, the identity of the perpetrator, it was central to the defendant's claim of innocence" and "crucial to his defense"); *State* v. *Leniart*, supra, 198 Conn. App. 603 ("[t]he primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial" (internal quotation marks omitted)); and, perhaps also, evidence that is simply admissible and relevant. See *State* v. *Morgan*, 70 Conn. App. 255, 265, 797 A.2d 616 ("[a] defendant's right to present a defense guarantees his or her right, to be exercised within limits, to present *relevant* evidence" (emphasis in original)), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002). Accordingly, our Supreme Court has recognized that "[t]he defendant's right to present a defense 'would be an empty one if the [s]tate were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.' " *State* v. *Cerreta*, supra, 264–65, quoting *Crane* v. *Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); see also *United States* v. *Scheffer*, 523 U.S. 303, 315, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (observing that "[t]he exclusions of evidence that [the United States Supreme Court] [has] declared unconstitutional . . . significantly undermined fundamental elements of the defendant's defense"); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) ("at a minimum . . . criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt").

In light of these principles, the essential question in the present case of whether the defendant was afforded a meaningful opportunity to present a complete defense involves a determination of whether the court's exclusion of the uniform arrest report significantly undermined a central aspect of the defendant's defense. See *State* v. *Cerreta*, supra, 260 Conn. 264–65; see also *United States* v. *Scheffer*, supra, 523 U.S. 315. If the evidence was central to the misidentification defense the defendant sought to present and might have influenced the jury's determination of guilt, the court's erroneous exclusion of the evidence amounted to a violation of the defendant's constitutional right to present a defense. See *State* v. *Cerreta*, supra, 264–65; see also *Pennsylvania* v. *Ritchie*, supra, 480 U.S. 56. Conversely, if the excluded evidence was not central to a theory advanced by the defendant or to a critical issue in the case, or if its substance was, or could have been, presented to the jury by other means, the defendant's constitutional right to present a defense was not violated. See *State* v. *Leniart*, supra, 198 Conn. App. 603–604.

Our analysis begins with an examination of the theories presented by the state and the defendant at trial to determine the fundamental components of the defendant's misidentification defense. The state's theory of the case was that the defendant was the perpetrator based on the facts that he identified himself as the person in the still images of the perpetrator from the video that had been shown to him by Merriam and that Sarbieski did the same. In contrast, the defense's theory of the case was that the defendant and Sarbieski incorrectly had identified the defendant as the person in the still images of the perpetrator primarily on the basis that the perpetrator had tattoos and the defendant does not have tattoos, as indicated on the uniform arrest report. The defendant also sought to admit, through the uniform arrest report, evidence pertaining to his height

and weight, which could have been used to contradict testimony of witnesses describing the height and weight of the perpetrator. It follows, therefore, that evidence pertaining to those factors—height, weight, and tattoos—was central to a critical issue in the case, namely, the identity of the defendant as the perpetrator.

In the present case, the defendant sought to admit the uniform arrest report and testimony from Bobrowiecki relating to the report, which constituted the only evidence *offered by the defendant* to establish one of the fundamental components of his misidentification defense—that he does not have tattoos. See *State* v. *Wright*, supra, 320 Conn. 821 ("[m]ore troubling, the excluded testimony was the only evidence the defense presented to support its theory of the case"). Indeed, defense counsel stated to the court that "the tattoo status of [the defendant]" was "essential to the defense's case . . . ." See *State* v. *Smith*, 85 Conn. App. 96, 110–11, 856 A.2d 466 (2004) (recognizing that evidence that is "relevant and central to [a defendant's] claim that he was misidentified as the complainant's attacker . . . is crucial to his defense" (citation omitted)), aff'd, 280 Conn. 285, 907 A.2d 73 (2006); see also *State* v. *Timothy C.*, 237 W. Va. 435, 445, 787 S.E.2d 888 (2016) (court's exclusion of "identity-related" evidence violated defendant's right to present defense "because [his] defense was his innocence," and, therefore, excluded evidence "was critical to his defense").

Indeed, in *State* v. *Cerreta*, supra, 260 Conn. 251, our Supreme Court held that an erroneous evidentiary ruling amounted to a constitutional violation under circumstances similar to those of the present case. Id., 264. In *Cerreta*, which involved a killing during a home invasion, the defendant raised a third-party culpability defense and "attempted to present to the jury evidence that the police had found hair and fingerprints at the crime scene that did not belong to the defendant." Id.,

262. After first determining that the trial court's exclusion of the evidence as irrelevant was improper because the evidence "was exculpatory and probative"; id.; our Supreme Court held that the erroneous ruling was constitutional in nature because "[t]he excluded evidence not only was relevant to the primary issue at trial, namely, the identity of the perpetrator, it was central to the defendant's claim of innocence . . . [and] was, in essence, the most compelling evidence available to the defendant and was crucial to his defense." Id., 264.

In the present case, the information pertaining to the defendant's appearance in the uniform arrest report was highly probative, material and potentially exculpatory, because if a juror had determined from the video and testimony offered that the perpetrator had tattoos, the existence of a uniform arrest report prepared by an independent party stating that the defendant does not have tattoos could have " 'create[d] a reasonable doubt [about the defendant's guilt] that did not otherwise exist . . . .' " *Miller* v. *Angliker*, 4 Conn. App. 406, 421, 494 A.2d 1226, cert. denied, 197 Conn. 809, 499 A.2d 59 (1985), quoting *United States* v. *Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Lastly, the record suggests that the excluded evidence was the most compelling evidence available to the defendant to establish this element of his defense, as, by all indications, it was the only evidence from an independent, objective party that the defendant could have offered at trial concerning his appearance closer to the time of the incident. See *State* v. *Wright*, supra, 320 Conn. 821; *State* v. *Cerreta*, supra, 260 Conn. 264–65.

Consequently, the court's exclusion of the uniform arrest report hindered the defendant's ability to present his misidentification defense. As a result, the defendant presented an incomplete defense, and his ability to put the key aspect of his misidentification theory before

the jury was relegated to references during closing argument to testimony from Sarbieski, a witness for the state who had a connection to the defendant. See *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 843, 225 A.3d 261 (2020) (statements made by counsel during closing argument are not evidence). That is contrary to the principle that the constitutional right to present a defense "is the right to present the defendant's version of the facts . . . to the jury so that it may decide where the truth lies"; (internal quotation marks omitted) *State* v. *Torres*, supra, 343 Conn. 217; which entails a "meaningful opportunity to present a complete defense." (Internal quotation marks omitted.) *State* v. *Tony M.*, supra, 332 Conn. 831; see *People* v. *Cerda*, 40 N.Y.3d 369, 378, 223 N.E.3d 308, 199 N.Y.S.3d 887 (2023) (trial court's erroneous evidentiary ruling violated defendant's constitutional right to present defense because, "[b]y permitting defense counsel to suggest to the jury that there were alternative innocent explanations . . . yet excluding the most viable evidence to support that premise, the trial court's ruling deflated the strength of the defense").

There is one final issue we must examine in our determination of whether the exclusion of the evidence rose to the level of a constitutional violation. Specifically, our case law also directs that a court's erroneous ruling cannot be considered a constitutional violation of a defendant's right to present a defense if the defendant "failed to take steps to exercise the right or if he adequately has been permitted to present the defense by different means." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 198 Conn. App. 603–604; see *State* v. *Santana*, 313 Conn. 461, 471, 97 A.3d 963 (2014) (evidentiary claim was nonconstitutional because "the defendant could have pursued other avenues" to establish his third-party culpability defense); *State* v. *Osimanti*, 299 Conn. 1, 17, 6 A.3d 790 (2010) (evidentiary

claims were nonconstitutional because defendant was permitted to present other evidence to support defense theory).[15]

The record in the present case shows that the defendant took the steps necessary to exercise his right to present a defense, which, as discussed, requires that a defendant is permitted to present his "version of the facts . . . to the jury so that it may decide where the truth lies." (Internal quotation marks omitted.) *State* v. *Torres*, supra, 343 Conn. 217. The version of the facts that the defendant sought to present to the jury was simple—that he had been misidentified as the person

[15] In arguing on appeal that the defendant's claim is evidentiary in nature, the state has not asserted that the defendant "failed to take steps to exercise the right" or that "he adequately has been permitted to present the defense by different means." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 198 Conn. App. 603–604. Rather, the state merely contends that "the jury had before it ample evidence of the defendant's appearance at the time of the crime in the form of evidence from the video that the defendant was the individual in the video who assaulted the victim. As discussed . . . the jury had: (1) the surveillance video which showed the defendant punching the victim twice in the head; (2) the defendant himself at the trial; (3) the testimony of Merriam whom the defendant identified himself in front of; (4) the three photographs from the video that Merriam showed the defendant; (5) the testimony of [Sarbieski] who also identified the defendant from the same three photographs; (6) the testimony of three waitresses who were all present during the assault; and (7) Angeloni's identification of the defendant." We find no merit to this contention.

First, the state's argument that the jury had evidence of the defendant's appearance from the video of the perpetrator or the photographs taken from the video presumes that the defendant is the perpetrator. Second, the prosecutor specifically pointed out to the jury that four and one-half years had passed since the incident and that, because "[p]eople change in time" and the video was from four and one-half years ago, the jurors should look at the defendant's face and commit it to memory, as "[t]he [COVID-19] pandemic thirty was a real thing," which suggested that the defendant's appearance may have changed due to significant weight gain during the COVID-19 pandemic. Moreover, two of the three waitresses gave descriptions of the perpetrator, and all three testified that the defendant was not the perpetrator. Angeloni did not identify the defendant as the perpetrator; on the contrary, she testified that she saw the perpetrator, that the perpetrator was not the defendant, and that she otherwise could not describe the perpetrator.

who assaulted the victim. The defendant attempted to present this version of the facts by offering the uniform arrest report into evidence through the testimony of Bobrowiecki.

Moreover, nothing in the record indicates that there were other means by which the defendant adequately was permitted to present his misidentification defense.[16] The uniform arrest report was the only independent documentary evidence that was offered at trial showing the defendant's height and weight and that he did not have tattoos, at least at the time he was arrested. See *Scrimo* v. *Lee*, 935 F.3d 103, 120 (2d Cir. 2019) (defendant "was deprived of his constitutional right to present a complete defense" because "[i]n circumstances in which . . . the marginal evidence pointing to the defendant over another person is flimsy, and *the excluded evidence was the only independent source of facts essential to proving the defense's theory that the other person committed the crime*, we must conclude that the wrongfully excluded testimony would have introduced reasonable doubt where none otherwise existed" (emphasis added)). The fact that Sarbieski testified, during the state's case-in-chief, that the defendant did not have tattoos, by itself, cannot be construed as adequate other means by which to present the defendant's theory of defense. Sarbieski was the defendant's long-standing employer and, as the prosecutor pointed out to the jury, a "good friend" of the defendant. His testimony about the defendant's lack of tattoos, as juxtaposed against evidence from an objective and independent third party, the uniform arrest report, was not evidence of equivalent value to the defendant. See *State* v. *Osimanti*, supra, 299 Conn. 17 (exclusion of evidence of victim's

[16] We note that there is nothing in the record indicating that the jury was otherwise able to view the defendant's forearms at trial, that is, whether, for example, the defendant wore short sleeves, and the state has not briefed any such claim on appeal.

conviction for violation of protective order and of inquiry into victim's history of domestic violence, which was offered to prove victim's "violent character," when defendant claimed self-defense, was nonconstitutional because defendant "was able to introduce evidence to that effect in the form of the victim's lengthy criminal record and gang affiliations, as well as through his cross-examination of [a witness]"); *State* v. *Papineau*, 182 Conn. App. 756, 780–82, 190 A.3d 913 (exclusion of testimony from defendant's mother concerning innocent explanation for defendant's flight—that prior to crime, he planned to travel to Massachusetts—was not constitutional in nature because "the defendant was permitted to present evidence that he had preexisting plans to travel to [Massachusetts] by means other than the narrow inquiry that was excluded," namely, through testimony of two other witnesses), cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). Therefore, we cannot conclude that the defendant was adequately permitted to present his misidentification defense through the evidence that was admitted at trial.

In sum, no reasonable review of the record could lead to the conclusion that the defendant was "adequately . . . permitted"; (internal quotation marks omitted) *State* v. *Leniart*, supra, 198 Conn. App. 604; "a meaningful opportunity to present a complete defense"; (internal quotation marks omitted) *State* v. *Cerreta*, supra, 260 Conn. 260; as the court prevented him from presenting relevant and material evidence that supported his version of the facts, that he considered to be "essential" to his misidentification theory of defense, and that was central to the critical issue of identity. See *State* v. *Torres*, supra, 343 Conn. 217; *State* v. *Cerreta*, supra, 264–65. Accordingly, we are convinced that the court's erroneous exclusion of the uniform arrest report rose to the level of a constitutional violation, as it resulted in the exclusion of evidence that was material

to the central issue of identity and to the defendant's defense of misidentification.

III

Because we have determined that the court's exclusion of the proffered evidence constituted an abuse of discretion that is of constitutional magnitude, we next must "consider whether the exclusion of the evidence was harmless beyond a reasonable doubt" to determine whether a new trial is warranted. *State* v. *Wright*, supra, 320 Conn. 825. In such cases, "the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt. . . . Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Citation omitted; internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 832, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

The state argues that the court's erroneous ruling was harmless because "any relevance to the defendant's physical description in the arrest report was slight and would likely have been inconsequential because the jury had before it ample evidence of the defendant's appearance at the time of the crime in the form of evidence from the video," which shows the perpetrator of the crimes. This argument presumes that the defendant is the person depicted in the video. See footnote 15 of this opinion. Therefore, the state asserts that "[t]he proffered evidence . . . would not have strengthened the defense's case or weakened the state's case in any appreciable way due to the ample evidence the jury had before it on the identity of the suspect." We conclude that the state has not met its burden of demonstrating harmless error.

An appellate court "cannot hold a constitutional violation harmless unless [it is] 'able to declare a belief that it was harmless beyond a reasonable doubt.' " *State* v. *Cerreta*, supra, 260 Conn. 265. That is to say, it must appear "beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors that [our Supreme Court has] considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the [defendant's] case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony. . . . In other words, we [must be] satisfied beyond a reasonable doubt that the result would be the same without the admission of the assumedly improper evidence. . . . This inquiry is an objective one and requires us to consider the quality and quantity of both the inadmissible evidence and the admissible evidence that remains to support the verdict of the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Sayles*, 348 Conn. 669, 682–83, 310 A.3d 929 (2024); see also *State* v. *Sweet*, 214 Conn. App. 679, 698, 280 A.3d 1243 ("[t]his court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt" (internal quotation marks omitted)), cert. denied, 345 Conn. 920, 284 A.3d 983 (2022).

As case law indicates, when identity is a disputed issue, as in the present case, evidence of a person's appearance is not only relevant but is indeed highly material. See *State* v. *Smith*, supra, 85 Conn. App.

110–11; *State* v. *Reese*, supra, 77 Conn. App. 166; see also footnote 11 of this opinion. The state's assertion that any harm resulting from the exclusion of the evidence was inconsequential in light of the video, which it contends is strong evidence of the defendant's guilt, ignores the fact that the defendant's theory was that he was incorrectly identified as the person in the still photographs taken from the video. The video itself was not entirely clear, and, thus, it was not undisputed that the defendant was the person in the video. Moreover, the three waitresses who witnessed the assault at the restaurant all affirmatively testified that the defendant was not the perpetrator. Thus, in the present case, there was no "independent overwhelming evidence of guilt . . . ." (Internal quotation marks omitted.) *State* v. *Sweet*, supra, 214 Conn. App. 698. For this reason, any evidence tending to show a difference between the appearance of the defendant and the perpetrator captured in the video certainly could have affected the strength of the state's case and the defendant's defense, which, in turn, may have had a tendency to influence the jury's verdict. See *State* v. *Carpenter*, supra, 275 Conn. 832. Thus, evidence in the form of the uniform arrest report was of significant value to the defendant's defense because it constituted independent evidence concerning his appearance, as opposed to testimony from Sarbieski, who had a relationship with the defendant. For these same reasons, the uniform arrest report would not have been cumulative evidence. See *State* v. *Sayles*, supra, 348 Conn. 682–83.

In addition, the court's erroneous ruling excluded what was substantially the only evidence regarding the lack of tattoos *on the defendant* that the defendant sought to present in support of his defense of mistaken identity. See *State* v. *Wright*, supra, 320 Conn. 821. When a court's ruling results in the exclusion of essentially the only relevant evidence a defendant seeks to present

in support of his primary defense theory—and the evidence is material to a disputed issue in the case—it is not reasonable to believe that, had the defendant been permitted to introduce such evidence, it would not have had any tendency to influence the jury's verdict. For instance, if any juror deduced from his or her analysis of the video that the perpetrator had tattoos, the presence of a uniform arrest report stating that the defendant did not have tattoos may have created reasonable doubt with respect to the conclusion that the perpetrator in the video was the defendant, as opposed to the testimony from Sarbieski, which the jury could have discounted as being from someone who was partial to the defendant and which had no independent corroboration. The trial court's exclusion of the uniform arrest report deprived the defendant of a meaningful opportunity to present a complete defense of misidentification, and the jury should have been allowed to hear and assess the excluded information and to reach a verdict after weighing all the relevant evidence.

The present case is akin to *State* v. *Smith*, supra, 85 Conn. App. 96, in which this court held that the trial court's erroneous exclusion of evidence was a constitutional violation warranting reversal because "[t]he exclusion of the evidence . . . *interfere*[*d*] *with* [*the defendant's*] *right to use a defense of misidentification and*, *therefore*, *could not be harmless*." (Emphasis added.) Id., 110. In *Smith*, this court reasoned that, "[w]hen the excluded evidence is relevant to the primary issue at trial, namely, the identity of the attacker, and central to the defendant's plea of not guilty and is the most compelling evidence available to the defendant, it is crucial to his defense, and the [exclusion] of such evidence conflicts with the defendant's right to present a defense." Id., 110–11. Those circumstances are analogous to the present case, in which the defendant's identity was the primary issue at trial, and in

which, as in *Smith*, "*the evidence the defendant sought to have admitted would not* [*have*] *exonerate*[*d*] *him unequivocally, but it would* [*have*] *be*[*en*] *relevant and central to his claim that he was misidentified as the complainant's attacker.*" (Emphasis added.) Id., 110. Thus, because the court's erroneous ruling in the present case interfered with the defendant's right to use his chosen defense of misidentification, we are unable to conclude that the court's error was harmless. See id., 110–11.

Finally, even though we do not address the defendant's prosecutorial impropriety claims[17] in light of our determination that the defendant was denied his constitutional right to present a defense and, thus, that a new trial is warranted, we nevertheless point out that, in assessing the harmfulness of the court's improper evidentiary ruling, we must view the entire record, which necessarily includes comments made by the prosecutor in rebuttal closing argument related to the defendant's appearance. See *State* v. *Hamilton*, supra, 352 Conn. 337–38 (our Supreme Court determined that trial court's improper admission into evidence of witness' two interviews with police, in which witness identified defendant as person in surveillance footage, was harmful and that conclusion was "buttressed by the way [the witness'] two interviews were used by the prosecutor during closing arguments"). The record shows that the prosecutor utilized testimony about the height, weight, and tattoos of the perpetrator in his closing argument to assert the state's position that the defendant's appearance matched that of the perpetrator and, further, suggested to the jury that it should not believe Sarbieski's testimony that the defendant does not have tattoos because the defendant is a good friend and employee of Sarbieski. In addition, the prosecutor specifically

[17] See footnote 18 of this opinion.

mentioned that the trial was taking place four and one-half years after the incident at the restaurant and that the jury should, thus, account for weight gain due to the COVID-19 pandemic, which occurred in the interim. Specifically, the prosecutor stated: "Four and a half years have passed since this incident, members of the jury. People change in time. I want you all to take a close look at [the defendant] now. Look at his face. Commit it to memory. *What you're looking at is not* [*the defendant*] *from 2018. You're looking at him now. The video is* [*the defendant*] *four and a half years ago. As* [*defense*] *counsel stated, we had a pandemic. The pandemic thirty was a real thing. Right? Some of us are still trying to take that weight off.*" (Emphasis added.)

Thus, despite the court's ruling *precluding the defendant* from introducing evidence concerning his height, weight and the existence of any tattoos six months after the incident, as set forth in the uniform arrest report, at the trial, which occurred more than four years after the incident, *the prosecutor* made comments that attempted to explain any difference in the appearance of the perpetrator in the video and the defendant's appearance at trial. See *People* v. *Cerda*, supra, 40 N.Y.3d 378 (when defendant was deprived of constitutional right to present defense, "[t]he prejudice . . . was compounded when the prosecutor emphasized to the jury on summation that evidence of such alternative theories 'doesn't exist,' despite knowing full well the findings in the precluded forensic reports"). Consequently, the harm resulting from the court's exclusion of the evidence, as we have outlined in this opinion, could only have been compounded by the prosecutor's remarks about the defendant's appearance, some of which were based on facts concerning the COVID-19 pandemic that were not in evidence.

Accordingly, for the foregoing reasons, the state has failed to meet its burden of demonstrating, beyond a reasonable doubt, that the court's error was harmless. We, therefore, conclude that the defendant is entitled to a new trial.[18]

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ISRAEL COLON (AC 47038)

Elgo, Moll and Suarez, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere, of the crimes of illegal possession of a weapon in a motor vehicle and possession of

[18] "Generally speaking, if we reverse a judgment and remand the case for a new trial, we sometimes choose to review other claims that are likely to arise on retrial." *State* v. *Norman P.*, 169 Conn. App. 616, 618 n.2, 151 A.3d 877 (2016), aff'd, 329 Conn. 440, 186 A.3d 1143 (2018). We decline to address the defendant's prosecutorial impropriety claims, as well as his claim that the court improperly prohibited a defense witness from testifying due to late disclosure, as they are not likely to arise on remand. See *State* v. *Culbreath*, 340 Conn. 167, 199 n.18, 263 A.3d 350 (2021); *State* v. *Gordon*, 206 Conn. App. 70, 72, 259 A.3d 676, cert. granted, 339 Conn. 913, 262 A.3d 135 (2021) (appeal withdrawn April 8, 2022); *State* v. *Fernando V.*, 170 Conn. App. 44, 46 n.1, 153 A.3d 701 (2016), aff'd, 331 Conn. 201, 202 A.3d 350 (2019). The defendant's remaining evidentiary claims are that the court erroneously precluded the defendant from presenting testimony from an expert in video graphics and limited defense counsel's cross-examination of Nocera, a legal technology specialist, concerning the nature of metadata. The defendant sought to admit the testimony of those witnesses to help the jury to understand his theory of the case—that he had misidentified himself "due to the poor quality of the [photographs taken from the] video," which, itself, was of poor quality, "including, but not limited to, the low pixel rate, the low frame rate, the compression rate, the wipeout of certain colors, and the size of the camera's lens." We cannot say that these claims are likely to arise on retrial in light of our remand for a new trial and our determination that the court improperly excluded the uniform arrest report, as the evidentiary record on retrial may be different from the one before this court. See *State* v. *Robert R.*, 340 Conn. 69, 92, 262 A.3d 810 (2021); *State* v. *Jackson*,

narcotics with intent to sell, the defendant appealed. He claimed that the trial court improperly denied his motion to suppress evidence seized without a warrant during a motor vehicle stop. *Held*:

The trial court properly denied the defendant's motion to suppress, as the court properly determined that the police officers had a reasonable and articulable suspicion sufficient to initiate the motor vehicle stop and probable cause to search the vehicle, thus, the warrantless search of the vehicle and the seizure of items found therein was not a violation of the defendant's rights pursuant to the federal and state constitutions.

Argued May 27—officially released August 5, 2025

Procedural History

Information charging the defendant with three counts of the crime of violation of a protective order, one count each of the crimes of criminal possession of a pistol, illegal possession of a weapon in a motor vehicle, possession of narcotics, possession of narcotics with intent to sell, and possession of a large capacity magazine, and with the infractions of improper parking and operating an unregistered motor vehicle, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Hon. Frank M. D'Addabbo, Jr.*, judge trial referee, denied the defendant's motion to suppress certain evidence; thereafter, the state filed a substitute information charging the defendant with the crimes of illegal possession of a weapon in a motor vehicle and possession of narcotics with intent to sell; subsequently, the defendant was presented to the court, *Chaplin, J.*, on a conditional plea of nolo contendere to the charges of illegal possession of a weapon in a motor vehicle and possession of narcotics with intent to sell; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Emily C. Kaas-Mansfield, assigned counsel, with whom was *Kara Moreau*, assigned counsel, for the appellant (defendant).

334 Conn. 793, 822, 224 A.3d 886 (2020). We, therefore, decline to address these evidentiary claims.

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Edward Azzaro*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Israel Colon, appeals from the judgment of conviction rendered by the trial court following his conditional plea of nolo contendere to illegal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38 (a)[1] and possession of a narcotic substance with intent to sell in violation of General Statutes § 21a-277 (a) (1) (A).[2] The defendant entered that plea after the court denied his motion to suppress evidence seized during a motor vehicle stop. The sole issue on appeal is whether the court properly denied the motion to suppress. We affirm the judgment of the trial court.

[1] General Statutes § 29-38 (a) provides: "Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 or any machine gun which has not been registered as required by section 53-202, shall be guilty of a class D felony, and the presence of any such weapon, pistol or revolver, or machine gun in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof. The word 'weapon', as used in this section, means any BB. gun, any blackjack, any metal or brass knuckles, any police baton or nightstick, any dirk knife or switch knife, any knife having an automatic spring release device by which a blade is released from the handle, having a blade of over one and one-half inches in length, any stiletto, any knife the edged portion of the blade of which is four inches or more in length, any martial arts weapon or electronic defense weapon, as defined in section 53a-3, or any other dangerous or deadly weapon or instrument."

[2] General Statutes § 21a-277 (a) provides in relevant part: "(1) No person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person, except as authorized in this chapter, any controlled substance that is a (A) narcotic substance . . . ."

The defendant also pleaded guilty to harassment in the second degree, pursuant to the *Alford* doctrine, stemming from events unrelated to the present appeal. See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

On September 15, 2023, the state recited the following facts prior to the court's acceptance of the defendant's plea of nolo contendere. On January 3, 2023, in the evening hours, members of the Hartford Police Department's street crimes unit were on patrol in the city of Hartford on Bond Street. The officers observed an Infiniti motor vehicle that had been improperly parked. The officers approached the vehicle and observed the operator, later identified as the defendant, frantic in the driver's seat. They also observed in plain view a scale that they believed to be an indication of drug paraphernalia. The defendant was asked to exit the vehicle. A search of that vehicle revealed a Glock nine millimeter semiautomatic pistol, as well as 115 wax paper sleeves containing a controlled substance that later tested positive for the presence of fentanyl. A search incidental to the defendant's arrest revealed approximately three grams of crack cocaine on his person. When the officers secured the drug evidence—in particular, the 115 wax paper sleeves—they believed, on the basis of their training and experience, that the manner of their packaging was indicative of street level narcotics dealing.

As a result of the search of his person and his vehicle, the defendant was arrested and charged with multiple offenses. On May 31, 2023, the defendant filed a motion to suppress all tangible evidence that had been seized, arguing that such evidence constituted the fruit of an illegal warrantless search. The defendant argued that, under the fourth and fourteenth amendments to the United States constitution, as well as article first, §§ 7, 8, and 9, of the Connecticut constitution, he was entitled to the exclusion of any evidence seized during the course of the traffic stop.

The court held a hearing on the motion to suppress on July 11, 2023. At the hearing, the state presented the testimony of Officers Justin Damone and David Anderson of the Hartford Police Department. The state

also submitted into evidence a still photograph taken from the officers' body camera recordings (exhibit 1), body camera recordings from both officers, a police report pertaining to the incident written by Officer Damone, and the scale that was seized from the vehicle.

After the evidentiary hearing on the motion to suppress, both parties filed memoranda of law. In his memorandum of law in support of the motion to suppress, the defendant argued in relevant part that the officers did not have a reasonable or articulable suspicion that he was engaged in illegal conduct because any reasonable officer, "upon sight of a vehicle stopped along the curb with its hazard lights flashing, would not have any basis to believe it was improperly parked . . . . General Statutes § 14-251 . . . allows disabled vehicles to remain stopped on the road." In support of this contention, the defendant pointed to the officers' failure to inquire as to whether the defendant's vehicle was disabled and further argued that the "video does not clearly show the distance of the vehicle from the curb."

The court heard oral argument from the parties on August 2, 2023. Defense counsel argued, inter alia, that the body camera footage contradicted Officer Damone's testimony that he had seen a scale, in plain view, on the center console of the defendant's vehicle and that the heavily tinted windows prevented the officers from seeing inside the interior of the vehicle at all.[3] Defense counsel further argued that "any sort of probable cause to search the vehicle . . . would have been based on the scale and the contraband allegedly seen on the scale that is not present in the video. Any sort of contraband found on [the defendant] was found after the search of the vehicle, so that cannot be a basis for probable cause

[3] More specifically, defense counsel contended that the object seen on the body camera recording was not the scale that was admitted into evidence.

to search the vehicle."[4] The prosecutor disagreed, arguing that the officers had a reasonable and articulable suspicion that the vehicle was illegally parked and that this gave them authority to initiate the traffic stop and approach the vehicle. The prosecutor further argued that the body camera footage should be considered as a "supplement" to the testimony of the officers, and that the court had discretion to weigh the officers' testimony, as well as the recording, in determining whether probable cause had developed to search the vehicle. The prosecutor then argued that the plain view exception to the warrant requirement applied in the current scenario because Officer Damone saw the scale covered in white residue sitting on the center console and relied on his training and experience in determining that it was evidence of criminal activity.[5]

[4] In its memorandum of decision on the motion to suppress, the court noted, with respect to the argument that the object visible on the center console of the defendant's vehicle did not resemble the scale that was recovered and admitted into evidence at the suppression hearing, that "the defendant places great emphasis on what he perceives to be a discrepancy between the scale that was reported in Officer Damone's police report, to wit, a black scale, versus that which is seen on the body camera recording, to wit, a gray scale. Although the court disagrees with the defendant's characterization of the scale's color, to the extent that the scale does not appear properly black on the recording, the court credits Officer Damone's testimony on the matter, namely, that lighting is responsible for any such discrepancy."

[5] The prosecutor also argued that the search could be justified as a search incident to a lawful arrest. Under well established precedent from the United States Supreme Court, a police officer who has effectuated a lawful custodial arrest of the occupant of an automobile may, incident to that arrest, search the passenger compartment of that automobile for evidence pertaining to the criminal activity that forms the basis of the lawful arrest. See *New York* v. *Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); see also *Arizona* v. *Gant*, 556 U.S. 332, 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (searches conducted "incident to a recent occupant's arrest are authorized only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"). Because we conclude that the court properly denied the motion to suppress on the ground that probable cause was established on the basis of the plain view exception to the warrant requirement, we do not address this alternative ground for affirmance of the judgment.

The court denied the defendant's motion to suppress on September 5, 2023. In its factual findings, the court noted that Officers Damone and Anderson were on patrol on the night of January 3, 2023, and were tasked with "enforcing quality of life issues throughout the city," which included policing parking violations. The court found that the officers observed the defendant's vehicle running and emergency lights activated, parked "along the south curb in front of 55 Bond Street. As the vehicle appeared to be more than twelve inches from the curb, officers suspected that this operator may be parking it in violation of . . . § 14-251."

"After activating the patrol vehicle's emergency lights and sirens, Officer Damone parked and proceeded on foot towards the vehicle's passenger side door activating his body camera. He saw through the vehicle's lightly tinted front window that the operator—a Hispanic male later identified as the defendant—was making various furtive movements and gestures including movements towards the rear of his pants.

"Officer Damone shined his flashlight in the direction of the vehicle's interior and knocked on the passenger window, informing the defendant that he could see him moving around inside. After observing the defendant reach towards his buttocks, Officer Damone informed Officer Anderson that he thought the defendant may be attempting to stuff something inside his rear cavity. Furthermore, Officer Damone testified that he could see a black scale, coated with a white powderlike substance, on the center console." (Footnote omitted.)

"Officer Damone subsequently requested that Officer Anderson, then standing adjacent to the driver side window, have the defendant step outside the vehicle. The defendant voluntarily complied and was not initially placed in handcuffs. Thereafter, Officer Damone opened the passenger door and observed from outside

the vehicle the scale sitting in plain view on the center console, coated with what appeared to be a white substance. Additionally, a large clear plastic bag with wax paper sleeves protruding out of it could be observed inside the steering wheel console. Based on Officer Damone's training and experience, wax paper sleeves are commonly used to package illegal narcotics. Officer Damone subsequently closed the passenger door, and the defendant was placed in handcuffs by Officer Anderson. Officer Damone then walked to the driver's door, where he crouched down and reached towards the plastic bag. As he attempted to dislodge the plastic bag, a firearm slid out from inside the console. After seizing the firearm and suspected narcotics, Office Damone asked the defendant whether he had secreted narcotics in his rear cavity. Rock cocaine was ultimately discovered therein. The body worn camera recorded the interaction."

The court concluded that, in initiating the traffic stop, the officers had a reasonable and articulable suspicion that the defendant had violated § 14-251 (a).[6] The court rejected the defendant's argument that any reasonable officer would not have believed that his vehicle was illegally parked. The court also rejected the defendant's argument that the body camera footage did not clearly reveal the true distance of his vehicle from the curb. The court based this finding on the credible testimony

[6] General Statutes § 14-251 (a) provides: "No vehicle shall be permitted to remain stationary within ten feet of any fire hydrant, or upon the traveled portion of any highway except upon the right-hand side of such highway in the direction in which such vehicle is headed; and, if such highway is curbed, such vehicle shall be so placed that its right-hand wheels, when stationary, shall, when safety will permit, be within a distance of twelve inches from the curb, except if a bikeway, as defined in section 13a-153f, or such bikeway's buffer area, as described in the federal Manual on Uniform Traffic Control Devices, is in place between the parking lane and the curb, such vehicle shall be so placed that its right-hand wheels, when stationary, shall, when safety will permit, be within a distance of twelve inches from the edge of such bikeway or buffer area."

of the officers, as well as its own review of exhibit 1 and the body camera footage, concluding that an objectively reasonable officer could have formed a reasonable suspicion that the defendant was parked in violation of § 14-251.[7] The court also concluded that the officers had probable cause to effectuate a search of the defendant's vehicle because of the defendant's "furtive behavior" coupled with Officer Damone's observations of contraband in plain view.[8] In light of those determinations, the court denied the defendant's motion to suppress.

The state subsequently charged the defendant by way of a long form information with illegal possession of a weapon in a motor vehicle in violation of § 29-38 (a) and possession with intent to sell in violation of § 21a-277 (a) (1) (A). The defendant thereafter entered a conditional plea of nolo contendere,[9] which the court

[7] More specifically, the court noted that the defendant's vehicle appeared "to be parked at a noticeably far distance from the curb." At the hearing on the motion to suppress, Officer Damone testified that he saw "a vehicle that was . . . sticking way out into the road. Well, more than twelve inches from the curb. The vehicle was running. So, we conducted a stop of the vehicle to speak with the operator to inform him that he was parked too far from the curb." We note that the state argued, and the court determined, that reasonable and articulable suspicion existed for the traffic violation. Notwithstanding this determination, we note that these facts, as found by the court, establish probable cause to issue a citation for the violation of § 14-251 (a).

[8] The court also determined that, even if probable cause to search the vehicle did not exist, the gun and drugs would have inevitably been discovered in a protective sweep. The defendant contends that this was an improper determination, and the state argues that this is an alternative ground by which we might affirm the court's denial of the motion to suppress. Because we conclude that probable cause for the search did exist, we need not reach this issue.

[9] General Statutes § 54-94a "permits a defendant to enter a conditional plea of nolo contendere while preserving the right to appeal in certain specified circumstances, namely, the denial of a motion to dismiss or a motion to suppress that is dispositive of the case." (Footnote omitted.) *State* v. *Russo*, 221 Conn. App. 729, 752–53, 303 A.3d 279 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024). "A nolo contendere plea has the same effect as a guilty plea, but a nolo contendere plea cannot be used against the

accepted, and he was sentenced to a total effective sentence of eight years of incarceration, execution suspended after eight months to serve, and three years of probation.

On appeal, the defendant argues that the court improperly denied his motion to suppress the evidence seized in the traffic stop. The defendant argues that the court erred in (1) finding reasonable and articulable suspicion for the traffic stop and (2) concluding that probable cause existed to justify the warrantless search of the vehicle. The state responds that, pursuant to *Terry* v. *Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a reasonable and articulable suspicion justified the initial motor vehicle stop by the officers. Once that stop was justified, according to the state, the presence of drug paraphernalia in plain view, in combination with the defendant's furtive movements, established probable cause to search the vehicle, as provided for by the automobile exception to the warrant requirement under the fourth amendment. We agree with the state.

We first set forth the appropriate standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [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 . . . . Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a

defendant as an admission in a subsequent criminal or civil case." (Internal quotation marks omitted.) *State* v. *Dayton*, 176 Conn. App. 858, 869 n.12, 171 A.3d 482 (2017). At the plea hearing, the parties stipulated that the granting of the defendant's motion to suppress would have been dispositive of the charges to which the defendant entered the plea of nolo contendere.

question of law. . . . The trial court's determination on the issue, therefore, is subject to plenary review on appeal. . . . Because a trial court's determination of the validity of a . . . search [or seizure] implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . . However, [w]e [will] give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 182 Conn. App. 580, 586–87, 190 A.3d 974, cert. denied, 330 Conn. 920, 194 A.3d 290 (2018).

We next set forth the applicable constitutional principles. "The federal law of search and seizure in this area is well settled. The fourth amendment to the federal constitution, made applicable to the states through the due process clause of the fourteenth amendment, provides in relevant part that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . Certain seizures are reasonable under the fourth amendment even in the absence of probable cause if there is a reasonable and articulable suspicion that a person has committed or is about to commit a crime. . . . When a reasonable and articulable suspicion exists, the detaining officer may conduct an investigative stop of the suspect in order to confirm or dispel his suspicions." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilkins*, 240 Conn. 489, 495, 692 A.2d 1233 (1997). "Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion. . . . The police officer's decision . . .

must be based on more than a hunch or speculation. . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Internal quotation marks omitted.) Id., 496.

Further, under both the United States and Connecticut constitutions, "[o]rdinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. . . . Under both the federal and the state constitutions, a warrantless search and seizure is per se unreasonable, subject to a few well defined exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 111 Conn. App. 614, 622, 960 A.2d 1056 (2008), cert. denied, 290 Conn. 917, 966 A.2d 234 (2009). One such exception to the warrant requirement is the automobile exception.[10]

"The United States Supreme Court first recognized the automobile exception to the fourth amendment warrant requirement in *Carroll* v. *United States*, 267 U.S. 132, 149, 45 S. Ct. 280, 69 L. Ed. 543 (1925), where the court explained that if [a] search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and

[10] "There are four recognized situations where a warrantless search of a car may lead to the conclusion that such a search was reasonable under the United States or [Connecticut constitution] . . . (1) it was made incident to a lawful arrest; (2) it was conducted when there was probable cause to believe that the car contained contraband or evidence pertaining to a crime; (3) it was based upon consent; or (4) it was conducted pursuant to an inventory of the car's contents incident to impounding the car." (Internal quotation marks omitted.) *State* v. *Wilson*, supra, 111 Conn. App. 622–23.

destruction, the search and seizure are valid. Likewise, under our state constitution, our automobile exception permits a warrantless search of an automobile whenever the police have probable cause to do so . . . as where the searching officer[s] have probable cause to believe that the vehicle contains contraband. . . . The probable cause determination must be based on objective facts that could have justified the issuance of a warrant by a neutral magistrate at the time the search was made." (Internal quotation marks omitted.) *State* v. *Brito*, 170 Conn. App. 269, 292–93, 154 A.3d 535, cert. denied, 324 Conn. 925, 155 A.3d 755 (2017).

The plain view doctrine is "based upon the premise that the police need not ignore incriminating evidence in plain view while they are operating within the parameters of a valid search warrant or are otherwise entitled to be in a position to view the items seized." (Internal quotation marks omitted.) *State* v. *Cobb*, 251 Conn. 285, 347, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). Further, "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.' " *Horton* v. *California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). In sum, when officers are in a place that they are entitled to be and they observe items—in plain view—that are immediately perceptible as incriminating, probable cause can be established from those observations. Moreover, "[f]urtive movements may be considered as a factor in determining whether officers have the requisite probable cause to conduct a search or arrest." *State* v. *Thomas*, 98 Conn. App. 542, 553, 909 A.2d 969 (2006), cert. denied, 281 Conn. 910, 916 A.2d 53 (2007). The combination of furtive movements and the observation of contraband within plain view of an officer is sufficient to establish probable cause to search an automobile. See id., 552.

"It is well settled that [i]f the police obtain physical evidence or statements as the result of the seizure of a person without probable cause, in violation of the constitution of Connecticut, article first, §§ 7 and 9, [or the fourth amendment to the United States constitution] the fruit of the poisonous tree doctrine requires that the evidence be suppressed as the product of the unlawful seizure." (Internal quotation marks omitted.) *State* v. *James*, 237 Conn. 390, 404, 678 A.2d 1338 (1996); see also *Weeks* v. *United States*, 232 U.S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (establishing exclusionary rule for evidence seized in violation of fourth amendment rights).

With the foregoing legal principles in mind, we consider the detailed findings of fact made by the court, following the evidentiary hearing on the motion to suppress. First, the court, having viewed the body camera recording of the traffic stop, found that the defendant's vehicle was "parked at a noticeably far distance from the curb."[11] The court concluded that the officers reasonably believed that the defendant's vehicle was parked in violation of § 14-251. That reasonable belief, in turn, gave the officers the right, pursuant to *Terry*, to stop the vehicle and approach the defendant, who was in the driver's seat of the vehicle. See *Terry* v. *Ohio*, supra, 392 U.S. 21–22. At that point in time, the officers were authorized to determine whether the vehicle was disabled and to alert the driver that the vehicle was illegally parked.[12]

[11] As the court aptly noted, "the issue is not whether the defendant actually parked his vehicle more than twelve inches from the curb . . . but whether [the officers] *reasonably* suspected that he had committed the foregoing offense." (Emphasis in original.)

[12] The defendant points out that both officers acknowledged that § 14-251 does not apply to disabled vehicles and that the hazard lights were activated on the defendant's vehicle when the officers initiated the traffic stop. Therefore, according to the defendant, if the vehicle were disabled, there would have been no basis for the reasonable and articulable suspicion that the vehicle was parked illegally. We are not persuaded that the mere use of hazard lights by a vehicle that appears to be illegally parked requires the

In concluding that there was probable cause that the defendant was involved in illegal activity, the court specifically credited the officers' testimony. The court found that, as the officers approached the vehicle, Officer Damone, using his flashlight, saw the defendant engaged in "various furtive movements and gestures including movements towards the rear of his pants." The court also found that Officer Damone saw the scale, in plain view, covered in white residue on the center console of the vehicle, next to the defendant. The court also credited Officer Damone's testimony that he saw a "large clear plastic bag with wax paper sleeves protruding out of it [that was] inside the steering wheel console." The court then properly determined that the officers ordered the defendant removed from the vehicle, for their own safety and because they now had probable cause to search the defendant and the passen-

assumption that the vehicle is disabled nor does it obviate the existence of a reasonable and articulable suspicion of illegal activity. Moreover, putting aside the defendant's failure to point to evidence that suggests that the vehicle was in fact disabled, the court reasoned that the officers would have seen the contraband in plain view when approaching the vehicle, regardless of whether or not it was actually disabled. Although the defendant argues that there are credibility issues with the officers and evidence to suggest that the traffic stop "was a mere pretext," the defendant nonetheless concedes that "[r]easonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available and known by the police, would have had that level of suspicion." (Internal quotation marks omitted.) *State* v. *Manousos*, 179 Conn. App. 310, 322, 178 A.3d 1087, cert. denied, 328 Conn. 919, 181 A.3d 93 (2018). This court's precedent is in accord with that of the United States Supreme Court, which has held that the subjective motivation behind a police officer's actions—for example, whether there are fabricated or pretextual reasons that are not reflective of the officer's true motivations for initiating a traffic stop—are irrelevant. See, e.g., *Whren* v. *United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (constitutionality of traffic stops does not depend on actual motivations of individual officers involved). Put differently, the court correctly determined that, in viewing the vehicle parked more than twelve inches from the curb, the officers had at least a reasonable and articulable suspicion that justified the traffic stop, regardless of whether the vehicle was disabled. See footnote 7 of this opinion.

ger compartment of his vehicle for evidence pertaining to the distribution of illegal narcotics. A "police officer is certainly entitled to utilize his training and experience in ascertaining probable cause . . . ." (Internal quotation marks omitted.) *State* v. *Wilson*, supra, 111 Conn. App. 625.

We agree with the court's conclusion that the ensuing search of the passenger compartment of the vehicle was constitutional, as it was conducted in accordance with the automobile exception to the warrant requirement. This search resulted in the discovery of the evidence that formed the basis for the charges against the defendant and to which he pleaded nolo contendere.

On appeal, the defendant acknowledges that the court's decision "relies in large part on its crediting of the officers' testimony" but argues, nonetheless, that the purportedly "clear contradictions" between that testimony and the police report, as well as the footage from the body cameras, undermines Officer Damone's account of what transpired such that his testimony "should not have been given weight or credit, particularly as it related to what he allegedly saw and when/where he allegedly saw it." The defendant, in effect, asks us to second-guess the trial court's credibility determinations. As we have often had occasion to iterate, "[c]redibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because the demeanor, conduct and other factors are not fully

reflected in the cold, printed record . . . . We, therefore, defer to the [trier of fact's] credibility assessments . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 183 Conn. App. 54, 61, 191 A.3d 1102, cert. denied, 330 Conn. 914, 193 A.3d 50 (2018). We will not depart from that deference to the trial court in the present case.

The court properly determined that the officers had a reasonable and articulable suspicion sufficient to initiate the traffic stop. Upon approaching the vehicle, the officers saw the defendant's furtive movements as well as immediately apparent evidence of criminal activity such that they established probable cause to search the vehicle. We therefore conclude that the warrantless search of the defendant's vehicle and the seizure of the items found within the vehicle were constitutionally valid. The court, therefore, properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.