STATE OF CONNECTICUT *v.* RYAN E. RAGALIS
(AC 46652)

Moll, Suarez and Seeley, Js.

Syllabus

Convicted of various crimes in connection with a motor vehicle accident involving a pedestrian, the defendant appealed to this court. The defendant claimed, inter alia, that his conviction of assault in the second degree with a motor vehicle and assault in the second degree, arising from a single

occurrence, violated the double jeopardy clause of the fifth amendment to the United States constitution and the Connecticut constitution. *Held*:

The defendant could not prevail on his claim that there was insufficient evidence to convict him of assault in the second degree with a motor vehicle and assault in the second degree, as the state adduced ample evidence for the jury to reasonably conclude that the state had proven beyond a reasonable doubt that the defendant was the operator of the vehicle that struck the victim, that the defendant's intoxication caused the victim's injuries, and that the victim suffered serious physical injuries.

The defendant's conviction of assault in the second degree with a motor vehicle and assault in the second degree did not violate double jeopardy because the defendant failed to establish a clear legislative intent to treat the relevant statutes (§§ 53a-60 (a) (3) and 53a-60d) as one offense for double jeopardy purposes pursuant to *Blockburger* v. *United States* (284 U.S. 299), as the statute and the information on each charge at issue required proof of elements that the statute and the information on the other charge did not, neither statute refers to the other, each statute sets a different penalty, and the statutes have distinct purposes, and the fact that the same evidence was used to establish that the defendant committed each crime was irrelevant.

The trial court's supplemental instruction to the jury in response to a note it received regarding whether "serious physical injury" to the victim must be long-term did not mislead the jurors, as the court answered the jury's question and that answer was correct in law, the court did not state that permanence was not a factor that the jury could consider in determining whether the victim sustained a serious physical injury, and the court referred the jury to its original instructions, a copy of which was in the jury's possession, and those instructions provided the correct definition of "serious physical injury."

Argued April 15—officially released October 7, 2025

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, assault in the second degree with a motor vehicle, assault in the second degree, and evasion of responsibility in the operation of a motor vehicle, and, in the second part, with the crime of operating a motor vehicle while the operator's license was under suspension, brought to the Superior Court in the judicial district of New London, where the first part of the

information was tried to the jury before *K. Murphy, J.*; verdict of guilty of operating a motor vehicle while under the influence of intoxicating liquor or drugs, assault in the second degree with a motor vehicle, and assault in the second degree; thereafter, the second part of the information was tried to the court, *K. Murphy, J.*; finding of guilty; subsequently, the defendant was presented to the court, *K. Murphy, J.*, on a plea of guilty to having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs; judgment of guilty in accordance with the verdict and the finding, and sentence enhanced in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Kayla R. Stephen, deputy assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Paul Narducci*, state's attorney, and *David J. Smith*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Ryan E. Ragalis, appeals from the judgment of conviction, rendered following a jury trial, of assault in the second degree with a motor vehicle in violation of General Statutes § 53a-60d[1] and assault in the second degree in violation of General Statutes § 53a-60 (a) (3).[2] On appeal, the defendant claims that (1) the evidence was insufficient to convict

[1] General Statutes § 53a-60d (a) provides: "A person is guilty of assault in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes serious physical injury to another person as a consequence of the effect of such liquor or drug."

[2] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (3) the actor recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument . . . ."

him of assault in the second degree with a motor vehicle and assault in the second degree, (2) his conviction of assault in the second degree with a motor vehicle and assault in the second degree violates the double jeopardy clause of the United States constitution, and (3) the trial court's supplemental instructions to the jury in response to a note misled the jury.[3] We affirm the judgment of the trial court.

On the basis of the evidence presented, the jury reasonably could have found the following facts. On the evening of June 16, 2019, Bethany Billing (victim), was at Pizzetta, a restaurant and bar located on Water Street in Mystic, with friends. The victim and her friend, Jessica Clapper, left Pizzetta and walked across the street. Shortly after midnight, while walking back to Pizzetta, Clapper saw a vehicle stopped in front of another restaurant farther down the street. Clapper and the victim began to cross the street,[4] when Clapper felt a "swoosh" and saw the victim's body being thrown in front of Pizzetta by a vehicle. At the time of the impact, Clapper and the victim were on the side of the roadway closest to Pizzetta.

[3] The jury also found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a. Thereafter, the defendant pleaded guilty to the charge in the state's part B information of having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of § 14-227a as a repeat offender. Following a trial to the court, the defendant also was found guilty of operating a motor vehicle while his operator's license was under suspension in violation of General Statutes § 14-215 (c). The defendant does not challenge his conviction of these offenses on appeal.

The defendant also was charged with one count of evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (b) (1). The jury found him not guilty of that charge.

[4] Clapper and the victim did not cross the street in a crosswalk. Clapper had been drinking alcohol on the night of the accident. Although the victim did not have any memory of the accident, Officer Brenna Bolduc of the Groton Police Department, who responded to the scene, testified at trial that she had noted in her police report that the victim was most likely intoxicated.

An eyewitness to the Water Street accident (first accident),[5] Patrick Scheurer, was working that night as a bouncer at a bar located diagonally across the street from Pizzetta. Scheurer was sitting outside the bar when he heard an engine "rev." He looked down the street and saw a dark sedan back up, nearly hitting another vehicle, and then slam on its brakes. He observed the vehicle driving forward down the street, hitting the victim and leaving the scene.

Jose Cepeda-Grullon, an Uber driver, was driving toward Pizzetta when he first observed the vehicle that struck the victim.[6] Cepeda-Grullon saw the vehicle back up out of a parking lot, almost hitting his vehicle. After Cepeda-Grullon honked his horn, the vehicle began accelerating forward. Cepeda-Grullon continued to drive forward, following the other vehicle, and saw two women crossing the street, heading toward Pizzetta. He then saw the vehicle strike the victim with the right side of its bumper and leave the scene.

Police officers quickly arrived at the scene of the first accident. Lieutenant Anthony LaFleur of the Groton Police Department collected evidence, including the plastic casing for a vehicle mirror that was later found to be from the defendant's vehicle. Video surveillance footage was acquired from the area of the accident. The footage shows two females walking down Water Street and then crossing the street toward Pizzetta. Subsequently, the footage shows a dark colored vehicle, similar to the vehicle in which the defendant was later

[5] As will be discussed in greater detail in this opinion, shortly after the victim was struck on Water Street, the defendant was involved in an accident in Stonington, in which he was found in a vehicle that had hit a fence and crashed into a tree. For clarity, we refer to the accident involving the victim that occurred in Mystic as the "first accident," and to the accident that occurred subsequently in Stonington as the "second accident."

[6] At various points during the trial, Cepeda-Grullon was referred to as Cepeda.

found at the scene of a second accident in Stonington (second accident), striking one of the females and leaving the scene. The footage depicts Cepeda-Grullon's vehicle following the dark colored vehicle from the first accident scene.

As Cepeda-Grullon pursued the vehicle, he lost sight of it twice. Before Cepeda-Grullon lost sight of the vehicle the second time, he saw the vehicle on the left side of the road. At first, he passed the vehicle. At this time, however, Cepeda-Grullon was on the phone with a 911 operator, who instructed him to go back to the location where he had seen the vehicle on the left side of the road. He arrived at the second accident scene less than two minutes later. By the time he arrived, the vehicle had hit a fence and crashed into a tree, facing oncoming traffic. Cepeda-Grullon told the police that he saw only one individual in the vehicle, in the driver's seat.[7] He described the individual as a younger white male with short dark hair and a black beard.[8]

Shortly after the first accident in Mystic, the police responded to the scene of the second accident in Stonington. Police officers and emergency personnel removed the individual, who later was identified by Officer Shawn Paradis of the Groton Police Department as the defendant, from the vehicle. The defendant's identification was found inside the vehicle. A DNA profile produced from a swab of the passenger side door of the defendant's vehicle was later found to match a known DNA profile from the victim. At the scene of the second accident, the defendant exhibited aggression and slurred speech.

[7] Although Cepeda-Grullon testified at trial that he never saw the defendant exit his vehicle, Groton Police Officer Shawn Paradis testified that Cepeda-Grullon had told him that he did see the defendant exit the vehicle.

[8] Cepeda-Grullon's physical description of the individual in the vehicle was consistent with video footage taken from the body camera of Officer Shawn Paradis of the Groton Police Department, which depicts the defendant at the scene of the second accident and at the hospital.

The defendant was taken from the scene of the second accident to Lawrence + Memorial Hospital by ambulance. Paradis followed in his police cruiser. At the hospital, the defendant became combative and had to be restrained. The defendant appeared intoxicated at the hospital. Paradis, who assisted the staff in restraining the defendant, smelled alcohol on the defendant and noted that his eyes were bloodshot, red, and glossy.[9] Paradis also observed that the defendant lacked coordination when trying to stand and saw the defendant swaying while sitting up in his bed. Blood tests revealed that the defendant had an elevated blood alcohol content of 0.27.

The victim was also transported to Lawrence + Memorial Hospital from the scene, where she was intubated and admitted to the intensive care unit. She stayed at the hospital for more than one week. The victim exhibited severe confusion at the hospital. As a result of the accident, the victim was diagnosed with a closed head injury, fractures to her neck, back, pelvis, and teeth, and required a total of twenty-five staples to repair scalp lacerations. She also had a broken nose, numerous scrapes and abrasions, and received stitches in her chin. After being discharged, the victim had extensive dental work to repair her teeth. She required medical treatment for six or seven months thereafter. For approximately three months, the victim had to live with her parents because she was not able to care for herself. The victim testified that, as of the time of trial, she continued to have problems with her short-term memory, as well as constant neck and lower back pain.

The defendant subsequently was arrested and charged in a substitute information containing two parts. In the

[9] The police did not perform field sobriety tests of the defendant at the scene of the second accident, but Paradis observed that the defendant exhibited nystagmus, which Paradis testified is the "bouncing . . . involuntary control of [one's] eyes" and is indicative of intoxication.

first part, the defendant was charged with operating a motor vehicle while under the influence of alcohol or drugs, assault in the second degree with a motor vehicle, assault in the second degree, and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (b) (1). He was charged, in the second part, with operating a motor vehicle while his operator's license was under suspension. The defendant was also charged in a separate part B information with previously having been convicted of operating a motor vehicle while under the influence of alcohol or drugs in violation of General Statutes § 14-227a.

The first part of the operative information was tried to the jury. At trial, the state presented testimony from several witnesses, including, inter alia, Clapper, Scheurer, Cepeda-Grullon, the victim, the victim's mother, and the investigating officers. On the first day of trial, Groton Police Officer Brenna Bolduc testified regarding her response to the first accident scene. She was dispatched at approximately 12:15 a.m. and, upon arrival, saw the victim lying on the sidewalk adjacent to Water Street. Bolduc followed the ambulance that transported the victim to the hospital, where Bolduc also encountered the defendant, whom she described as "hostile . . . ." The next day, Bolduc was recalled by the state and testified regarding her training and experience as a "drug recognition expert."[10] Bolduc testified regarding the effects of a person who is under the influence of alcohol, including its effects on a person's ability to perceive events and to operate a motor vehicle. She also testified that "alcohol is considered a central nervous system depressant. So, under that category of drugs, it would slow your central nervous system and cause slow motor skills and slower functioning."

[10] Bolduc testified that a drug recognition expert is a person who has "received advanced training and . . . [has] the ability to use a scientifically validated process to determine if somebody is under the influence of a drug."

After the prosecutor rested the state's case-in-chief, defense counsel made an oral motion for judgment of acquittal on all counts, which the court denied. Thereafter, the defense presented testimony from Captain Gregory J. McCarthy, Groton Police Department's shift commander at the time of the accident. When asked by defense counsel why an accident reconstruction was not completed at the scene of the first accident, McCarthy testified that there were not any skid marks, yaw marks, or other vehicles on the roadway and that, "[w]ithout skid marks or yaw marks or a vehicle at the scene, you cannot truly place the vehicle right there and . . . make measurements . . . ."

The jury found the defendant guilty of operating a motor vehicle while under the influence, assault in the second degree with a motor vehicle, and assault in the second degree, but not guilty of evasion of responsibility. The defendant thereafter pleaded guilty to the charge in the part B information, and the court found the defendant guilty of operating a motor vehicle while his operator's license was under suspension. On April 27, 2023, the defendant filed a motion to set aside the verdict, which the court denied on May 1, 2023. On May 1, 2023, the court sentenced the defendant to a total effective term of fifteen years of incarceration, suspended after twelve years, one year of which was mandatory, followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that there was insufficient evidence to convict him of assault in the second degree with a motor vehicle and assault in the second degree. Specifically, he argues that there was insufficient evidence that (1) he was the operator of the motor vehicle that struck the victim, (2) his alleged

intoxication caused the victim's injuries, and (3) the victim suffered serious physical injuries. We disagree.

We begin our analysis with well settled legal principles governing our review of evidentiary sufficiency claims, including our standard of review. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . 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. *Rosa*, 233 Conn. App. 211, 217–18, 338 A.3d 1207 (2025), petition for cert. filed (Conn. June 26, 2025) (No. 240414).

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 402–403, 902 A.2d 1044 (2006).

A

The defendant first argues that there was insufficient evidence to establish that he was the operator of the motor vehicle that struck the victim. We are not persuaded.

Counts two and three of the operative substitute information charged the defendant with assault in the second degree with a motor vehicle and assault in the second degree on factual allegations that the defendant, "while operating a motor vehicle under the influence of intoxicating liquor . . . cause[d] serious physical injury to . . . [the victim], as a consequence of the effects of such liquor and drugs," and "recklessly cause[d] serious physical injury to . . . [the victim] by means of a dangerous instrument."[11] To convict a defendant of assault in the second degree with a motor vehicle, the state must prove that the defendant, "while

[11] A motor vehicle qualifies as a "dangerous instrument" under § 53a-60 (a) (3). See General Statutes § 53a-3 (7) (" '[d]angerous instrument' means

operating a motor vehicle under the influence of intoxicating liquor or any drug or both . . . causes serious physical injury to another person as a consequence of the effect of such liquor or drug." General Statutes § 53a-60d (a). Because operating a motor vehicle is an essential element of the crime of assault in the second degree with a motor vehicle, "that element must be proven beyond a reasonable doubt." *State* v. *Teti*, 50 Conn. App. 34, 39, 716 A.2d 931, cert. denied, 247 Conn. 921, 722 A.2d 812 (1998). A person "operates a motor vehicle within the meaning of § 14-227a (a) (2) when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency [that] alone or in sequence will set in motion the motive power of the vehicle." (Internal quotation marks omitted.) Id., 38. We interpret the meaning of the term "operating" in § 53a-60d similarly in the present case. Moreover, to convict a defendant of assault in the second degree under § 53a-60 (a) (3), the state must prove that the defendant "recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument . . . ." Accordingly, the use of a deadly weapon or dangerous instrument is an essential element of assault in the second degree. See, e.g., *State* v. *Chapman*, 46 Conn. App. 24, 33–34, 698 A.2d 347, cert. denied, 243 Conn. 947, 704 A.2d 800 (1997), cert. denied, 523 U.S. 1063, 118 S. Ct. 1393, 140 L. Ed. 2d 652 (1998).

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, and includes a 'vehicle' as that term is defined in this section"); see also, e.g., *State* v. *Rios*, 171 Conn. App. 1, 26, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017). At trial, the evidence offered to prove that the defendant operated a motor vehicle under § 53a-60d was the same evidence offered to prove that he used a dangerous instrument to cause the victim's injuries under § 53a-60 (a) (3). We conclude, for the reasons stated in this opinion, that there was sufficient evidence to demonstrate that the defendant operated a motor vehicle under § 53a-60d and that he utilized a dangerous instrument for purposes of § 53a-60 (a) (3).

In the present case, the state adduced evidence from Cepeda-Grullon, which was corroborated by video surveillance footage, that he had been following the defendant's vehicle when he saw it hit the victim and leave the first accident scene. Cepeda-Grullon then testified that he pursued the vehicle and ultimately located it at the second accident scene. Police officers identified the defendant as the individual in the driver's seat of the vehicle that crashed at the second accident scene. A plastic casing that was found to match the defendant's vehicle was found at the first accident scene, and the victim's DNA was found on the defendant's vehicle. Moreover, the police responded to the second accident scene only a short time after the first accident. Considering the combined impact of all of the foregoing evidence, the jury reasonably could have concluded that the state had proven beyond a reasonable doubt that the defendant was the operator of the vehicle that struck the victim.

The defendant's attacks on the evidence introduced by the state are unavailing. The defendant argues that "neither [Clapper] nor [Scheurer], who both witnessed the accident, testified that they could see inside of the vehicle, how many passengers there were, or the identity of the driver." There was evidence, however, that Cepeda-Grullon observed the vehicle strike the victim, followed the vehicle from the first accident scene, and found the same vehicle at the second accident scene only a short time later. Although Cepeda-Grullon lost sight of the vehicle on two occasions, he found the vehicle at the second accident scene, where the defendant was found in the driver's seat. Cepeda-Grullon then provided a physical description of the driver to the investigating officers, which was similar to that of the defendant.[12] The defendant also relies on Cepeda-Grullon's testimony that he did not see anyone exit

[12] We note that, although the defendant argues that Cepeda-Grullon "was never asked by the police to identify the driver of the vehicle and did not

the vehicle after the second accident and was not 100 percent certain that there was only one person in the vehicle; however, there is no evidence that any person other than the defendant was in the vehicle or that any other person was seen near the vehicle at the second accident scene. See, e.g., *State* v. *Smith*, 179 Conn. App. 734, 750–51, 181 A.3d 118 (determining that there was sufficient evidence that defendant was operator of motor vehicle when there was ample evidence that he had operated vehicle just prior to his arrest), cert. denied, 328 Conn. 927, 182 A.3d 637 (2018); *State* v. *Sienkiewicz*, 162 Conn. App. 407, 411, 131 A.3d 1222 (concluding that there was sufficient evidence of element of operation of motor vehicle when defendant was in driver's seat and no one else was observed in vicinity), cert. denied, 320 Conn. 924, 134 A.3d 621 (2016).

The defendant's attempt to distinguish *State* v. *Teti*, supra, 50 Conn. App. 34, is not persuasive.[13] In *Teti*,

make an identification of the driver in court," the jury could still rely on the physical description of the driver that Cepeda-Grullon gave to the police as circumstantial evidence. See, e.g., *State* v. *Makins*, 232 Conn. App. 199, 215–16, 335 A.3d 67 (2025), petition for cert. filed (Conn. June 10, 2025) (No. 240398). The defendant's argument that the jury had to "speculate" that the defendant was the operator of the vehicle because he was taken to the hospital is belied by the evidence, including that his identification was located inside the vehicle and that Cepeda-Grullon saw the defendant in the driver's seat. Moreover, Cepeda-Grullon was prevented from identifying the defendant in court because the court had sustained defense counsel's own objection to such an identification, pursuant to *State* v. *Dickson*, 322 Conn. 410, 445–47, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017).

[13] The defendant also attempts to distinguish *State* v. *Tine*, 137 Conn. App. 483, 48 A.3d 722, cert. denied, 307 Conn. 919, 54 A.3d 562 (2012), on the ground that, in *Tine*, the state had the benefit of the statutory presumption in General Statutes § 14-107 (b) with respect to the element of operation because the defendant owned the vehicle involved in the accident. See id., 489; see also General Statutes § 14-107 (b) ("[w]henever there occurs a violation of section . . . 14-224 . . . proof of the registration number of any motor vehicle therein concerned shall be prima facie evidence in any criminal action . . . that the owner was the operator thereof"). Although it is true that the statutory presumption in § 14-107 (b) is not applicable in

this court held that the jury reasonably could have concluded that the defendant operated a vehicle while under the influence of liquor or drugs for purposes of § 14-227a. See id., 40–41. Although the defendant in that case argued that the evidence did not preclude the "reasonable hypothesis" that a third party had operated the vehicle; id., 41; this court held that the jury reasonably could have concluded that the defendant operated the vehicle on the basis of circumstantial evidence, including that there was only one set of footprints in the snow coming from the vehicle, that those footprints matched the defendant's, and that the "only footprints in the area were those of the defendant and the police officers." Id., 40. In the present case, there was no evidence that another individual was operating the vehicle or was in the vicinity of the second accident, where the vehicle was found.

In short, the defendant asks us to draw inferences from the evidence consistent with his theory of innocence. The jury, however, was not required to draw only those inferences consistent with innocence. See *State* v. *Calabrese*, supra, 279 Conn. 402–403. Accordingly, although the state relied on circumstantial evidence to show that the defendant was the operator of the vehicle, that evidence was amply sufficient for the jury reasonably to conclude that the defendant was the operator of the vehicle that struck the victim. See, e.g., *State* v. *Seeley*, 326 Conn. 65, 76, 161 A.3d 1278 (2017) ("[w]hen evaluating the sufficiency of the evidence, [t]here is no distinction between direct and circumstantial evidence so far as probative force is concerned" (internal quotation marks omitted)); *State* v. *Sienkiewicz*, supra, 162 Conn. App. 410 ("[t]here is no requirement that the fact of operation be established by direct evidence" (internal quotation marks omitted)).

the present case, the jury had more than sufficient evidence before it, even in the absence of such a presumption, from which it reasonably could have concluded that the defendant operated the motor vehicle that struck the victim.

B

The defendant also argues that there was "no evidence presented that the defendant's intoxication was the proximate cause of the accident." (Emphasis omitted.) We disagree.

Causation is an essential element of the crimes of assault in the second degree with a motor vehicle and assault in the second degree. See General Statutes § 53a-60 (a) ("[a] person is guilty of assault in the second degree when . . . (3) the actor recklessly *causes* serious physical injury to another person by means of a deadly weapon or a dangerous instrument" (emphasis added)); see also General Statutes § 53a-60d ("[a] person is guilty of assault in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he *causes* serious physical injury to another person as a consequence of the effect of such liquor or drug" (emphasis added)). "In order for legal causation to exist in a criminal prosecution, the state must prove beyond a reasonable doubt that the defendant was both the cause in fact, or actual cause, as well as the proximate cause of the victim's injuries. . . . In order that conduct be the actual cause of a particular result it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that but for the antecedent conduct the result would not have occurred. . . . On the other hand, proximate cause requires that the forbidden result which actually occurs must be enough similar to, and occur in a manner enough similar to, the result or manner which the defendant intended (in the case of crimes of intention), or the result or manner which his reckless or negligent conduct created a risk of happening (in the case of crimes of recklessness and negligence) that the defendant may fairly be held responsible

for the actual result even though it does differ or happens in a different way from the intended or hazarded result . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Leroy*, 232 Conn. 1, 5–6 n.6, 653 A.2d 161 (1995).

The defendant argues that evidence of his alleged intoxication was insufficient, standing alone, to establish causation. Contrary to the defendant's argument that the state did not present any evidence of the ''effect of [his] intoxication'' on the victim's injuries; (emphasis omitted); we conclude that there was sufficient evidence from which the jury reasonably could have inferred that his intoxication caused the victim's injuries. Here, the evidence revealed that the defendant's blood alcohol content was 0.27, well above the legal limit. During trial, the jury heard testimony from Bolduc, who testified that alcohol intoxication inhibits a person's ability to drive.[14] She further testified that alcohol acts as a central nervous system depressant, which can slow motor skills and functioning. The jurors could have inferred, on the basis of Bolduc's testimony and their own common knowledge and experience, that the

[14] The defendant argues that Bolduc did not respond to the scene of the second accident or administer any field sobriety tests to the defendant and that Bolduc did not become a drug recognition expert until after the accident. We agree with the state, however, that Bolduc's recall testimony related to the general effects of alcohol and that there was other direct evidence of the defendant's intoxication.

The defendant also asserts, for the first time in his reply brief, that Bolduc was not an expert witness and that expert testimony was required to demonstrate the effects of his intoxication. First, ''[i]t is . . . a well established principle that arguments cannot be raised for the first time in a reply brief.'' (Internal quotation marks omitted.) *ECR 2, LLC* v. *Thompson*, 232 Conn. App. 586, 595 n.6, 336 A.3d 1275 (2025). Moreover, regardless of whether Bolduc's testimony properly is characterized as lay or expert testimony, the defense neither objected to the admission of Bolduc's testimony before the trial court nor argued that expert testimony of the effects of the defendant's intoxication was necessary and not presented. We therefore decline to address this unpreserved argument.

defendant's intoxication while operating a motor vehicle caused the victim's injuries. "The condition of intoxication and its common accompaniments are a matter of general knowledge." (Internal quotation marks omitted.) *State* v. *Gordon*, 84 Conn. App. 519, 528, 854 A.2d 74, cert. denied, 271 Conn. 941, 861 A.2d 516 (2004).

Moreover, the jury heard evidence from eyewitnesses that the defendant almost backed into Cepeda-Grullon's vehicle, accelerated toward the victim, hit the victim without braking before the impact, and then left the scene.[15] See, e.g., *State* v. *Guitard*, 61 Conn. App. 531, 542, 765 A.2d 30 (there was sufficient evidence that defendant's intoxication was proximate cause of victim's injuries when defendant "crossed into the lane of oncoming traffic and did not appear to decelerate his vehicle"), cert. denied, 255 Conn. 952, 770 A.2d 32 (2001); *State* v. *Kwaak*, 21 Conn. App. 138, 147, 572 A.2d 1015 (holding that there was sufficient evidence that defendant's intoxication caused victim's death when defendant did not take evasive action to avoid collision), cert. denied, 215 Conn. 811, 576 A.2d 540 (1990). The jury viewed video surveillance footage that corroborated the witnesses' recollection of the first accident. Officers noted the absence of any skid marks at the first accident scene.[16] The jury also heard evidence regarding the second accident, which occurred

[15] Although the defendant relies on Bolduc's testimony that the victim most likely was under the influence and failed to yield the right of way, the jury heard that evidence at trial and still concluded that the defendant's intoxication, rather than any conduct of the victim, caused the accident. "We will not now entertain the defendant's request that we discount the state's evidence and give greater weight to evidence proffered by him. The trier is the judge of the credibility of all the witnesses and the weight to be given their testimony and, therefore, has the right to accept part or disregard part of a witness' testimony." (Internal quotation marks omitted.) *State* v. *Guitard*, 61 Conn. App. 531, 542, 765 A.2d 30, cert. denied, 255 Conn. 952, 770 A.2d 32 (2001).

[16] The defendant argues that an accident reconstruction was not done at the scene of the first accident. McCarthy testified, however, that it was not possible to conduct an accident reconstruction investigation because there

shortly after the first accident, including that the vehicle in which the defendant was later found had crashed into a tree, facing oncoming traffic. When the defendant was removed from the vehicle, he was hostile, and Paradis observed at the hospital that the defendant's eyes were bloodshot, red, and glossy. Viewing the foregoing evidence in the light most favorable to sustaining the verdict, the jury could have reasonably concluded that the evidence established beyond a reasonable doubt that the defendant's intoxication caused the victim's injuries.

C

The defendant further claims that the record contains insufficient evidence that the state proved that the victim suffered serious physical injuries pursuant to §§ 53a-60 (a) (3) and 53a-60d. We disagree.

"Serious physical injury" is defined by General Statutes § 53a-3 (4), for the purposes of both §§ 53a-60 (a) (3) and 53a-60d, as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." The evidence adduced at trial revealed that the victim was brought by ambulance to Lawrence + Memorial Hospital, where she exhibited severe confusion. She was diagnosed with a closed head injury, multiple fractures, and several abrasions and lacerations. After the accident, the victim could not care for herself for approximately three months and had to move in with her parents. The victim testified that, as of the time of trial, she still suffered from short-term memory loss and constant neck and back pain.

were no skid marks, yaw marks, or vehicles left at the scene. Even in the absence of accident reconstruction evidence, there was more than sufficient other evidence to establish causation in the present case.

Notwithstanding the defendant's argument that medical expert testimony was not offered in this case, such testimony was not required.[17] See *State* v. *Rumore*, 28 Conn. App. 402, 414, 613 A.2d 1328 ("our case law . . . does not require expert medical testimony to establish the element of serious physical injury"), cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992). The jury heard testimony regarding the victim's injuries directly after the accident, and their sequelae, from the victim and her mother. The jury also had before it the victim's medical records, which confirmed her diagnoses, as well as multiple photographs of the victim in the hospital that depict her wearing a neck brace, as well as multiple lacerations of her scalp, nose, and feet, and broken teeth. The jury also viewed Bolduc's body camera footage in which the victim is shown lying on the ground at the scene and bleeding.

The defendant argues that the victim did not lose consciousness, was speaking after the accident, and did not require surgical operations to treat her injuries. The absence of such evidence, however, did not preclude the jury from reasonably concluding that the victim sustained serious physical injuries. The nature of the serious physical injury inquiry is fact intensive and is not predicated on a threshold showing of grievousness. See *State* v. *Ovechka*, 292 Conn. 533, 545–46, 975 A.2d 1 (2009); see also, e.g., *State* v. *Lewis*, 146 Conn. App. 589, 607–608, 79 A.3d 102 (2013) (concluding that there was sufficient evidence of serious physical injuries when, although victim did not lose consciousness and recovered, victim sustained forehead laceration

[17] The defendant also argues that the jury was not instructed that " 'it may be inferred that' any of [the victim's] injuries created an impairment of the function of an organ of her body." To the extent that the defendant, for the first time in his reply brief, attempts to raise a separate instructional error claim with respect to that element of "serious physical injury," which was not raised before the trial court, we decline to review it. See, e.g., *ECR 2, LLC* v. *Thompson*, 232 Conn. App. 586, 595 n.6, 336 A.3d 1275 (2025).

that required stitches, nasal fracture, and chipped teeth and had blurred vision and difficulty breathing), cert. denied, 311 Conn. 904, 83 A.3d 605 (2014). The defendant also argues that the victim was able to live on her own and to work after the accident. It is well established, however, that "the term 'serious physical injury' does not require that the injury be permanent." *State* v. *Barretta*, 82 Conn. App. 684, 689, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); see also, e.g., *State* v. *Petion*, 332 Conn. 472, 489, 211 A.3d 991 (2019) (stating that permanence is not "a necessary condition for serious disfigurement . . . neither is it a sufficient condition, in and of itself, to establish serious disfigurement" (citation omitted; footnote omitted)). Moreover, even though the victim was living on her own at the time of trial, she testified that she continued to suffer the effects of her injuries. Accordingly, the jury reasonably rejected the defendant's invitation to conclude that the victim did not suffer serious physical injuries.

"[W]hether [the victim] suffered a 'serious physical injury' was a question of fact for the jury." *State* v. *Almeda*, 211 Conn. 441, 450, 560 A.2d 389 (1989). We decline to substitute our judgment for that of the jury. See, e.g., id. On the record before us, we cannot conclude, as a matter of law, that there was insufficient evidence from which the jury could reasonably have found that the victim suffered a serious physical injury. See, e.g., *State* v. *Leveille*, 232 Conn. App. 687, 698 and n.10, 337 A.3d 797 (2025). We therefore reject the defendant's sufficiency claim.

II

The defendant also claims that his convictions of assault in the second degree with a motor vehicle and assault in the second degree, arising from a single occurrence or act, violated his rights as guaranteed by the

double jeopardy clause of the fifth amendment to the United States constitution and the Connecticut constitution. We disagree.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013). "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . This constitutional provision is applicable to the states through the due process clause of the fourteenth amendment. . . . The Connecticut constitution provides coextensive protection, with the federal constitution, against double jeopardy. . . .[18] This constitutional guarantee serves three separate functions: (1) It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protects against multiple punishments for the same offense [in a single trial]. . . . In the present appeal, the defendant's claim implicates the last of these three functions.

"The double jeopardy analysis in the context of a single trial is a two part process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if

[18] "The Connecticut constitution does not contain an express prohibition against double jeopardy, but the due process guarantees of article first, § 8, of the constitution of Connecticut have been interpreted to include a protection against double jeopardy. See *State* v. *Michael J.*, 274 Conn. 321, 349–50, 875 A.2d 510 (2005). The scope of this state constitutional protection consistently has been construed to mirror, rather than to exceed, the protection afforded under the federal constitution. Id." *State* v. *Oscar H.*, 204 Conn. App. 207, 241 n.25, 252 A.3d 842, cert. denied, 338 Conn. 912, 259 A.3d 654 (2021).

both conditions are met. . . . With respect to cumulative sentences imposed in a single trial, the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. . . . [T]he role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. . . . On appeal, the defendant bears the burden of proving that the prosecutions are for the same offense in law and fact. . . .

"With respect to the first part of this two part process, it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to [part two of the analysis], where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger* test[19] to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact [that] the other does not.[20] . . . In applying the *Blockburger*

[19] "See *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)." *State* v. *Oscar H.*, 204 Conn. App. 207, 242 n.26, 252 A.3d 842, cert. denied, 338 Conn. 912, 259 A.3d 654 (2021).

[20] "Both our Supreme Court and the United States Supreme Court have clarified that the *Blockburger* test, which also is referred to as the *same-elements* test, inquires whether each offense contains an element not contained in the other; if not, they are the same offence and double jeopardy bars additional punishment and successive prosecution. . . . *United States* v. *Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In *State* v. *Bernacki*, [supra, 307 Conn. 21–22], our Supreme Court emphasized that it is irrelevant for purposes of a *Blockburger* analysis that the state

test, we look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged. . . .[21] Stated differently, only [i]f the elements of one offense as defined by the statute include the elements of a lesser offense; or if one offense is merely nominally distinct from the other will double jeopardy attach." (Citations omitted; emphasis omitted; footnotes in original; internal quotation marks omitted.) *State* v. *Oscar H.*, 204 Conn. App. 207, 241–43, 252 A.3d 842, cert. denied, 338 Conn. 912, 259 A.3d 654 (2021).

The state does not dispute the defendant's assertion that his conviction of assault in the second degree with a motor vehicle and assault in the second degree arose from the same act or transaction. The issue is whether they constitute the same offense.[22] We must therefore

may have relied on the same evidence to prove that the elements of both statutes were satisfied; id., 21; and that proper application of the *Blockburger* test looks at whether each statute contains a different statutory element requiring proof of a fact that the other does not . . . . Id., 22. The court further noted that emphasis on the conduct at issue, rather than purely on the statutory language and charging instruments, is not consistent with our well established case law holding that the *Blockburger* analysis is theoretical in nature and not dependent on the actual evidence adduced at trial. Id., 21 n.16." (Emphasis altered; internal quotation marks omitted.) *State* v. *Oscar H.*, 204 Conn. App. 207, 242–43 n.27, 252 A.3d 842, cert. denied, 338 Conn. 912, 259 A.3d 654 (2021).

[21] "As our Supreme Court has stated, the *Blockburger* test is, at its core, a rule of statutory construction, and 'because it serves as a means of discerning [legislative] purpose the rule should not be controlling [if], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling [if] a contrary intent is manifest. . . . [If] the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary.' . . . *State* v. *Alvaro F.*, 291 Conn. 1, 12–13, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009)." *State* v. *Oscar H.*, 204 Conn. App. 207, 243 n.28, 252 A.3d 842, cert. denied, 338 Conn. 912, 259 A.3d 654 (2021).

[22] The defendant has not argued that either assault in the second degree with a motor vehicle or assault in the second degree is a lesser included offense of the other.

examine the language of §§ 53a-60 (a) (3) and 53a-60d, as well as the operative substitute information,[23] to determine whether, as charged, "there was any element that the state was required to prove under one statute that was different from an element under the other." *State* v. *Nixon*, 231 Conn. 545, 551, 651 A.2d 1264 (1995).

Section 53a-60 (a) (3), assault in the second degree, requires the state to prove that a person "recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument . . . ." Section 53a-60d (a), assault in the second degree with a motor vehicle, requires the state to prove that a person, "while operating a motor vehicle under the influence of intoxicating liquor or any drug or both . . . causes serious physical injury to another person as a consequence of the effect of such liquor or drug." The operative substitute information with which the defendant was charged essentially duplicated this language.[24] We conclude that the relevant statute and information on each charge at issue requires proof of elements that the statute and information on the other charge do not.[25]

Most significantly, with respect to the element of intent, to prove assault in the second degree under § 53a-60 (a) (3), the state must prove that the defendant "recklessly" caused serious physical injury to another

[23] The defendant has not disputed that he did not request a bill of particulars in this case.

[24] Count two of the operative information provided in relevant part: "[T]he defendant . . . while operating a motor vehicle under the influence of intoxicating liquor and any drug [or] both, cause[d] serious physical injury to another person . . . as a consequence of the effects of such liquor and drugs."

Count three of the operative information provided in relevant part: "[T]he defendant did recklessly cause serious physical injury to another person . . . by means of a dangerous instrument."

[25] We agree with the defendant, and the state does not dispute, that the elements of "serious physical injury" and causation require the same proof under both §§ 53a-60 (a) (3) and 53a-60d.

person by means of a deadly weapon or dangerous instrument. In contrast, assault in the second degree with a motor vehicle under § 53a-60d is a general intent crime, requiring the state to prove that the defendant, while operating a motor vehicle under the influence of intoxicating liquor, caused another person serious physical injury. "The intent element in each statute consequently requires proof of a fact which the other does not." (Internal quotation marks omitted.) *State* v. *Nixon*, supra, 231 Conn. 552; see, e.g., id., 553–54, 563 (concluding that defendant's convictions of assault of correctional officer pursuant to General Statutes § 53a-167c (a) (1) and assault in second degree under § 53a-60 (a) (5) did not violate double jeopardy clause because it was possible for defendant to commit one crime and not other).

Furthermore, § 53a-60 (a) (3) requires proof that a person used a "deadly weapon or a dangerous instrument" to cause serious physical injuries to another person. Section 53a-60d is narrower, however, and requires proof that a person caused serious physical injury to another person "while operating a motor vehicle under the influence of intoxicating liquor or any drug or both . . . ." Thus, a person may commit the crime of assault in the second degree under § 53a-60 (a) (3) without operating a motor vehicle and/or being intoxicated, which is an essential element of assault in the second degree with a motor vehicle under § 53a-60d. See, e.g., *State* v. *Ovechka*, supra, 292 Conn. 547 (evidence supported finding that pepper spray was dangerous instrument). Likewise, a person may commit the crime of assault in the second degree with a motor vehicle without committing the crime of assault in the second degree if the fact finder determines that the defendant's conduct was not reckless. Cf., e.g., *State* v. *Borrelli*, 94 Conn. App. 849, 862, 895 A.2d 257 (2006) (trial court did not issue inconsistent decisions when it rejected

defendant's defense of involuntary intoxication with respect to charge of operating motor vehicle while under influence because defendant showed general intent to operate motor vehicle, while also finding defendant not guilty of reckless driving in light of defendant's involuntary intoxication). Accordingly, it is possible for a person to commit either assault in the second degree with a motor vehicle or assault in the second degree, without committing the other crime.

Indeed, the defendant's counsel acknowledged at oral argument before this court that the statutory language of the two offenses differs. To the extent that the defendant argues that "neither charge required proof of a fact that the other did not," we disagree. For example, the defendant argues that his alleged intoxication was the same evidence used to show that his conduct was reckless under § 53a-60 (a) (3).[26] The defendant also asserts that, although the statutory language differs because § 53a-60d requires proof that the defendant "operat[ed] a motor vehicle," whereas § 53a-60 (a) (3) requires proof that the defendant utilized a "dangerous instrument," "in effect and *as applied to the defendant's case*, they are the same element and require proof of the same fact . . . ." (Emphasis added.) These arguments essentially invite us to look beyond the information to the evidence to determine whether assault in the second degree with a motor vehicle and assault in the second degree are the same offense. Under the technical analysis of the *Blockburger* test, however, we look only to the statutory elements and the operative information in determining whether the crimes at issue constitute the same offense. See, e.g., *State* v. *Nixon*, supra, 231

[26] Because we decline to examine the evidence at this stage of the *Blockburger* analysis, we need not address the state's argument that it presented other evidence of the defendant's recklessness at trial, namely, evidence that Cepeda-Grullon saw the defendant's vehicle speed up as it headed toward the victim.

Conn. 551. As we previously stated, the fact that the same evidence was used to establish that the defendant committed each crime is irrelevant. See *State* v. *Oscar H.*, supra, 204 Conn. App. 242 n.27.

Our analysis, however, does not end here. "[T]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. . . . The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning congressional purpose the rule should not be controlling whe[n], for example, there is a clear indication of contrary legislative intent. . . . The language, structure, and legislative history of a statute can provide evidence of this intent. . . . If the legislature clearly expressed an intention that the statutes were designed to punish the same offense, then prosecution under both statutes would violate the double jeopardy clause." (Citations omitted; internal quotation marks omitted.) *State* v. *Nixon*, supra, 231 Conn. 555.

"When divining legislative intent in the double jeopardy context, our Supreme Court has considered several factors, including: (1) whether the statutes were designed to protect separate and distinct interests of society . . . (2) whether the statute in question references other statutory offenses . . . (3) whether the statute in question set[s] forth a separate penalty rather than using a multiplier of the penalty for another offense . . . (4) the presence of language expressly prohibiting cumulative punishments . . . (5) the placement of each offense within the General Statutes . . . and (6) the legislative history of the challenged statute . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Burgos*, 170 Conn. App. 501, 552, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017).

The defendant argues that the legislature did not intend for multiple punishments under these circumstances. Specifically, the defendant asserts that he cannot be convicted of assault in the second degree and

assault in the second degree with a motor vehicle when "there is a single assault, and an absence of legislative history indicating an intent for multiple punishments to be available for one criminal act." We are not persuaded. First, the statutory scheme supports our determination that §§ 53a-60 and 53a-60d are different offenses. Neither statute refers to the other, and each statutory offense sets out its own penalty: assault in the second degree is a class C felony when the offense results in serious physical injury, and assault in the second degree with a motor vehicle is a class D felony. See, e.g., *State* v. *Delgado*, 19 Conn. App. 245, 255, 562 A.2d 539 (1989); see also General Statutes §§ 53a-60 (b) and 53a-60d (b). Furthermore, § 53a-60d (b) provides for penalties that § 53a-60 (a) (3) does not. Specifically, § 53a-60d (b) provides in relevant part that, upon conviction, "the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year. The court shall also order such person not to operate any motor vehicle that is not equipped with an approved ignition interlock device, as defined in section 14-227j, for a period of two years after such person's operator's license or nonresident operating privilege is restored by the Commissioner of Motor Vehicles."

We further note the absence of any express language in § 53a-60d to indicate that the legislature intended that a person convicted of assault in the second degree with a motor vehicle could not also be convicted of assault in the second degree. By contrast, "our Penal Code is replete with other statutes in which the legislature expressly has barred conviction of two crimes for one action. See, e.g., General Statutes § 53a-55a (a) ('[n]o person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction') . . . . In view of this common practice, we ordinarily presume

that the legislature's failure to include such terms in [§ 53a-60d] indicates that it did not intend a similar result." (Citations omitted.) *State* v. *Kirsch*, 263 Conn. 390, 418–19, 820 A.2d 236 (2003).

The defendant also argues that he cannot be convicted of §§ 53a-60 and 53a-60d "whe[n] there is a single assault and an absence of legislative history indicating an intent for multiple punishments to be available for one criminal act."[27] We are unpersuaded.

In 1969, the legislature approved Public Acts 1969, No. 828, the first iteration of Connecticut's Penal Code. See *State* v. *Terwilliger*, 314 Conn. 618, 654, 104 A.3d 638 (2014). Thereafter, the legislature codified § 53a-60, to take effect on October 1, 1971. See Public Acts 1969, No. 828, § 215. Section 53a-60 (a) originally proscribed several types of conduct, including recklessly causing serious physical injury to another person by means of a deadly weapon or a dangerous instrument, the conduct alleged in the present case. See Public Acts 1969, No. 828, § 61. The legislature enacted § 53a-60d in 1982 as a new statute, which was introduced as part of a comprehensive reform effort to enhance criminal penalties for driving while under the influence. See Public Acts 1982, No. 82-403, § 2 (P.A. 82-403).

[27] In support of his argument that the legislature did not intend for multiple punishments in these circumstances, the defendant cites *State* v. *Nixon*, 92 Conn. App. 586, 589, 597, 886 A.2d 475 (2005), for the proposition that "multiple assault convictions arising out of a single act of assault violate double jeopardy." That case is distinguishable. In that case, the defendant was charged with two counts of the same crime, assault in the second degree under § 53a-60 (a) (2), for conduct that arose from one continuous assault. *State* v. *Nixon*, supra, 587. In the present case, by contrast, although it is true that there was only one assault, the defendant was charged with two separate crimes: assault in the second degree with a motor vehicle and assault in the second degree. "It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the [d]ouble [j]eopardy [c]lause." *Albernaz* v. *United States*, 450 U.S. 333, 345 n.3, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

The statutes at issue have distinct purposes. An obvious purpose of § 53a-60 (a) (3) is to proscribe reckless, assaultive conduct. Section 53a-60d has the more targeted, specific purpose of proscribing the operation of a motor vehicle while under the influence of an intoxicating liquor or drug.[28] See, e.g., *Albernaz* v. *United States*, 450 U.S. 333, 343, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) (concluding that Congress intended to permit imposition of consecutive sentences with respect to two conspiracy statutes when those statutes were directed to "separate evils"); *State* v. *Greco*, 216 Conn. 282, 293, 296, 579 A.2d 84 (1990) (conviction of felony murder, robbery in first degree and burglary in first degree did not violate double jeopardy because "[a]n obvious purpose of the felony murder statute . . . is to protect human life," whereas robbery statutes were intended to protect against forcible taking); *State* v. *Dunbar*, 37 Conn. App. 338, 346–47, 656 A.2d 672 (defendant's convictions of assault on peace officer and assault in second degree did not violate double jeopardy because statutes were enacted with different intents), cert. denied, 233 Conn. 906, 657 A.2d 644 (1995).

The apparent intent of the legislature was not to merge § 53a-60 (a) (3) into § 53a-60d but, instead, to enact a *new* offense.[29] See, e.g., *State* v. *Nixon*, supra,

[28] Although §§ 53a-60 (a) (3) and 53a-60d are located in the same part of the Penal Code, titled "Assault and Related Offenses," "that the statutes were designed to protect separate and distinct interests of society, rather than where they are situated is more indicative of whether the legislature intended to create separate crimes and separate punishments." (Internal quotation marks omitted.) *State* v. *Bernacki*, supra, 307 Conn. 29.

[29] In making this determination, we are mindful of our Supreme Court's recent decision in *State* v. *Williams*, 352 Conn. 104, 107–109, 335 A.3d 792 (2025), in which the court held that the defendant's conviction of criminal possession of a firearm and criminal possession of ammunition in violation of the same statute, General Statutes § 53a-217 (a), violated double jeopardy. The court concluded that § 53a-217 (a) was ambiguous with respect to the legislature's intent to treat criminal possession of a firearm and ammunition as separate offenses. Id., 134–35. The court looked to the legislative history and stated that "the addition of 'ammunition' in § 53a-217 appears to be directed to a situation in which someone, who was not legally allowed to

231 Conn. 561 (concluding that apparent intent of legislature was "not to merge the class D felony of § 53a-60 (a) (5) into the class C felony of § 53a-167c (a) (1), but instead to make the class D felony of § 53a-60 (a) (5) the basis of a *new* class *B* felony" (emphasis in original)). It is well settled that "the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law . . . ." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 709, 998 A.2d 1 (2010); see also *State* v. *Nixon*, supra, 231 Conn. 559 ("[w]hen the legislature acts . . . it is presumed to know the state of the law").

The defendant argues that § 53a-60d was designed to fill a "gap" in the law, specifically, to "address a problem the legislature saw in drunk driving accidents resulting in serious physical injury." We agree that the legislature enacted § 53a-60d with the intent to fill a gap in the existing law. See 25 H.R. Proc., Pt. 9, 1982 Sess., p. 2271, remarks of Representative Richard D. Tulisano

have ammunition, was found in possession of ammunition, such as on their person or in a car, but not in a loaded gun." Id., 136. The court concluded, applying the rule of lenity, that, even if the legislative history did not clarify the meaning of the statute, allowing multiple punishments for possessing a firearm and the ammunition contained within that firearm would violate double jeopardy. Id., 136–37.

We believe that the present case is distinguishable because, here, the statutory scheme unambiguously reveals the legislature's intent, in enacting § 53a-60d, to create the new offense of assault in the second degree with a motor vehicle. See, e.g., *Albernaz* v. *United States*, supra, 450 U.S. 342 (noting that "touchstone" of rule of lenity "is statutory ambiguity," and, when the legislature "has manifested its intention, we may not manufacture ambiguity in order to defeat that intent" (internal quotation marks omitted)). As stated previously, §§ 53a-60 (a) (3) and 53a-60d were enacted with distinct purposes. By contrast, the harm targeted by the criminal possession of firearms and ammunition in § 53a-217 (a) is the same: to prevent the unlawful arming of felons. See *State* v. *Williams*, supra, 352 Conn. 135–37. Finally, although the addition of "ammunition" was apparently added to § 53a-217 to fill a gap in prosecutions under that existing statute; see id.; in the present case, § 53a-60d was enacted as one of several new statutes to fill a gap contained in the criminal law generally.

(noting that legislation "sets up a new series of penalties for causing injury or death while driving a motor vehicle while intoxicated by either drugs or alcohol"); see also 25 S. Proc., Pt. 11, 1982 Sess., p. 3601, remarks of Senator Myron R. Ballen (noting that existing laws proscribing driving while under influence of intoxicating liquor or other drugs "are not strong enough to put people away"); id., p. 3642, remarks of Senator Russell L. Post, Jr. ("What we're saying is that if, indeed, you are involved, while intoxicated, in an accident that involves a fatality, manslaughter or what have you, you've got to be prosecuted. . . . We're trying to . . . make it clear that if, indeed, you're arrested for drunken driving and there is this kind of an accident, you're going to be prosecuted for that offense.").[30] Number 82-403 of the 1982 Public Acts is titled "An Act Concerning Criminal Penalties For Driving While Intoxicated," which indicates the legislature's intent to enact a series of new criminal offenses, including § 53a-60d, to address the same harm: operating a motor vehicle while under the influence of an intoxicating liquor or drug. See, e.g., *State* v. *Kozlowski*, 199 Conn. 667, 678, 509 A.2d 20 (1986) ("[i]n attempting to glean legislative intent, it is often useful to examine the title of a proposed bill . . . and the purpose the legislature intended to accomplish by its enactment" (citation omitted)).

Our Supreme Court also previously has noted—in discussing manslaughter in the second degree pursuant to General Statutes § 53a-56b, which was also enacted as part of P.A. 82-403—that the legislature had intended to "enhance the existing criminal penalties for causing physical injury or death when driving while intoxicated

[30] Moreover, in written testimony submitted to the Joint Standing Committee on the Judiciary, Austin J. McGuigan, then chief state's attorney, submitted that "[t]he increasing number of alcohol-related deaths and injuries on [s]tate highways makes it necessary to advocate stiffer penalties for those driving under the influence." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1982 Sess., p. 419.

in order to deter such conduct." *State* v. *Kirsch*, supra, 263 Conn. 419; see also, e.g., *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 170, 12 A.3d 948 (2011).

Although we agree with the defendant that the legislature enacted § 53a-60d with the apparent intention of filling a gap in the existing law, we disagree that this intention clearly demonstrates that the legislature intended to treat §§ 53a-60 (a) (3) and 53a-60d as the same offense. This court has stated that, "[w]henever the legislature fills a gap in the criminal law, it is fair to infer, absent clear legislative history to the contrary, that it is seeking to provide the executive branch with an addition to its existing law enforcement arsenal, rather than a substitute for an already existing offense." *State* v. *Delgado*, supra, 19 Conn. App. 256. We have carefully reviewed the legislative history of §§ 53a-60 (a) (3) and 53a-60d and have not found any indication as to whether the legislature intended to preclude or to permit the prosecution of assault in the second degree or assault in the second degree with a motor vehicle when the state has commenced the prosecution of the other offense for the same conduct. "Therefore, we are left with silence on the issue, from which we do not determine legislative intent." (Internal quotation marks omitted.) *State* v. *Wyatt*, 80 Conn. App. 703, 713, 836 A.2d 1242 (2003), cert. denied, 267 Conn. 918, 841 A.2d 1192 (2004); see also, e.g., *Albernaz* v. *United States*, supra, 450 U.S. 341–42 ("[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind. It is not a function of [appellate courts] to presume that Congress was unaware of what it accomplished . . . ." (Internal quotation marks omitted.)).

We conclude that the defendant has not established a clear legislative intent to treat §§ 53a-60 (a) (3) and

53a-60d as one offense for double jeopardy purposes.[31] See, e.g., *State* v. *Dunbar*, supra, 37 Conn. App. 347–48. Having failed to rebut the presumption under *Blockburger*, the defendant cannot prevail on his double jeopardy claim.[32]

III

The defendant's final claim is that the trial court's supplemental instruction to the jury in response to a note misled the jury. Specifically, the defendant argues that the court's "supplemental instruction that serious physical injury did not need to be long-term crossed into the purview of the [jurors], who were the sole fact finders tasked with determining what constituted 'serious physical injury,' and misled them." We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. After closing

[31] We decline the defendant's invitation to apply the rule of lenity because "that principle is inapplicable given the lack of ambiguity in the statutory scheme after application of the *Blockburger* analysis and review of the legislative history. See . . . *Albernaz* v. *United States*, [supra, 450 U.S. 342] (Where [the legislature] has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. . . . Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. . . .)." (Citation omitted; internal quotation marks omitted.) *State* v. *Bernacki*, supra, 307 Conn. 30 n.24.

[32] We also reject the defendant's argument that "[t]here has only been one case . . . where a defendant was convicted of assault [in the] second [degree] under the theory that operation of a motor vehicle constituted the use of a dangerous instrument, and where the defendant was intoxicated at the time of the accident," citing *State* v. *Guitard*, supra, 61 Conn. App. 531. First, the defendant's counsel acknowledged at oral argument before this court that there may be cases aside from *Guitard* in which a defendant was convicted of assault in the second degree with a motor vehicle and assault in the second degree that were not appealed. Furthermore, the "decisions by the state's attorneys as to the offenses with which they will charge a defendant require inherently fact intensive inquiries. We will not [second-guess] the rationality of those decisions in the absence of persuasive reasons for doing so." *State* v. *Kirsch*, supra, 263 Conn. 422–23.

arguments, the court delivered its initial instructions to the jury on the relevant law, which included an instruction on "serious physical injury," an essential element of both §§ 53a-60 and 53a-60d. Specifically, the court instructed the jury in relevant part: "Serious physical injury is something more serious than mere physical injury, which is defined as impairment of physical condition or pain. It is more than a minor or superficial injury. It is defined by statute as physical injury which creates a substantial risk of death or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any . . . bodily organ."[33]

The court provided the jurors with a paper copy of the jury instructions for their use during deliberations. The jury then began its deliberations and, thereafter, sent the following note to the court: "Serious physical injury, must this be long term or at [occurrence]?" Upon receiving the note, the court discussed the matter with counsel. The court proposed responding to the note by informing the jurors that "it does not need to be long-term, and I will refer them to the instruction that I've already given them regarding serious physical injury." Defense counsel, in response, requested that the court "reread the instruction on serious physical injury to them and [not] give them a direct answer on that." In the alternative, defense counsel requested that the court "remind them they're the finders of fact and [permanence] is something they can consider in consideration of that question." The court noted defense counsel's exception. The court then called the jury back to the courtroom and issued a supplemental instruction: "Court

[33] The defendant has not challenged the court's initial charge on the element of serious physical injury. The court's initial instruction tracks the definition of " '[s]erious physical injury' " pursuant to § 53a-3 (4) and as contained in the Connecticut model criminal jury instructions. See Connecticut Criminal Jury Instructions 6.1-9, available at https://jud.ct.gov/JI/criminal/criminal.pdf (last visited September 22, 2025).

exhibit five indicates, 'serious physical injury, must this be long-term or at occurrence?' And, the answer is—one is, obviously, I'm referring to the instruction on serious physical injury, does describe in some detail as to what the state . . . considers serious physical injury. So, I do refer to that. I'm not [going to] read it again. I know you have a copy of that. But, the short answer to your question is, it does not need to be long-term, [it] does not need to be permanent."

With the entirety of the court's jury instructions in mind, we next set forth the legal principles that guide our analysis. "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 570, 187 A.3d 454 (2018), aff'd, 334 Conn. 660, 224 A.3d 129 (2020). "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review. . . . This standard of review also applies to supplemental instructions." (Citation omitted; internal quotation marks omitted.) *State* v. *Moon*, 192 Conn. App. 68, 75, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

On the basis of our review of the entire jury charge, we conclude that it is not reasonably possible that the jury was misled by the court's supplemental instruction. The defendant does not challenge the court's original instruction regarding the element of serious physical injury. With respect to the supplemental charge, the court "properly answered the specific question that was raised by the jury; see Practice Book § 42-27;[34] and did not contradict . . . its previous instructions." (Footnote in original.) *State* v. *Turner*, supra, 181 Conn. App. 571; see also, e.g., *State* v. *Delgado*, 247 Conn. 616, 627, 725 A.2d 306 (1999) (concluding that "it [was] not reasonably possible that the jury was misled" when court did not contradict concededly correct initial and first supplemental charges in challenged second supplemental charge).

The defendant's argument that the court's instruction was "unnecessarily rigid and misled the [jurors] by taking away their fact-finding ability to determine what constitutes serious physical injury . . . and whether [the victim's] injuries fit that description" is unavailing. The court answered the jury's question, namely, whether the victim's injuries must be long-term, and that answer was correct in law. See *State* v. *Barretta*, supra, 82 Conn. App. 689; see also, e.g., *State* v. *Moon*, supra, 192 Conn. App. 83 (defendant could not prevail on supplemental instructional error claim because instruction was proper statement of law). The court did not state that permanence was not a factor the jury could consider in determining whether the victim sustained a serious physical injury. Finally, the court

[34] "Practice Book § 42-27 provides: 'If the jury, after retiring for deliberations, requests additional instructions, the judicial authority, after providing notice to the parties and an opportunity for suggestions by counsel, shall recall the jury to the courtroom and give additional instructions [necessary] to respond properly to the request or to direct the jury's attention to a portion of the original instructions.' " *State* v. *Turner*, supra, 181 Conn. App. 571 n.21.

referred the jury to its original instructions, a copy of which was in the jury's possession, and those instructions provided a correct definition of serious physical injury.[35] The defendant therefore cannot prevail on his claim of instructional impropriety.

The judgment is affirmed.

In this opinion the other judges concurred.

VERMONT AEROSPACE INDUSTRIES, LLC *v.* LAWRENCE W. SCHWOERI (AC 48111)

Cradle, C. J., and Elgo and Wilson, Js.

Syllabus

The plaintiff appealed from the trial court's judgment denying its application to vacate, correct and/or modify a certain arbitration award and granting the defendant's motion for order confirming the arbitration award. The plaintiff claimed, inter alia, that the court improperly denied its application and granted the defendant's motion because the arbitrator acted in manifest disregard of the law and violated public policy. *Held*:

The judgment of the trial court was affirmed, as the trial court properly resolved the issues raised in this appeal, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued May 21—officially released October 7, 2025

Procedural History

Application to vacate, correct and/or modify an arbitration award, and for other relief, brought to the Superior Court in the judicial district of Bridgeport, where the defendant filed a motion for order confirming the arbitration award; thereafter, the case was tried to the

[35] We also reject the defendant's argument that the court should have "remind[ed] the jury that it was the sole fact finder . . . ." The court's original instructions informed the jurors that they were the "sole judges of the facts." The court need not have repeated that instruction when the jury did not express any confusion on that point.

court, *Hon. Barry K. Stevens*, judge trial referee; judgment denying the plaintiff's application to vacate, correct and/or modify the arbitration award and granting the defendant's motion for order confirming the arbitration award, from which the plaintiff appealed to this court. *Affirmed.*

Jay M. Levin, with whom were *James J. Philopena* and, on the brief, *Thomas J. Riley* and *Joseph J. Selinger*, for the appellant (plaintiff).

John L. Cesaroni, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Vermont Aerospace Industries, LLC, appeals from the judgment of the trial court denying its application to "partially vacate, correct, and/or modify" an arbitration award and granting the motion for order confirming that award filed by the defendant, Lawrence W. Schwoeri. On appeal, the plaintiff claims that the court improperly denied its application and granted the defendant's motion for order because the arbitrator acted in manifest disregard of the law and violated public policy. The plaintiff alternatively contends that the court improperly declined to modify the manner in which the damages awarded to the defendant must be paid. We affirm the judgment of the trial court.

This appeal concerns an employment dispute. The plaintiff is a limited liability company that manufactures metal components used by defense contractors and commercial aircraft. At all relevant times, the defendant was a minority shareholder who owned 15 percent of the plaintiff. On June 15, 2016, the defendant was named chief executive officer of the plaintiff. His employment was governed by an "Executive Term Sheet" dated June 15, 2016 (term sheet). Section 3.2 of the term sheet memorialized the defendant's right to exercise a "put"

option regarding his shares in the plaintiff.[1] The term sheet also contained an arbitration clause that pertained to any disputes regarding the defendant's employment. On June 15, 2021, the defendant notified the plaintiff that he was exercising his put option pursuant to § 3.2 of the term sheet.

On February 11, 2022, the plaintiff terminated the defendant's employment. The defendant thereafter filed a demand for arbitration, in which he asserted four counts. Relevant to the present appeal is the first count, in which the defendant alleged breach of contract due to the plaintiff's failure to pay his put option.[2] In response, the plaintiff filed an answer and a three count counterclaim, in which it alleged breach of fiduciary duty, constructive fraud, and corporate waste.

On January 9, 2024, the arbitrator issued a decision in which she found in favor of the defendant on his two breach of contract claims and awarded him a total of $2,983,382 plus interest.[3] The arbitrator also found in favor of the plaintiff on its breach of fiduciary duty count of its counterclaim and awarded the plaintiff $297,916.66 plus interest as a setoff against the damages awarded to the defendant.[4]

On February 7, 2024, the plaintiff filed an application with the Superior Court to vacate in part or modify

[1] "A put is [a]n option that conveys to its holder the right, but not the obligation, to sell a specific asset at a predetermined price until a certain date." (Internal quotation marks omitted.) *Securities & Exchange Commission* v. *Dorozhko*, 574 F.3d 42, 44 n.1 (2d Cir. 2009).

[2] The defendant also alleged breach of contract due to the plaintiff's failure to pay certain taxes and unjust enrichment claims against the plaintiff, as well as a breach of fiduciary duty claim against Leonard M. Levie, who at all relevant times was the chairman and majority shareholder of the plaintiff.

[3] The arbitrator dismissed the defendant's unjust enrichment and breach of fiduciary duty counts.

[4] The arbitrator dismissed the plaintiff's constructive fraud and corporate waste counts of its counterclaim.

the arbitration award.[5] The defendant, in turn, filed a motion for an order confirming the arbitration award. The parties thereafter submitted memoranda of law and the court held a hearing on the motion for order to confirm and the application to vacate the arbitration award on June 4, 2024. By memorandum of decision dated September 26, 2024, the court granted the defendant's motion for order to confirm and denied the plaintiff's application to vacate. The court rendered judgment accordingly, and this appeal followed.

Our plenary review of the record, briefs, and arguments of the parties persuades us that the judgment should be affirmed. The issues properly were resolved in the court's thorough and well reasoned memorandum of decision. See *Vermont Aerospace Industries, LLC* v. *Schwoeri*, Superior Court, judicial district of Bridgeport, Docket No. CV-24-6131230-S (September 26, 2024) (reprinted at 235 Conn. App. 580, A.3d (2025)). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

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[5] The plaintiff sought to vacate the arbitration award only with respect to the court's ruling on the first count of the defendant's demand for arbitration, which alleged breach of contract due to the plaintiff's failure to pay the put option. The plaintiff alternatively asked the court to modify the manner in which the damages awarded to the defendant must be paid.

APPENDIX

VERMONT AEROSPACE INDUSTRIES, LLC *v.* LAWRENCE W. SCHWOERI*

Superior Court, Judicial District of Bridgeport
File No. CV-24-6131230-S

Memorandum filed September 26, 2024

Proceedings

Memorandum of decision on plaintiff's application to vacate, correct and/or modify arbitration award and on defendant's motion for order confirming arbitration award. *Application to vacate, correct and/or modify arbitration award denied; motion for order confirming arbitration award granted.*

Jay Levin, with whom was *James Philopena*, for the plaintiff.

John Cesaroni, for the defendant.

Opinion

HON. BARRY K. STEVENS, judge trial referee.

STATEMENT OF THE CASE

This present action was instituted on February [23], 2024, by the plaintiff, Vermont Aerospace Industries, LLC (VAI), against the defendant, Lawrence W. Schwoeri (Schwoeri), seeking to vacate, correct or modify an arbitration award. On March 7, 2024, in response to the application, Schwoeri filed a motion for an order confirming the award. On April 5, 2024, VAI filed a memorandum in support of its application to vacate, correct, or modify the arbitration award. On May 3, 2024, Schwoeri filed a memorandum in opposition to

* Affirmed. *Vermont Aerospace Industries, LLC* v. *Schwoeri*, 235 Conn. App. 576, A.3d (2025).

VAI's application. The court heard oral argument on the matter on June 4, 2024.

The filings of the parties provide the following relevant information. VAI is a limited liability company organized and existing under the laws of the state of Wyoming. Schwoeri resides in Florida and formerly served as the chief executive officer (CEO) of VAI. On June 1[5], 2016, Schwoeri signed an Executive Term Sheet (term sheet) as the CEO of VAI, which summarized the terms of his employment. Section 3.2 of the operating agreement between the parties provides that Schwoeri may sell or put his interest in the company (the put right) or, alternatively, that VAI may purchase Schwoeri's interest in the company in certain circumstances. On or about June 14, 2021, Schwoeri attempted to exercise his put option for VAI. However, Leonard M. Levie, the chairman of VAI, refused to honor the put right. In February, 2022, Levie terminated Schwoeri's employment.

On January 30, 2023, Schwoeri commenced arbitration with the American Arbitration Association (AAA), entitled *Lawrence W. Schwoeri* v. *Vermont Aerospace Industries, LLC and Leonard M. Levie*, Docket No. 01-23-0000-3897. Schwoeri asserted four claims against VAI and Levie: (1) breach of contract: refusal to pay put option; (2) breach of contract: failure to pay taxes; (3) breach of fiduciary duties (asserted against Levie); and (4) unjust enrichment. On April 25, 2023, VAI filed [its] answer and asserted three counterclaims against Schwoeri: (1) breach of fiduciary duties; (2) constructive fraud; and (3) corporate waste. Abigail Pessen was designated as the arbitrator. The arbitrator received extensive witness testimony, including expert witness testimony, and over 200 exhibits into evidence. Thereafter, both parties submitted postarbitration briefs. The AAA hearing was declared closed as of December 8, 2023, but the parties mutually agreed to January 12,

2024, as the deadline for the issuance of a final award. On January 9, 2024, the arbitrator issued the final award.

In the final award, the arbitrator found that Schwoeri was entitled to the sum of $2,829,794, the credible valuation of the put right. The arbitrator further found that Schwoeri did not commit any fraud, misconduct, or violate the term sheet based on a breach of his fiduciary duties, explaining that the operating agreement did not impose a fiduciary duty on LLC managers. Because the operating agreement did not include a clause indicating that a breach of fiduciary duty was a ground to disallow executing the put right, breaching his fiduciary duty was not a valid ground to bar Schwoeri from executing his put option. Next, the arbitrator found that Schwoeri was entitled to the income tax distributions for the years of 2021 and 2022 and that VAI would pay his tax distribution for 2023 if they did not remove him as a shareholder per the language of the operating agreement. Finally, the arbitrator dismissed Schwoeri's third claim of breach of fiduciary duties against Levie and fourth claim of unjust enrichment.

Regarding VAI's counterclaims, the arbitrator found that, as to Schwoeri's breach of fiduciary duty, that Schwoeri was not candid or transparent in his dealings with the company and his manager for all post-June 5, 2020 monetary transfers. The arbitrator specified that Schwoeri was insubordinate and breached the fiduciary duty owed to VAI as the manager of the LLC and as VAI's employee. As a result of this conduct, the arbitrator awarded to VAI as a setoff the amount of $297,916.66.

DISCUSSION

I

"The standard of review for arbitration disputes is well settled. Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitra-

tion and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *Girolametti* v. *Rizzo Corp.*, 152 Conn. App. 60, 63–64, 97 A.3d 55 (2014); see also *Zelvin* v. *JEM Builders, Inc.*, 106 Conn. App. 401, 406, 942 A.2d 455 (2008).

General Statutes § 52-417 provides that "[a]t any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

The standard of review that guides the analysis of arbitration awards is well established. "Our review is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. With respect to the latter, we have explained that, as long as the arbitrator's remedies were consistent with the agreement they were within the scope of the submission." (Footnotes omitted; internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 85–86, 881 A.2d 139 (2005).

In VAI's application to vacate, correct, or modify the final arbitration award and in [its] supporting memorandum, VAI argues that, although the arbitrator found that Schwoeri breached [his] fiduciary duty as an employee and CEO of VAI, the arbitrator failed to determine whether that breach of fiduciary duty amounted to a violation of the term sheet and, consequently, the operating agreement between the two parties. Further, VAI argues that the arbitrator ignored the language of the operating agreement regarding Schwoeri's put right and failed to determine whether Schwoeri's conduct, which violated his fiduciary duties, also violated the covenant of good faith and fair dealing. Finally, VAI argues that the arbitrator's award amounts to a manifest disregard of the law and a violation of public policy.

In opposition, Schwoeri argues that VAI's positions merely reflect disagreement with the arbitrator's decision, which was well within the scope of the unrestricted submission provided under the parties' arbitration agreement. Schwoeri maintains that there is no evidence to support VAI's argument that the arbitrator ignored the language of the operating agreement when issuing the final award. Schwoeri further argues that the arbitrator, when deciding the final award, did not manifestly disregard the law simply because she misinterpreted a contractual provision or violate public policy.[1]

II

UNRESTRICTED SUBMISSION

As an initial matter, the court finds that the parties' submission to arbitration was unrestricted. See generally *Girolametti* v. *Rizzo Corp.*, supra, 152 Conn. App.

[1] In [his] memorandum in opposition to the application to vacate the award, the defendant filed an affidavit summarizing the facts of the arbitration. VAI moves to strike the affidavit on the ground that it alleges new facts and evidence. Although the affidavit does not appear to present anything new, the court, treating the motion to strike as an objection, sustains the objection on the ground that this affidavit is unnecessary and superflu-

63 ("[w]hen the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission"). "The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 850–51, 144 A.3d 373 (2016).

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact." *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 80.

Section 12.4 of the VAI operating agreement states: "Arbitration. Each party hereto, for itself and its successors and assigns, irrevocably agrees that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in accordance with the then prevailing American Arbitration

ous. The court is bound to review the findings made by the arbitrator, making the affidavit unnecessary. See *Reyes* v. *Allstate Ins. Co.*, Superior Court, Docket No. CV-95-0377725-S (March 18, 1996) (holding that court would not consider evidence not previously considered by umpire).

Association ("AAA") Rules and Procedures (except as modified herein). Failing timely agreement, the arbitrators shall be selected by AAA. The place of arbitration shall be Fairfield County, Connecticut. This clause shall not preclude [the] parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction." (Defendant's Memorandum in Opposition; Entry at Docket No. 107.00, Ex. 3, p. 20).

This language of the arbitration clause of the operating agreement indicates an unrestricted arbitration submission because there is nothing indicating any limitations on the breadth of issues subject to arbitration or anything reserving any explicit rights. The Appellate Court has held that an arbitration clause that provided "[a]ny controversy or claim arising out of, or relating to this agreement, or the breach thereof, shall be settled by arbitration . . ." is unrestricted because it "contained no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, 59 Conn. App. 224, 227 n.3, 230, 755 A.2d 990, cert. denied, 254 Conn. 939, 761 A.2d 760 (2000).

In summary, because the submission of the parties' dispute to arbitration was unrestricted, the court may not review the award for errors of fact and law, but may reverse the award if the arbitrator manifestly disregarded the law or if the award violates public policy.

III

MANIFEST DISREGARD OF THE LAW

"Judicial inquiry under the manifest disregard standard is . . . extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. [The court is] not at liberty to set aside an arbitration panel's

award because of an arguable difference regarding the meaning or applicability of laws urged upon it." (Internal quotation marks omitted.) *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Bobker*, 808 F.2d 930, 934 (2d Cir. 1986); see also *Nxegen, LLC* v. *Carbone*, 155 Conn. App. 264, 270–71, 109 A.3d 534, cert. denied, 316 Conn. 906, 111 A.3d 882 (2015).

"A litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." (Internal quotation marks omitted.) *Smarter Tools, Inc.* v. *Chongqing SENCI Import & Export Trade Co., Ltd.*, 57 F.4th 372, 383 (2d Cir. 2023). "[A] claim that the arbitrators have exceeded their powers may be established under [General Statutes] § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission;[2] or (2) the arbitrators manifestly disregarded the law." (Footnote added; internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 85.[3]

[2] "Section 52-418 (a) (4) provides that an award shall be vacated if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Internal quotation marks omitted.) *Garrity* v. *McCaskey*, 223 Conn. 1, 7, 612 A.2d 742 (1992); see also *New Haven* v. *AFSCME, Council 15, Local 530*, 208 Conn. 411, 415, 544 A.2d 186 (1988).

[3] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient

"Manifest disregard can be established only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature." (Internal quotation marks omitted.) *Goldman* v. *Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002); see also *New York Telephone Co.* v. *Communications Workers of America Local 1100, AFL-CIO District One*, 256 F.3d 89, 91 (2d Cir. 2001) ("[t]o modify or vacate an award on [manifest disregard], a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (internal quotation marks omitted)); *Siegel* v. *Titan Industrial Corp.*, 779 F.2d 891, 892–93 (2d Cir. 1985) ("[t]he erroneous application of rules of law is not a ground for vacating an arbitrator's award . . . nor is the fact that an arbitrator erroneously decided the facts" (citation omitted)).

"In determining whether an arbitrator has exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator correctly interpreted the contract. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced." (Internal quotation marks omitted.) *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 755, 980 A.2d 297 (2009).

cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

"[A] necessary predicate to a claim that the arbitrators manifestly disregarded the law is that the arbitrators generally were vested with the authority to decide the issue or to grant the relief but ignored clearly applicable law in making that determination." *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 88. Further, "a party must show that the arbitrator knew that her award was contrary to the law." *Lathuras* v. *Shoreline Dental Care, LLC*, 65 Conn. App. 509, 515, 783 A.2d 83, cert. denied, 258 Conn. 936, 785 A.2d 231 (2001). Therefore, "[i]n reviewing arbitrators' decisions, manifest disregard of the law may be found only where the arbitrators understood and correctly stated the law but proceeded to ignore it." (Internal quotation marks omitted.) Id., 514; see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Bobker*, supra, 808 F.2d 936–37.

VAI argues that the arbitrator manifestly disregarded the law when she failed to determine whether Schwoeri's insubordination, lack of candor and transparency, and breach of fiduciary duty amounted to a breach of the term sheet, and thus amounted to an automatic termination of Schwoeri's put right. More specifically, VAI contends that the arbitrator committed an obvious error when she "fail[ed] to even analyze whether Schwoeri's conduct, which she admitted breached his fiduciary duty as an employee and CEO of VAI, was a breach of the term sheet." (Plaintiff's Memorandum in Support; Entry at Docket No. 106.00, p. 12). According to VAI, this failure to analyze and decide this issue is made more egregious because VAI specifically raised the issue, and because the arbitrator allegedly exceeded her power by consciously disregarding issues plainly before her, amounting to a failure to apply basic contractual principles of the operating agreement the parties signed and a manifest disregard of the law.

On this issue, the arbitrator states that "in my view breach of fiduciary duty does not constitute breach of

the [o]perating [a]greement. In sum, none of the grounds for forfeiture of the [p]ut set forth in § 3.2, are applicable here to bar Schwoeri from executing his [p]ut [right]. The [o]perating [a]greement could have included 'breach of fiduciary duty' as a grounds for disallowing the [p]ut [right]. It did not do so. Similarly, the VAI [t]erm [s]heet could have included 'breach of fiduciary duty' as [grounds] for termination for cause . . . . It did not do so. In the face of these contractual silences, Schwoeri's breach of fiduciary duty does not bar his [p]ut [right]. Accordingly, Schwoeri is entitled to the sum of $2,829,794." (Defendant's Memorandum; Entry at Docket No. 107.00; Ex. 6, pp. 12-13).

On the basis of the arbitrator's finding, Schwoeri insists that "VAI's complaint is not that the arbitrator failed to address the claims submitted to her but that she resolved them incorrectly . . . by misconstruing and/or ignoring the parties' agreements. . . . Such a claimed error cannot be the basis to vacate an arbitration award for failing to conform to the submission." (Citation omitted.) (Defendant's Opposition; Entry at Docket No. 107.00, p. 9). The court agrees with Schwoeri.

There is no evidence that the arbitrator ignored whether Schwoeri's conduct, which was found to be a breach of his fiduciary duty as employee and CEO of VAI, was also a breach of the term sheet. On the contrary, based on the arbitrator's final award, the arbitrator accounts for Schwoeri's breach of fiduciary duty in her decision. Consequently, the arbitrator did not display a manifest disregard for the law when she submitted the final award, and VAI's claim must be denied. "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the [construction] placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor,

where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved." (Internal quotation marks omitted.) *Bic Pen Corp.* v. *Local 134*, 183 Conn. 579, 584, 440 A.2d 774 (1981). "The arbitrator is only required to render an award in conformity to the submission and an award need not contain an explanation of the means by which he reached the award." Id., 585.[4]

IV

VIOLATION OF PUBLIC POLICY

The Supreme Court has recognized that one ground for vacating an arbitration award is when the award violates public policy. See *Garrity* v. *McCaskey*, supra, 223 Conn. 6. "[T]he public policy exception to arbitral authority should be narrowly construed . . . ." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 475, 747 A.2d 480 (2000). "When a party raises the issue of a public policy violation with regard to an arbitral award, a two step process is required." *Sandhu* v. *Haverson Construction Management, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-4016359-S (September 7, 2010). "First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then [determines] if the arbitrator's award violated the public policy." (Internal quotation marks omitted.) *State* v.

[4] For similar reasons, the plaintiff's alternative request for a modification of the award must also be denied. The plaintiff contends that the arbitration award should be modified to comply with a provision of the parties' contract allowing the payout to Schwoeri to be made over time rather than through a lump sum payment. Contrary to the plaintiff's position, the court does not find the existence of any evident miscalculation or mistake by the arbitrator in this regard. The arbitrator explicitly considered this contractual provision and found it to be inapplicable to an award of damages. Although the plaintiff may disagree with the arbitrator's decision on this issue, this determination by the arbitrator does not constitute a mistake warranting judicial modification.

AFSCME, *Council 4*, *Local 387*, *AFL-CIO*, supra, 476. The court "look[s] to statutes, administrative decisions, and case law to determine the existence of public policy." *Stratford* v. *AFSCME*, *Council 15*, *Local 407*, 315 Conn. 49, 56, 105 A.3d 148 (2014). "When a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy." (Internal quotation marks omitted.) *State* v. *Connecticut State Employees Assn.*, *SEIU Local 2001*, 287 Conn. 258, 272, 947 A.2d 928 (2008); see also *Schoonmaker* v. *Cummings & Lockwood of Connecticut*, *P.C.*, 252 Conn. 416, 429, 747 A.2d 1017 (2000).

Here, VAI emphasizes that the arbitrator found that Schwoeri was insubordinate, lacked candor and transparency, and breached his fiduciary duty as CEO and an employee of VAI. As a result of this conduct, the arbitrator awarded VAI a setoff in the amount of $297,916.66. Notwithstanding this setoff, VAI argues that Schwoeri's receipt of any arbitral award under these circumstances violates public policy. According to VAI, "Connecticut has a well defined public policy disfavoring compensation to employees who breach their fiduciary duties and [VAI] has shown that the final award violates that policy. The final award should therefore be vacated on this ground." (Plaintiff's Reply; Entry at Docket No. 108.00, p. 5). The obvious problem with VAI's argument is that it cites no authority identifying any explicit, dominant public policy to support its position.

The burden is on VAI to support its public policy argument with the identification of an explicit, well defined and dominant public policy. See *State* v. *New England Health Care Employees Union*, *District 1199*, *AFL-CIO*, 271 Conn. 127, 136, 855 A.2d 964 (2004) ("[t]he

party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated" (internal quotation marks omitted)). This burden requires VAI to identify "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (Internal quotation marks omitted.) Id. This burden cannot be met by VAI asserting a desirable position in the abstract that amounts to nothing more than a statement that it dislikes how the arbitrator decided the dispute. Certainly there may be circumstances, as indicated by the plaintiff, when an employer may withhold all compensation owed to a disloyal employee, but the plaintiff has not cited any authority that this consequence is an inviolable, dominant public policy doctrine. Certainly, the plaintiff has not shown the existence of a rule of public policy explicitly stating or establishing that the circumstances of the parties' dispute as found by the arbitrator cannot be addressed and resolved in a manner as done by the arbitrator here.

Furthermore, for similar reasons, even if VAI were able to show that there is an express public policy at issue, VAI still fails to satisfy the second prong of the public policy inquiry, which is to show that the arbitrators' decision actually violates this public policy. Therefore, VAI's public policy argument must be denied.

CONCLUSION

For the foregoing reasons, VAI's application to vacate the arbitration award is denied and Schwoeri's motion for an order confirming the award is granted.

STATE OF CONNECTICUT *v.* RICHARD BENSON (AC 47503)

Seeley, Wilson and Lavine, Js.

Syllabus

The defendant appealed from the trial court's judgment rendered in accordance with his pleas of guilty to, inter alia, the crimes of possession of narcotics with intent to sell, criminal possession of a pistol or revolver, and failure to appear in the first degree. He claimed, inter alia, that the court violated his right to self-representation under the sixth amendment to the United States constitution by failing to canvass him pursuant to the rule of practice (§ 44-3) after he clearly and unequivocally asserted that he wanted to represent himself. *Held*:

The defendant's unpreserved claim that the trial court violated his constitutional right to self-representation by failing to canvass him pursuant to Practice Book § 44-3 failed under the third prong of *State* v. *Golding* (213 Conn. 233), as the defendant's isolated statement, when viewed in context and considering the totality of the circumstances surrounding the request, was not a clear and unequivocal invocation of his right to self-representation, obligating the court to conduct a canvass.

Argued June 5—officially released October 7, 2025

Procedural History

Informations, in the first and second cases, charging the defendant with violation of probation, and information in the third case, charging the defendant with the crime of possession of a controlled substance, and information in the fourth case, charging the defendant with two counts each of the crimes of carrying a pistol without a permit, illegal possession of a weapon in a motor vehicle, and criminal possession of a firearm, and one count each of the crimes of possession of a controlled substance and possession of a controlled substance with intent to sell, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the court, *Zagaja*, *J.*, denied defense counsel's motion to withdraw; thereafter, the state filed a substitute information in the fourth case charging the defendant with the crimes

of possession of narcotics with intent to sell, criminal possession of a pistol or revolver, and failure to appear in the first degree; subsequently, the defendant was presented to the court, *Iannotti*, *J.*, on pleas of guilty to the charges of possession of narcotics with intent to sell, criminal possession of a pistol or revolver, and failure to appear in the first degree and admissions of violations of probation; judgments of guilty in accordance with the pleas and admissions; thereafter, the state entered a nolle prosequi as to the remaining charges; subsequently, the court, *Iannotti*, *J.*, denied the defendant's motion to withdraw his guilty pleas and admissions, and the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Rajan M. Doering, certified legal intern, with whom were *Ronald G. Weller*, senior assistant state's attorney, and, on the brief, *John P. Doyle*, state's attorney, and *Sarah Jones*, assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Richard Benson, appeals from the judgment of conviction, rendered following his entry of guilty pleas pursuant to the *Alford* doctrine,[1] of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a) (1) (A), criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c, and failure to appear in the first degree in violation of General Statutes § 53a-172. On appeal, the defendant claims, inter alia, that the court violated his right to self-representation under the sixth

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

amendment to the United States constitution by failing to canvass him after he clearly and unequivocally asserted that he wanted to represent himself.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant procedural history. On May 20, 2021, the defendant was arraigned on various charges in four separate criminal docket numbers in the judicial district of New Haven, geographical area number twenty-three. Two of the matters, Docket Nos. CR-13-0139740-S and CR-14-0144876-S, involved charges of violation of probation in violation of General Statutes § 53a-32, the third matter, Docket No. CR-21-0235322-S, involved a charge of possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1) (A), and the fourth matter, Docket No. CR-21-0235327-S, involved charges of possession of a controlled substance in violation of § 21a-279 (a) (1) (A), possession of narcotics with intent to sell in violation of General Statutes § 21-278 (b) (1) (A), and two counts each of the charges of carrying a pistol without a permit in violation of General Statutes § 29-35, illegal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38, and criminal possession of a firearm in violation of General Statutes § 53a-217.

The defendant hired Attorney Stephen Lebedevitch to represent him in connection with all four criminal matters. Lebedevitch first appeared in court on the defendant's behalf at a pretrial hearing on July 7, 2021. At subsequent pretrial hearings, the defendant expressed dissatisfaction with Lebedevitch's representation of him. At a hearing on August 3, 2022, the defendant told

[2] The defendant also claims that, because he made a clear and unequivocal request to represent himself, the court was required to canvass him and its failure to do so constituted structural error requiring reversal of the judgment. In light of our determination that the defendant did not make a clear and unequivocal request to represent himself, we do not address this claim.

the court that he wanted a different attorney and that he needed time to obtain new counsel. Lebedevitch, however, continued to appear on the defendant's behalf.

On April 18, 2023, the defendant was arraigned on a charge of threatening in the first degree in connection with an incident that was unrelated to the matters in which Lebedevitch was representing him, also in the judicial district of New Haven, geographical area number twenty-three. The court appointed the Office of the Public Defender to represent the defendant for this matter. Attorney Keith Zackowitz, of the public defender's office, subsequently appeared on the defendant's behalf regarding this charge. Lebedevitch continued to appear as the defendant's retained counsel for the other matters.

At a hearing on May 10, 2023, the defendant again expressed his dissatisfaction with Lebedevitch and told the court that he needed more time to obtain a different attorney. On June 16, 2023, Lebedevitch filed a motion to withdraw his appearance, representing that the attorney-client relationship had broken down irretrievably. In that motion, Lebedevitch asserted, inter alia, that the defendant had failed to return his calls to speak about an upcoming violation of probation hearing. The court, *Iannotti*, *J.*, held a hearing on June 22, 2023, to address Lebedevitch's motion,[3] but the defendant failed to appear in court. The defendant's bond was forfeited and his rearrest was ordered.[4] The court deferred ruling on Lebedevitch's motion.

The court, *Zagaja*, *J.*, addressed Lebedevitch's motion at a proceeding on August 22, 2023, which had been

[3] At the hearing, Zackowitz indicated that he also had filed a motion to withdraw his appearance.

[4] On July 14, 2023, the defendant was arraigned for violating the conditions of his release by failing to appear at the June 22, 2023 hearing, and the state indicated that the defendant also had cut off a GPS bracelet that he had been ordered to wear as a condition of his release.

scheduled with respect to the merits of the defendant's violation of probation charges. At the start of the hearing, the defendant stated that Lebedevitch was not his attorney and that he had been fired. The defendant stated, among other things: "He's not representing me on this matter. He's not my attorney. He's not representing me on no matters. He was fired. He filed a motion to withdraw on the 22nd. Before that, he filed a motion to withdraw, he was fired. He's not my attorney. He's not . . . He's not . . . He's not fighting on no cases. He's been lying to me the whole way through. This is not my attorney. This is not my attorney at all. I'm not moving forward with . . . nothing with this man name on it. He's not my attorney." The defendant also indicated that he had retained a different attorney to represent him who "should be walking in here any second." The court attempted to continue with the proceeding, but the defendant continuously interjected and repeatedly stated: "He's not my attorney."[5]

As a result of the defendant's disruptive behavior, the court ordered the defendant to be removed from the courtroom. In the defendant's absence, the court denied Lebedevitch's motion to withdraw his appearance. The court recalled that meaningful discussions previously had taken place between Lebedevitch and the defendant, and it believed that the defendant was "simply trying to not proceed with the violation of probation hearing," as reflected by his failure to appear at the June 22, 2023 hearing, his "boisterous" behavior in court, and his failure to cooperate with his transportation to court that morning. The court recessed to provide Lebedevitch and Zackowitz with an opportunity to speak to the defendant about whether he wanted to return to the courtroom and participate in the proceeding without being disruptive.

[5] At the hearing, the defendant stated, "He's not my attorney" or "This is not my attorney" a total of forty-seven times.

When court reconvened, the defendant, along with Lebedevitch, Zackowitz, and the prosecutor, returned to the courtroom and appeared before a different judge. The court, *Iannotti*, *J.*, stated its understanding that the parties had reached a plea agreement. The prosecutor confirmed that they had, explaining that the state had made an offer involving a total effective sentence of fifteen years of incarceration, execution suspended after eight years, followed by five years of probation, in exchange for the defendant's admission to the violations of probation and his guilty pleas under Docket No. CR-21-0235327-S to charges of possession of narcotics with intent to sell, criminal possession of a pistol or revolver, and failure to appear in the first degree.[6] The prosecutor stated that the state would enter a nolle prosequi as to all other remaining charges at sentencing.

The defendant, addressing the court directly, pleaded guilty to the charges pursuant to the *Alford* doctrine and admitted to the two violations of probation. The court conducted a canvass, during which the court told the defendant, inter alia, that he could not withdraw his pleas once they were accepted by the court as long as the court sentenced him in accordance with the plea agreement. The court stated: "I'm being really up front here and clear with you. Once I accept this plea, there's no turning back. You can't come back here in a couple of weeks and start yelling I'm taking my pleas back, I want my hearing. . . . [T]hat's over." The defendant responded that he understood. Upon completing the canvass, the court found that the guilty pleas had been knowingly and voluntarily made, with the effective assistance of counsel.

[6] On that same day, the state filed a substitute information in the case involving Docket No. CR-21-0235327-S charging the defendant with possession of narcotics with intent to sell in violation of § 21a-277 (a) (1) (A), criminal possession of a pistol or revolver in violation of § 53a-217c, and failure to appear in the first degree in violation of § 53a-172.

In September, 2023, the defendant, in a self-represented capacity, filed a motion to withdraw his guilty pleas and admissions on the grounds that he had been denied the effective assistance of counsel and furthermore that they were entered involuntarily and under duress. In October, 2023, the self-represented defendant filed an amended motion to withdraw his guilty pleas and admissions in which he detailed the manner in which the assistance provided by Lebedevitch allegedly had been ineffective.

The defendant's sentencing was scheduled for October 24, 2023. When the hearing began, the defendant stated that his pleas had been coerced and were involuntary. The defendant also repeatedly stated, as he had at the hearing on August 22, 2023, that Lebedevitch was not his attorney. The defendant added: "I spoke to Taylor Crillo . . . . Taylor Crillo was supposed to come down here and file an appearance. You're not my attorney."

The court, *Iannotti*, *J.*, began to address the defendant's motion to withdraw his guilty pleas and admissions when the defendant stated: "Your Honor, I would like to represent these guilty pleas and waive the appearance of my attorney and have stand-by counsel." The court did not address the defendant's statement but, rather, continued to summarize the proceedings from August 22, 2023, related to the defendant's pleas. Lebedevitch stated that he was not adopting the defendant's self-represented motion to withdraw and, in response to a question from the court,[7] indicated that he did not believe that the court's plea canvass was flawed. The court, after stating that it had thoroughly reviewed its canvass, denied the defendant's motion to withdraw.

[7] When the court addressed Lebedevitch, the defendant told the court: "Your Honor, I waived the appearance. . . . I waived the appearance."

The defendant subsequently stated: "Wait. Whoa, whoa, whoa, whoa, whoa. I waived the appearance to have this man present . . . for this motion to withdraw. . . . I contacted attorney—" The court interjected: "I'm denying that. Sir, I'm denying that. He is your sentencing lawyer." Additional discussion took place regarding the defendant's pleas and the prior denial of Lebedevitch's motion to withdraw his appearance. The following colloquy then ensued:

"The Defendant: Can you please give me a continuance for my lawyer to file a[n] appearance? . . . I obtained . . . I spoke to my attorney. My attorney was supposed to be here. Can you please just get this . . . this is not my attorney to represent me. He was fired beforehand . . . .

"The Court: Sir, you've had virtually—

"The Defendant: I have every right to fire him, Your Honor.

"The Court: With all due respect, sir, you have—

"The Defendant: Please . . . .

"The Court: [Y]ou have virtually had years, years for some other lawyer to come into the case.

"The Defendant: Silverstein was on trial . . . when I came [in] August he said he had a trial . . . . I stated to Lebedevitch when he came downstairs, could you please get me a continuance so my lawyer can come here. A month continuance.

"The Court: . . . I'm not gonna grant a continuance."

The court attempted to proceed with sentencing as the defendant continued to interject about his issues with Lebedevitch[8] and the claimed involuntariness of

[8] The defendant also raised concerns with Zackowitz' representation, however, Zackowitz was not present at the sentencing hearing. Daniel Lage, a different attorney from the public defender's office, appeared in place of Zackowitz.

his pleas. The court eventually sentenced the defendant in accordance with the plea agreement that he had reached with the state.[9] This appeal[10] followed.

On appeal, the defendant claims that the court improperly failed to canvass him pursuant to Practice Book § 44-3[11] after he clearly and unequivocally asserted his right to self-representation at the October 24, 2023 sentencing hearing when he stated: "Your Honor, I would like to represent these guilty pleas and waive the appearance of my attorney and have standby counsel." In response, the state argues, inter alia, that the defendant did not clearly and unequivocally invoke his right to self-representation and, therefore, the court had no obligation to canvass him.[12] We agree with the state.

[9] After the defendant was sentenced, he repeatedly called Lebedevitch a "liar" and stated that Lebedevitch had "sold [him] out." The court described the setting as "chaos." The defendant also kicked Lebedevitch in the leg on his way out of the courtroom.

[10] The defendant's appeal form lists only Docket No. CR-21-0235327-S and states that the defendant is appealing from his judgment of conviction under §§ 21a-277 (a) (1) (A), 53a-217c, and 53a-172.

[11] 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."

[12] The state also argues that the defendant's claim is unpreserved and that the record is inadequate for review under the first prong of *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). Specifically, the state argues that the defendant's claim is unpreserved because the defendant "did not adequately alert the trial court to his invocation of his right to self-representation or that the trial court was required to conduct a canvass," and the record is inadequate for review under *Golding* because "the record in this

The defendant seeks review of his unpreserved claim under the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "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; internal quotation marks omitted.) *State* v. *Washington*, 345 Conn. 258, 267, 284 A.3d 280 (2022). The record is adequate to review the claim, and it is of constitutional magnitude as it implicates the defendant's constitutionally protected right to self-representation. For the reasons that follow, we conclude that the defendant cannot

case is, at best, ambiguous as to what the defendant was requesting at his sentencing proceeding." We are not persuaded. The state's argument appears to conflate the issues of preservation and adequacy of the record for review with the extent to which the defendant has established the merits of his claim that he made a clear and unequivocal request to represent himself. Because a review of the transcripts fully establishes what happened before the trial court, thus setting the factual predicate for the defendant's claim on appeal, we proceed to address the merits of the defendant's claim. See, e.g., *State* v. *Elson*, 311 Conn. 726, 780, 91 A.3d 862 (2014) ("[t]he record in this case is perfectly adequate for review in that the transcript of the sentencing proceeding tells us verbatim what happened in the trial court").

In addition, the state raises alternative arguments that, even if we agree with the defendant that he made a clear and unequivocal request to represent himself, (1) the trial court was not required to conduct a canvass because the defendant forfeited his right to proceed in a self-represented capacity based on his disruptive behavior, and (2) the defendant suffered no harm by the lack of a canvass. In light of our conclusion that the defendant did not clearly and unequivocally invoke his right to self-representation, we need not address the state's alternative arguments.

prevail under *Golding* because he has failed to demonstrate that the alleged constitutional violation exists.

The following legal principles guide our analysis of the defendant's claim. "The sixth amendment to 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. . . . In short, forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .

"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." (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); see also, e.g., *State* v. *Braswell*, 318 Conn. 815, 827–28, 123 A.3d 835 (2015); *State* v. *Paschal*, 207 Conn. App. 328, 332–33, 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).

"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 . . . . [Instead] recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . Conversely, once there has been an unequivocal request for self-representation, a court must undertake an inquiry [pursuant to Practice Book § 44-3; see footnote 11 of this opinion]; 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. . . .

"Although a clear and unequivocal request is required, there is no standard form it must take. [A] defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to [that] request. Insofar as the desire to proceed [as a self-represented party] is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. . . . Moreover, it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious;

rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement. . . .

"Finally, in conducting our review, we are cognizant that the context of [a] reference to self-representation is important in determining whether the reference itself was a clear invocation of the right to self-representation. . . . The inquiry is fact intensive and should be based on the totality of the circumstances surrounding the request . . . which may include, inter alia, whether the request was for hybrid representation . . . or merely for the appointment of standby or advisory counsel . . . the trial court's response to a request . . . whether a defendant has consistently vacillated in his request . . . and whether a request is the result of an emotional outburst . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pires*, 310 Conn. 222, 231–32, 77 A.3d 87 (2013).

"We ordinarily review for abuse of discretion a trial court's determination, made after a canvass pursuant to [Practice Book] § 44-3, that a defendant has knowingly and voluntarily waived his right to counsel. . . . In cases like the present one, however, where the defendant claims that the trial court improperly failed to exercise that discretion by canvassing him after he clearly and unequivocally invoked his right to represent himself . . . whether the defendant's request was clear and unequivocal presents a mixed question of law and fact, over which . . . our review is plenary." (Citation omitted; internal quotation marks omitted.) *State* v. *Jordan*, 305 Conn. 1, 13–14, 44 A.3d 794 (2012); see also *State* v. *Flanagan*, 293 Conn. 406, 419–21 and 420–21 n.10, 978 A.2d 64 (2009).

In the present case, we conclude that the defendant's isolated statement, when viewed in context and considering "the totality of the circumstances surrounding the

request"; (internal quotation marks omitted) *State* v. *Pires*, supra, 310 Conn. 232; see also *State* v. *Jordan*, supra, 305 Conn. 15; was not a clear and unequivocal request invoking his right to self-representation. Rather, the record demonstrates that, at the start of the October 24, 2023 hearing, just prior to the defendant's statement that he would "like to represent these guilty pleas and waive the appearance of [his] attorney and have standby counsel," the defendant indicated that he had spoken to a different attorney who "was supposed to come down here and file an appearance." In addition, after the defendant's purported request to represent himself, the defendant stated that his new attorney "was supposed to be here" and explicitly asked the court for a continuance in order for his new attorney to appear on his behalf.

Indeed, the record demonstrates that, beyond the one isolated statement by the defendant at the October 24, 2023 hearing, on which he relies in support of the present claim, the defendant had displayed a pattern of conduct, at and before that proceeding, in which he had been focused on firing Lebedevitch and replacing him with a different, privately retained attorney, including at the August 22, 2023 hearing when he repeatedly stated that Lebedevitch was not his attorney and explained that he had retained a different attorney to represent him who "should be walking in here any second." See *State* v. *Pires*, supra, 310 Conn. 240 (considering defendant's "pattern of activity" over course of several pretrial proceedings, which demonstrated that, beyond one isolated comment by defense counsel that defendant told her that he wanted to represent himself, defendant's energies "had been exclusively devoted to trying to 'fire' [defense counsel] and have her replaced with different court-appointed counsel" (emphasis omitted)); see also *State* v. *Carter*, 200 Conn. 607, 611, 513 A.2d 47 (1986) (defendant's repeated complaints

about public defender's performance and requests for appointment of special public defender, and his statements that " 'I am misrepresented and now I have to represent myself' " and " 'I'll have to represent myself,' " did not constitute clear and unequivocal request when "couched in terms of his request for a different public defender" (internal quotation marks omitted)).

Further, the court's failure to acknowledge the defendant's comment about his apparent desire to represent himself and rule definitively on that matter also supports the conclusion that the defendant's comment was not clear and unequivocal. See *State* v. *Pires*, supra, 310 Conn. 242 ("[t]he trial court's response is one factor that we consider in determining whether the defendant's request was clear and unequivocal"). Thus, considering the totality of the circumstances and the context of the defendant's isolated statement, we conclude that the court was not required to canvass the defendant pursuant to Practice Book § 44-3 because he did not clearly and unequivocally invoke his right to self-representation. Accordingly, the defendant's claim fails under *Golding*'s third prong.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID PANICCIA *v.* SUCCESS VILLAGE APARTMENTS, INC., ET AL.
(AC 47026)

Bright, C. J., and Cradle and Seeley, Js.*

Syllabus

The plaintiff appealed from the trial court's judgment limiting his recovery of costs pursuant to statute (§ 31-72) to statutory, taxable costs. The plaintiff

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

claimed that the court improperly concluded that costs recoverable under § 31-72 are limited to statutory, taxable costs rather than all reasonable and necessary costs. *Held*:

Pursuant to the binding precedent of this court in *Miller* v. *Guimaraes* (78 Conn. App. 760) and *Arnone* v. *Enfield* (79 Conn. App. 501), this court concluded that costs recoverable under § 31-72 are limited to statutory, taxable costs.

Argued January 9—officially released October 7, 2025

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Jacobs*, *J.*; judgment for the plaintiff, from which the named defendant appealed to this court, *Prescott*, *Suarez* and *Bishop*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Hon. Barry K. Stevens*, judge trial referee, awarded attorney's fees, costs and postjudgment interest to the plaintiff, and the plaintiff appealed to this court. *Affirmed.*

Richard E. Hayber, for the appellant (plaintiff).

Claire E. Ryan, with whom, on the brief, was *Megan E. Bryson*, for the appellee (named defendant).

Opinion

SEELEY, J. In this action arising out of the termination of the employment of the plaintiff, David Paniccia, with the named defendant, Success Village Apartments, Inc.,[1] the plaintiff appeals from the judgment of the trial court limiting his recovery of costs pursuant to General Statutes § 31-72 to statutory, taxable costs. On appeal,

[1] The plaintiff also named as defendants eight individuals who served on the board of directors of Success Village Apartments, Inc. The plaintiff withdrew his complaint against them prior to the trial. Accordingly, all references in this opinion to the defendant are to Success Village Apartments, Inc.

the plaintiff claims that the trial court improperly concluded that costs recoverable under § 31-72 are limited to statutory, taxable costs rather than all reasonable and necessary costs. We affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The plaintiff brought this action against the defendant alleging breach of contract, a violation of General Statutes §§ 31-71b and 31-72 for failure to timely pay wages, and breach of the implied covenant of good faith and fair dealing arising out of the termination of his employment with the defendant. The defendant denied the material allegations in the complaint and alleged seven special defenses.[2] Following a second court trial, the court, *Jacobs*, *J.*, rendered judgment in favor of the plaintiff on all counts of the complaint and six of the defendant's special defenses.[3] The court ordered the defendant to pay $172,969.90 in damages to the plaintiff. This court thereafter affirmed the judgment of the trial court. See *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 284 A.3d 341 (2022).

On November 10, 2022, the plaintiff filed a motion for attorney's fees and costs pursuant to § 31-72.[4] With regard to costs, the plaintiff sought, in broad terms, costs for Superior Court clerk fees, court filing fees, state marshal fees, process serving fees, depositions and trial transcripts,

[2] The defendant withdrew an eighth special defense prior to trial.

[3] Previously, on April 16, 2018, the trial court, *Arnold*, *J.*, rendered judgment in favor of the defendant on all counts but subsequently granted the plaintiff's motion to open and vacate the judgment on the ground that the decision was untimely under General Statutes § 51-183b and ordered a new trial. The trial court, *Jacobs*, *J.*, held a new trial over three days in December, 2019.

[4] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k . . . such employee . . . shall recover, in a civil action . . . twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court . . . ."

court reporter fees, parking, photocopying, focus groups, fees related to liens and lien recording, and fees related to releases. The plaintiff also filed a motion for postjudgment interest. On April 27, 2023, the trial court issued an order giving the parties the opportunity to file briefs regarding the issue of whether costs under § 31-72 are limited to taxable costs in accordance with General Statutes § 52-260, or include "nontaxable" costs, i.e., expenses not recoverable by statute as taxable costs. In response to the court's order, the defendant filed a brief in which it argued that any costs awarded pursuant to § 31-72 should be narrow in scope and limited by the statutory mandates contained in General Statutes §§ 52-257[5] and

[5] General Statutes § 52-257 provides in relevant part: "(a) The fees of parties in civil actions in which the matter in demand is not less than fifteen thousand dollars shall be: For each complaint, exclusive of signing and bond, five dollars for the first page and, for each succeeding page, two dollars; for each judgment file, two dollars for the first page and, for each additional page, one dollar and fifty cents. The prevailing party in any such civil action shall receive, by way of indemnity, the following sums: (1) For all proceedings before trial, fifty dollars; (2) for the trial of an issue of law or fact, seventy-five dollars, but if more than one issue of fact is tried at one time, only one trial fee shall be allowed; and (3) in difficult or extraordinary cases in the Superior Court, where a defense has been interposed, a further allowance, in the discretion of the court, not to exceed two hundred dollars.

"(b) Parties shall also receive: (1) For each witness attending court, the witness' legal fee and mileage; (2) for each deposition taken out of the state, forty dollars, and for each deposition within the state, thirty dollars; (3) on an application for the sale of property attached, the expenses incurred; (4) in any civil action affecting the title to real property situated in this state, or affecting any mortgage or lien thereon, the actual expense, not exceeding the sum of two hundred twenty-five dollars, of an examination of the land records concerning the title to the real property in question and such amount as the court or judge determines to be reasonable for the services of an expert on the value of the land when such value is in dispute; (5) for maps, plans, mechanical drawings and photographs, necessary or convenient in the trial of any action, a reasonable sum; (6) for copies of records used in evidence, bonds, recognizances and subpoenas, court and clerk's fees; (7) for the signing and service of process, the legal fees payable therefor, except that a fee shall not be allowed for the return of a subpoena to court; (8) the actual expense incurred in publishing orders of notice under direction of the court; (9) for each interpreter necessarily employed in the trial of any civil action, twenty dollars per diem; (10) for premiums upon all bonds or undertakings provided pursuant to statute, rule of court, order of court or stipulation of parties, including bonds in lieu of or in release or dissolution of attachment, the actual amount paid, not exceeding a reasonable amount;

52-260.[6] The plaintiff did not file a brief in response to the court's order.

On August 16, 2023, the court issued a memorandum of decision in which it granted the plaintiff's motions for attorney's fees and costs and for postjudgment interest. The court awarded attorney's fees of $225,000 and postjudgment interest of $34,040, plus statutory costs, and indicated that the plaintiff was permitted leave to file a bill of costs.[7] In its decision, the court noted that,

(11) documented investigative costs and expenses, not exceeding the sum of two hundred dollars; and (12) for the recording, videotaping, transcribing and presentation of the deposition of a practitioner of the healing arts, as defined in section 20-1, dentist, registered nurse, advanced practice registered nurse or licensed practical nurse, as defined in section 20-87a, or real estate appraiser that is used in lieu of live testimony in the civil action, the reasonable expenses incurred. . . ."

[6] General Statutes § 52-260 provides in relevant part: "(a) The fees of a witness for attendance before any court, the General Assembly or any committee thereof, when summoned by the state, or before any legal authority, shall be fifty cents a day, and for travel to the place of trial, except as provided in section 54-152, shall be the same amount per mile as provided for state employees pursuant to section 5-141c. Whenever a garnishee is required to appear before any court, such garnishee shall receive the same fees as a witness in a civil action and be paid in the same manner. The clerk of the Superior Court, upon request, shall, on the day of attendance, pay the fee of any witness summoned by the state to appear before the court.

* * *

"(f) When any practitioner of the healing arts, as defined in section 20-1, dentist, registered nurse, advanced practice registered nurse or licensed practical nurse, as defined in section 20-87a, psychologist or real estate appraiser gives expert testimony in any action or proceeding, including by means of a deposition, the court shall determine a reasonable fee to be paid to such practitioner of the healing arts, dentist, registered nurse, advanced practice registered nurse, licensed practical nurse, psychologist or real estate appraiser and taxed as part of the costs in lieu of all other witness fees payable to such practitioner of the healing arts, dentist, registered nurse, advanced practice registered nurse, licensed practical nurse, psychologist or real estate appraiser. . . ."

[7] Practice Book § 18-5 (a) provides: "Except as otherwise provided in this section, costs may be taxed by the clerk in civil cases fourteen days after the filing of a written bill of costs provided that no objection is filed. If a written objection is filed within the fourteen day period, notice shall be given by the clerk to all appearing parties of record of the date and time of the clerk's taxation. The parties may appear at such taxation and have the right to be heard by the clerk."

To date, the plaintiff has not filed a bill of costs in this case.

"[a]lthough the plaintiff request[ed] the recovery of expenses beyond taxable, statutory costs, he [had] not presented any controlling or persuasive authority that such expenses are recoverable under § 31-72." On August 17, 2023, the plaintiff filed a motion to reargue the denial of court costs in the amount of $10,821.78. In his motion, the plaintiff contended that he was seeking reimbursement of reasonable and necessary costs of litigation, including filing fees, deposition transcript fees, and fees for process servers. The defendant filed an objection to the plaintiff's motion to reargue.

On October 20, 2023, the court denied the plaintiff's motion to reargue, concluding that the recoverable costs under § 31-72 are limited to statutory, taxable costs. The court noted that its conclusion was consistent with case law interpreting the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., which limits the recovery of costs to statutory, taxable costs. Although acknowledging that CUTPA involves a different statutory scheme, the court found the case law interpreting CUTPA persuasive, as both § 31-72 and General Statutes § 42-110g (d) allow the award of costs to the prevailing party. The plaintiff thereafter filed the present appeal.

On appeal, the plaintiff claims that the court erred in limiting the recoverable costs under § 31-72 to statutory, taxable costs rather than all reasonable and necessary costs. Specifically, the plaintiff claims that limiting the recoverable costs in an action pursuant to § 31-72 to those provided in § 52-257 would render the legislature's use of the word "costs" in § 31-72 superfluous and contradict the remedial nature and purpose of that statute. We disagree.

We begin our analysis with the "settled principle of our common law that parties are required to bear their own litigation expenses, except as otherwise provided

by statute." (Internal quotation marks omitted.) *Taylor* v. *King*, 121 Conn. App. 105, 133, 994 A.2d 330 (2010); see also *Traystman*, *Coric & Keramidas*, *P.C.* v. *Daigle*, 282 Conn. 418, 429, 922 A.2d 1056 (2007) ("[c]osts are the creature of statute . . . and unless the statute clearly provides for them courts cannot tax them" (internal quotation marks omitted)). We next note that the issue of whether recoverable costs under § 31-72 are limited to statutory costs involves an issue of statutory interpretation, over which our review is plenary. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2020).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Pryor* v. *Brignole*, 231 Conn. App. 659, 670–71, 333 A.3d 1112 (2025).

Section 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance

with section 31-76k . . . such employee . . . shall recover, in a civil action . . . twice the full amount of such wages, *with costs and such reasonable attorney's fees as may be allowed by the court* . . . ." (Emphasis added.) The word "costs" is not defined in the statute. "Under our rules of statutory construction, ambiguity arises whenever statutory language is subject to more than one plausible interpretation." *Pryor* v. *Brignole*, supra, 231 Conn. App. 675. It is plausible to interpret § 31-72 as providing that the costs recoverable under the statute are limited to statutory, taxable costs, as found by the trial court. As relevant to this case, those costs are found in § 52-257 (fees of parties in civil actions) and § 52-260 (witness fees). It is also plausible to interpret § 31-72 as providing that the costs recoverable under the statute include, as argued by the plaintiff, all reasonable and necessary expenses. Because the statutory language in question is subject to more than one plausible interpretation, we conclude that § 31-72 is ambiguous as applied to the facts of this case. Accordingly, § 1-2z permits us to consult extratextual sources. See id., 676.

The parties have not cited, and our research has not revealed, any legislative history that provides insight into what costs are recoverable under § 31-72.[8] We, therefore, look for interpretive guidance to case law interpreting "costs" in other statutory schemes. For example, CUTPA contains language similar to the language in § 31-72 regarding costs. Specifically, § 42-110g (d) provides in relevant part that "the court may award . . . costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . . "

In *Miller* v. *Guimaraes*, 78 Conn. App. 760, 829 A.2d 422 (2003), the plaintiffs brought an action against the

[8] Section 31-72 was enacted as No. 70 of the 1951 Public Acts.

defendants asserting, inter alia, a violation of CUTPA in connection with an agreement between the parties for the sale of a lot and the construction of a residential dwelling on the lot. Id., 762, 766. On appeal from the trial court's judgment in favor of the plaintiffs, this court reversed the judgment only as to the award of $1000 in expert witness fees, stating: "We find no statutory or discretionary basis . . . for the court's award of $1000, as taxable costs for an expert who was an attorney. [Section] 52-260, relating to witness fees, sets forth the court's authority to award expert witness fees in civil litigation. Within the statute, there is an enumeration of the categories of experts entitled to a discretionary award of expert witness fees. Legal experts are not included within that enumeration. Accordingly, we conclude that the court was without authority to award, as fees, the sum of $1000 for the expert who testified as to the reasonable fees to be awarded to the plaintiffs' counsel." Id., 766, 783; see also *Taylor* v. *King*, supra, 121 Conn. App. 133–35 (declining to award expert witness fees under CUTPA for plaintiff's construction expert); *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 540–41, 967 A.2d 550 (applying *Miller* and declining to award expert witness fees under CUTPA for roof consulting firm), cert. denied, 292 Conn. 907, 973 A.2d 103 (2009). Thus, in the context of CUTPA, this court has held that a trial court has no authority to award expert witness fees as taxable costs unless those fees are specifically enumerated in § 52-260.[9]

[9] We are aware that the United States District Court for the District of Connecticut has held that the costs that may be awarded under CUTPA are not limited to statutory, taxable costs. In *Lavatec Laundry Technology GmbH* v. *Voss Laundry Solutions*, Docket No. 3:13-cv-00056 (SRU), 2018 WL 2426655, *17 (D. Conn. January 9, 2018) (*Lavatech Laundry*), the court stated: "CUTPA provides that the court may award . . . costs . . . over and above the . . . taxable cost provisions in state and federal law. . . . The statute fail[s] to define what costs are recoverable, but courts have awarded costs for reasonable litigation expenses . . . [that] are often incurred by counsel on behalf of the client. . . . Examples of recoverable costs include court filing fees, copying costs, messenger fees, and expert

We note that, in *Ulbrich* v. *Groth*, 310 Conn. 375, 461–63, 78 A.3d 76 (2013), the trial court, relying on this court's decision in *Miller* v. *Guimaraes*, supra, 78 Conn. App. 782–83, denied the plaintiffs' request for costs under CUTPA. The plaintiff's request for costs "included $5705.19 for trial equipment, $21,142.08 for transcripts, $839.45 for third party copying, $4170.10 for Westlaw research, $466.04 for delivery costs, $2672.25 for marshal fees, $350 for the jury fee and $975 for court fees." *Ulbrich* v. *Groth*, supra, 461–62. The trial court observed that "numerous trial courts have questioned the reasoning of *Miller* and its progeny because nontaxable costs are recoverable as punitive damages under the common law and construing the term 'costs' as used in § 42-110g (d) to be coextensive with the costs allowed by § 52-260 would render the costs provision of § 42-110g (d) superfluous." Id., 462. Nevertheless, the trial court recognized that it was bound by *Miller*. Id. On appeal, our Supreme Court did not consider whether to overrule the holding of *Miller* that § 42-110g (d) does not authorize the trial court to award costs that are not authorized by § 52-260 because the award of such costs was authorized by § 42-110g (a). Id.

witness fees . . . as well as [c]osts for travel [and] deposition transcripts." (Citations omitted; internal quotation marks omitted.)

Lavatech Laundry, however, relied on *Bristol Technology, Inc.* v. *Microsoft Corp.*, 127 F. Supp. 2d 64, 82–83 (D. Conn. 2000), which was decided prior to *Miller* v. *Guimaraes*, supra, 78 Conn. App. 760. *Lavatech Laundry* does not discuss *Miller*. Similarly, in *Charts* v. *Nationwide Mutual Ins. Co.*, 397 F. Supp. 2d 357, 383–85 (D. Conn. 2005), rev'd on other grounds sub nom. *Chartschlaa* v. *Nationwide Mutual Ins. Co.*, 538 F.3d 116 (2d Cir. 2008), cert. denied, 555 U.S. 1213, 129 S. Ct. 1534, 173 L. Ed. 2d 658 (2009), the court, also relying on *Bristol Technology, Inc.*, awarded costs for expenses such as "messenger services, copies, travel and court reporter services" under CUTPA and the Connecticut Franchise Act, General Statutes § 42-133e et seq., but declined a request for expert witness fees, relying on *Miller*. The court, however, made no attempt to explain why the awarded costs should be treated differently or why *Miller* should be limited to expert witness fees. For these reasons, we do not find these cases persuasive authority demonstrating that the court may award costs pursuant to CUTPA beyond statutory, taxable costs.

Because § 31-72 does not authorize a court to award nontaxable costs as punitive damages, we are unable to take the same approach that the Supreme Court took in *Ulbrich*. On the contrary, we are bound by *Miller* unless overruled by this court sitting en banc or by our Supreme Court. "It is well established . . . that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we have often stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc."[10] (Internal quotation marks omitted.) *State* v. *Dayvid J.*, 227 Conn. App. 755, 760, 322 A.3d 1126, cert. denied, 350 Conn. 919, 325 A.3d 218 (2024).

In addition to CUTPA, this court has reached a similar result in other contexts. For example, in *Arnone* v. *Enfield*, 79 Conn. App. 501, 530–35, 831 A.2d 260, cert. denied, 266 Conn. 932, 837 A.2d 804 (2003), this court held that the plaintiff, who had prevailed in a retaliatory discharge action pursuant to General Statutes § 31-51m, was not entitled to an award of costs for the fees of an economist who testified as an expert witness, as an economist is not a listed expert witness whose cost may be reimbursed under § 52-260 (f). The plaintiff in *Arnone* had argued that, "because § 31-51m provides some discretion to the court to award costs, §§ 52-257 and 52-260 do not apply and the court correctly awarded costs associated with [the witness'] in-court testimony. The [trial] court agreed with that reasoning. In its memorandum of decision, the court stated that to construe the term 'costs' in [§] 31-51m and [General Statutes §] 31-51q in the same manner as §§ 52-257 and 52-260 would be superfluous and give no meaning to the legislature's words." Id., 533. This court disagreed and

[10] We note that the plaintiff did not file a motion requesting that this court hear this appeal en banc. See Practice Book § 70-7.

reversed the judgment of the trial court as to the award of costs, concluding that the court's discretion to award costs under §§ 31-51m and 31-51q is "discretionary *within the bounds of the general provisions*."[11] (Emphasis added.) Id., 533–35. Thus, this court in *Arnone* rejected an argument very similar to the argument that the plaintiff advances in the present case, namely, that limiting the recoverable costs in an action pursuant to § 31-72 to those provided in § 52-257 would render the legislature's use of the word "costs" superfluous.

Although *Miller* and *Arnone* involved expert witness fees under § 52-260, we are unable to discern a reason why the litigation fees set forth in § 52-257 should be treated differently from expert witness fees under § 52-260. We note that the Supreme Court in *Ulbrich* did not view our holding in *Miller* as limited to expert witness fees. As noted previously in this opinion, the plaintiffs in that case sought nontaxable costs that did not include expert witness fees. Nevertheless, the trial court relied on *Miller* as a basis to deny the plaintiffs' request for those costs, and, because the Supreme Court found the costs otherwise recoverable under § 42-110g (a), it concluded that it did not need to "decide whether *the holding of Miller that § 42-110g (d) does not authorize the trial court to award costs that are not authorized by § 52-260* should be overruled . . . ." (Emphasis added.) *Ulbrich* v. *Groth*, supra, 310 Conn. 462.

Furthermore, just as § 52-260 contains an enumeration of the categories of experts to which a discretionary award of expert witness fees may be awarded, § 52-257 contains an enumeration of the categories of fees that

[11] In reaching this conclusion, we relied on *M. DeMatteo Construction Co.* v. *New London*, 236 Conn. 710, 717–18, 674 A.2d 845 (1996), in which our Supreme Court concluded that the trial court in a tax appeal brought pursuant to General Statutes § 12-117a lacked the authority under General Statutes (Rev. to 1993) § 52-260 (f) to award costs to the prevailing party for fees that a party had paid to its appraiser for his appraisal report.

may be awarded in civil actions. Most of the fees that the plaintiff requested, such as fees for deposition transcripts, court fees and process servers, are specifically covered in § 52-257. See footnote 5 of this opinion. The plaintiff could have filed a bill of costs as to these items but chose not to do so.[12] We also note that, in his appellate brief, the plaintiff has not discussed the other items for which he requested an award of costs, such as fees for focus groups, parking and photocopying. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Kosiorek* v. *Smigelski*, 138 Conn. App. 695, 717–18, 54 A.3d 564 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013). As to these items, therefore, we conclude that the plaintiff's claim is inadequately briefed and, therefore, decline to review it.

The plaintiff, nonetheless, urges us to follow the reasoning set forth in *Yeager* v. *Alvarez*, 134 Conn. App. 112, 114, 38 A.3d 1224 (2012), and conclude that a successful litigant in an action for unpaid wages is not limited to the "paltry" taxable costs provided in § 52-257. See footnote 5 of this opinion. In *Yeager*, this court considered how the proceeds of a negligence action

[12] In his principal appellate brief, the plaintiff explains that he did not file a bill of costs because he did not believe he could recover any costs in light of Practice Book § 18-19, which provides: "In proceedings before a judge no costs shall be taxed in favor of either party *unless otherwise provided by statute*." (Emphasis added.) The present case was tried to the court. Pursuant to Practice Book § 18-19, the plaintiff would not have been permitted to recover costs in the absence of statutory authorization. Section § 31-72 provides, however, that the successful plaintiff may recover costs. Contrary to the plaintiff's contention, therefore, limiting the recoverable costs pursuant to § 31-72 to those provided in § 52-257 would not render the legislature's use of the word "costs" in § 31-72 superfluous because, without that language, the plaintiff would not have been permitted to recover his costs pursuant to Practice Book § 18-19.

are to be distributed between the employer, which intervened for the purpose of recovering workers' compensation payments, and the employee's attorney. *Yeager* v. *Alvarez*, supra, 114. Specifically, this court construed the language of General Statutes § 31-293 (a), which provides in relevant part that an employer that pays workers' compensation benefits to an injured employee is entitled to reimbursement for those payments "*after the deduction of reasonable and necessary expenditures, including attorney's fees, incurred by the employee in effecting the recovery*. . . . " (Emphasis added.) The plaintiff in *Yeager* argued that the trial court had erred by failing to deduct her reasonable and necessary expenditures incurred in effecting recovery against the defendants prior to apportioning the damages to her employer. Id., 117–18. The plaintiff argued, and this court agreed, that the "reasonable and necessary" expenditures recoverable under § 31-293 (a) are different from the enumerated fees and costs recoverable in a civil action pursuant to § 52-257. Id., 118.

We stated in *Yeager* that, "[i]f reasonable and necessary expenditures pursuant to § 31-293 (a) were limited to those costs sought in a bill of costs, a question would arise as to the practical purpose of recovery under § 31-293 (a). In effect, if granted, the costs sought in a bill of costs already would have been paid by the opposing party, and a party would not need to request them under § 31-293 (a). Such a result would render the deduction of reasonable and necessary expenses redundant. Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant. . . . Ordinarily, the only costs recoverable pursuant to a bill of costs are those that are enumerated; therefore, it would be illogical to require a party to include in a bill of costs all expenditures that may have been reasonable

and necessary." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 121–22.

In relying on this language, however, the plaintiff overlooks the distinction that we made in *Yeager* between costs and expenses. Specifically, we stated in *Yeager* that " 'the term "costs" is a term of art having a limited, well-defined legal meaning as statutory allowances to a prevailing party in a judicial action in order to reimburse him or her for expenses incurred in prosecuting or defending the proceeding. . . . Costs are not synonymous with expenses. Because "costs" are limited to necessary expenses, they may not include everything that a party spends to achieve victory; rather, the term "expenses" refers to *those expenditures* made by a litigant in connection with an action that are *normally not recoverable from the opponent* but must be borne by the litigant absent a special statute or the exercise of judicial discretion.' . . . Whereas a bill of costs ordinarily includes only allowances that fit into the limited classification of 'costs,' § 31-293 (a) uses the broader term 'expenditures,' which includes expenses ordinarily not recoverable from the opposing party." (Citation omitted; emphasis in original.) Id., 121. Unlike § 31-293 (a), which was at issue in *Yeager*, § 31-72 uses the term "costs" rather than "expenditures." Read in context and in light of the distinction between the terms "costs" and "expenses," *Yeager* provides little support for the plaintiff's argument that the recoverable costs under § 31-72 are not limited to statutory, taxable costs.

Finally, the plaintiff also cites *Lemma* v. *York & Chapel, Corp.*, 204 Conn. App. 471, 254 A.3d 1020 (2021), as support for his argument that the costs recoverable under § 31-72 are not limited to statutory, taxable costs. In *Lemma*, this court affirmed the judgment of the trial court denying the defendant's application to vacate an arbitration award that had awarded arbitration fees as costs to an employee who prevailed in a claim for

unpaid wages. Id., 475, 477–78. The trial court concluded in *Lemma* that the arbitrator had not acted in manifest disregard of the law in violation of General Statutes § 52-418 (a) (4) in awarding fees, stating that "the award of attorney's fees and costs does not involve any obvious error of law or the arbitrator's decision to ignore the law. As the [defendant] has not demonstrated egregious or patently irrational rejection of clearly controlling legal principles by the arbitrator, its argument with respect to the award of fees and costs fails." *Lemma* v. *York & Chapel, Corp.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-18-5016228-S (December 19, 2019) (reprinted at 204 Conn. App. 478, 501, 254 A.3d 1028), aff'd, 204 Conn. App. 471, 478, 254 A.3d 1020 (2021). *Lemma*, however, involved an application to vacate an arbitration award on the ground that the arbitrator exceeded his powers under § 52-418 (a) (4); id.; it did not address the issue presently before this court, namely, whether the costs recoverable under § 31-72 are limited to statutory, taxable costs. This distinction is important because concluding that an arbitrator manifestly disregarded the law is very different than concluding that the arbitrator made a legal error. "Manifest disregard of the law is an extremely deferential standard of review. [T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 161, 252 A.3d 317 (2020). As the trial court recognized in *Lemma*, "[e]ven if an arbitrator misapplies the relevant law, such a misconstruction of the law [does] not demonstrate the [arbitrator's] egregious or patently irrational rejection of clearly controlling legal principles. . . . [M]anifest disregard of the law may be found only where the arbitrators understood and correctly stated the law

but proceeded to ignore it." (Citation omitted; internal quotation marks omitted.) *Lemma* v. *York & Chapel, Corp.*, supra, Superior Court, Docket No. CV-18-5016228-S; see *Lemma* v. *York & Chapel, Corp.*, 204 Conn. App. 471, 478, 254 A.3d 1020 (2021) (adopting trial court's decision as "a correct statement of the facts and applicable law"). We are, therefore, not persuaded that the trial court's decision in *Lemma* provides support for the argument advanced by the plaintiff.

As previously set forth in this opinion, this court is bound by *Miller* v. *Guimaraes*, supra, 78 Conn. App. 760, and *Arnone* v. *Enfield*, supra, 79 Conn. App. 501. Pursuant to this court's precedent, we conclude, therefore, that the recoverable costs under § 31-72 are limited to statutory, taxable costs.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

HERBERT A. CLARK *v.* COMMISSIONER OF CORRECTION (AC 46316)

Moll, Clark and Wilson, Js.

Syllabus

The petitioner, who previously had been convicted of assault in the first degree, appealed, on the granting of certification, from the habeas court's judgment denying his petition for a writ of habeas corpus. The petitioner, whose trial counsel had been permitted by the trial court to withdraw upon

[13] In reaching this conclusion, we note the plaintiff's reliance on cases interpreting the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., in support of his argument that the costs recoverable under § 31-72 are not limited to statutory, taxable costs. Although we have looked to decisions concerning the FLSA to aid in our analysis of cases involving the wage statutes; see, e.g., *Belgada* v. *Hy's Livery Service, Inc.*, 220 Conn. App. 102, 121–22, 297 A.3d 199 (2023) (looking to decisions analyzing FLSA for guidance in interpreting "work" in General Statutes § 31-76b (2) (A)); our decision in the present case is based on binding Connecticut precedent, and, therefore, we need not engage in such an analysis.

an oral motion made during a hearing at which the petitioner failed to appear, claimed, inter alia, that the habeas court erred in determining that the proceeding during which his counsel had withdrawn was not a critical stage of the prosecution and, thus, despite his absence, his rights to due process had not been violated. *Held*:

The habeas court properly determined that the proceeding during which the trial court granted the motion to withdraw by the petitioner's criminal trial counsel was not a critical stage of the petitioner's prosecution, as, although the proceeding had originally been scheduled to address a pending plea offer from the state, the petitioner's failure to appear at the hearing changed the nature of the hearing, and the proceeding had no effect on the petitioner's ability to later accept or reject a plea offer from the state.

Argued March 19—officially released October 7, 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, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (petitioner).

Raynald A. Carre, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Erin Stack*, assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Herbert A. Clark, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner principally claims that the habeas court erred in concluding that the June 2, 2009 proceeding in his criminal matter, during which the trial court allowed his trial counsel to withdraw from representing him upon an oral motion made while

the petitioner was not present, was not a critical stage of his prosecution, and, therefore, his due process rights were not violated.[1] We affirm the judgment of the habeas court.

The following undisputed facts, as found by the habeas court or as gleaned from the record, and procedural history are relevant to our resolution of this appeal.[2] On January 20, 2009, the petitioner was arrested and charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1)[3] and assault in the first degree in violation of § 53a-59 (a) (2).[4] *State* v. *Clark*, 137 Conn. App. 203, 205–206, 48 A.3d 135 (2012), aff'd, 314 Conn. 511, 103 A.3d 507 (2014). At his January 21, 2009 arraignment, while represented by Attorney Todd Edgington, a public defender, the petitioner informed the trial court that he did not want the services of a public defender, and he subsequently hired private counsel, Attorney Richard Lawlor.

[1] The petitioner also claims that the habeas court erred in purportedly concluding that his absence from the June 2, 2009 proceeding did not give rise to structural error warranting reversal of his conviction. We decline to review this claim because it was not raised in the operative habeas petition or, contrary to the petitioner's representation, decided by the habeas court. See *VanDeusen* v. *Commissioner of Correction*, 212 Conn. App. 427, 452, 275 A.3d 215 ("[a] reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court" (internal quotation marks omitted)), cert. denied, 345 Conn. 903, 282 A.3d 982 (2022).

[2] We confine our summary of the facts to those necessary to provide context for the issues presented in this appeal. For a full recitation of the facts that the jury reasonably could have found in connection with the petitioner's underlying conviction, see *State* v. *Clark*, 137 Conn. App. 203, 204–206, 48 A.3d 135 (2012), aff'd, 314 Conn. 511, 103 A.3d 507 (2014).

[3] General Statutes § 53a-59 (a) (1) provides in relevant part: "A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

[4] General Statutes § 53a-59 (a) (2) provides in relevant part: "A person is guilty of assault in the first degree when . . . with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person . . . ."

On April 29, 2009, the state and the petitioner, represented by Attorney Lawlor, appeared for a pretrial hearing. During the hearing, the trial court, *Alexander*, *J.*, noted that the state had made a plea offer and told the petitioner that, "[i]f you want to take it, [Attorney] Lawlor will explain it to you." That same day, a so-called "accept or reject" date was scheduled for June 2, 2009.

On June 2, 2009, Attorney Lawlor appeared before the trial court, *Alexander*, *J.* The petitioner, who was out on bond at the time, did not appear when his case was called. Attorney Lawlor made an oral request to withdraw as the petitioner's counsel, stating that the petitioner had not appeared at the courthouse that day and that, despite his repeated efforts, he had not been able to get in touch with the petitioner since his court appearance on April 29, 2009. The court granted from the bench Attorney Lawlor's oral request to withdraw "based on the breakdown of the attorney/client relationship." Later that day, the petitioner arrived at the courthouse and the court informed him of Attorney Lawlor's withdrawal and that, by his next court date of July 1, 2009, he needed either to talk to Attorney Lawlor or to retain a new attorney. There was no discussion of the plea offer during the foregoing June 2, 2009 hearings.

Thereafter, the petitioner was given several court dates by which to return to court with a new attorney or to renew his relationship with Attorney Lawlor. The petitioner failed to do so, and Attorney Edgington subsequently was reappointed to represent the petitioner. The habeas court found that a plea offer was available to the petitioner while Attorney Edgington represented him and that Attorney Edgington advised him to accept it, but on December 7, 2009, the petitioner chose to reject the offer and proceed to trial. See footnote 8 of this opinion.

Following a jury trial, the petitioner was convicted of assault in the first degree in violation of § 53a-59 (a) (1). *State* v. *Clark*, supra, 137 Conn. App. 206. The trial court, *Espinosa*, *J.*, sentenced the petitioner to twenty years of incarceration and issued a standing criminal restraining order (as formerly named). Id. The petitioner appealed from the judgment of conviction; this court reversed the judgment only as to the issuance of the restraining order and affirmed the judgment in all other respects. Id., 215. Our Supreme Court affirmed the judgment of this court. *State* v. *Clark*, 314 Conn. 511, 513, 103 A.3d 507 (2014).

Thereafter, on July 21, 2015, the petitioner commenced the present habeas action. In his June 9, 2022 second amended habeas petition (operative habeas petition), the petitioner asserted three claims. In counts one and two, he alleged that his trial counsel, Attorney Edgington, rendered ineffective assistance during his plea negotiations and criminal trial. In count three, which is the subject of this appeal, the petitioner claimed that his "constitutional rights to due process and confrontation, as protected by the fifth, sixth, and fourteenth amendments to the United States constitution, and article first, §§ 8 and 9, of the Connecticut constitution were violated" in his underlying criminal case. In support of this claim, the petitioner alleged, inter alia, that (1) "[o]n June 2, 2009, during a pretrial hearing, the trial court granted Attorney Lawlor's oral request to withdraw from representing the petitioner," (2) "[t]he petitioner was not present prior to or at the time that the trial court granted Attorney Lawlor's oral request to withdraw from representing the petitioner," and (3) "[t]he petitioner received no prior notice of Attorney Lawlor's intent or request to withdraw." The petitioner argued that the court's granting of Attorney Lawlor's request to withdraw without him present constituted a violation of his constitutional rights because

he "has a constitutional right to be present at all critical stages of his prosecution, including during any inquiries or hearings regarding defense counsel's desire to withdraw his appearance and cease representing the petitioner."

On June 7, 2022, the respondent, the Commissioner of Correction, filed a return either denying or leaving the petitioner to his proof as to the material allegations of his operative habeas petition. Additionally, as to count three, the respondent asserted procedural default and failure to state a claim as special defenses. That same day, the petitioner filed a reply rejecting the respondent's special defenses.

The matter was tried to the habeas court, *M. Murphy*, *J.*, on June 8 and July 19, 2022. Several exhibits were admitted and the court heard testimony from several witnesses: Attorney Edgington; Attorney Lawlor; Attorney Brett Salafia; Dr. Edward McDonough, a retired forensic pathologist and medical examiner; Attorney Brian Carlow; and the petitioner.[5] The respondent and the petitioner subsequently filed posttrial briefs.

On January 19, 2023, the court issued a memorandum of decision denying the operative habeas petition.[6] In

[5] Attorney Salafia represented the state in some of the proceedings for the underlying criminal case, including pretrial proceedings and the criminal trial. Dr. McDonough and Attorney Carlow testified at the habeas trial as expert witnesses, and neither witness had any involvement in the petitioner's underlying criminal case.

[6] Prior to trial, on June 7, 2022, the respondent moved to dismiss the third count of the operative habeas petition on the grounds of (1) failure to state a claim upon which relief could be granted and (2) procedural default. On that same day, the petitioner filed an opposition to the respondent's motion to dismiss. On June 8, 2022, immediately prior to commencing trial, the court heard argument from both parties on the respondent's motion to dismiss and reserved its judgment.

In its January 19, 2023 memorandum of decision, the court denied the respondent's motion to dismiss before addressing the merits of the operative habeas petition. Specifically, the court determined that, "in taking the petitioner's allegations as true and interpreting the claim in the light most favorable to the petitioner, the petitioner has alleged a claim upon which

rejecting counts one and two, the petitioner's ineffective assistance of counsel claims, the court concluded that the petitioner had failed to sustain his burden of establishing either deficient performance or prejudice.[7] With respect to the petitioner's third claim regarding his right to be present at all critical stages of a criminal proceeding, the court stated: "This court finds that the hearing at which Attorney Lawlor was permitted to withdraw as counsel did not constitute a critical stage in the petitioner's prosecution for purposes of a constitutional violation. The fairness of the hearing was not thwarted by the petitioner's absence and the petitioner's absence did not have a reasonably substantial relation to the fullness of his opportunity to defend himself against prosecution on the assault charges. The petitioner was promptly notified by the court of Attorney Lawlor's withdrawal and was given ample opportunity to find substitute counsel. When the petitioner failed to do so, the court assigned counsel [Attorney Edgington] to represent him. As a result, [count three] must be denied." Thereafter, the court granted the petitioner's petition for certification to appeal, and this appeal followed.[8]

relief can be granted." In denying the motion, the court did not address the respondent's arguments regarding procedural default.

[7] "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], 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 underlying] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense." (Internal quotation marks omitted.) *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 66, 223 A.3d 85 (2019), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020).

[8] As relief, the petitioner seeks to have the plea offer, the terms of which provided that he would plead guilty to assault in the second degree in exchange for three years of incarceration followed by two years of special parole, restored. The petitioner does not argue that a better plea offer was available to him when Attorney Lawlor represented him and, in fact, during oral argument before this court, the petitioner's counsel represented that the plea offer that was available while Attorney Edgington represented the

The petitioner claims that the habeas court erred in concluding that (1) the June 2, 2009 proceeding in the underlying criminal matter, during which the trial court allowed Attorney Lawlor to withdraw from representing him upon an oral motion, was not a critical stage of his prosecution and (2) his due process rights under the fifth, sixth, and fourteenth amendments to the United States constitution, and article first, §§ 8 and 9, of the Connecticut constitution were not therefore violated.[9] This claim fails.

Because the petitioner challenges the habeas court's conclusion, which was premised on factual findings, "we first apply the clearly erroneous standard of review to [those] finding[s]. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [a] finding of fact is clearly erroneous when there is no evidence in the

petitioner was the same plea offer that was extended to him prior to Attorney Lawlor's withdrawal, and this assertion went unrebutted.

[9] To the extent that the petitioner also claims on appeal that the trial court, *Alexander*, *J.*, erred in allowing Attorney Lawlor's withdrawal on the ground that he did not follow the requirements of Practice Book §§ 3-9 and 3-10, we decline to review this claim because it was not raised in the operative habeas petition or decided by the habeas court. See *VanDeusen* v. *Commissioner of Correction*, 212 Conn. App. 427, 452, 275 A.3d 215 ("[a] reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court" (internal quotation marks omitted)), cert. denied, 345 Conn. 903, 282 A.3d 982 (2022).

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." (Footnote omitted; internal quotation marks omitted.) *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 812, 246 A.3d 1047, cert. denied, 336 Conn. 931, 248 A.3d 1 (2021). Here, to the extent that the petitioner challenges the court's findings to support its conclusion that the hearing at which Attorney Lawlor was permitted to withdraw as counsel did not constitute a critical stage in the petitioner's prosecution for purposes of a constitutional violation, we conclude that such findings were not clearly erroneous because there was evidence in the record to support them.

"Whether the [petitioner's] constitutional rights were violated by his exclusion from the hearing presents a question of law and, accordingly, we exercise plenary review." *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015); see also *State* v. *Pierre*, 277 Conn. 42, 92, 890 A.2d 474 ("[t]he defendant challenges the trial court's legal conclusion that the critical stage triggering the protections of the sixth amendment did not occur until the information was filed and the defendant was charged at his arraignment"), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

"It is undisputed that a defendant has a constitutional right to be present at all critical stages of the trial. . . . The constitutional right to presence is rooted to a large extent in the [c]onfrontation [c]lause of the [s]ixth [a]mendment . . . but . . . [that] right is protected by the [d]ue [p]rocess [c]lause in some situations where the defendant is not actually confronting witnesses or evidence against him. . . . In judging whether a particular segment of a criminal proceeding constitutes a critical stage of a defendant's prosecution, courts have evaluated the extent to which a fair and just hearing

would be thwarted by [the defendant's] absence or whether his presence has a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge. . . . Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. . . .

"Although some courts have held that a defendant has a right to be present even when questions of law are discussed . . . the better view would seem to be that there is no such absolute right . . . especially when . . . the question of law is argued prior to the selection of the jury and the commencement of trial. . . . The question should be whether the defendant's presence bears a relation, reasonably substantial, to his opportunity to defend. . . . [T]he exclusion of a defendant from a proceeding should be considered in light of the whole record." (Citations omitted; internal quotation marks omitted.) *State* v. *Ralph B.*, 162 Conn. App. 583, 595–96, 131 A.3d 1253 (2016). In the context of claims sounding in ineffective assistance of counsel, "[o]ur Supreme Court has recognized that pretrial negotiations implicating the decision of whether to plead guilty constitute a critical stage in criminal proceedings and that plea bargaining is an integral component of the criminal justice system." *Shefelbine* v. *Commissioner of Correction*, 150 Conn. App. 182, 186, 90 A.3d 987 (2014).

For the reasons that follow, we reject the petitioner's argument that, because the June 2, 2009 "hearing was scheduled for the petitioner to either accept or reject the state's plea offer," the habeas court erred in concluding that the June 2, 2009 proceeding was not a critical stage of his prosecution.[10] The habeas court

[10] Insofar as the petitioner argues that the June 2, 2009 proceeding constituted a critical stage of his prosecution because "the hearing evolved into a procedure in which [Attorney Lawlor] made a request to withdraw which was granted," we disagree. The sixth amendment "does not provide an inexorable right to representation by a criminal defendant's preferred law-

expressly concluded, and we agree, that the June 2, 2009 proceeding "did not constitute a critical stage in the petitioner's prosecution for purposes of a constitutional violation." Although June 2, 2009, was originally scheduled to be a so-called "accept or reject" date, because the petitioner failed to appear at that hearing, the nature of the hearing entirely changed. The June 2, 2009 transcript reveals that nothing occurred with respect to the pending plea offer, and, in fact, that offer remained available after the withdrawal of Attorney Lawlor and the reappointment of Attorney Edgington. See footnote 8 of this opinion. In short, because the June 2, 2009 proceeding had no effect on the petitioner's ability to accept or reject the plea offer, the habeas court properly determined that it was not a critical stage of the petitioner's prosecution and, therefore, the petitioner's due process rights were not violated.

The judgment is affirmed.

In this opinion the other judges concurred.

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yer"; (internal quotation marks omitted) *State* v. *Dijmarescu*, 182 Conn. App. 135, 143, 189 A.3d 111, cert. denied, 329 Conn. 912, 186 A.3d 707 (2018); and a defendant's sixth amendment right to counsel of choice is not implicated by a motion to withdraw from representation. Id., 143–44. "In circumstances in which a defendant's private attorney seeks to withdraw from representing the defendant . . . all the sixth amendment demands is a reasonable opportunity to retain new counsel . . . ." (Internal quotation marks omitted.) Id., 143 n.5. In the present action, the court found that "[t]he petitioner was promptly notified by the court of Attorney Lawlor's withdrawal and was given ample opportunity to find substitute counsel," a finding that the petitioner does not challenge on appeal.

STATE OF CONNECTICUT *v.* ANGEL A.*
(AC 47294)

Moll, Westbrook and Keller, Js.

Syllabus

Convicted, following a jury trial, of attempt to commit murder and other crimes, the defendant appealed. He claimed, inter alia, that the trial court violated his right to jury unanimity by discharging the jury after accepting its verdict but before disclosing to the parties that one of the jurors had made an ex parte comment to the court in the deliberation room that she felt "a little guilty about the attempted murder charge." *Held*:

The defendant's unpreserved claim that the trial court violated his right to jury unanimity failed under the third prong of *State* v. *Golding* (213 Conn. 233), as the juror's comment was simply a statement about how she felt about the verdict that could not reasonably be construed as an equivocation or expression of reservation about it and did not indicate that she or any other juror had not agreed to the verdict, and, because this court could not infer that the juror intended her comment to inform the trial court that the jury's verdict was not unanimous, that court's failure to disclose the comment to the parties before discharging the jury did not amount to a constitutional violation.

The trial court did not abuse its discretion by conducting a limited inquiry during a posttrial hearing about the juror's comment and denying the defendant's request to inquire into why she made that comment, as the court's actions did not deprive the defendant of his right to a fair trial but, rather, satisfied the preliminary inquiry into possible juror misconduct required under *State* v. *Brown* (235 Conn. 502), the juror having affirmed her verdict and the court, on the basis of the juror's testimony, having determined that there was no indication that the jury's verdict lacked unanimity or that juror misconduct had occurred, and further questioning of the juror would have constituted improper inquiry into the mental processes by which the verdict was determined.

(*One judge concurring and one judge dissenting in separate opinions*)

Argued February 10—officially released October 7, 2025

* 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.

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of attempt to commit murder, assault in the first degree and criminal violation of a protective order, and, in the second part, with having committed an offense while on release, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Swords*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Louis Luba*, *Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The defendant, Angel A., appeals from the judgment of conviction, rendered after a jury trial, of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal violation of a protective order in violation of General Statutes § 53a-223 (c) (2).[1] The defendant claims that the trial court improperly (1) violated his right to jury unanimity by discharging the jury before disclosing to the parties a postverdict comment made to the court by a member of the jury, C.A.,[2] following the acceptance of the verdict that she "[felt] a little guilty about the attempted murder charge," and

[1] On appeal, the defendant challenges only his conviction of attempt to commit murder in violation of §§ 53a-49 (a) (2) and 53a-54a.

[2] "The jurors are referred to by their initials to protect their privacy interests." *State* v. *Hughes*, 341 Conn. 387, 406 n.13, 267 A.3d 81 (2021).

(2) violated his right to a fair trial by denying his request to question C.A. at a posttrial hearing about why she made that postverdict comment. We disagree and, accordingly, affirm the judgment of the court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. In August and September, 2016, the defendant was in a romantic relationship with the victim, R.[3] On August 30, 2016, the defendant and R got into an argument, the police were called, and protective orders were issued against both parties. On September 24, 2016, the defendant and R again got into a heated argument, which, this time, culminated in the defendant's approaching R from behind and stabbing her in the back three times with a knife. R was able to escape from her apartment and call the police. The defendant, who followed R out of the apartment building, admitted to neighbors who were aiding R that he had stabbed her. When the police arrived, he raised his hands and yelled: "[I]t was me, Papi! It was me!" The defendant was arrested and charged with attempt to commit murder in violation of §§ 53a-49 (a) (2) and 53a-54a, assault in the first degree in violation of § 53a-59 (a) (1) and criminal violation of a protective order in violation of § 53a-223 (c) (2).

The case was tried to a panel of six jury members on November 28, 29 and 30, and December 3 and 4, 2018. On December 5, 2018, the jury found the defendant

[3] In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline 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.

guilty on all counts. After the jury foreperson announced the verdict, the following colloquy took place:

"[The Court]: Well, first I'd like to ask, do the other five members of the jury agree with the foreperson's verdict?

"[The Jurors]: Yes.

"[The Court]: Okay. And the record may reflect that all of the jurors responded affirmatively. As a result of that, the court orders that the jury verdict be accepted and recorded. And with that . . . [a]nything further from counsel at this point?

"[Defense Counsel]: No, Your Honor.

"[The Prosecutor]: Nothing, Your Honor.

"[The Court]: Okay. . . . Ladies and gentlemen, I want to let you know that your jury service is ended. You're free from your oath at this point. . . . So, with that, I thank you and ask you to go back into the jury deliberation room for a short period of time. The clerk has some paperwork that she needs to give you, and after that, we'll release you to go home. Thank you."

Thereafter, the members of the jury returned to the deliberation room. The court, *Swords*, *J.*, elected to speak with the jurors prior to their dismissal and later stated on the record: "When I first walked in, I told the jurors I was there to answer any questions they might have about the trial, or about the Connecticut court system, or about the criminal justice system. I also told them that I did not want to discuss their verdict or anything about their deliberations. Several of the jurors asked me questions about the court system. After approximately five to seven minutes, one of the jury members [C.A.] said, 'I feel a little guilty about the attempted murder charge.' This jury member did not indicate why she felt a little guilty, and I did not ask

her any questions about her comment. While I was with the jury, no other jurors made any comments about their verdict."

Two days after conversing with the jury, on December 7, 2018, the trial court held a telephone conference with defense counsel and the prosecutor during which it disclosed that, after the verdict was recorded but before the jury left the deliberation room, C.A. had told the court that she felt "a little guilty about the attempted murder charge." The trial court, sua sponte, scheduled a posttrial hearing with the parties and C.A. to "make further inquiry" into C.A.'s comment. At the hearing, which took place on December 12, 2018, the following colloquy took place between the court and C.A.:

"[The Court]: Now, you will recall last Wednesday that, at the conclusion of your deliberations, the jury came out, and your foreperson . . . reported the verdict . . . upon questioning from the clerk.

"[C.A.]: Yes.

"[The Court]: The clerk asked him what the verdict was as to count one, attempted murder, [and] he said guilty. As to count two, assault in the first degree, he said guilty. As to count three, violation of a protective order, he said guilty.

"[C.A.]: Correct.

"[The Court]: Do you recall that?

"[C.A.]: Yes.

"[The Court]: Okay. And then, immediately thereafter, the clerk asked the jury as a whole, collectively, whether they agreed with the verdict as reported by the foreperson.

"[C.A.]: Yes.

"[The Court]: Do you remember that? And did you say yes when the clerk asked that question?

"[C.A.]: I *absolutely* did." (Emphasis added.)

Thereafter, outside the presence of C.A., defense counsel made the following request: "Your Honor, I would just ask if the court would inquire of the juror . . . if her comments to the court after the verdict was recorded were based on any reasons she may have to believe that any juror may have not followed the instructions given by the court." The prosecutor objected to any additional questioning on the ground that it is not appropriate to inquire into the jury's deliberative process. Defense counsel countered: "[T]he reason why I phrased the requested question the way I did was to perhaps get close, but not to cross that line. I understand the state's position that it would be inappropriate for the court to ask why the juror said that, but I think it would be appropriate for the court to ask if there's any reason this juror may have to believe that any juror failed to follow the instructions."

The trial court stated: "I will deny [defense counsel's] request. There is absolutely no indication from . . . that sole comment that the juror said to me, that this involved any misconduct on the part of anybody, either as part of the jury or someone outside the jury. So, I don't think that your request is appropriate under the limited scope of the hearing that the Supreme Court has set out in *State* v. *Brown* [235 Conn. 502, 668 A.2d 1288 (1995)] and other cases. . . . So . . . [C.A.] is free to leave." The court explained that, in deciding the scope of the posttrial hearing, it considered, inter alia, Practice Book § 42-33, *State* v. *Johnson*, 288 Conn. 236, 951 A.2d 1257 (2008), *State* v. *Gary*, 273 Conn. 393, 869 A.2d 1236 (2005), and *State* v. *Castonguay*, 194 Conn. 416, 481 A.2d 56 (1984). The court concluded: "[T]he court cannot find that there's any evidence that this

juror did not vote guilty in the jury room [and] affirm the verdict as entered by all of . . . her fellow jury members. Any further inquiry would invade the deliberative process and the state of mind of this juror. And the court finds [that this] is not appropriate under the circumstances."

On May 15, 2019, the trial court sentenced the defendant to a total effective term of thirty years of incarceration, five years of which are a mandatory minimum.[4] This appeal followed.

I

The defendant claims that the trial court violated his right to jury unanimity by discharging the jury before disclosing C.A.'s postverdict comment to the parties. He argues that the court should have immediately disclosed C.A.'s comment to the parties while the jury remained in the deliberation room so that the defendant had an additional opportunity to request a poll of the jurors. The state, on the other hand, argues that the defendant's claim is unpreserved and fails to satisfy the test for determining whether a defendant can prevail on a claim of unpreserved constitutional error under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We agree with the state that the defendant's claim is unpreserved and fails under the third prong of *Golding*.

We first consider whether the defendant preserved his claim that the trial court improperly failed to disclose C.A.'s postverdict comment before discharging the jury. With respect to preservation, the defendant

[4] Specifically, the trial court sentenced the defendant to twenty years of incarceration on the attempted murder charge; five years of incarceration on the assault charge, which was mandatory minimum time; and five years of incarceration on the charge of violation of a protective order. The court ordered all sentences to run consecutively to one another.

states in his brief that he "preserved this issue by his request to have [C.A.] questioned further to determine whether her remark to the judge reflected juror misconduct, which might include the inability to disregard a news story she was exposed to during voir dire.[5] If this court disagrees, and to the extent that [the defendant] did not explicitly base his request on his constitutional rights, the risk that the jury's verdict on the attempted murder charge was not unanimous, or was tainted by misconduct, is a constitutional issue which can be reviewed by this court under [*Golding*]." (Footnote added.) The state responds that the defendant's claim is unpreserved because the defendant (1) waived his right to poll the jury and (2) did not raise any jury unanimity issue to the court during the posttrial hearing.

Although the defendant did not exercise his right to have the jury polled by making a timely request to do so before the jurors separated or dispersed; see *State* v. *Pare*, 253 Conn. 611, 621, 755 A.2d 180 (2000); the defendant did not learn about C.A.'s postverdict comment until *after* the time to request a poll had passed. Nevertheless, the defendant never raised any issues to the trial court concerning polling or lack of unanimity of the verdict during the posttrial hearing or in a motion for a new trial. See *State* v. *Franklin*, 162 Conn. App. 78, 93, 129 A.3d 770 (2015) ("defendant did not preserve [his challenge to the verdict] by moving for a new trial pursuant to Practice Book § 42-53"), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). Because the defendant failed to raise this claim with the court, it is unpreserved. Therefore, we next consider whether the claim meets the requirements of *Golding*.

[5] During voir dire, some venirepersons, including C.A. and the jury foreperson, A.B., were exposed to a brief news report on television showing a clip about the case. During voir dire examination, however, both C.A. and A.B. told the court that they could put the news report aside and decide the case solely on the evidence they would hear in the courtroom. Aware that C.A. and A.B. had been exposed to the news report, the prosecution and defense counsel both accepted them to serve as members of the jury.

"Pursuant to *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. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Emphasis in original; internal quotation marks omitted.) *State* v. *Daniels*, 228 Conn. App. 321, 342, 324 A.3d 820, cert. denied, 350 Conn. 926, 326 A.3d 248 (2024). "In the absence of any one of these conditions, the defendant's claim will 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." (Internal quotation marks omitted.) *State* v. *Andaz*, 181 Conn. App. 228, 232, 186 A.3d 66, cert. denied, 329 Conn. 901, 184 A.3d 1214 (2018); see also *State* v. *Mejia*, 233 Conn. 215, 232, 658 A.2d 571 (1995) (resolving defendant's claim under third prong of *Golding* without deciding whether claim was of constitutional magnitude). We conclude that the defendant's claim—premised on his assertion of a violation of his right to jury unanimity—fails under the third prong of *Golding*.[6]

[6] The parties disagree about whether the defendant's claim satisfies the second prong of *Golding*, i.e., whether the claim is of constitutional magnitude. Specifically, the defendant argues that "the risk that the jury's verdict on the attempted murder charge was not unanimous . . . is a constitutional issue . . . ." See *State* v. *Douglas C.*, 345 Conn. 421, 438, 285 A.3d 1067 (2022) ("federal constitutional right to jury unanimity clearly applies in both state and federal courts"). The state, however, argues that the defendant alleges only a violation of his right to have the jury polled, which is not of constitutional magnitude. See, e.g., *State* v. *J.R.*, 69 Conn. App. 767, 773 n.2, 797 A.2d 560 ("the right to poll the jury is not of constitutional dimension"),

Turning to the merits of the defendant's claim, we consider whether the trial court violated the defendant's right to jury unanimity by discharging the jury before disclosing C.A.'s postverdict comment to the parties. The defendant argues that, "[w]hen, during a postverdict, ex parte discussion with the jury, a trial judge inadvertently learns anything that calls the unanimity of the jury's verdict into question, or suggests potential misconduct, the trial judge has a duty to ask the jury to remain in the deliberation room and immediately put this information on the record so that the parties can take whatever steps they deem appropriate . . . ." He contends that, "[h]ad the trial court asked the jury to remain in the deliberation room and told the parties about [C.A.'s] remarks, the defense could have exercised its rights under Practice Book § 42-31 . . . to individually poll the jurors to determine whether their verdict was truly unanimous."

The state argues that, even if the trial court had informed the parties of C.A.'s postverdict statement immediately, any subsequent polling request would have been untimely because, after the verdict was recorded and before the court sent the jury back to the deliberation room, the court released the jurors from their oath and thereafter engaged in ex parte conversation with them about the case. Thus, the state contends that the jury already had been "discharged" for the purposes of Practice Book § 42-31.

cert. denied, 260 Conn. 935, 802 A.2d 89 (2002). Because we choose to focus on the third prong of *Golding*, we do not need to resolve whether the defendant's claim invokes only his right to have the jury polled or, more broadly, alleges a violation of his constitutional right to jury unanimity and, therefore, satisfies the second prong of *Golding*.

Furthermore, even if we were to agree with the defendant and the dissenting judge that the defendant preserved his claim before the trial court or was not required to do so such that resort to *Golding* review is unnecessary, such a conclusion would not change the outcome of this appeal because we reject the defendant's claim on its merits.

Practice Book § 42-31 provides in relevant part: "After a verdict has been returned *and before the jury has been discharged*, the jury shall be polled at the request of any party or upon the judicial authority's own motion. . . ." (Emphasis added.) Our Supreme Court has stated that a jury is not discharged for the purposes of § 42-31 until its members have separated or dispersed. See *State* v. *Pare*, supra, 253 Conn. 621 ("[A] trial court's obligation to poll the jury upon a timely request from either party is mandatory. . . . [A] jury is not discharged for the purpose of § 42-31 until its individual members separate or disperse and, therefore, a request submitted prior thereto is timely."). The court in *Pare*, however, also favorably cited federal case law instructing that, if "a jury remains as an undispersed unit within the control of the court *and with no opportunity to mingle with or discuss the case with others*, it is undischarged and may be recalled." (Emphasis added.) Id., 630.

Although the jury in the present case remained in the deliberation room under the effective supervision of the trial court when C.A. made her postverdict comment to the judge, whether the jury had been "discharged" at that time for the purposes of Practice Book § 42-31 is not entirely clear. Under *Pare*, once jurors are effectively discharged from their obligations and free to discuss the case with nonjurors, any subsequent poll would be ineffective. The trial judge is a nonjuror, and the prohibition against a judge talking ex parte with one or more jurors had been violated. Nothing in § 42-31 speaks to the situation here, in which the judge already has gone into the deliberation room and conversed with the jurors. In *Pare*, the trial court had not spoken to the jurors after they left the courtroom and, thus, that decision provides only limited guidance regarding the circumstances at issue in the present case.

Nevertheless, even if we assume, without deciding, that the jurors in the present case had not been discharged for purposes of polling, despite the ex parte discussion with the trial judge, we would conclude that, under the facts of this case, the judge was not required to disclose C.A.'s comment before allowing the jury to disperse.

As a threshold matter, we set forth the standard of review. "The scope of our appellate review depends upon the proper characterization of the [actions taken] by the trial court." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 281, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). In the present case, the issue is whether the trial court violated the defendant's right to jury unanimity by discharging the jury after C.A. told the judge that she felt "a little guilty about the attempted murder charge." Whether the trial court properly discharged the jury presents a question of law over which our review is plenary. See *State* v. *Colon*, supra, 282. Therefore, "we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) Id. Nevertheless, the court's findings as to the circumstances surrounding the discharge of the jury and C.A.'s comment are findings of fact that will not be disturbed unless they are clearly erroneous. See id. "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.) Id.

The defendant argues that the trial court had a duty to inform the parties of C.A.'s comment before discharging

the jury so that the defendant had an additional opportunity to request a poll of the jury.[7] We conclude that, under the circumstances of this case, the court did not have such a duty.

Generally, "[i]n a criminal trial, ex parte conversations between the judge and jury are constitutionally prohibited." (Internal quotation marks omitted.) *State* v. *Kamel*, 115 Conn. App. 338, 349 n.2, 972 A.2d 780 (2009). It is common practice, however, "for judges to enter the jury room after a verdict has been returned to thank the jury for its service and converse with jurors about their experience . . . ." Id. "Answering jurors' questions, to promote good public relations, and soliciting feedback regarding the performance of members of the bar are within the trial court's administrative functions and are permissible . . . as long as the judge fully discloses his [or her] intention to speak with the jury and discloses the subject matter to be discussed." (Internal quotation marks omitted.) *State* v. *Durant*, 94 Conn. App. 219, 231–32, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007).

Connecticut courts have not yet addressed what duty, if any, a trial court owes parties when, after the verdict is recorded but before the jury has dispersed, a member of the jury makes an ex parte comment related to the verdict. The United States Supreme Court has stated the following concerning the disclosure of ex parte communications: "When an ex parte communication

[7] Although, after the jury foreperson announced the verdict, the courtroom clerk asked the jurors, collectively, whether they agreed with the verdict, and they collectively answered affirmatively, that inquiry does not constitute polling the jury. Pursuant to Practice Book § 42-31, "[a] poll shall be conducted by the clerk of the court by *asking each juror individually* whether the verdict announced is such juror's verdict." (Emphasis added.); see also *State* v. *Pare*, supra, 253 Conn. 637 (distinguishing between "the jury's *collective assent* to the verdict," which does not constitute polling, and "an *individual interrogation*," which is required under § 42-31 (emphasis added)).

[between judge and juror] relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a [posttrial] hearing. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred. . . . [Posttrial] hearings are adequately tailored to this task." (Citations omitted; footnote omitted.) *Rushen* v. *Spain*, 464 U.S. 114, 119–20, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).[8] Although the court in *Rushen* addressed ex parte communication that occurs *during* the course of a trial, we are persuaded that this rule also should apply if an ex parte communication occurs between the trial judge and a juror after the verdict is recorded but before the jury has dispersed because, at that time, the jury remains under the effective supervision of the trial court.

In *Rushen* v. *Spain*, supra, 464 U.S. 114, evidence was introduced during trial that a member of the Black Panther Party, who was neither a party nor a witness at trial, had previously been convicted of a murder that was unrelated to the crimes at issue in the case. Id., 115–16. After the defendant was convicted and sentenced, defense counsel learned of ex parte communications that occurred during the trial between the trial judge and a member of the jury, during which the juror disclosed that she recognized the name of the Black

[8] We note that some federal courts have "recognized that a court's ex parte communication with the jury will not require a reversal where substantive rights of parties have not been adversely affected." (Internal quotation marks omitted.) *United States* v. *Mann*, 685 F.3d 714, 721 (8th Cir.), cert. denied, 568 U.S. 1029, 133 S. Ct. 670, 184 L. Ed. 2d 464 (2012); see also *United States* v. *Balderas*, Docket Nos. 93-1201 and 93-1202, 1994 WL 144449, *4 (6th Cir. April 21, 1994) (unpublished opinion); *United States* v. *de Hernandez*, 745 F.2d 1305, 1310 (10th Cir. 1984). We find this rule to be consistent with the United States Supreme Court's holding in *Rushen* v. *Spain*, supra, 464 U.S. 119–20.

Panther Party member as the man who had been convicted of murdering her childhood friend. Id., 116. "The judge [had] asked her . . . whether her disposition of the case would be affected [and] [s]he assured him that it would not." Id. Defense counsel, upon learning about these ex parte communications, "moved for a new trial. At a hearing on the motion, [the] juror . . . testified that she had not remembered her friend's death during voir dire and that her subsequent recollection did not affect her ability impartially to judge [the defendant's] innocence or guilt. She admitted telling other jurors that she personally knew [the Black Panther Party member's] murder victim, but denied making any disparaging remarks about the Black Panther Party. The trial judge concluded that the ex parte communications lacked any significance and that [the defendant] suffered no prejudice therefrom. . . . Accordingly, he denied the motion for new trial." (Citation omitted; internal quotation marks omitted.) Id.

On appeal, the United States Supreme Court concluded: "The [posttrial] hearing in this case created more than adequate support for the conclusion that [the juror's] presence on the jury did not prejudice [the defendant]. The [murder of the juror's friend] was not related to the crimes at issue in the trial. [The member of the Black Panther Party who had been convicted of the murder of the juror's friend] was not connected to any of the offenses for which [the defendant] was convicted and he did not testify at the trial. [The juror] . . . repeatedly testified that, upon recollection, the incident did not affect her impartiality. She turned to the most natural source of information—the trial judge—to disclose the information she should have but failed to recall during voir dire. Their ex parte communication was innocuous. They did not discuss any fact in controversy or any law applicable to the case. The judge simply assured her that there was no cause for concern. Thus,

the state courts had convincing evidence that the jury's deliberations, as a whole, were not biased by the undisclosed communication of [the juror's] recollection. . . . [T]herefore . . . the alleged constitutional error [was] harmless beyond a reasonable doubt." (Footnote omitted.) Id., 120–21.

We additionally find instructive *United States* v. *Jefferson*, 258 F.3d 405 (5th Cir.), cert. denied, 534 U.S. 967, 122 S. Ct. 379, 151 L. Ed. 2d 289 (2001), in which the United States Court of Appeals for the Fifth Circuit addressed the trial court's handling of a juror's postverdict comment concerning the verdict. In *Jefferson*, "the jury foreperson announced that they had reached a unanimous decision. The form of the verdict, signed by all twelve members of the jury was read aloud in open court. 'We the jury find the defendant . . . guilty as charged.' . . . Upon its own motion, the court then polled all twelve members of the jury individually, [asking] 'whether this is your verdict' to which all twelve jurors answered affirmatively. Only after this did a juror indicate that she had voted guilty but had reservations. Upon hearing the juror express that she had reservations, the court inquired of the juror, '[i]s this your verdict?' whereupon the juror nodded her head affirmatively. The court then received, announced and recorded the verdict." Id., 411. The defendant subsequently moved for a new trial on the ground that the verdict was not unanimous, but the court denied the motion. Id., 410.

On appeal, the defendant in *Jefferson* claimed that the "juror's expression of reservations concerning her verdict during the polling of the jury indicated a lack of unanimity and the subsequent questioning employed by the trial judge was in violation of [rule 31 of the Federal Rules of Criminal Procedure]."[9] Id. The Fifth

[9] Similar to Practice Book § 42-31, rule 31 of the Federal Rules of Criminal Procedure provides in relevant part: "(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or

Circuit stated: "While a juror's expression of reservations may indicate the need for further inquiry to ascertain with certainty that the juror assents to the verdict as rendered, simply expressing reservations in conjunction with a guilty verdict, in and of itself, is not sufficient to indicate a lack of unanimity. The standard of beyond a reasonable doubt does not require a juror to find with absolutely certainty that a defendant is guilty. A juror may have reservations and still find the evidence presented to be sufficient to meet the burden established by the standard of beyond a reasonable doubt. . . . Here, prompted by the juror's guilty verdict and expression of reservations, the trial judge's inquiry to ascertain with certainty the juror's assent to the guilty verdict was an appropriate exercise of control over the trial proceedings. The trial court correctly denied [the defendant's] motion for new trial . . . ." (Citations omitted.) Id., 411–12.

In the present case, C.A.'s postverdict, ex parte comment to the trial judge that she "[felt] a little guilty about the attempted murder charge" relates to an aspect of the trial, namely, the verdict. Similar to the ex parte communications in *Rushen* v. *Spain*, supra, 464 U.S. 114, however, C.A.'s comment did not raise constitutional concerns. C.A. did not indicate that she, or any other member of the jury, had not *agreed* to the verdict. Her statement cannot reasonably be construed as an equivocation or expression of reservation about the verdict. Rather, C.A. simply told the trial judge how she *felt* about the verdict to which she had agreed. Similar to the juror's comment in *Jefferson*, C.A.'s expression of her feelings in conjunction with the guilty verdict, in and of itself, is not sufficient to indicate a lack of unanimity. Because the trial court did not inquire about

may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury." Fed. R. Crim. P. 31 (d).

C.A.'s comment at the time it was made or during the posttrial hearing, any inferences we may draw about what C.A. meant would be purely speculative. C.A.'s comment expressed reservations about the verdict, but reservations do not necessarily mean that she did not find that the state had met its burden of proving the attempted murder charge beyond a reasonable doubt. See *United States* v. *Jefferson*, supra, 258 F.3d 411. Because we cannot infer that C.A. intended her comment to inform the judge that the verdict was not unanimous, the judge's failure to disclose C.A.'s comment to the parties before discharging the jury does not amount to a constitutional violation.

Even if C.A.'s comment had indicated a risk that the verdict lacked unanimity, the trial court's posttrial hearing created adequate support for the conclusion that the verdict was, in fact, unanimous. At the posttrial hearing, the court, similar to the court in *Jefferson*, asked C.A. whether, when the clerk asked the members of the jury if they agreed with the verdict, she had answered affirmatively. C.A. replied: "I *absolutely* did." (Emphasis added.) Because C.A. affirmed her verdict at the posttrial hearing and her comment did not reasonably implicate any other members of the jury, the posttrial hearing mitigated any concern that the verdict lacked unanimity. This is particularly so in light of the fact that the court had inquired as to whether the jurors collectively accepted the verdict provided by the foreperson, and they collectively indicated in the affirmative that they agreed with the verdict. Even if the judge, despite relieving the jurors of their oath[10] before conversing with them, could have elected to disclose C.A.'s

[10] The jurors' oath, as set forth in General Statutes § 1-25, provides: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that you will, without respect of any persons or favor of any person, decide this case between the state of Connecticut and the defendant (or defendants) based on the evidence given in court and on the laws of this state, as explained by the judge; that you will not talk to each other about this case until instructed to do so; that you will listen to and consider what the other

comment to the parties before the jury dispersed and granted the defendant an additional opportunity to request a poll of the jurors, we conclude that the court did not violate the defendant's right to jury unanimity by discharging the jury and holding a posttrial hearing to confirm C.A.'s verdict.[11]

Our review of the record reveals that the trial court mitigated any risk that the verdict was not unanimous by disclosing C.A.'s comment to the parties and subsequently holding a posttrial hearing to confirm her verdict. We therefore conclude that the court did not violate the defendant's right to jury unanimity by discharging the jury before disclosing C.A.'s comment to the parties. Thus, the defendant's claim fails under the third prong of *Golding* because he failed to prove that the alleged constitutional violation exists.

jurors have to say in deliberations about this case; that you will not speak to anyone else, or allow anyone else to speak to you, about this case until you have been discharged by the court; and that when you reach a decision, you will not disclose the decision until it is announced in court; so help you God or upon penalty of perjury."

[11] It is important to note that the record does not disclose what behaviors the jurors engaged in prior to the judge's entering the deliberation room. Having been released from their oath, the jurors were free to speak about the case and their verdict on their cell phones with nonjurors, potentially with relatives, friends, the jury alternates, employers, the courtroom clerk who was ordered to bring some documents to them, courthouse marshals, and groups comprised of only some, not all, members of the jury. In other words, the jurors could have discussed the case with "outsiders" other than the judge. The jurors also were free to look up news and social media reports concerning the case. Finally, we do not know how many of the jurors heard C.A.'s comment to the judge. In short, there were a number of ways that the sanctity of the jurors' deliberations could have already been tainted prior to C.A.'s comment that would have rendered the reliability of any subsequent jury poll problematic.

We share the concerns expressed in the concurring opinion, and we would strongly encourage the Rules Committee of the Superior Court, which is the "appropriate forum in which to fully and fairly consider any potential amendment to the procedural rules"; *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 686 n.7, 142 A.3d 1095 (2016); to evaluate current practices regarding the polling of jurors and to consider whether changes to Practice Book §§ 42-31 and 42-32 are warranted.

II

The defendant next claims that the trial court violated his constitutional right to a fair trial by denying his request to question C.A. at the posttrial hearing about why she made a postverdict comment to the judge that she felt "a little guilty about the attempted murder charge." He argues that C.A. may have felt guilty because juror misconduct had occurred and, further, that, because the judge did not ask C.A. why she made that comment, there was "no evidence upon which the trial court could rule out the possibility of misconduct." We reject the defendant's claim that the judge was required to inquire into why C.A. made the comment.

Our Supreme Court, in *State* v. *Brown*, supra, 235 Conn. 502, held that "a trial court must, when presented with any allegations of jury misconduct, conduct a preliminary inquiry, sua sponte if necessary, in order to assure itself that a defendant's constitutional right to a trial before an impartial jury has been fully protected. [This] requirement . . . still leaves the form and scope of such an inquiry to be determined by the trial court within the exercise of its discretion. . . . In the proper circumstances, the trial court may discharge its obligation simply by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for the limited form and scope of the proceedings held. In other circumstances, the trial court itself may need to cause an investigation of the allegations of jury misconduct to be conducted through informal or formal means." (Citations omitted.) Id., 528–29.

The court in *Brown* articulated the following factors to guide trial courts in exercising their discretion as to the form and scope of an inquiry into allegations of jury misconduct: "The first factor, the private interest involved, focuses on the criminal defendant. . . . The

second factor, the risk of deprivation of a defendant's constitutional right to a trial before an impartial jury, varies with the seriousness and the credibility of the allegations of jury misconduct. *The more obviously serious and credible the allegations, the more extensive an inquiry is required; frivolous or incredible allegations may be disposed of summarily.* . . . The third factor focuses on the state's interest. . . . [A]fter a jury verdict has been accepted . . . state interests . . . favor proceedings limited in form and scope. . . . It is the trial court that must, in the exercise of its discretion, weigh the relevant factors and determine the proper balance between them." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 530–32. "Our review on appeal is limited to the inquiry of whether the court's review of the alleged jury misconduct can be characterized fairly as an abuse of discretion." *State* v. *Kamel*, supra, 115 Conn. App. 343.

When a trial court holds a postverdict hearing, "[i]t is well established that evidence as to the expressions and arguments of the jurors in their deliberations and evidence as to their own motives, beliefs, mistakes and mental operations generally, in arriving at their verdict is excludable . . . ." (Internal quotation marks omitted.) *State* v. *Gary*, supra, 273 Conn. 415. This rule comes from Practice Book § 42-33, which provides in relevant part: "Upon an inquiry into the validity of a verdict, *no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined.* . . ." (Emphasis added.) "That rule has been aptly described as applying the parol evidence rule to a jury's verdict, so that their outward verdict as finally and formally made, and not their prior and private intentions, is taken as exclusively constituting the act. . . . That the verdict may have been the result of compromise, or a

mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." (Citation omitted; internal quotation marks omitted.) *State* v. *Gary*, supra, 415–16.

In the present case, after the verdict was recorded, C.A. told the trial judge that she felt "a little guilty about the attempted murder charge." The court, sua sponte, held a posttrial hearing during which it asked C.A. whether she affirmed that she had agreed to the guilty verdict. C.A. testified that she "absolutely" did. The court thereafter did not ask C.A. any additional questions. The court's actions clearly satisfied the preliminary inquiry required by *Brown*. On the basis of C.A.'s testimony at the posttrial hearing, the court determined that there was no indication on the part of C.A. that the verdict lacked unanimity or that juror misconduct had occurred. The court further determined that any further questions about why C.A. made that postverdict comment would constitute improper inquiry into the mental processes by which the verdict was determined.

The defendant argues that C.A. may have felt guilty about the attempted murder charge because juror misconduct occurred such as another juror referencing a news report,[12] racial animus, or other consideration of extraneous information. He also contends that "[t]he state's interests would not have been harmed by confirming what [C.A.] had said and asking, in general

[12] The defendant argues that C.A.'s postverdict comment raises concerns about juror misconduct because C.A. and the jury foreperson, A.B., had been exposed to the news report about the case during voir dire and, therefore, C.A.'s comment indicates that either she or A.B. may have improperly referenced that news report during deliberations. See footnote 5 of this opinion. The trial court addressed concerns regarding the exposure to the news report before the trial began, and there is no indication that the news report affected either juror's impartiality during the trial or deliberations. Any inference that C.A.'s postverdict comment meant that either she or A.B. had referenced the news report during deliberations would be purely speculative. Accordingly, we reject the defendant's argument.

terms, if misconduct had occurred." Verdicts, however, "cannot be upset by speculation or inquiry" into the deliberation process. (Internal quotation marks omitted.) *State* v. *Gary*, supra, 273 Conn. 416. At the posttrial hearing, the trial court confirmed C.A.'s verdict, and C.A.'s postverdict comment did not "obviously" indicate juror misconduct such that it required a "more extensive" inquiry. *State* v. *Brown*, supra, 235 Conn. 531; see also *State* v. *Gary*, supra, 417 ("the defendant takes great pains to characterize the thoughts and discussions described in [the juror's postverdict] letter as juror misconduct, which is subject to judicial inquiry, rather than as the mental operations of [that juror] and the other jurors, into which the courts may not delve"); *State* v. *Castonguay*, supra, 194 Conn. 437 ("[i]n the absence of a fair indication to the contrary, the jury is presumed to have followed the instructions of the court . . . [and] the inquiry [into juror misconduct] must be narrow" (internal quotation marks omitted)); *Josephson* v. *Meyers*, 180 Conn. 302, 310–11, 429 A.2d 877 (1980) (court may not consider evidence that juror was unduly influenced by statements of fellow jurors). Thus, we conclude that the court did not abuse its discretion in conducting a limited inquiry about C.A.'s postverdict comment and denying the defendant's request to inquire into *why* C.A. made that comment. See *State* v. *Alston*, 272 Conn. 432, 454, 862 A.2d 817 (2005) (concluding that trial court did not abuse its discretion by conducting limited inquiry into allegation of juror misconduct).

The judgment is affirmed.

In this opinion KELLER, J., concurred.

KELLER, J., concurring. I am in agreement with, and join the analysis contained in, the well reasoned majority opinion in this case, but I have reservations regarding the suggestion that the trial court possibly could have

brought the jurors back into the courtroom for individual polling after the judge had met and conversed with them in the deliberation room. In my view, the judge's meeting with the members of the jury effectively terminated the ability to conduct a poll, as such an event amounted to what the United States Court of Appeals for the Second Circuit has described as an "outside factor" that renders the reliability of any jury poll on recall problematic. See, e.g., *United States* v. *Rojas*, 617 F.3d 669, 678 (2d Cir. 2010); see also *United States* v. *Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994) (jury remains undischarged and may be recalled only where it remains as undispersed unit within control of court and with no opportunity to mingle with or discuss case with others); *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.) (same), cert. denied, 271 U.S. 681, 46 S. Ct. 632, 70 L. Ed. 1149 (1926). Stated differently, "intervening comments by a judge can undermine the defendant's right to poll the jury." *United States* v. *Harlow*, 444 F.3d 1255, 1267 (10th Cir. 2006).

Additionally, it is unclear what conduct the jurors had participated in after being dismissed by the trial judge in the courtroom. As stated in the majority opinion, the jurors' oath, as set forth in General Statutes § 1-25, obligates the members of a jury to "not talk to each other about this case until instructed to do so; [and] not speak to anyone else, or allow anyone else to speak to you, about this case until you have been discharged by the court . . . ." See footnote 10 of the majority opinion. After accepting and recording the verdict, the judge told the jury, "I want to let you know that your jury service is ended. You're free from your oath at this point." At that point, she said nothing to the jurors about speaking to them in the deliberation room. She only asked them to wait there for the courtroom clerk to bring them some documentation, most likely juror evaluation forms. Her statements on the

record to the jurors after the verdict was recorded and accepted were effectively a discharge of the jury, even if the jurors were asked to wait when they got back to the deliberation room. In the absence of a full-blown hearing, there is no way of knowing what behaviors the jurors engaged in before the judge's entry into the deliberation room. They were free to speak about the case and their verdict on their cell phones with nonjurors, potentially with relatives, friends, the jury alternates, employers, the courtroom clerk who was ordered to bring some documents to them, courthouse marshals, and groups comprised of only some, not all, members of the jury.[1] The jurors also were free to look up news and social media reports concerning the case.[2]

[1] In its instructions to the jury after counsel's closing arguments, the court stated: "You may only deliberate when all six of you are present in the jury room."

[2] I am mindful of our Supreme Court's discussion in *State* v. *Pare*, 253 Conn. 611, 755 A.2d 180 (2000), of when a jury has been discharged. In that case, the court observed that the discharge of a jury occurs when its members are relieved from any further responsibilities in the case. See id., 628. This does not necessarily occur when the members of a jury depart from the courtroom. Id., 629. Rather, our Supreme Court explained: "When a jury remains as an undispersed unit within the control of the court *and with no opportunity to mingle with or discuss the case with others*, *it is undischarged* and may be recalled." (Emphasis added; internal quotation marks omitted.) Id., 630, 633–34. In the present case, advances in technology have made it possible for the members of a jury to now communicate almost instantly with others once the trial court has released them from the juror oath and its corresponding obligations. That presents issues that were not before the court in *Pare*.

This court has observed that modern cell phones are a pervasive and insistent part of daily life, and that "these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, [R]olodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." (Internal quotation marks omitted.) *State* v. *Sayles*, 202 Conn. App. 736, 742 n.7, 246 A.3d 1010 (2021), aff'd, 348 Conn. 669, 310 A.3d 929 (2024). I note that the ubiquitous nature and the constantly expanding capabilities of cell phones are vastly different from those found in such devices at the time *Pare* was decided. Specifically, the use of a present day cell phone affords a member of a jury a greater ability to communicate almost instantly with nonjurors, whether by voice or by text, and to use the Internet, including

Moreover, we do not know the substance of the full conversation the judge exchanged with the jurors in the deliberation room. What questions were asked? How did she answer them? The influence of any of these behaviors irrevocably taints any attempted poll. The reason counsel must request a poll before the jurors are discharged from their oath is to preserve the protective bubble of isolation that every trial judge strives to preserve throughout the trial. See, e.g., *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012) (trial courts impose protective shield throughout proceeding to prevent members of jury from influence of outside factors). Because we have no way of ascertaining what behaviors all of the jurors may have engaged in after they left the courtroom, and their potential influence, I do not see how any subsequent poll would not have been suspect.

I also write separately to express my own view that, although it may be a "common practice" for a trial judge to enter the jury room to converse with the members of the jury about their experience and thank them for their service after a verdict has been returned; *State* v. *Kamel*, 115 Conn. App. 338, 349 n.2, 972 A.2d 780 (2009); this case provides a concrete example of the inherent dangers of doing so. I recognize that our appellate courts have observed that a trial judge may engage in an ex parte meeting with a jury after it has returned a verdict for the purpose of thanking the jurors for their service, answering questions unrelated to the deliberative process, promoting good public relations, and soliciting feedback regarding the administration of the jury

social media, to access information regarding the subject of the trial while remaining part of the "undispersed unit within the control of the court . . . ." *State* v. *Pare*, supra, 253 Conn. 630. These concerns were not present twenty-five years ago. In other words, despite the jury remaining as an undispersed unit in the courthouse, it is far more difficult to ensure that a jury today remains "untainted by any outside conduct." Id., 631.

process as a permissible exercise of a judge's administrative functions. See, e.g., *Tessmann* v. *Tiger Lee Construction Co.*, 228 Conn. 42, 56–57, 634 A.2d 870 (1993); *State* v. *Durant*, 94 Conn. App. 219, 231–32, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007); see generally *Gillingham Construction, Inc.* v. *Newby-Wiggins Construction, Inc.*, 142 Idaho 15, 25–26, 121 P.3d 946 (2005) (after verdict but before posttrial matters have concluded, judge may thank members of jury for their service and address issues of juror convenience but door between bench and jury must remain closed while case remains pending). While I do not question the benefits of such exchanges, the corresponding unintended risks that could result from a stray remark made by a juror to the judge who has presided over a trial may prove to be too great and result in the otherwise unnecessary expenditure of judicial resources, including an additional hearing, or even a new trial.

I urge my colleagues to be vigilant and to exercise great caution when speaking with a jury after it has returned a verdict. First, the judge should request that a clerk be present with him or her when the discussion occurs. Prior to any discussion, the judge should unequivocally advise the jury that it will not entertain any questions, and no one should comment concerning the merits of the case, the verdict, or the deliberations of the jury, just as the trial judge attempted to do in the present case, to no avail. Frankly, I would suggest a more cautionary approach. After the acceptance of the verdict, I would directly ask counsel if they want to have the jury polled, not just generally inquire: "Anything else, counsel?" A trial judge might sua sponte consider polling the jurors individually if such a poll is not requested by counsel pursuant to Practice Book § 42-31. Then, provided counsel have no further issues to raise, I would remain on the record, with counsel present, and advise the jurors that they are discharged

from their service, relieved of their oath, and are free to discuss the case with nonjurors only if they want to do so. I would then thank them for their service and release them.

I respectfully concur in the reasoning and judgment of the majority opinion.

MOLL, J., dissenting. The crux of this appeal involves the right of the defendant, Angel A.—having just been found guilty of, inter alia, attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (for which he subsequently received a consecutive sentence of twenty years of incarceration)—to have the jury polled pursuant to Practice Book § 42-31,[1] which, "although not of constitutional dimension, is nonetheless a corollary to the defendant's right to a unanimous verdict." (Internal quotation marks omitted.) *State* v. *Pare*, 253 Conn. 611, 623, 755 A.2d 180 (2000). Our Supreme Court has held that, in a criminal case, a trial court's failure to conduct a jury poll following a timely request constitutes structural error[2] not subject to harmless error review.[3] See id., 635–39. In the present case, one juror, C.A., purportedly told the trial judge in the jury deliberation room—after the

[1] Practice Book § 42-31 provides: "After a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the judicial authority's own motion. The poll shall be conducted by the clerk of the court *by asking each juror individually whether the verdict announced is such juror's verdict.* If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged." (Emphasis added.)

[2] A structural error is "a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. . . . Such errors infect the entire trial process . . . ." (Internal quotation marks omitted.) *State* v. *Lopez*, 271 Conn. 724, 733, 859 A.2d 898 (2004).

[3] In contrast, in a civil case, a violation of Practice Book § 16-32—the civil counterpart of Practice Book § 42-31—is subject to harmless error review. See *Wiseman* v. *Armstrong*, 295 Conn. 94, 115, 989 A.2d 1027 (2010).

return of the verdict but before the jury had been discharged—that she "[felt] a little guilty about the attempted murder charge."[4] The court did not advise counsel of C.A.'s statement prior to the jury's separation and dispersal.

In my view, it is inconceivable that, had he immediately been informed of C.A.'s statement, defense counsel would not have made a polling request prior to the jury's discharge (i.e., at a time when such request would have been deemed timely as a matter of law pursuant to *State* v. *Pare*, supra, 253 Conn. 611, and when the court would have been *required* to conduct a poll). See id., 621 ("We conclude that, pursuant to [Practice Book] § 42-31, a trial court's obligation to poll the jury upon a timely request from either party is mandatory. We conclude further that a jury is not discharged for the purpose of § 42-31 until its individual members separate or disperse and, therefore, a request submitted prior thereto is timely."). Because I see no meaningful difference between a trial court's per se reversible denial of a request to conduct a jury poll following a timely request, as in *Pare*, and a trial court's withholding of information that otherwise would have prompted a timely request for a jury poll, as in the present case, I respectfully dissent from part I of the majority opinion and would reverse the judgment of conviction of

[4] It does not appear from the December 5, 2018 transcript (the date of the verdict and the discharge of the jury) that the trial judge informed counsel that she intended to speak with the jurors following their exit from the courtroom. See *Tessmann* v. *Tiger Lee Construction Co.*, 228 Conn. 42, 57, 634 A.2d 870 (1993) ("[a]nswering jurors' questions, to promote good public relations, and soliciting feedback regarding the performance of members of the bar are within the court's administrative functions and are permissible under [the rule of the Code of Judicial Conduct governing ex parte communications] *as long as the judge fully discloses* [*her*] *intention to speak with the jury and discloses the subject matter to be discussed*" (emphasis added)). The defendant does not raise this issue on appeal.

attempt to commit murder and remand the case for a new trial on that count.[5]

As a threshold matter, I disagree with the majority's analysis in part I concerning the issue of preservation of the defendant's first claim on appeal. Unlike the majority, I would deem the defendant's claim preserved.[6]

Practice Book § 60-5 provides in relevant part that this court "shall not be bound to consider a claim unless

[5] As the majority correctly notes, on appeal, the defendant seeks a reversal of the judgment of conviction only as to the count of attempt to commit murder.

[6] The majority concludes that the defendant did not preserve his Practice Book § 42-31 claim because he did not raise it (1) during the posttrial hearing or (2) in a motion for a new trial. With regard to the former (i.e., that the defendant did not raise this claim during the posttrial hearing), by the time of that hearing, a request for an individual poll under Practice Book § 42-31 would have been too late as a matter of law, through no fault of the defendant. See *State* v. *Pare*, supra, 253 Conn. 632–33. With regard to the latter (i.e., that the defendant did not raise the issue in a motion for a new trial), the majority cites *State* v. *Franklin*, 162 Conn. App. 78, 93, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). I believe that the majority's reliance on *Franklin* is misplaced. In *Franklin*, this court opined that, because the defendant had not moved for a new trial under Practice Book § 42-53, he had not preserved his claim that he was entitled to a new trial on the ground that the verdicts were against the weight of the physical evidence. See id. In light of the nature of that particular claim, such a preservation requirement makes sense. With regard to such a claim, "[i]t is well settled that *only the judge who presided over the trial* where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence . . . . Consequently, *a judge in a later proceeding, such as a direct appeal* or a habeas corpus proceeding, *is not legally competent* to decide such a claim on the basis of the cold printed record before it. . . . It necessarily follows that appellate review of a weight of the evidence claim is greatly circumscribed. . . . [T]he proper appellate standard of review when considering the action of a trial court granting or denying a motion to set aside a verdict and a motion for a new trial is the abuse of discretion standard." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Capasso*, 203 Conn. App. 333, 346–47, 248 A.3d 58, cert. denied, 336 Conn. 939, 249 A.3d 352 (2021). However, to extend, as the majority does, the preservation requirement applicable to a weight of the evidence claim to a jury polling claim that arises subsequent to the trial is a bridge too far.

it was distinctly raised at the trial *or arose subsequent to the trial. . . .*" (Emphasis added.) See *Weiss* v. *Smulders*, 313 Conn. 227, 247–48, 96 A.3d 1175 (2014) (because issue arose subsequent to trial, claim on appeal was deemed preserved); *Azia* v. *DiLascia*, 64 Conn. App. 540, 558–59 n.13, 780 A.2d 992 (same), cert. denied, 258 Conn. 914, 782 A.2d 1241 (2001); *Hayward* v. *Hayward*, 53 Conn. App. 1, 5–6, 752 A.2d 1087 (1999) (same).

Here, the issue of C.A.'s equivocation as to the verdict arose—from the perspective of the parties' knowledge—subsequent to the trial (more specifically, after the return of the verdict and after the discharge of the jury). That is, by the time the court informed counsel of C.A.'s statement (i.e., two days after the jury's discharge), it was too late, as a matter of law, for counsel to make a polling request under Practice Book § 42-31. In *Pare*, our Supreme Court stated: "For practical reasons . . . a trial court should be [and is] required to reassemble a jury and conduct a poll only prior to the separation and dispersal of its members. 'The reason usually given why it is too late to poll jurors after they have been dispersed is that they may have "come into contact with outside influences." 3 ABA Standards for Criminal Justice at 15-148.' *State* v. *Coulthard*, [171 Wis. 2d 573, 582, 492 N.W.2d 329 (1992), review denied, 497 N.W.2d 130 (1993)]; see also *People* v. *McNeeley*, 216 Ill. App. 3d 647, 652, 575 N.E.2d 926, appeal denied, 141 Ill. 2d 553, 580 N.E.2d 128 (1991) ('protective shield' removed upon discharge thereby 'allowing the jurors to be influenced by improper outside factors'). Even '[s]imple questions such as "[d]id we do alright?" or "[w]e did the right thing, didn't we?"—responded to either positively or negatively would taint any subsequent poll.' *United States* v. *Marinari*, [32 F.3d 1209], 1214 [(7th Cir. 1994)]. Until that time, however, it can be assumed, in the absence of any indication to the

contrary, that the deliberative process had not been tainted and, therefore, that the results of a jury poll will provide adequate confirmation as to whether the verdict was reached upon full consensus of the jurors." *State* v. *Pare*, supra, 253 Conn. 632–33. In light of the foregoing, and pursuant to Practice Book § 60-5, I would deem the defendant's claim preserved.

Having determined that the defendant's Practice Book § 42-31 claim is unpreserved, however, the majority proceeds to conclude that the claim fails under the third prong of *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Respectfully, I disagree with the majority's application of *Golding*. It is well settled that, in order for a defendant to prevail on a claim pursuant to *Golding*, all of *Golding*'s conditions must be satisfied. See, e.g., *State* v. *Bolton*, 352 Conn. 477, 494 n.14, 337 A.3d 1114 (2025). With respect to the second *Golding* prong (i.e., "the claim is of constitutional magnitude alleging the violation of a fundamental right"; *State* v. *Golding*, supra, 239), the majority effectively assumes it is satisfied, notwithstanding the fact that our Supreme Court has expressly held, however, that the right to poll the jury under § 42-31 is "not of constitutional dimension . . . ." *State* v. *Pare*, supra, 253 Conn. 623. Indeed, our Supreme Court recently held that a claim of a § 42-31 violation "is not subject to *Golding* review," stating that, because a defendant's claim that the trial court violated § 42-31 "is not of constitutional magnitude, it fails to satisfy the second prong of *Golding*." *State* v. *Bolton*, supra, 499. In addition, this court previously rejected the availability of *Golding* review of a § 42-31 claim for that very reason. See *State* v. *Mazzeo*, 74 Conn. App. 430, 438, 811 A.2d 775 ("[T]he defendant's claim fails because it is not of constitutional magnitude alleging a violation of a fundamental right. . . . As such, review under *Golding*

is denied." (Citation omitted.)), cert. denied, 263 Conn. 910, 821 A.2d 767 (2003). Because this court follows the doctrine of horizontal stare decisis (i.e., this court's commitment to follow its own precedent),[7] and this court previously has held that *Golding* is not available on a claim under § 42-31, the majority opinion also creates an inconsistency in our case law. In sum, the majority's *Golding* analysis directly contravenes our Supreme Court's recent holding in *Bolton*, as well as this court's prior precedent.

The majority's treatment of a Practice Book § 42-31 claim as a constitutional claim amenable to harmless error review permeates the remainder of its analysis in part I of its opinion. The majority begins its analysis of the merits of the defendant's claim by relying on *Rushen* v. *Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983), which did not involve a juror statement about the verdict but rather a juror's ex parte, midtrial communication with the trial judge concerning her recollection of the murder of a childhood friend by a police informant who was identified during a witness' testimony at the defendant's criminal trial and subsequently had been convicted of that crime. Id., 115–16. After a subsequent habeas action, the defendant in *Rushen* v. *Spain*, supra, 117, raised on appeal a constitutional claim to which the United States Supreme Court applied harmless error review. Id., 121. As stated previously, however, a claim under § 42-31 is not of constitutional magnitude, and a violation of § 42-31 results in structural error that is not subject to harmless error review. See *State* v. *Pare*, supra, 253 Conn. 635–39.

[7] See *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 192 Conn. App. 245, 260 n.10, 217 A.3d 996 (2019) ("[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.)), aff'd, 338 Conn. 651, 258 A.3d 1244 (2021).

Relying on *Rushen*, the majority adopts a rule whereby a trial judge has no *immediate* obligation to disclose a juror's ex parte comment reflecting equivocation as to the verdict that is expressed after the return of the verdict but prior to the jury's discharge. According to the majority, a trial judge can wait to make the disclosure until after the jury's discharge, and any prejudicial effect can be determined in a posttrial hearing (when the ability to conduct a jury poll no longer exists). I find such a rule to be ill-advised and lacking in the proper regard for the "weighty interest protected by a jury poll"; id., 639; either done "at the request of any party or upon the judicial authority's own motion." Practice Book § 42-31.

Further, I am unpersuaded by the majority's reliance on *United States* v. *Jefferson*, 258 F.3d 405 (5th Cir.), cert. denied, 534 U.S. 967, 122 S. Ct. 379, 151 L. Ed. 2d 289 (2001). Although *Jefferson* involved a juror expressing reservations about her verdict, the case is readily distinguishable because, among other things, the trial court in that case had in fact individually polled the jury members as to their guilty verdict and all twelve jurors answered affirmatively.[8] Id., 410. In the present case, the defendant obviously did not have the benefit of an individual poll.

Unpersuaded by the majority's analysis, and for the reasons that follow, I conclude that the trial court had a duty, prior to the jury's discharge, to notify counsel of C.A.'s statement reflecting her equivocation as to the verdict on the count of attempt to commit murder and that the failure to do so deprived the defendant of his

[8] In *Jefferson*, the juror's statement of equivocation was made after the trial court had polled the jury, at which time the court asked the juror, individually again, whether that was the juror's verdict and the juror responded affirmatively. *United States* v. *Jefferson*, supra, 258 F.3d 410. The court's handling of the juror's equivocation following the jury poll was reviewed for an abuse of discretion. Id.

right to request a jury poll under Practice Book § 42-31, thereby resulting in structural error pursuant to *State* v. *Pare*, supra, 253 Conn. 635–39.

The defendant's claim distills to the legal question of whether the trial court had a duty to inform counsel of C.A.'s statement prior to the jury's discharge and whether the failure to do so resulted in a violation of Practice Book § 42-31. " 'The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation.' *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 733–34, 830 A.2d 228 (2003); see also *State* v. *Pare*, supra, 253 Conn. 622 ('principles of statutory construction apply "with equal force to Practice Book rules" '). The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. *Commissioner of Social Services* v. *Smith*, supra, 734." *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

My analytical starting point is the guidance provided in *State* v. *Pare*, supra, 253 Conn. 611, in which our Supreme Court considered whether the trial court's denial of a polling request in a criminal trial constituted structural error. See id., 635–36. In *Pare*, the defendant had been charged with murder. Id., 612. During deliberations, the jury informed the court of its inability to reach a unanimous verdict, whereupon the trial court gave a "Chip Smith" charge reminding the jury that it must act unanimously.[9] Id., 616 and n.4. Shortly thereafter, the jury returned a verdict of guilty, and the court denied the defendant's subsequent request to poll the jury,

[9] "A Chip Smith [charge] reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity. . . . A similar jury instruction, known as an *Allen* charge, is utilized in the federal courts." (Citations omitted; internal quotation marks omitted.) *State* v. *O'Neil*, 261 Conn. 49, 51 n.2, 801 A.2d 730 (2002); see *Allen* v. *United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

made after the jury had retired to the jury room. Id., 617, 619–20. On appeal, the defendant argued that the denial of his request constituted per se reversible error. Id., 613. Our Supreme Court concluded that the "weighty interest protected by a jury poll" and constitutional concerns inherent in criminal trials required invocation of per se reversible error. Id., 639. The court explicitly stated that, "because the purpose of permitting an individual poll is to protect the accused's constitutional right to an acquittal in the absence of the full consensus of each juror, the denial of a timely request to poll is of substantial and unique magnitude. . . . [T]he action of the court [in denying a timely request to poll the jury] work[s] a denial of a right of the accused so fundamental as to require a retrial . . . . [I]t is better that the case be tried again than that a precedent impairing a defendant's right to a poll of the jury be engrafted on our criminal procedure." (Internal quotation marks omitted.) Id., 636. The court proceeded to reject the state's contention that a Practice Book § 42-31 violation is subject to harmless error review; id., 637; instead holding that "a defendant's right to poll the jury, if not waived, is absolute, and its denial requires reversal even though the remainder of the trial may be error-free." (Internal quotation marks omitted.) Id., 638–39. The court reasoned: "Despite the jury's collective assent to the verdict, absent a poll, a defendant has no way of ensuring that his or her right to a unanimous, uncoerced verdict was honored. . . . [Although] the jury did not behave in any manner to suggest that polling would have produced a juror who did not support the verdict and thus changed the outcome of the trial, the fact remains that we cannot know the results of polling the jury. . . . [I]n the absence of a valid poll upon a timely request, we must regard the verdict as defective." (Citations omitted; internal quotation marks omitted.) Id., 637–38. The court also highlighted that "rarely does an

individual poll reveal that a juror assented to a verdict despite reservation regarding the defendant's guilt beyond a reasonable doubt. . . . Nonetheless, in light of the weighty interest protected by a jury poll, and the impracticality of gauging the results of a poll not taken, [the court] conclude[d] that a violation of a party's timely polling request requires automatic reversal of the judgment." (Citation omitted.) Id., 639.

"The purpose of a jury poll is to test the uncoerced unanimity of the verdict by requiring each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman. . . . [T]he right to poll the jury, although not constitutional, is nonetheless a substantial right . . . that enables the court to ascertain with certainty that a unanimous verdict has in fact been recorded and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented." (Citations omitted; internal quotation marks omitted.) *State* v. *Bolton*, supra, 352 Conn. 483–84; see also *State* v. *Pare*, supra, 253 Conn. 624 (Practice Book § 42-31 is "a mechanism for preserving an essential characteristic of both the state and federal constitutions; see *Burch* v. *Louisiana*, 441 U.S. 130, 138, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979) (right to unanimous verdict rendered by six person jury protected under right to jury trial guaranteed by due process clause of fourteenth amendment to United States constitution); *State* v. *Jennings*, 216 Conn. 647, 656, 583 A.2d 915 (1990) (acknowledging right to unanimous verdict protected by article first, § 8, of Connecticut constitution)").

The potential import of a jury poll is not mere fiction. For example, a jury poll in *State* v. *Bolton*, supra, 352 Conn. 477, uncovered equivocation on the part of one of the jurors. The polling was halted after six jurors had been polled, and the jury ultimately was instructed

to continue deliberating. Id., 480–81. Indeed, Practice Book § 42-31 expressly provides in relevant part that, "[i]f upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged." Our Supreme Court in *Bolton* gave this guidance: "Depending on the circumstances before it, the court may choose to canvass the dissenting juror, to dismiss the jury and declare a mistrial, or to issue a Chip Smith charge or other instruction before returning the jury to its deliberations; it may also simply return the jury to deliberate without additional instruction." *State* v. *Bolton*, supra, 488. A trial court's handling of a juror's equivocation uncovered during a jury poll is reviewed for an abuse of discretion. Id., 482–94.

In the present case, the trial court deprived the defendant of his right to request a jury poll with the knowledge of C.A.'s expressed equivocation as to the verdict. Indeed, had a jury poll occurred in real time and C.A. individually responded to the clerk's inquiry regarding whether the verdict announced was her verdict by stating that she "[felt] a little guilty about the attempted murder charge," there can be little doubt that the trial court would have been *required* to address C.A.'s equivocation during the poll and could not simply assume that she had returned a verdict of guilty. Cf. *State* v. *Bolton*, supra, 352 Conn. 482 n.3 ("[b]ecause the jury poll was not completed, it is unclear how the trial court determined that eleven jurors had returned a verdict of guilty"). In effect, this is what the majority does. That is, the majority states: "Because the trial court did not inquire about C.A.'s comment at the time it was made or during the posttrial hearing, any inferences we may draw about what C.A. meant would be purely speculative." Yet, that is precisely the point. We simply have no idea whether C.A. would have, in a jury poll, individually affirmed a verdict of guilty on the count of

attempt to commit murder. See *State* v. *Pare*, supra, 253 Conn. 637 (*rejecting* state's argument that, "in the absence of any indication of dissent, the jury's affirmative responses as a body provides a sufficient guarantee of unanimity to render the lack of individual interrogation harmless").

As previously stated, it is inconceivable to me that defense counsel would not have requested a jury poll upon being timely informed of C.A.'s equivocation regarding the verdict on the attempt to commit murder count. See *J.R.* v. *Commissioner of Correction*, 105 Conn. App. 827, 843, 941 A.2d 348 ("the petitioner does not argue, nor do we conclude, that defense counsel is required in all circumstances to poll the jury, *absent some indication that the verdict was not unanimous*" (emphasis added)), cert. denied, 286 Conn. 915, 945 A.2d 976 (2008). As stated in *Pare*, "[i]n the absence of a valid poll upon a timely request, we must regard the verdict as defective." (Internal quotation marks omitted.) *State* v. *Pare*, supra, 253 Conn. 638. Under these circumstances, I conclude that the court's withholding of information that otherwise would have prompted a timely request for a jury poll resulted in structural error not subject to harmless error review. See *State* v. *Lewis*, 134 Conn. App. 262, 263, 37 A.3d 832 (2012) (reversing judgment of conviction where trial court improperly denied timely request to poll jury, made after recording of verdict and prior to jury's discharge); *State* v. *James P.*, 96 Conn. App. 93, 102, 899 A.2d 649 ("[b]ecause the jury was not discharged, defense counsel's request to poll the jury [made after the recording of the verdict and prior to the jury's discharge] was timely, and the court's improper denial of that request requires reversal of the judgment"), cert. denied, 280 Conn. 910, 908 A.2d 540 (2006); *State* v. *Edelman*, 64 Conn. App. 480, 482–84, 780 A.2d 980 (2001) (concluding that court's denial of defendant's timely request for jury poll, made after jury

had returned verdict and prior to jury's discharge, required automatic reversal of judgment), appeal dismissed, 262 Conn. 392, 815 A.2d 104 (2003).

In light of the foregoing considerations, I respectfully dissent from part I of the majority opinion.[10]

[10] Because my conclusion with regard to the defendant's first claim would be dispositive of the resolution of his appeal, I do not address part II of the majority opinion.