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State v. Norman P.

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STATE OF CONNECTICUT v. NORMAN P.\*  
(SC 19863)

Palmer, McDonald, D'Auria, Mullins, Kahn and Vertefeuille, Js.

*Syllabus*

Pursuant to the Connecticut Code of Evidence (§ 1-5 [b]), “[w]hen a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.”

The defendant, who had been convicted of several crimes in connection with the alleged sexual assault of C, his wife, appealed to the Appellate Court, which reversed the judgment of conviction and remanded the

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

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case for a new trial. Several days after the alleged sexual assault, and during an examination by her primary care physician, C informed him that her injuries were caused by the defendant. After C's physician referred her to I Co., an organization that provides counseling and other services to victims of domestic violence, C called I Co. and spoke with I Co. personnel. C subsequently provided a sworn statement concerning the assault to the police. The defendant filed a pretrial motion requesting that the trial court conduct an in camera review of the privileged communications contained in the I Co. records, claiming that C provided different accounts of the assault to her physician and to the police, and that those differences supported his claim that the I Co. records likely contained impeachment evidence. The trial court denied that motion without prejudice, and, following C's testimony, the defendant renewed his request, which the trial court denied on the ground that the defendant had not made an adequate showing that he was entitled to an in camera review of the I Co. records. The defendant then requested that those records be marked for identification, specifically for the purpose of ensuring an adequate record for appeal, but the trial court declined to do so on the basis that it had not reviewed the records. The defendant also requested that the trial court allow him to introduce into evidence his entire statement to the police under § 1-5 (b) of the Connecticut Code of Evidence, after the state had introduced portions of that statement during its cross-examination of the defendant. The defendant claimed that the entire statement would inform the jurors about what the police asked him and why he said certain things and not others in response to questions asked of him, and to place into context the portions of the statement that had been introduced by the state during cross-examination. The trial court denied the defendant's request, concluding that § 1-5 (b) and case law interpreting that rule precluded the introduction of prior consistent statements when the balance of the proffered statement consists of self-serving hearsay. The Appellate Court concluded that the trial court improperly declined to conduct an in camera review of the I Co. records and to mark those records for identification, and that the trial court, in declining to admit into evidence the defendant's entire statement to the police, misinterpreted § 1-5 (b) and relevant case law applying that rule. On the granting of certification, the state appealed to this court. *Held:*

1. The Appellate Court correctly concluded that the trial court had abused its discretion in declining to mark the I Co. records for identification and in declining to conduct an in camera review of those records: the trial court lacked discretion to decline to mark for identification exhibits for which an in camera review has been requested, regardless of how it rules on the motion for an in camera review; moreover, the defendant made the requisite preliminary showing to obtain an in camera review of those records because, in light of the inconsistencies between the accounts C gave to the police and to her physician, and in light of the

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- fact that C's call to I Co. was prompted by her physician's referral, the defendant established that there was a reasonable ground to believe that the failure to produce the information in those records was likely to impair the defendant's right of confrontation; furthermore, because the trial court improperly declined to mark the I Co. records for identification, this court was prevented from conducting its own review of those records to assess whether the trial court's error in declining to conduct an in camera review was harmless, and, accordingly, the defendant was entitled to a new trial.
2. The trial court improperly declined to admit into evidence a portion of the defendant's statement to the police in accordance with § 1-5 (b) of the Connecticut Code of Evidence, but, contrary to the conclusion of the Appellate Court, properly declined to allow the entire statement to be admitted: this court clarified that, when a portion of a statement introduced by a party has been taken out of context such that it distorts the meaning of the entire statement and could mislead the jury, § 1-5 (b) requires that the relevant remainder be admitted, even if that remainder is otherwise inadmissible; in light of this principle, this court concluded that, after the state introduced, during its cross-examination of the defendant, testimony concerning the defendant's use of a "bar of soap" during the alleged sexual assault of C, the trial court improperly declined to allow the defendant to introduce that portion of his statement to the police that referred to a "used bar of soap," which would provide proper context and would be consistent with his testimony that he used a "piece of soap" rather than an unused bar of soap; moreover, the defendant's claim that the admission of the entire statement was necessary to disclose the questions the police asked him and the reasons he included some information and omitted other information lacked merit both factually and legally under § 1-5 (b), as nothing in the defendant's narrative statement to the police revealed what questions he had been asked by the police or the defendant's reasons for including or omitting certain details, and the state's questions to the defendant during cross-examination regarding what he did not say in his statement to the police did not introduce any portion of that statement into evidence.

Argued January 16—officially released July 17, 2018

*Procedural History*

Substitute information charging the defendant with four counts of the crime of sexual assault in a spousal relationship, and with one count each of the crimes of attempt to commit sexual assault in a spousal relationship, assault of an elderly person in the second degree and assault of an elderly person in the third degree, brought to the Superior Court in the judicial district of

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Hartford, where the court, *Kwak, J.*, denied the defendant's motion for disclosure of certain confidential records; thereafter, the case was tried to the jury before *Kwak, J.*; verdict and judgment of guilty of three counts of sexual assault in a spousal relationship, and one count each of assault of an elderly person in the second degree and assault of an elderly person in the third degree, from which the defendant appealed to the Appellate Court, *Sheldon, Prescott and Flynn, Js.*, which reversed the trial court's judgment and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Affirmed.*

*James A. Killen*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anne Mahoney*, former senior assistant state's attorney, for the appellant (state).

*Michael S. Taylor*, with whom were *Emily Graner Sexton* and, on the brief, *Marina L. Green*, for the appellee (defendant).

*Opinion*

KAHN, J. The dispositive issue in this appeal is whether the Appellate Court properly concluded that the trial court lacked discretion to refuse to mark records for identification following the court's determination that the defendant, Norman P., had failed to make the requisite showing to require an in camera review of those records. *State v. Norman P.*, 169 Conn. App. 616, 639–40, 151 A.3d 877 (2016). We conclude that the trial court had no such discretion. This certified<sup>1</sup>

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<sup>1</sup> We granted the state's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court misapplied *State v. Jackson*, 257 Conn. 198, 777 A.2d 591 (2001), to a claim of admissibility under § 1-5 (b) of the Connecticut Code of Evidence?" (2) "If the answer to the first question is in the affirmative, did the Appellate Court correctly determine that the defendant demonstrated that the trial court error was harmful?" (3) "Did the Appellate Court properly conclude that the defendant was entitled to an in camera review of the [complainant's] privileged records

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appeal arises from the defendant's conviction of three counts of sexual assault in a spousal relationship in violation of General Statutes § 53a-70b, one count of assault of an elderly person in the second degree in violation of General Statutes § 53a-60b, and one count of assault of an elderly person in the third degree in violation of General Statutes § 53a-61a. The state claims that the Appellate Court incorrectly concluded that the trial court had improperly declined to conduct an in camera review of the complainant's privileged records from Interval House, an organization that provides counseling and other services to domestic violence victims, and that the trial court also improperly declined to mark those records for identification. The state additionally challenges the Appellate Court's conclusion that, in declining to admit into evidence the defendant's entire written statement to the police, the trial court misinterpreted § 1-5 (b) of the Connecticut Code of Evidence and our relevant case law applying that rule. We affirm the judgment of the Appellate Court on the basis of our conclusion that the trial court improperly refused to mark for identification the complainant's privileged records from Interval House, and that the court further abused its discretion in declining to review those records in camera. Because the issue is likely to arise on remand, we also address the state's claim that the Appellate Court improperly concluded that the defendant's entire written statement was admissible

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from a sexual abuse treatment center?" *State v. Norman P.*, 324 Conn. 910, 910–11, 153 A.3d 654 (2017).

In his brief to this court, the defendant argued that because the state made no argument in the Appellate Court—either in its brief or during oral argument—that any error in the trial court's application of § 1-5 (b) was harmless, the state has waived the second certified issue. Because the resolution of this appeal rests on the third certified issue, and because we address the proper application of § 1-5 (b) only for purposes of remand, it is unnecessary for us to address the second certified issue. It is therefore also unnecessary for us to address the defendant's argument that the state waived that issue.

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pursuant to § 1-5 (b). Although we agree with the Appellate Court that the trial court misinterpreted § 1-5 (b) and our relevant case law applying that rule, we disagree that the entire statement should have come into evidence pursuant to that rule. To the contrary, our application of § 1-5 (b) leads us to conclude that only a portion, rather than the entirety, of the defendant's prior statement should have been admitted.

The Appellate Court set forth the following relevant facts, which reasonably could have been found by the jury. "On the evening of Thursday, August 2, 2012, the defendant was at home with the complainant, who was the defendant's sixty-one year old wife, and their twenty year old son, [B], who had a strained relationship with the defendant. A dispute over the operation of the air conditioning system arose between the defendant and [B]. A verbal argument between the two, in which the complainant interceded on [B's] behalf, soon escalated into a physical altercation. Eventually, in an effort to avoid calling the police and possibly having the two men arrested, the complainant told [B] that it would be best if he left the house and went to his grandmother's residence. [B] then left.

"Thereafter, the defendant approached the complainant and, using his closed fist, punched her in the chest with such force that it took her breath away. The complainant punched the defendant back, injuring her shoulder in the process, and the defendant began hitting and jabbing the complainant repeatedly in the midsection with the television remote control, causing the complainant severe bruising. The complainant eventually retreated to the upstairs bedroom where she usually slept, away from the master bedroom where the defendant usually slept.

"Several minutes later, the defendant entered the complainant's bedroom where she was lying down on

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the bed, pulled the covers off of her, and stated that he was ‘going to show [her] something.’ He then ripped off the nightgown she was wearing, prompting the complainant to attempt to push and kick him away from her. The complainant was unsuccessful in her efforts, however, because the defendant was physically stronger than her, one of her shoulders had no strength as a result of it having been injured earlier, and the defendant was restraining her other uninjured hand. The defendant then began to insert his finger into the complainant’s rectum, and the complainant pleaded with him to stop because he was hurting her. The defendant refused and threatened that the more the complainant protested, the harder he would continue the penetration. The complainant soon realized that the defendant was penetrating her with more than one finger and that he was also curling his fingers inside of her, like a hook, pulling at her. At some point during the assault, the complainant saw that she was emitting blood and feces onto the bedsheet.

“After a period of time, the defendant directed the complainant to go to the bathroom to wash herself off. He then walked her into the bathroom and to the bathtub, all the while refusing to remove his finger from her rectum. Filling the tub with water and directing the complainant to get in, the defendant proceeded to remove his own clothing and enter the tub with her. The defendant then pulled the complainant onto his lap and began to manipulate a bar of soap into her rectum, although the complainant did not know this at the time because she could not see what he was doing behind her. Consumed with pain, the complainant kept trying to remove the defendant’s hand from her rectum, but was unable to overcome his strength. Eventually, the complainant complained that her stomach was cramping and that she needed to move her bowels, so the defendant released her and allowed her to sit on the

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toilet. In addition to emitting blood and feces, the complainant expelled the bar of soap into the toilet, thereby realizing for the first time that he had pushed the soap inside of her.

“Afterward, the defendant led the complainant back into the complainant’s bedroom, and the complainant, overcome with exhaustion, could not attempt to fight him any longer. The defendant proceeded to lean the complainant over the bed and penetrate her rectum with his penis and fingers. After the defendant stopped the assault, he fell asleep on the bed, and the complainant lay crying on the floor.

“Eventually, near daylight, the complainant got up, got dressed, and began wandering on foot around the streets in her neighborhood. The complainant attempted to telephone a friend of hers and a friend of the defendant, but neither answered, so the complainant called the defendant’s brother, and told him about the assault. At some point while she was walking, the complainant felt ‘a gush [of wetness] come down in [her] pants’ and, after returning to the house, discovered that she had had an involuntary bowel movement that was mixed with blood and ‘white stuff,’ which she assumed was from the bar of soap. She cleaned herself off and lay down on the couch in the basement until it was time for her to go to work in the afternoon.

“Although the complainant had difficulty walking because of her injuries, she went to work that Friday, Saturday, and Sunday because she did not want to be alone in the house with the defendant. On Monday evening, the complainant confided in her close friend and coworker about the assault, and accepted the friend’s invitation to stay the night at her house. The next day, on Tuesday, the complainant saw her primary care physician, told him of her injuries, and informed him that they had been the result of an assault by the defendant.



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The [physician] diagnosed the complainant with a rectal tear and . . . referred her to Interval House for counseling.

“On Thursday, almost one week after the assault, the complainant took her car to a shop to be serviced. While at the service shop, the complainant experienced another involuntary bowel movement and decided at that point that she would report the assault to the police. The complainant then drove straight from the service shop to the police station, where the authorities took her statement and, thereafter, accompanied her to her home to collect evidence. When the defendant arrived home from work that day, he encountered the police outside his house. Upon request, he followed a police detective to the police station. During an interview with the detective, he gave a sworn written statement concerning the events that occurred on August 2 and 3, 2012. The following day, the defendant was arrested pursuant to an arrest warrant.” *Id.*, 619–22. Following the trial, the defendant was convicted of all but two of the counts. He was sentenced to a total effective term of thirty-six years of imprisonment, execution suspended after twenty-four years, with ten years of probation. *Id.*, 623. The defendant appealed from the judgment of conviction to the Appellate Court.

The Appellate Court concluded that the trial court misapplied the applicable law in denying the defendant’s motion to introduce his entire statement to the police after the state had introduced portions of the statement during its cross-examination of the defendant. *Id.*, 623. Specifically, the Appellate Court concluded that the trial court relied on an incorrect interpretation of this court’s decision in *State v. Jackson*, 257 Conn. 198, 777 A.2d 591 (2001), for the proposition that when an opposing party has introduced portions of a statement, the remainder of a statement is not admissible pursuant to § 1-5 (b) of the Connecticut

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Code of Evidence if the remainder is comprised of “ ‘self-serving hearsay.’ ” *State v. Norman P.*, supra, 169 Conn. App. 627, 630. Applying de novo review, the Appellate Court concluded that the entire statement was necessary to place the portions introduced by the state into the proper context, and, therefore, the trial court improperly refused to admit the complete statement. *Id.*, 632–33. The court also concluded that the error was harmful. *Id.*, 634. Accordingly, the Appellate Court reversed the judgment of conviction and remanded the case for a new trial. *Id.*, 644. Because the issue was likely to arise on remand, the Appellate Court also considered the defendant’s claims concerning the Interval House records. *Id.*, 635. The Appellate Court concluded that the trial court improperly refused to mark those records for identification and that the court further abused its discretion in declining to review those records in camera. *Id.*, 640, 644. This appeal followed. Additional facts and procedural history will be set forth as necessary.

## I

We first address the issue of whether the Appellate Court properly concluded that the trial court lacked discretion to refuse to mark the Interval House records for identification following the court’s determination that the defendant had failed to make the requisite showing to require an in camera review of those records. The state concedes that the trial court improperly declined to mark the records for identification, but argues that, because the defendant did not make the requisite showing to require an in camera review, the failure to mark the records constituted harmless error. We conclude, to the contrary, that the Appellate Court properly concluded that the defendant’s threshold showing triggered the trial court’s duty to conduct an in camera review of the records. Most significantly for purposes of this appeal, however, because the trial

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court improperly failed to mark the records for identification—which it was required to do regardless of its resolution of the defendant’s motion for an in camera review—this court is prevented from conducting its own review of the records. We are therefore unable to assess whether the trial court’s error in declining to conduct that review was harmless.

The following additional facts are relevant to the resolution of this issue. When the complainant’s physician, Michael Fischer, examined her on August 7, 2012, following the alleged assault, he referred her to Interval House for counseling. While the complainant was still at Fischer’s office, she telephoned Interval House and spoke to someone there. Because the Interval House records document privileged communications between a victim of sexual assault and a sexual assault counselor, the defendant filed a pretrial motion seeking an in camera review of the records pursuant to General Statutes § 52-146k.

The trial court heard argument on the defendant’s motion on December 5, 2014. At that time, the defendant alleged that the complainant provided different accounts of the assault to Fischer and to the police and that those differences supported his claim that the Interval House records likely contained impeachment material. Specifically, the defendant, relying on the complainant’s medical records and the police reports, claimed that the complainant had not told Fischer about the soap but had provided that information to the police. Because of the inconsistencies between the two accounts, the defendant contended that the Interval House records likely contained impeachment material. Specifically, he argued that the information that the complainant provided to that organization would have to differ either from the account the complainant gave to the police or the one she gave to Fischer. The trial court denied the motion without prejudice, subject to

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renewal following the defendant's cross-examination of both the complainant and her physician.

On December 10, 2014, after the complainant testified, but before Fischer testified, the defendant renewed his request for an in camera review of the Interval House records. The defendant relied generally on the complainant's testimony, claiming that there had been "a lot of testimony [that was] conflicting from the complainant . . . ." He also reiterated his argument that the information that the complainant provided to Interval House likely would contain additional inconsistencies with which he could impeach the complainant. The trial court denied the motion on the basis that the defendant had not made an adequate showing that he was entitled to an in camera review of the records. When the defendant requested that the records be marked for identification—specifically for the purpose of ensuring an adequate record for appeal—the court responded that it would not, because it had never reviewed the records.

We begin with the Appellate Court's conclusion that the trial court improperly refused to mark the Interval House records for identification. *State v. Norman P.*, supra, 169 Conn. App. 640. It is beyond dispute that the trial court lacks discretion to refuse to mark for identification an exhibit for which an in camera review has been requested, regardless of whether the court reviews the records. "A trial court has the absolute duty to mark for identification and seal for possible appellate review any such records offered, whether or not an in camera inspection is undertaken, even in the absence of an objection to its failure to do so from the parties." *State v. Bruno*, 236 Conn. 514, 538, 673 A.2d 1117 (1996). This court has characterized the refusal to mark such records as "manifest error" and has explained that "to allow such discretion would permit a trial judge to deprive an aggrieved party of a proper record for an appeal." *Duncan v. McTiernan*, 151 Conn. 469, 470,

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199 A.2d 332 (1964); see also C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 1.29.3, p. 75.

In the present case, the Appellate Court properly concluded that the trial court did precisely what this court has expressly stated it lacked discretion to do. When the trial court refused to conduct an in camera review of the Interval House records, the defendant properly requested that they be marked for identification, consistent with his duty to ensure an adequate record for appeal. The trial court refused to do so. In his motion for a new trial, the defendant renewed his request to have the records marked for identification. He relied on this court's decision in *State v. Bruno*, supra, 236 Conn. 538, for the proposition that the trial court had an absolute duty to mark the Interval House records for identification. At the defendant's sentencing hearing, the court denied the motion for a new trial and refused to reconsider its ruling declining to mark the records for identification, despite the court's acknowledgment that it had reviewed this court's decision in *Bruno*.<sup>2</sup>

Finally, we conclude that the Appellate Court properly concluded that the trial court abused its discretion in declining to conduct an in camera review of the Interval House records. *State v. Norman P.*, supra, 169 Conn. App. 640–44. The defendant made the requisite showing to obtain review.

“Generally, a trial court has some discretion in the matter of discovery where material is sought for

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<sup>2</sup> We find the trial court's refusal to follow this court's decision in *Bruno* troubling. As we have observed, it is not debatable that the trial court lacks discretion to mark for identification records for which an in camera review has been requested, regardless of whether the court actually conducts the requested review. The trial court's refusal to abide by that rule improperly has prevented this court from being able to determine whether the trial court's refusal to conduct an in camera review of the Interval House record was harmless error.

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impeachment purposes. . . . If, however, the claimed impeaching information is privileged there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. If the consent is limited to an in camera inspection and such inspection, in the opinion of the trial judge, does not disclose relevant material then the resealed record is to be made available for inspection on appellate review. If the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal." (Citation omitted.) *State v. Esposito*, 192 Conn. 166, 179–80, 471 A.2d 949 (1984). This court has observed that the trial court should allow defendants "a certain latitude" in determining whether they have made the requisite preliminary showing to obtain an in camera review. *State v. Bruno*, supra, 236 Conn. 531; see also C. Tait & E. Prescott, supra, § 6.16.3, p. 320.

Applying this standard, we conclude that the Appellate Court properly determined that the defendant made the required showing. *State v. Norman P.*, supra, 169 Conn. App. 642. In light of the inconsistencies between the accounts that the complainant gave to the police and to Fischer, and in light of the fact that her telephone call to Interval House was prompted by Fischer's refer-

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ral; *id.*, 636–37; the defendant established that there was “reasonable ground to believe that the failure to produce the information is likely to impair the defendant’s right of confrontation . . . .” *State v. Esposito*, *supra*, 192 Conn. 179. The Appellate Court properly concluded that the trial court abused its discretion in refusing to conduct an in camera review of the Interval House records. Due to the trial court’s failure to mark the records for identification, however, we are unable to assess whether the defendant was harmed by the error. Accordingly, the defendant is entitled to a new trial.

## II

Because it is likely to arise on remand, we next address the state’s claim that the Appellate Court improperly concluded that the trial court, in refusing to allow the defendant to introduce his entire prior statement to the police, relied on an incorrect reading of *State v. Jackson*, *supra*, 257 Conn. 198, which discussed § 1-5 (b) of the Connecticut Code of Evidence. The state claims that the Appellate Court improperly concluded that the trial court rested its ruling on a misreading of this court’s interpretation of § 1-5 (b) in *Jackson*. Instead, the state argues, the trial court looked to *Jackson* only for the principles governing the admissibility of prior consistent statements to rehabilitate a witness who has been impeached with prior inconsistent statements. Our review of the record confirms that the Appellate Court correctly characterized the legal basis of the trial court’s ruling. We also agree with the Appellate Court’s conclusion that the trial court misstated the applicable legal rule. *State v. Norman P.*, *supra*, 169 Conn. App. 630. Our review of the record persuades us, however, that the proper application of § 1-5 (b) required only a portion of the statement to be admitted and not the entire statement, as the Appellate Court concluded. *Id.*, 634.

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We begin by setting forth the applicable standard of review. Because the question presented in this appeal turns on the trial court's interpretation of the application of § 1-5 (b) of the Connecticut Code of Evidence in *Jackson*, we review de novo the question of whether § 1-5 (b) required that the entire statement be admitted. We have explained that, "[t]o the extent [that] a trial court's [ruling regarding] admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." (Internal quotation marks omitted.) *State v. Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "We review the trial court's decision [whether] to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." *Id.*

The following procedural facts reveal that the Appellate Court properly concluded that the trial court relied on a misinterpretation of *Jackson* and § 1-5 (b) of the Connecticut Code of Evidence in refusing the defendant's proffer of his entire statement into evidence. In first proffering the entire statement, defense counsel argued that, although the state had relied on the statement to point out inconsistencies between it and the defendant's testimony on direct examination, when viewed in its entirety, the statement was actually a prior consistent statement. The state countered that its reliance on the portions of the defendant's statement that were inconsistent with his trial testimony entitled the defendant to introduce only portions of the state-



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ment—specifically, prior consistent statements that rebutted the state’s reliance on the defendant’s inconsistent statements. In this initial discussion of the defendant’s proffer, neither party cited to any specific decision of this court or to any provision of the Connecticut Code of Evidence. Defense counsel merely stated generally that he believed that case law supported the introduction of the entire statement “in order to rehabilitate a witness who has been impeached by [an] allegedly inconsistent statement.” The court then allowed a short break in order for defense counsel to assemble his argument and case citations.

When the court resumed after the short recess, defense counsel provided the court and the state with two decisions in support of his proffer of the entire statement: *State v. Jackson*, supra, 257 Conn. 198, and *State v. Hines*, 243 Conn. 796, 709 A.2d 522 (1998). The state argued that *Hines* was inapplicable and that it appeared that the decision had been overruled. But see *State v. Norman P.*, supra, 169 Conn. App. 627 n.7. The trial court rested its ruling on *Jackson* and suggested that it interpreted that decision and the defendant’s reliance on it to pertain to the admissibility of prior consistent statements after a witness has been impeached by a prior inconsistent statement. The court further read *Jackson* to preclude such prior consistent statements if the balance of the proffered statement consisted of self-serving hearsay. The court observed that, during the redirect examination, defense counsel had already elicited testimony from the defendant regarding some prior consistent statements that he had made in his statement to the police. The court therefore refused the defendant’s request to have the entire written statement admitted into evidence. The court suggested that defense counsel could elect to discuss with the state which portions of the defendant’s statement

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he sought to offer, and the parties could agree on redactions of inadmissible portions of the statement.

Defense counsel then clarified that his argument was that the entire written statement was admissible pursuant to § 1-5 (b) of the Connecticut Code of Evidence. In support of the proffer, defense counsel reiterated that, when viewed in its entirety, the statement was consistent with the defendant's testimony during direct examination. He claimed that having access to the entire written statement would allow the jurors to see what the police asked the defendant, why he said certain things and not others in response to the questions asked of him, and to understand the context of the portions of the statement that were introduced by the state during his cross-examination. Defense counsel offered no explanation as to how the entire written statement, which was in narrative form, would reveal which questions the police asked the defendant or how it would clarify why he said some things and not others. The trial court did not change its ruling.

The Appellate Court properly concluded that the trial court's ruling was premised on a misunderstanding of this court's application of § 1-5 (b) of the Connecticut Code of Evidence in *Jackson*. Contrary to the trial court's explanation of *Jackson*, in that decision, this court interpreted § 1-5 (b) and applicable decisions of this court to require the admission of the remainder of a statement, if the remainder is necessary to provide context for the already admitted portions of the statement, regardless of whether the remainder is otherwise admissible. *State v. Jackson*, supra, 257 Conn. 213. In *Jackson*, this court rejected the defendant's claim that the trial court improperly admitted into evidence a redacted version of his statement to the police rather than the entire statement. *Id.*, 211–12. Just as in the present case, the defendant in *Jackson* merely relied on a conclusory assertion to support his claim that the

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entirety of the statement should be admitted pursuant to § 1-5 (b). Specifically, he claimed that the trial court was required to admit the balance of the statement because it would demonstrate that he was not a “‘consummate storyteller.’” *Id.*, 214. In rejecting the defendant’s claim, this court reviewed the balance of his statement to the police to determine whether the trial court had properly concluded that the redacted statement had not been “taken out of context” and did not “give a distorted view in the absence of the balance of the statement.” (Internal quotation marks omitted.) *Id.*, 213 n.17, 214. Following that review, this court concluded that the remainder of the statement “was not relevant in providing meaning and coherence to the admitted portion.” *Id.*, 214.

The trial court in the present case appears to have focused on a brief discussion in *Jackson* on the inadmissibility of a statement that consists of self-serving hearsay. The trial court appears to have taken a discussion of that issue in *Jackson* out of context. Specifically, in *Jackson*, the court first addressed the question of whether the proffered remainder of the defendant’s statement was necessary to provide context for the initial portions that had been introduced by the state. *Id.*, 214. After answering that question in the negative; *id.*, 214–15; the court addressed and rejected an alternative argument advanced by the defendant, namely, that the trial court improperly had determined that the remainder of the statement was inadmissible hearsay. *Id.*, 215. The Appellate Court properly concluded that the trial court in the present case incorrectly interpreted the discussion of this remaining issue in *Jackson*—whether the remainder constituted inadmissible hearsay—to constitute this court’s application of § 1-5 (b) of the Connecticut Code of Evidence. *State v. Norman P.*, *supra*, 169 Conn. App. 630. As the Appellate Court properly observed, that interpretation not only is incon-

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sistent with a reasonable reading of *Jackson*, but also runs directly counter to the express language of § 1-5 (b), which requires the trial court to admit the remainder of a statement, when necessary to provide context, “‘whether or not otherwise admissible . . . .’” (Emphasis omitted.) *Id.*, 630; see Conn. Code Evid. § 1-5 (b).

Section 1-5 (b) of the Connecticut Code of Evidence provides: “When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.” We have stated that the purpose of the rule is “‘to ensure that statements placed in evidence are not taken out of context.’” *State v. Jackson*, *supra*, 257 Conn. 213. We have further explained that the rule’s purpose “also demarcates [its] boundaries; a party seeking to introduce selected statements under the rule must show that those statements are, in fact, relevant to, and within the context of, an opponent’s offer and, therefore, are part of a single conversation.” (Internal quotation marks omitted.) *Id.* In other words, the remainder of a statement is admissible pursuant to § 1-5 (b) if the rest of the statement is necessary in order to place the initial portion in context.

The dictionary definition of the term “context” is: “[T]he weaving together of words in language . . . [t]he part or parts of a written or spoken passage preceding or following a particular word or group of words and so intimately associated with them as to *throw light upon their meaning* . . . .” (Emphasis added.) Webster’s Third New International Dictionary (2002) p. 492. An excerpt from a passage is taken out of context when the meaning of the excerpt is somehow distorted or made incomplete by the omission of the entire passage. “‘The fool hath said in his heart, there is no God,’

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where only the last phrase is quoted, is [John Henry] Wigmore's classic example of the possibilities of distortion." (Footnote omitted.) 1 K. Broun, McCormick on Evidence (7th Ed. 2013) § 56, p. 392.

In accordance with these principles, when a portion of a statement introduced by a party has been taken out of context such that it distorts the meaning of the entire statement and could mislead the jury, § 1-5 (b) of the Connecticut Code of Evidence requires that the relevant remainder be admitted—even if that remainder would otherwise be inadmissible. We have relied on a useful inquiry in determining whether § 1-5 (b) requires the admission of a remainder of a statement: does the remainder “alter the context” of the already introduced portion of the statement? *State v. Castonguay*, 218 Conn. 486, 497, 590 A.2d 901 (1991). The nature of the question suggests a practical approach to applying § 1-5 (b): identify which portions of the statement were initially introduced into evidence, set forth the argument of the party proffering the remainder as to how the partial introduction distorts the meaning of the whole, then juxtapose that initial offering with the remainder. If the addition of the remainder would alter the meaning of the initial offering—or, in other words, would demonstrate that the initial portion was taken out of context—then § 1-5 (b) requires that the remainder be admitted into evidence. This court followed precisely this approach in *Jackson*, in which the court first considered which portions of the statement had been admitted, identified the defendant's argument as to why the remainder was necessary to provide context, then juxtaposed the initial offering with the remainder of the statement and concluded that the original portions had not distorted the meaning of the entire statement. *State v. Jackson*, supra, 257 Conn. 214.

We therefore begin by identifying which portions of the statement the state introduced during its cross-

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examination of the defendant.<sup>3</sup> During its examination, the state used the defendant's prior statement to the police to impeach his credibility and cast doubt on his testimony during direct examination. That is, the state explored in detail what the defendant told the police in the written statement he gave on August 9, 2012, and highlighted the inconsistencies between his account to the police and his testimony at trial.<sup>4</sup> For example, in his prior statement to the police, the defendant stated that after B had left the house, the defendant had "vagi-

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<sup>3</sup> Because § 1-5 (b) of the Connecticut Code of Evidence does not expressly limit its scope to written statements, we construe the term "introduced," as used in § 1-5 (b), broadly, to include the introduction of portions of a statement through the testimony of a witness. This construction is consistent with our past decisions. See, e.g., *State v. Paulino*, 223 Conn. 461, 465–66, 613 A.2d 720 (1992) (suggesting, without expressly considering, that rule of completeness applied when initial "introduction" was solely through testimony regarding statement to police); *Rokus v. Bridgeport*, 191 Conn. 62, 68–69, 463 A.2d 252 (1983) (same); see also C. Tait & E. Prescott, *supra*, § 1.28.2, pp. 71–73.

Our broad construction of the meaning of the term "introduced" in § 1-5 (b) to include portions of a statement introduced solely through the testimony of a witness necessitates an important clarification. When the initial portions of the statement have been elicited through the testimony of a witness, that introduction must be accomplished through testimony by the witness that affirmatively represents that he made a particular assertion in the prior statement. For example, in the present case, the defendant testified during cross-examination that, in his statement to the police, he said that he had engaged in vaginal intercourse with the complainant on the night of the assault. That testimony introduced that portion of the statement into evidence because the defendant testified that he said it. By contrast, testimony of the witness regarding what he did *not* say in a prior statement obviously does not introduce any portion of that statement into evidence. We therefore reject the defendant's suggestion that his testimony regarding the omissions in his statement to the police in any way triggered the application of § 1-5 (b). Nor is any portion of a prior statement introduced pursuant to § 1-5 (b) when a witness simply denies making a particular assertion in the prior statement.

<sup>4</sup> Although the state also relied on the contrast between the details that were included in the defendant's testimony on direct examination but were excluded in his statement to the police, those questions and resulting testimony are not relevant to our inquiry. As we have explained, that line of questioning did not introduce any portion of the defendant's statement into evidence.

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nal intercourse” with the complainant. During his direct examination, however, the defendant testified that although he had attempted to have vaginal intercourse with the complainant, he was unable to maintain an erection. He testified during cross-examination that he had not had vaginal intercourse at all with the complainant, and instead had digitally penetrated her anus.

Pursuing this strategy of highlighting various inconsistencies between the defendant’s testimony during direct examination and the claims he made in his statement to the police, the state elicited testimony from the defendant that, in his statement, he told the police that (1) B hit the defendant with a baseball bat during the altercation on Thursday, August 2, 2012, (2) the complainant intervened in the struggle between the defendant and B, (3) the defendant and the complainant had vaginal intercourse on the night of the alleged assault, (4) after vaginal intercourse, he went to the bathroom to look for a “bar of soap,” (5) while he was digitally penetrating her anus, the complainant told him to stop, so he stopped,<sup>5</sup> (6) he saw blood on the sheets on the bed, (7) the complainant then went to the toilet, and he accompanied her to the bathroom, (8) he did not know whether the soap came out of her while she was sitting on the toilet, and (9) the complainant was working from Thursday, August 2 through Sunday, August 5, 2012.

On redirect examination, defense counsel focused primarily on addressing the inconsistencies between the defendant’s direct examination testimony and what he failed to tell the police in his prior statement. Defense counsel sought to demonstrate that the omissions in the defendant’s statement were due to a combination

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<sup>5</sup> Despite the defendant’s admissions in his statement that he caused the complainant’s injuries, he did not inform the police, as he later testified, that he believed that those injuries were due to a deformity in one of his fingers.

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of factors, including his mistaken belief that the police were investigating B rather than the defendant, the short duration of the interview, the absence of specific questions that would have prompted him to supply additional information, and the detective's inaccurate transcription of the defendant's words. In order to effect this strategy, defense counsel questioned the defendant regarding some portions of his statement that the state had focused on during cross-examination. He also introduced portions of the defendant's statement that were consistent with his direct examination testimony. After defense counsel had successfully introduced some prior consistent statements from the defendant's statement to the police, he proffered the entire written statement as a full exhibit, claiming that it was admissible pursuant to § 1-5 (b) of the Connecticut Code of Evidence. As we have explained, the reasons that defense counsel offered in support of the admissibility of the entire written statement were that it would provide context by revealing which specific questions were asked to the defendant and why he said some things and not others. He also made the conclusory assertion that, when viewed as a whole, the statement was consistent with the defendant's testimony on direct examination.

The defendant's argument—that admission of the entire statement was necessary to disclose the questions that he was asked and the reasons he included some information and omitted other information—lacks merit both factually and legally under § 1-5 (b) of the Connecticut Code of Evidence. We first observe that nothing in the defendant's narrative statement to the police reveals what questions the police asked the defendant or the defendant's reasons for providing some details regarding the assault but omitting other details.<sup>6</sup> Second, the defendant's reliance on the state's

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<sup>6</sup> Because the statement is in narrative form, we also disagree with the Appellate Court's conclusion that the brevity of the statement "might have caused the jury to credit the defendant's testimony as to *why* his statement



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questions about the omissions in his statement reflects a basic misunderstanding of what is required to trigger the application of § 1-5 (b). In order for that rule to apply, a portion of a statement must be *introduced* into evidence. Questions regarding what a witness did *not* say in a prior statement do not introduce any portion of the statement. See footnote 3 of this opinion.

As to the defendant's broad claim that, when viewed as a whole, the statement is consistent with his testimony on direct examination, we disagree. Some portions of the statement are consistent with his direct examination testimony. Others, highlighted by the state during cross-examination, are not. Our review of his statement, however, does reveal that one statement elicited by the state during the defendant's cross-examination was arguably taken out of context. Specifically, during cross-examination, the state elicited testimony from the defendant concerning his statement that he went to the bathroom to look for a "bar of soap . . . ." In the defendant's statement, however, he not only used the phrase "bar of soap," but also referred to a "used bar of soap." The latter phrase is consistent with the defendant's testimony that he inserted a "piece of soap" into the complainant's anus. It is at least arguable that the jury *could* have interpreted the reference to a "bar of soap" in the defendant's statement to mean an unused bar of soap. Accordingly, the portion of the defendant's statement referring to a "used bar of soap" would be admissible pursuant to § 1-5 (b) of the Connecticut

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to the police was missing certain details to which he testified at trial . . . ." (Emphasis added.) *State v. Norman P.*, supra, 169 Conn. App. 631. The length of the statement reveals nothing about how long the interview took, what questions the detective asked the defendant, or whether the defendant confined his answers strictly to the scope of the questions that the detective asked him. We also observe that if defense counsel had wished to highlight the short duration of the interview or the brevity of the statement, he was free to ask the defendant questions to elicit those facts. He did not do so.

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Code of Evidence to provide proper context.<sup>7</sup> We therefore conclude that the trial court improperly refused to permit the introduction of that portion of the statement into evidence.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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STATE OF CONNECTICUT v. JAN G.\*  
(SC 19518)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.\*\*

*Syllabus*

Convicted of the crimes of murder and assault of an elderly person in the third degree, the defendant appealed to this court, claiming that he was entitled to a new trial because he had been compelled to represent himself during a portion of the underlying trial without a proper waiver of his right to counsel. After representing the defendant during jury selection, arguing pretrial motions, cross-examining the state's witnesses, and presenting the testimony of three individuals for the defense, defense counsel indicated to the trial court that the defendant wished to testify on his own behalf and requested that the defendant be permitted to do so in narrative form. The trial court canvassed the defendant concerning both his decision to testify generally and his decision to testify in narrative form, and then granted defense counsel's request. After the defendant took the stand, defense counsel posed certain prelim-

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<sup>7</sup> Our application of § 1-5 (b) of the Connecticut Code of Evidence, and our conclusion that the phrase "used bar of soap" is admissible pursuant to that rule, is necessarily dependent on the procedural facts as they evolved during the defendant's first trial. We recognize that, if the defendant is retried, the parties may well pursue different lines of questioning, with the result that different portions of the defendant's statement to the police may be introduced into the record. Those differences, of course, must be taken into account by the trial court should either party rely on § 1-5 (b) to introduce the balance of the defendant's statement on the basis that the opposing party introduced a portion of it out of context.

\* In accordance with General Statutes § 54-86e, we decline to identify the victims in the present case or others through whom the victims' identities may be ascertained.

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

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inary questions and then asked the defendant what he would like to tell the jury about the events in question. The defendant then testified in narrative form about those events. During this testimony, defense counsel responded to a relevancy objection by the state, assisted in laying the foundation for the admission of a photograph, and assisted in publishing various exhibits to the jury. Defense counsel objected nine times during the state's cross-examination of the defendant and, thereafter, conducted a brief redirect examination. Following the defendant's testimony, defense counsel argued a motion to preclude a rebuttal witness, cross-examined that witness, submitted proposed jury instructions, participated in a charging conference, presented closing argument, and filed a motion for a new trial. *Held* that the defendant could not prevail on his unpreserved claim that, in order to exercise his right to testify on his own behalf, he was compelled to represent himself during his narrative testimony without a proper waiver of his right to counsel: the defendant failed to show a violation of his constitutional right to counsel, this court having concluded that a review of the record supported the conclusion that the defendant was represented by counsel throughout the trial, including during his narrative testimony; moreover, the unique factual record underlying *State v. Francis* (317 Conn. 452), in which this court determined that the defendant represented himself during his narrative testimony and that his waiver of the right to counsel was not voluntary, was highly distinguishable, in part because the trial court in that case explicitly ruled that the defendant would represent himself during his narrative testimony and appointed standby counsel, whereas, in the present case, the trial court and defense counsel understood that the defendant continued to be represented by counsel throughout his testimony.

Argued December 11, 2017—officially released July 17, 2018

*Procedural History*

Substitute information charging the defendant with the crimes of murder and assault of an elderly person in the third degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *D'Addabbo, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

*Emily H. Wagner*, assistant public defender, with whom was *Lauren M. Weisfeld*, public defender, for the appellant (defendant).

*Rocco A. Chiarenza*, assistant state's attorney, with whom were *Elizabeth M. Moseley*, assistant state's

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attorney, and, on the brief, *Brian W. Preleski*, state's attorney, for the appellee (state).

*Opinion*

MULLINS, J. This appeal arises from the conviction of the defendant, Jan G., who murdered his father and physically assaulted his elderly mother. At trial, the defendant insisted upon testifying that Satan had taken over his body and performed these acts. As a result, defense counsel requested, based on the Rules of Professional Conduct generally, that the defendant be permitted to give that testimony in narrative form. The trial court granted that request, and the defendant subsequently testified to his version of events in that manner. Ultimately, the jury found the defendant guilty of murder in violation of General Statutes § 53a-54a (a) and assault of an elderly person in the third degree in violation of General Statutes § 53a-61a (a) (1). This appeal followed.<sup>1</sup>

The issue we must resolve in this appeal is whether the trial court's decision to allow the defendant to testify in narrative form caused him to be self-represented during his testimony without a proper waiver of his right to counsel. The defendant claims that *State v. Francis*, 317 Conn. 450, 452, 118 A.3d 529 (2015), wherein this court held that the defendant, Maurice Francis, was self-represented during his narrative testimony and that his waiver of the right to counsel was not voluntary, controls the present case and requires a new trial. Because of the factual distinctions between this case and *Francis*, however, we conclude that our decision in that case does not control the outcome of the present appeal. Instead, on the basis of our review of the facts and circumstances of the present case, we conclude that the defendant was not self-represented

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<sup>1</sup> The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3).

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during his testimony and, therefore, is not entitled to a new trial. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. The defendant lived in the first floor apartment of a two-family home. His ninety year old father and seventy-four year old mother lived in the second floor apartment.

On October 13, 2011, the defendant consumed a large quantity of cocaine. Thereafter, in the early morning hours of October 14, 2011, the defendant entered his parents' apartment and punched his mother in the face. The punch knocked out one of his mother's upper front teeth, cut her lip, and caused swelling and bruising extending from her left eye to the bridge of her nose. After assaulting his mother, the defendant armed himself with an ornamental sword from his apartment and knives from his parents' kitchen. With these weapons, he proceeded to attack and kill his father.

In this attack, the defendant gouged out the father's left eye, broke his nose, slit his neck twice, and forced the handle of a potato masher down his throat. The defendant also amputated his father's penis and ate it. In all, the autopsy subsequently performed on the father's body revealed approximately seventy-six sharp force wounds.

As the defendant attacked his father, his mother ran for help. When the police officers entered the first floor apartment, they found the defendant seated on his couch, using his computer, naked from the waist down, and covered in blood. The defendant was sweating, and it appeared to the officers that he was under the influence of some type of illicit drug. Nevertheless, the officers observed that he also appeared to understand what was being said to him. The officers discovered

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the lifeless body of the defendant's father on the floor of the second floor apartment. He was pronounced dead at the scene. The defendant was arrested.

After his arrest, the defendant tested positive for cocaine and opiates. Both in his apartment and in the hospital on October 14, 2011, the defendant asserted that he was Satan. Specifically, the defendant stated the following to the officers in his apartment shortly after his arrest: "I am Satan. I made a pact with your earth and you did not keep your end of the deal. I order you to release me and take these cuffs off . . . ." Even though the defendant identified himself as Satan at times, at other points during his interactions with the police that evening he also referred to himself by his real name. At the police department later that day, the defendant told officers "that it was the drugs . . . crack and cocaine." The defendant then asked: "What do you think I'll get? Ten, twenty years?"

The state charged the defendant with one count of murder in violation of § 53a-54a (a) and one count of assault of an elderly person in the third degree in violation of § 53a-61a (a) (1). The defendant pleaded not guilty to these charges, elected a jury trial, and was found competent to stand trial.

At trial, the defense introduced the testimony of Alec Buchanan, a forensic psychiatrist, who conducted a psychiatric evaluation of the defendant while he was awaiting trial. Buchanan explained that the defendant told him that he began to use cocaine in 2008, developed an interest in Satanism shortly thereafter, and believed Satan took over his body to perpetrate the crimes against his parents. Buchanan also acknowledged that the onset of the defendant's symptoms coincided with his cocaine dependence and that the symptoms resolved when he no longer had access to cocaine.

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Following Buchanan’s testimony, defense counsel requested time to discuss with the defendant whether he would testify on his own behalf. The trial court granted that request and permitted a recess. When the trial resumed two days later, defense counsel informed the trial court, outside the presence of the jury, that the defendant was asserting his right to testify.

The trial court then canvassed the defendant on his decision to testify. After this canvass, defense counsel requested that the defendant’s testimony proceed in a narrative format. When the trial court asked why, defense counsel specified that his request was not based on rule 3.3 of the Rules of Professional Conduct,<sup>2</sup> but “on other parts of the rule[s] . . . .”<sup>3</sup> The state did not object to this request, provided it could object during the defendant’s testimony and conduct cross-examination.

Accordingly, the trial court proceeded to canvass the defendant a second time. This canvass focused specifically on the defendant’s decision to testify in narrative form. The trial court explained to the defendant that his testimony would be in a different format than the testimony of other witnesses and that the court would

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<sup>2</sup> Rule 3.3 (a) of the Rules of Professional Conduct provides in relevant part: “A lawyer shall not knowingly . . . (3) [o]ffer evidence that the lawyer knows to be false . . . .”

<sup>3</sup> See *In re Yanique S. v. Frederick T.*, 151 App. Div. 3d 1222, 1225, 56 N.Y.S.3d 603 (2017) (The court concluded that counsel fulfilled his ethical obligations by informing the court that he had ethical dilemma, without elaborating or identifying specific ethical rule he relied on, because “an attorney confronted with [such a] situation . . . must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other. Requiring counsel to put on the record his or her reasons underlying the stated ethical dilemma and the advice proffered to the client related to his or her testimony would not strike the appropriate balance between these competing considerations but rather, would present too great a risk that . . . counsel would be forced to reveal client confidences.”).

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instruct the jury not to speculate as to why the defendant was testifying in narrative form. The trial court then warned the defendant that his attorney might not be “effective in representing” him during the narrative testimony. The trial court then asked the defendant if he still wished to testify in narrative form, and the defendant confirmed that he did.

After the trial court completed this second canvass, the jury entered the courtroom. The trial court instructed the jury that the defendant would testify in a “somewhat partial narrative form . . . .” After the defendant took the stand, defense counsel inquired about the defendant’s name, age, and schooling, and then asked the defendant broadly “about [October 14, 2011] and [the] events leading up to October 14, 2011 . . . .” The defendant then testified, in narrative form, that his drug use led to an interest in Satanism and that, on October 14, 2011, after taking drugs the evening before, he was possessed by Satan. He told the jury that Satan took his body to his parents’ apartment and killed his father. The state then cross-examined the defendant. Following cross-examination, defense counsel conducted a brief redirect examination of the defendant. After redirect, defense counsel rested the defendant’s case, and, after the state called a rebuttal witness, defense counsel presented closing argument to the jury.

Ultimately, the jury returned a verdict of guilty on both counts. The trial court rendered judgment in accordance with the jury’s verdict and sentenced the defendant to sixty years of imprisonment. Thereafter, defense counsel filed a motion for a new trial, which was denied. This appeal followed. Additional relevant facts will be set forth as necessary.

The defendant claims on appeal that, pursuant to *State v. Francis*, supra, 317 Conn. 452, he is entitled to a new trial because in order to exercise his right to



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testify, he was compelled to self-represent without a proper waiver of his right to counsel. Because the defendant did not raise this claim before the trial court, his claim is unpreserved, and he seeks review pursuant to *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989).<sup>4</sup> In response to the defendant's argument, the state asserts, inter alia, that the defendant's claim is unreviewable pursuant to the second prong of *Golding*. Specifically, the state contends that the trial court's decision to allow the defendant to testify narratively was a matter of trial management and, therefore, does not raise a constitutional question. Alternatively, the state argues that, even if reviewable, the defendant's claim fails the third prong of *Golding* because the defendant's narrative testimony did not constitute self-representation. Instead, the state contends, the defendant was represented throughout his testimony, and, therefore, no constitutional violation occurred.

For purposes of the present appeal, we assume that the defendant's claim is of constitutional magnitude, and, thus, we assume that the defendant has satisfied the second prong of *Golding*. See *State v. Mejia*, 233 Conn. 215, 232, 658 A.2d 571 (1995) (analyzing defendant's claim pursuant to third prong of *Golding* without discussing merits of first two prongs); see also *State v. Golding*, supra, 213 Conn. 240 ("In the absence of any one of [these four] conditions, the defendant's claim

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<sup>4</sup> In *Golding*, this court held that "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 omitted; footnote omitted.) *State v. Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

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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."). We conclude, however, that the defendant has not shown a constitutional violation existed and deprived him of a fair trial because, under the circumstances of the present case, his narrative testimony did not constitute self-representation. Consequently, the defendant's claim fails under the third prong of *Golding*.

We begin with the following principles. The sixth amendment to the United States constitution guarantees a criminal defendant the right to the assistance of counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The fourteenth amendment's due process clause extends this right to state criminal prosecutions. *Id.*, 342. "Embedded within the sixth amendment right to assistance of counsel is the defendant's right to elect to represent himself, when such election is voluntary and intelligent. See, e.g., *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)." *State v. Braswell*, 318 Conn. 815, 827, 123 A.3d 835 (2015). "We require a defendant to clearly and unequivocally assert his right to self-representation . . ." *Id.*, 827–28. This "threshold requirement . . . is one of many safeguards of the fundamental right to counsel." (Internal quotation marks omitted.) *State v. Pires*, 310 Conn. 222, 231, 77 A.3d 87 (2013). To be sure, "[v]iolation of the right to counsel at a critical stage of the criminal proceedings is structural error, requiring a new trial without proof of actual prejudice." *State v. Francis*, *supra*, 317 Conn. 460.

In addition to his sixth amendment right to counsel, "[a] criminal defendant also has a right to testify on his own behalf, secured by the fifth, sixth, and fourteenth amendments to the federal constitution. See *Rock v. Arkansas*, 483 U.S. 44, 51–52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The right to testify includes the right to

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testify fully, without perjury, to matters not precluded by a rule of evidence.” (Internal quotation marks omitted.) *State v. Francis*, supra, 317 Conn. 460.

“The defendant’s right to testify . . . cannot be waived by counsel. . . . Indeed, in the absence of an intention to offer perjurious testimony, [i]f a defendant insists on testifying, no matter how unwise such a decision, the attorney must comply with the request. . . . [I]f counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. . . . [However] while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense. . . . By exercising his constitutional right to the assistance of counsel, a defendant does not relinquish his right to set the parameters of that representation.” (Citations omitted; internal quotation marks omitted.) *Id.*, 460–61.

With these principles in mind, we turn to the facts of the present case. We must ascertain whether, as the defendant contends, he was compelled to represent himself in order to vindicate his right to testify on his own behalf. To do so, we begin with the threshold question of whether the defendant was represented by counsel during his narrative testimony. We conclude that he was represented by counsel during his testimony and, therefore, has failed to establish the existence of a constitutional violation. Accordingly, he is not entitled to a new trial.

In the present case, defense counsel’s actions before, during, and after the defendant’s narrative testimony demonstrate that the defendant was not self-represented. See *People v. Nakahara*, 30 Cal. 4th 705, 717, 68 P.3d 1190, 134 Cal. Rptr. 2d 223 (2003) (concluding that “defendant at no time before, after, or during his narrative testimony ‘waived’ his right to counsel’s assis-

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tance” when “counsel’s assistance was . . . available during all other stages of trial”). Indeed, before to the defendant testified in narrative form, defense counsel: represented the defendant during jury selection; filed and argued multiple pretrial motions in limine, including motions seeking to suppress evidence and preclude testimony; vigorously cross-examined the state’s witnesses; and presented the testimony of three witnesses for the defense. Once the defendant took the stand, defense counsel asked him preliminary questions regarding his age and education, before asking him, “[w]hat would you like to tell the jury about [October 14, 2011] and [the] events leading up to October 14, 2011?”

As the defendant testified in narrative form, defense counsel assisted him in publishing two exhibits to the jury. For each exhibit, defense counsel asked the defendant questions about the exhibit’s significance and then led him back into his narrative. Also during the defendant’s narrative testimony, defense counsel asked the defendant questions to lay the foundation for the admission of a photograph as an exhibit and then published that exhibit to the jury. At one point during the defendant’s testimony, the state objected to the defendant’s testimony on the ground of relevance. Defense counsel responded to the objection, and a proffer was conducted outside the presence of the jury. At the conclusion of the defendant’s narrative testimony, defense counsel then asked him one direct question before the state began its cross-examination.<sup>5</sup>

During the state’s cross-examination of the defendant, defense counsel objected nine times. These objections involved claims that certain questions posed by

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<sup>5</sup> At this juncture, defense counsel asked the defendant: “[W]as it your plan that day to kill your father?” The defendant responded, “No, I love my father, I miss him so much. I really miss him so much.” Defense counsel then said, “I have no further questions.” After that, cross-examination commenced.

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the prosecutor were outside the scope of the direct testimony, not relevant, improper in form, mischaracterizing the evidence, calling for inadmissible hearsay, or argumentative. Defense counsel made and argued each of these objections on behalf of the defendant. Defense counsel then conducted redirect examination of the defendant. The defendant did not testify in narrative form on redirect; rather, defense counsel asked him two pointed questions.<sup>6</sup>

Thereafter, defense counsel argued a motion to preclude the state's rebuttal witness, cross-examined the state's rebuttal witness, submitted proposed jury instructions, participated in the charging conference, and presented closing argument on behalf of the defendant. After the jury returned its verdict, defense counsel filed a motion for a new trial, which was denied. A review of the record in the present case supports the conclusion that the defendant was ably represented by counsel throughout the entire trial, including during his narrative testimony.

Nevertheless, the defendant asserts that *State v. Francis*, supra, 317 Conn. 461, controls the outcome of the present appeal. We disagree. Although Francis made the same claim—namely, that he was compelled to give up his right to counsel in order to vindicate his right to testify on his own behalf—and although we held that Francis was self-represented during his narrative testimony, we find *Francis* inapposite on the basis of its unique factual circumstances.

Francis was represented by two attorneys. *Id.*, 452. The subject of Francis testifying first was addressed

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<sup>6</sup> Defense counsel asked the defendant the following question: "Have you done your best to tell the truth about what you recall happened on October [14, 2011]?" The defendant responded: "Yes, sir." Defense counsel then asked the defendant the following question: "[W]as it your plan and intent to kill your father on [October 14, 2011]?" The defendant responded: "No, it wasn't." Defense counsel then said: "No further questions, Your Honor."

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when the state objected to his making statements on the record without being subject to cross-examination. *Id.* In response, the trial court explained that Francis could make statements on the record only if he chose to testify. *Id.*, 453. During this discussion, defense counsel explained that they “had limited contact with [Francis], by [Francis’] choice, and that [Francis’] views could be characterized as not ‘reality based.’” *Id.* Defense counsel further explained that he had not discussed with Francis whether Francis should testify. *Id.* Defense counsel then informed the trial court that, in the event Francis chose to testify, they “would have to take the position that he is doing so uncounseled and in essentially . . . a manner in which he is representing himself.” (Internal quotation marks omitted.) *Id.* Thereafter, defense counsel informed the trial court that, contrary to their advice, Francis intended to testify on his own behalf. *Id.* Defense counsel further explained that Francis “had declined their offer to help him prepare for testifying and expressed concerns about his competency” to make that decision. *Id.*

The trial court then explained to Francis that he had a right to choose whether to testify. *Id.* Francis responded that he wanted to testify, but that his counsel was “trying to legally gag” him. (Internal quotation marks omitted.) *Id.* He then told the court: “I’d rather speak on my behalf than talk to these two guys here.” (Internal quotation marks omitted.) *Id.*, 454. Thereafter, defense counsel explained to the court that “based on the defendant’s failure to seek their counsel and his belief that counsel was working against him . . . should [Francis] take the stand and testify, he will essentially be representing himself” and that “defense counsel would file a motion to withdraw if necessary.” (Internal quotation marks omitted.) *Id.* When the trial court asked the defendant if he wanted to represent himself during his

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testimony, he ultimately said, “I’ll do so . . . .” (Internal quotation marks omitted.) *Id.*, 455.

Following these discussions, the trial court told Francis that he would “‘self-represent’” during his testimony. *Id.* Specifically, the trial court “warned the defendant of the disadvantages of self-representation and then ruled: ‘I have to let him self-represent . . . . But I’m going to appoint counsel as standby counsel, certainly . . . for purposes of objection during the cross-examination. . . . Well, standby counsel for purposes of his testimony only.’” *Id.* The trial court then appointed defense counsel to be standby counsel charged with asking “introductory questions and asserting objections during cross-examination, specifically to questions that went beyond the scope of direct examination . . . .” *Id.*, 463.

In concluding that Francis was self-represented when he took the witness stand and provided narrative testimony, this court relied on the fact that the “[trial] court and defense counsel understood the defendant to be self-represented during his testimony.” *Id.*, 461. With respect to the trial court’s understanding that the defendant was self-represented, this court highlighted the fact that, after Francis had been canvassed regarding his choice to represent himself, the trial court ruled that Francis would “self-represent . . . during this point . . . .” *Id.*, 462. Then, after issuing its ruling that the defendant would self-represent, the trial court took the additional step of appointing standby counsel for purposes of the defendant’s testimony and canvassed the defendant regarding self-representation. *Id.* Finally, this court pointed out that the trial court’s docket sheet contained notations from the court clerk “indicating that, for purposes of [Francis’] testimony only, [Francis] was allowed to represent himself and standby counsel was appointed . . . [and] further indicated that, for the

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remainder of the trial, counsel was retained to represent [Francis].” Id.

With respect to defense counsel’s understanding in *Francis*, this court highlighted the fact that defense counsel had not had any discussions with the defendant regarding his desire to testify. Id., 453. The lack of communication between defense counsel and Francis resulted in counsel’s explaining to the trial court that the defendant would be giving testimony that was uncounseled. Id. Indeed, this court noted that defense counsel “made it abundantly clear that they had no intention of representing [Francis] should he testify and would file a motion to withdraw if necessary to avoid doing so.”<sup>7</sup> Id., 461–62.

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<sup>7</sup> Our conclusion that Francis was self-represented during his narrative testimony also is supported by this court’s determination that the “presentation of [Francis’] testimony was consistent with self-representation.” Id., 462. Specifically, this court determined that Francis had “actual control of the presentation of his case” because he conveyed an “unguided, uninterrupted narrative . . . of the facts he deemed relevant to his case” during his testimony. Id. We take this opportunity to clarify that *Francis* does not stand for the proposition that any time a defendant presents narrative testimony he is self-represented. Further, “actual control” for the time of narrative testimony does not necessarily equate to self-representation. See, e.g., *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (discussing “actual control” in context of defendant’s representation of himself throughout entire trial with appointed standby counsel); *United States v. Frazier*, United States Court of Appeals, Docket No. 99-4109 (4th Cir. November 8, 1999) (defendant was not denied right to counsel where he was allowed “to testify in a narrative form without direct examination by defense counsel” and adequate warnings were given by court), cert. denied, 530 U.S. 1250, 120 S. Ct. 2703, 147 L. Ed. 2d 973 (2000); *People v. Nakahara*, 30 Cal. 4th 705, 717, 68 P.3d 1190, 134 Cal. Rptr. 2d 223 (2003) (“defendant at no time before, after, or during his narrative testimony ‘waived’ his right to counsel’s assistance” where “counsel was fully available before and after [narrative] statement was given, including cross-examination” but would not conduct direct examination where content of testimony was unknown); cf. *Commonwealth v. Mitchell*, Docket No. 9673CR0312, 2000 WL 33119695, \*25 (Mass. Super. December 18, 2000) (concluding that defendant’s presentation of narrative testimony did not deprive defendant of effective assistance of counsel where perjury is concern and “defendant is otherwise vigorously defended” and citing similar cases), aff’d, 438 Mass. 535, 781 N.E.2d 1237, cert. denied, 539 U.S. 907, 123 S. Ct. 2253, 156 L.



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The record in the present case is highly distinguishable from *Francis*. In particular, unlike in *Francis*, the trial court and defense counsel in the present case understood the defendant to be represented by defense counsel throughout his testimony.

With respect to the trial court in the present case, when defense counsel requested time to speak with the defendant about testifying, the trial court granted a recess for that purpose. When defense counsel notified the trial court that the defendant would be testifying, the trial court did not inform the defendant that he would be representing himself if he testified. The trial court certainly never made a ruling that the defendant would be self-represented like the trial court did in *Francis*.

Instead, the trial court canvassed the defendant on his decision to testify and, then, upon defense counsel's request for narrative testimony, canvassed the defendant on testifying in that form. Significantly, during its canvass on the defendant's decision to testify in narrative form, the trial court discussed that this narrative format may cause the defendant's counsel to not be "effective" in his representation. Specifically, the following colloquy occurred:

"The Court: Okay. Now, do you understand by the request, and I can't get into the communications between you and your attorney, but *the request . . . that [defense counsel] is making could put him in a position where . . . he's not being effective in representing you, do you understand that?*

"The Defendant: *Yes, he explained this to me.*

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Ed. 2d 118 (2003). Instead, our review of *Francis* reveals that this court's conclusion that the defendant was self-represented for the short portion of his trial, in which he testified was not based on the format his testimony took—namely, narrative testimony—but on the unique factual circumstances of that case in which the trial court and defense counsel understood the defendant to be self-represented for his testimony.

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“The Court: I’m assuming that, by your discussions with him, you still want to proceed that way?”

“The Defendant: Yes, sir.”

“The Court: So then *are you giving up or waiving your claim of ineffective assistance of counsel on this specific area?*”

“The Defendant: *Yes, sir.*”

“The Court: Okay. Is anyone forcing you or threatening you in any way . . . .”

“The Defendant: No, my own volunteer.”<sup>8</sup> (Emphasis added.)

The quoted colloquy demonstrates that the trial court in the present case understood the defendant to be represented by counsel during his narrative testimony. Indeed, the trial court notified the defendant that his counsel may not be “effective” during the narrative testimony, thereby acknowledging that he understood him to be represented by counsel. The trial court’s understanding in the present case stands in sharp contrast to the trial court’s understanding in *Francis*, in which the trial court explicitly ruled that Francis would be self-represented during his narrative testimony. *State v. Francis*, supra, 317 Conn. 454–55.

Furthermore, the trial court in *Francis* appointed defense counsel as standby counsel during Francis’ narrative testimony. *Id.*, 455. The trial court in *Francis* also “assigned standby counsel the limited role of asking [Francis] introductory questions and asserting objections during cross-examination, specifically to questions that went beyond the scope of direct examination, although standby counsel in fact asserted no objections.” *Id.*, 463. In the present case, by contrast, the

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<sup>8</sup> Shortly after this discussion, the defendant again confirmed to the trial court that he still wished to proceed “in that form.”

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trial court never appointed defense counsel as standby counsel for the limited purpose of the defendant's narrative testimony. In fact, not only was defense counsel not appointed as standby counsel, there was no limitation placed on defense counsel's role. This is entirely consistent with the court's understanding that the defendant continued to be represented by counsel.

It is also evident that, in the present case, unlike in *Francis*, defense counsel proceeded with the understanding that he continued to represent the defendant. Indeed, as we explained previously in this opinion, defense counsel actively assisted the defendant during his narrative testimony. In particular, during his narrative testimony, the defendant asked defense counsel to publish exhibits to the jury on two occasions, and his defense counsel responded, "[s]ure." Defense counsel published the requested exhibits in accordance with the trial court's instructions and then guided the defendant back into his narration. In addition, defense counsel assisted the defendant in introducing a photograph into evidence by asking the defendant appropriate questions to lay the proper foundation and then published that exhibit to the jury. Also, the efficiency with which defense counsel published exhibits suggests advance planning between the defendant and defense counsel. Specifically, defense counsel was able to locate and publish the exhibits during the defendant's narrative with little discussion with the defendant as if he knew exactly which exhibit the defendant planned to publish at each point during his narrative testimony. The attorney-client relationship in the present case stands in stark contrast to that in *Francis*, in which Francis refused to speak with defense counsel about testifying and defense counsel explicitly characterized Francis as being self-represented. *State v. Francis*, supra, 317 Conn. 453. In other words, the defendant's testimony

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in the present case, although given in narrative form, does not appear to be unguided or uncounseled.

Furthermore, defense counsel's involvement in handling and making objections on behalf of the defendant during both the narrative testimony and the cross-examination demonstrates that defense counsel understood the defendant to be represented by counsel during his narrative testimony.<sup>9</sup> Defense counsel also asked direct questions of the defendant on direct; see footnote 5 of this opinion; and on redirect. See footnote 6 of this opinion. Indeed, defense counsel conducted the entire redirect examination in a question and answer format without any direction from the defendant.

On the basis of the foregoing analysis, we conclude that *Francis* does not control the present case. Instead, we conclude that, given the facts of the present case, the

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<sup>9</sup> To support his argument that he actually controlled his case presentation during his testimony and, therefore, was self-represented, the defendant cites to allegedly harmful evidence that was admitted on cross-examination. The defendant asserts that, although defense counsel objected during cross-examination, the trial court largely overruled these objections and allowed the state's questions regarding harmful evidence because his narrative testimony opened the door to sensitive topics. Specifically, the defendant asserts that, had he been represented by counsel during his testimony, his drug use and activities on October 13, 2011, would not have been a subject of his direct testimony. Consequently, more damaging evidence related to these topics would not later have been admitted on cross-examination. We disagree. First, as we have explained, "actual control" for the time of narrative testimony does not equate to self-representation. See footnote 7 of this opinion. Second, these topics and the related evidence raised on cross-examination would have been introduced and admissible if the defendant had testified in any manner. The defendant's drug use was the impetus for his interest in Satanism and played a central role in his daily activities, particularly on October 13, 2011, when, according to his testimony, he consumed a large amount of drugs. Indeed, he already had presented the testimony of Buchanan, who had testified that the defendant's cocaine use and interest Satanism were related. Thus, we find it difficult to envision a situation in which the defendant would have testified without raising this information to support his defense and, by extension, enabling the state on cross-examination to ask questions relating to his drug use and his activities the day before the murder.

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defendant was not self-represented during his narrative testimony or at any other point during the trial. Therefore, the defendant has failed to establish that a constitutional violation occurred, and his claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other justice concurred.

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