STATE OF CONNECTICUT *v.* ELMER G.*
(SC 20031)

Robinson, C. J., and McDonald, D'Auria, Mullins and Ecker, Js.

Syllabus

Convicted of two counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and three counts of the crime of criminal violation of a restraining order, the defendant appealed to the Appellate Court. The defendant, his wife, A, and the minor victim, their daughter, came to the United States from Guatemala. While living in Connecticut, the defendant sexually abused the victim and was verbally and physically abusive toward A and the couple's other children. A eventually reported the defendant's physical abuse of her to the police while the defendant was out of the country and obtained an ex parte restraining order, which was served on him when he returned to the United States. The ex parte order, inter alia, prohibited the defendant from contacting A and her children, and denied the defendant visitation rights pending a hearing. After the hearing, which the defendant attended with his counsel, the trial court issued a temporary restraining order that prohibited the defendant from contacting A and contained additional orders providing that A's children also were protected by the order. The order also allowed the defendant weekly, supervised visitation with the children. Other parts of the order reiterated its terms and stated that violation of the order was a criminal offense and that contacting a protected person could violate the order. The order also contained a Spanish translation of its terms on a separate page. At the hearing, during which the defendant, whose primary language is Spanish, required an interpreter, the trial court explained the terms of the temporary restraining order to the defendant. The court stated, inter alia, that the order prohibited the defendant from assaulting, threatening, abusing or harassing A and the children and that he was not to have any contact with A in any manner. The court further stated that the defendant could have supervised, weekly contact with the children. The defendant thereafter contacted the victim on three occasions, sending her two text

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

Additionally, in accordance with the Violence Against Women and Department of Justice Reauthorization Act of 2005, § 106 (c), Pub. L. No. 109-162, 119 Stat. 2960, 2982 (2006), codified as amended at 18 U.S.C. § 2265 (d) (3) (2012), we decline to identify the party protected under a restraining order or others through whom that party's identity may be ascertained.

messages and a letter that he had one of the victim's siblings deliver to the victim. The Appellate Court upheld the defendant's convictions. In his certified appeal from the Appellate Court's judgment, the defendant claimed that the evidence was insufficient to support his conviction of criminal violation of a restraining order and that the prosecutor committed certain improprieties while questioning two witnesses and during closing argument. *Held*:

1. The evidence was sufficient to support the defendant's conviction of three counts of criminal violation of a restraining order:

a. The defendant could not prevail on his claim that there was insufficient evidence from which the jury reasonably could conclude that he knew that the terms of the restraining order prohibited his contact with the children except during weekly, supervised visitation: although the court did not expressly state during the hearing that the no contact term applied to both A and the children, the court specified, immediately after stating that the no contact term applied to A, that the defendant could have contact with his children but that it must be supervised and then clarified that it would be "weekly and supervised," and the victim advocate similarly characterized the order at the hearing with respect to contact with the children as being limited to weekly, supervised visits; moreover, although it was possible for the jury to infer that the court and the victim advocate meant visitation when they referred at the hearing to contact in light of subsequent references to visitation, it also was entitled to infer that the court and the victim advocate meant what they said when they said contact, and the written temporary restraining order, the actions of A and the victim in reporting the defendant's contacts to the police, and the prior, ex parte order all supported the latter inference.

b. This court found unavailing the defendant's claim that he lacked knowledge of the terms of the restraining order on the ground that the record failed to show he was informed in Spanish that he was prohibited from contacting the children by text or letter: the evidence demonstrated that the defendant was fully apprised of the terms of the order in Spanish by defense counsel, the court, and the victim advocate, as defense counsel confirmed with the court that he was fluent enough in Spanish to make the defendant understand what was said in English, counsel stated that he had gone over the proposed order with the defendant in private in a meeting attended by the defendant's sister and the victim advocate, and the defendant was assisted by a Spanish language interpreter during a portion of the hearing and by defense counsel, who acted as an interpreter during the remainder of the hearing; moreover, the fact that the defendant asked the victim's sibling to deliver the letter to the victim rather than delivering it to the victim himself indicated that the defendant knew he was not permitted to contact the children outside of the weekly, supervised visits.

c. The defendant could not prevail on his claim that there was insufficient evidence to establish that he had sent the letter to the victim while the temporary restraining order was in effect and, therefore, that this instance of contact was not in violation of that order; the victim testified that she received the letter during the time the restraining order was in effect, there was evidence that the defendant had given the letter to the victim's sibling for delivery to the victim during one of the supervised visits that was authorized under the order, and the defendant's pleas in the letter for the victim to meet with him suggested that it was written in response to the victim's refusal to attend the court-approved visits.

2. The defendant was not deprived of a fair trial as a result of certain alleged improprieties committed by the prosecutor: the prosecutor's questions to the victim and another witness about whether certain of their testimony was truthful were not improper, as defense counsel put the victim's credibility squarely before the jury throughout the trial, information about the witnesses' motivations to lie was the type of information a jury requires to assess their credibility, the prosecutor's questions were unlikely to confuse the issues for the jury, and, because the evidentiary rule against preemptive bolstering of a witness' testimony has its roots in efficiency rather than fairness, this court declined to rely on it as a basis on which to adjudicate a claim of prosecutorial impropriety; moreover, the prosecutor did not make a golden rule argument when, during closing argument, he asked the jurors to consider their own perspectives in considering certain of the victim's testimony, as the prosecutor's comment was not an attempt to encourage the jurors to believe the victim out of passion or sympathy but was directed at her credibility, which was squarely at issue, and was a permissible attempt to encourage the jurors to infer that the victim was not fabricating her testimony; furthermore, the prosecutor did not improperly evoke sympathy for the victim when he referenced her credibility in light of the psychological, social and physical barriers she faced in accusing the defendant of sexual assault, and the prosecutor's comment asking the jurors whether other individuals in circumstances similar to those of the victim would fabricate sexual assault accusations was not improper, as the comment was a permissible, rhetorical device to encourage the jury to infer that the victim had no motive to fabricate her testimony.

Argued February 22—officially released September 17, 2019

Procedural History

Substitute informations charging the defendant, in the first case, with three counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and, in the second case, with three counts of the crime of criminal violation of a restraining order, brought to the Superior Court in the judicial district of

Danbury, where the cases were consolidated and tried to the jury before *Pavia*, *J.*; verdicts and judgments of guilty of two counts each of sexual assault in the second degree and risk of injury to a child, and three counts of criminal violation of a restraining order, from which the defendant appealed to the Appellate Court, *Alvord*, *Prescott* and *Pellegrino*, *Js.*, which affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Warren C. Murray*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. A jury found the defendant, Elmer G., guilty of several offenses stemming from the sexual assault of his minor daughter, including three counts of criminal violation of a restraining order in violation of General Statutes § 53a-223b.[1] The Appellate Court upheld his convictions. *State* v. *Elmer G.*, 176 Conn. App. 343, 383, 170 A.3d 749 (2017). On further appeal to this court, the defendant claims that the state presented insufficient evidence to convict him of any of the counts of criminal violation of a restraining order. In addition, he claims that he was deprived of a fair trial as a result of certain improprieties committed by the prosecutor. We disagree with both claims and affirm the judgment of the Appellate Court.

[1] General Statutes § 53a-223b (a) provides in relevant part: "A person is guilty of criminal violation of a restraining order when (1) (A) a restraining order has been issued against such person pursuant to section 46b-15 . . . and (2) such person, having knowledge of the terms of the order . . . (B) contacts a person in violation of the order. . . ."

The jury reasonably could have found the following facts. The victim's parents—the defendant and his former wife, A.N.—originally are from Guatemala. The victim was born to the couple in 1996, and, two years later, the defendant immigrated to the United States. A.N. came to the United States two years after that, leaving the victim in Guatemala with relatives. The defendant and A.N. had four other children after they arrived in the United States.

The defendant would visit Guatemala about once a year. During one of these visits, in 2007, when the victim was about ten years old, the defendant began sexually abusing her. In 2010, when the victim was thirteen years old, the defendant had relatives smuggle her into the United States and to the family's Connecticut home. About two weeks after she arrived, the defendant again started sexually abusing her. The defendant also verbally and physically abused the victim, A.N., and the victim's younger siblings "[a]ll the time."

The Department of Children and Families (department) twice investigated allegations that the defendant had abused family members. In June, 2011, it investigated a report that the defendant had physically abused one of the victim's younger brothers. In January, 2012, the defendant left the United States for a planned visit to Guatemala. Soon after he left, one of the victim's brothers complained to school officials about a recent incident in which the defendant threatened A.N. and cut her with a knife.[2] The department opened a second investigation at this point. Although the victim had not

[2] A.N. acknowledged that her son had inaccurately reported that the defendant actually cut her with the knife. She described the incident as follows: "[Our son], the little kid, he didn't want to eat, so [the defendant] got upset and grab a knife. I got in the middle of it, and he was gonna kill me, so [the victim] got in the middle . . . ." The defendant injured the victim with a knife on a separate occasion, however, and held a knife to her neck on another occasion.

yet disclosed the sexual abuse to anyone, the department was aware of "continuous domestic violence complaints . . . ."

In early March, 2012, while the investigation was ongoing and a few days before the defendant was to arrive back in the United States, the victim encouraged A.N. to report the defendant's physical abuse to the police, which she did. Although the police indicated that they were unable to help the family at that time, the department immediately began to assist the family. Among other things, it moved the family to another town and helped A.N. secure an ex parte restraining order against the defendant.

In relevant part, the ex parte order (1) prohibited the defendant from contacting A.N. and her children, (2) granted A.N. custody of the children, (3) denied the defendant visitation rights, and (4) scheduled a hearing on the matter for March 15, 2012. Days later, the defendant returned from Guatemala and was served personally with the order. The court held a temporary restraining order hearing as scheduled, which the defendant attended with his counsel. As a result of the hearing, the court issued a temporary restraining order that, in relevant part, retained the same contact restrictions but granted the defendant "[w]eekly, supervised" visitation with the children. Defense counsel advised him of the order's terms in private, the judge and a victim advocate informed him of the terms in open court, and he received a physical copy of the order. The defendant, who primarily speaks Spanish, had the proceedings translated for him by either a court-appointed interpreter or by his bilingual attorney.[3]

[3] The facts concerning the conduct at the temporary restraining order hearing derive from a transcript of the hearing admitted into evidence as exhibit 51 and submitted to the jury. Except for the referenced remarks, most of the transcript of that hearing—including any testimony the court heard in support of the order—was redacted, as agreed to by the parties, and therefore was not submitted to the jury.

After the order was in place, the defendant contacted the victim on at least three occasions. First, on March 28, 2012, he sent the victim a text message. The victim "felt unsafe" after receiving it and reported it to the police the same day. Second, at some point between April 1 and 9, 2012, the defendant sent the victim a letter. On April 9, 2012, the victim again went to the police, reported the letter and, for the first time, disclosed that the defendant had sexually abused her. Finally, on April 10, 2012, the defendant sent the victim another text message, which the victim reported to the police. Additional facts will be set forth as necessary.

The record also reflects the following procedural history. In addition to alleging the three counts of criminal violation of the restraining order, the state charged the defendant with three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). Following a trial, a jury found the defendant guilty of two counts of sexual assault in the second degree, two counts of risk of injury to a child, and all three counts of criminal violation of a restraining order. The jury found the defendant not guilty of one count of sexual assault in the second degree and one count of risk of injury to a child. The court denied the defendant's posttrial motions for a judgment of acquittal, to set aside the jury's verdict, and for a new trial. On the sexual assault and risk of injury counts, the defendant received a total effective sentence of forty years of imprisonment, execution suspended after twenty-five years, followed by twenty-five years of probation. On the restraining order violation counts, the defendant received a sentence of five years imprisonment on each count, to run concurrently with the sexual assault and risk of injury sentences.

The defendant appealed to the Appellate Court, which affirmed the judgments of conviction. *State* v. *Elmer G.*, supra, 176 Conn. App. 383. He then petitioned this court for certification to appeal, which we granted, limited to the following issues: (1) "Did the Appellate Court properly conclude that there was sufficient evidence to support the defendant's conviction for criminal violation of a restraining order?" And (2) "[d]id the Appellate Court properly conclude that the defendant was not deprived of his right to a fair trial by prosecutorial impropriety?" *State* v. *Elmer G.*, 327 Conn. 971, 173 A.3d 952 (2017).[4]

I

The defendant first claims that the state presented insufficient evidence for a reasonable jury to have concluded that he contacted the victim in violation of the temporary restraining order against him. We disagree.

In reviewing a claim of insufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the verdict. E.g., *State* v. *Moreno-Hernandez*, 317 Conn. 292, 298, 118 A.3d 26 (2015). We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt. Id. A defendant is guilty of a criminal violation of a restraining order if he (1) had a restraining order issued against him, (2) had "knowledge of the terms of the order," and (3) "contact[ed] a person in violation of the order . . . ." General Statutes § 53a-223b (a).

On appeal, the defendant does not dispute that he had a restraining order issued against him and that he contacted the victim twice by text message and once by letter. Rather, he argues that the state presented insufficient evidence that (1) he had "knowledge of the terms of the order" because the court's explanation of

[4] We declined to certify a question regarding whether there was sufficient evidence to support the defendant's conviction of sexual assault.

the order to him was unclear, and (2) because he does not read or understand English and the terms were not translated for him, and (3) the contact via letter with the victim was "in violation of the order" because it occurred before the order was in place.

We first set forth the terms of the order. The temporary restraining order the court entered against the defendant consisted of four standardized Judicial Branch forms stapled together. The first was a single page form titled "Order of Protection." That form required the issuing court to identify a "[p]rotected [p]erson" (A.N.) and a "[r]espondent" (the defendant), who were to be the subjects of the order's protections and prohibitions, respectively. It then listed several terms the defendant had to follow, two of which are relevant to this appeal. The first term prohibited the defendant from contacting A.N. and certain people close to her: "Do not contact the protected person in any manner, including by written, electronic or telephone contact, and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." The second term notified the defendant that he would find "[a]dditional terms" on a form titled "Additional Orders of Protection."

That single page form, "Additional Orders of Protection," contained a different list of terms, one of which extended A.N.'s protection to her children: "This order also protects the protected person's minor children." Below that appeared a section labeled "Temporary Child Custody and Visitation," in which the court permitted the defendant visitation as follows: "Weekly, supervised visits with children. The first three visits are to be supervised by Visitation Solutions, Inc., and thereafter by [the defendant's sister]."

Two other single page forms were also attached. On one, titled "Ex Parte Restraining Order/Restraining

Order: Worksheet Only," the previously referenced terms—the contact restriction, the protection of A.N.'s children, and visitation—were reiterated. The other form, titled "General Restraining Order Notifications (Family)," contained basic information about the order, including that these documents constituted a restraining order, that violating the order was a criminal offense, that the recipient must comply with both the "Order of Protection" and "Additional Orders of Protection" forms, and that contacting a protected person could violate the order. The final form was a Spanish language translation of the notifications form.

From these forms, a reasonable jury could have found that the temporary restraining order limited the defendant's contact with his children to weekly, supervised visits and, thus, that by initiating unsupervised contact with the victim via text message and letter, the defendant "contact[ed] a person in violation of the order . . . ." General Statutes § 53a-223b (a).[5] The "Order of

[5] The defendant's appellate counsel discussed at oral argument before this court an inconsistency, which was not discussed in the briefs, between the no contact term and the term granting visitation: the former prohibited "contact . . . in any manner" with the children, whereas the latter permitted "visits" with them. This arguably rendered the order ambiguous. Because this argument was raised for the first time at oral argument, however, we are not obligated to consider it. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

We emphasize that, although our courts generally examine an order of another court as a question of law subject to plenary review and construe it "in the same fashion as other written instruments"; (internal quotation marks omitted) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010); the defendant has never before challenged the scope or clarity of the terms of the order as a matter of law (or, even, of fact). Rather, on appeal, he challenges only his *knowledge* of the order's terms as an insufficiency claim. Appellate counsel specified at oral argument that even the inconsistency of the written order only "goes to his knowledge." If the defendant had wanted to argue to this court, as a matter of law, that the order failed to adequately inform him that this kind of contact was prohibited, then we would agree with the well reasoned opinion of the concurring Appellate Court judge that he could have done so via a vagueness challenge. See *State* v. *Elmer G.*, supra, 176 Conn. App. 391 (*Prescott*, *J.*, concurring).

Protection" form plainly provides: "Do not contact the protected person in *any* manner, including by written, electronic or telephone contact . . . ." (Emphasis added.) The minor children term made this contact restriction applicable to A.N.'s children: "This order

Similarly, at trial, the defendant evidently elected "to have the jury decide, as a factual question, whether he had knowledge of the terms of the orders." Id. He "never moved to dismiss the counts of the information on the ground that they were insufficient as a matter of law . . . ." Id. Nor did he even place the scope or clarity of the order squarely before the jury by "submit[ting] any particular request to charge that would seek . . . a jury determination regarding the question of whether the restraining orders were sufficiently clear and unambiguous." Id.

In any case, the defendant's argument fails as an insufficiency claim because the no contact and visitation terms are reconcilable under a reasonable reading of the order. In reviewing an insufficiency claim, we ask "whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Moreno-Hernandez*, supra, 317 Conn. 299. Each inference of fact supporting the verdict "need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). When the terms are read together, a reasonable view of them supports the jury's verdict of guilty because the visitation term was a limited modification of the contact restriction. In other words, the defendant was not to contact his children, except for weekly, supervised visits.

The inference that the defendant was not to contact the children outside of court-approved visitation is further supported by (1) the court's explanation of the order to the defendant ("you can have contact with your children but for now we need it supervised" and "[i]t's to be weekly and supervised"), (2) the victim advocate's characterization of the order to the court ("[c]ontact with the kids [will] be limited to weekly, supervised visits"), (3) the no contact term itself, which prohibits contact with anyone "likely to cause annoyance or alarm to" A.N. and, thus, also reasonably could be found to prohibit contact with the children, (4) the fact that A.N. and the victim interpreted the order to prohibit contact with the children (they immediately reported contact to the police as violations of the order), and (5) the absence of this inconsistency in the ex parte restraining order, which did not grant visitation and therefore unequivocally restricted contact with the children.

We also note that an alternative reading of these terms, in which they are read to conflict, would render one of them meaningless. If the defendant can "visit" with the children but also has an absolute restriction on "contact" with them, exercising his right under the visitation provision would result in a violation of the no contact provision. Conversely, absolute respect for the no contact provision would make the visitation provision pointless. Although the order is not a model of clarity, reading these terms in harmony is not just *a* reasonable way to interpret the order, it is the *only* reasonable interpretation.

also protects the protected person's minor children." Although this language does not expressly state that the defendant could not contact the children, a jury reasonably could infer it from the "Additional Orders of Protection" form. The language, "[t]his order *also* protects," indicates that the terms on the primary form "also" apply to the protected person's minor children. (Emphasis added.)

The no contact term itself also applies not only to the protected person, but to "others with whom the contact would be likely to cause annoyance or alarm to the protected person." A reasonable jury therefore could find that unsupervised contact with the children "would be likely to . . . alarm" A.N. on the basis of the defendant's history of verbally and physically abusing family members, which included the events that directly precipitated the order: his threats to A.N. with a knife, which occurred in front of her children, and hitting A.N. when she would get between him and the children in an effort to protect them when he was hitting the children, after which she went to the police and was taken to a shelter by the department along with her children in an effort to keep the children away from the defendant.

A

The defendant first argues that there was insufficient evidence from which the jury could conclude that he had "knowledge of the terms of the order"; General Statutes § 53a-223b (a); because the court's explanation of the order at the temporary restraining order hearing "created an ambiguity" about its scope. We disagree. The court expressly instructed the defendant to limit "contact" with the children to weekly, supervised visits.

"A person acts 'knowingly' with respect to . . . a circumstance described by a statute defining an offense when he is aware . . . that such circumstance exists . . . ." General Statutes § 53a-3 (12). Knowledge is typically inferred. E.g., *State* v. *Simino*, 200 Conn. 113, 119,

509 A.2d 1039 (1986) ("[o]rdinarily, guilty knowledge can be established only through an inference from other proved facts and circumstances" [internal quotation marks omitted]).

The temporary restraining order hearing proceeded as follows. Defense counsel stated that he had reviewed the order with the defendant and his sister, and that the victim advocate had also been present to answer questions. Defense counsel also confirmed that he would "make [the defendant] understand" the proceedings. The victim advocate and the court then had the following discussion:

"The Victim Advocate: What we've agreed upon is that *it would be considered a no contact restraining order*.

"The Court: *As far as mom is concerned*?

"The Victim Advocate: *As far as mom is concerned*.

"The Court: Right.

"The Victim Advocate: *Contact with the kids* [*will*] *be limited to weekly, supervised visits*.

"The Court: *Contact with minor children weekly, supervised. Yes*?

"The Victim Advocate: To fully cooperate with all of [the department's] recommendations.

"The Court: Yes?

"The Victim Advocate: The first three visits will be through Visitation Solutions [Inc.]

"The Court: Okay.

"The Victim Advocate: The following visits will be through the sister . . . ." (Emphasis added.)

Thereafter, the court addressed the defendant directly: "I am going to order a temporary restraining order. *Now, as to* [*A.N.*] *and the five children*, sir, you are not to assault, threaten, abuse, harass, follow, interfere with or stalk. You are to stay away from the home of [A.N.] or wherever she's residing, and *you're not to contact her in any manner*. As far as the children are concerned, *you can have contact with your children but for now we need it supervised. It's to be weekly and supervised*. The first three visits you have with the children will take place at Visitation Solutions, Inc., and you will pay the fee. That's for the first three visits, starting next week. After that, your weekly visitation will be supervised by your sister . . . . Any contact that you need to have with your wife, or that your wife needs to have with you, will go through a third party . . . ." (Emphasis added.) We conclude that the court's explanation was not so unclear that the jury could not reasonably have determined that the defendant knew he was prohibited from contacting the children, outside of weekly, supervised visits.

The defendant relies primarily on the fact that the court specified that the no *assault* term applied to both A.N. and her minor children, but did not likewise specify that the no *contact* term applied to both A.N. and the children. We are not persuaded. Immediately after mentioning the no contact term as applied to A.N., the court specified to the defendant: "[Y]ou can have *contact* with your children but for now we need it supervised." (Emphasis added.) The court clarified that contact would be "weekly and supervised." Previously, in the presence of the defendant, the victim advocate similarly characterized the order, stating: "*Contact* with the kids [will] be limited to weekly, supervised visits." (Emphasis added.)

It is possible to infer that the court and the victim advocate each meant "visitation" when they said "con-

tact," given the references to visitation that followed. If the jury drew this inference, then it would have concluded that neither actually mentioned a restriction on contact between the defendant and the children. Defense counsel made this argument to the jury: "I think what you'll see when you review this transcript is not much by the way of clear. And I say this because I think when you read it, it's going to be evident to you that, at best, what this was, was that the court and everybody talking about these things didn't really think about what to do with communication with the children because all of the other children were so young, so they didn't contemplate it. . . . *What's supervised contact mean? They were referring to the supervised visitation*." (Emphasis added.) The jury rejected this argument, however. Certainly, it was entitled to infer that the court and the victim advocate each "[thought] about what to do with communication" and meant what they said—"contact" with the children was prohibited, with the exception of weekly, supervised visits. The written order, the actions of A.N. and the victim, and the ex parte order supported this conclusion. See footnote 5 of this opinion.

B

The defendant also notes that he does not read or understand English and argues that the record does not show that he was informed, in his primary language, Spanish, that he was prohibited from contacting the children by text or letter. Therefore, he contends that he lacked "knowledge of the terms of the order . . . ." General Statutes § 53a-223b (a). We disagree. On at least three occasions, the defendant heard Spanish language translations of the terms of the order. The jury also reasonably could have found that the letter he sent to the victim was evidence that he knew he was not permitted to contact the children outside of court-approved visits.

The defendant is a native of Guatemala and required a Spanish language interpreter at the restraining order hearing.[6] There was evidence, however, that he was fully apprised of the terms of the order in Spanish by his attorney, the court and the victim advocate.

First, defense counsel privately advised the defendant of the terms of the order. Counsel confirmed to the court that he was "fluent enough in Spanish that [he] could make [the defendant] understand what is said in English in this court . . . ." Defense counsel also stated that he had "looked at all the papers" and had "gone over that proposed [order] with [the defendant] . . . ." The defendant's sister had attended that meeting, and the victim advocate also had been present to answer questions.

The second and third instances of the defendant's receiving a Spanish language interpretation of the terms of the restraining order were through the on-the-record descriptions of the order by the court and the victim advocate. For a portion of the hearing, the defendant had the assistance of a Spanish language interpreter provided by the court. For the remainder of the hearing, including during the comments of the victim advocate and the court set forth previously, defense counsel served as the defendant's interpreter. Although defense counsel argued to the jury that "things get lost in translation" and that "we have no idea what was understood [by the defendant]," there was no evidence that the translations were inaccurate or that the order entered by the court differed from the proposed order the defendant had reviewed with his attorney. Thus, the jury reasonably could have inferred that each of these three translations was an accurate description of the order.

Finally, the defendant asked the victim's sibling to deliver the letter to the victim, rather than delivering

[6] At the defendant's criminal trial, the victim also testified that the defendant only "knew a little bit" of English.

it himself. As the Appellate Court aptly reasoned, this "suggests that the defendant knew that he could not have contact with the victim outside of their weekly, supervised visits, which the victim was refusing to attend." *State* v. *Elmer G.*, supra, 176 Conn. App. 361.[7]

[7] There was also evidence that the defendant received a physical copy of the order. A court clerk testified that it is the court's usual procedure to mail a temporary restraining order to a defendant after a hearing. Although we cannot say that the defendant's receipt of these orders would have itself been sufficient to establish his knowledge of the specific terms of the order, neither can we conclude that it was irrelevant to the jury's determination.

As noted in part I A of this opinion, one of the forms was printed in Spanish. It told the defendant that the documents he had received were a restraining order, a violation of the order was a criminal offense, and contacting a protected person might violate the order. The other forms also contained some material information that did not require translation, such as the names of his wife and children. Thus, it was entirely reasonable for the jury to infer that the defendant knew he was under some type of contact restriction with his wife and children on the basis of the forms alone.

For some courts, if a defendant receives a restraining order, he is deemed to have knowledge of its contents. E.g., *People* v. *Williams*, 118 App. Div. 3d 1295, 1296, 987 N.Y.S.2d 772 ("defendant's signature acknowledging receipt of the order of protection establishes that it was served and that [s]he was on notice as to its contents" [citations omitted; internal quotation marks omitted]), appeal denied, 24 N.Y.3d 1090, 25 N.E.3d 354, 1 N.Y.S.3d 17 (2014); see *Smith* v. *State*, 999 N.E.2d 914, 917 (Ind. App. 2013) (rejecting defendant's argument that officer "had to inform him of every specific term" in protective order to establish knowledge of its terms); see also *Commonwealth* v. *Delaney*, 425 Mass. 587, 592, 682 N.E.2d 611 (1997) ("[c]learly, a showing that a defendant was served with a copy of a court order is strong evidence that a defendant had knowledge that certain conduct . . . could result in a criminal conviction"), cert. denied, 522 U.S. 1058, 118 S. Ct. 714, 139 L. Ed. 2d 655 (1998). In at least one jurisdiction, this presumption applies even if the order is written in English and English is not the defendant's primary language. See *Cardenas-Najarro* v. *Commonwealth*, Record No. 0699-13-4, 2014 WL 820544, *4 (Va. App. March 4, 2014) ("Once an order is served on a litigant, the litigant is deemed to have notice of the document . . . . [The] [a]ppellant cites no authority, and we find none to say, that the process server must explain the document to the recipient in order for him to have knowledge of the terms of the order. . . . If the litigant is properly served, it is incumbent upon the recipient to learn the import of the order." [Citations omitted.]).

We do not rely on the defendant's receipt of a physical copy of the order in this case, however, because of the other evidence that the defendant had knowledge of its terms. Cf. *State* v. *Wiggins*, 159 Conn. App. 598, 605 n.7, 124 A.3d 902 (2015) (declining to decide whether defendant had sufficient knowledge of protective order under General Statutes § 53a-223 based on presumed receipt of order), cert. denied, 327 Conn. 908, 170 A.3d 4 (2017).

Therefore, we conclude that the state presented sufficient evidence that the defendant had "knowledge of the terms of the order" prohibiting him from having unsupervised contact with his children via text message or letter.[8] General Statutes § 53a-223b (a).

C

Finally, regarding the third count of criminal violation of a restraining order, the defendant argues that the state presented insufficient evidence that he sent a letter to the victim while the order was in effect, and, thus, this instance of contact was not in violation of

[8] By affirming the defendant's conviction on these counts, we simply conclude that, given the record in this case and the defendant's arguments on appeal, we cannot say that no reasonable jury could have found the defendant guilty of the charges of violating the restraining order. Looking beyond the facts of this case, we understand that the Judicial Branch is committed to ensuring that persons who appear before our state's courts receive the tools necessary to understand the proceedings in which they participate and the orders issued therein, consistent with the Judicial Branch's mission to serve "the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient and open manner." To facilitate "meaningful access to the court system and its programs and services," the Judicial Branch has committed to robust efforts to overcome language barriers that limited English proficient (LEP) litigants face when appearing in court, which are implemented via the comprehensive Language Access Plan. See State of Connecticut, Judicial Branch, Language Access Plan (Rev. 2019) p. 2, available at https://jud.ct.gov/LEP/LanguageAccessPlan.pdf (last visited September 9, 2019). The Language Access Plan requires, for example, that the forms provided by the Judicial Branch and regularly used by the public in our court system are made available in the languages most often spoken by those who use them; see id., p. 9; and that interpreters and translation services are available "at no cost, for LEP parties and other LEP individuals, such as witnesses and victims, whose presence or participation is appropriate to the justice process." Id., p. 7. We urge all state judicial officers and Judicial Branch employees to continue to take pains to make certain that those appearing before our courts have been afforded the available interpreting and translation services necessary to enhance their understanding of matters involving them. And, even when any language barrier has been addressed, we emphasize that our trial courts must make certain that the orders they issue are clear, such as by making sure that restraining orders are specific about what forms of contact are being prohibited so there can be no misunderstanding. We can only expect confidence in our courts and respect for court orders that is commensurate with the efforts on the part of the entire Judicial Branch to ensure greater understanding and meaningful participation by those who come before us.

the order. We disagree. The victim testified that she received the letter at some point between April 1 and 9, 2012, while the order was in effect. There was also evidence that the defendant had given the letter to one of her siblings at one of the visits permitted under the order, which, of course, would have occurred while the order was in effect. Finally, the contents of the letter—the defendant's pleas to the victim to meet with him—suggest that it was written in response to the victim's refusal to attend the court-approved visits, which, again, would have occurred while the order was in effect.

II

The defendant next claims that the prosecutor committed several improprieties. Specifically, he argues that the prosecutor improperly (1) bolstered the credibility of two witnesses during questioning, (2) vouched for the victim during closing argument to the jury, and (3) attempted to evoke sympathy for the victim during closing argument.[9] We disagree with each of the defendant's arguments.

We apply a two step analysis for claims of prosecutorial impropriety. *State* v. *Warholic*, 278 Conn. 354, 361, 897 A.2d 569 (2006). First, we determine whether any impropriety occurred. Id. Second, we determine whether any impropriety deprived the defendant of his due process right to a fair trial, relying on the factors enumerated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). *State* v. *Warholic*, supra, 361. It is the defendant's burden to show that the prosecutor's conduct was improper and that it constituted a denial of due process. *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). If a prosecutor's remark is ambiguous,

[9] The defendant also notes other comments made by the prosecutor and offers other grounds as to why they were improper. He did not, however, object to those comments at trial or raise them on appeal to the Appellate Court. Therefore, we do not consider them. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 26 n.1, 917 A.2d 978 (2007).

this court should not " 'lightly infer' " that it is improper. Id. Upon our review of the challenged remarks, we do not find any of them to be improper.

A

The defendant first argues that the prosecutor's questioning improperly bolstered the credibility of two witnesses. We disagree. This court has held that similar conduct by prosecutors is not improper. Moreover, the defendant alleges evidentiary violations and fails to identify any harm of a constitutional nature, upon which claims of prosecutorial impropriety rest. We therefore conclude that the prosecutor's conduct was not improper.

The defendant specifically challenges two lines of questioning between the prosecutor and the state's witnesses. The first line of questioning occurred at the end of the direct examination of the victim:

"[The Prosecutor]: [*A*]*re you making this stuff up*?

"The Victim: No.

"[The Prosecutor]: *Has anybody put you up to testifying the way that you have testified here today in court*?

"The Victim: No.

"[The Prosecutor]: In your own words, why are you doing it?

"The Victim: Because I wanted to get out of the life that I had with him." (Emphasis added.)

The second line of questioning occurred on redirect examination of Lourdes Lopez, a pastor at the victim's church, to whom the victim had disclosed the defendant's sexual abuse. On direct examination, Lopez had testified that she had observed the victim crying and, on that basis, decided to talk to her about her home life, which ultimately led to the victim's disclosure. On

cross-examination, defense counsel questioned Lopez' motives for approaching the victim—whether it was her own idea to talk to the victim or whether she had been convinced to do so by Altagracia Lara, a social worker who was helping the family. Lopez conceded that Lara had asked her to ask the victim about whether "anything was happening" with the defendant.[10] On redirect examination, the prosecutor attempted to rehabilitate Lopez during the following colloquy:

"[The Prosecutor]: You were asked a series of questions about a conversation you had with Altagracia Lara. Do you recall those?

"[Lopez]: It was just a phone call.

"[The Prosecutor]: And Alta [Lara] asked you to do something, didn't she?

"[Lopez]: She only said to me that, since I was closer to [the victim], probably, I should ask her about what was going on with her and her dad.

"[The Prosecutor]: So, when you asked [the victim] about what was happening, in your mind, when you asked that question, you had planned to ask that question. Correct?

"[Lopez]: Yes.

[10] The following colloquy occurred between defense counsel and Lopez:

"[Defense Counsel]: And you said this was a decision on your own [to talk to the victim about her father]?

"[Lopez]: Oh, you're just trying to confuse me.

"[Defense Counsel]: Do you know a woman named Altagracia—Altagracia Lara?

"[Lopez]: Yes. When she called me just to—asking me that, that was a confirmation of what I already observed based on [the victim's] attitude. But that didn't have anything to do with the church. . . .

"[Defense Counsel]: It was Altagracia Lara who asked you to ask [the victim] . . . if anything was happening with her dad. Isn't that true?

"[Lopez]: Yes.

"[Defense Counsel]: And that is, in fact, why you asked [the victim] about whether anything was happening with her father. True?

"[Lopez]: Yes."

"[The Prosecutor]: And you said earlier you chose that moment because you felt she was weak?

"[Lopez]: Yes.

"[The Prosecutor]: In addition to Altagracia [Lara] telling you to ask that question, did you have any intention [of] asking that question yourself?

"[Lopez]: Yes.

"[The Prosecutor]: *Is that the truth*?

"[Lopez]: Yes. . . .

"[The Prosecutor]: Were you considering asking [the victim] even before Alta [Lara] called you?

"[Lopez]: Yes.

"[The Prosecutor]: And why was—why were you intending to do that?

"[Lopez]: Because of the way [the victim] was behaving." (Emphasis added.)

Under our evidence code, evidence bolstering a witness' credibility generally is inadmissible but may become admissible if the witness' credibility first has been attacked. See Conn. Code Evid. § 6-6 (a). Viewed in isolation, the prosecutor's questions, emphasized previously, which attempted to bolster the witnesses' credibility, might appear to violate this rule. However, defense counsel's cross-examination of the victim and Lopez at least arguably constituted attacks on their credibility. Because defense counsel did not object to any of the prosecutor's questions, we have no ruling from the trial court on whether defense counsel in fact had placed the witnesses' credibility at issue. Therefore, the issues the defendant raises are unpreserved. See, e.g., *State* v. *Edwards*, 99 Conn. App. 407, 412, 913 A.2d 1103, cert. denied, 281 Conn. 928, 918 A.2d 278 (2007). The defendant nonetheless seeks review of these ques-

tions under the rubric of prosecutorial impropriety, which implicates a constitutional right and is therefore subject to review despite the absence of an objection at trial. See, e.g., *State* v. *Angel T.*, 292 Conn. 262, 274–75, 973 A.2d 1207 (2009) (unpreserved claim of prosecutorial impropriety subject to review, although methodology of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 [1989], is inapplicable).[11] We conclude, however, that the prosecutor's conduct was not improper.

The defendant primarily relies on *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002). In that case, this court held that it was improper to ask a witness to comment on another witness' veracity. Id., 712. We offered two reasons for the conclusion. First, we stated that "determinations of credibility are for the jury, and not for witnesses." (Internal quotation marks omitted.) Id., 707. These questions lack probative value because whether another witness had lied is beyond the competence of the testifying witness. Id., 708. Second, we were concerned that these questions could confuse the jury: "[Q]uestions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . A witness' testimony, however, can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as misrecollection, failure of recollection or other

[11] The Appellate Court "decline[d] to review [the claim] under the prosecutorial impropriety framework." *State* v. *Elmer G.*, supra, 176 Conn. App. 371. Instead, it treated the claim as evidentiary and dismissed it as unpreserved. Id. We address the claim under the prosecutorial impropriety framework because we have addressed similar issues under that framework in the past. E.g., *State* v. *Maguire*, 310 Conn. 535, 562, 78 A.3d 828 (2013) ("because the state's case rested entirely on the victim's credibility, any improper remarks by the prosecutor that tended to bolster [the victim's] credibility, or to diminish that of the defendant, may very well have had a substantial impact on the verdict"); see also *State* v. *Taft*, 306 Conn. 749, 764, 51 A.3d 988 (2012); *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002).

innocent reason." (Citations omitted; internal quotation marks omitted.) Id. "This risk was especially acute" when a government agent testified because a government agent often is perceived to have " 'heightened credibility,' " and, thus, a jury might hesitate to find that the government agent lied. Id.

This court subsequently clarified that a question about the witness' *own* veracity was not necessarily improper. See *State* v. *Taft*, 306 Conn. 749, 764–65, 51 A.3d 988 (2012). In *Taft*, a witness gave an account of an event on direct examination but admitted on cross-examination that she previously had given a different account. Id. On redirect examination, the prosecutor asked the witness whether she was now lying. Id., 765. This question was not improper because "the prosecutor merely provided the jury with information relevant to determining why [the witness] may have changed her story and whether it should believe the version of events that she testified to at trial." Id. We distinguished *Singh* on the ground that "[s]uch testimony . . . did not improperly invade the province of the jury in determining whether [the witness] was credible. Indeed, exploring [the witness'] motivation for lying and her awareness of the ramifications of not telling the truth is exactly the type of information a jury requires to make an appropriate determination regarding a witness' credibility." Id.

As in *Taft*, both concerns identified by *Singh* are inapplicable to this case. First, information about the victim's and Lopez' *own* "motivation for lying . . . is exactly the type of information a jury requires" to assess their credibility. Id. Although the challenged question in *Taft* occurred on redirect examination, its reasoning applies equally to the prosecutor's questions on direct examination of the victim here because the questions went to her own credibility. Further, as we will describe more fully, defense counsel would go on to put the

victim's credibility squarely before the jury throughout the trial, including in his cross-examination of her.[12] E.g., *State* v. *Thomas*, Docket No. M2010-01394-CCA-R3CD, 2011 WL 5071917, *8 (Tenn. Crim. App. October 4, 2011) (not improper to ask "victim if she had been truthful" before defendant "cross-examined the victim extensively" on credibility).

Second, the prosecutor's questions were unlikely to confuse the issues for the jury. In no uncertain terms, defense counsel told the jury: "This didn't happen." His theory of the case was that the victim and Lopez were lying: "[The defendant] didn't do the things that he's being accused of. And it comes in the form of fabrication. Because at the end of the day, that's what this is." Defense counsel also offered a motive for them to lie: serious allegations against the defendant would secure financial aid from state agencies, give A.N. grounds for divorce, and give A.N. and the victim a basis for legal status in the United States. These issues also had been explored at length during examination of the witnesses. Moreover, the victim's graphic depictions of sexual, verbal, and physical abuse were especially unlikely to result from " 'misrecollection [or] failure of recollection,' " and neither witness was a government agent. *State* v. *Singh*, supra, 259 Conn. 708.

Our conclusion is further supported by consideration of the concerns underlying both a prosecutorial impropriety claim and the evidentiary rule prohibiting ques-

[12] We also note that *Taft* relied on *State* v. *Vazquez*, 79 Conn. App. 219, 231 n.10, 830 A.2d 261, cert. denied, 266 Conn. 918, 833 A.2d 468 (2003), which involved questions on cross-examination. In that case, the Appellate Court stated: "We interpret the remarks in question as inquiries into their potential motivation for lying and their awareness of the ramifications of not telling the truth. We have long held that [a]n important function of cross-examination is the exposure of a witness' motivation in testifying. . . . We conclude that this is equally true of direct examination. Those questions, therefore, were not improper." (Citation omitted; internal quotation marks omitted.) Id.; see *State* v. *Taft*, supra, 306 Conn. 764.

tions bolstering a witness' credibility before an attack on that witness' credibility. Due process and fundamental fairness underlie prosecutorial impropriety claims. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 571, 849 A.2d 626 (2004) ("[t]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial" [internal quotation marks omitted]). The evidentiary rule underlying the defendant's claim, on the other hand, exists to promote judicial efficiency: "As of the time of the direct examination, it is uncertain whether the cross-examiner will attack the witness's credibility . . . . If the opposing counsel [does not attack the witness' credibility], all the time devoted to the bolstering evidence on direct examination will have been wasted." 1 C. McCormick, Evidence (7th Ed. 2013) § 33, pp. 204–205; see also Fed. R. Evid. 608, advisory committee notes ("enormous needless consumption of time which a contrary practice would entail justifies the limitation"). Because the evidentiary rule against preemptive bolstering of a witness' testimony has its roots in efficiency, rather than fairness, we will not in the present case rely on it as a basis on which to adjudicate a claim of prosecutorial impropriety. Cf. *State* v. *Ruffin*, 144 Conn. App. 387, 399, 71 A.3d 695 (2013) ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature" [internal quotation marks omitted]), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015). Therefore, we conclude that the prosecutor's questions to the victim and Lopez about their truthfulness were not improper.

B

The defendant points to three comments the prosecutor made during closing argument and argues that each was an improper attempt to evoke sympathy for the victim. We disagree and address each comment in turn.

"[A] prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim . . . ." *State* v. *Long*, 293 Conn. 31, 59, 975 A.2d 660 (2009). This kind of argument "invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) Id.

The prosecutor, in the first challenged comment, asked the jurors to consider their own perspectives: "[The victim was] asked . . . why are you saying these things about your father? And here's what she said: 'I had to get out of the life I had with him.' *If you were in her position, would you feel the same way*?" (Emphasis added.) The defendant argues that this was an improper "golden rule" argument.[13] We disagree.

"[A] golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 53–54. But we have repeatedly recognized that "not every use of rhetorical language or device is improper." (Internal quotation marks omit-

[13] The Appellate Court addressed the prosecutor's comment but did so on different grounds without mentioning the defendant's "golden rule" argument. See *State* v. *Elmer G.*, supra, 176 Conn. App. 378–79 and 378 n.12; see also *State* v. *Long*, supra, 293 Conn. 53–54 ("[a] golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes" [internal quotation marks omitted]). Although we do not address several of the defendant's other arguments, which were not discussed by the Appellate Court; see footnote 5 of this opinion; we address this one. Unlike the defendant's other arguments, which are raised for the first time on appeal to this court, the defendant raised this argument, albeit in passing, in his brief to the Appellate Court.

ted.) *State* v. *Warholic*, supra, 278 Conn. 366. Specific to golden rule arguments, we have acknowledged that the "animating principle behind the prohibition . . . is that jurors should be encouraged to decide cases on the basis of the facts as they find them, and reasonable inferences drawn from those facts, rather than by any incitement to act out of passion or sympathy for or against any party." *State* v. *Long*, supra, 57–58. In this light, a prosecutor may ask jurors to place themselves in the shoes of a victim, so long as he does so only as a rhetorical device "to encourage the jurors to draw inferences from the evidence . . . on the basis of . . . how a reasonable [person] would act under the circumstances." Id., 58; see also, e.g., *State* v. *Stephen J. R.*, 309 Conn. 586, 607, 72 A.3d 379 (2013) ("by having the jurors put themselves in [the victim's] place . . . the prosecutor was arguing that [the victim's] statements . . . were consistent with how a reasonable child her age would react under the specific circumstances"); *State* v. *Campbell*, 141 Conn. App. 55, 64–65, 60 A.3d 967 ("prosecutor used 'you' in a way that the jurors could distinguish as a request for them to view evidence as a reasonable person, and not as an appeal for them to empathize with the victim"), cert. denied, 308 Conn. 933, 64 A.3d 331 (2013).

Here, the challenged comment was directed at the victim's credibility, which, as discussed in part II A of this opinion, was squarely at issue. It was preceded by a litany of evidence that the victim was credible, including prior consistent statements and the various psychological, social and physical barriers she had to overcome in order to testify.[14] The prosecutor specified

[14] In full, the prosecutor's argument was: "[The victim] told the story [to] Lourdes Lopez. She told it to her mom. She told it to the police. She told it to [a forensic pediatrician]. She told it to Julia Jiminez [the victim's school guidance counselor], and she told it to this jury. Remember what she's had to do. She's [gone] through counseling. She's [gone] through medical exams. She's [gone] through interviews. She's [gone] through court appearances. And she's gone through cross-examination. And after all that, I am arguing

that the jury could infer that she was credible on the basis of this evidence and not on the basis of emotion: "And after all that, I am arguing to you that *this evidence shows* she's not fabricating these things." (Emphasis added.) He immediately followed the challenged statement by stating that the victim's conduct was consistent with how "a person" would react under these circumstances. See footnote 14 of this opinion. We conclude that the prosecutor's comment was a permissible attempt to encourage the jury, on the basis of how a reasonable person would view this evidence, to infer that the victim was not fabricating her testimony. The comment was not an improper attempt to encourage the jury to believe the victim out of passion or sympathy.

In the second challenged comment, the prosecutor referenced the victim's credibility, in light of the various psychological, social and physical barriers she faced in accusing the defendant of sexual assault: "[R]emember what the judge says about credibility. You [have] seen how a young woman who makes up a claim of sexual assault kind of has to come through and run the legal gauntlet. Even the members of her family can testify against her. But I think the evidence shows you that [the victim's] testimony has endured, it's remained intact in the core. . . . Remember what she's had to do. She's [gone] through counseling. She's [gone] through medical exams. She's [gone] through interviews. She's [gone] through court appearances. And she's gone through cross-examination. And after all that, I am arguing to you that this evidence shows she's not fabricating these things." These types of comments are permitted in Connecticut, and we decline the defendant's invitation to

to you that this evidence shows she's not fabricating these things. Defense focused on all of the supposed reasons she's fabricating these claims except for one. There's one they left out. . . . [The victim was] asked . . . why are you saying these things about your father? And here's what she said: 'I had to get out of the life I had with him.' *If you were in her position, would you feel the same way*? This is exactly what a person would say that was in this position." (Emphasis added.)

overrule this precedent. E.g., *State* v. *Felix R.*, supra, 319 Conn. 10 (not improper to "[recount] the difficulties that the victim faced during the investigation and trial"); *State* v. *Long*, supra, 293 Conn. 48 (not improper to ask jury "to infer that [the victim's] complaint was more credible because it required her to undergo an uncomfortable medical examination and embarrassing conversations with both her family members and complete strangers"); *State* v. *Warholic*, supra, 278 Conn. 377 (not improper to ask jury "to assess [the minor victim's] credibility by recognizing the emotional difficulty that [he] subjected himself to by making the allegations of sexual assault").

The prosecutor, in the third challenged comment, asked the jury whether other individuals in circumstances similar to the victim would fabricate sexual assault accusations: "[I]f a young girl such as [the victim] wanted to fabricate a lie, is this the lie they would fabricate? I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude." The defendant argues that this comment invited the jury to rely on extraneous matters because it is "irrelevant whether most young girls would make up such allegations—the issue was whether [the victim] did." "[A] prosecutor should not inject extraneous issues into the case that divert the jury from its duty to decide the case on the evidence." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 376. As stated previously, however, "not every use of rhetorical language or device is improper." (Internal quotation marks omitted.) Id., 366. Moreover, "the state may argue that a witness has no motive to lie"; id., 365; and may ask the jurors to draw inferences that are based on their "common sense and life experience." Id., 378. In this instance, the prosecutor's comment rebutted defense counsel's arguments that the victim fabricated her testimony. Although the prosecutor literally asked the jury how other young girls would respond

in similar circumstances, which is irrelevant, he did so as a rhetorical device to encourage the jury to infer that the victim was not fabricating her testimony on the basis of how the jurors, in their life experience, would believe a reasonable person in similar circumstances would respond. Therefore, the prosecutor's comment was not improper.

C

Finally, the defendant highlights four comments the prosecutor made about the victim during closing argument to the jury and argues that each was an improper expression of the prosecutor's personal opinion about the victim's credibility as a witness. For the reasons stated by the Appellate Court, we disagree. See *State* v. *Elmer G.*, 176 Conn. App. 375–77.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

CONNECTICUT INTERLOCAL RISK MANAGEMENT AGENCY *v.* CHRISTOPHER JACKSON ET AL.
(SC 19946)

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

Syllabus

Pursuant to the alternative liability doctrine, when the conduct of two or more actors is tortious and it is proven that the plaintiff's injuries have been caused by only one of those actors but it is unclear which one, the burden of proving causation shifts from the plaintiff to each actor to prove that he did not cause those injuries.

The plaintiff appealed from the trial court's judgment in favor of the defendants, three teenagers who had entered an abandoned mill in the town of Somers and discarded multiple cigarette butts without extinguishing them, thereby causing a fire that destroyed the mill and a sewage line in the mill's basement. While the defendants were exploring inside the mill for about forty-five minutes, each of them smoked approximately five cigarettes and discarded their unextinguished cigarettes by tossing them onto the mill's wooden floor. Experts later determined that the

likely cause of the fire was the defendants' careless disposal of the cigarettes. After the plaintiff paid the town for the cost of replacing the sewage line, it brought the present subrogation action against the defendants. The trial court granted the defendants' motions for summary judgment, concluding that the plaintiff could not prevail on the element of causation because it was unable to establish which of the defendants' cigarettes caused the fire. The trial court also declined the plaintiff's request to apply the alternative liability rule, reasoning that it would have the effect of significantly changing the negligence standards in this state and that adoption of the rule was a policy decision to be made by an appellate court or the legislature, none of which previously had endorsed the rule. On appeal, the plaintiff claimed that the trial court improperly failed to apply the alternative liability rule in granting the defendants' motions for summary judgment. *Held* that the plaintiff should have received the benefit of the alternative liability rule for the purpose of proving its case against the defendants, and, therefore, this court reversed the trial court's judgment and remanded the case for further proceedings: faced with the choice of leaving an injured plaintiff without a remedy, on the one hand, and requiring multiple wrongdoers, all of whom acted negligently toward the plaintiff and created the situation in which the plaintiff was injured, to bear the burden of absolving themselves, on the other, this court concluded that the latter approach, which has been adopted in at least some form in nearly all jurisdictions, represented the fairer, more sensible alternative, and, accordingly, this court adopted the alternative liability rule for application in cases in which the plaintiff can demonstrate that all of the defendants acted negligently and the plaintiff suffered harm, all possible tortfeasors have been named as defendants, and the tortfeasors' negligent conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm; moreover, all of the requirements for the rule to apply were satisfied in the present case, as the plaintiff had adduced evidence demonstrating that all three of the defendants acted negligently, that all possible tortfeasors had been named as defendants, and that the tortious conduct of those defendants was substantially simultaneous and of the same character; furthermore, this court's adoption of the alternative liability rule was not incompatible with this state's statutory apportionment of liability scheme, the defendants identified no facts or circumstances that would render retroactive application of the alternative liability rule in the present case unfair or unduly harsh, and there was no basis for the defendants' claim that applying the rule to them would violate or compromise any legitimate reliance interest that they may have had.

Argued November 9, 2018—officially released September 17, 2019

Procedural History

Action to recover damages to certain real property sustained as a result of the defendants' alleged negli-

gence, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Cobb*, *J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Heather J. Adams, with whom was *Sarah F. D'Addabbo*, for the appellant (plaintiff).

James P. Sexton, with whom were *Danielle J.B. Edwards*, *Sergio C. Deganis* and *Erin M. Field*, for the appellees (defendants).

Opinion

PALMER, J. To prevail in a negligence action, a plaintiff ordinarily must establish all of the elements of that cause of action, namely, duty, breach, causation, and damages. See, e.g., *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 742, A.3d (2019). In this appeal, which presents an issue of first impression for this court, we must decide whether to adopt the alternative liability doctrine, which was first articulated in *Summers* v. *Tice*, 33 Cal. 2d 80, 85–87, 199 P.2d 1 (1948), and later endorsed by the Restatement (Second) of Torts. That rule provides that, when "the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." 2 Restatement (Second), Torts § 433 B (3), pp. 441–42 (1965).[1] We are persuaded that the doctrine is a sound one and therefore adopt it.

[1] The alternative liability doctrine also has been adopted in the Third Restatement of Torts. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 28 (b), p. 399 (2010). Because the treatment of the doctrine in the Restatement (Third) is materially identical to the treatment of the doctrine contained in the Restatement (Second), we refer to the Restatement (Second) for purposes of our analysis.

The plaintiff, Connecticut Interlocal Risk Management Agency, as subrogee of its insured, the town of Somers (town), brought this action against the defendants, Christopher Jackson, Wesley Hall, and Erin Houle, claiming that their negligent disposal of cigarettes inside an abandoned, privately owned mill in the town ignited a fire that destroyed both the mill and a public, aboveground sewage line in the basement of the mill. The trial court granted the defendants' motions for summary judgment on the ground that the plaintiff could not establish which of the defendants' cigarettes had sparked the blaze and, therefore, could not establish causation, an essential element of its cause of action. In doing so, the trial court declined the plaintiff's request that it adopt the alternative liability doctrine as set forth in § 433 B (3) of the Restatement (Second), concluding, inter alia, that whether to do so was a decision only this court, the Appellate Court or the legislature properly should make. We reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. At approximately 1 a.m. on June 2, 2012, the defendants, all of whom were teenagers at the time, entered an abandoned mill located in the town. Once inside, the defendants proceeded to explore the multistory structure while drinking alcohol and smoking cigarettes. Each of them smoked approximately five cigarettes, and each discarded the cigarette butts by tossing them onto the wooden floor of the mill without extinguishing them. The defendants left the mill at approximately 1:45 a.m. By about 2:20 a.m., the property was engulfed in flames, and the Somers Fire Department had been dispatched to the scene. The fire destroyed both the mill and the sewage line.

The plaintiff compensated the town for the loss of the sewage line and, subsequently, commenced the present

subrogation action against the defendants to recover the cost of replacing the sewage line. For purposes of this action, the plaintiff retained the services of two forensic fire experts, Detective Scott J. Crevier and Trooper Patrick R. Dragon, both of the Connecticut Department of Public Safety. Crevier and Dragon each opined that the likely cause of the fire was the careless disposal of the cigarettes.

The trial court thereafter granted the defendants' motions for summary judgment, concluding that the plaintiff could not prevail on the element of causation because it admittedly was unable to establish which of the defendants' cigarettes had caused the fire. In reaching its conclusion, the trial court declined the plaintiff's request to apply the alternative liability rule because to do so "would result in . . . a significant change in the negligence standards of this state," as reflected in "long-standing and binding" legal precedent, "by shifting the burden of proof to the defendants," such that the policy decision to adopt the rule was "better left to the legislature, the Appellate Court or [this] [c]ourt," none of which previously had endorsed the rule. The court also expressed concern that the adoption of such a rule "would be inconsistent with the tort reforms of the 1980s pursuant to which joint and several liability was abolished in favor of apportionment."

On appeal,[2] the plaintiff renews its claim that, under the unusual circumstances presented, it is only fair that the burden of proof on causation be shifted to the defendants so that they are required to establish that their negligence in discarding the cigarettes *did not* cause the fire. Otherwise, the plaintiff contends, it will be left

[2] The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

without a remedy because, through no fault of its own, it will be unable to prove causation even though it is undisputed that all of the defendants were negligent in discarding the cigarettes and that that conduct by at least one or more of the defendants caused the fire. The plaintiff supports this argument with the observation that the fire, for which it bears no responsibility, resulted in the destruction of evidence that the plaintiff otherwise might have used to establish which of the defendants started the fire. For their part, the defendants maintain that the trial court properly declined to apply the alternative liability rule, first, because the plaintiff cannot establish the threshold requirements of the rule and, second, because the rule is incompatible with our modern tort system, which is predicated on apportionment of liability rather than joint and several liability. Finally, the defendants argue that, even if we were to adopt the alternative liability doctrine, we should apply it prospectively only and not retroactively to the defendants' conduct.

We begin our analysis of the plaintiff's claim by setting forth the standard of review. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005). Because the plaintiff claims that the trial court failed to apply the appropriate legal principle, namely, the alternative liability doctrine, in granting the defendants' motions for summary judgment, our review is plenary.

As we previously noted, the alternative liability doctrine, which was first articulated and adopted in *Summers* v. *Tice*, supra, 33 Cal. 2d 80, is an exception to the general rule that a plaintiff in a negligence action carries the burden of establishing that the defendant's tortious conduct caused the plaintiff's injury. In *Summers*, the plaintiff, Charles A. Summers, was injured when the defendants, two fellow hunters who knew Summers' approximate location, negligently shot at the same time in his direction. Id., 82–83. Following a bench trial, the court found for Summers, and, thereafter, the hunters appealed, claiming, among other things, that there was insufficient evidence to establish which of them had caused Summers' injuries. See id., 82–84. The California Supreme Court affirmed the trial court's judgment; id., 88; and, in so doing, adopted a burden shifting rule pursuant to which each of the hunters, in order to avoid liability on the issue of causation, was required to prove that his shot was not the cause of Summers' injuries. Id., 86–87.

The court reasoned: "When two or more persons by their acts are possibly the sole cause of a harm . . . and the plaintiff has introduced evidence that . . . one of the two persons . . . is culpable, then the defendant has the burden of proving that the other person . . . was the sole cause of the harm." (Internal quotation marks omitted.) Id., 85. The court explained that "[t]he real reason for the rule . . . is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves." (Internal quotation marks omitted.) Id., 85–86. "When [the court] consider[s] the relative position of the parties and the results that would flow if [Summers] was required to pin the injury on one of the [hunters] only, a requirement that the burden of proof on that subject be shifted

to [the hunters] becomes manifest. They are both wrongdoers—both negligent toward [Summers]. They brought about a situation [in which] the negligence of one of them injured [Summers] . . . [and thus] it should rest with . . . each [hunter] to absolve himself if he can. The injured party has been placed by [the hunters] in the unfair position of pointing to which [hunter] caused the harm. If one can escape the other may also and [Summers] is remediless." Id., 86. The court further observed that the rule found additional support in the fact that, "[o]rdinarily defendants are in a far better position to offer evidence to determine which one caused the injury." Id.

In reaching its conclusion, the court rejected the hunters' assertion that such a burden shifting rule conflicted with that court's established precedent that, "[when] two or more [tortfeasors] acting independently of each other cause an injury to [a] plaintiff, they are not joint [tortfeasors] and [the] plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each." Id., 87. The court explained, rather, "that the same reasons of policy and justice" that militated in favor of adopting the burden shifting rule as to the issue of causation also justified "relieving the wronged person of the duty of apportioning the injury to a particular defendant . . . . If [the] defendants are independent [tortfeasors] and thus each [is] liable for the damage caused by him alone, [then], at least, [when] the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. [Instead] [t]he wrongdoers should be left to work out between themselves any apportionment."[3] Id., 88.

[3] In embracing the alternative liability doctrine, the Restatement (Second) provided the following illustration, which mirrors the facts of *Summers*: "A and B, independently hunting quail, both negligently shoot at the same time in the direction of C. C is struck in the face by a single shot, which could have come from either gun. In C's action against A and B, each of the

Although this court previously has not had occasion to consider the alternative liability rule, it appears that at least some version of the doctrine "has been accepted by virtually all jurisdictions." M. Geistfeld, "The Doctrinal Unity of Alternative Liability and Market-Share Liability," 155 U. Pa. L. Rev. 447, 447 (2006); see also 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 28, comment (f), p. 476 (2010) ("[o]nly two jurisdictions have rejected the concept of alternative liability since the . . . Restatement [Second]"); 1 D. Dobbs, The Law of Torts (2000) § 175, p. 428 ("most courts appear to regard [*Summers*] as established law on its facts"). Our research confirms that the vast majority of jurisdictions to have considered the issue have adopted the doctrine. See, e.g., *Bowman* v. *Redding & Co.*, 449 F.2d 956, 967–68 (D.C. Cir. 1971) (construing law of District of Columbia); *Abel* v. *Eli Lilly & Co.*, 418 Mich. 311, 329, 343 N.W.2d 164, cert. denied sub nom. *E.R. Squibb & Sons, Inc.* v. *Abel*, 469 U.S. 833, 105 S. Ct. 123, 83 L. Ed. 2d 65 (1984); *Estate of Chin ex rel. Chin* v. *St. Barnabas Medical Center*, 160 N.J. 454, 464, 734 A.2d 778 (1999); *Roderick* v. *Lake*, 108 N.M. 696, 701, 778 P.2d 443 (App.) (overruled in part on other grounds by *Heath* v. *La Mariana Apartments*, 143 N.M. 657, 180 P.2d 664 [2008]), cert. denied, 108 N.M. 681, 777 P.2d 1325 (1989); *Silver* v. *Sportsstuff, Inc.*, 130 App. Div. 3d 907, 909, 14 N.Y.S.3d 421 (2015); *Trapnell* v. *Sysco Food Services, Inc.*, 850 S.W.2d 529, 539–40 (Tex. App. 1992), aff'd, 890 S.W.2d 796 (Tex. 1994); see also *Snoparsky* v. *Baer*, 439 Pa. 140, 144–45, 266 A.2d 707 (1970).[4]

defendants has the burden of proving that the shot did not come from his gun, and if he does not do so is subject to liability for the harm to C." 2 Restatement (Second), supra, § 433 B, illustration (9), p. 447.

[4] Unlike other courts that have been urged to adopt the alternative liability rule, the Oregon Supreme Court declined to do so, primarily because, as that court maintained, "the adoption of any theory of alternative liability requires a profound change in fundamental tort principles of causation, an adjustment rife with public policy ramifications" that are better left to the judgment of the legislature. *Senn* v. *Merrell-Dow Pharmaceuticals, Inc.*,

As both the Restatement (Second) and those courts have explained, the rule applies only when the plaintiff can demonstrate, first, that all of the defendants acted negligently and harm resulted, second, that all possible tortfeasors have been named as defendants, and, third, that the tortfeasors' negligent conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm. See 2 Restatement (Second), supra, § 433 B, comments (f) and (g), p. 446; see also, e.g., *Goldman* v. *Johns-Manville Sales Corp.*, 33 Ohio St. 3d 40, 45, 46, 47, 514 N.E.2d 691 (1987) ("the burden shifts to the defendant only if the plaintiff can demonstrate that [1] all defendants acted tortiously and that the harm resulted from conduct of one of them," [2] "the defendants' conduct creates a substantially similar risk of harm," and [3] "all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants").

The reasons for these requirements are evident. With respect to the first requirement, a plaintiff must establish by a preponderance of the evidence that all defendants acted negligently before the burden of proof on causation shifts because the rationale for the exception is the unfairness inherent in permitting multiple tortfeasors, acting simultaneously, to escape liability merely because their conduct and the resulting harm has made it difficult, if not impossible, for the plaintiff to demonstrate which of them caused the harm. See 2 Restatement (Second), supra, § 433 B, comment (f), p. 446; see also *Bowman* v. *Redding & Co.*, supra, 449 F.2d 968 (reasoning that alternative liability rule serves interests of justice and is so limited in applicability that it does

305 Or. 256, 271, 751 P.2d 215 (1988). The Oregon Supreme Court stands virtually alone in categorically rejecting the rule. For the reasons set forth in this opinion, we disagree with that court's concerns that the exception, when applied in the limited and unusual circumstances for which it was intended, contravenes or otherwise undermines fundamental tort principles.

not conflict with settled negligence principles). Thus, if a plaintiff fails to prove that all of the defendants committed tortious acts that may have caused the harm, the doctrine does not apply. See, e.g., *Porterie* v. *Peters*, 111 Ariz. 452, 456, 532 P.2d 514 (1975) (declining to apply alternative liability rule because "the proof [was] not clear as to which of the defendants, if any . . . committed an act of negligence [that] produced [the] plaintiff's injury"); *Cuonzo* v. *Shore*, 958 A.2d 840, 844 (Del. 2008) (declining to apply rule because plaintiff injured in automobile accident "never contended" that both of the defendant drivers were negligent); *Goldman* v. *Johns-Manville Sales Corp.*, supra, 33 Ohio St. 3d 46 ("[T]his theory relaxes only the traditional requirement that the plaintiff demonstrate that a specific defendant [or defendants] caused the injury. But the relaxation is . . . warranted [only when the] plaintiff shows that all defendants acted tortiously.").

With respect to the second requirement, a plaintiff must establish that all possible tortfeasors have been named as defendants "to eliminate from the jury's consideration the theory that some other cause, besides a joined [defendant's] conduct, caused the injury." *Trapnell* v. *Sysco Food Services, Inc.*, supra, 850 S.W.2d 539 n.7. Otherwise, it simply would not be fair and equitable to relieve the plaintiff of the responsibility of proving which tortfeasor or tortfeasors caused the harm. And, finally, with respect to the third requirement, a plaintiff must demonstrate that the tortious conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm because it would be unreasonable to require defendants to absolve themselves from liability unless "the likelihood that any one of them injured the plaintiff is relatively high." (Internal quotation marks omitted.) *Silver* v. *Sportsstuff, Inc.*, supra, 130 App. Div. 3d 910.

We agree with our sister states that, when these three threshold requirements have been met, the alternative liability doctrine should be recognized as a limited exception to the general rule that the plaintiff in a negligence action must prove that each of the defendants caused the plaintiff's harm, in addition to all of the other elements of that tort. Faced with the choice of leaving an injured plaintiff without a remedy, on the one hand, or requiring "two wrongdoers, both of whom had acted negligently toward the plaintiff and had created the situation [in which the] plaintiff was injured, [to] bear the burden of absolving themselves"; *Abel* v. *Eli Lilly & Co.*, supra, 418 Mich. 326; on the other, it seems clear that the latter approach represents the fairer, more sensible alternative. See, e.g., 2 Restatement (Second), supra, § 433 B, comment (f), p. 446 (application of alternative liability rule is warranted by virtue of unfairness that would exist if multiple, proven tortfeasors were allowed to avoid liability merely because manner in which they were negligent and nature of resulting harm have precluded plaintiff from establishing which of them caused that harm); *Wysocki* v. *Reed*, 222 Ill. App. 3d 268, 278, 583 N.E.2d 1139 (1991) ("[w]e believe it is more unjust that the injured party receive nothing from two admitted wrongdoers"), appeal denied, 144 Ill. 2d 644, 591 N.E.2d 32 (1992); *Roderick* v. *Lake*, supra, 108 N.M. 701 (alternative liability rule is "fairest and most logical way to determine the amount of fault of two or more tortfeasors in the unusual circumstances . . . [in which the] plaintiff can prove [that the] defendants were negligent . . . but cannot prove which defendant's negligence caused the injury, or which defendant was more at fault").

The three requirements for application of the alternative liability doctrine are satisfied in the present case. The plaintiff has adduced evidence demonstrating that all three of the defendants acted negligently in the

manner in which they disposed of their cigarettes in the mill, that all possible tortfeasors have been named as defendants, and that the tortious conduct of those defendants was substantially simultaneous in time and of the same character so as to give rise to the same risk of harm. We therefore agree with the plaintiff that we must reverse the trial court's decision to grant the defendants' motions for summary judgment and that the plaintiff is entitled to the benefit of the alternative liability doctrine for the purpose of proving its case at trial.

The defendants argue against application of the doctrine for three reasons: (1) the plaintiff has failed to satisfy the rule's requirements; (2) the rule is inconsistent with our statutory apportionment scheme; and (3) even if this court were to adopt the rule, it should not be applied retroactively to the defendants' conduct in this case. None of these contentions is persuasive.

First, the defendants claim that the plaintiff has not produced sufficient evidence to create a triable issue as to all of the necessary conditions for the alternative liability rule to apply. Although conceding that the plaintiff appears to have named all possible tortfeasors as defendants and presented evidence sufficient to establish that the defendants' tortious conduct was substantially simultaneous and similar in nature, the defendants nevertheless assert that there are three *additional* requirements that the plaintiff must meet before the rule may be applied. Specifically, they maintain that the plaintiff must demonstrate that (1) one, and only one, of the defendants possibly could have caused the harm, (2) the defendants have better information about causation than the plaintiff, and (3) the plaintiff is completely innocent with regard to the loss. We disagree that the plaintiff is entitled to the benefit of the rule only upon satisfaction of these three requirements.

To support their contention that the plaintiff must prove that only one defendant caused the harm in order to avail itself of the rule, the defendants rely on *Thodos* v. *Bland*, 75 Md. App. 700, 542 A.2d 1307, cert. denied, 313 Md. 689, 548 A.2d 128 (1988). In *Thodos*, the plaintiff, Patricia Thodos, was a passenger in a car driven by the defendant Alton Linsey Thacker that collided with a car driven by the other defendant, Brian Bland. Id., 703. The Maryland Court of Special Appeals declined to recognize the applicability of the alternative liability rule under the circumstances, which involved Thodos' failure to convince the jury that either Bland or Thacker or both of them were negligent and that such negligence caused Thodos' injuries. Id., 712. *Thodos* does not stand for the proposition advanced by the defendants in the present case; rather, the court in *Thodos* rejected the applicability of the rule because Thodos failed to prove that *both* Bland and Thacker were negligent, that Thodos' injuries were caused by the negligence of only one of them, and that there was uncertainty as to which one. Id., 715–17. More to the point, conditioning the application of the doctrine on proof that only one defendant caused the harm conflicts with the core rationale underlying the rule, namely, to address the unfairness that arises when, as a consequence of the simultaneous negligence of multiple defendants, it is impossible for the plaintiff "to pin the injury on one of the defendants only . . . ." *Summers* v. *Tice*, supra, 33 Cal. 2d 86.

The defendants also contend that the doctrine should be applied only upon a showing by the plaintiff that the defendants have better access to information concerning the actual cause of the harm sustained by the plaintiff. It is true that, in *Summers*, the court recognized that, as a general matter, when the negligent conduct of multiple tortfeasors is more or less simultaneous, each such tortfeasor is likely to be better situated than the plaintiff to know who among them caused the plain-

tiff's injury. See id. As other courts have observed, however, the court in *Summers* made this point only by way of explaining the justifications underlying the alternative liability rule, and there is nothing in the court's decision in *Summers* to suggest that a plaintiff must demonstrate, in any particular case, that the tortfeasors have better access than the plaintiff to information concerning the cause of the plaintiff's injuries. See, e.g., *Abel* v. *Eli Lilly & Co.*, supra, 418 Mich. 333–34 (noting that defendants' access to evidence of causation is not required); *Silver* v. *Sportsstuff, Inc.*, supra, 130 App. Div. 3d 910 ("[A]lthough *Summers* indicated that defendants are [o]rdinarily . . . in a far better position to offer evidence to determine which one caused the injury, the [decision] in *Summers* did not conclude that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury . . . . Thus, in [*Summers*] the paradigm case for alternative liability, the defendants did not have greater access to information that might establish the identity of the tortfeasor . . . ." [Citations omitted; internal quotation marks omitted.]). Indeed, adopting the requirement advocated by the defendants may only encourage those defendants to adopt a strategy of wilful ignorance or to remain silent to avoid liability. See id., 910–11 ("failure to apply the [burden shifting] doctrine of alternative liability to circumstances such as those presented . . . might encourage products distributors to remain silent by failing to adequately label or track their products, and thereby shielding their identity, as a means of avoiding liability" [internal quotation marks omitted]).

The defendants also maintain, in reliance on *Leuer* v. *Johnson*, 450 N.W.2d 363 (Minn. App. 1990), that, to take advantage of the doctrine, the plaintiff must prove it was innocent of all wrongdoing. *Leuer*, however, is inapposite to the present case because it involved

the issue of whether the doctrine of *res ipsa loquitur* applied, not the alternative liability doctrine. See id., 363–66. Indeed, even if we agreed—and we do not—with the defendants' unsupported claim that the alternative liability doctrine applies only if the plaintiff can prove that it was altogether free of blame for its injuries, the defendants have offered no evidence that the town breached any duty in regard to the mill.

The defendants next argue that, even if the plaintiff has satisfied all three of the requirements that we have identified as necessary prerequisites for application of the rule, the rule is incompatible with this state's enactment of tort reform, pursuant to which the legislature replaced the common-law rule of joint and several liability with apportioned liability, whereby each tortfeasor is liable for his or her proportionate share of the plaintiff's damages. Specifically, the defendants argue that the rule "[c]annot [w]ork" without joint and several liability because, in its absence, defendants "have no incentive" to meet their burden of disproving that their negligence caused the plaintiff's injury, thereby "mak[ing] it impossible for a fact finder to apportion liability" without resort to impermissible speculation. We find no merit in this argument.

We disagree that, under the alternative liability rule, defendants "have no incentive" to establish that their negligence was not a cause of the injuries because it is only by doing so that they will be able to avoid liability. This is true under a system that holds tortfeasors jointly and severally liable for their negligence or under a system based on apportionment of liability: under either scheme, the alternative liability rule places the burden on the tortfeasors to demonstrate that they did not cause the damages, and, if they fail to meet that burden, they will be held liable.

We acknowledge, as the defendants assert, that the rule deviates from established negligence principles by

allowing the fact finder, in the absence of evidence to the contrary, to conclude that all three defendants caused the plaintiff's injury and, therefore, that all three defendants are equally liable for the plaintiff's damages. Contrary to the defendants' assertions, however, use of this presumption to address the evidentiary lacuna created by the tortfeasors' simultaneous negligence is not a disqualifying feature but, rather, the sine qua non of the rule. As one court aptly stated in addressing a similar contention, "[§ 433 B (3) of the Restatement (Second)] is an exception to the general rule that the plaintiff must establish by a preponderance of evidence that his injury was caused by defendant's tortious conduct. [T]he reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury [on] the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.

"The provisions of [§ 433 B] (3) are not to be gainsaid on the ground that they are contrary to the doctrine requiring [the plaintiff to prove all the elements of the cause of action]. They are set forth as limited exceptions to that doctrine. These exceptions are supported by the interest of justice and are so limited and structured that it is [evident] that they do not represent a disguised overturning or undermining of the main doctrine. So far as [§ 433 B] (3) is concerned [the court is] satisfied that it is fairly supported by precedents reaching the indicated result as in the interest of justice and consonant with sound common law.

"The effect of shifting the burden of proof to the defendants will . . . arise [only] if the jury should decide that it is satisfied that [the] plaintiff has established by a preponderance of the evidence that both defendants were wrongdoers . . . and that one or another was the cause of [the plaintiff's injury], but is unable to find from a preponderance of the evidence

which defendant [caused the injury]. Then the burden will shift to each defendant to absolve itself of liability, either for the purpose of avoiding a verdict for the plaintiff or for avoiding a claim of contribution by the other defendant. If neither defendant can prove [that] it did not cause the [plaintiff's injury], they would both be liable." (Footnotes omitted; internal quotation marks omitted.) *Bowman* v. *Redding & Co.*, supra, 449 F.2d 967–68.

We therefore see no reason why our adoption of the alternative liability rule should be understood as a return to our past system of joint and several liability, pursuant to which any one of the defendants could have been liable for the entire judgment at the option of the plaintiff. It is not. To the contrary, we view the rule as being fully compatible with our modern apportionment scheme. Indeed, when subject to the alternative liability rule, the defendants fare *better* under the apportionment approach because, in the event they are unable to absolve themselves of liability, the law requires that the plaintiff's damages be apportioned equally among them, with each defendant liable for only his or her proportionate share. See General Statutes § 52-572h (c).

Finally, the defendants assert that, if we adopt the alternative liability doctrine for cases involving fact patterns like the present one, we nevertheless should not apply it retroactively to their conduct because they were not on notice that we would recognize the doctrine and because it would impose a substantial hardship on them. We disagree.

"Traditionally . . . in cases of civil tort liability in which new causes of action are recognized, the new theory of liability is applied to the parties in the case"; *Clohessy* v. *Bachelor*, 237 Conn. 31, 57, 675 A.2d 852 (1996); see also *Campos* v. *Coleman*, 319 Conn. 36, 62, 123 A.3d 854 (2015) (judicial decisions generally apply

retroactively to pending cases); and only in exceptional circumstances will we deviate from that general rule. See *Campos* v. *Coleman*, supra, 62. Thus, to establish that the alternative liability doctrine should be applied prospectively only, the defendants must demonstrate that applying the doctrine retroactively to them "would produce substantial inequitable results, injustice or hardship." *Ostrowski* v. *Avery*, 243 Conn. 355, 378 n.18, 703 A.2d 117 (1997). The defendants have identified no such facts or circumstances that would render the retroactive application of the alternative liability rule in the present case unfair or unduly harsh, and, importantly, there is no basis for a claim that applying the rule retrospectively would violate or compromise any legitimate reliance interest of the defendants. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 655–56, 95 A.3d 1011 (2014); *Clohessy* v. *Bachelor*, supra, 57 and n.15; *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 495–96 and n.5, 408 A.2d 260 (1979). In fact, it would be facetious to suggest that any of the defendants, each of whom carelessly disposed of their cigarettes, would have acted any differently if the law had been different. Because the defendants have identified no persuasive reason why the alternative liability rule that we adopt today should not be applied to them, we reject their claim that the rule should be applied prospectively only.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.