D. A. *v.* A. C.*
(AC 47507)

Cradle, C. J., and Suarez and DiPentima, Js.

Syllabus

The defendant appealed from the trial court's judgment granting the plaintiff's application for relief from abuse and issuing a civil order of protection pursuant to statute (§ 46b-15). The defendant claimed, inter alia, that the court improperly issued a civil order of protection. *Held*:

The trial court properly denied the defendant's motion to dismiss, as the plaintiff produced evidence sufficient to establish a prima facie case, including testimony of the guardian ad litem for the parties' child.

This court could not conclude that the trial court incorrectly applied the law or otherwise abused its discretion in issuing the protective order, as it was unclear from the record on which statutory basis the trial court relied in issuing the protective order, the defendant left unchallenged on appeal two statutory grounds to support the issuance of the protective order, the defendant failed to request an articulation from the trial court, and the

* 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.

defendant rooted his claim on appeal on a superseded revision of § 46b-15 and case law citing to that revision.

Argued June 3—officially released September 16, 2025

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of New London at Norwich, where the court, *Shluger*, *J.*, issued a restraining order ex parte; thereafter, the case was tried to the court, *Shluger*, *J.*; subsequently, the court, *Shluger*, *J.*, denied the defendant's motion to dismiss and rendered judgment granting the plaintiff's application for relief from abuse, from which the defendant appealed to this court. *Affirmed.*

Brandon H. Marley, with whom was *Drzislav Coric*, for the appellant (defendant).

Opinion

DiPENTIMA, J. The defendant, A. C., appeals from the judgment of the trial court granting the application of the plaintiff, D. A., for relief from abuse and the issuing of a civil order of protection pursuant to General Statutes § 46b-15.[1] On appeal, the defendant claims that the court improperly (1) denied his motion to dismiss and (2) issued a civil order of protection. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiff and the defendant, who had a dating relationship that ended in 2019, are the parents of a minor child, E, who was born in 2018. In 2020, the plaintiff initiated a custody proceeding concerning E, which is currently pending. In that action, the plaintiff filed motions for sole physical custody of E, and the

[1] The plaintiff did not file a brief or otherwise participate in the present appeal. On March 14, 2025, this court ordered that the appeal be considered on the basis of the defendant's brief, the record, and the defendant's oral argument.

parties reached multiple temporary agreements, which were accepted by the court without prejudice. The agreements included the following terms: the parties would not threaten, harass, stalk, or assault each other; a guardian ad litem would be appointed for E; the defendant would undergo a psychological evaluation; the plaintiff would have sole physical custody of E; the parties would have joint legal custody of E; and the defendant would have supervised visitation with E, with pickups and drop-offs conducted at a police station.

On December 2, 2022, pursuant to § 46b-15, the plaintiff filed an application for relief from abuse against the defendant. The court, *Shluger*, *J.*, issued an ex parte restraining order against the defendant and, on the scheduled hearing date, the court dismissed the matter by agreement of the parties. On August 7, 2023, the plaintiff filed a second application for relief from abuse against the defendant pursuant to § 46b-15, and the court issued an ex parte restraining order against the defendant, and, on the scheduled hearing date, the court dismissed the matter at the plaintiff's request.

On February 20, 2024, the plaintiff filed the application for relief from abuse that underlies the present appeal. The court issued an ex parte restraining order against the defendant, which was set to expire on March 12, 2024. At a March 12, 2024 evidentiary hearing on the application, the plaintiff and E's guardian ad litem testified.

During the plaintiff's testimony, her counsel asked if she was ever fearful for her safety during the time in which she had dated the defendant, and the defendant's counsel objected, stating that "[a]s far as time frame, there has been several restraining orders filed in the past that have been withdrawn. I think that for time frame purposes, it should be limited." The court responded, "I'll give a little bit of latitude . . . just to

set the context, but . . . a restraining order today must be for recent events, so I'll overrule the objection for some background . . . ." The plaintiff then testified that the defendant "was very emotionally abusive to me. He would leave and not come back until random hours. Like at 3 in the morning, sometimes I'd wake up, and he wouldn't be there." She further explained that, in early 2020, when she went to the defendant's house to drop off E for a visit and called out his name to gain his attention while he was fixing the roof on his neighbor's house, the defendant "came down and was screaming at [the plaintiff] in front of [E], and he said, 'If you ever come around my house saying my name like that again, I'm going to put a hammer through your head.' " When asked if the defendant has threatened to harm her since that incident, the plaintiff responded, "[p]hysically, not so much. It's mostly emotionally and mentally and psychologically that he goes after me." She further testified that "apparently" the defendant owns a gun.

The plaintiff testified that she witnessed the defendant exhibiting "up and down manic behavior" that has been "progressing greatly over the last several years" and manifesting in certain ways such that "sometimes, he'd be really great with [E] and willing to, you know, work together on certain things. And then all of a sudden, out of nowhere, everything flips, and then I would be, essentially, psychologically tormented and emotionally abused by him belittling me, threatening me, challenging me . . . ." She further explained that the defendant "has admitted that he thinks he has bipolar."

The plaintiff further testified, "I am fearful of my life because this man right here has been emotionally and psychologically abusing me for the last six years straight, and he has been abusing my family, showing up at my house uninvited, coming towards me, making me purposely uncomfortable, raising his voice at me in

front of my daughter, saying things that are incredibly inappropriate in front of her. I—he has—it seems like almost every time I see him in person he has no ability to control himself and the things he says. I am afraid that he can—like I said before, I'm legitimately scared that he can come to my house and literally kill [me and T, my boyfriend] and take [E]. I'm scared. I wouldn't put it past him to do something like that."

The plaintiff also testified concerning the defendant showing up uninvited at her house. She testified that the defendant exhibited "aggression" in many ways including that "he's come up to my—he drove up to my house before" when he was not invited. She further testified that she went to the police department to drop off E with the defendant and when he did not show up, she left to go to her own house to drop E off with T. She stated that the defendant, however, "ended up driving up right behind me as I was pulling up at my house, and he blocked me in, so I couldn't get out. I had to, like, pull forward and move my car completely around to get out" and the defendant said, " 'oh, you're not—you can't leave my daughter with that f-ing pedophile,' very loudly in front of our neighbors." The plaintiff noted that the Department of Children and Families conducted an investigation into T, regarding the defendant's allegations that T had sexually abused E, and that T was "fully cleared."

The guardian ad litem for E testified that, in the custody case, there is an order in place that the defendant undergo a psychological evaluation, but that process had not been completed. She further explained that she recommended a psychological evaluation of the defendant in the custody case because he "is, for lack of a better term, obsessed with the sex abuse allegations. And despite that they weren't vetted, that [the

Department of Children and Families] didn't find anything, he ended up confronting one of the therapists, and she discharged the child."

Following direct examination of the plaintiff and prior to the testimony of the guardian ad litem, the defendant's counsel made an oral motion to dismiss, arguing that the plaintiff had not met her burden because she had not "shown that she has been subject to a continuous threat of present physical pain or physical injury. She mentions one instance where [the defendant] came to her house to pick up her—his daughter on his access time. There were no threats of violence made at that time. There have been no threats of stalking. Again, threats of violence, the last date she claims was July of 2020. You know, basically, she's claiming that, you know, he's mean. He yells and screams." The court did not rule at that time on the motion to dismiss, reasoning that it was premature.

At the close of the plaintiff's case-in-chief, the defendant's counsel made a renewed motion to dismiss, which the court denied, stating, "[t]he case of *Margarita* [*O.*] v. *Fernando* [*I.*], [189 Conn. App. 448, 207 A.3d 548, cert. denied, 331 Conn. 930, 207 A.3d 1051, cert. denied, U.S. , 140 S. Ct. 72, 205 L. Ed. 2d 130 (2019)], speaks to just that scenario, so I would agree with you that if it weren't for this toxic custody dispute where he is going through a psychological evaluation, where he has only supervised visitation, where there have been allegations upon allegations of [a] gun, there are serious issues of his mental health as well as rage, I think it amplifies what would ordinarily be insufficient evidence."

At the close of the hearing, the court stated, "[t]his case has many indicia of lethality that I've ever seen. You could go down one of those charts, and judges go to these trainings where we get those kinds of charts,

and we would be checking almost every box: firearm, mental health problems, toxic custody case, another restraining order/CPO against [T], drop-offs and pick-ups at police department, an order of a psychological evaluation, a threat of violence, albeit dated years ago. And I'll underscore the uncontroverted claims that he is suffering from numerous mental health disorders. He didn't get on the witness stand and say, 'I don't have multiple personality disorder. I'm not narcissistic. I'm not paranoid. I'm not bipolar. I'm not schizophrenic.' That testimony is all I've got. As I indicated earlier, I think the case of [*Margarita O.* v. *Fernando I.*, supra, 189 Conn. App. 448] by the Appellate Court gives the court some latitude under circumstances such as this. . . . I think it stands for the proposition that a toxic relationship like this can give the court expanded leverage and leeway in fashioning a protective order, a minimal protective order."

The court issued a restraining order, which expired on March 12, 2025,[2] ordering the defendant to "[s]urrender or transfer all firearms and ammunition" and not to "assault, threaten, abuse, harass, follow, interfere with, or stalk" the plaintiff. This appeal followed.

I

The defendant first claims that the court improperly denied his oral motion to dismiss made at the March 12, 2024 evidentiary hearing. We disagree.

Practice Book § 15-8 provides in relevant part: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. . . ."

[2] Although the restraining order expired on March 12, 2025, the defendant's appeal is not moot due to adverse collateral consequences. See, e.g., *L. D.* v. *G. T.*, 210 Conn. App. 864, 869 n.4, 271 A.3d 674 (2022).

"The standard for determining whether the plaintiff has made out a prima facie case, under Practice Book § 15-8, is whether the plaintiff put forth sufficient evidence that, *if believed*, would establish a prima facie case, not whether the trier of fact believes it. . . . For the court to grant the motion [for judgment of dismissal pursuant to Practice Book § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor. . . . Whether the plaintiff has established a prima facie case is a question of law, over which our review is plenary." (Emphasis in original; internal quotation marks omitted.) *J. R.* v. *N. K.*, 232 Conn. App. 434, 440, 337 A.3d 14 (2025).

Although much of the plaintiff's testimony contained her conclusory interpretations of the defendant's behavior as painted with broad brush strokes, our plenary review of the trial court's denial of the motion to dismiss is not based on whether we believe the plaintiff's testimony or her general characterizations of the defendant's behavior.[3] Rather, we must accept her testimony as true and consider whether she has satisfied the low bar of setting forth a prima facie case. See General Statutes § 46b-15 (a) (any family member who is victim of domestic violence as defined in General Statutes

[3] Although we do not condone the language used by the trial court in denying the motion to dismiss concerning background factors amplifying insufficient evidence; see footnote 6 of this opinion; because our review is plenary, we are not bound by the trial court's reasons for denying the motion.

§ 46b-1, by another family member may make application for relief); see also General Statutes § 46b-1 (b) (domestic violence is defined as continuous threat of present physical pain or physical injury, stalking, pattern of threatening, or coercive control). We conclude that the plaintiff's testimony along with that of the guardian ad litem, if believed, was sufficient to establish a prima facie case. Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss.

II

The defendant also claims that the court improperly issued a protective order pursuant to § 46b-15. We are not persuaded.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Internal quotation marks omitted.) *K. S.* v. *R. S.*, 350 Conn. 692, 734–35, 326 A.3d 187 (2024). "The issue of whether the court held the parties to the proper standard of proof is a question of law. When issues in [an] appeal concern questions of law, this court reviews such claims de novo." (Internal quotation marks omitted.) *Kathrynne S.* v. *Swetz*, 191 Conn. App. 850, 860, 216 A.3d 858 (2019).

First, the defendant argues, relying solely on *Putman* v. *Kennedy*, 279 Conn. 162, 900 A.2d 1256 (2006),[4] that,

[4] In *Putman* v. *Kennedy*, supra, 279 Conn. 162, our Supreme Court held that "it is reasonably possible that adverse collateral consequences of the domestic violence restraining orders may occur, and, therefore, the defendant's appeals are not rendered moot by virtue of the expiration of the orders during the pendency of the appeals." Id., 175. In so holding, the court referenced the then applicable language of § 46b-15, stating that "[t]he threat of reputation harm is particularly significant in this context because domes-

because our Supreme Court "has held that [§] 46b-15 specifically requires a direct causal link between the defendant and the continuous threat of physical harm to the [plaintiff]," the trial court abused its discretion in issuing the protective order because there was no evidence that the plaintiff was subject to a pattern of threatening.

The revision of § 46b-15 (a) that was applicable in *Putman*, provided: "Any family or household member as defined in section 46b-38a who has been subjected to a *continuous threat of present physical pain or physical injury* by another family or household member or person in, or has recently been in, a dating relationship who has been subjected to a *continuous threat of present physical pain or physical injury* by the other person in such relationship may make an application to the Superior Court for relief under this section." (Emphasis in original.) *Putman* v. *Kennedy*, supra, 279 Conn. 171 n.10; see also General Statutes (Rev. to 2003) § 46b-15 (a).

The defendant's argument relies solely on whether he had subjected the plaintiff to a continuous threat of present physical pain or physical injury. The revision of § 46b-15 (a) applicable in the present case provides, however, that threatening is not the only statutory basis to support the issuance of a domestic violence protective order. Section 46b-15 (a) has since been amended to provide in relevant part: "Any family . . . member . . . who is the victim of domestic violence, as defined in section 46b-1, by another family . . . member may make an application to the Superior Court for relief under this section. . . ." Section 46b-1 (b) defines "domestic violence" as follows: "(1) A continuous

tic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a continuous threat of present physical pain or physical injury to the applicant." (Internal quotation marks omitted.) Id., 171.

threat of present physical pain or physical injury against a family or household member, as defined in section 46b-38a; (2) stalking, including, but not limited to, stalking as described in section 53a-181d, of such family or household member; (3) a pattern of threatening, including, but not limited to, a pattern of threatening as described in section 53a-62, of such family or household member or a third party that intimidates such family or household member; or (4) coercive control of such family or household member, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. . . ."

Second, the defendant argues that the court erred in relying on *Margarita O.* because the present case does not involve any oral or written threatening communications. In *Margarita O.*, this court explained that "[i]n *Princess Q. H.* v. *Robert H.*, [150 Conn. App. 105, 116, 89 A.3d 896 (2014)], this court viewed the trial court's decision in light of the surrounding circumstances and context of all the evidence presented to the trial court. . . . In the present case . . . in light of the lengthy, repetitive and hostile nature of the defendant's communications, and the trial court's ability to supplement the written exhibits with its observation of the demeanor of the parties at the hearing, the trial court reasonably could have concluded that the defendant's written threatening communications constituted a pattern of threatening." (Citations omitted; footnotes omitted.) *Margarita O.* v. *Fernando I.*, supra, 189 Conn. App. 464–66.

Third, the defendant contends that "the trial court held that but for the toxic custody dispute, there would have been insufficient evidence to grant the application" and made "conclusory statements . . . devoid of

any evidentiary foundation upon which to base said conclusions."[5]

In its oral decision, the court did not specify whether it relied on a continuous threat of present physical pain or physical injury, stalking, a pattern of threatening, or coercive control in issuing the protective order, and it made no findings of fact in this regard. The defendant did not request an articulation; see Practice Book §§ 60-5 and 61-10 (a); and instead has rooted his sufficiency claim on an outdated revision of § 46b-15, addressing the evidence only in the context of the continuous threat of present physical pain or physical injury, and framed his argument concerning the court's reliance on *Margarita O.*, in the context of a pattern of threatening. It is unclear from the record, however, on which statutory basis the court relied in issuing the protective order and the defendant leaves unchallenged on appeal the statutory grounds of stalking and coercive control.

We are left to speculate whether the court improperly relied solely on background factors[6] or whether it concluded in light of all of the surrounding circumstances

[5] The defendant also argues the court improperly shifted to him the burden to prove that he did not have any mental health concerns when it stated, "I'll underscore the uncontroverted claims that he is suffering from numerous mental health disorders. He didn't get on the witness stand and say, 'I don't have multiple personality disorder. I'm not narcissistic. I'm not paranoid. I'm not bipolar. I'm not schizophrenic.' That testimony is all I've got." Contrary to the defendant's contention, the court stated that the plaintiff's testimony concerning the defendant's mental health was undisputed and that it found the plaintiff's testimony credible in that regard. The court is the sole arbiter of credibility; see, e.g., *D. S.* v. *R. S.*, 199 Conn. App. 11, 18, 234 A.3d 1150 (2020); and the court's making of such credibility determinations does not evince an improper shifting of the burden of proof to the defendant.

[6] We note that nothing in *Margarita O.* or similar cases discussing the examination of background factors eliminates the requirements that, for a trial court to issue a civil restraining order pursuant to § 46b-15, it must determine that the applicant has proven by a preponderance of the evidence; see *Kathrynne S.* v. *Swetz*, supra, 191 Conn. App. 860–62; that the defendant (1) poses a continuous threat of present physical pain or physical injury, (2) has engaged in stalking, (3) has engaged in a pattern of threatening of

and the demeanor of the parties at the hearing that evidence existed in the record to support the issuance of the protective order under one of the statutory bases in § 46b-15. We, however, do not presume error on the part of the trial court, rather, error must be demonstrated by an appellant on the basis of an adequate record.[7] See, e.g., *Connecticut Novelty Co.* v. *Graichen*, 233 Conn. App. 843, 848, A.3d (2025).

The ambiguous nature of the court's comments and the lack of factual findings in the present case is cast against a backdrop wherein we are presented on appeal with narrowly framed issues that significantly rely on an outdated revision of § 46b-15. Under these circumstances, our resolution of the issues presented to us is guided by the following legal principles. "As a general matter, it is incumbent on the appellant to provide an adequate record for review. . . . To the extent that the court's decision is ambiguous . . . it was [the appellant's] responsibility to seek to have it clarified. . . . [O]ur appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Citations omitted; emphasis in original; internal quotation

the plaintiff, or (4) has engaged in coercive control of the plaintiff. See General Statutes § 46b-15 (a); see also General Statutes § 46b-1 (b).

[7] The record in the trial court includes a report prepared by the Judicial Branch family services unit containing the defendant's "risk level." Section 46b-15 (b) provides in relevant part that "at the time of the hearing, the court, in its discretion, may also consider a report prepared by the family services unit of the Judicial Branch, provided the person who prepared such report is available to testify at the hearing and is subject to cross examination. . . ." The court does not allude to it, nor has the defendant raised on appeal the inclusion of the report in the record. Therefore, we do not address it. We note, however, the potential due process implications of a trial court's considering such a report in the absence of the person who prepared the report being available to testify at the hearing and subject to cross-examination.

marks omitted.) *Doe* v. *Bemer*, 215 Conn. App. 504, 517, 283 A.3d 1074 (2022). Because of the defendant's reliance in the present appeal on a superseded revision of the relevant statute and on case law citing to that superseded revision, compounded by the defendant's failure to request an articulation, we cannot conclude that the court applied the law incorrectly or that it otherwise abused its discretion in issuing the protective order.

The judgment is affirmed.

In this opinion the other judges concurred.

DANIEL W. E. *v.* COMMISSIONER OF CORRECTION*
(AC 46617)

Seeley, Westbrook and Wilson, Js.

Syllabus

The petitioner, who had previously been convicted of sexual assault and risk of injury to a child, appealed after the habeas court denied his petition for certification to appeal from its judgment denying his petition for a writ of habeas corpus. He claimed, inter alia, that the court improperly construed the allegations in his petition for a writ of habeas corpus, resulting in a deprivation of his right to due process. *Held*:

The habeas court did not abuse its discretion in denying the petitioner certification to appeal, as he failed to demonstrate that his underlying claim of error was debatable among jurists of reason, that a court could resolve the issues in a different manner or that the question was adequate to deserve encouragement to proceed further, and, accordingly, this court concluded that the petitioner failed to invoke this court's jurisdiction, and the appeal was dismissed.

The habeas court properly denied the petition for a writ of habeas corpus, as, despite the petitioner's claim to the contrary, the court properly construed the allegations of the petition to the petitioner's benefit, in light of the petitioner's legal burden and the specific relief sought by him, and, even if

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

the petitioner could demonstrate that the court erred in its interpretation of the allegations in the petition, the petitioner failed to demonstrate that it resulted in a specific due process violation as was alleged.

Argued March 17—officially released September 16, 2025

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition; thereafter, the court, *Newson, J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Donna Fusco*, assistant state's attorney, for the appellee (respondent).

Opinion

WILSON, J. The petitioner, Daniel W. E., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly construed the allegations in his amended petition for a writ of habeas corpus, resulting in a deprivation of his right to due process. We conclude that the habeas court properly denied the petition for certification to appeal and, therefore, dismiss this appeal.

The following procedural history is relevant to the claims raised on appeal. On September 27, 2012, following a jury trial, the petitioner was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and one count of risk of injury to a child in violation of General Statutes

(Rev. to 2001) § 53-21 (a) (2). The conviction was based on evidence that the petitioner sexually assaulted the victim, his daughter, when she was between six and nine years of age. On November 26, 2012, the court, *Boland*, *J.*, imposed a total effective sentence of twenty-five years, followed by fifteen years of special parole. At the petitioner's criminal trial, he was represented by Attorney Mark Hauslaib.

Following his conviction, the petitioner brought a direct appeal to this court. Our Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. Thereafter, our Supreme Court affirmed the judgment of conviction. See *State* v. *Daniel W. E.*, 322 Conn. 593, 142 A.3d 265 (2016), overruled by *State* v. *Adam P.*, 351 Conn. 213, 330 A.3d 73 (2025). In that appeal, our Supreme Court rejected the petitioner's claim that the trial court had improperly instructed the jury on the use of constancy of accusation testimony.[1] Id., 616. In connection with his direct appeal, the petitioner was represented by Attorney Glen W. Falk.

While the petitioner's direct appeal was pending, he brought a habeas action challenging his conviction (prior habeas action). The amended petition filed in the prior habeas action set forth a single claim of ineffective assistance of trial counsel, which was based on various alleged deficiencies. On April 26, 2018, following a trial, the court, *Kwak*, *J.*, denied the petition. In connection with the prior habeas action, the petitioner was represented by Attorney James E. Mortimer. Thereafter, this

[1] We note that in *Daniel W. E.* our Supreme Court modified the constancy of accusation doctrine by requiring trial courts to instruct juries in sexual offense cases in which defendants had not challenged the complainants' credibility based on delayed reporting, that they could not consider a complainant's delay in reporting a sexual offense in evaluating a victim's credibility. *State* v. *Daniel W. E.*, supra, 322 Conn. 629–30. The court subsequently overruled *Daniel W. E.* and abandoned the modified approach to constancy evidence. See *State* v. *Adam P.*, 351 Conn. 213, 330 A.3d 73 (2025).

court affirmed the judgment of the habeas court. *Daniel W. E.* v. *Commissioner of Correction*, 193 Conn. App. 905, 217 A.3d 59 (2019), cert. denied, 334 Conn. 926, 224 A.3d 904 (2020).

Subsequently, the petitioner brought the present habeas action. In count one of his August 17, 2020 amended petition, the petitioner alleged that he was denied his right to the effective assistance of appellate counsel, Attorney Falk. The petitioner alleged that Attorney Falk's representation fell below the standard of care for appellate counsel and that, but for Attorney Falk's ineffective and deficient performance, there is a reasonable probability that his conviction, in whole or in part, would have been reversed on appeal.

In count two of his amended petition, the petitioner alleged that he was denied his right to the effective assistance of prior habeas counsel, Attorney Mortimer. The petitioner alleged that, in his prior habeas action, Attorney Mortimer failed "to investigate and locate a trial witness who allegedly recanted her statements made to law enforcement officials" concerning his criminal conduct, failed "to consult and retain a medical expert to independently assess the victim's injuries," and failed "to question Dr. David Mantell about whether the quality of [State] Trooper Eric Trotter's interview of the victim fell below the standard of care under recently promulgated guidelines for obtaining statements from children."[2] The petitioner alleged that Attorney Mortimer's representation fell below the standard

[2] The record reflects that, at the prior habeas trial, the petitioner presented testimony from Mantell. Mantell is a clinical psychologist who specializes in forensic psychology and "particularly in child abuse and neglect issues." In preparation for his testimony, Mantell reviewed a variety of documents related to the victim, including records from the Department of Children and Families, records of police interviews, investigation records, handwritten witness statements and court records of testimony. At the prior habeas trial, Mantell rendered an expert opinion about the merits of an interview of the victim that was conducted by Trotter when the victim and her mother arrived at the police station to file a complaint concerning the petitioner. At the

of care for habeas counsel and that, but for his ineffective assistance, there is a reasonable probability that the court would have granted his petition for a writ of habeas corpus in the prior habeas action.

In the present habeas action, the petitioner requested that the habeas court vacate the judgment of conviction; return the matter to the trial court docket; direct the respondent, the Commissioner of Correction, to release him from confinement; and order whatever other relief that law and justice required. With respect to the substantive allegations of deficient performance and prejudice, the respondent left the petitioner to his proof.

On February 27 and March 13, 2023, the habeas court, *Newson*, *J.*, held a trial on the petition. On April 12, 2023, the court issued a memorandum of decision in which it rendered judgment denying the petition. With respect to the allegations in count one concerning appellate counsel, the court concluded that the petitioner failed to satisfy his burden of proving ineffective assistance of appellate counsel.[3]

The habeas court then addressed the allegations in count two that the petitioner was deprived of the effective assistance of habeas counsel in the prior habeas action. After setting forth the applicable principles of law, the court stated: "As to the claims that Attorney Mortimer failed [to] investigate and call a witness who allegedly recanted their statement and that he failed to question Dr. Mantell about the quality of the trooper's interview of the victim, they . . . fail as a matter of law. . . . Neither the unnamed witness [nor] Dr. Mantell

petitioner's criminal trial, the state introduced evidence that Trotter had interviewed the victim and that the statements that she made during this interview led to the petitioner's arrest.

[3] Because the court's resolution of count one is not a subject of this appeal, it is unnecessary for us to discuss the analysis of count one in any greater detail.

was called as a witness at the habeas trial, which prevents the court from assessing the information either of them allegedly had to offer or the potential impact of that information on the outcome of the trial. . . . As such, there is no need for further analysis of those claims. . . .

"Additionally, although Attorney Mortimer was asked 'glancing' questions about his memory or the testimony the trooper provided at the prior habeas trial about his interview of the victim, there was no substantive attempt to address why Attorney Mortimer handled the trooper's testimony the way he did or to substantively address what, if any, other ways the petitioner alleges he should have attacked that testimony. In other words, the petitioner offered no affirmative evidence that made Attorney Mortimer's decisions in addressing the testimony of Dr. Mantell and the trooper, under the circumstances presented to him at that time and based on the information he possessed, objectively unreasonable. . . . Attorney Mortimer was not questioned at all about the unnamed recantation witness. Therefore, even if those claims did not fail as a matter of law for failure to call the witnesses in question to the stand, they would fail because the petitioner did not offer any substantive evidence addressing Attorney Mortimer's performance with regard to these claims. . . .

"Another reason all of the claims above would fail as a matter of law is because there was no evidence presented directly regarding the performance of Attorney Hauslaib, criminal trial counsel, regarding these matters. Attorney Hauslaib also did not testify at the habeas trial. As stated [previously], to be successful in a claim of ineffective assistance against first habeas counsel would require the petitioner to prove deficient performance *and* prejudice against first habeas counsel *and* criminal trial counsel. . . . Without directly questioning Attorney Hauslaib about what he knew, when

he knew those things, and why he made particular decisions during the course of his representation, the petitioner cannot meet his burden of overcoming the presumption that all of Attorney Hauslaib's decisions fell within the wide range of professionally reasonable decisions under the circumstances. . . .

"The petitioner's final claim is that Attorney Mortimer failed to consult with and obtain his own expert to independently assess the victim's injuries. By way of additional information, Dr. Erica Kesselman testified at the petitioner's criminal trial as an expert in sexual assault examinations and was also part of the Windham County child sexual assault multidisciplinary team. She was asked to perform a sexual assault examination on the victim by the Department of Children and Families during the course of the investigation. . . . In the end, based on all of the information available, Dr. Kesselman reached a conclusion that her findings . . . were 'indeterminate' on the issue of whether the victim had suffered sexual trauma. She also testified that she did not, and would not expect to, find any physical evidence of injury with regard to the reports of anal penetration. It was the petitioner's contention that Attorney Mortimer should have offered his own expert to testify as to these critical issues.

"The petitioner did present the testimony of Dr. Stephen Guertin, an expert in pediatric care and child sexual assault investigations. The testimony Dr. Guertin presented, however, was not overly compelling nor did it actually contradict Dr. Kesselman's ultimate opinion that the physical findings were 'indeterminate.' Also, Dr. Guertin's testimony, despite the fact that he is an expert witness, must be viewed through the lens that he has never actually spoken to the victim, never examined, and never even saw photographs or other medical imaging of the structures Dr. Kesselman physically examined. In other words, Dr. Guertin's entire opinion

was based on his review of Dr. Kesselman's written report and the transcripts of her testimony. Notwithstanding, his only real dispute was he claimed there are studies that indicate that the type of injuries seen on the victim's hymen *could be* associated with her current sexual activity . . . [and] that such information should have [been] provided within Dr. Kesselman's testimony. Other than that, he agreed that Dr. Kesselman's examination of the victim appeared to have followed proper protocols and that her ultimate conclusion that the findings were 'indeterminate' was the proper conclusion called for based on all of the information.

"Given [that] Dr. Guertin's expert opinion ultimately agrees with the opinion provided by Dr. Kesselman, there is no reasonable likelihood that presenting his testimony at the prior habeas, or the criminal trial would have resulted in a more favorable outcome for the petitioner. Therefore, the petitioner has failed to meet his burden of showing that he was prejudiced . . . and it is not necessary for the court to analyze habeas or trial counsel's performance." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.)

Following the habeas court's denial of the amended petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal. In the petition, he set forth the following ground: "The habeas . . . court erred in denying the petitioner's ineffective assistance of counsel claim because trial counsel did not call a medical expert at trial." The court denied the petition. This appeal followed.[4] Additional facts will be set forth as necessary.

[4] As stated previously in this opinion, the petitioner's claims in this appeal do not concern the habeas court's resolution of count one of his amended petition for a writ of habeas corpus. In challenging the court's resolution of count two of the amended petition, however, the petitioner relies on the alleged constitutional violation that we discuss in greater detail in part II

I

We first address the petitioner's claim that the court abused its discretion in denying his petition for certification to appeal. We are not persuaded.

At the outset, we observe that the ground set forth by the petitioner in his petition for certification to appeal is different than the claim that he advances in this appeal. As set forth previously in this opinion, in the petition for certification to appeal, the petitioner set forth as the ground for the appeal that "[t]he habeas . . . court erred in denying [his] ineffective assistance of counsel claim because trial counsel did not call a medical expert at trial." In this appeal, however, the petitioner challenges the denial of his petition for a writ of habeas corpus on the ground that the habeas court improperly construed count two of his amended petition. More specifically, in his appellate brief, the petitioner argues as follows: "The habeas court incorrectly read beyond the four corners of the petitioner's amended petition and inferred claims that were not included in the petition. More particularly, the habeas court read the petition to specify that it contained claims that prior habeas counsel, [Attorney] Mortimer, failed to plead and prove that trial counsel, [Attorney] Hauslaib, was ineffective for the various reasons as alleged in the complaint.

"This reading of the complaint by the habeas court was erroneous, and prejudiced the petitioner, because by adding claims to the complaint that were not actually pled, and that did not have any basis in the evidence presented at trial, the habeas court preempted the ability of the petitioner to file any type of future ineffective

of this opinion. Beyond arguing in connection with that claim that the court misinterpreted count two of his amended petition, the petitioner does not challenge the reasons on which the court relied in denying him relief in connection with count two. Accordingly, we do not review the court's substantive analysis of that claim.

claim against current habeas counsel for her failure to properly plead the underlying complaint, thus violating the petitioner's due process right to bring a claim alleging [in]effective assistance of current habeas counsel."

The petitioner does not dispute that he failed to include this claim, which he couches in constitutional terms, in his petition for certification to appeal. Instead, the petitioner argues before this court that the habeas court abused its discretion in denying certification because the unpreserved claim is not frivolous. The petitioner argues that the judgment of the habeas court dismissing his petition for a writ of habeas corpus must be reversed on its merits in light of the habeas court's flawed interpretation of count two. The respondent correctly observes that the habeas court was not asked to consider this issue when it considered the petition for certification to appeal. The respondent urges us to conclude that, even if the unpreserved claim had been included in the petition for certification to appeal, the habeas court would have properly exercised its discretion to deny the petition because the claim "is wholly frivolous and underserving of encouragement to proceed further." Setting aside the fact that the petitioner did not include the claim raised in this appeal in the petition for certification to appeal, he argues that he preserved the claim for appellate review "through the testimony and arguments that were presented during the habeas trial." Alternatively, the petitioner seeks review of this claim pursuant to the bypass doctrine articulated 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). In *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 359–60, 297 A.3d 541 (2023), our Supreme Court concluded "that unpreserved claims challenging the habeas court's handling of the habeas proceeding are reviewable under

the plain error doctrine and *Golding*, despite the petitioner's failure to include such claims in the petition for certification to appeal denied by the habeas court, if the petitioner can demonstrate, consistent with [the criteria set forth in *Simms* v. *Warden*, 230 Conn. 608, 618, 646 A.2d 126 (1994) (*Simms II*)], that the unpreserved claims involve issues that are debatable among jurists of reason, could be resolved in a different manner, or deserve encouragement to proceed further." In *Banks*, the court specified that a petitioner may fulfill this burden in one of two ways: "First, the petitioner may strictly comply with the two part showing required by *Simms II* and expressly argue specific reasons why the habeas court abused its discretion in denying certification. Second, the petitioner may expressly allege that his [or her] argument on the merits demonstrates an abuse of discretion. . . . Although the burden is not onerous, requiring compliance with the *Simms II* criteria provides petitioners with the requisite incentive to include their unpreserved claims in the petition for certification to appeal whenever possible." (Citation omitted; internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 359.

For the reasons set forth in part II of this opinion, we conclude, on the basis of our review of the record and applicable legal principles, that the petitioner has failed to demonstrate that his underlying claim of error is debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the question is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the petitioner has failed to invoke this court's jurisdiction, and the appeal must be dismissed.

II

We next address the petitioner's claim that the habeas court improperly construed the allegations in his

amended petition for a writ of habeas corpus, resulting in a deprivation of his right to due process. We are not persuaded.

According to the petitioner, in his amended petition, he "failed to plead any counts alleging ineffective assistance of trial counsel or a claim of ineffective assistance of prior habeas counsel for failure to plead a claim against trial counsel due to deficient performance." The petitioner correctly states that, with respect to the claim concerning prior habeas counsel, Attorney Mortimer, he alleged in his amended petition that Attorney Mortimer's representation was deficient in that he failed "to investigate and locate a trial witness who allegedly recanted her statements made to law enforcement about the petitioner's criminal conduct," failed "to consult and retain a medical expert to independently assess the victim's injuries," and failed "to question Dr. [Mantell] about whether the quality of Trooper [Trotter's] interview of the victim fell below the standard of care under recently promulgated guidelines for obtaining statements from children." When the habeas court addressed these counts, however, it noted: "Although the allegations [in count two] failed to specify the further necessary allegation that [prior] habeas counsel 'failed to plead and prove *that trial counsel*' was ineffective for the various reasons alleged, the court reads them in that fashion. It was also clear from the proceedings and closing arguments that the respondent also read the allegations in the same fashion, so [the petitioner] was not prejudiced in any way." (Emphasis in original.)

For the first time in this appeal, the petitioner claims that the habeas court's decision to interpret the allegations in count two in the manner previously noted was improper and deprived him of his right to due process. The petitioner argues that "[t]he four corners of the amended petition did not contain any allegations against criminal trial counsel, nor did it contain any allegations

that prior habeas counsel failed to plead and prove that criminal trial counsel was deficient in any manner, nor did current habeas counsel present any witnesses or evidence at petitioner's habeas trial in support of any alleged ineffectiveness by criminal trial counsel." According to the petitioner, "any testimony as to any presumed deficiencies by criminal trial counsel . . . was for background information only, relative to the claims that prior habeas counsel put forth." The petitioner urges us to conclude that the alleged error amounted to a due process deprivation in that the court "preemptively denied the petitioner his right to bring a habeas petition against current habeas counsel, since the court read beyond the four corners of the amended petition and sua sponte and arbitrarily decided claims not raised in that amended petition."

The petitioner asserts that the present claim was adequately preserved for appellate review "through the testimony and arguments that were presented during the habeas trial." The petitioner does not provide us with citations to the record that support this assertion. Our review of the record does not reflect that the present claim of constitutional error was distinctly raised before the habeas court and considered by that court. The claim, however, is reviewable under *Golding* because the record is adequate for review and the claim is of constitutional magnitude.[5] For the reasons that

[5] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [party

follow, we conclude that the alleged constitutional violation does not exist and, thus, the petitioner has failed to demonstrate that he was deprived of a fair trial.

Because the petitioner's due process claim is based on a claim that the habeas court improperly interpreted count two of his amended petition for a writ of habeas corpus, we first set forth the following relevant principles concerning the interpretation of pleadings. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . [A] habeas petitioner is limited to the allegations in his petition, which are intended to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Citation omitted; internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 382–83, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore [also] is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . .

claiming error] may prevail." (Internal quotation marks omitted.) *In re Skye B.*, 230 Conn. App. 725, 737, 331 A.3d 769, cert. denied, 351 Conn. 922, 333 A.3d 105 (2025).

[T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient to allow recovery." (Emphasis omitted; internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021). "[T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d 1095 (2016).

Our analysis of whether the court improperly interpreted the allegations in count two is also guided by the principles governing claims of ineffective representation. It is well settled that "[t]o succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . In *Strickland* . . . the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

. . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 437–38, 119 A.3d 607 (2015).

"In *Lozada* [v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992)], our Supreme Court established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* . . . both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 50, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695

(2021); see also *Santaniello* v. *Commissioner of Correction*, 230 Conn. App. 741, 749, 331 A.3d 739, cert. denied, 351 Conn. 926, 333 A.3d 1109 (2025).

As stated previously in this opinion, in count two of his amended petition, the petitioner alleged that he was denied his right to the effective assistance of prior habeas counsel in three distinct ways. Specifically, the petitioner alleged that, in his prior habeas action, Attorney Mortimer failed "to investigate and locate a trial witness who allegedly recanted her statements made to law enforcement officials" concerning his criminal conduct, failed "to consult and retain a medical expert to independently assess the victim's injuries," and failed "to question Dr. [Mantell] about whether the quality of Trooper [Trotter's] interview of the victim fell below the standard of care under recently promulgated guidelines for obtaining statements from children. In count two, the petitioner alleged that, but for Attorney Mortimer's ineffective representation in the prior habeas action, there was a reasonable probability that the petition for a writ of habeas corpus in the prior habeas action would have been granted. In his prayer for relief in the present habeas action, the petitioner sought an order directing "the sentencing court to vacate the judgment" of conviction and "return the matter to the trial court docket."

The petitioner argues that it was improper for the court to have interpreted count two of his "ill pled petition . . . to include an additional count containing claims that alleged ineffective assistance of prior habeas counsel for failing to bring claims of ineffective assistance of counsel against criminal trial counsel, when no such claims were pled." This argument lacks merit. In light of the authority previously cited, the petitioner's claim of ineffective assistance of prior habeas counsel by its nature was factually and legally intertwined with the issue of whether he received effective assistance from his trial counsel. The petitioner

could not prove prejudice in connection with prior habeas counsel's alleged deficient performance in the prior habeas action without proving that, in the absence of such deficient performance, the outcome of the prior habeas action would have been favorable to him. Stated otherwise, the prior habeas action was based on the petitioner's claim that he was deprived of his right to the effective assistance of counsel at his criminal trial. Thus, the *only* way that the petitioner could prove prejudice in connection with any deficient performance on the part of Attorney Mortimer in the prior habeas action was by demonstrating that, but for such deficiencies, he would have prevailed in demonstrating that Attorney Hauslaib failed to provide competent representation at his criminal trial. The court in the present action correctly recognized this when it stated in its memorandum of decision that, in proving his claim of ineffective representation of prior habeas counsel, "the petitioner bears the task of proving the two *Strickland* factors against *both* habeas counsel *and* trial counsel in order to prevail." (Emphasis in original.) By interpreting the allegations in count two such "that [prior] habeas counsel 'failed to plead and prove that trial counsel' was ineffective"; (emphasis omitted); in the various ways alleged, the court did not alter the nature of count two. It correctly recognized that claims of ineffective assistance of prior habeas counsel must ultimately challenge the conviction itself.

Moreover, in connection with the present habeas action, the petitioner sought an order vacating his criminal conviction and a new trial. It belies logic for the petitioner to suggest that he was entitled to such relief in connection with his criminal conviction based solely on proof of Attorney Mortimer's alleged deficiencies. The petitioner bore the burden of proving that Attorney Mortimer's alleged deficiencies, if proven, prejudiced him because Attorney Mortimer failed to demonstrate

that deficient performance *during the criminal trial* undermined the outcome of that proceeding. By interpreting the allegations in count two in the manner that it did, the court did nothing more than construe the allegations of the petition to the petitioner's benefit, in light of the petitioner's legal burden and the specific relief sought by him.[6]

Finally, we observe that, even if the petitioner could demonstrate that the court erred in its interpretation of count two, and that his claim did not implicate Attorney Hauslaib's performance during the criminal trial, the petitioner failed to demonstrate that it resulted in the specific due process violation claimed in this appeal. As stated previously in this opinion, the petitioner claims that his right to due process was violated because the court's alleged misinterpretation of count two preemptively denied him his right to bring a habeas petition against current habeas counsel in the future. The petitioner does not cite to any relevant authority in support of this proposition, and we are unaware of any. Our Supreme Court has stated: "[T]he legislature has created a statutory entitlement to counsel in 'any habeas corpus proceeding arising from a criminal matter . . . .' General Statutes § 51-296 (a). This statutory right includes the right to ' "effective and competent" ' habeas counsel. *Lozada* v. *Warden*, [supra, 223 Conn.

[6] The petitioner argues that the court's interpretation of count two was contrary to the respondent's interpretation of count two at the time of the habeas trial. Specifically, the petitioner draws our attention to statements made by the respondent's counsel at the habeas trial that, in his view, reveal the respondent's belief that the petitioner was not pursuing a claim of ineffective assistance of trial counsel. The respondent argues that the habeas court's interpretation of the pleadings "neither surprised nor prejudiced the respondent in any way because the respondent read the pleadings to incorporate ineffective assistance of trial counsel into the petitioner's claim of ineffective assistance of first habeas counsel and litigated the case as such. . . . Simply put, the petitioner lacks standing to claim that the respondent was prejudiced by the manner in which the habeas court interpreted the pleadings in the petitioner's favor."

838–39]. Connecticut takes that statutory right so seriously that habeas petitioners in this state are afforded the opportunity to challenge their convictions through successive petitions based on inadequate performance by habeas counsel. See, e.g., *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) ('a third habeas petition is available as a matter of fundamental fairness to vindicate the statutory right under § 51-296 (a) to competent counsel in litigating a second habeas petition')." *Cooke* v. *Williams*, 349 Conn. 451, 475–76, 316 A.3d 278 (2024).

For the foregoing reasons, we are not persuaded that the petitioner has proven under *Golding* that the alleged constitutional violation exists and that it deprived him of his right to a fair trial.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RANDY A. WRIGHT (AC 47370)

Elgo, Moll and Clark, Js.

Syllabus

Convicted, following a jury trial, of sexual assault in the first degree, sexual assault in the second degree, and risk of injury to a child, the defendant appealed. Following the second day of trial, the defendant did not appear in court, and the court completed the trial and sentenced the defendant in absentia. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support certain of his convictions. *Held*:

The jury reasonably could have concluded that the cumulative force of the evidence established the defendant's guilt beyond a reasonable doubt, as there was sufficient evidence that the defendant's abuse of the victim occurred after the victim turned thirteen years old, as required to sustain his convictions of sexual assault in the second degree and risk of injury to a child.

The defendant's unpreserved claim that the trial court violated his constitutional rights to due process and to counsel by denying his midtrial requests

for a continuance failed under the third prong of *State* v. *Golding* (213 Conn. 233), as the defendant failed to show that the alleged constitutional violations existed.

The trial court did not abuse its discretion in denying the defendant's requests for a midtrial continuance, as the court considered the status of the case, made reasonable efforts to accommodate the defendant, and marked off two days of trial testimony to allow the defendant to prepare.

The trial court did not commit plain error in failing to advise the defendant of the consequences of failing to appear and in trying and sentencing him in absentia, as the defendant's conduct constituted a waiver of his right to be present at both his trial and sentencing, and the defendant failed to make a showing that this case presented circumstances extraordinary enough to merit this court's exercise of its supervisory authority.

The trial court did not abuse its discretion in denying defense counsel's motion for a mistrial when the defendant failed to appear for the third day of trial, as the court properly concluded that the defendant had waived his right to be present when he failed to appear through no fault of the state, and the court provided a curative instruction to the jury, directing it not to draw any inferences adverse to the defendant as a result of his absence.

This court declined to review the defendant's unpreserved constitutional claim that the trial court's denial of defense counsel's motion for a mistrial deprived the defendant of his due process rights under the federal constitution, as, pursuant to the first prong of *Golding*, the record was inadequate for review.

This court declined to review the defendant's unpreserved claim that the trial court committed plain error by not sua sponte discharging defense counsel and declaring a mistrial as the record was inadequate for review of that claim.

This court dismissed as moot the defendant's claim that the trial court improperly relied on the rape shield statute to prevent him from cross-examining the victim about a false allegation of sexual misconduct she allegedly had made, as the defendant failed to challenge all independent bases for the trial court's ruling.

Argued June 4—officially released September 16, 2025

Procedural History

Information charging the defendant with two counts of the crime of risk of injury to a child and with one count each of the crimes of sexual assault in the first degree and sexual assault in the second degree, brought to the Superior Court in the judicial district of Windham,

geographical area number eleven, and tried to the jury before *Swords*, *J.*; thereafter, the court denied the defendant's motions for a continuance; subsequently, the court denied the defendant's motion to dismiss his counsel; thereafter, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty, from which the defendant appealed to this court. *Appeal dismissed in part*; *affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Danielle Koch, assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Angela Macchiarulo*, for the appellee (state).

Opinion

CLARK, J. The defendant, Randy A. Wright, appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[1] one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1),[2] and two counts of

[1] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . .

"(b) . . . (2) Sexual assault in the first degree is a class A felony if . . . the offense is a violation of subdivision (2) of subsection (a) of this section. Any person found guilty under said subdivision . . . (2) shall be sentenced to a term of imprisonment . . . of which five years of the sentence imposed may not be suspended or reduced by the court if the victim is under sixteen years of age."

We note that § 53a-70 has been amended by the legislature since the events underlying the present case. See Public Acts 2015, No. 15-211, § 16. This amendment, however, has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] General Statutes § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . .

risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[3] On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction of sexual assault in the second degree and one of his convictions of risk of injury to a child, (2) the trial court improperly denied his midtrial request for a lengthy continuance in order to seek new counsel or prepare to represent himself, (3) the trial court erred in failing to advise him of the consequences of failing to appear and in trying and sentencing him in absentia after he absconded during his trial, (4) the trial court improperly denied the request by the defendant's counsel, Vincent Fazzone, for a mistrial when the defendant failed to appear on the second day of evidence, (5) the trial court improperly failed to sua sponte declare a mistrial and remove Fazzone as defense counsel, and (6) the trial court improperly prevented Fazzone from cross-examining the victim about a prior accusation of sexual misconduct that she allegedly had made. We dismiss the appeal as to the defendant's sixth claim and otherwise affirm the judgment of the court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. The victim[4] was born on September 14, 1998,

"(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

[3] General Statutes § 53-21 provides in relevant part: "(a) Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

[4] In accordance with our policy of protecting the privacy interests of victims of sexual assault and the crime of risk of injury to a child, we decline

and the defendant was born on September 24, 1973. The defendant was a friend of the victim's father, T, and the victim had known the defendant for her entire life. T and the victim's mother, G, are divorced. Following the divorce, T moved out of the family home, and the victim and her sister continued to reside with G. The defendant began a romantic relationship with G and moved into the home, at which point in time the victim was approximately nine years old. Beginning when the victim was nine years old, and at least once per week for several years after that, the defendant touched the victim inappropriately when the two of them were in her bedroom. The touching began as a back massage during which the defendant removed the victim's bra, but eventually progressed to touching the victim's breasts and clitoris.

Although the victim and the defendant were largely alone when this touching occurred, on one occasion a family friend, A, who was residing in the home, walked in on the two of them and observed the defendant without a shirt on, laying on the victim's bed with the victim in a "cuddling position." A ran out of the room and downstairs to tell G what she had seen, but the defendant ran out after her and denied wrongdoing; an argument ensued. G did not believe A and did not call the police. On another occasion, the victim told her former boyfriend, C,[5] that the defendant had touched

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.

[5] Although we refer to C as the victim's former boyfriend, there was conflicting evidence on whether C and the victim were still in a romantic relationship at the time that she told him about the defendant's abuse. C testified that the victim told him that the defendant had touched her about four or five months after C and the victim had broken up. The victim,

her breasts and "fingered" her but made C promise not to tell anyone. The defendant's touching of the victim continued until approximately September, 2012, at which point the victim moved out of the home and went to live with T. The following month, the victim told T that the defendant had touched her inappropriately, and T subsequently took the victim to the police station so that she could make a statement. In her statement, the victim described an occasion on which the defendant had given her a back massage, undone her bra, and touched her vagina. She also stated that the defendant had removed her bra on several occasions in the past.

The defendant was subsequently arrested and tried before a jury of six on November 5, 6 and 10, 2014. Fazzone represented the defendant throughout the trial. On the morning of November 6, 2014, following the first day of evidence, the defendant filed a handwritten "motion for dismissal/removal of counsel," in which he asked the court to discharge Fazzone for "misrepresentation and gross negligence of my case." Shortly thereafter on that same day, the parties appeared before the court, *Swords*, *J.*, to address the defendant's motion. During the hearing,[6] the defendant expressed his view that Fazzone was not providing him with adequate representation and requested that the court grant him a thirty day or, in the alternative, fifteen day continuance so that he could find new counsel or prepare to represent himself. The court denied these requests but—after the defendant requested that the court give him at least "a couple days to . . . pull it together"—granted the defendant a continuance until the following Monday, November 10, at which time the court stated that it intended to canvass him regarding his ability to represent himself.

however, testified that C was "my boyfriend at the time" that she told him of the abuse.

[6] We discuss this hearing in greater detail in part II of this opinion.

The defendant did not appear in court on November 10. Fazzone represented to the court that he had attempted to call the defendant over the weekend but had not been able to reach him. The court adjourned for approximately twenty minutes to allow the defendant additional time to appear and to permit Fazzone to attempt to contact him. When court reconvened, Fazzone stated that he had called the defendant again and had been unable to reach him but that he had left a voicemail telling the defendant that he needed to come to court immediately. Fazzone then orally moved for a mistrial "in light of my client's . . . absence," stating that he "would not want the jury to see [the defendant's] absence as any indication of guilt in any way." The court denied the motion, stating that, "[i]f there is any necessity for a mistrial, it's been created by the defendant himself, and the court certainly finds it's not—does not reach the threshold of manifest necessity . . . ." The court then adjourned for another twenty minutes to afford the defendant a final opportunity to appear, which he did not. Fazzone stated that he had again attempted, without success, to get in touch with the defendant via phone. The court accordingly found that the defendant had "intentionally absented himself in an effort to thwart the proceedings in this matter" and had thus waived his right to be present.

The trial thereafter resumed and proceeded in the defendant's absence. Before the resumption of evidence, the court instructed the jury that it was not to speculate as to why the defendant was not present or to draw any inferences adverse to the defendant as a result of his absence. The state rested after calling one additional witness and the defense rested without calling any witnesses. The jury returned a verdict of guilty on all charges on that same day, November 10, after deliberating for approximately thirty-five minutes.

On January 6, 2015, the defendant was sentenced to a total effective sentence of twenty years of incarceration, five years and nine months of which were a mandatory minimum, followed by twenty-five years of special parole. He was also ordered to register as a sex offender for life. The defendant did not appear for his sentencing. The court found that, "although there is no evidence . . . that the defendant was aware of the sentencing which is to take place today, there is also no evidence . . . that the defendant had made any inquiry or any attempts to find out the status of the case or the fact that the sentencing would be held today. Significantly, there's also no evidence . . . that the defendant is either unable or incapable of attending today's proceedings." Accordingly, the court concluded that the defendant had again "voluntarily, wilfully, and intentionally absented himself" from the proceeding and accordingly had waived his right to be addressed personally at sentencing and to speak in mitigation of his punishment. The court stayed the execution of the sentence pending the defendant's reapprehension.

Later that month, the defendant was apprehended. On January 20, 2015, the defendant was arraigned before the court, *Riley*, *J.*, on a charge of failure to appear in the first degree in violation of General Statutes § 53a-172.[7] At that time, the court lifted the stay of execution on the sentence that previously had been imposed by Judge Swords, and imposed a standing criminal protective order on the victim's behalf, to remain in effect until 2075. The defendant did not timely appeal from his conviction or seek sentence review.

[7] General Statutes § 53a-172 provides in relevant part: "(a) A person is guilty of failure to appear in the first degree when (1) while charged with the commission of a felony and while out on bail or released under other procedure of law, such person wilfully fails to appear when legally called according to the terms of such person's bail bond or promise to appear . . . ."

On November 4, 2016, the defendant filed a petition for a writ of habeas corpus and, thereafter, filed an amended petition on October 7, 2019. See generally *Wright* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008455-S. In his operative amended petition, the defendant claimed that Fazzone had rendered ineffective assistance of counsel in various ways, including by failing to file a direct appeal of his conviction and by failing to file an application for sentence review. On June 6, 2023, following a trial, the habeas court, *Bhatt, J.*, issued a memorandum of decision in which it granted in part and denied in part the defendant's petition. The habeas court concluded that Fazzone had rendered ineffective assistance by failing to file appeal paperwork on the defendant's behalf and by failing to seek sentence review but otherwise rejected the defendant's claims of ineffective assistance. The habeas court accordingly restored the defendant's right to appeal from his conviction and to seek sentence review. On August 3, 2023, the defendant filed a direct appeal from his conviction with our Supreme Court, which transferred the appeal to this court pursuant to Practice Book § 65-1.[8] Additional facts and procedural history will be set forth as necessary.

I

We begin with the defendant's claim that there was insufficient evidence to support his conviction of sexual assault in the second degree and one of his convictions

[8] The defendant has also filed with this court an appeal from the judgment of the habeas court denying in part his amended petition for a writ of habeas corpus. See *Wright* v. *Commissioner of Correction*, Connecticut Appellate Court, Docket No. AC 46768 (August 7, 2023). That appeal was argued before this court on November 21, 2024. On January 14, 2025, this court sua sponte stayed resolution of the defendant's habeas appeal pending final resolution of the present appeal.

of risk of injury to a child.[9] In support of this claim, the defendant argues that it is "undisputed" that his assaults of the victim stopped when the victim was twelve years old. As such, he argues, there was insufficient evidence to sustain his convictions under § 53a-71 (a) (1), which requires that the victim be between thirteen and sixteen years old,[10] and under count four of the information, which charged him with a violation of § 53-21 (a) (2) on the basis of conduct that was alleged to have occurred on and after the victim's thirteenth birthday. We disagree.

The following legal principles govern our review of this claim. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Ziolkowski*, 351 Conn. 143, 160, 329 A.3d 939 (2025). "We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with

[9] Although this is the final claim that the defendant raises in his principal appellate brief, "[w]e begin with this issue because if the defendant prevails on the sufficiency claim, [he] is entitled to a directed judgment of acquittal rather than to a new trial" on the counts for which he claims there was insufficient evidence. *State* v. *Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007).

[10] See footnote 2 of this opinion.

other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"When there is conflicting evidence . . . it is the exclusive province of the . . . trier of fact, to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude . . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 447–48, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020).

The victim, as we have explained, was born on September 14, 1998. Count two of the information charged the defendant with a violation of § 53a-71 (a) (1), and count four charged him with a violation of § 53-21 (a) (2), on the basis of his having had sexual intercourse with, and contact with the intimate parts of, the victim "on unspecified dates from about September 14, 2011 [the victim's thirteenth birthday] to about November 6, 2012[11] . . . ." (Footnote added.) The victim testified that the defendant's touching of her continued until just before she moved out of the family home and went to live with T. She further testified that at the time she

[11] November 6, 2012, is the date of the victim's statement to the police.

moved out, she was twelve years old. T, however, testified that the victim came to live with him in September, 2012, at which time the victim would have been at least thirteen, if not fourteen, years old. Moreover, on cross-examination, the victim testified that she had moved in with T in 2012, to which Fazzone replied: "Well, it just seems after doing the math that you would actually—when you moved in with your father, you weren't twelve, you were fourteen. Are we correct by saying that? I'm not putting pressure on you." The victim replied: "I'm not sure."

The defendant is correct that the victim initially testified that she was twelve when she moved out and the defendant's abuse ended, but he is not correct that this testimony was "undisputed." To the contrary, there was ample other evidence—including the victim's own testimony on cross-examination—that she did not move out until approximately one year after she turned thirteen. Although the evidence was somewhat equivocal on the victim's precise age at the time the defendant ceased touching her, "[i]t is well settled . . . that [e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . Rather, the [finder of fact] [weighs] the conflicting evidence and . . . can decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Montana*, 179 Conn. App. 261, 266, 178 A.3d 1119, cert. denied, 328 Conn. 911, 178 A.3d 1042 (2018). Construing the evidence in the light most favorable to sustaining the verdict, the jury reasonably could have concluded that the defendant continued to touch the victim inappropriately until roughly one year after her thirteenth birthday. Accordingly, there was sufficient evidence both that the defendant's abuse continued until after the victim turned thirteen years old, as required to sustain the defendant's conviction for sexual assault in the second degree, and that the defendant had contact with

the victim's intimate parts between her thirteenth birthday and November 6, 2012, as alleged in count four of the information. The defendant's claim therefore fails.

II

Next, the defendant claims that the trial court violated his constitutional rights to due process and to counsel, and, in the alternative, that the court abused its discretion, when it denied his midtrial requests for either a thirty day or a fifteen day continuance. Because the defendant did not preserve the constitutional portion of this claim before the trial court, he seeks review pursuant to *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). We are not persuaded by the defendant's claim.

The following additional procedural history is relevant. The defendant's first appearance in this case occurred in January, 2013, and the defendant was tried in November, 2014. At the time that the defendant made his request for a continuance, on November 6, 2014, the jury had been empaneled and sworn, and the state had presented testimony from: the victim; T; Erica Kesselman, a physician and expert in the field of pediatric female genitalia]; A; George Grauer, a police officer; and C. At the close of the first day of evidence on November 5, the state had informed the court that it "ha[d] one final witness for tomorrow who will be ready at 10 a.m."

During his cross-examination of the victim on November 5, Fazzone asked the victim whether she had "accused other people of doing this to you as well." The state objected on relevance grounds, and the court excused the jury for the morning recess while it heard argument on the objection. When asked by the court to justify his line of questioning, Fazzone appeared to assert that, on a previous occasion, T had reprimanded

the victim for dressing inappropriately, and the victim had then retaliated by falsely reporting to officials at her school that T had committed unspecified sexual misconduct against her.[12] The court pressed Fazzone as to whether he had a good faith basis for believing that the victim had in fact made such an accusation; Fazzone conferred briefly with the defendant and then asserted that the defendant had heard it from G, who had in turn heard it from T. The court, after confirming that Fazzone had not himself spoken to G, observed that "everything that you reported to the court is at a minimum triple hearsay. In other words, you got it from your client, who allegedly got it from some other party, who allegedly got it from some other party." Fazzone then attempted further to justify the relevance of his

[12] Specifically, the following colloquy occurred:

"The Court: All right. Mr. Fazzone, what was your claim with respect to that line of questioning?

"[Defense Counsel]: Yes, Your Honor. That there was on one occasion where [the victim's] father—she had reported to the school that—it's my understanding anyway, that she had reported to the school that her father had reprimanded her when she was not dressed or appropriately dressed. And she took it to the attention of the school board and, apparently, her father—it was found that he—he actually—that this didn't—did not occur, or that he did nothing wrong. That's my understanding.

"The Court: That who did nothing wrong?

"[Defense Counsel]: The father. I apologize. The father—the father—I don't know. These are just—I just—this is something I wanted to explore on—

"The Court: All right. What's your claim? The father did what?

"[Defense Counsel]: That the father—at one point when they were together in the home, the father, while trying to reprimand—reprimand [the victim], had done so—[the victim] had said that the father had reprimanded her when she was not dressed. And that she then went and said to the school officials that she felt that she had been violated, that her father had done something wrong, and that type of thing. So, I wanted to see if that—I think it's relevant, Your Honor. I'm not trying to be difficult, but I think it's relevant to the case.

"The Court: How—how—

"[Defense Counsel]: It shows a pattern. It shows a pattern of possible—you know, she's not being truthful as far as these allegations and it's a pattern of not being truthful of these types of situations."

inquiry by stating that, "if this is true and [T] was found guilty of this, that would be one thing. But if he was not found guilty, I think it's relevant to the case at hand." The court responded: "Well, you're assuming a lot of things. You're assuming not only that this happened, you're assuming then a complaint was made to a law enforcement authority that then pursued an investigation and then made an arrest and then it was brought to court and then he was somehow acquitted of that charge. So, there's a lot of assumptions in there."

Fazzone then asserted that he had also learned from "a Jennifer DuCharme" that the victim "likes to take things to extreme; she had a friend . . . who had a sixteen year old brother who sexually touched her. . . . And [the victim] did not say anything until six months later. And then the boy moved to Providence, Rhode Island." The court responded that there was nothing in this offer of proof that would indicate that, even if the victim had made such a complaint against her friend's brother, this complaint was false. Fazzone replied: "Fair enough . . . . If she's saying that, I understand. You know, if she's saying that didn't happen, I don't want to rock the boat. . . . I agree, Your Honor. But as far as [T] goes, I stand by my contentions." The court then sustained the state's objection. It ruled that it was not going to permit Fazzone to ask the victim about the alleged false accusation of sexual misconduct that she had made against T, because it determined that Fazzone lacked a good faith basis for asking that question, and "a good faith basis is a minimum for that kind of attack on credibility, notwithstanding the rape shield statute."[13] The court explained that "that inquiry would be

[13] The rape shield statute, General Statutes (Rev. to 2013) § 54-86f, "prohibits the admission of a victim's prior sexual conduct [in a prosecution for sexual assault under §§ 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive] . . . unless such evidence is . . . offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of . . . injury, or . . . offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or

more prejudicial than probative because there is no good faith basis based upon what [Fazzone] indicated."

At the outset of the hearing on the defendant's motion to remove Fazzone as his counsel on November 6, the defendant requested that the court grant him a continuance of "approximately thirty days so I could pull it together and possibly find other counsel or figure out where I need to go from here." The court responded that, in order to grant that request, it would have to grant a mistrial because the jury had been empaneled and "we've heard approximately three-quarters or more of the state's case-in-chief." The court then inquired as to why the defendant wanted to discharge Fazzone. The defendant responded in relevant part: "Your Honor . . . today's supposed to be the beginning of my defense. Mr. Fazzone has no witnesses for me; I have no one speaking on my behalf today. There's nobody here. . . . Through [Fazzone's] performance, [not] being able to . . . introduce evidence properly, formulate questions properly, being prepared to the best of, I believe, his ability, I don't feel that I'm getting represented to—fair. . . . I feel like I was misled that he was actually a trial lawyer, that he had this under control all throughout the eighteen months. . . . And then for today, that there's no witnesses, that's—he's making a mockery of the court in my eyes and I would, I guess, formally request a mistrial so that way we could—I could find someone that's more adept for my situation." The court asked the defendant which specific witnesses he had anticipated would be called in his defense. The defendant identified G, a person named Heather Green, T, and Jennifer DuCharme, giving brief offers of proof for each.

her sexual conduct . . . or . . . otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights." (Internal quotation marks omitted.) *State* v. *Shaw*, 312 Conn. 85, 103–104, 90 A.3d 936 (2014).

The defendant claimed that G's testimony was "a pivotal point in [his] defense" because she did not believe the victim's account, as evidenced by the fact that she had remained in a relationship with the defendant for more than one year after the victim first made her allegations. At the close of the previous day of testimony, the state had represented to the court that it had been unable to locate and subpoena G and thus had no ability to produce her. When the court observed during the November 6 hearing that, "[G], from what I understand, has gone to parts unknown," the defendant replied: "She's in—if you look on her Facebook account, Your Honor, she's in Agawam [Massachusetts]. I'm sure—the daughter, the mother, half of her family was here the other day. I'm sure if they tried, they could . . . find her. I mean, it's not like she fell off the face of the earth, Your Honor." With respect to Green, the defendant claimed, without elaboration, that she would "testify under oath that [the victim] lied . . . about me touching her."

The defendant claimed that DuCharme "could come in here and testify that [the victim] actually accused somebody else. This is firsthand information. . . . It came from—this came directly from her. [The victim] told [DuCharme] that another child had touched her. She made another allegation. . . . So, the allegations of—[the victim] has done this before. This child has called—cried wolf on other people. They didn't believe her then. . . . [The victim] has a habitual lying process. Tried to get an expert witness in here to testify about that; never happened." As for T, the defendant stated: "[T] . . . he reprimanded [the victim] while she was half dressed. [The victim] went to the school to do that. There's documentation at the school through the counselor there. I've asked counsel to get it. Your Honor, there's nothing there."

After the defendant made these offers of proof with respect to DuCharme and T, the court responded that Fazzone had attempted to cross-examine the victim the previous day regarding the allegations of sexual misconduct she allegedly had made to DuCharme, and to her school regarding T, and that the court had already determined that there was no good faith basis to question the victim about the allegation regarding T. The court further observed that, "even if there was a good faith basis, there would need to be a showing that this evidence was admissible, despite the rape shield statute. And that's—that's a fairly hard standard to overcome." With respect to the defendant's offer of proof as to G, the court stated that the testimony the defendant sought to elicit—that G did not believe the victim's story—was already before the jury through the testimony of A.

The court then proceeded to deny the defendant's request for a thirty day continuance and/or mistrial. The court stated that it based its decision on several factors: the fact that the jury had already been selected; that the jury had already heard a full day of evidence and the majority of the state's case-in-chief; and that, on the basis of the offers of proof put forward by Fazzone the previous day, the testimony that the defendant hoped that DuCharme and T would give would likely be inadmissible. The court further reasoned that Fazzone had "impeached the victim's credibility by her inconsistencies—or prior inconsistencies, and he does have a trial strategy directed to putting in front of the jury the victim's motive to lie here."

The defendant then indicated that he was contemplating representing himself and requested a fifteen day continuance "so I could try to pull it together if I'm going to lead this." The court denied this request as well. It stated: "I have observed you throughout this trial, starting with jury selection, consulting with Mr. Fazzone repeatedly, even during the middle of the

examination and cross-examination of witnesses in this case. You've been an active participant, even though Mr. Fazzone's been the one that's been up in front of the jury and asking the questions. So as far as I can tell, you are fully conversant in the case here and the trial strategy." The court further reasoned that a fifteen day continuance was unwarranted because the case had been pending since January, 2013. Finally, the defendant requested "a couple days to please pull it together," which the court granted. Specifically, the court granted the defendant a continuance until 10 a.m. the following Monday, November 10, and indicated that, on that date, it would conduct a canvass to determine if the defendant was able to represent himself. The court further indicated that it would be willing to appoint Fazzone as standby counsel if the defendant elected to represent himself.

A

We begin with the defendant's unpreserved constitutional claim. "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of a constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [T]he inability to meet any one prong requires a determination that the defendant's claim must fail. . . . The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Sweet*, 214 Conn. App. 679, 693, 280 A.3d 1243, cert.

denied, 345 Conn. 920, 284 A.3d 983 (2022). For present purposes, "[w]e assume, without deciding, that the [defendant's] claim is reviewable under the first two prongs of *Golding* . . . and we proceed to determine whether the [defendant] has met the third requirement of *Golding*, i.e., that a constitutional violation exists and deprived [him] of a fair trial." (Citation omitted.) *In re Na-Ki J.*, 222 Conn. App. 1, 7–8, 303 A.3d 1206, cert. denied, 348 Conn. 929, 304 A.3d 860 (2023).

"Although [a] reviewing court ordinarily analyzes a denial of a continuance in terms of whether the court has abused its discretion . . . [t]his is so where the denial is not directly linked to a specific constitutional right. . . . If . . . the denial of a continuance is directly linked to the deprivation of a specific constitutional right, some courts analyze the denial in terms of whether there has been a denial of [such right]. . . . Even if the denial of a motion for a continuance . . . can be directly linked to a claim of a denial of a specific constitutional right [however], if the reasons given for the continuance do not support any interference with the specific constitutional right, the court's analysis will revolve around whether the trial court abused its discretion. . . . In other words, the constitutional right alleged to have been violated must be shown, not merely alleged." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 225 Conn. App. 263, 273–74, 315 A.3d 426, cert. denied, 349 Conn. 917, 316 A.3d 741 (2024).

The defendant argues that Fazzone's performance during the first day of evidence had been so poor[14] that,

[14] To the extent that the defendant asks us to conclude that Fazzone rendered constitutionally deficient performance in the manner in which he conducted the defendant's trial—introducing exhibits, calling and cross-examining witnesses, and choosing which theories to advance—it is not proper for us to review such a claim in the context of this direct appeal. It is well established that, "[a]lmost without exception . . . a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such

by refusing to grant the defendant a thirty or fifteen day continuance in order to seek new counsel or prepare to represent himself, the trial court violated his rights to counsel and to due process under the sixth and fourteenth amendments to the federal constitution. We disagree. The defendant cites no case to support the proposition that a court violates a criminal defendant's constitutional rights to counsel or to due process when it reasonably[15] refuses such a midtrial request. To the contrary, it is well established that "[a] defendant has no unbridled right to discharge counsel on the eve of trial"; (emphasis omitted; internal quotation marks omitted) *State* v. *Drakeford*, 202 Conn. 75, 83, 519 A.2d 1194 (1987); and that, "[a]fter the commencement of trial, neither a right to be represented by counsel of choice nor a right to due process entitle a defendant to a continuance on demand." (Internal quotation marks omitted.) *State* v. *Crawley*, 138 Conn. App. 124, 135, 50 A.3d 349, cert. denied, 307 Conn. 925, 55 A.3d 565 (2012). Moreover—in light of the general rule that ineffective assistance of counsel claims are properly addressed in a habeas corpus proceeding—this court has refused to require that a court overseeing a criminal trial, in considering a defendant's request for a continuance in order to secure new counsel, analyze whether the defendant's current counsel is constitutionally ineffective. See *State* v. *Ross V.*, 110 Conn. App. 1, 9, 953 A.2d

[a] claim. . . . On the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal, we have limited our review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the *trial court*, rather than by those of his counsel." (Emphasis in original; internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 385, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). "[W]e underscore that," in the context of our review of the present claim, "our review is of the actions of the trial court, not of the actions of defense counsel." Id.

[15] The defendant characterizes the trial court's refusal to grant his continuance requests as "arbitrary and capricious," but—for the reasons we set forth in part II B of this opinion—we disagree.

945, cert. denied, 289 Conn. 939, 958 A.2d 1247 (2008); see also, e.g., *State* v. *Gonzalez*, 205 Conn. 673, 683–84, 535 A.2d 345 (1987) ("The defendant argues that his counsel's alleged failure to represent the defendant zealously required the trial court to allow him to discharge his attorney. . . . Since this argument is, in essence, a disguised allegation of ineffective assistance of counsel, it is governed by our decisions requiring such claims to be pursued on a petition for a new trial or on a petition for a writ of habeas corpus . . . ."). Finally, our Supreme Court has also recognized that, "[a]fter trial commences, consistent with the defendant's sharply curtailed freedom to elect self-representation . . . a trial court is not obligated to delay the proceedings in order to enable or facilitate a belated request for self-representation." (Citations omitted; internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 320–21, 157 A.3d 586 (2017).[16] We further note that our review of the record does not indicate that the defendant had made a clear and unequivocal request to represent himself at the time he made his continuance requests, which was the minimum required in order for his constitutional right to self-representation to attach. See, e.g., *Abrams* v. *Commissioner of Correction*, 192 Conn. App. 850, 862, 218 A.3d 729, cert. denied, 333 Conn. 939, 218 A.3d 1046 (2019). As such, the defendant has failed to

[16] Although the defendant does not specifically argue that the trial court's denial of his continuance requests violated his right to self-representation, we nonetheless consider the principles articulated by our Supreme Court in *Bush* to be relevant to our resolution of this claim. The defendant challenges both the denial of his request for a thirty day continuance (which he sought for the purpose of retaining new counsel) and his request for a fifteen day continuance (which he sought for the purpose of preparing to represent himself). Moreover, the sixth amendment right to counsel, which the defendant argues that the trial court violated, affords criminal defendants a correlative right to self-representation. See *State* v. *Bush*, supra, 325 Conn. 317–18. Finally, as we discuss herein, at certain points in his principal appellate brief, the defendant contends that the trial court's denial of his continuance requests deprived him of the opportunity to adequately prepare if he were to proceed in a self-represented capacity.

show that the trial court violated his constitutional rights to due process or to counsel, and his claim accordingly fails under the third prong of *Golding*. See, e.g., *Davis* v. *Commissioner of Correction*, supra, 225 Conn. App. 276–78.

B

In the alternative, the defendant claims that the denial of his continuance requests constituted an abuse of discretion. In general, "[t]he determination of whether to grant a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . . A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary . . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge at the time the request is denied*. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay . . . the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request . . . the timing of the request; the likelihood that the denial would substantially impair the defendant's ability to defend himself; [and] the availability of other, adequately equipped and prepared counsel to try the case . . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for a continuance made on the day of the trial. . . . In order to work a delay

by a last minute [replacement] of counsel there must exist exceptional circumstances." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ross V.*, supra, 110 Conn. App. 7–8. Moreover, "a denial of a continuance to enable a midtrial election of self-representation is not an abuse of discretion if the trial court has thoughtfully considered the status of the case and otherwise made reasonable efforts to accommodate the needs of the defendant, such as the provision of standby counsel or breaks during the scheduled trial itself." *State* v. *Bush*, supra, 325 Conn. 322.

In support of his claim that the court abused its discretion in denying his continuance requests, the defendant argues that Fazzone's performance throughout the trial thus far had been "bumbling and inept," and that, "by the end of the first day of trial, Fazzone had demonstrated to the court, the jury, and the defendant that he had never tried a case before, much less one as serious as a sexual assault claim." He argues that the length of the delay he sought did not present an "insurmountable obstacle" under the circumstances, that a substantial continuance was warranted in light of the complexity and gravity of the charges against him, and that if he had to continue with Fazzone as his counsel he would have been effectively "exposed to a trial without a defense." He further contends that the brief continuance the trial court granted him was insufficient "to line up witnesses and prepare (if need be) to proceed [in a self-represented capacity] . . . under these circumstances." He also argues that he was not at fault for the belated timing of the request because he was only able to "realize the extent of Fazzone's ineffectiveness and lack of preparation" after observing his performance on the first day of evidence and that his request for a continuance was made sincerely and not for the purpose of delay.

We are not persuaded by the defendant's arguments. At the time that the defendant made his continuance requests, his trial was underway, and a duly empaneled jury had heard testimony from the victim and all but one of the state's other witnesses. Under such circumstances, we are "especially hesitant" to conclude that the court's denial of the defendant's requests constituted an abuse of its discretion. (Internal quotation marks omitted.) *State* v. *Ross V.*, supra, 110 Conn. App. 8. Although the defendant attempts to downplay the delay that his requested continuances would have caused as a mere "inconvenience" that would "not [have] present[ed] an insurmountable obstacle" to the court, jury, state and witnesses, the trial court was well within its discretion to consider the likelihood that pausing the proceedings for thirty or even fifteen days could lead to jury loss and a mistrial.[17] See *State* v. *Ross V.*, supra, 8; see also, e.g., *State* v. *Komisarjevsky*, 338 Conn. 526, 613, 258 A.3d 1166 (mistrial is "drastic remedy" that, though "permitted under the rules of practice . . . is not favored" (internal quotation marks omitted)), cert. denied, U.S. , 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021). Moreover, the case was more than one and one-half years old, and this court has upheld denials of continuance requests for younger cases. See, e.g., *Cinotti* v. *Divers*, 151 Conn. App. 297, 306, 94 A.3d 1212 (upholding denial of continuance where, inter alia, case had been pending for approximately one year at time request was made), cert. denied, 314 Conn. 924, 100 A.3d 855 (2014); *State* v. *Youngs*, 97 Conn. App. 348, 368, 904 A.2d 1240 (same), cert. denied, 280 Conn. 930, 909 A.2d 959 (2006). Although we are mindful of the defendant's contention that he was not responsible for the timing of his requests, and the record does not

[17] We note that, on the first day of jury selection, the court, *Seeley, J.*, had informed prospective jurors that they would likely need to be available for trial between approximately November 5 and 14, 2014. The court, *Swords, J.*, reiterated this estimate to the venire on the second day of jury selection.

indicate that he made his requests in bad faith, "these circumstances do not in themselves warrant a finding that the trial court abused its discretion." (Internal quotation marks omitted.) *State* v. *Beckenbach*, 198 Conn. 43, 50, 501 A.2d 752 (1985).

The court was entitled reasonably to conclude that the reasons proffered by the defendant for the lengthy continuances he sought—Fazzone's performance, the defendant's desire to secure new counsel and additional witnesses, and the defendant's need to prepare if he were to represent himself—were not sufficient to overcome these weighty countervailing considerations. As we previously have explained, this court has determined that a court overseeing a criminal trial is not required to assess defense counsel's constitutional effectiveness in ruling on a motion for a continuance to secure new counsel. See *State* v. *Ross V.*, supra, 110 Conn. App. 9. It is also significant that the defendant did not claim actually to have found an attorney, other than Fazzone, who would be willing and able to take his case; rather, he stated that he hoped to "*possibly* find other counsel." (Emphasis added.) See, e.g., *State* v. *Hamilton*, 228 Conn. 234, 247–48, 636 A.2d 760 (1994). Moreover, the witnesses whom the defendant sought to call were witnesses whose testimony the court reasonably could have concluded was of minimal relevance and/or already before the court, for whom the defendant had provided little more than a cursory, undeveloped proffer, or for whom the defense's proposed line of questioning, the court had already concluded, lacked a good faith basis. Finally, the record reflects that the court thoughtfully considered the status of the case (as evidenced by its lengthy colloquy with the defendant and counsel regarding the defendant's concerns, the witnesses the defendant sought to call, and the various interests at stake) and that the court made reasonable efforts to accommodate the defendant, including by

indicating its willingness to appoint Fazzone as standby counsel if the defendant elected to represent himself, and by marking off two days of trial testimony to allow the defendant to prepare. For all the foregoing reasons, we cannot conclude that the court's denial of the defendant's requests for a thirty or fifteen day continuance constituted an abuse of its discretion.[18]

III

The defendant next claims that the court committed plain error when it failed at the November 6, 2014 hearing to advise him of the consequences of failing to appear and thereafter proceeded to try and sentence him in absentia. He further claims that the court's actions deprived him of his constitutional right to be present at trial and seeks review of this unpreserved claim under *Golding*. In the alternative, the defendant asks us to exercise our supervisory authority to require that, in circumstances in which it is reasonably foreseeable that a criminal defendant will flee—such as, he argues, the present case—the trial court must advise him or her of the consequences of a failure to appear. We are not persuaded.

The following additional legal principles are relevant to our review of this claim. "In evaluating plain error claims, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also obvious in the sense of not debatable. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of

[18] "Because we have concluded that the court did not act unreasonably in denying the defendant's [continuance requests], we need not engage in harmless error analysis." *State* v. *Patel*, 186 Conn. App. 814, 825 n.4, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019).

and public confidence in the judicial proceedings. . . . A party cannot prevail under the plain error doctrine unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Tahir L.*, 227 Conn. App. 653, 665, 322 A.3d 455, cert. denied, 350 Conn. 913, 324 A.3d 141 (2024). "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016).

With respect to the defendant's request that we exercise our supervisory authority, we are mindful that "[b]ypass doctrines permitting the review of unpreserved claims such as [*Golding*] and plain error, are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts

in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Leach*, 165 Conn. App. 28, 35–36, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016). "Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, [although] not rising to the level of a constitutional violation, is nonetheless of the utmost seriousness . . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Aisjaha N.*, 343 Conn. 709, 724–25, 275 A.3d 1181 (2022).

"A trial court's finding that a defendant has voluntarily absented himself from the proceedings is reviewed for an abuse of discretion. . . . It has long been settled that an accused enjoys a right both at common law and pursuant to the sixth amendment's confrontation clause to be present at all stages of trial. . . . It is also well settled that under the due process clauses of the fifth and fourteenth amendments a defendant must be allowed to be present at his trial to the extent that a fair and just hearing would be thwarted by his absence. . . . Nevertheless, the defendant's presence is not required when the right is waived. . . . [T]he trial court is authorized to direct the trial or a part thereof to be conducted in the absence of the defendant who is represented by counsel if the court determines that he has waived his right to be present. . . . Waiver is the intentional relinquishment of a known right. Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . Moreover, whether there has been an intelligent and competent waiver of the right to presence must depend,

in each case, upon the particular facts and circumstances surrounding that case. . . . [W]here the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (Citations omitted; internal quotation marks omitted.) *State* v. *Hernandez*, 197 Conn. App. 257, 262–63, 231 A.3d 266, cert. denied, 335 Conn. 960, 239 A.3d 1215 (2020).[19] "[T]here can be no doubt whatever that the governmental prerogative to proceed with

[19] In a footnote of his principal appellate brief, the defendant contends that the record of his habeas trial—which is not part of the record in the present case, but is before this court in a separate appeal; see footnote 8 of this opinion—establishes as a matter of fact that "the defendant *thought* that the trial would be postponed if he fled, and that Fazzone had given him that impression." (Emphasis in original.) The defendant requests that we take this evidence—which he characterizes as "undisputed"—"as proof that [his] failure to appear did not constitute an intentional waiver of his rights." We decline the defendant's request.

"Judicial notice . . . meets the objective of establishing facts to which the offer of evidence would normally be directed. . . . The true concept of what is judicially known [therefore] is that it is something which is already in the court's possession or, at any rate, is so accessible that it is unnecessary and therefore time wasting to require evidence of it. . . . Thus, judicial notice properly may be taken of [a court's findings in another case] only if those findings reasonably can be said to be not in dispute." (Citations omitted; internal quotation marks omitted.) *State* v. *Griffin*, 251 Conn. 671, 702–703, 741 A.2d 913 (1999). A review of Judge Bhatt's June 6, 2023 memorandum of decision in the defendant's habeas case reveals that the defendant testified in the habeas trial that, after the first day of evidence in his criminal trial, he had conversations with Fazzone that left him with the impression that he should flee the jurisdiction, purchase a burner phone, and change his hair and that, if he fled, the trial would stop and he would be able to hire alternative counsel. According to the memorandum of decision, however, Fazzone also testified in the habeas trial that he did not, in any way, advise the defendant to flee, and in fact advised him against it. Therefore, the allegedly "undisputed" fact that Fazzone gave the defendant the impression that his trial would stop if he fled, can, to the contrary, reasonably be said to be in dispute, rendering it an improper subject of judicial notice.

a trial may not be defeated by the conduct of [an] accused that prevents the trial from going forward. . . . Not only may an accused waive his right to presence by his misconduct . . . but he may also do so by simply failing to show up for the trial through no fault of the state. . . . It is reasonable to assume that a defendant who had attended his trial for several days and had knowledge of the date and time of its continuance would know that as a consequence [of his failure to appear] the trial could continue in his absence." (Citations omitted; internal quotation marks omitted.) *State* v. *Simino*, 200 Conn. 113, 128–30, 509 A.2d 1039 (1986).

In support of this claim, the defendant argues that, as of the November 6 hearing, "[t]he court was on notice . . . of the desperate circumstances in which the defendant found himself" due to "the incompetence of [Fazzone] and the breakdown in the attorney/client relationship," and should have inferred on that basis that the defendant posed a flight risk and advised him of what the consequences would be if he failed to appear for the remainder of his trial. The defendant further argues that, in the absence of any such advisement, "it cannot be said that [he] waived his right to be present at his own trial" because he was not "relinquishing a known right." (Internal quotation marks omitted.) He concedes that "Connecticut's court rules do not currently expressly require this advisement" but, nonetheless, argues that this court "should adopt such a rule as an exercise of its supervisory authority," or that, "[a]t the very least, the absence of such an advisement under the circumstances of this case was plain error." He further contends that, by trying and sentencing him in absentia without having delivered such an advisement, the court violated his constitutional right to be present at his trial. In response, the state argues that the defendant's claim is largely foreclosed by this court's decision in *State* v. *Hernandez*, supra, 197 Conn. App. 257, and that he is

not otherwise entitled to relief on this claim. We agree with the state.

In *Hernandez*, the defendant, who had been convicted of assault in the first degree, failed to appear for his sentencing. Id., 259. At the time, the defendant was at liberty on bail, and the court previously had granted the defendant's request to delay sentencing by approximately one month so that he could "get his affairs in order." (Internal quotation marks omitted.) Id., 259–60. When the defendant failed to appear, the court called the bond, ordered the defendant's rearrest, and then proceeded to sentence the defendant in absentia to a term of twenty years of incarceration. Id., 261. On appeal, the defendant claimed that the trial court had violated his constitutional right to be present at all critical stages of the trial when it had sentenced him in absentia, because, inter alia, it had failed to notify him that sentencing would proceed in his absence if he did not appear. Id. Because this constitutional claim was unpreserved, the defendant sought review under *Golding*. Id.

This court rejected the defendant's claim. It concluded that the defendant had waived his constitutional right to be present at sentencing and that his claim thus failed under *Golding*'s third prong. Id., 264–65. It explained that, "[w]hile the defendant's failure to appear for sentencing alone satisfies waiver in this case," there was additional evidence in the record that the defendant knew that he was required to be present at sentencing and had knowingly and voluntarily relinquished that right. Id., 265. In particular, the court observed that, in light of the fact that the defendant was at liberty on bail, "it would be disingenuous to suggest that [he] . . . did not know that he had a duty to appear at sentencing or that he did not know of the possibility that the sentencing would continue in his absence." Id. The court also noted that the record was clear that the defendant was aware that sentencing was scheduled for the date

on which he failed to appear, yet he elected not to attend. Id.

The court further disagreed that the trial court was required to advise the defendant, prior to imposing sentence, that sentencing would proceed in his absence. The court explained that, of the cases cited by the defendant to support his proposition that such an advisement was constitutionally required, all were factually distinguishable because they involved defendants who had been removed from the courtroom due to disruptive behavior or at their own request, and who were either in police custody or had elected to leave trial in the middle of proceedings. Id., 267–68. The court concluded that "[t]he trial court is not required to preemptively notify a defendant that his case will proceed in his absence without any indication that he would be absent at some later time." Id., 268. It reasoned that to impose such a requirement on the trial court "would give the defendant the power to control the court by unilaterally prevent[ing] his case from going forward, allowing him to defy the law with impunity, and in the process, to paralyze the [criminal] proceedings." (Internal quotation marks omitted.) Id.

In the present case, the record reflects that at the time the defendant absented himself from trial, he was—like the defendant in *Hernandez*—at liberty on bond. The record further reflects that, as in *Hernandez*, the defendant was aware of the date on which proceedings would resume, because during the November 6 hearing, the court clearly and repeatedly informed the defendant that proceedings would resume on the morning of November 10, and that the defendant indicated his understanding of this fact.[20] Furthermore, although

[20] For example, at one point the court stated: "On Monday morning, I need to conduct a canvass with you as to your ability to represent yourself if that's your final decision. If I find that you are not able to represent yourself . . . then Mr. Fazzone is going to remain your attorney." The defendant replied: "Yes, Your Honor." At another point, the court stated: "So, I

there is no indication that the defendant was aware of the date set for sentencing, the court found, and the defendant does not contest, that he made no effort to learn that information and that there was no impediment to his attending his sentencing. The record does not reflect, nor does the defendant argue, that the state was in any way at fault for the defendant's failure to appear on November 10, or for his sentencing. We therefore agree with the trial court that the defendant's conduct constituted a waiver of his right to be present at both his trial and sentencing. As such, the defendant cannot show that the court violated his constitutional right to be present or otherwise erred—let alone committed plain error—in trying and sentencing him in absentia.

We are likewise unconvinced that the trial court plainly erred or violated the defendant's constitutional rights when it failed to inform him of the consequences of his failure to appear. The defendant's concession that such an advisement is not currently required in Connecticut courts is fatal to his claim of plain error in this regard, as "[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine." *State* v. *Diaz*, 302 Conn. 93, 104 n.8, 25 A.3d 594 (2011). As for the defendant's unpreserved claim of constitutional error, this court in *Hernandez* rejected the argument that an advisement of the sort the defendant seeks is constitutionally required when the defendant gives no indication that he will be absent

guess the defendant's motion for dismissal and/or removal of counsel, the court will make a final decision on that Monday morning. It will be the first order of business. I think in light of that, we should start with that piece of it at 9:30 on . . . Monday morning." The defendant again stated: "Yes, Your Honor." At another point, the court stated that the defense "needs to be prepared to present . . . all of its witnesses Monday morning," to which the defendant again responded, "Yes, Your Honor."

at a later date. And, despite his assertions to the contrary, the defendant gave no indication of his desire to flee during the November 6 hearing. To the contrary, as we previously have discussed, after his requests for a thirty and fifteen day continuance were denied, the defendant requested, and the court granted, a "couple days" to "pull it together," implying that, the denial of his requests for more time notwithstanding, the defendant intended to continue with the trial—whether counseled or in a self-represented capacity—on the following Monday. Moreover, the record reflects that, during the November 6 hearing, the defendant repeatedly assented whenever the court discussed its plans to resume proceedings on November 10. See footnote 20 of this opinion. Although the defendant argues that the court should have inferred that he was likely to flee because Fazzone was allegedly incompetent, and it was clear that there had been a breakdown in their relationship, he cites no authority for the proposition that a defendant's dissatisfaction with his counsel's performance, standing alone, is a sufficient basis from which to conclude that the defendant is a flight risk, especially when the defendant gives contrary indicia of his intent to appear for future proceedings.

We further reject the defendant's argument that we should, through the exercise of our supervisory authority, impose a rule requiring that trial judges inform criminal defendants of the consequences of a failure to appear whenever they reasonably conclude that the defendant poses a risk of flight. The defendant has not demonstrated that the failure to give such advisements presents a "pervasive and significant problem" sufficient to justify the promulgation of a new rule pursuant to our supervisory authority. *State* v. *Hill*, 307 Conn. 689, 706, 59 A.3d 196 (2013). Moreover, as we have already determined, the defendant's responses to the court during the November 6 hearing indicated not that

he had any intention of fleeing but that he would appear the following Monday; accordingly, we have no occasion, under the circumstances of this case, to establish the rule that the defendant seeks. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 553, 212 A.3d 208 (2019) (declining defendant's invitation to exercise supervisory authority to promulgate rule prohibiting generic tailoring arguments, where record showed that prosecution made specific rather than generic tailoring argument, and "we do not disapprove of specific tailoring arguments when they are warranted by the evidentiary record"). As such, the defendant has not made a showing that this case presents circumstances "extraordinary" enough to merit the exercise of our supervisory authority. The defendant's claim therefore fails.

IV

The defendant next claims that the trial court improperly denied Fazzone's motion for a mistrial when the defendant failed to appear on November 10, 2014. We disagree.

"[Although] the remedy of a mistrial is permitted under the rules of practice, it is not favored. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . The trial court enjoys wide discretion in deciding whether a mistrial is warranted . . . and its evaluation as to events occurring before the jury is to be accorded the highest deference. . . . Every reasonable presumption will be given in favor of the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Tarver*, 166 Conn. App. 304, 326, 141 A.3d 940, cert. denied, 323 Conn. 908, 150 A.3d 683 (2016). "On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances which may arise during the trial in which [her] function is to assure a fair and just outcome. . . . The trial court is better

positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice." (Internal quotation marks omitted.) *State* v. *Walker*, 80 Conn. App. 542, 553, 835 A.2d 1058 (2003), cert. denied, 268 Conn. 902, 845 A.2d 406 (2004).

We discern no abuse of discretion in the trial court's denial of Fazzone's motion for a mistrial. As we previously have explained, the trial court properly concluded that the defendant had waived his right to be present when, while at liberty on bond, he failed to appear at his trial through no fault of the state, despite having been clearly informed that trial would resume on November 10. See, e.g., *State* v. *Parham*, 174 Conn. 500, 506, 391 A.2d 148 (1978) (where court could reasonably conclude that defendant waived right to be present by voluntarily absenting himself from trial after two days of evidence, and defendant made no showing that he was unable to appear through no fault of his own, denial of defense motion for mistrial on basis of defendant's absence was not erroneous). The court was not obliged to "[permit] [the] defendant unilaterally to prevent his case from going forward" by granting him the benefit of a mistrial when he failed to appear. *State* v. *Drakeford*, supra, 202 Conn. 81. Moreover, the court provided a curative instruction to the jury, directing it not to draw any inferences adverse to the defendant as a result of his absence or otherwise speculate as to why he was not present in court, and "in the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that the jury followed them." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 229 Conn. App. 487, 535 n.40, 327 A.3d 941 (2024), cert. denied, 351 Conn. 923, 333 A.3d 105 (2025), and cert. denied, 351 Conn. 923, 333 A.3d 106 (2025). The court acted well within its discretion in determining that such an instruction could obviate any prejudice that

the defendant had brought upon himself by voluntarily absenting himself from the proceedings.

Although Fazzone did not articulate his request for a mistrial in constitutional terms, the defendant nonetheless claims on appeal that the court's denial of Fazzone's motion for a mistrial "raises a deprivation of the defendant's due process rights under [the] federal [constitution]," and the defendant seeks *Golding* review of this unpreserved constitutional claim. He further argues that the court was obligated, in light of Fazzone's allegedly poor performance, to grant the motion for a mistrial in order to protect the defendant's right to competent counsel—an argument that Fazzone never presented to the trial court. Although his principal appellate brief is somewhat unclear on this point, we understand the defendant's unpreserved claim of constitutional error to be that his right to counsel, as guaranteed by the sixth and fourteenth amendments to the federal constitution, imposed a duty on the trial court to grant a mistrial in light of Fazzone's claimed deficiencies. However, "[s]ince this argument is, in essence, a disguised allegation of ineffective assistance of counsel, it is governed by our decisions requiring such claims to be pursued on a petition for a new trial or on a petition for a writ of habeas corpus, rather than on direct appeal, so that a complete factual record can be developed." *State* v. *Gonzalez*, supra, 205 Conn. 684; see also footnote 14 of this opinion. Accordingly, because the record is inadequate for review of this claim, it fails under the first prong of *Golding*.

V

The defendant next claims that the court should have sua sponte discharged Fazzone as his counsel and declared a mistrial because, "[b]y the end of the second day of evidence, Fazzone had demonstrated to the court that he did not have the minimum level of competence

to continue as defense counsel, and was ill-equipped to provide even minimally effective assistance of counsel to the defendant." The defendant claims that, by failing to do so, the court committed plain error. We decline to review this claim.

The defendant's claim is substantially identical to the unpreserved constitutional claim that we discuss in part IV of this opinion. We have already determined that the record is inadequate for our review of that claim under *Golding*, and where "the record is inadequate for review under *Golding* it is also inadequate for consideration under the plain error doctrine." *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 69 n.3, 967 A.2d 41 (2009). We therefore conclude that the record is inadequate for our review of this claim and decline to review it.

VI

Finally, the defendant claims that the trial court improperly relied on the rape shield statute to prevent him from cross-examining the victim about a false allegation of sexual misconduct that she allegedly had made against T.[21] In response, the state argues that the defendant "myopically" overlooks the fact that the trial court

[21] At certain points in his principal appellate brief, the defendant also appears to contend that the trial court improperly barred him from asking the victim about an allegation of sexual misconduct she allegedly had made against her friend's brother. See part II of this opinion. Our review of the transcript of November 5, 2014, however, reveals that, although Fazzone did state that he intended to inquire both as to this claimed allegation and as to the claimed allegation that the victim had made against T, when pressed by the trial court as to the relevance of the former line of inquiry, Fazzone backed down, stating that he did not "want to rock the boat" and that he "stood by his contentions" only with respect to his question about the victim's allegation against T. The court then proceeded to rule that the defendant lacked a good faith basis for asking about the alleged allegation against T. The court did not, however—and was not asked to—rule on the permissibility of any questions the defendant may have had about a past allegation of sexual misconduct against the brother of the victim's friend. To the extent that the defendant challenges any such ruling, he challenges a ruling that the trial court never made, and we cannot pass on the correct-

also precluded him from asking about the victim's alleged allegation on the ground that there was no good faith basis for such a line of questioning. The defendant does not address the state's argument in his reply brief. We conclude that this claim is nonjusticiable because the defendant has failed to challenge all of the bases for the trial court's adverse ruling, and, accordingly, we dismiss the appeal as to this claim as moot.[22]

"Mootness is a question of justiciability that must be addressed as a threshold matter because it implicates this court's subject matter jurisdiction . . . . [I]t 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. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse

ness of such a ruling. See, e.g., *State* v. *McLaughlin*, 135 Conn. App. 193, 202, 41 A.3d 694, cert. denied, 307 Conn. 904, 53 A.3d 219 (2012).

[22] Although the state does not couch its argument in jurisdictional terms, its contention that the defendant failed to challenge an independent basis for the court's adverse ruling implicates our subject matter jurisdiction, which we are required to address once raised. See, e.g., *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 275 n.4, 21 A.3d 759 (2011). The defendant had the opportunity to respond to the state's argument in his reply brief but elected not to do so. See, e.g., *Fischer* v. *M&T Bank, N. A.*, 233 Conn. App. 147, 152–53, 338 A.3d 1222 (2025) (dismissing appeal for lack of appellate standing where issue of standing was raised by defendants in appellate brief and plaintiff did not address issue in reply brief or when asked during oral argument). Accordingly, we conclude that the defendant has been afforded an adequate opportunity to address whether the appeal should be dismissed as moot with respect to this claim.

ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

We previously have set forth the procedural history relevant to this claim in part II B of this opinion. In support of his claim, the defendant argues that the trial court erroneously concluded that the rape shield statute barred him from asking about the victim's alleged allegation against T. He contends that the rape shield statute "prohibits questions into the complainant's own prior sexual history, *not* into evidence of the complainant's lack of veracity." (Emphasis in original.) As the state correctly points out, however, the defendant ignores the fact that the trial court precluded him from asking about the victim's alleged allegation against T primarily on the separate ground that Fazzone lacked a good faith basis for asking that question. See, e.g., *State* v. *Henry*, 72 Conn. App. 640, 666, 805 A.2d 823 ("[a] good faith basis on the part of examining counsel as to the truth of the matter contained in questions propounded to a witness on cross-examination is required" (internal quotation marks omitted)), cert. denied, 262 Conn. 917, 811 A.2d 1293 (2002). The defendant not only fails to challenge this separate basis for the trial court's decision; at one point, he appears expressly to concede the correctness of the court's ruling, stating: "It is true that . . . Fazzone failed to provide any sort of cogent explanation of why this line of questioning was proper and permitted under the [Connecticut] Code [of Evidence]." Therefore, even if we were to agree with the defendant that the trial court's interpretation of the rape shield statute was erroneous, we would not be able to provide him any practical relief on his claim. See, e.g., *State* v. *Lester*, supra, 324 Conn. 528. We therefore conclude that this claim is moot and,

accordingly, that we lack subject matter jurisdiction to review it.[23]

The appeal is dismissed as to the defendant's claim that the trial court improperly precluded him from asking the victim about a prior accusation of sexual misconduct that she allegedly had made; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DEUTSCHE BANK TRUST COMPANY AMERICAS, TRUSTEE *v.* KEVIN R. BURKE ET AL.
(AC 47889)

Elgo, Wilson and Keller, Js.

Syllabus

The defendant property owners appealed from the trial court's judgment granting the plaintiff bank's application for execution of ejectment and from

[23] In the section of his principal appellate brief discussing the reviewability of this claim, the defendant contends that Fazzone preserved his objection to the trial court's ruling but, in the alternative, "submits that the claim is also reviewable [under *Golding*] as it involves a violation of [the defendant's] constitutional right to confront witnesses and to cross-examination . . . as required under the sixth amendment." We agree that the defendant properly preserved his claim, and thus we need not analyze the *Golding* prongs. To the extent, however, that the defendant seeks now to raise a separate unpreserved constitutional claim that his right to confrontation afforded him a right to unfettered cross-examination of the victim, regardless of whether his questions had a good faith basis, we disagree. The defendant cites no authority for and provides no substantive analysis for any such claim, rendering it inadequately briefed. Moreover, such a claim is contrary to well established law. The confrontation clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination . . . ." (Internal quotation marks omitted.) *State* v. *Halili*, 175 Conn. App. 838, 850, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017). "[T]rial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant . . . . [W]e have upheld restrictions on the scope of

the court's denial of their motion for judgment on the plaintiff's claim for money damages under the mortgage note. This court, in a prior appeal, affirmed the trial court's judgment of strict foreclosure, and, thereafter, the trial court granted the plaintiff's motion for order to set new law days. Prior to the running of the law days, the court denied the defendants' motion to open the judgment and extend the law days. On appeal, the defendants claimed, inter alia, that the court improperly granted the plaintiff's application for execution of ejectment on the ground that their objection thereto was moot. *Held*:

This court rejected the plaintiff's challenge to this court's subject matter jurisdiction over the appeal, as the law day set by the trial court was rendered ineffective by the automatic appellate stay that arose after the denial of the plaintiff's motion to open and, therefore, title to the property had not passed irrevocably to the plaintiff and the appeal was not moot.

The trial court abused its discretion in relying on the scheduled law day to conclude that the defendants' objection to the application for execution of ejectment was moot, as the court's denial of the defendants' motion to open gave rise to an automatic appellate stay, which rendered the scheduled law day ineffective, and therefore title had not yet vested in the plaintiff.

This court declined to review the merits of the defendants' claim that the trial court improperly denied their motion for judgment on the plaintiff's claim for money damages under the mortgage note, the defendants having failed to provide this court with an adequate record for review.

Argued June 2—officially released September 16, 2025

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Cordani*, *J.*; judgment of strict foreclosure, from which the named defendant et al., appealed to this court, *Moll*, *Clark* and *DiPentima*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Cirello*, *J.*, granted the plaintiff's motion for order to set new law days; subsequently, the court, *Cirello*, *J.*, denied the

cross-examination where the defendant's allegations of witness bias lack any apparent factual foundation and thus appear to be mere fishing expeditions." (Internal quotation marks omitted.) Id., 853.

motion of the named defendant et al. to open the judgment and extend the law days; thereafter, the court, *Cirello*, *J.*, granted the plaintiff's application for execution of ejectment, and the named defendant et al. appealed to this court; subsequently, the court, *Regan*, *J.*, denied the motion of the named defendant et al. for judgment on the promissory note, and the named defendant et al. filed an amended appeal. *Reversed*; *judgment directed*; *further proceedings*.

Thomas P. Willcutts, for the appellants (named defendant et al.).

Victoria L. Forcella, for the appellee (plaintiff).

Opinion

WILSON, J. The defendants Kevin R. Burke and Maura Lee Wahlberg[1] bring this amended appeal from the trial court's granting of the application for execution of ejectment brought by the plaintiff, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2005-QA10, and its denial of the defendants' motion for judgment on the plaintiff's claim under the mortgage note, seeking money damages. On appeal, the defendants claim that the court improperly (1) granted the plaintiff's application for execution of ejectment on the ground that their objection thereto was moot and (2) denied their motion for judgment on the plaintiff's claim for a deficiency judgment under the mortgage note. We reverse the judgment of the trial court and remand the case with direction to vacate the execution of ejectment, to make a new finding as to the appraisal of the property, to make a new finding as to the amount of the debt, to set new law days, and for other proceedings according to law.

[1] Ridge Homeowners Association, Inc., and MorEquity, Inc., were also named as defendants but are not participating in this appeal. Our references in this opinion to the defendants are to Burke and Wahlberg.

See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 349 Conn. 483, 316 A.3d 338 (2024).

The following facts and procedural history relevant to the resolution of this appeal are taken from this court's decision in the defendants' appeal from the trial court's judgment of strict foreclosure in *Deutsche Bank Trust Co. Americas* v. *Burke*, 218 Conn. App. 542, 292 A.3d 81, cert. denied, 347 Conn. 904, 297 A.3d 567 (2023). "On or about March 4, 2005, Burke executed and delivered a note for a loan in the principal amount of $1,500,000 to a predecessor in interest to the plaintiff. The loan was used to refinance certain real property in Fairfield. On or about March 4, 2005, the defendants executed and delivered a mortgage on the property, which secured the indebtedness under the note, to the plaintiff's predecessor in interest. The mortgage was recorded in the Fairfield land records on March 10, 2005. In October, 2008, the note was modified at the defendants' request to reflect a new principal balance of $1,545,133.75. The mortgage was assigned to the plaintiff, and that assignment was recorded in the Fairfield land records on June 25, 2009. The note was endorsed and delivered to the plaintiff prior to the initiation of the present action and has remained in the possession of the plaintiff. The defendants failed to make the January, 2009 payment due under the note and failed to make any subsequent payments. The plaintiff accelerated the mortgage debt sometime in 2009 and, in May, 2009, filed a foreclosure action on the note and mortgage. That prior action was dismissed for dormancy on May 8, 2014. The plaintiff commenced the present foreclosure action on July 3, 2017. The value of the property at the time of trial was $590,000, and the debt was $2,752,982.71; there was no equity in the property." (Footnote omitted.) Id., 543–44.

In its original complaint and amended complaint, the plaintiff sought a "[d]eficiency judgment against the

makers of, or obligors on, the note described herein, and/or their estate, if deceased (unless same has been precluded by virtue of a bankruptcy filing) . . . ." Nothing in the record indicates that the plaintiff withdrew, waived or abandoned its claim seeking a deficiency judgment. In their answer and special defenses, the defendants, pursuant to General Statutes § 42a-3-118 (a), raised a statute of limitations defense to the plaintiff's claim for a deficiency judgment. The defendants also raised counterclaims against the plaintiff in which they alleged breach of contract and the implied covenant of good faith and fair dealing, negligence, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On August 2, 2021, following a trial, the trial court, *Cordani*, *J.*, rendered a judgment of strict foreclosure and rendered judgment in favor of the plaintiff on the defendants' counterclaims. The court set the first law day as October 11, 2021.[2] The court, however, deferred issuing a decision on the defendants' statute of limitations defense to the plaintiff's claim for deficiency judgment. The court determined that the defendants had failed to prove their remaining special defenses of laches, equitable estoppel, and unclean hands.

On February 21, 2024, the plaintiff filed a motion for order to set new law days and, on March 18, 2024, the trial court, *Cirello*, *J.*, granted the motion, opened the judgment of strict foreclosure and set new law days to commence on April 23, 2024. On April 10, 2024, the defendants filed a motion to open judgment to extend the April 23, 2024 law day and, on that same date, filed a "Motion for Judgment on Promissory Note." The defendants' motion to open was their first and only

[2] Although the court originally ordered the law days to commence on October 11, 2021, it issued a corrected judgment on August 9, 2021, ordering the law days to commence on October 12, 2021.

motion to open.[3] In its motion for judgment on the note, the defendants argued that any action on the note was barred by the applicable statute of limitations pursuant to § 42a-3-118 (a).

On April 18, 2024, the trial court, *Cirello*, *J.*, denied the defendants' motion to open and stated in its order that "the motion to open will not be heard before the law day." On June 5, 2024, the plaintiff filed an application for execution of ejectment asserting that title was transferred to it on April 26, 2024. The defendants objected to the application for execution of ejectment and argued that it should be denied because the trial court's April 18, 2024 denial of their motion to open created an automatic appellate stay, which prevented the law day from running on April 23, 2024. On July 19, 2024, the court, *Cirello*, *J.*, overruled the defendants' objection and issued an order holding that the law day had passed, title had vested in the plaintiff, and, therefore, the execution of ejectment could proceed. On August 7, 2024, the defendants filed an appeal challenging the trial court's July 19, 2024 order. On September 5, 2024, the trial court, *Regan*, *J.*, denied the defendants' April 10, 2024 motion for judgment, and, on September 20, 2024, the defendants filed an amended appeal to include the September 5, 2024 ruling of the trial court.[4]

[3] We note that, as this was the defendants' first motion to open, Practice Book § 61-11 did not apply. Practice Book § 61-11 (g) provides in relevant part: "In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. Such affidavit shall recite the specific facts relied on in support of the moving party's claim of good cause. . . ."

[4] On August 19, 2024, the plaintiff moved to dismiss the defendants' initial appeal "on the basis that [it] is untimely and [because this appeal is moot, as] title has vested absolutely in the plaintiff . . . ." On September 26, 2024, the plaintiff also moved to dismiss the defendants' amended appeal. This court denied both motions to dismiss on October 2, 2024.

Both rulings are the subject of the present appeal. Additional facts and procedural history will be set forth as necessary.

I

Before we address the defendants' claims on appeal, we must first address a jurisdictional argument raised by the plaintiff, that this appeal is moot because title to the subject property has passed irrevocably to the plaintiff. We are not persuaded.

"The question of mootness implicates our subject matter jurisdiction. 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. . . . Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, 206 Conn. App. 509, 512–13, 260 A.3d 1240 (2021). As this court has observed, "[i]f the law days pass before appellate review of the defendant's claims can occur, the appeal will likely become moot because title has passed irrevocably and an appeals court may not grant the defendant any further relief except in rare circumstances." *U.S. Bank Trust, N.A.* v. *O'Brien*, 231 Conn. App. 779, 787, 334 A.3d 558 (2025).

For the reasons that we discuss in part II of this opinion we conclude that the law day set by the trial

court was rendered ineffective by the automatic appellate stay, and therefore title to the subject property has not passed irrevocably to the plaintiff. We therefore reject the plaintiff's challenge to this court's subject matter jurisdiction over the appeal.

II

Next, we consider the defendants' claim that the court improperly granted the plaintiff's application for execution of ejectment on the ground that their objection thereto was moot. We agree with the defendants that, in granting the motion, the court erroneously relied on the April 23, 2024 law day to conclude that title had passed irrevocably to the plaintiff.

We begin by setting forth the standard of review and relevant legal principles that guide our resolution of the defendants' appeal. "A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 811–12, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005).

In evaluating the court's exercise of its discretion, we must focus on the legal correctness of its determination that, at the time that it granted the plaintiff's application for execution of ejectment, title had passed irrevocably to the plaintiff. " 'Because the principal issue on appeal concerns questions of law, namely, subject matter jurisdiction and the scope of the appellate stay provisions in the rules of practice, our review is plenary.' *Wells*

Fargo Bank of Minnesota, N.A. v. *Morgan*, 98 Conn. App. 72, 78, 909 A.2d 526 (2006); see also *Chamerda* v. *Opie*, 185 Conn. App. 627, 637–38, 197 A.3d 982 ('A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.' . . .), cert. denied, 330 Conn. 953, 197 A.3d 893 (2018); *Zirinsky* v. *Zirinsky*, 87 Conn. App. 257, 269, 865 A.2d 488 ('[w]e are required to interpret the scope of [the] rules of practice; accordingly, we are presented with a question of law over which our review is plenary'), cert. denied, 273 Conn. 916, 871 A.2d 372 (2005)." *Lending Home Funding Corp.* v. *REI Holdings, LLC*, 214 Conn. App. 703, 710–11, 281 A.3d 1 (2022).

The defendants argue that the court's April 18, 2024 denial of their motion to open was an appealable order, giving rise to a twenty day automatic appellate stay which rendered the law day set for April 23, 2024, ineffective, and as such, title did not pass to the plaintiff by operation of the April 23, 2024 law day. The defendants argue, therefore, that the court erred when it determined that title had passed and granted the plaintiff's application to eject the defendants from their property.

The plaintiff argues that title had passed at the time the court granted its application and therefore the defendants lacked the requisite standing to appeal as they no longer held any legal title interest in the property that was the subject of the underlying foreclosure action. The plaintiff argues therefore that the court did not abuse its discretion when it permitted the ejectment to proceed. For the reasons that follow, we agree with the defendants that the court's denial of the defendants' motion to open the judgment of strict foreclosure triggered the twenty day automatic stay, thereby rendering

the April 23, 2024 law day ineffective, and, therefore, title had not passed at the time the court granted the application for execution of ejectment.

As previously discussed, in *Burke*, this court upheld the trial court's judgment of strict foreclosure in favor of the plaintiff. Thereafter, on February 21, 2024, the plaintiff filed a motion to open to set a new law day. On March 18, 2024, the court granted the motion, reentered the judgment of strict foreclosure and reset the law day for April 23, 2024. On April 10, 2024, before the law day had passed, the defendants, for the first time, filed a motion to open the judgment of strict foreclosure, and, on April 18, 2024, the court denied the motion to open stating that "the motion to open will not be heard before the law day."[5]

On June 5, 2024, the plaintiff filed an application for execution of ejectment and, on July 19, 2024, the court granted that application, stating: "[T]he law day passed. There was no appellate stay in effect when the plaintiff filed its motion for execution of ejectment." The court determined that because the law day had passed, title had vested in the plaintiff, and once title vested, a motion to open or any similar motion, such as the defendants' objection to the application for ejectment, "must

[5] In its appellate brief, the plaintiff erroneously argues that the court "recognized that the defendants' motion to open would not be heard prior to vesting and thus denied the defendants' motion to open . . . not on its merits but rather on its inability to be heard prior to vesting due to the defendants' failure to timely file the motion to open . . . ." The court did not deny the motion to open after the law days ran but rather denied the motion prior to the running of the law days. Specifically, the court stated that "the motion to open will not be heard before the law day." Accordingly, when the court denied the defendants' motion to open before the law days ran, it created an automatic appellate stay, and it did not matter that the court did not hear argument on the motion or place it on the short calendar before denying the motion to open. See *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 845–47, 158 A.3d 405 (2017) (holding that appeal was not moot because trial court summarily denied defendant's motion to open on law day without motion being placed on short calendar).

be dismissed as moot because there is no practical relief that the court can provide." The court therefore ruled that the execution of ejectment could proceed.

This court has previously set forth the principles that guide our analysis: "The opening of judgments of strict foreclosure is governed by [General Statutes] § 49-15, which provides in relevant part: Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified . . . provided no such judgment shall be opened after the title has become absolute in any encumbrancer . . . .

"In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. . . . Thus, once the law day passes and title vests in the [plaintiff], no practical relief is available [p]rovided that this vesting has occurred pursuant to an authorized exercise of jurisdiction by the trial court . . . . In other words, " 49-15 (a) (1) . . . generally prohibits mortgagors from obtaining practical relief after the passage of the law days and,

as a result, [renders] . . . postvesting motions to open a judgment . . . moot. . . .

"On the other hand, it is well established that law days that are set forth in a judgment of strict foreclosure can have no legal effect if an appellate stay is in effect because to give them legal effect would result in an extinguishment of the right of redemption pending appeal. . . . [S]ee . . . *Continental Capital Corp.* v. *Lazarte*, 57 Conn. App. 271, 273–74, 749 A.2d 646 (2000) (Law days are ineffective while the appeal period is pending. To conclude otherwise would be tantamount to depriving a party of judicial review and, therefore, of due process of law.).

"In the context of strict foreclosure, our Supreme Court in *Farmers & Mechanics Savings Bank* v. *Sullivan*, [216 Conn. 341, 579 A.2d 1054 (1990)], addressed the issue of whether a motion to open, filed pursuant to Practice Book (1978–97) § 4009, the predecessor of Practice Book § 63-1,[6] operated to toll the automatic stay period until that motion was decided. In so doing, the court in *Sullivan* distinguished between motions to open that are timely filed within the twenty day appellate period following the court's judgment of strict

[6] Practice Book § 63-1 provides in relevant part:

"(a) Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. The appeal period may be extended if permitted by Section 66-1 (a). If circumstances give rise to a new appeal period as provided in subsection (c) of this rule, such new period may be similarly extended as long as no extension of the original appeal period was obtained. . . .

"(c) If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion, except as provided for additur or remittitur in the next paragraph. . . .

"Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment . . . ."

foreclosure and those that are untimely filed. See id., 348–50. When a motion is filed *after the expiration of the twenty day appellate stay period*, *the motion must be heard*, *and not merely filed*, *prior to the vesting of title*, for the court to retain jurisdiction over the motion. Id., 349–50. By contrast, when a motion is filed *within the appellate stay period*, *the filing of the motion extends the stay period* until that motion is decided, even when a law day is scheduled to run before the court has an opportunity to resolve the motion. Id., 346–47; 349–50; see also *Continental Capital Corp.* v. *Lazarte*, supra, 57 Conn. App. 273 ([l]aw days in a strict foreclosure cannot run if a motion to open is filed during the appeal period but is yet to be ruled on). Stated otherwise, the timely filing of a motion to open, pursuant to Practice Book § 63-1, activate[s] the automatic stay under [Practice Book § 61-11] until that motion is decided; *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 346; rendering any redemption . . . violative of the automatic stay, and any title derived through such stayed proceedings . . . subject to defeasance. . . . Id., 349. Accordingly, it is well settled that, when a motion to open is timely filed within the twenty day appeal period following the court's judgment of strict foreclosure, any law day scheduled before the motion is decided has no effect, and the court retains jurisdiction to decide the motion. See id., 346–47, 349–50; see also *Continental Capital Corp.* v. *Lazarte*, supra, 273–74." (Citations omitted; emphasis altered; footnote added; footnotes omitted; internal quotation marks omitted.) *Lending Home Funding Corp.* v. *REI Holdings*, *LLC*, supra, 214 Conn. App. 711–14. "[L]aw days are ineffective pending the stay because to treat them otherwise would carry out the judgment in violation of the stay." *RAL Management*, *Inc.* v. *Valley View Associates*, 278 Conn. 672, 683–84, 899 A.2d 586 (2006).

Here, the defendants filed their motion to open the judgment of foreclosure after the expiration of the

twenty day appellate stay that arose from the court's March 18, 2024 ruling opening the judgment for the purpose of setting new law days. However, the motion to reopen was denied before the law days ran and before title in the subject property vested irrevocably in the plaintiff. When the court denied the defendants' motion to open before the law days ran, that ruling gave rise to an automatic appellate stay, rendering the April 23, 2024 law day ineffective. Accordingly, the court abused its discretion when it erroneously relied on that law day to conclude that title had passed and granted the application for execution of ejectment.

III

The defendants' second claim is that the court improperly denied their motion for judgment on the plaintiff's claim under the mortgage note. We lack an adequate record of the factual and legal basis of the court's ruling. However, in light of our resolution of the claim addressed in part II of this opinion, it is unnecessary for us to reach the merits of this claim.

The following procedural history is relevant to this claim. On April 10, 2024, the defendants filed a motion for judgment on the promissory note. In their motion, the defendants argued that they were seeking a formal adjudication of their statute of limitations defense to the plaintiffs' claim at law for money damages and a deficiency judgment as the plaintiff had specifically pleaded in its prayer for relief. The defendants argued that a formal ruling on the plaintiff's claim for money damages under the note was material to the parties' dispute because of its potential impact upon the parties' respective federal tax rights and liabilities. The defendants argued that the trial court, *Cordani*, *J.*, made all the requisite factual findings to find in favor of the defendants on their statute of limitations defense on the subject note and had simply deferred ruling on the

issue because the plaintiff was not "currently seeking a deficiency judgment." The defendants therefore claimed that the issue was not moot and requested the trial court, *Regan*, *J.*, to grant their motion and render judgment in their favor. The plaintiff did not file an objection to the motion for judgment. On September 5, 2024, the trial court, *Regan*, *J.*, denied the motion. The court's ruling states: "DENIED. Per oral record." The defendants have appealed from the court's denial.

The defendants argue that the trial court, *Regan*, *J.*, erred in failing to enter judgment in their favor as to the plaintiff's claim at law for money damages under the note, erroneously concluding that the claim was moot. The defendants raise essentially the same arguments raised in their motion for judgment. More specifically, the defendants claim that, because the trial court, *Cordani*, *J.*, in his decision rendering judgment of strict foreclosure, found the requisite facts to rule in favor of the defendants on their statute of limitations defense directed to the plaintiff's claim for money damages under the note, and because Judge Cordani specifically referenced the applicable statute of limitations in his decision, Judge Regan erred in denying the motion for judgment based on mootness. The defendants further argue that the plaintiff represented to this court in *Burke* that it is required to issue a 1099-C tax form relative to forgiveness of debt under the note, creating tax liability for the defendants in the event there is a deficiency, as has already been determined in the court's judgment of strict foreclosure. The defendants argue that because Judge Cordani, in his ruling, specifically cited to the controlling statute of limitations under § 42a-3-118 (a),[7] and because he specifically found that

[7] General Statutes § 42a-3-118 (a) provides in relevant part that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date."

the plaintiff had accelerated on the note in 2009, Judge Regan should have ruled in the defendants' favor on the motion for judgment, finding that the plaintiff's deficiency claim was time barred rather than finding that the issue was moot.

The plaintiff argues that Judge Regan did not err in denying the motion for judgment and correctly determined that the defendants' motion was moot.[8] The plaintiff argues that there was no pending action to collect on the note at the time the defendants filed their motion for judgment, and it had not filed a motion for deficiency judgment in accordance with Practice Book § 23-19.[9] The plaintiff further argues that at the time Judge Regan issued his decision on the defendants' motion for judgment, there was nothing pending in the underlying action that would constitute an attempt to collect on the note. Relying on its interpretation of the procedural posture of the case, the plaintiff argues that it had affirmatively waived any claim for a deficiency judgment. The plaintiff also argues that the claims raised in the defendants' motion for judgment were moot and could not survive because there was not a pending

[8] To the extent the plaintiff is arguing that the defendants' motion for judgment was moot because title had passed, this court has addressed this issue in part II of this opinion and has determined that title had not passed because an automatic stay was triggered when the court denied the defendants' motion to open, thereby rendering the April 23, 2024 law day ineffective.

[9] Practice Book § 23-19 (a) provides: "Whenever a deficiency judgment is claimed in a foreclosure action, the party claiming such judgment shall file with the clerk of the court within the time limited by statute a written motion setting forth the facts relied on as the basis for the judgment, which motion shall be placed on the short calendar for an evidentiary hearing. Such hearing shall be held not less than fifteen days following the filing of the motion, except as the judicial authority may otherwise order. At such hearing the judicial authority shall hear the evidence, establish a valuation for the mortgaged property and shall render judgment for the plaintiff for the difference, if any, between such valuation and the plaintiff's claim. The plaintiff in any further action upon the debt, note or obligation, shall recover only the amount of such judgment."

action on the note or a motion pending to seek a deficiency judgment.

The record reflects that the plaintiff in both its original complaint and amended complaint sought money damages and a deficiency judgment. Judge Cordani in his August, 2021 memorandum of decision found that the plaintiff had accelerated on the note some time in 2009 and referenced the applicable statute of limitations regarding the plaintiff's claim for a deficiency judgment; however, he deferred any decision on the plaintiff's claim and the defendants' statute of limitations defense to such claim. The court stated in its decision that, "[w]hile the special defense of the statute of limitations may apply to the enforcement of the note directly or in any deficiency judgment, the statute of limitations as provided for in [§ 42a-3-118 (a)] does not impact the entry of a judgment of foreclosure. Section 42a-3-118 (a) is a statute of limitations that applies to bringing an action to force payment on a note, providing: 'Except as provided in subsection (e), *an action to enforce the obligation of a party to pay a note* payable at a definite time must be commenced within six years after the . . . accelerated due date.' . . .

"The foregoing statute of limitations does not extinguish the debt, but instead potentially bars the remedy of bringing an action to collect on the note. This is not an action at law to collect on the note but is instead an equitable foreclosure action seeking foreclosure of the mortgage." (Emphasis in original; footnote omitted.)

Judge Cordani noted at footnote 7 of his decision that "[t]he plaintiff confirmed on the record of the hearing in this matter on July 7, 2021, that it is not *currently* seeking a deficiency judgment. In determining the amount of the debt for purposes of this decision, *which does not include any decision on a deficiency*, the

court has not considered equitable factors that may have arisen in connection with the delay that may impact a deficiency judgment, *because the court makes no decision concerning a deficiency judgment at this point*. The court has also not considered the impact, if any, of the statute of limitations on the collectability of the debt under the note itself because such a decision is not required at this point since the plaintiff is *currently* only seeking an equitable judgment of foreclosure." (Emphasis added.)

Judge Cordani further noted at footnote 9 that "[t]he plaintiff represented that it is not currently seeking a deficiency judgment or money damages. *The court does not at this time decide the impact, if any, of § 42a-3-118 (a) on the collectability of the note or on the appropriateness of any future requested deficiency judgment.*" (Emphasis added.) Thus, the record clearly reflects that Judge Cordani, in his August, 2021 decision, deferred considering any deficiency claim "because such a decision [was] not required at [that] point since the plaintiff [was] currently only seeking an equitable judgment of foreclosure." It is clear from the record that Judge Cordani's decision to defer ruling on the defendants' statute of limitations defense in response to the plaintiff's claim for a deficiency judgment was not based on mootness grounds but, rather, because the plaintiff was not at that time seeking a deficiency judgment.

In this appeal, both parties, citing Judge Cordani's decision, however, argue that Judge Regan denied the motion based on mootness grounds. Judge Regan, however, denied the motion without providing a written basis for his decision and simply stated in his decision: "DENIED. Per oral record." The record before this court is devoid as to the basis for his decision, as no record of Judge Regan's oral decision was submitted by the parties to this appeal.

Although both parties have represented to this court that Judge Regan denied the motion for judgment on mootness grounds, we do not presume the basis of the court's ruling. Likewise, "[t]his court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of an adequate record." (Internal quotation marks omitted.) *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 410, 46 A.3d 937, cert. denied, 307 Conn. 907, 53 A.3d 222 (2012). As the appellants, the defendants bore the burden of providing this court with an adequate record to review their claim on appeal. See Practice Book § 61-10.[10]

Although the defendants have failed to provide this court with an adequate record with respect to the ruling at issue, that lack of a record does not end our discussion of the present claim. In part II of this opinion, we concluded that title to the subject property had not passed irrevocably to the plaintiff because the court's denial of the defendants' motion to open had triggered the automatic stay, rendering the April 23, 2024 law day ineffective. Because our resolution of that claim leads us to reverse the judgment of the trial court granting the application for execution of ejectment and to remand the case, among other things, for the purpose of setting new law days,[11] the redemption period has not yet expired. Accordingly, if during the remand proceeding the plaintiff wishes to pursue its rights in accordance with Practice Book § 23-19 and General Statutes § 49-14 (a), it can do so by filing a motion for deficiency

[10] Practice Book § 61-10 provides in relevant part: "(a) It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal. . . ."

[11] In accordance with *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 349 Conn. 513, in addition to setting new law days, the case is remanded for a new finding as to the appraisal of the property and as to the amount of the debt.

judgment in accordance with the statute, after which the defendants' motion for judgment can be heard.[12]

The judgment is reversed and the case is remanded with direction to vacate the execution of ejectment, to make a new finding as to the appraisal of the property, to make a new finding as to the amount of the debt, to set new law days, and for other proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SHIFE TRICE
(AC 46683)

Elgo, Moll and Eveleigh, Js.

Syllabus

Convicted, following a bench trial, of the crime of robbery in the second degree, the defendant appealed. He claimed, inter alia, that the trial court improperly failed to conduct an independent inquiry into his competence to understand the proceedings and to assist his counsel in his defense. *Held*:

The trial court did not abuse its discretion in declining to conduct a competency hearing, as the court's observations of the defendant did not lead it to believe that his conduct rose to the level of substantial evidence of mental impairment and, thus, the defendant's unpreserved claim that the trial court's failure to conduct a competency hearing violated his due process right to a fair trial failed under the third prong of *State* v. *Golding* (213 Conn. 233).

The evidence was sufficient to support the defendant's conviction, as the trial court found, beyond a reasonable doubt, that the defendant intended to steal the victim's car and represented to the victim that he had a deadly

[12] General Statutes § 49-14 (a) provides: "At any time within thirty days after the time limited for redemption has expired, any party to a mortgage foreclosure may file a motion seeking a deficiency judgment. Such motion shall be placed on the short calendar for an evidentiary hearing. Such hearing shall be held not less than fifteen days following the filing of the motion, except as the court may otherwise order. At such hearing the court shall hear the evidence, establish a valuation for the mortgaged property and shall render judgment for the plaintiff for the difference, if any, between such valuation and the plaintiff's claim. The plaintiff in any further action upon the debt, note or obligation, shall recover only the amount of such judgment."

weapon or a dangerous instrument, which he put to the back of the victim's head and threatened to use if the victim did not comply with his order to get on the ground.

The trial court did not, as the defendant claimed, clearly and conclusively deny him his constitutional right to represent himself during a pretrial hearing, the court having instead continued the hearing to resolve its concern about his competence, and the defendant thereafter waived his right to self-representation when, after his counsel withdrew, he acquiesced to being represented by a different attorney and did not reassert his request to represent himself, and the defendant's contention that the court's alleged error was structural, thereby requiring the reversal of his conviction, did not contradict this court's conclusion that he waived his right to represent himself.

The trial court did not abuse its discretion when it properly determined that defense counsel opened the door to the admission of hearsay testimony from a police officer regarding an out-of-court statement by the victim describing the robbery suspects, as defense counsel's implication on cross-examination of the officer that the police did not have an adequate description of the robber could have left the court, as the fact finder, with the false impression that the police did not have a more specific description of the robber, and the officer's testimony served to remove any unfair prejudice that might have otherwise ensued from defense counsel's inquiry.

Argued March 13—officially released September 16, 2025

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of robbery in the second degree and conspiracy to commit robbery in the second degree, and, in the second part, with being a persistent felony offender, brought to the Superior Court in the judicial district of Hartford, where the court, *Baldini*, *J.*, denied the defendant's motion for new counsel; thereafter, the court, *K. Doyle*, *J.*, granted the motion to withdraw filed by the defendant's counsel; subsequently, the first part of the information was tried to the court, *Schuman*, *J.*; thereafter, the court, *Schuman*, *J.*, denied the defendant's motion for a judgment of acquittal; finding of guilty of robbery in the second degree; subsequently, the defendant was presented to the court, *Schuman*, *J.*, on a plea of guilty to the second

part of the information; judgment of guilty in accordance with the finding and the plea, from which the defendant appealed to this court. *Affirmed*.

Abigail H. Mason, assigned counsel, for the appellant (defendant).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Robert Diaz*, supervisory assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Shife Trice, appeals from the judgment of conviction, rendered after a trial to the court, of robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B). On appeal, the defendant claims that (1) the court improperly failed to conduct, sua sponte, an independent inquiry into his competence, (2) there was insufficient evidence presented at trial to support his conviction, (3) the court violated his constitutional right to self-representation, and (4) the court abused its discretion by admitting a certain hearsay statement into evidence. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the trial court reasonably could have found, and procedural history are relevant to the resolution of this appeal. On September 30, 2020, at approximately 3:48 a.m., the victim, Anthony West, parked his car in a parking lot on Sigourney Street in Hartford, down the street from his apartment. As the victim was exiting his car, the defendant approached him, put a facsimile firearm to the back of his head, and told him to get on the ground. The victim could feel that the object was metal and that it felt like a gun. The victim was scared that he was going to get killed, so he complied with the defendant's commands and laid on the ground. He left his phone, wallet, and keys

in the car. The defendant and V,[1] a juvenile who was with the defendant, "jumped in [the car] and took off."

The victim went to a neighbor's house and used the neighbor's phone to call 911. Officer Steven McCullough of the Hartford Police Department responded to the victim's location on Sigourney Street. The victim told McCullough that two individuals were involved, but he could not identify them. The victim provided a general description of both individuals to McCullough, including that they were both males wearing hoods and medical masks.

Meanwhile, Officer Nathan McOuat of the Hartford Police Department drove around the area looking for the victim's car. At 3:59 a.m., approximately ten or eleven minutes after the officers had received the victim's call, McOuat located the victim's car on Sargeant Street, which was two or three blocks away from the victim's location on Sigourney Street. McOuat angled his police cruiser in front of the victim's car, which was parked on the curb line of the road. Because a weapon reportedly was used when the car was taken, McOuat waited, with his gun drawn and pointed at the car, until other officers could arrive to assist him. As McOuat gave verbal commands to the occupants of the vehicle, he could hear the engine of the car revving.

McCullough left the victim's location to assist McOuat. The defendant, who was in the driver's seat of the victim's car, complied with McCullough's order to exit the car. McCullough patted the defendant down and found a facsimile firearm and the victim's wallet inside the defendant's pockets. V, who had been in the front passenger seat, was found with a backpack containing two large knives with steel blades. McCullough observed that both the defendant and V were

[1] Because V was a juvenile at the time of his involvement in this incident, we decline to identify him by his full name.

wearing dark-colored, hooded sweatshirts and medical masks, and that V was wearing gloves.

The defendant was arrested and charged in a substitute information with robbery in the second degree in violation of § 53a-135 (a) (1) (B), and conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (1) (B) and General Statutes § 53a-48 (a). The defendant waived his right to a jury trial and elected a trial to the court. The trial took place over the course of five days in January and February, 2023. The court, *Schuman*, *J.*, found the defendant guilty of robbery in the second degree and not guilty of conspiracy to commit robbery in the second degree. Thereafter, the defendant pleaded guilty to being a persistent felony offender pursuant to General Statutes § 53a-40 (g), which the state had charged in a separate part B information, and the court rendered judgment accordingly, imposing a total effective sentence of ten years of incarceration followed by five years of special parole. This appeal followed.

I

We first address the defendant's claim that the trial court improperly failed to conduct, sua sponte, an independent inquiry into his competence. The defendant acknowledges that his claim is unpreserved and seeks review pursuant to *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).

Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

The state concedes that the defendant has met the first two *Golding* prongs in that the record is adequate to permit review and that his claim is of constitutional magnitude. We therefore proceed to a consideration of the third prong, namely, whether the alleged constitutional violation exists and deprived the defendant of a fair trial. See, e.g., *State* v. *Paulino*, 127 Conn. App. 51, 61, 12 A.3d 628 (2011). We conclude that the defendant has not satisfied the third prong of *Golding*.

The following additional facts and procedural history are relevant to our resolution of this claim. At a pretrial hearing on April 8, 2021, the court, *Baldini*, *J.*, addressed a plea offer that had been extended by the state, pursuant to which the defendant would receive a total effective sentence of eight years of incarceration followed by five years of special parole if he pleaded guilty to charges of robbery in the first degree and conspiracy to commit robbery in the first degree. The state had charged the defendant with these offenses in a substitute information filed on March 11, 2021.[2]

Discussion ensued between the trial court and the defendant after he indicated that he wanted to reject the offer, fire his attorney, Dennis P. McMahon, and represent himself.[3] During these discussions, the defendant asked the court about the charges against him. The following colloquy occurred:

[2] The substitute information that was the operative information at the time of the defendant's trial, charging him with robbery in the second degree and conspiracy to commit robbery in the second degree, was not filed until January 24, 2023.

[3] These discussions are addressed in further detail in part III of this opinion.

"[The Defendant]: . . . May I please get acknowledgment about my alleged criminal offenses I'm being charged with right now?

"The Court: I'm not really sure . . . what you mean. I just told you that the state has charged you with robbery in the first degree and conspiracy to commit robbery in the first degree.

"[The Defendant]: So, I'm being charged with that right now?

"The Court: Yes. So, it sounds like . . . there's also some other stuff. So, this is what we're going to do, sir. I'm going to continue your case to allow you to have another conversation with your attorney, and then I'm also going to just make sure . . . I'm going to ask Attorney McMahon in those subsequent conversations that I anticipate you're having, if there's any conversations that you have that lead you to think that maybe this defendant doesn't understand the proceedings against him or assisting in his defense that you'll bring that to the court's attention. It's not apparent to me at this point, but it could be something that might require further discussion in the future, okay."

McMahon agreed to proceed in the manner outlined by the court; however, the defendant responded: "But I don't understand what I'm being charged with right now." The defendant listed the statutory provisions that the state had alleged he violated in the original information and stated his belief that he had not been charged with robbery in the first degree.[4] He also stated that

[4] In the original information, filed on October 1, 2020, the state charged the defendant with violating General Statutes § 53a-136a, which the information described as "robbery by carjacking"; carrying a dangerous weapon in violation of General Statutes § 53-206; and risk of injury to a child in violation of General Statutes § 53-21. Notably, § 53a-136a is not a separate crime but, rather, a sentence enhancement provision for a robbery of an occupied motor vehicle. See *State* v. *Edwards*, 100 Conn. App. 565, 596–97, 918 A.2d 1008, cert. denied, 282 Conn. 928, 926 A.2d 666 (2007), and cert. denied, 282 Conn. 929, 926 A.2d 667 (2007); see also *State* v. *Orlando F.*, 233 Conn. App. 1, 9 n.10, 338 A.3d 379, cert. denied, Conn. , A.3d (2025).

he did not understand how he could be charged with robbery in the first degree if he did not "reach the criteria" of that offense.

The court responded: "[W]e're going to move this to May [13, 2021] at 10:30 [a.m.]. And so, what I want is to make sure we have some clarity on . . . it seems like you have some questions with regard to the charges. And I'm going to give you a chance to speak with Attorney McMahon because it sounds like, from the questions you're asking, that that is necessary." The defendant again expressed that he did not understand how he was being charged with robbery in the first degree given the offenses that he had been charged with in the original information. The following colloquy then ensued:

"The Court: Okay. So, we're going to have an opportunity for you to speak with your attorney. At this point, we're not focused on what we had intended to do today. There are some issues that have come up. Certainly, we can discuss them further on May 13th. The state can change the charges to substitute an information, okay. And that was what I understood to be part of the plea agreement. If the plea agreement is something that the defendant doesn't wish, the state can proceed on the initially filed charges. So, that is something that we'll discuss on that May 13th date at 10:30 a.m. Okay?

"[The Defendant]: Will you please say that again? So, the state can change the charges at any given time.

"The Court: Well, what we intended to do, from what I understand, is, there was a plea agreement. The state made an offer to resolve your case. And the offer contemplated pleas to the charges that I mentioned. So, since you're not making a decision today, we don't have to address that issue. So, Attorney McMahon, you can talk to [the prosecutor] about what the intended charges

are, what the plea agreement is. You can have a conversation with your client. We'll go back on the record on May 13th at 10:30 a.m."

At the hearing on May 13, 2021, the trial court permitted the defendant to read a written statement he had prepared, in which he challenged the state's ability to charge him with robbery in the first degree by way of its substitute information. Specifically, the defendant argued: "The prosecutor is illegally subject to on my original accused criminal offense of [General Statutes §] 53a-136a and [General Statutes §] 53-206 and . . . [General Statutes § 53-21] to new criminal offenses of [§] 53a-134 (a), robbery, first degree, firearm threatening, [§] 53a-134 (a) (4), conspiracy to commit robbery, first degree, firearm threat. That clearly deprives me of my due process cause under the fourteenth amendment and the federal constitution and violates my Supreme Court and Appellate Court laws of Connecticut. I refer to case law [*State* v. *Dash*, 242 Conn. 143, 150, 698 A.2d 297 (1997)] and [*State* v. *Edwards*, 100 Conn. App. 565, 568, 918 A.2d 1008, cert. denied, 282 Conn. 928, 926 A.2d 666 (2007), and cert. denied, 282 Conn. 929, 926 A.2d 667 (2007)]. Both case law specifically indicate [§] 53a-136a is not a separate offense or shall be imposed as a prosecution as a separate offense or replaced as a separate criminal offense because this statutory section is a sentence enhancement provision rather than a separate offense, and the purpose of [§] 53a-136a . . . is not to create a separate offense or to impose criminal liability on the legislature fail to do so. So, with that being said, Your Honor, I'd like for you to look into that, if you can, on recess or something like that and back to me as soon as possible. Thank you for your time."

The trial court responded: "Okay. Thank you. So, I certainly, when somebody cites case law, I want to make sure that I understand what's being argued. So,

at this point, I've listened to the cases that you've cited and the things that you said, and I'm concerned that maybe there might be some issues that would prevent you from understanding what's happening here or your ability to assist in your defense, but I'm not sure. I don't know whether Attorney McMahon has anything that he wants to weigh in at this time, but I do want to respond to what you were saying, Mr. Trice. But before I do, I want to hear from your attorney."

McMahon responded: "Yeah, Your Honor, I don't share that position. I just think he's against the offer. That's how I feel." The court then explained to the defendant that one of the cases he had cited in support of his argument involved a statutory provision with which the defendant was not being charged. No other concerns were raised regarding the defendant's competence throughout the remaining pretrial proceedings or at trial.

The following legal principles guide our analysis of this claim. "Because the conviction of an accused person while he is legally incompetent violates due process; *Pate* v. *Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); a trial court must be vigilant to the possibility that a competency evaluation may be required in the case of a defendant who . . . engages in conduct during the trial [or pretrial proceedings] that calls his competency into question." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 522–23, 973 A.2d 627 (2009). "[General Statutes §] 54-56d establishes the procedural requirements for competency determinations. A court may undertake a competency examination upon a motion by the defendant or the state and in some circumstances must evaluate the defendant's competency sua sponte." *State* v. *Johnson*, 253 Conn. 1, 22, 751 A.2d 298 (2000); see also General Statutes § 54-56d (c) ("[i]f, at any time during a criminal

proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency"). Pursuant to § 54-56d (a), "a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense."

"[A]s a matter of due process, the trial court is required to conduct an independent inquiry into the defendant's competence whenever [the court becomes aware of] substantial evidence of mental impairment. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court. . . . Evidence is substantial if it raises a reasonable doubt about the defendant's competency." (Internal quotation marks omitted.) *State* v. *Connor*, supra, 292 Conn. 523. "In determining whether a defendant's competence has been sufficiently called into doubt so as to necessitate a hearing on the matter, the United States Supreme Court has cautioned that there is no single approach or factor that is most important in establishing competency or lack thereof. . . . [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." (Citation omitted; internal quotation marks omitted.) *State* v. *Dort*, 315 Conn. 151, 163, 106 A.3d 277 (2014).

We review the trial court's determination of whether to conduct an inquiry into the defendant's competence

under the abuse of discretion standard. *State* v. *Paulino*, supra, 127 Conn. App. 61. We note that the trial judge "is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant." (Internal quotation marks omitted.) *State* v. *Connor*, supra, 292 Conn. 523–24. In addition, although a defendant whose competence has been challenged may not be personally canvassed through the questioning of his or her attorney; *State* v. *Dort*, supra, 315 Conn. 182; "a trial court is entitled to consider trial counsel's assertions that his client is competent." *State* v. *Paulino*, supra, 65.

On appeal, the defendant cites several instances during the pretrial proceedings that he claims should have prompted the trial court to order a competency hearing: (1) he "interject[ed] in court consistently after his first appearance, making requests for a speedy trial and claiming to have problems with his attorney"; (2) he filed motions on his own behalf despite being represented by counsel; (3) he "raise[d] the problem that he [did] not understand what the charges [were] against him at each court date leading up to his waiver of the jury trial"; and (4) he stated that he did not understand the prosecutor's ability to amend the charges against him. The defendant contends that, because the trial court did not conduct an inquiry into his competence, he involuntarily and unknowingly rejected multiple plea offers, pleaded not guilty, waived his right to a jury trial, and chose to testify.[5] We disagree.

[5] As noted in part III of this opinion, the state made two separate plea offers to the defendant: (1) an offer discussed at hearings on April 8, May 13 and June 24, 2021, under which he would receive a sentence of eight years of incarceration followed by five years of special parole if he pleaded guilty to the charges of robbery in the first degree and conspiracy to commit robbery in the first degree; and (2) an offer discussed at a hearing on September 2, 2022, under which he would receive a sentence of five years of incarceration followed by ten years of special parole if he pleaded guilty to larceny in the first degree.

Although the trial court expressed some initial concern regarding the defendant's competence, it is apparent from our review of the record that the court did not believe that the defendant's conduct rose to the level of substantial evidence of mental impairment. At the pretrial hearing on April 8, 2021, after the defendant questioned what he was being charged with, the court asked McMahon to bring to the court's attention any concerns he had about whether the defendant understood the proceedings or was able to assist in his defense. In doing so, however, the court stated: "*It's not apparent to me at this point*, but it could be something that *might* require further discussion in the future, okay." (Emphasis added.) Similarly, at the hearing on May 13, 2021, after the defendant argued that the state's filing of a substitute information violated his right to due process, the court stated in relevant part: "I'm concerned that *maybe* there *might* be some issues that would prevent you from understanding what's happening here or your ability to assist in your defense, *but I'm not sure*." (Emphasis added.) While the court appropriately expressed its uncertainty, the court's observations of the defendant's conduct did not sufficiently call into doubt the defendant's competence so as to necessitate a hearing on the matter.

Moreover, the trial court's initial concern subsequently was dispelled by McMahon's assertion that he did not "share that position" regarding the court's uncertainty about the defendant's competence and that he believed the defendant was "just . . . against the offer." The court reasonably took McMahon's opinion into account. See *State* v. *Paulino*, supra, 127 Conn.

The defendant waived his right to a jury trial on November 9, 2022, after the court, *Gold*, *J.*, canvassed him to ensure that he was knowingly, voluntarily, and intelligently waiving that right. The defendant also was canvassed by the court, *Schuman*, *J.*, on his decision to testify immediately before taking the witness stand on January 25, 2023.

App. 65 ("a trial court is entitled to consider trial counsel's assertions that his client is competent"); see also *State* v. *Burgos*, 170 Conn. App. 501, 530, 155 A.3d 246 ("a failure by defense counsel to indicate that the defendant had any difficulty in comprehending the nature of the proceedings or in assisting in his own defense provides substantial evidence of the defendant's competence"), cert. denied, 325 Conn. 907, 156 A.3d 538 (2017).

In addition, our review of the record reflects that the defendant's proclaimed misunderstanding of the charges against him was not indicative of diminished mental capacity but, rather, related to his disagreement with the state's ability to file different charges against him in a substitute information. Further, the defendant's opposition to the state's filing of a substitute information was based on an apparent misunderstanding of the law. "[A] lack of legal expertise is not indicative of incompetence." *State* v. *Paulino*, supra, 127 Conn. App. 66; see also *State* v. *Connor*, supra, 292 Conn. 524 (court was not required to order competency evaluation where "conduct reflect[ed] more on the defendant's lack of legal experience and expertise than it [did] on his mental condition"); *State* v. *Jeremy D.*, 149 Conn. App. 583, 591, 90 A.3d 979 ("a lack of understanding or mere confusion concerning criminal proceedings does not amount to mental incompetence"), cert. denied, 312 Conn. 913, 93 A.3d 596 (2014). Similarly, many of the defendant's interjections in court throughout the pretrial proceedings, including his repeated requests for a speedy trial and his filing of motions on his own behalf, appear from the record to be based on his dissatisfaction with McMahon; see part III of this opinion; rather than reflecting evidence of mental impairment.

Finally, the defendant's behavior must be viewed in light of the other parts of the record that reflect his ability to follow court rules and procedures during the remainder of the trial. See *State* v. *Connor*, supra, 292

Conn. 524 ("to the extent that [certain] examples of the defendant's conduct might be viewed as suggestive of a diminished mental capacity, they must be considered in the light of other evidence indicating that the defendant was, in fact, competent, including evidence of his ability to follow court rules and procedures and the trial court's directives"). Other parts of the record, including the defendant's own testimony and the comments from both the trial court and the prosecutor, who had the opportunity to view the defendant's behavior in person, reflect that the defendant understood the proceedings and was able to assist in his defense. At the conclusion of trial, after making its guilty finding, the court noted that "[the defendant] has behaved himself very well in court throughout this entire trial and has been very respectful to the court." Similarly, when the prosecutor spoke at the defendant's sentencing, he stated: "I want to put on the record that [the defendant] as a young man has shown himself to be and has the capability to be a very articulate and well-behaved gentleman. He has been nothing but polite during his entire proceedings. He has actually been polite before the court has come out and engaging in conversations about random things. I say that because he has a lot of potential." Consistent with its earlier observation, the court remarked that "[t]he defendant is an articulate person who has the ability to become a productive citizen. Up until today, when he spoke out of time,[6] he's been very polite and well behaved in court . . . ." (Footnote added.)

Accordingly, we conclude that, in the absence of substantial evidence of mental impairment, the trial court

[6] The defendant interrupted the prosecutor's sentencing remarks on a single occasion to object to what he perceived as "false information." After the court explained to the defendant that he needed to object through his attorney and that he would have his own opportunity to speak subsequently in the proceeding, the defendant responded that he understood and he did not interrupt further.

did not abuse its discretion in declining to conduct an independent inquiry into the defendant's competence. Accordingly, the defendant has failed to prove that his constitutional due process right to a fair trial was violated, and his claim fails to meet the third prong of *Golding*.

II

Next, we address the defendant's claim that the evidence presented at trial was insufficient to support his conviction of robbery in the second degree. We are not persuaded.

We begin by setting forth our standard of review and the relevant legal principles. "When reviewing sufficiency of the evidence claims, this court applies a two part test. . . . First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [fact finder] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . When this inquiry involves circumstantial evidence, [i]t is not one fact, but the cumulative impact of a multitude of facts which establishes guilt . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *King*, 350 Conn. 303, 314–15, 324 A.3d 81 (2024). "[W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty." (Internal quotation marks omitted.) Id., 315.

"In order for a [fact finder] to find a defendant guilty of robbery in the second degree, it would have to find that in the course of committing a larceny, the defendant used or threatened the immediate use of physical force on another person for the purpose of compelling

the owner of such property to deliver up the property and in the course of the commission of the crime or of the immediate flight therefrom displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument." (Internal quotation marks omitted.) *State* v. *Hall-George*, 203 Conn. App. 219, 227, 247 A.3d 659, cert. denied, 336 Conn. 934, 248 A.3d 709 (2021); see General Statutes § 53a-135 (a) (1) (B).[7]

The following additional facts and procedural history are relevant to this claim. At trial on the first part of the operative information, the state presented testimony from the victim, McCullough, and McOuat. In addition, the state entered into evidence footage from McOuat's body camera (body camera), the facsimile firearm that had been found on the defendant, a map depicting the area of Hartford where the robbery took place and where the victim's car was recovered, and a photograph of the defendant that was taken at the time of his arrest.

At the conclusion of the state's case, defense counsel moved for a judgment of acquittal, which the trial court denied. The defense then presented its case, during which the defendant testified on his own behalf. At the outset, the defendant denied stealing the victim's car. He admitted to being in the driver's seat of the car when he encountered the police and having the facsimile firearm that the officers recovered, but he denied having the victim's wallet on him. According to the defendant's version of events, V had been the one who initially took

[7] General Statutes § 53a-135 (a) provides in relevant part that "[a] person is guilty of robbery in the second degree when such person (1) commits robbery, as defined in section 53a-133, and . . . (B) in the course of the commission of the crime or of immediate flight therefrom, such person or another participant in the crime displays or threatens the use of what such person represents by such person's words or conduct to be a deadly weapon or a dangerous instrument . . . ."

the car, the defendant had no reason to believe that it was stolen, and V had given him the firearm when they were in the car. After the defendant completed his testimony, the defense rested its case. The defendant subsequently renewed his motion for a judgment of acquittal, which the court again denied.

At the conclusion of trial, the trial court, *Schuman*, *J.*, found the defendant guilty of robbery in the second degree. In its oral decision, the court made certain factual findings and identified the evidentiary basis for its guilty finding, stating in relevant part: "[T]here's no question that a robbery of the victim . . . occurred. And it was robbery in the second degree because the suspect threatened to use what . . . by his conduct, he represented to be a deadly weapon. The victim felt a . . . metal object that felt like a gun in the back of his head.

"I've examined the gun myself and . . . although it's a facsimile gun, it does have the feel of a real gun. And there was thus, sufficient evidence that the suspect threatened by his conduct . . . to use a deadly weapon. So, the question here, in this trial, was primarily whether it was the defendant who committed the crime. Here is the evidence that I find proves that it was the defendant:

"First and foremost, the defendant is found driving the victim's car only about ten to eleven minutes after the crime within three blocks of the crime. It's true that there was enough time for someone else to steal the car and leave it in the area of where the defendant then entered it and started driving, but this is a most unlikely scenario at 4 a.m. . . . And there is no evidence to support this other theory. Further, the distance traveled by the car, once it is stolen, is a distance that is certainly possible to drive during the ten minutes before it is found . . . before the car is found on the side of the street. Second, even if I don't consider other evidence

. . . that tends to describe the suspects, we do know, without dispute, that the victim felt that there were two people involved in a crime. And there were two people, in fact, stopped by the police ten to eleven minutes later. This tends to show that the defendant, because he was with someone else, was one of the robbers and matched at least that minimal description of the suspects. Third, the defendant is found in possession of a metal gun. It turns out to be a facsimile gun. That is consistent with the victim's description of an item, of an object that felt like a firearm. Fourth, and critically, the victim's wallet is found on the defendant's person. We know that because Officer McCullough testified to it, and I have closely examined the [body camera footage] . . . . [T]he video tends to corroborate and support the officer's testimony in court that the wallet was found on the defendant's person.

"So, in sum, the defendant is found driving the victim's car, in the vicinity of the robbery, about ten minutes after the robbery, with another person, as described by the victim, in possession of a metal cap gun, that's consistent with the victim's description of an object that was put in the back of his head, and critically, with the victim's wallet on his person.

"The likelihood that all these events are just a coincidence seems to the court to be . . . infinitesimal and minute. Now, the defendant did testify to a different version of events. And I've considered that. . . . The defendant's testimony as to why he was found in the driver's seat of a stolen car with a gun similar in respect to the object placed in the . . . back of the victim's head was incredible and unbelievable. At times, I also found the defendant's testimony evasive . . . . So, the defendant's testimony did nothing to weaken the state's case. And, in fact, because of its incredulity, tends to strengthen it. In conclusion, I find that the state has

proven robbery in the second degree beyond a reasonable doubt. It is true that there is . . . more that the police could have done in this case . . . [b]ut there is sufficient evidence here because of all the circumstantial evidence to prove count one, robbery in the second degree, beyond a reasonable doubt."

On appeal, the defendant contends that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that (1) he intended to commit a larceny, and (2) he used or threatened the immediate use of physical force to carry out the larceny and displayed or threatened the use of what was represented by words or conduct to be a deadly weapon or dangerous instrument. We address each of these arguments in turn.

A

The defendant first claims that the state failed to establish that he intended to commit a larceny. More specifically, he argues that "the state did not offer any direct evidence that the defendant was the perpetrator who stole the victim's car in this case," and, therefore, the trial court was "forced to speculate about whether evidence at trial established the defendant's guilt beyond a reasonable doubt." We are not persuaded.

The state presented the following evidence at trial to establish the defendant's identity as the perpetrator who stole the victim's car. McOuat testified that he discovered the victim's vehicle on Sargeant Street, which was in the vicinity of where the robbery took place on Sigourney Street,[8] only ten minutes after the robbery had occurred. McCullough testified that he arrived to assist McOuat shortly thereafter, and both officers testified that they observed the defendant in the driver's seat of the victim's vehicle.

[8] McCullough explained that Sargeant Street was two or three blocks away from Sigourney Street, which was consistent with the map that the state had introduced into evidence.

In addition, McCullough testified that he discovered the victim's wallet and a facsimile firearm in the defendant's pockets during a patdown. McOuat testified that he was present when McCullough recovered both of those items, and McOuat's body camera recorded the officers' observations of these items after the patdown had occurred. McCullough described the facsimile firearm as "like a little pistol, a metal pistol," which fit the description of the object that was put to the back of the victim's head during the robbery. During the victim's testimony, he confirmed that the object was metal and that it felt "like a firearm," and he recalled telling officers that it "felt like a gun but not a real gun."

On the basis of the foregoing evidence, the trial court reasonably could have concluded, as it did, that the defendant was the individual who stole the victim's car. In addition, because "[t]he [fact finder] may infer that a defendant intended the natural consequences of his actions"; *State* v. *Stephenson*, 207 Conn. App. 154, 180, 263 A.3d 101 (2021), cert. denied, 342 Conn. 912, 272 A.3d 198 (2022); see also, e.g., *State* v. *Papandrea*, 120 Conn. App. 224, 230, 991 A.2d 617 (2010), aff'd, 302 Conn. 340, 26 A.3d 75 (2011); the court reasonably could have inferred that the defendant possessed the requisite intent to find him guilty of robbery in the second degree.

Although the defendant points out the lack of direct evidence of the defendant's identity based on the victim's testimony at trial that he was unable to identify the perpetrator,[9] the cumulative force of the foregoing circumstantial evidence is more than sufficient to fulfill the state's burden of establishing the defendant's guilt beyond a reasonable doubt. "[I]t does not diminish the

[9] At trial, the following colloquy took place between the prosecutor and the victim:

"[The Prosecutor]: When that happened, did you . . . were you able to see the individual?

"[The Victim]: No. I could not . . . I can't identify him, so."

probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." (Internal quotation marks omitted.) *State* v. *Ramsey*, 352 Conn. 210, 232, 336 A.3d 455 (2025); see also *State* v. *Hinton*, 352 Conn. 183, 194, 336 A.3d 62 (2025) ("[w]e do not draw a distinction between direct and circumstantial evidence so far as probative force is concerned" (internal quotation marks omitted)).

In addition, we reject the defendant's attempt to discount McCullough's testimony that he discovered the victim's wallet on the defendant. The defendant highlights testimony from McCullough that he was unable to recognize the defendant in court on the day of trial[10] and the fact that McCullough did not document in his police report that he found the wallet on the defendant. Regardless of that evidence, however, McCullough specifically testified that he recovered the victim's wallet from one of the defendant's pockets during his patdown of the defendant,[11] and McOuat's testimony and body camera footage corroborated McCullough's version of events. The trial court, as the fact finder in this case, found McCullough's testimony credible, and we will not disturb this credibility determination on appeal. See, e.g., *State* v. *Shin*, 193 Conn. App. 348, 359, 219 A.3d

[10] When the prosecutor asked McCullough: "Do you see the person in court today . . . who you pulled out of the car," he responded: "Honestly . . . he had his head covered in a mask . . . a medical mask on . . . and it's been three years. I couldn't possibly recall his exact identity."

[11] Specifically, after McCullough testified about finding the facsimile firearm on the defendant, the following colloquy took place between the prosecutor and McCullough:

"[The Prosecutor]: Did you recover anything else on [the defendant]?

"[McCullough]: [The victim's] wallet was in . . . one of his pockets, also.

"[The Prosecutor]: [The victim's] wallet was in [the defendant's] pocket?

"[McCullough]: Yes, sir.

"[The Prosecutor]: How did you know it was [the victim's] wallet?

"[McCullough]: We went to go identify the driver, to find out who he was, and when we opened the wallet, [the victim's identification] was right there, so."

432 ("[b]ecause it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations" (internal quotation marks omitted)), cert. denied, 333 Conn. 943, 219 A.3d 374 (2019).

Moreover, to the extent the defendant argues that there was no evidence that he, as opposed to V, had been the perpetrator who stole the victim's car, we disagree.[12] The testimony from McCullough and McOuat established that the defendant—not V—was found in the driver's seat of the victim's stolen car with the victim's wallet and a facsimile firearm in his pockets. Although there was evidence that V was found with a backpack containing two large knives with steel blades, the evidence also demonstrated that the defendant was the one found with a facsimile firearm. The court reasonably found that that firearm—not the knives found with V—fit the victim's description of the object that had been put to the back of his head. At trial, the victim responded in the affirmative when the prosecutor asked if the object felt "like a firearm." In addition, the victim testified: "I recall telling [the officers] that . . . I don't think it was a real gun." Similarly, he responded in the affirmative when the prosecutor asked whether he told the officers that it "felt like a gun but not a real gun." Accordingly, on the basis of this evidence, the trial court reasonably concluded that the defendant, rather than V, was the individual who stole the victim's car.

In addition, although the trial court did not explicitly rely on such evidence in support of its decision, McCullough testified that the victim provided a physical description to differentiate between the two suspects. Specifically, McCullough testified that the victim had

[12] In support of this argument, the defendant references his own testimony that V had stated he was going to ask the victim for a ride and that, a couple of minutes later, V drove up in the victim's car. The court, however, found the defendant's testimony "incredible and unbelievable."

"described the one as fat and one as skinny," and "[h]e described the one with the weapon as a . . . fat person."[13] McCullough further testified that, on the basis of his own observations, he would describe V as "slim" and the defendant as "[h]eavier set than [V]."[14] This evidence further supports the court's conclusion that the defendant, rather than V, had been the individual who approached the victim, put a firearm to the back of his head, and stole his car.

B

The defendant next argues that the state "did not offer any evidence that the defendant used or threatened the immediate use of physical force, nor displayed or threatened the use of what was represented by words or conduct to be a deadly weapon or dangerous instrument."

Section 53a-135 (a) provides in relevant part: "A person is guilty of robbery in the second degree when such person (1) commits robbery, as defined in section 53a-133, and . . . (B) in the course of the commission of the crime or of immediate flight therefrom, such person . . . displays or threatens the use of what such person represents by such person's words or conduct to be a

[13] Although the defendant challenges the propriety of the trial court's admission of McCullough's testimony as to the victim's description of the suspects; see part IV of this opinion; "[e]stablished case law commands us to review claims of evidentiary insufficiency in light of *all* of the evidence [adduced at trial]." (Emphasis added; internal quotation marks omitted.) *State* v. *Waters*, 214 Conn. App. 294, 302, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022); see also id. ("even improperly admitted evidence may be considered . . . since [c]laims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error" (internal quotation marks omitted)); *State* v. *Ervin B.*, 202 Conn. App. 1, 9 n.6, 243 A.3d 799 (2020) ("[i]n assessing the sufficiency of the evidence . . . we consider *all* evidence admitted at trial" (emphasis in original)).

[14] During his testimony, the defendant acknowledged that V is thinner than he is.

deadly weapon[15] or a dangerous instrument[16] . . . .'' (Footnotes added.)

To be convicted of robbery in the second degree, a defendant need not actually have been armed with a deadly weapon or a dangerous instrument. See *State* v. *Hall-George*, supra, 203 Conn. App. 230. Instead, ''a defendant need only represent by his words *or* conduct that he is armed with a deadly weapon or dangerous instrument.'' (Emphasis in original.) Id. Even in cases involving a conviction of robbery in the first degree under General Statutes § 53a-134 (a) (4), which ''contains language almost identical to the language of § 53a-135 (a) (1) (B)[17] . . . a defendant need not have an operable firearm; in fact, he need not even have a gun. He need only *represent* by his words or conduct that he is so armed.'' (Emphasis in original; footnote added; internal quotation marks omitted.) Id., 229–30; see also *State* v. *Bell*, 93 Conn. App. 650, 670–71, 891 A.2d 9 (defendant held object under jacket that '' 'looked like a gun' ''), cert. denied, 277 Conn. 933, 896 A.2d 101 (2006); *State* v. *Ingram*, 43 Conn. App. 801, 807, 687 A.2d 1279 (1996) (toy gun seized from defendant's apartment was similar to that displayed during robbery), cert.

[15] General Statutes § 53a-3 (6) defines ''[d]eadly weapon'' in relevant part as ''any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles. . . .''

Although § 53a-3 (6) has been amended since the events at issue; see Public Acts 2025, No. 25-29, § 8; that amendment is not relevant to this appeal. We therefore refer to the current revision of § 53a-3 (6).

[16] General Statutes § 53a-3 (7) defines ''[d]angerous instrument'' in relevant part as ''any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . .''

[17] In *Hall-George*, this court explained: ''The difference between the two statutes is that § 53a-135 (a) (1) (B) covers the display or threatened use of deadly weapons and dangerous instruments, as opposed to only the display or threatened use of firearms.'' *State* v. *Hall-George*, supra, 203 Conn. App. 229.

denied, 240 Conn. 908, 689 A.2d 472 (1997); *State* v. *Arena*, 33 Conn. App. 468, 471, 636 A.2d 398 (1994) (defendant held object inside bag that "looked like a gun"), aff'd, 235 Conn. 67, 663 A.2d 972 (1995).

The state presented the following evidence at trial to establish that the defendant had used or threatened the immediate use of physical force and displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument. The victim testified: "I was getting out of my car, and somebody came behind me and stuck something in the back of my head and told me to get down." He testified that "[t]hey told me to get on the ground," and he laid on the ground. He further testified that "[they] told me to do a lot of commands and stuff like that," but he did not remember the details of those commands. The victim explained that, when the person put the object to the back of his head, he felt "scared" because "[he] didn't want to get killed."

During his direct examination, the victim initially testified that he did not know what object was put to the back of his head. Immediately thereafter, however, the prosecutor asked: "[D]o you recall if it felt like a firearm or not, by the way, or no?" The victim responded: "Yeah." When the prosecutor asked: "[D]o you recall . . . did it feel like one or not?" the victim responded: "Yes, it did."

On cross-examination, the victim again indicated that he did not know what the object was, as he did not turn around to see what was there, but he confirmed that the object "felt metal." On redirect examination, the victim testified that he did not recall telling the police that it was a metal object, explaining: "I don't recall what I told [the officer] that night because it's been so long ago." When the prosecutor asked: "Do you recall telling the officers that . . . you knew that

it wasn't a real gun?," the victim responded: "I recall telling them that . . . I don't think it was a real gun." When the prosecutor similarly asked: "Do you remember telling them . . . that it felt like a gun but not a real gun?," the victim responded: "Yes." On recross examination, the victim answered in the affirmative that he did not "actually see the object," that he did not know what it was, and that he "just felt something that felt like metal."

In addition, as set forth in part II A of this opinion, the state presented testimony from McCullough and McOuat that the defendant was found in the driver's seat of the victim's car only ten minutes after the incident occurred with a facsimile firearm in his pocket. McCullough explained that the facsimile firearm was "like a little pistol, a little metal pistol." He also described it as "a heavy metal toy pistol," and "a cap gun or cap pistol . . . toy gun."

On the basis of this evidence, the trial court reasonably could conclude, as it did, that the defendant threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument, i.e., a gun, by putting a facsimile firearm to the back of the victim's head and ordering him to get on the ground, immediately prior to stealing his car.

The defendant argues that "[t]here is no evidence to show a nexus connecting the metal object that the [victim] felt on the back of his head to the facsimile firearm found on the defendant's person." We disagree. The victim's testimony that the object was metal was consistent with McCullough's testimony describing the facsimile firearm found on the defendant as being metal, specifically, "like a little pistol, a *metal* pistol," and "a heavy *metal* toy pistol." (Emphasis added.) In addition, although the defendant attempts to highlight the victim's testimony that he did not know what the object

was,[18] the victim responded in the affirmative when the prosecutor asked if the object felt "like a firearm" and confirmed that he told officers that it "felt like a gun but not a real gun . . . ." Given the similarities in the descriptions of the items, the trial court reasonably could conclude that there was a sufficient nexus between the facsimile firearm found on the defendant's person and the object put to the back of the victim's head during the robbery.

In addition, we reject the defendant's suggestion that the evidence was insufficient because the victim did not see or directly observe the object put to the back of his head. Although the victim did not *see* the object, he could *feel* that the object felt "like a firearm . . . ." To the extent that the defendant attempts to highlight the victim's testimony that he told the police that the object did not feel like a "real gun," we emphasize that the victim also testified that he felt "scared" because "[he] didn't want to get killed."

Moreover, although the defendant's command to the victim to "get on the ground" did not in and of itself express a threat of physical force or express that the defendant was armed with a firearm, that statement must be taken together with the defendant's conduct in putting the facsimile firearm to the back of the victim's head. See *State* v. *Hall-George*, supra, 203 Conn. App. 231 (describing cases in which "[t]he defendants' conduct *and* words . . . were sufficient for the juries to

[18] To the extent that the victim provided conflicting testimony in this regard, "[i]t was within the province of the court to resolve this inconsistent testimony." *Delena* v. *Grachitorena*, 216 Conn. App. 225, 233, 283 A.3d 1090 (2022); see also *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony"); *Hospital Media Network, LLC* v. *Henderson*, 209 Conn. App. 395, 430, 268 A.3d 657 (2021) ("a trier of fact is free to credit one version of events over the other, even from the same witnesses" (internal quotation marks omitted)), cert. denied, 343 Conn. 916, 274 A.3d 867 (2022).

reasonably infer that the defendants wanted the victims to *think* that they had firearms" (emphasis in original)).

Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the trial court reasonably could have found beyond a reasonable doubt that the defendant represented that he had a deadly weapon or a dangerous instrument, i.e., a firearm, and that, by putting it to the back of the victim's head and ordering him to get on the ground, the defendant threatened, by his conduct, to use that firearm if the victim did not comply. Accordingly, the evidence was sufficient for the court to find the defendant guilty of robbery in the second degree in violation of § 53a-135 (a) (1) (B).

III

The defendant next claims that the trial court deprived him of his right to self-representation when it failed to canvass him regarding the waiver of his right to counsel after he had made a clear and unequivocal request to represent himself and, further, that the court's failure to canvass him amounts to structural error. We are not persuaded.

The following additional facts and procedural history are relevant to our resolution of this claim. At the defendant's first court appearance in the present case, on October 1, 2020, the court appointed the Office of the Public Defender to represent the defendant. On December 7, 2020, McMahon filed an appearance in lieu of the Office of the Public Defender to serve as the defendant's assigned counsel.

The defendant claims that he asserted his right to self-representation in court during the pretrial hearing on April 8, 2021. On that date, the trial court, *Baldini*, *J.*, held a virtual hearing to address a plea offer that had been extended by the state. After the court recited

the state's plea offer on the record, the following colloquy took place:

"The Court: . . . Attorney McMahon, did you get a chance to talk to your client about that offer?

"[Defense Counsel]: Yes, Your Honor.

"The Court: Okay. And Mr. Trice, did you have enough time to speak with your attorney about that offer?

"[The Defendant]: I did . . . I would like to speak to the court alone. . . .

"The Court: Okay. So, what I want to do is . . . you said that you want to say something. Before you say something, I always tell people that, if you say something, that it could be used against you. So, if you start talking about the case, those are all things that could be used against you. Do you understand that?

"[The Defendant]: Yes, Your Honor.

"The Court: And did . . . you want to say anything to your client, Attorney McMahon?

"[Defense Counsel]: Yes, Your Honor. Just for the record, and he knows this, I think very strongly he should not discuss the case in any way, shape, or form. Obviously, whether or not he pleads is totally up to him. I would advise him not to say anything. Having said that, he has the right to address the court if he so desires. . . .

"The Court: All right. Mr. Trice . . . what I want to know is whether or not you wish to accept or reject that offer?

"[The Defendant]: Your Honor, I reject. And I would like to speak upon my behalf . . . I want to represent myself, and I want to fire my attorney, Mr. McMahon.

"The Court: Okay. So, there's a couple of things that are going on that you just indicated. So, here's where we're at. You got the offer that was extended to you, right?

"[The Defendant]: Yes.

"The Court: Okay. Did you have enough time to talk to your attorney about that offer?

"[The Defendant]: Not at all. I tried to address the situation. And I did research upon myself . . . upon the alleged criminal offense I'm being charged with. And it seems like he's my prosecutor against me. So, I tried to talk . . . go over multiple times with him on different occasions about my innocence and he never . . . he never came to me, and we discussed these about my innocence. . . .

"The Court: . . . [Y]our attorney doesn't have the burden of proving your innocence. The state has the burden of proving your guilt beyond a reasonable doubt, which is the highest legal standard, okay? So, there's no requirement that your innocence be proven. Your attorney can provide defenses. Your attorney can't create facts. The facts are what they are. The evidence is what it is. And what I just want to make sure is, this is a big decision. So, the fact that . . . a lot of times, people come into court on the day when it's accept or reject and they express that they're not happy with their attorney, but what they're really not happy with is the offer. And so, I want to make sure that your attorney is somebody who has appeared in front of this court multiple times, so I am familiar with him and the work that he does. Unfortunately, defense attorneys sometimes have the difficult job of conveying bad news to defendants. In this situation, any offer that involves incarceration I would imagine is not good news, okay. But that's the state's offer to you to resolve your case, and what I'm hearing is that you believe that you are

innocent of this charge, and you have the choice on whether or not you wish to plead guilty. So, if you don't want to plead guilty, your attorney can't make that decision for you. Your attorney can advise you of your options. Can tell you what the evidence is. Can tell you what information he knows about the case, and he can recommend to you whether or not you should take the case to trial, whether you should enter a plea to a charge. I will say that your attorney has been a pretty strong advocate for you. . . . So, I understand that you've made certain representations today. . . .

"You mentioned something about firing your attorney. You have assigned counsel. So, just reminding you that, if you have an assigned attorney, you are not constitutionally allowed to have an attorney that you like, but you are constitutionally entitled to have an attorney that is effective, who can represent you.

"The other issue that you brought up was representing yourself, okay. There are tremendous risks when someone represents themselves because, a lot of times, you will have a mindset. There are things that you think that you want to tell a judge or tell a jury, but there are rules, there are evidentiary rules that it takes years for many people to understand. . . . So, if you don't know what those rules are and you can't effectively present your case, and you represent yourself, you could put yourself in a hugely bad position if your case goes to trial.

"So, I'm just trying to tell you all those things so there are things that you can think about, and you don't have to make a decision today, but it is important for you to understand all of those things because representing yourself . . . you're not kind of separating your emotions from the logic that is necessary. Some people can do it. Most people can't, and it's very difficult. A judge can't help you out. A judge has to always remain right

in the middle, neutral. So, if you're asking a judge, can I do this? Can this get admitted into evidence? The judge can't help you. So, I want you to think about all of those things. Would you like to have some more time to consider everything that I said today?

"[The Defendant]: I understand everything you said today, but I would like to speak on my defense, if you don't mind.

"The Court: Well, the one thing that we're going to do today is, we're addressing the [plea offer]. So, we're not going to try the case, okay. That's the thing, it's like, remember your attorney was correct in saying, you know, I advise you not to say anything. Because today we're not . . . we're not deciding . . . your guilt or your innocence. . . . All we're trying to figure out is whether or not you have made a decision to accept or reject the offer. And maybe you haven't, and maybe you want more time. That's really all we're going to do today.

"[The Defendant]: Well, Your Honor, my attorney . . . [McMahon] make me fear for my life very, very bad. Like, I want to speak upon my behalf in my defense, if you don't mind, please.

"The Court: Okay. So . . . just one moment. So, when you say that you want to speak in your defense, it sounds like you want to talk about your case. And . . . keep in mind, and this is where it makes me really concerned about any efforts that you might want to have to represent yourself because you want to tell your story, right? But, in telling your story, you could say something that you might think is good for you but, in reality, the state might be listening to what you say and might write that down or might ask for a copy of the transcript and use that against you if the case goes to trial, okay. Just remember, you do not have to prove that you're innocent. It's their job. So, a lot of times,

the reasons why a defense attorney just like Attorney McMahon would say . . . don't say anything. . . . [L]et them sustain their burden, their job. Their burden of proof, which is the highest standard, beyond a reasonable doubt. So, if you want to go and start talking about your case, of course, you could do that, but, in fact, you could actually be helping the state with their case, and that's something that sometimes people don't realize that. . . . And let me also remind you that, sometimes when your attorney talks to you about your case and strategy, you might not agree with it, but his experience, the number of cases that he's handled here in this court alone are many. He does a lot of work throughout the state, but he appears here regularly. So, he has some experience with these kinds of cases. Sometimes, you might not agree with his strategy, but that's not a reason in and of itself to allow you to get a new lawyer or be allowed summarily to represent yourself. So, I just want you to know that, too. . . . I told you a lot of things today. So, I'm thinking that maybe we pick another time for you to come back and address your case. . . . I think that's probably . . . a better strategy."

After the defendant asked the trial court about his charges; see part I of this opinion; he expressed that he thought McMahon was "illegally obtaining evidence against [him]" and that McMahon was "going up against [him]" because McMahon "want[ed] [him] to cop out to robbery in the first degree [and] conspiracy to commit robbery in the first degree."

The defendant subsequently stated: "Your Honor, I do not want Mr. McMahon representing me no more." The court responded: "Okay. Well, I haven't had the opportunity to address the issue. I have not been satisfied with what has been presented. I am going to ask you . . . we can address that on the next court date because this is the first time. So, if you refuse to talk

to your attorney, there's no guarantee that you're going to get a new attorney. I went through, I believe in detail today, what I believe to be the options that you have, what the obligations are with your attorney, the risks of self-representation. I believe we can adequately address any issues that you have on the next court date. But I do, given what you presented today . . . I am not going to discuss that issue because it wasn't one that we intended to address today. So, May 13th, 10:30. Happy to address anything on that date."

At the start of the next court date, on May 13, 2021, the trial court stated: "We last spoke on the record on April 8, 2021. And we had some conversations on that date. There is an existing offer to resolve [the defendant's] matter. And the matter was continued to today for additional discussions. So, can we have an update on where things stand?"

McMahon responded: "Yes, Your Honor. My client's advised me that he does wish to reject the offer." The court recited the terms of the plea offer and asked the defendant whether he had received that offer, the defendant responded: "I was told that by my attorney, Your Honor. And last time I was in court, I spoke about me and my attorney always having difficulty between him representing me in a court of law. So, I would like to know if I could read for the record what I wrote down, and thank you." After additional discussion, in which the defendant expressed his dissatisfaction with McMahon, the trial court permitted the defendant to read his written statement challenging the state's ability to charge him with robbery in the first degree by way of its substitute information. As explained in part I of this opinion, the court expressed its concern that "maybe there might be some issues" with the defendant's ability to understand the proceedings or to assist in his defense, given his reliance on inapplicable case law, and McMahon stated that he did not "share that

position" regarding the court's uncertainty about the defendant's competence.

The court then stated in relevant part: "I want to make sure that you understand what's going on here. And I want to make sure that I understand that, if you don't want to accept the offer, that that's what your decision is and that you've had enough time to evaluate it. So, can you respond to that, please?" The defendant responded: "Your Honor, I do not have enough time at all." The court told the defendant that it would give him more time to talk to his attorney and to consider the plea offer, and explained to the defendant that it was ultimately his decision whether he wanted to accept the plea offer. When the court asked the defendant whether he understood, he responded: "Yes."

After additional discussion with the trial court, the defendant asked: "Your Honor, have you ever approved upon me getting new counsel?" The court explained to the defendant, among other things, that asking for a new attorney was "not so simple" and that "there's nothing that I've heard from you or from your attorney that raises the question that your attorney is not doing what he's supposed to be doing on your behalf." The court told the defendant, "we will talk about it on the next [court] date," which it then scheduled for June 24, 2021.

The defendant subsequently filed a pro se motion for a speedy trial, which was dated June 1, 2021. In the substance of that motion, the defendant requested, inter alia, a "motion to dismiss counsel" and a "motion to [appoint] a new counsel," to take place before a speedy trial.

The court addressed the defendant's motion at the hearing on June 24, 2021. The court explained to the defendant that it could not act on the motion for a

speedy trial that the defendant had filed in a self-represented capacity unless McMahon adopted that motion because "hybrid representation" is not permitted pursuant to *State* v. *Gethers*, 197 Conn. 369, 382, 385, 497 A.2d 408 (1985). After the court addressed the state's plea offer that had been discussed at the April 8 and May 13, 2021 hearings, and the defendant confirmed that he was rejecting that offer, the court asked McMahon whether he was adopting the defendant's motion for a speedy trial. McMahon responded: "I am not. He does not want me as his lawyer."

The defendant expressed concerns he had with McMahon's representation of him, stating, inter alia, "I feel like he's not with me; he don't represent me at all," and, "I'm not understanding how I'm being charged with robbery, or I will go to trial with robbery, and, like, I fear for my life right now because Mr. McMahon, he don't help me at all, and I'm not understanding . . . ." After additional discussions between the trial court, the defendant, and McMahon, the defendant asked the court whether it was denying his motion for a new attorney. The court recognized the defendant's "wish to have another attorney represent [him]" and stated that it would "entertain this as a motion for a change of counsel in [the defendant's] matter." The court found that there was not good cause to dismiss McMahon as the defendant's counsel because, inter alia, there had not been a breakdown in the communication so severe that McMahon's ability to represent the defendant was impaired. Accordingly, the court denied the defendant's motion for new counsel.

Subsequently, however, on June 6, 2022, McMahon filed a motion to withdraw his appearance on the ground that the attorney-client relationship had broken down. The court addressed McMahon's motion to withdraw at a hearing on September 2, 2022. After the defendant rejected another plea offer from the state, McMahon addressed the court: "Well, Your Honor, the other

thing is that he no longer wants me as his lawyer. He's made it clear for the past two or three months that he either wants to go pro se or he wants to proceed with another standby counsel. It was my understanding with him that this [plea deal] would resolve the entire matter. He wanted to go forward with me. Obviously, now with this change, I assume that he wants me to withdraw from the case because he's been asking for this for a while." After confirming with both McMahon and the defendant that the attorney-client relationship had broken down, the court granted McMahon's motion to withdraw his appearance.

The trial court then told the defendant, "I've got to figure out who your lawyer's going to be," and explained that it was going to set a new court date and that he probably would be assigned another special public defender.[19] The defendant responded, "Yes, Your Honor," and the court directed an attorney from the Office of the Public Defender to assign a new special public defender for the defendant.

On September 7, 2022, Attorney Jennifer M. Buyske filed an appearance in lieu of McMahon as the defendant's assigned counsel. Thereafter, the defendant did not voice any dissatisfaction with his representation and did not express any desire to represent himself.

The following legal principles guide our analysis of the defendant's claim that the trial court violated his right to self-representation. "The sixth amendment to

[19] Specifically, the court stated: "[W]e'll have to get the [Office of the] Public Defender involved to see if there's another standby counsel, and we will have to get a new date to see if he qualifies for a special public defender and standby counsel, and then we can see where the case is heading, to either canvass him or what the representation is going to be. At the point, this will be excludable time until we figure out what the proper representation is going to be. So, I'm going to give you a new court date, Mr. Trice, so you can meet . . . we'll probably get you a new special public defender, and then you can talk with that lawyer to see where the case is heading. Okay?"

the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. The sixth amendment right to counsel is made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . In *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court concluded that the sixth amendment [also] embodies a right to self-representation and that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." (Internal quotation marks omitted.) *State* v. *Ghant*, 212 Conn. App. 662, 676–77, 276 A.3d 1004, cert. denied, 345 Conn. 901, 282 A.3d 465 (2022). "Article first, § 8, of the constitution of Connecticut also guarantees the right to self-representation by providing: 'In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . .' " *State* v. *Shashaty*, 251 Conn. 768, 771 n.3, 742 A.2d 786 (1999), cert. denied, 529 U.S. 1094, 120 S. Ct. 1734, 146 L. Ed. 2d 653 (2000).

"It is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . .

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in

the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed [as a self-represented party] is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . . In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself . . . . Conversely, once there has been an unequivocal request for self-representation, a court must undertake an inquiry [pursuant to Practice Book § 44-3],[20] on the record, to inform the defendant of the risks of self-representation and to permit him to make a knowing and intelligent waiver of his right to counsel. . . . The inquiry mandated by . . . § 44-3 is designed to ensure the knowing and intelligent waiver of counsel that constitutionally is required." (Citation omitted; footnote in original; internal quotation marks omitted.) *State* v. *Ghant*, supra, 212 Conn. App. 677–78.

Conversely, "[w]hen a defendant's assertion of the right to self-representation is not clear and unequivocal, recognition of the right becomes a matter entrusted to

[20] " 'Practice Book § 44-3 provides: A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

" '(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

" '(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

" '(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

" '(4) Has been made aware of the dangers and disadvantages of self-representation.' " *State* v. *Ghant*, supra, 212 Conn. App. 678 n.3.

the exercise of discretion by the trial court. . . . In the exercise of that discretion, the trial court must weigh into the balance its obligation to indulge in every reasonable presumption against waiver of the right to counsel." (Internal quotation marks omitted.) *State* v. *Paschal*, 207 Conn. App. 328, 335, 262 A.3d 893, cert. denied, 340 Conn. 902, 263 A.3d 387 (2021), cert. denied, U.S. , 142 S. Ct. 1395, 212 L. Ed. 2d 341 (2022).

On appeal, the defendant claims that he clearly and unequivocally invoked his right to self-representation at the April 8, 2021 pretrial hearing when he stated, "I would like to speak upon my behalf . . . I want to represent myself and I want to fire my attorney, Mr. McMahon." The defendant further claims that, despite this clear and unequivocal invocation, the trial court failed to conduct an inquiry pursuant to Practice Book § 44-3, thereby violating his right to self-representation under the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution.[21] The state argues that the defendant did not make a clear and unequivocal request to represent himself, and, in the alternative, even if he did make a clear and unequivocal request to represent himself, the court did not clearly and conclusively deny his request, and the defendant subsequently waived his right to self-representation by accepting the appointment of replacement counsel. We conclude that, even if we assume, without deciding, that the defendant's statement at the April 8, 2021 hearing constituted a clear and unequivocal request to represent himself, the court did not clearly

[21] Although the defendant refers in his appellate brief to the right to self-representation afforded under article first, § 8, of the Connecticut constitution, he has not provided an independent analysis of his state constitutional claim in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Therefore, we limit our review of the defendant's claim to his right to self-representation under the federal constitution. See, e.g., *State* v. *Ghant*, supra, 212 Conn. App. 664 n.1.

and conclusively deny that request and the defendant subsequently waived his right to self-representation.

"Although a court is required to conduct a canvass pursuant to Practice Book § 44-3, once a defendant has clearly and unequivocally invoked his right to self-representation; see *State* v. *Paschal*, supra, 207 Conn. App. 334; our Supreme Court explained in *State* v. *Braswell*, 318 Conn. 815, 842 n.8, 123 A.3d 835 (2015), that there may be some circumstances in which a defendant asserts his right to self-representation but subsequently waives that right before a court clearly and conclusively denies his request. The court in *Braswell* explained: '[If] a trial court has not clearly and conclusively denied a defendant's request to represent himself, the defendant may subsequently waive such a request. But, [if] a court has clearly and conclusively denied the request, the defendant does not waive his right to self-representation by subsequently acquiescing in being represented by counsel or by failing to reassert that right.' Id., 843–44." *State* v. *Ghant*, supra, 212 Conn. App. 679–80; see also *United States* v. *Barnes*, 693 F.3d 261, 271 (2d Cir. 2012) ("even after the right to proceed pro se has been clearly and unequivocally asserted, the right may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether" (internal quotation marks omitted)), cert. denied, 568 U.S. 1113, 133 S. Ct. 917, 184 L. Ed. 2d 704 (2013).

"The court in *Braswell* made clear that '[t]his does not mean, however, that, after a defendant's clear and unequivocal request to represent himself, a trial court may simply ignore such a request and proceed to a critical stage of the proceedings, and thereby avoid any error simply because it did not make a clear and conclusive ruling on the defendant's request. . . . [O]nce a defendant has clearly and unequivocally invoked his right to self-representation, the trial court

is obligated to conduct a canvass in accordance with Practice Book § 44-3 to determine if his waiver of counsel is knowingly and intelligently made. Our decision in this case does not alter that obligation. Instead, it suggests there may be some instances in which a defendant asserts and subsequently waives his right to self-representation before a court clearly and conclusively rules on the defendant's request. In such instances, it is possible that there are circumstances in which the trial court's delay in ruling on the request would not constitute error.' [*State* v. *Braswell*, supra, 318 Conn. 842 n.8].

"Our Supreme Court explained its reasoning behind this rule: 'Although a defendant does not have to reassert his right to self-representation once it has been clearly denied by the court . . . we have never held that there is no obligation to renew such claim [if] the court does not address it. It seems to us that there is a significant difference between a defendant who waives or forfeits his right to self-representation after a clear ruling and one who waives or forfeits the right when there has been no such ruling. In the former situation, it is likely that the waiver or forfeiture is precipitated by the denial. . . . In the latter situation, contrarily, there has been no court action that would suggest that the reassertion of one's right would be futile.' . . . Id., 841 n.8." *State* v. *Ghant*, supra, 212 Conn. App. 680–81.

In the present case, the defendant acknowledges that the trial court did not explicitly rule on his purported request to represent himself. Nevertheless, he argues that the court, in effect, clearly and conclusively denied his request because "[t]he court's repeated instructions that he needed to continue to work with his defense attorney caused the defendant to believe that a further request would be anything more than futile." We disagree.

It is clear from the record that the matter of the defendant's representation was still open for discussion. See *State* v. *Paschal*, supra, 207 Conn. App. 338 (defendant's request to represent himself was not conclusively denied where it was "clear from the record that both the defendant and the court considered the matter of the defendant's representation still open for discussion"); see also *Wilson* v. *Walker*, 204 F.3d 33, 38 (2d Cir.), cert. denied, 531 U.S. 892, 121 S. Ct. 218, 148 L. Ed. 2d 155 (2000). At the conclusion of the hearing on April 8, 2021, the defendant stated, "I do not want [McMahon] representing me no more," and the court responded in relevant part, "[w]ell, I haven't had the opportunity to address the issue . . . we can address that on the next court date . . . ." In addition, the court explicitly referenced the issue of self-representation and stated, again, that it could address any issues on the next court date. Specifically, the court told the defendant: "[I]f you refuse to talk to your attorney, there's no guarantee that you're going to get a new attorney. *I went through, I believe in detail today, what I believe to be the options that you have, what the obligations are with your attorney, the risks of self-representation. I believe we can adequately address any issues that you have on the next court date.* But I do, given what you presented today . . . I am not going to discuss that issue because it wasn't one that we intended to address today. So, May 13th, 10:30. *Happy to address anything on that date.* Okay?"[22] (Emphasis added.) Because the court did not rule on the defendant's request to represent himself at the April 8, 2021 hearing and, instead, made clear that "the question of self-representation was left open for possible further

[22] The trial court also stated, more broadly, that "we're going to have an opportunity for you to speak with your attorney. At this point, we're not focused on what we had intended to do today. *There are some issues that have come up. Certainly, we can discuss them further on May 13th.*" (Emphasis added.)

discussion"; *Wilson* v. *Walker*, supra, 204 F.3d 38; we conclude that the defendant's request was not clearly and conclusively denied.

Moreover, the trial court did not "simply ignore [the defendant's] request and proceed to a critical stage of the proceedings"; *State* v. *Braswell*, supra, 318 Conn. 842 n.8; as the defendant suggests. Instead, the court acknowledged the defendant's request, which was made directly after the defendant stated that he wanted to reject the state's plea offer, and expressed concern that the defendant may be having an emotional reaction to his dissatisfaction with his counsel's advice during the plea negotiation process.[23] See *State* v. *Paschal*, 207 Conn. App. 335 (in considering whether reference to self-representation was clear and unequivocal request, court may consider "whether a request is the result of an emotional outburst" (internal quotation marks omitted)).

After additional discussion between the trial court and the defendant, during which the defendant stated that he did not know or understand the charges against him, the court expressed that it had some possible concerns with the defendant's competence. The court continued the matter for additional discussions to take place between the defendant and McMahon, and the court asked McMahon to bring to the court's attention any concerns he had from those discussions about the defendant's ability to understand the proceedings or to assist in his defense.[24]

[23] As set forth previously, the trial court told the defendant, in relevant part, that, "a lot of times, people come into court on the day when it's accept or reject and they express that they're not happy with their attorney, but what they're really not happy with is the offer."

[24] Specifically, the trial court stated: "I'm going to continue your case to allow you to have another conversation with your attorney, and then I'm also going to just make sure . . . I'm going to ask Attorney McMahon in those subsequent conversations that I anticipate you're having, if there's any conversations that you have that lead you to think that maybe this defendant doesn't understand the proceedings against him or assisting in

Given the trial court's potential concern about the defendant's competence[25]—along with its duty to ensure that any waiver of the defendant's right to counsel would be knowingly and intelligently made—the court reasonably declined to conduct a canvass of the defendant at the April 8, 2021 hearing and, instead, continued the matter in an abundance of caution to provide time to resolve that concern. As we set forth in more detail in part I of this opinion, continuing the matter enabled the court to obtain McMahon's opinion, after additional discussions with the defendant, that he did not share the court's concern. In addition, the defendant's statements at the May 13, 2021 hearing confirmed that his remarks about not understanding the charges against him reflected more on his lack of legal experience than it did on his mental condition. Accordingly, although a court typically *must* canvass a defendant in accordance with Practice Book § 44-3 after he makes a clear and unequivocal request to represent himself; see *State* v. *Bush*, 325 Conn. 272, 318, 157 A.3d 586 (2017); the court's decision not to do so under the particular circumstances of the present case did not, in and of itself, amount to a denial of the defendant's right to self-representation. See *United States* v. *Barnes*, supra, 693 F.3d 274 (court declined to rule on defendant's request to represent himself until there had been competency evaluation, and, after competency evaluation, there was no further mention of self-representation request); see also *State* v. *Ghant*, supra, 212

his defense that you'll bring that to the court's attention. *It's not apparent to me at this point*, but it could be something that might require further discussion in the future, okay." (Emphasis added.)

[25] As we explained in part I of this opinion, the record does not reflect substantial evidence of mental impairment. The trial court, however, was reasonably cautious given the defendant's statements that he did not know or understand the charges against him, particularly in light the more stringent standard for competence applied in the context of self-representation. See *State* v. *J.M.F.*, 170 Conn. App. 120, 163 n.14, 154 A.3d 1, cert. denied, 325 Conn. 912, 159 A.3d 230 (2017).

Conn. App. 686 (court acknowledged but did not rule on defendant's request to represent himself and continued matter based on concern about talking to defendant about his request without his attorney present); *State* v. *Paschal*, supra, 207 Conn. App. 338 (court denied without prejudice defendant's request to represent himself and continued matter to afford defendant's counsel opportunity to obtain video from state in accordance with defendant's expressed goals).

In light of our conclusion that the trial court did not clearly and conclusively deny the defendant's request to represent himself, we must next consider whether the defendant reasserted his right to self-representation after the April 8, 2021 hearing. The defendant argues that he subsequently attempted to proceed pro se by filing motions on his own behalf. We are not persuaded.

Although the defendant filed a pro se motion for a speedy trial on June 1, 2021, the filing of that motion in a self-represented capacity did not reflect the defendant's desire to represent himself given that it included a "motion to [appoint] a new counsel." Both this court and our Supreme Court have repeatedly held that "[t]he right to counsel and the right to self-representation present mutually exclusive alternatives." (Internal quotation marks omitted.) *State* v. *Joseph A.*, 336 Conn. 247, 254, 245 A.3d 785 (2020); *State* v. *Paschal*, supra, 207 Conn. App. 333. Indeed, after the April 8, 2021 hearing, the defendant repeatedly expressed a desire for a different attorney, rather than a desire to represent himself, as reflected (1) at the May 13, 2021 hearing when he asked the trial court: "Your Honor, have you ever approved upon me getting new counsel?"; (2) in his June 1, 2021 motion, when he requested that a "motion to dismiss counsel" and a "motion to [appoint] a new counsel" be considered before his speedy trial; and (3) at the June 24, 2021 hearing, when he asked the court whether it was denying his "motion for a new

attorney . . . .'' In addition, although the court initially denied the defendant's request for new counsel, the defendant acquiesced to being represented by a different attorney after the court granted McMahon's motion to withdraw his appearance on September 2, 2022. The defendant did not subsequently voice any dissatisfaction with his replacement counsel and did not express any desire to represent himself. The defendant, therefore, waived his right to self-representation. See *State* v. *Ghant*, supra, 212 Conn. App. 688 (defendant waived right to self-representation when he ''acquiesced to being represented by counsel'' at subsequent hearings); see also *Wilson* v. *Walker*, supra, 204 F.3d 39 (highlighting defendant's apparent cooperation with replacement counsel and failure to voice any dissatisfaction after original counsel's withdrawal from case).

Finally, we note that the defendant's assertion that the trial court's alleged error is structural and subject to automatic reversal does not contradict our conclusion that the defendant waived his right to represent himself.[26] Although neither the United States Supreme Court nor our Supreme Court has expressly addressed the issue of waiver in the context of a claim of structural error, several federal circuit courts of appeals have concluded that a party may waive a structural error. See, e.g., *United States* v. *Pancholi*, Docket No. 24-1127, 2025 WL 2218478, *10 (6th Cir. August 5, 2025) (''the fact that the violation would constitute structural error does not mean that a defendant cannot waive the underlying right''); *Jackson* v. *Bartow*, 930 F.3d 930, 934 (7th Cir. 2019) (''the consequence of a 'structural' error is that it is not subject to harmless-error review . . . but such errors can still be waived'' (citation omitted));

[26] Our Supreme Court has held that ''the improper denial of the right to self-representation is a structural error, requiring a new trial.'' *State* v. *Petteway*, 351 Conn. 682, 692, 332 A.3d 196 (2025); see also *State* v. *Braswell*, supra, 318 Conn. 846–47; *State* v. *Jordan*, 305 Conn. 1, 23, 44 A.3d 794 (2012).

Wilson v. *Walker*, supra, 204 F.3d 37–38 (concluding that defendant's "failure to reassert his desire to proceed pro se constituted a waiver of his previously asserted [s]ixth [a]mendment right," despite recognition that "a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction"); see also Z. Henderson, "A Comprehensive Consideration of the Structural-Error Doctrine," 85 Mo. L. Rev. 965, 1008–10 (2020) (discussing rationale behind courts' application of waiver doctrine in context of claims of structural error).

In sum, even if we assume that the defendant clearly and unequivocally requested to represent himself on April 8, 2021, the trial court did not conclusively deny that request. During the remainder of the proceedings, the defendant did not clearly and unequivocally reassert the right to self-representation. Accordingly, the defendant waived his right to represent himself.

IV

Finally, the defendant claims that the trial court improperly admitted into evidence certain hearsay statements. Specifically, he argues that the court abused its discretion in allowing testimony from McCullough regarding the victim's out-of-court statement describing the suspects as "fat" and "skinny." We conclude that the defense opened the door to the challenged testimony and, therefore, that the trial court did not abuse its discretion in permitting the state to elicit that testimony.

The following additional facts and procedural history are relevant to this claim. At trial, the state sought to elicit testimony from McCullough regarding the differences in the physical appearances of the defendant and V. On direct examination, the prosecutor asked: "Was there a difference in body size between the two individuals?" McCullough responded: "The way that [the victim]

identified them, yes, very much so." The prosecutor followed up, asking: "When *you* physically saw the two individuals, was there a difference in body type, by the way?" (Emphasis added.) McCullough responded, "[y]es, sir." When the prosecutor asked what the difference in the body types was, McCullough began to respond with the description that the victim had provided to the police on the night of the incident, rather than his own observations. The court sustained defense counsel's subsequent objections to the testimony on the basis of hearsay and because the testimony was not responsive to the question posed. Finally, the prosecutor asked: "Without . . . telling us what [the victim] said the difference between the body types was, did you observe the difference in the body types between the two individuals?" McCullough responded, "[y]es," explaining that "[o]ne was heavier set than the other," and the defendant was the heavier set individual.

On cross-examination, defense counsel sought to elicit testimony from McCullough about the alleged lack of detail that the police had about the identity of the suspects. The following colloquy took place:

"[Defense Counsel]: Now, in this specific case, [the victim] was the only person who was at the scene of the robbery; right?

"[McCullough]: Yes.

"[Defense Counsel]: Okay. He's the one that called 9-1-1.

"[McCullough]: Yes, ma'am.

"[Defense Counsel]: He didn't know who the robber was.

"[McCullough]: No, ma'am.

"[Defense Counsel]: He didn't provide a lot of description.

"[McCullough]: We had a general description.

"[Defense Counsel]: Of the car, right?

"[McCullough]: And of the people that took the car.

"[Defense Counsel]: So, you're saying that he gave details about the individual who took the car.

"[McCullough]: Very generic details."

Defense counsel continued to question McCullough about alleged inadequacies in the police investigation, such as the failure to locate any surveillance footage, the failure to speak to anyone in the neighborhood about the incident, and the failure to conduct a showup identification procedure. In addition, defense counsel sought to highlight that V was found with gloves on and had a backpack with two "[r]eal" knives in it.

The prosecutor attempted to address these alleged inadequacies on redirect examination. For instance, the prosecutor elicited testimony from McCullough about how he did not speak to anyone in the neighborhood because the incident had happened at approximately 3:48 a.m., no one else was on the street in the victim's location at that time, and he did not see any lights on in the victim's apartment building. In addition, the following colloquy occurred between the prosecutor and McCullough:

"[The Prosecutor]: Counsel specifically asked you the question . . . and when she started her questioning on that, and she phrased it, 'you didn't have a description of the individuals.' Do you recall that question?

"[McCullough]: . . . [S]ort of. Yes, sir.

"[The Prosecutor]: Okay. Did you have a description of the individuals?

"[McCullough]: . . . [A] vague one, yes, sir.

"[The Prosecutor]: When you say a 'vague one,' what was the general description you had?

"[McCullough]: . . . [T]wo males with medical masks with hoods covering their heads, and dark clothing.

"[The Prosecutor]: Okay.

"[McCullough]: . . . [A]nd the physical description, also.

"[The Prosecutor]: Did you have a description of the individual who put the object to [the victim's] head, by the way? . . . Did you have a description of them?

"[McCullough]: A basic description, yes.

"[The Prosecutor]: What was that basic description?

"[McCullough]: He described the one as fat and one as skinny. And the one with the—"

Before McCullough could finish his response, defense counsel objected on hearsay grounds. The prosecutor argued to the trial court that defense counsel had opened the door to this inquiry during her questioning of McCullough on cross-examination. Specifically, the prosecutor argued: "Counsel had opened the door regarding when she specifically asked it . . . that indicating that the officer did not have a description. I believe that she's opened the door to that, that I have a right to ask the officer whether in fact he had a description."

The trial court agreed with the prosecutor, stating: "I think that's . . . a fair point. I'll allow it. The door's been opened." The prosecutor then asked McCullough: "What was the, again, the general description that you had of the individual that had the object [on the victim] versus the other individual?" McCullough responded: "[H]e described the one with the weapon as a . . . fat

person." McCullough further testified that, on the basis of his own observations of the defendant and V, he would describe V as "slim" and the defendant as "[h]eavier set than [V]."

On appeal, the defendant argues that the trial court improperly admitted McCullough's testimony as to the victim's statement describing the suspects because "[the] statement is hearsay within hearsay [for] which there are no exceptions."[27] The defendant contends that the court abused its discretion in concluding that defense counsel had opened the door to the admission of this testimony. Specifically, the defendant contends that the court's ruling was based on an "incorrect recollection" of defense counsel's cross-examination[28] and that "[d]oor-opening describes a principle of relevance . . . not a hearsay exception." (Citation omitted.)

The following legal principles and standard of review are relevant to our resolution of this claim. "Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating inquiry has made unfair use of the evidence. . . . This rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to

[27] The defendant describes the statement as "hearsay within hearsay" because the victim's statement was relayed to McCullough through a dispatch officer.

[28] The defendant does not explain how the trial court's recollection of defense counsel's cross-examination was incorrect.

place the evidence in its proper context. . . . The doctrine of opening the door cannot, of course, be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 479, 72 A.3d 48 (2013); see also *State* v. *Paulino*, 223 Conn. 461, 467, 613 A.2d 720 (1992); *State* v. *Graham*, 200 Conn. 9, 13–14, 509 A.2d 493 (1986).

"We review for abuse of discretion the trial court's determination that a party has opened the door to otherwise inadmissible rebuttal evidence." *State* v. *Brown*, supra, 309 Conn. 479–80. "Generally, a trial court abuses its discretion when the court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . When this court reviews a decision of the trial court for abuse of discretion, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable. . . . Accordingly, the abuse of discretion standard reflects the context specific nature of evidentiary rulings, which are made in the heat of battle by the trial judge, who is in a unique position to [observe] the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence." (Internal quotation marks

omitted.) *State* v. *Frazier*, 181 Conn. App. 1, 23, 185 A.3d 621, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018).

We conclude that the trial court did not abuse its discretion in admitting McCullough's testimony as to the victim's statement because the court properly determined that defense counsel had opened the door to the admission of that evidence. In the present case, after the court excluded the testimony about the victim's statement during the state's direct examination of McCullough, defense counsel, during cross-examination, delved into the subject of what information the police had about the suspects' identities. After eliciting testimony that the victim was the only person who was at the scene of the robbery and that he did not know who the robber was, defense counsel implied that the police did not have an adequate description of the robber by stating that the victim "didn't provide a lot of description." When McCullough responded that he did have a "general description," defense counsel continued to imply that the police did not have a description of the individual who had robbed the victim by stating, "[o]f the car, right?" Although McCullough clarified that he did, in fact, have a description of the individuals who took the victim's car, he further testified that he had only "[v]ery generic details."

Defense counsel's inquiry and McCullough's answer could have left the trial court, as the fact finder, with the false impression that the police did not have a more specific description of the individual who had robbed the victim. See *State* v. *Frazier*, supra, 181 Conn. App. 25 (cross-examination opened door to challenged testimony where defense counsel's inquiry and witness' response reasonably could have left jury with false impression). In addition, defense counsel's subsequent inquiry about how V was wearing gloves and had knives in his backpack implied that V, rather than the defendant, had robbed the victim.

The state's follow-up on redirect examination and the admission of the victim's statement through McCullough's testimony served to remove any unfair prejudice that might have otherwise ensued from defense counsel's inquiry on cross-examination. The state's follow-up demonstrated that the police had a more specific physical description of the individuals who were involved in the robbery and that, from that information, they could determine that the defendant, rather than V, had been the individual who put a weapon to the back of the victim's head. As both this court and our Supreme Court have observed, "[t]he defendant cannot reap the benefits of inquiry into one subject and expect the state's questioning within the same scope to be held impermissible." (Internal quotation marks omitted.) *State* v. *Frazier*, supra, 181 Conn. App. 25; see also *State* v. *Brown*, supra, 309 Conn. 482.

Accordingly, even though McCullough's testimony would otherwise have been inadmissible under the rule against hearsay, as the court ruled during the prosecutor's direct examination, defense counsel's inquiry opened the door to the admission of such evidence. See, e.g., *State* v. *Colon*, 71 Conn. App. 217, 234, 800 A.2d 1268 (rejecting defendant's argument "that the doctrine on opening the door is not a recognized hearsay exception," and concluding, instead, that hearsay testimony was properly admitted after defendant opened door to such evidence), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002); see also *State* v. *Brown*, supra, 309 Conn. 479 (pursuant to doctrine on opening door, court may permit rebuttal evidence "[e]ven though the rebuttal evidence would ordinarily be inadmissible on other grounds" (internal quotation marks omitted)). We conclude, therefore, that the trial court did not abuse its discretion in permitting the state to

rebut the evidence adduced by defense counsel regarding the victim's statement describing the suspects.

The judgment is affirmed.

In this opinion the other judges concurred.

EMMANUEL CRUZ *v.* CITY OF WATERBURY ET AL. (AC 47154)

Cradle, C. J., and Westbrook and Harper, Js.

Syllabus

The plaintiff, a former Waterbury police officer who suffered a work-related injury, appealed from the trial court's judgment dismissing in part and denying in part his administrative appeal from the decision of the defendant Retirement Board of the City of Waterbury, which had denied his application for a disability pension, and from the court's judgment dismissing his breach of contract claim with respect to the board and denying that claim with respect to the defendant city. The plaintiff claimed, inter alia, that the court committed plain error by failing to consider and analyze an allegedly applicable statute (§ 31-71f) regarding certain information an employer must provide to employees, which the parties did not raise in their arguments before the court. *Held*:

This court declined to reach the merits of the plaintiff's claim regarding the trial court's failure to consider § 31-71f, as the plaintiff failed to adequately brief it.

The trial court did not improperly deny the plaintiff's administrative appeal from the board's denial of his application for disability retirement and pension benefits, the court having properly determined that the plaintiff did not have a "work-related disability" as defined under the city's ordinances (§§ 35.035 and 35.073), as there was substantial evidence that the city intended to and did offer the plaintiff a qualifying job pursuant to § 35.035 that he could perform.

The board properly did not award any retroactive payments under § 35.073 of the city's ordinances, as it determined that the plaintiff was not eligible for disability benefits.

The plaintiff's claim that § 35.035 of the city's ordinances required the city to offer him a job with a base pay rate of at least 75 percent of his total compensation as a police officer, not his base pay rate, was unsupported by the language of the ordinance.

The trial court properly dismissed the administrative appeal with respect to the city, as the plaintiff provided no legal authority to support bringing an administrative appeal against the city, which was not involved in rendering the administrative decision.

The plaintiff could not prevail on his claim that the trial court improperly denied his breach of contract claim with respect to the city, as the plaintiff failed to demonstrate that the city violated any ordinance with respect to disability pension benefits and, therefore, failed to establish a breach of the collective bargaining agreement between the city and the plaintiff's former union.

The trial court properly dismissed the plaintiff's breach of contract claim with respect to the board, as the board was not a proper party to the claim because it was not a party to the collective bargaining agreement.

Argued April 21—officially released September 16, 2025

Procedural History

Appeal from the decision of the defendant Retirement Board of the City of Waterbury denying the plaintiff's application for a disability pension and action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Cordani, J.*; judgment denying in part and dismissing in part the administrative appeal and denying in part and dismissing in part the breach of contract action, from which the plaintiff appealed to this court. *Affirmed.*

Robert C. Lubus, Jr., with whom was *Donald J. Trella*, for the appellant (plaintiff).

Daniel J. Foster, corporation counsel, for the appellees (defendants).

Opinion

WESTBROOK, J. The plaintiff, Emmanuel Cruz, a former Waterbury police officer whose employment was terminated after he suffered a work-related injury that rendered him unable to return to full-time police work, brought the underlying combined administrative

appeal and breach of contract action against the defendants, the city of Waterbury (city) and the Retirement Board of the City of Waterbury (board), challenging the denial of his application for a disability pension. The plaintiff now appeals from the judgment of the trial court rendered in favor of the defendants. The plaintiff claims that the trial court (1) committed plain error by failing to consider and analyze General Statutes § 31-71f (a), despite the parties' failure to raise that statute in their arguments before the court,[1] (2) improperly denied, as to the board, and dismissed, as to the city, count one of his complaint asserting an administrative appeal from the board's denial of his application for disability retirement and pension benefits, and (3) improperly denied, as to the city, and dismissed, as to the board, count two of his complaint asserting a breach of the collective bargaining agreement that governed the terms of his employment.[2] For the reasons that follow, we affirm the judgment of the court.

The record reveals the following facts, as set forth in the administrative record and by the court in its memorandum of decision, and procedural history. As

[1] General Statutes § 31-71f (a) provides: "Each employer shall: (1) Advise his employees in writing, at the time of hiring, of the rate of remuneration, hours of employment and wage payment schedules, and (2) make available to his employees, either in writing or through a posted notice maintained in a place accessible to his employees, any employment practices and policies or change therein with regard to wages, vacation pay, sick leave, health and welfare benefits and comparable matters."

Although § 31-71f has been amended by the legislature since the events underlying this case; see Public Acts, Spec. Sess., June, 2021, No. 21-2, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] The plaintiff's statement of the issues in his appellate brief sets forth seven purported claims. We view several of these claims, however, as more properly characterized as arguments in support of the plaintiff's principal claims as reflected and outlined in the table of contents of the plaintiff's brief. For ease of discussion and clarity, we have combined and restated the plaintiff's claims in a manner that aligns more closely with the parties' briefing.

previously indicated, the plaintiff was a police officer employed by the city. He injured himself on the job when he smashed a car window with his right, dominant arm in order to apprehend a criminal suspect. A resulting injury to his right hand rendered him unable to return to full-time work as a police officer, and the chief of police terminated his employment on April 8, 2019. In conjunction with the termination, the chief of police submitted a disability pension application on behalf of the plaintiff to the defendant board. The board denied the application at a meeting held on March 9, 2020.

Specifically, the board determined that the plaintiff did not qualify for a disability pension under §§ 35.035 and 35.073 of the Waterbury Code of Ordinances (ordinances).[3] Section 35.073 (C) (1) provides in relevant part that a Waterbury police officer "who incurs a *work-related disability* in the line of duty" is entitled to receive a disability pension, and § 35.035 defines "work-related disability" in relevant part as "[t]he total and permanent inability of a participant with at least five years of service, determined at the time that the participant ceases to be in pay status, to perform all of the essential functions of the participant's current job, *and the functions of any other job offered to the participant by the city in its absolute discretion which has a base pay rate of at least 75% of the participant's current job*, by reason of any medically determinable physical or mental impairment caused by or resulting from a work-related accident, injury or illness . . . ." (Emphasis added.) The board determined that the city had a building facility coordinator position available for the plaintiff that he could perform and that had a base pay

[3] The board cited to a prior numbering scheme for the relevant ordinances, whereas, before the trial court and this court, the parties cite to the presently operative scheme. We, like the parties, will cite to the ordinances according to their current numbering.

rate of $56,570, which was more than 75 percent of the base pay rate of $75,427 that the plaintiff earned in his previous position as a police officer, and, therefore, he did not have a "work-related disability" for purposes of disability pension eligibility under § 35.035. The board invited the plaintiff and his attorney to discuss the new position further with the city's assistant corporation counsel and human resources director (HR director) after the meeting.

The plaintiff commenced the underlying trial court action on April 8, 2020. In count one of the operative complaint, he sought review of the board's decision that he did not have a "work-related disability" under § 35.035 of the ordinances that entitled him to a disability pension. He claimed that the defendants violated §§ 35.035 and 35.073 of the ordinances because the building facility coordinator position was never formally offered to him in writing, the terms of employment were vague and inconsistent, and the stated base pay rate was actually less than 75 percent of his pay as a police officer. He also claimed that the defendants violated § 35.073 (D), which provides that "[t]he disability pension benefit shall be payable on the first day of the month following the participant's termination of service with the city as the result of the disability," because he did not receive the disability pension payments to which he was entitled following his termination of service due to his disability on April 8, 2019.

Count two of the operative complaint alleged a breach of contract claim premised on a theory that the aforementioned ordinances were incorporated into the collective bargaining agreement between the city and the Waterbury Police Union, Brass City Local, Connecticut Alliance of City Police (union), which governed the plaintiff's employment as a police officer, and that the

same violations of the ordinances alleged in the administrative appeal also constituted a breach of the collective bargaining agreement. Both counts of the complaint were brought against both defendants.

The trial court, *Cordani*, *J.*, conducted a hearing with respect to the count asserting an administrative appeal and a trial de novo on the breach of contract count. Thereafter, on November 17, 2023, the court issued a memorandum of decision in favor of the defendants. The trial court made several factual findings in connection with the breach of contract count, including that "[t]he position offered to the plaintiff, and discussed at the March 9, 2020 board meeting, was that of a building facility coordinator for the Silas Bronson Library, which position had a salary range of $45,000 to $65,000 and was being offered to the plaintiff at a salary of $56,570 per year, which was 75 percent of his base rate of pay as a police officer at $75,426.96 per year, [and] [t]he benefits provided with the position were to follow the benefits provided by the plaintiff's former bargaining unit, meaning he would receive the same benefits as he did as a police officer"; "[t]he plaintiff was capable of performing the functions of a building facility coordinator"; "[t]he position as a building facility coordinator was offered to the plaintiff and he had the ability to take the position by accepting it"; and "[t]he plaintiff did not accept the position as a building facility coordinator." The trial court noted that "[t]he plaintiff's nonacceptance of the position occurred in two ways. First, [the city's HR director] credibly testified that the plaintiff affirmatively refused the job offer. Second, it is clear that, although the plaintiff could have accepted the position, he did not do so."

With respect to the administrative appeal as set forth in count one of the complaint, the trial court held, contrary to the plaintiff's claims, that there was substantial evidence in the record that the city had offered him the

building facility coordinator position with a base pay rate of at least 75 percent of his base pay rate as a police officer, which position he was capable of performing, and, accordingly, he did not have a "work-related disability" for purposes of qualifying for a disability pension under §§ 35.035 and 35.073 of the ordinances. The trial court explained in relevant part: "The record contains substantial evidence that the city offered the plaintiff such a job. First, on February 26, 2020, the board sent [the city's] HR director a memo inquiring whether a qualifying job existed. The HR director signed off on the memo confirming that the job of building facility coordinator met the pay requirement and that the plaintiff could perform the job despite his injury. Then, at the March 9, 2020 board meeting, the motion approved by the board explicitly denied the pension because the city was offering the plaintiff the building facility coordinator job as certified by the HR director. The board then invited the plaintiff to discuss the job with the HR director who was at the meeting. The transcript of the foregoing at the March 9, 2020 board meeting coupled with the memo to the HR director is substantial evidence that the board and the city planned to offer the plaintiff a qualifying job and did exactly that at the meeting. There is also substantial evidence that the plaintiff rejected the offer."

In accordance with well established principles governing administrative appeals brought to the Superior Court; see, e.g., *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 139–40, 178 A.3d 1043 (2018); the trial court concluded that there was substantial evidence supporting the board's decision and that the board's decision was not unlawful, in excess of the board's authority, clearly erroneous, or arbitrary or capricious, such that it should be affirmed. The trial court further dismissed count one as to the city on the ground that the city was not an

appropriate party with respect to that count because it was not an administrative agency and had not rendered the administrative decision at issue.

With respect to count two alleging breach of contract, the court ruled in favor of the city, agreeing that the relevant collective bargaining agreement provided for pension and retirement benefits in accordance with the city's ordinances but holding that, for the same reasons set forth in the decision on count one of the plaintiff's complaint, the plaintiff was ineligible for a disability pension under the ordinances and, therefore, under the collective bargaining agreement. Accordingly, there was no breach of the contract by the city. The trial court further dismissed count two as to the board on the ground that the board was not a party to the collective bargaining agreement at issue and, therefore, was not a proper party to the breach of contract count. This appeal followed.

I

The plaintiff first claims that, despite the parties having never raised § 31-71f in their arguments before the court, the court nevertheless committed plain error when it failed to consider and apply § 31-71f (a) in resolving the underlying action. As previously noted, § 31-71f (a) provides in relevant part: "Each employer shall: (1) Advise his employees in writing, at the time of hiring, of the rate of remuneration, hours of employment and wage payments schedules . . . ." The plaintiff argues that the applicability of this statute "changes the outcome of this case" because the defendants admitted in their answer that the only document provided to the plaintiff with respect to the building facility coordinator position was a written job description that did not fully satisfy the criteria set forth in § 31-71f (a) (1), and, therefore, no job offer was made in accordance with §§ 35.035 and 35.073 of the ordinances that would

preclude him from claiming a "work-related disability" for purposes of disability pension eligibility.

The defendants respond that the plaintiff's claim is inadequately briefed and, thus, is unreviewable. The defendants argue that the plaintiff simply states that plain error review is available and cites to a number of cases in which appellate courts have undertaken plain error review, but he fails to set forth the standards applicable to plain error review or to apply those standards to the facts and circumstances of the present action. The defendants also respond, in the alternative, that the trial court did not commit plain error by failing to apply § 31-71f because, by its plain language, that statute is inapplicable. In particular, the defendants note that the statute requires an employer to "[a]dvise *his employees* in writing, *at the time of hiring*, of the rate of remuneration, hours of employment and wage payment schedules"; (emphasis added) General Statutes § 31-71f (a) (1); and the plaintiff was not a newly hired employee at any point following the 2019 termination of his employment. We conclude, for the reasons given by the defendants, that the plaintiff has abandoned this claim as a result of an inadequate brief.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such magnitude exists, it necessitates reversal. . . . [I]t is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the

claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Citations omitted; internal quotation marks omitted.) *State* v. *Kyle A.*, 348 Conn. 437, 445, 307 A.3d 249 (2024). Our Supreme Court has "noticed plain error in the failure of a trial court to apply a *clearly relevant* statute to the case before it." (Emphasis added; internal quotation marks omitted.) *Ralto Developers, Inc.* v. *Environmental Impact Commission*, 220 Conn. 54, 59, 594 A.2d 981 (1991).

"Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim . . . receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *Sicignano* v. *Pearce*, 228 Conn. App. 664, 690–91, 325 A.3d 1127 (2024), cert. denied, 351 Conn. 908, 330 A.3d 881 (2025).

Here, the plaintiff's claim consists of the statement that "[o]ur Supreme Court routinely has held that a court's failure to apply an applicable statute is plain error"; a string cite of cases in which plain error was found on the basis of a court's failure to consider a statute that was " 'plain[ly]' " or " 'clearly' " applicable; see, e.g., *Curley* v. *Phoenix Ins. Co.*, 220 Conn. App. 732, 752–53 n.10, 299 A.3d 1133 (citing cases), cert. denied, 348 Conn. 914, 303 A.3d 260 (2023); and a conclusory statement that § 31-71f applies in the present case and "changes the outcome of [the] case." He does not expressly state the standard for plain error review in his principal brief. He does not attempt to apply the standard to the facts of the present action. Moreover, he does not provide any real substantive discussion

regarding why § 31-71f was so clearly relevant that the court's failure to address it sua sponte was an error of such "monumental proportion" that it threatened "to erode our system of justice and work a serious and manifest injustice . . . ." (Internal quotation marks omitted.) *State* v. *Kyle A.*, supra, 348 Conn. 445. In short, the plaintiff has failed to meet the minimum threshold required for review of his plain error claim. Accordingly, we decline to reach the merits of the claim on the ground that it is inadequately briefed and deemed abandoned.[4]

II

The plaintiff next claims that the court improperly denied in part and dismissed in part count one of his complaint asserting an administrative appeal from the board's denial of his application for disability retirement and pension benefits. First, he argues that there is not substantial evidence in the record that he was offered a job with a qualifying salary for purposes of § 35.035 of the ordinances. Second, he argues that the court never properly acknowledged that the defendants had failed to pay him disability pension benefits for the period of time between the termination of his employment and the denial of his disability pension application and that he is entitled to such payments under the plain language of the ordinances. Third, the plaintiff argues that the trial court misinterpreted § 35.035 by indicating that the city had discretion under that ordinance to offer the plaintiff a job with a base pay rate of at least 75 percent of the *base pay rate* of the participant's current job whereas the plain language of the ordinance refers to "base pay rate" only with respect to the new

[4] Even if we were to overlook the inadequacy of the briefing and review the plaintiff's claim on the basis of the minimal briefing provided, it inevitably would fail on its merits because, on its face, § 31-71f is not plainly or clearly applicable to the circumstances at issue in this case, and, thus, the court's failure to address it sua sponte could not have constituted plain error.

job, not the current one, nor can such a construction reasonably be inferred. Finally, the plaintiff argues that the trial court improperly dismissed the administrative appeal with respect to the city because the city's actions were so inextricably bound up with the decision of the board that the city is a proper party to the administrative appeal. For the reasons that follow, we reject the plaintiff's claim.

"It is well established that [j]udicial review of [an administrative agency's] action is governed by the [Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted.[5] . . . Review of an appeal taken from the order of an administrative agency . . . is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion. . . . [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . . Ultimately, [t]he question is not whether the [reviewing] court would have reached the same conclusion but whether the record before the [agency] supports the action taken." (Citations omitted; footnote added; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Dance Right, LLC*, 230 Conn. App. 53, 72, 329 A.3d 1008 (2025).

[5] "This court in *Greene* v. *Waterbury*, 126 Conn. App. 746, 749, 12 A.3d 623 (2011), determined that when a retirement board was created by the Waterbury City Code and granted such board powers and duties similar to that of an administrative agency, this court review[s] the actions of the board under the . . . standard[s] that [govern] review of an administrative agency's actions." (Internal quotation marks omitted.) *Vanghele* v. *Fairfield*, 156 Conn. App. 714, 721, 115 A.3d 474 (2015).

A

We first address the plaintiff's argument that no substantial evidence exists that he was offered a job with a qualifying salary for purposes of § 35.035 of the ordinances. He posits that the base pay rate of the building facility coordinator position was less than 75 percent of his pay as a police officer. According to the plaintiff, the board improperly determined his pay as a police officer to be $75,427, whereas a pension worksheet prepared by the city's finance director listed his pay as a police officer at $75,578.72. If the higher rate is utilized, in order to amount to at least 75 percent of his pay as a police officer, the base pay rate for the building facility coordinator position needed to be at least $56,684, rather than the $56,570 cited by the board.[6] The plaintiff also asserts that he never received a formal offer for the building facility coordinator position because the only written documentation given to him with respect to that position was a February 26, 2020 internal memorandum that he did not receive until after he filed his administrative appeal.[7]

We agree with the defendants that the trial court properly determined that there was substantial evidence

[6] In his principal brief, the plaintiff states that he believes the proper basis for the 75 percent calculation should be his total earnings as a police officer, including overtime payments, night and weekend differentials, and bonuses, but that he is adopting "the defendants' preferred interpretation" of the amount to demonstrate that he should still prevail on that basis.

[7] The plaintiff further asserts: "In other words, the [board] received and acted on secret information that was not part of the record and was not provided to [him] prior to the denial of his application, thereby violating his right to due process under the fifth and fourteenth amendments to the United States constitution and article [first], § 8, of the Connecticut constitution." The plaintiff does not otherwise address a claimed due process violation in the body of his principal brief. As we set forth in detail in part I of this opinion, "[a]nalysis, 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.) *Sicignano* v. *Pearce*, supra, 228 Conn. App. 690. Because the plaintiff does not adequately brief his alleged constitutional violation, we decline to review it.

that the city intended to and did offer the plaintiff a qualifying job under § 35.035 of the ordinances. It is reasonable to infer from the transcript of the March 9, 2020 board hearing in combination with the February 26, 2020 memorandum from the city's HR director to the board indicating the availability of the building facility coordinator position that the plaintiff was offered the position and declined it.

Further, the board's citation to $75,427 as the pay received by the plaintiff as a police officer is supported by the February 26, 2020 memorandum. Even if the figure from the pension worksheet is used, we agree with the defendants' contention that "the difference between [the] two possible prior base pay rates is $151.76. Seventy-five percent of that difference is $113.82 per year. . . . [T]his discrepancy in the record does not render the board's denial of the plaintiff's disability pension application an abuse of discretion."

B

We turn next to the plaintiff's argument that the trial court failed to acknowledge that the defendants improperly had failed to pay him disability pension benefits for the period of time between the termination of his employment and the denial of his disability pension application and that he was entitled to such payments under the plain language of the ordinances. He relatedly asserts that the board improperly declined to retroactively award him such payments when it denied his application.

We are unconvinced, on the record presented, that the plaintiff was entitled to disability pension benefits while his disability pension application was pending from May, 2019, to March, 2020. Section 35.073 of the ordinances, on which the plaintiff relies, provides for disability pension benefits only when an applicant has a "work-related disability," which the board determined

the plaintiff did not have due to the offer of a qualifying alternative position under § 35.035 of the ordinances. Nothing in the ordinances provides that the plaintiff was entitled to receive disability pension benefit payments while his application was pending. Section 35.073 (D) provides only that benefits become "payable" on the first day of the month following the termination of employment. We read this provision as simply establishing the start date from which benefits would accrue upon a finding of eligibility. In other words, a more reasonable interpretation of the ordinance would be that the plaintiff would have been entitled to receive benefits during the pendency of his application when and if the board ultimately determined that he qualified for benefits in the first place, at which point such benefits would be awarded retroactively. Because the board determined, however, that he was not eligible for benefits, the board properly did not award any retroactive payments.[8]

C

The plaintiff next argues that the trial court misinterpreted § 35.035 of the ordinances when it suggested that the city had discretion to offer the plaintiff a job that has a base pay rate of at least 75 percent of the *base pay rate* of the participant's current job because

[8] We note that, both in conjunction with this argument and in support of his appeal more generally, the plaintiff takes issue with the eleven month delay between the date of the termination of his employment and the date the board heard and rendered a decision on his application. We agree with the plaintiff that it is important to have timely resolutions of disability pension applications because unwarranted delays can have significant adverse financial impacts on individuals awaiting resolution of their applications. Although the defendants were unable to provide this court with any compelling rationale for the lengthy delay in the present case, the plaintiff has not directed us to any ordinance, statutory provision or other legal authority that required the board to meet and render a decision within any prescribed time frame, nor can we conclude, on the basis of the present record, that the board's delay in the present case was arbitrary, exceeded the board's authority or constituted an abuse of its discretion.

the plain language of the ordinance does not refer to "75 percent of the base pay rate" nor can such a construction be inferred. The plaintiff asserts that 75 percent of the participant's current job should include all compensation, including overtime, weekend/night differentials, bonuses, etc. earned by the plaintiff as a police officer in the year before the injury that disabled him from duty and that the base pay rate cited by the city in its offer of the building facility coordinator position was insufficient under § 35.035 as a result thereof. This assertion, however, is unsupported by any language in § 35.035 and also cannot be inferred when the ordinance is read in its entirety, particularly the express reference to the "base pay rate" with respect to the alternative position.

D

Finally, the plaintiff acknowledges that the trial court correctly concluded that the city is not an administrative agency and did not issue the administrative decision from which he brings this appeal. He nonetheless contends that the city is the entity tasked with offering a qualifying job under § 35.035 of the ordinances and that "[t]he [city's] actions (or lack thereof) are inextricably bound up with the decision of the [board]," such that it is a proper defendant to the claim. We are not persuaded.

The plaintiff has provided no legal authority for bringing an administrative appeal against an entity that was not the administrative agency involved in rendering the administrative decision at issue. Moreover, as the defendants argue, even if the trial court erred in its dismissal, any such error was harmless because the city would have been entitled to a judgment in its favor for the same reasons that the appeal was denied with respect to the board. Having considered all of the plaintiff's arguments to the contrary, we are not persuaded that

the trial court improperly dismissed the claim against the city.

In summary, the trial court's conclusion that the plaintiff was offered a position with a base pay rate that was at least 75 percent of his base pay rate as a police officer and that he rejected said position, such that he did not have a "work-related disability" for purposes of disability pension eligibility under § 35.035 of the ordinances, appears to be substantiated by evidence in the record. The plaintiff's disagreements with respect thereto seem to result from his differing interpretations of the relevant ordinances and the underlying facts rather than from an identified lack of evidence or a belief that the board acted illegally or in excess of its authority, and he does not cite to or apply any pertinent authority in support of his positions. Because the plaintiff has not established any basis for reversing the trial court's judgment as to his administrative appeal, we reject this claim.

III

Finally, the plaintiff claims that the court improperly denied in part and dismissed in part his breach of contract count. The plaintiff argues that all relevant terms of the city's ordinances are incorporated by reference into the collective bargaining agreement, and, therefore, the defendants' violations of those ordinances in the manner argued with respect to the administrative appeal also constituted a breach of the provision of the collective bargaining agreement that provided in relevant part that employees of the Waterbury Police Department are entitled to retirement benefits pursuant to the ordinances. The plaintiff also argues that the trial court improperly dismissed the board as a defendant to the breach of contract count because the board was established by the city charter with a duty to act legally and, "[t]o the extent that an official act of the [board]

violates the . . . collective bargaining agreement, it becomes a proper defendant in this case." We disagree with both arguments.

"It is axiomatic that a collective bargaining agreement is a contract. . . . Like any other contract, a collective bargaining agreement may incorporate by reference other documents, statutes or ordinances to be included within the terms of its provisions. . . . [If] a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of a contract for the indicated purposes just as though the words of that enactment were set out in full in the contract." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Greene* v. *Waterbury*, 126 Conn. App. 746, 751, 12 A.3d 623 (2011). "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Lalli* v. *New Haven*, 230 Conn. App. 863, 867 n.3, 332 A.3d 1073, cert. denied, 351 Conn. 924, 333 A.3d 796 (2025). "The determination of whether a contract has been materially breached is a question of fact that is subject to the clearly erroneous standard of review. . . . 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." (Internal quotation marks omitted.) *Regional School District 8* v. *M & S Paving & Sealing, Inc.*, 206 Conn. App. 523, 531, 261 A.3d 153 (2021).

We first note that "[o]rdinarily a court may entertain a suit by an individual employee to enforce the terms of a collective bargaining agreement only if the agreement so provides. . . . An employee does, however,

have standing to enforce the terms of a collective bargaining agreement if the employee claims that the union has breached its duty of fair representation." (Citation omitted.) *Labbe* v. *Pension Commission*, 239 Conn. 168, 182, 682 A.2d 490 (1996). Here, the complaint did not include a count against the union for breach of the duty of fair representation. The city nevertheless did not challenge the propriety of the breach of contract count on the ground that the plaintiff lacked standing to assert it. Because the parties have not raised or addressed any possible standing issue, and the record consequently is inadequate to determine whether such an issue exists, we decline to address it further.

Turning to the propriety of the court's resolution of the breach of contract count on its merits, all parties largely rely on the same arguments raised with respect to the administrative appeal. The defendants admit that the relevant provisions of the collective bargaining agreement provide the plaintiff with a right to retirement benefits in accordance with the city's ordinances. Nevertheless, they argue that the board properly determined that the plaintiff was not entitled to a disability pension pursuant to the ordinances, and, therefore, any reliance on a violation of the ordinances as the basis for a claim of a breach of the collective bargaining agreement is unfounded and was properly resolved in favor of the city. For the reasons set forth in part II of this opinion, which we will not repeat, we agree that the plaintiff failed to demonstrate that the city violated any ordinance with respect to disability pension benefits and, therefore, also failed to establish a breach of the collective bargaining agreement. Accordingly, the court properly ruled in favor of the city with respect to the breach of contract count.

We also reject the plaintiff's argument that the trial court improperly dismissed the breach of contract count with respect to the board. The board, which

undisputedly is not a party to the collective bargaining agreement between the city and the plaintiff's union, was not a proper party to the breach of contract count because it is axiomatic that "[t]he obligation of contracts is limited to the parties making them, and, ordinarily, only those who are parties to contracts are liable for their breach. Parties to a contract cannot thereby impose any liability on one who, under its terms, is a stranger to the contract, and, in any event, in order to bind a third person contractually, an expression of assent by such person is necessary." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 797, 17 A.3d 40 (2011). Moreover, as with the court's dismissal of the city with respect to the administrative appeal count, even if the trial court erred in its dismissal of the board with respect to count two, any such error was harmless because the board would have been entitled to judgment as a matter of law for the same reasons that the court rendered judgment in favor of the city.

The judgment is affirmed.

In this opinion the other judges concurred.