STATE OF CONNECTICUT *v.* MICHAEL J. MARSALA (SC 20249)

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

Syllabus

Convicted, after a jury trial, of the crime of criminal trespass in the first degree, the defendant appealed to the Appellate Court, claiming that the trial court improperly declined to instruct the jury on the infraction of simple trespass as a lesser included offense. The defendant's conviction stemmed from his conduct in entering and panhandling on shopping mall property despite having been previously banned from the property by mall security officers and having been told by a private duty police officer, S, that he would be arrested for trespassing if he entered the property again. At trial, the defendant claimed that the first degree criminal trespass statute (§ 53a-107 (a) (1)) requires that an order not to enter the property be communicated "by the owner of the premises or other authorized person" and that the state failed to prove that S was authorized to communicate such an order to the defendant. Following the close of evidence, the defendant requested a jury instruction on simple trespass as a lesser included offense of first degree criminal trespass, which the trial court denied. The defendant appealed to the Appellate Court, which affirmed the judgment of conviction. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly determined, for purposes of *State* v. *Whistnant* (179 Conn. 576), that there was no evidence that could have permitted the jury to find him not guilty of first degree criminal trespass but also find him guilty of simple trespass. Specifically, the defendant claimed that the jury could have agreed with him that the state failed to prove that mall security personnel and S were authorized to ban him from mall property, and thus have found him not guilty of first degree criminal trespass, but nonetheless have found that the state proved that the defendant had been told multiple times that he was not allowed to enter the property to panhandle and thus have found him guilty of simple trespass. *Held* that the Appellate Court correctly concluded that the trial court properly declined the defendant's request to instruct the jury on simple trespass as a lesser included offense of first degree criminal trespass because the prerequisites set forth in *Whistnant* for obtaining a jury instruction on a lesser included offense were not satisfied; the jury could not consistently have found the defendant not

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

guilty of first degree criminal trespass but guilty of simple trespass, as required by *Whistnant*, because the element of criminal and simple trespass requiring proof that the defendant knew he was not licensed or privileged to enter the property necessarily requires proof that he was not in fact licensed or privileged to enter, and, if the jury accepted the defendant's claim that the state had failed to prove that the security officers and S were authorized to ban him from entering the mall, there would have been no evidence permitting the jury to find that his entry at the time of his arrest was unlawful, an element of simple trespass.

Argued February 20—officially released September 16, 2020**

Procedural History

Substitute information charging the defendant with the crime of criminal trespass in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Markle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Alvord*, *Moll* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Matthew R. Kalthoff*, assistant state's attorney, and *Laurie N. Feldman* and *Brett R. Aiello*, deputy assistant state's attorneys, for the appellee (state).

Opinion

MULLINS, J. In this certified appeal, the defendant, Michael J. Marsala, appeals from the judgment of the Appellate Court affirming his judgment of conviction, rendered after a jury trial, for criminal trespass in the

** September 16, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

first degree in violation of General Statutes § 53a-107.[1] He challenges the Appellate Court's conclusion that the trial court properly declined to instruct the jury on the infraction of simple trespass; see General Statutes § 53a-110a;[2] as a lesser included offense of criminal trespass in the first degree. Because we agree with the Appellate Court's conclusion that the prerequisites set forth in *State* v. *Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980), for obtaining a jury instruction on a lesser included offense were not satisfied in the present case,[3] we affirm the judgment of the Appellate Court.[4]

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural

[1] General Statutes § 53a-107 provides in relevant part: "(a) A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person . . . ."

[2] General Statutes § 53a-110a provides: "(a) A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises without intent to harm any property.

"(b) Simple trespass is an infraction."

[3] Under *State* v. *Whistnant*, supra, 179 Conn. 576, "[a] defendant is entitled to an instruction on a lesser [included] offense if . . . the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser." Id., 588.

[4] Because we conclude that the defendant failed to satisfy *Whistnant*, we do not reach the state's alternative ground for affirmance, in which the state contends that the defendant would not have been entitled to an instruction on the infraction of simple trespass even if he had satisfied *Whistnant* because infractions are categorically prohibited from being submitted to the jury as lesser included offenses of crimes.

history. The Connecticut Post Mall of the Centennial Collection, formerly known as the Westfield Connecticut Post (mall), is located at 1201 Boston Post Road in Milford (mall property). At all relevant times, the mall was owned by the Westfield Corporation (Westfield). Westfield contracted with an independent entity, Professional Security Consultants (PSC), to provide security services on mall property. During the holiday shopping season, November through January, the mall hires Milford police officers to assist PSC with security and to conduct traffic control. While working these "private duty" jobs, the officers are essentially part of PSC's security staff; they report directly to PSC and assist PSC employees with enforcing the mall's security policies. For their work on these private duty jobs, the officers are paid by the city of Milford, which is, in turn, reimbursed by the mall.

By November, 2015, the defendant was well known to PSC. He was frequently seen in mall parking lots "panhandling," i.e., asking customers for money. Panhandling is prohibited on mall property. Prior to November 28, 2015, PSC security official Wilfred Castillo received ten to fifteen complaints about the defendant's panhandling. On several of these occasions, Castillo confronted the defendant and told him that "panhandling isn't allowed on [mall] property, and that he would have to leave." In response to Castillo's directives, the defendant would leave the mall property without incident.

PSC also had a "ban notice," dated July 9, 2015, on file in its office for the defendant. The ban notice stated that the defendant had been banned from mall property for one year. Under PSC policy, ban notices can be reviewed and approved (or potentially reversed) by PSC's director of security, Thomas Arnone, or by Arnone's assistant, as well as by the general manager

of the mall, Dan Kiley.[5] Based on the existence of this ban notice, the defendant was not permitted to be on mall property.

On November 27, 2015, Officer Joanna Salati of the Milford Police Department was working a private duty job when she saw the defendant panhandling on mall property. She contacted PSC on her radio and confirmed that the defendant previously had been banned. Salati approached the defendant and told him that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property, he's going to be arrested" for trespassing. Salati decided not to arrest the defendant for trespassing at that time because "it was too busy." The defendant left the property in response to Salati's directive.

The following day, November 28, 2015, Salati again saw the defendant on mall property "approaching customers." When the defendant saw Salati walking toward him, he began walking "quickly" away from her. Salati eventually caught up with the defendant and arrested him.

The defendant was charged with criminal trespass in the first degree in violation of § 53a-107 (a) (1). As the basis for this charge, the state alleged, in an amended long form information, that, "on November 28, 2015 . . . [the defendant], knowing that he was not licensed or privileged to do so, did enter . . . [mall property] after having been directed not to return to the property by authorized mall security personnel and/or authorized

[5] There was no evidence presented at the defendant's trial about the circumstances that led to this purported July 9, 2015 one year ban. The ban notice was submitted as an exhibit for identification purposes only, and neither party introduced any evidence as to who had issued the ban, whether the duration of the ban was communicated to the defendant, or whether the decision to issue the ban had been reviewed and approved by Kiley or anyone else outside of PSC.

officers of the Milford Police Department . . . .'' The defendant elected a trial by jury.

At trial, the parties' dispute centered around the element of criminal trespass in the first degree that requires the defendant's unlawful entry to have occurred ''after an order to leave or not to enter [was] personally communicated to [the defendant] by the owner of the premises or other authorized person . . . .'' General Statutes § 53a-107 (a) (1). As proof that such an order had been communicated to the defendant prior to his entry onto mall property on November 28, 2015, the state relied on Salati's testimony that, on November 27, 2015, she told the defendant that ''he had to leave . . . because he was banned from being on mall property'' and that ''the next time he's caught on mall property, he's going to be arrested'' for trespassing.

The crux of the defense was that § 53a-107 (a) (1) requires the order not to enter to be communicated ''by the owner of the premises or other *authorized* person,'' and the state failed to prove that Salati had been authorized to communicate such an order to the defendant. (Emphasis added.) The defendant pointed out that the state called no witnesses from Westfield to testify about the authority it had granted to PSC or the private duty officers working for PSC to ban individuals from entering mall property. The defendant also introduced into evidence a document titled ''Enforcement—Banning Procedures: Use of Physical Force'' and subtitled ''Lesson Plan 9'' (lesson plan) that PSC's corporate office had prepared for purposes of training PSC's staff. The lesson plan provides, under the heading of ''Temporary Suspension'': ''Suspend the privilege of being on the property for an amount of time that is determined by the severity of the incident and local and state ordinances. Any suspension for more than [twenty-four] hours must [be] approved [by] the [c]enter [m]anager.'' The lesson plan further provides, under the heading of

"Reason to [S]uspend": "1. Only those individuals who have committed a crime at [the] [s]hopping [c]enter will be considered for banning and as in compliance with local, state and federal ordinances. 2. The [d]irector of [s]ecurity, [a]ssistant [d]irector of [s]ecurity or [s]ecurity [s]upervisor can only temporarily ban suspects for the remainder of the business day."

Relying on the lesson plan, defense counsel argued during closing argument that the state never proved that Westfield had authorized PSC to ban violators of the panhandling prohibition from mall property for one year (as reflected in the July 9, 2015 ban notice), or for any period of time longer than the remainder of the business day. Defense counsel further argued that this policy extended to Salati because Salati was working in a private capacity, assisting PSC's staff, and that her November 27, 2015 order to stay off mall property indefinitely exceeded her authority as set forth in the lesson plan.

The state, for its part, introduced evidence that PSC, and by extension Salati, did indeed have authority to ban people from mall property. Arnone, PSC's director of security, testified that PSC was authorized to ban people for periods of six months or one year and that PSC issued between 360 and 370 such bans per year. Arnone further testified that the lesson plan was not a "complete statement" of PSC's banning authority and that he had a verbal understanding with Kiley, the mall's general manager, whereby PSC's banning authority extended beyond what was set forth in the lesson plan.

Following the close of evidence, the defendant filed a written request for a jury instruction on the infraction of simple trespass, which he asserted was a lesser included offense of criminal trespass in the first degree.[6] The state opposed the instruction on the grounds that

[6] The defendant requested the following instruction: "If you have unanimously found the defendant not guilty of the crime of criminal trespass in

(1) the second prong of *Whistnant* was not satisfied; see footnote 3 of this opinion; because simple trespass requires proof of an element that criminal trespass in the first degree does not, namely, that the defendant enter or remain on the premises "without intent to harm any property"; General Statutes § 53a-110a (a); and (2) infractions cannot be submitted to the jury as lesser included offenses of crimes. The trial court agreed with both of the state's arguments and denied the defendant's request for the instruction.

The jury subsequently found the defendant guilty of criminal trespass in the first degree. The court imposed a sentence of one year incarceration, execution suspended after four months, followed by two years of conditional discharge.

The defendant appealed to the Appellate Court, claiming that the trial court should have instructed the jury on the infraction of simple trespass as a lesser included offense. See *State* v. *Marsala*, 186 Conn. App. 1, 2–3, 7, 198 A.3d 669 (2018). In rejecting this claim, the Appellate Court concluded that the defendant's requested instruction failed the third and fourth elements of *Whistnant*; see footnote 3 of this opinion; because there was no reasonable view of the evidence

the first degree, you shall then consider the lesser offense of simple trespass. Do not consider the lesser offense until you have unanimously acquitted the defendant of the greater offense.

"A person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property. For you to find the defendant guilty of simple trespass, the state must prove the following elements beyond a reasonable doubt: first that he entered the premises. Premises is not defined in the law so it has the common meaning. The second element is that he entered knowing he was not licensed or privileged to do so. To be licensed or privileged the defendant must have either consent from the owner of the premises or other authorized person or have some other right to be on the premises. A person acts knowingly with respect to conduct when he is aware that his conduct is of such nature or such circumstances exist." (Internal quotation marks omitted.) *State* v. *Marsala*, 186 Conn. App. 1, 5–6, 198 A.3d 669 (2018).

that permitted the jury consistently to find the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass.[7] See *State* v. *Marsala*, supra, 21. More specifically, the Appellate Court determined that, "if the jury was to reject the evidence presented by the state that the defendant received an order not to enter from an authorized person"; id., 20; the jury necessarily also would have had to find that the state failed to prove the "knowledge" element of simple trespass because "there was no other evidence, introduced by either the state or the defendant, from which the jury could have found that the defendant knew he was not privileged to enter or remain on mall property." Id., 19–20. Accordingly, the Appellate Court concluded that the defendant was not entitled to an instruction on simple trespass as a lesser included offense of criminal trespass in the first degree and affirmed his conviction.[8] Id., 21. This certified appeal followed.[9]

[7] There was no dispute that the defendant had made a proper request for the instruction and, therefore, that the first element of *Whistnant* was satisfied. See *State* v. *Whistnant*, supra, 179 Conn. 588. With respect to the second element, which requires a showing that "it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser"; id.; the Appellate Court concluded that this element was satisfied because simple trespass does not require proof of an element that criminal trespass in the first degree does not. See *State* v. *Marsala*, supra, 186 Conn. App. 9–10. Contrary to the trial court's determination, the Appellate Court concluded that the "without intent to harm any property" language of the simple trespass statute; General Statutes § 53a-110a (a); is not an element of the offense that the state must prove beyond a reasonable doubt. *State* v. *Marsala*, supra, 9–10. The state has not challenged this aspect of the Appellate Court's decision on appeal to this court.

[8] The Appellate Court did not reach the state's alternative ground for affirmance that infractions can never be submitted to the jury as lesser included offenses of crimes. See *State* v. *Marsala*, supra, 186 Conn. App. 8 n.8.

[9] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court [correctly] conclude that the defendant was not entitled to an instruction on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree?" *State* v. *Marsala*, 330 Conn. 964, 199 A.3d 1079 (2019).

The defendant claims that the Appellate Court incorrectly determined, for purposes of the third and fourth prongs of *Whistnant*, that there was no evidence that permitted the jury to consistently find him not guilty of criminal trespass in the first degree but guilty of simple trespass. Specifically, the defendant argues that the jury could have agreed with him that the state failed to prove that PSC and Salati were authorized to ban him from mall property, and thus found him not guilty of criminal trespass in the first degree, but nonetheless found that the state proved that the defendant had been told multiple times that he was not allowed to enter the property to panhandle. The defendant also asserts that the jury could have credited the testimony from Salati that the defendant tried to leave the property when Salati saw him on the day of the incident. The defendant contends that this evidence provided the jury with an independent basis to find, for purposes of the simple trespass statute, that the defendant knew he was not licensed or privileged to be panhandling on mall property.

The state responds that, under the facts of this case, if the jury found that the state had failed to prove that PSC and Salati were authorized to exclude the defendant from mall property, it could not then have found that the defendant knew he was not permitted on the property on November 28, 2015. The state emphasizes that, in order to establish that the defendant knew his entry was unlawful for purposes of simple trespass, it was required to prove not just "the defendant's mere *belief*" that his entry was unlawful, but that it was *in fact* unlawful. (Emphasis in original.) The state argues that, if the jury found that the state never proved that PSC and Salati were authorized to ban the defendant, there was no other evidence in the record upon which the jury could have found that he had in fact been banned and, therefore, that his entry on November 28, 2015, was unlawful.

We note at the outset that, as the state's brief acknowledges, the element of criminal and simple trespass requiring proof that the defendant knew he was not licensed or privileged to enter the property necessarily requires proof that he was not in fact licensed or privileged to enter. See *State* v. *Harper*, 167 Conn. App. 329, 338, 143 A.3d 1147 (2016) ("to prove that the defendant knew that he did not have a license or privilege to be at [the property], the state was necessarily required to prove that, in fact, he did not have such a right or privilege"); see also General Statutes § 53a-3 (12) ("[a] person acts 'knowingly' with respect to . . . a circumstance described by a statute defining an offense when he is aware . . . *that such circumstance exists*" (emphasis added)). We agree with the state that, if the jury had found that the state never proved that PSC and Salati were authorized to ban the defendant, there was no other evidence in the record upon which the jury could have found that the defendant did not have license or privilege to enter mall property on November 28, 2015. Accordingly, we conclude that the defendant's requested instruction fails the fourth element of *Whistnant*.[10]

We begin with the general principles governing our review. The defendant's claim that he had improperly been denied an instruction on a lesser included offense "requires us, on appeal, to review the facts in the light most favorable to the defendant. . . . Whether one offense is a lesser included offense of another presents a question of law. . . . Accordingly, our review is de novo. . . .

"The applicable legal principles are well established. A defendant is entitled to an instruction on a lesser

[10] We therefore need not address the third element of *Whistnant* in this case. We note, however, that this court has observed in other cases that, "[d]espite being conceptually distinct parts of the *Whistnant* formulation, the third and fourth prongs are subject to the same evidentiary analysis . . . [and, therefore, can be analyzed] simultaneously." (Internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 762, 961 A.2d 322 (2008).

[included] offense if . . . the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser. *State* v. *Whistnant*, [supra, 179 Conn. 588]." (Citations omitted; internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 758–59, 961 A.2d 322 (2008). Because we conclude in the present case that the defendant's requested instruction fails the fourth element of *Whistnant*, we limit our analysis to that element.

This court previously elaborated on the fourth element of *Whistnant* and noted that "[t]he fourth prong of *Whistnant* specifically requires that the 'proof' be 'sufficiently in dispute.' " *State* v. *Manley*, 195 Conn. 567, 579, 489 A.2d 1024 (1985). This court further explained: "Such proof is sufficient when it is marked by [a] quality [such as] to meet with the demands, wants or needs of a situation . . . . In the *Whistnant* context, therefore, the proof is sufficiently in dispute [when] it is of such a factual quality that would permit the finder of fact reasonably to find the defendant guilty [of] the lesser included offense. This requirement serves to prevent a jury from capriciously convicting on the lesser included offense when the evidence requires either conviction on the greater offense or acquittal. . . . Moreover, the trial court, in making its determination whether the proof is sufficiently in dispute, [although] it must carefully assess all the evidence whatever its source, is not required to put the case to the jury on a basis [of a

lesser included offense] that essentially indulges and even encourages speculations as to [a] bizarre reconstruction [of the evidence]." (Citations omitted; internal quotation marks omitted.) Id., 579–80.

We therefore begin by identifying the element that differentiates simple trespass from criminal trespass in the first degree. We then determine whether, in light of the evidence introduced at trial, that element was sufficiently in dispute so as to permit the jury consistently to have found the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass.

"A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises . . . ." General Statutes § 53a-110a (a). To obtain a conviction for criminal trespass in the first degree, the state must prove these same elements, as well as the additional element that the defendant's unlawful entry occurred "after an order to leave or not to enter [is] personally communicated to [the defendant] by the owner of the premises or other authorized person . . . ." General Statutes § 53a-107 (a) (1); see *State* v. *Kinchen*, 243 Conn. 690, 703, 707 A.2d 1255 (1998) (criminal trespass in first degree under § 53a-107 (a) (1) requires proof "(1) that the defendant, knowing he was not privileged or licensed to do so, entered or remained in [or on the premises]; and (2) that the defendant committed that act after an order to leave or not to enter had been personally communicated to him by the owner or other authorized person" (internal quotation marks omitted)).

As previously noted, the state attempted to prove this element of criminal trespass in the first degree by introducing Salati's testimony that she told the defendant on November 27, 2015, that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property,

he's going to be arrested" for trespassing. The defendant did not dispute that Salati had said this to him on November 27, 2015. Instead, he attempted to place this element in dispute by establishing reasonable doubt as to whether Salati was an "authorized person," within the meaning of § 53a-107 (a) (1), to communicate such an order to him.

As support for this defense, the defendant introduced the lesson plan into evidence. That document provided that "[a]ny suspension for more than [twenty-four] hours must [be] approved [by] the [c]enter [m]anager"; "[o]nly those individuals who have committed a crime . . . will be considered for banning"; and PSC personnel "can only temporarily ban suspects for the remainder of the business day." Defense counsel relied on the lesson plan to argue that PSC and, by extension, Salati were authorized to ban violators of the panhandling prohibition only for the remainder of the business day and, therefore, that Salati's November 27, 2015 order never to return exceeded her authority.

Even if this evidence placed in dispute the differentiating element of criminal trespass in the first degree, it would not have provided the jury with a basis to find the defendant not guilty of that charge but still find him guilty of simple trespass. This is because, under the unique circumstances of the present case, if the jury credited this defense and found that the state failed to prove that PSC and Salati were authorized to ban the defendant from mall property for longer than the remainder of the business day, there was no other evidence in the record to permit the jury rationally to find that, when the defendant entered mall property the next day, on November 28, 2015, he was not "licensed or privileged to do so . . . ." General Statutes § 53a-110a (a). Our conclusion in this regard is illuminated by the state's theory of guilt at trial.

The only theory advanced by the state for why the defendant did not have license or privilege to enter mall

property on November 28, 2015, was that he previously had been banned from the property. The state never pursued the theory that the defendant's entry was unlawful because he intended to engage in the unauthorized activity of panhandling.[11] It is well settled that the state cannot obtain a conviction based on a theory that it never pursued at trial. See *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015); *State* v. *Fourtin*, 307 Conn. 186, 208, 211, 52 A.3d 674 (2012). Accordingly, the

[11] The state charged the defendant with trespass based on the fact that he "enter[ed]" mall property after having been ordered not to do so. Throughout the trial, the state's focus in establishing that the entry was unlawful was on the fact that the defendant previously had been banned. When defense counsel objected to the prosecutor's attempt to elicit evidence of the defendant's prior instances of panhandling on mall property on the ground that such evidence was unduly prejudicial, the prosecutor explained the probative value of that evidence: "Again, one of the elements of this particular crime is that the defendant unlawfully entered the property. The entry was unlawful because he had been banned from the property. That ban was necessary because of the solicitation."

The prosecutor also elicited from Arnone and Castillo the fact that, based on the July 9, 2015 ban notice stating that the defendant had been banned for one year, the defendant was not "permitted to be on mall property" when he entered on November 28, 2015. Finally, after eliciting from Castillo that, on the prior occasions when the defendant was found panhandling, Castillo would simply tell him "to leave" mall property because panhandling was not allowed, the prosecutor then elicited the following:

"[The Prosecutor]: If you could just look up when you're done. Does [the ban notice] refresh your recollection as to what date the defendant was banned from mall property?

"[Castillo]: Yeah. Yes, it was July 9, 2015.

"[The Prosecutor]: And for how long was that ban in place?

"[Castillo]: One year.

"[The Prosecutor]: *How does it change the status of an individual on mall property once they have been banned? How does that change your interaction with him?*

"[Castillo]: *My interaction is different because he is trespassing, and our policy is to contact police when there is a trespasser.*" (Emphasis added.)

Nor did the prosecutor contend during closing argument that the defendant's entry was unlawful because he intended to panhandle. Indeed, the prosecutor emphasized: "[The defendant] may not have liked the fact that he wasn't allowed to be on [mall] property, and, in fact, we don't have to prove in this case whether the reasons that he wasn't allowed on mall property were proper or *even what those reasons were*." (Emphasis added.) Finally, consistent with the state's theory of unlawful entry, the trial court instructed the jury that it must determine whether the defendant "unlawfully *entered*" mall property. (Emphasis added.)

state could have proved the "unlawful entry" element of both criminal trespass in the first degree and simple trespass only by establishing that a valid ban was in fact in place against the defendant on November 28, 2015, so as to render his entry onto mall property on that date unlawful. See, e.g., *State* v. *Fourtin*, supra, 211 (determination of whether evidence was sufficient to sustain conviction must be made "in light of the state's theory of guilt at trial").

In light of the evidence introduced at trial, however, if the jury were to find that the state failed to prove that PSC and Salati were authorized to ban the defendant for longer than the rest of the business day, the jury could not consistently then have found that there was a valid ban in place against the defendant when he entered mall property on November 28, 2015. The jury would have been required to find that the July 9, 2015 ban notice, which purported to ban the defendant for one year, was invalid. There was no evidence that the ban had been issued by anyone other than an employee of PSC. The ban notice was submitted as an exhibit for identification purposes only, and neither party introduced any evidence as to who had issued the ban or whether the issuer had authority to do so. Although Arnone testified that ban notices are generally submitted to Kiley, the mall's general manager, to be "finalized," there was no evidence that this particular ban notice was submitted for review, or ever approved, by Kiley.

Therefore, there was no way that the jury could have credited the defendant's defense that bans issued by PSC personnel were not authorized beyond the business day on which they were issued, yet also have found that the July 9, 2015 ban notice was valid more than four months later, on November 28, 2015, without resorting to improper speculation as to whether it had been either issued or approved by someone outside of PSC with authority to do so. See *State* v. *Manley*, supra,

195 Conn. 579–80 (*Whistnant* does not permit instruction to be given "on [an evidentiary] basis . . . that essentially indulges and even encourages speculations" (internal quotation marks omitted)). Likewise, insofar as Salati's communication to the defendant on November 27, 2015, could be construed as its own independent ban from mall property, any such ban (under the defendant's theory) would no longer have been in effect when the defendant entered mall property the next day on November 28, 2015.

Accordingly, if the jury accepted the defendant's defense that the state failed to prove that PSC and Salati were authorized to ban him indefinitely, there was no evidence permitting the jury to find that his entry on November 28, 2015, was unlawful. Because unlawful entry is an element of simple trespass, the jury could not consistently have found the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass, as required by the fourth element of *Whistnant*. Put another way, the dispute at trial was not about the differentiating element of criminal trespass in the first degree—whether an order not to enter had been personally communicated to the defendant by an authorized person—but the common element of whether the defendant's entry was unlawful. Under such circumstances, the jury cannot rationally convict *only* on the greater offense, and no lesser included instruction is warranted. See *State* v. *Langley*, 128 Conn. App. 213, 233–34, 16 A.3d 799 (defendant was not entitled to instruction on criminally negligent homicide as lesser included offense of murder or of manslaughter in first degree, when evidence permitted jury to find either that defendant intentionally lit victim on fire or had "nothing to do whatsoever with [his] injuries," because "[s]uch competing theories do not revolve around the [differentiating] element of intent but the defendant's culpable conduct more generally"), cert.

denied, 302 Conn. 911, 27 A.3d 371 (2011); see also *United States* v. *Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018) ("[w]hen a defendant relies on an exculpatory defense that, if believed, would lead to acquittals on both the greater and lesser charges," that defendant is not entitled to instruction on lesser offense (internal quotation marks omitted)), cert. denied, U.S. , 139 S. Ct. 1276, 203 L. Ed. 2d 289 (2019); *United States* v. *Nur*, 799 F.3d 155, 159 (1st Cir. 2015) (lesser included offense instruction was inappropriate when "the scope of rational dispute [is limited] to elements common to the two offenses").

The defendant's arguments for why the jury could have found that the state failed to prove that PSC and Salati were authorized to ban people for more than the rest of the business day, but nonetheless found him guilty of simple trespass, are unavailing. First, the defendant contends that the jury could have credited Salati's testimony that the defendant began walking "quickly" away when she started to approach him on November 28, 2015, as if to try to escape, as well as Castillo's testimony that he told the defendant on numerous, prior occasions that "panhandling isn't allowed on [mall] property and that he would have to leave." Although this evidence may suggest that the defendant *subjectively believed* he was not licensed or privileged to be on mall property, it is insufficient as a matter of law to support the inference that he *in fact* was not licensed or privileged to be there. See *State* v. *Harper*, supra, 167 Conn. App. 341–42 (holding that there was insufficient evidence to sustain conviction for criminal trespass in third degree and observing that, "even if [the defendant's evasive conduct upon encountering police] could have supported the inference that the defendant . . . did not believe that [he] had a license or privilege to be at [the premises] that evening, such . . . conduct did not establish that [he] in fact had no license or privilege to be there"). Therefore, if the jury credited

the defendant's defense at trial, that does not provide an independent basis for finding his entry to be unlawful.

Moreover, we agree with the state that the jury could not properly have relied on Castillo's testimony that he had many times told the defendant to leave because of his panhandling as proof that the defendant's entry on November 28, 2015, was unlawful because it would have been inconsistent with the theories advanced by the parties at trial. As previously explained; see footnote 11 of this opinion and accompanying text; the state's theory of guilt was that the defendant was not licensed or privileged to enter mall property on November 28, 2015, because he previously had been banned, not because he had entered the property in order to panhandle. It was the defendant's initial act of entering the property, as distinct from entering it to engage in an unauthorized activity, that constituted the trespass.[12] See *State* v. *Belton*, 190 Conn. 496, 500, 461 A.2d 973 (1983) ("[t]o enter unlawfully contemplates an entry which is accomplished unlawfully, [whereas] to remain unlawfully contemplates an initial legal entry which becomes unlawful at the time that the actor's right, privilege or license to remain is extinguished"). In any event, for

[12] The defendant contends that the "theory of the case doctrine does not preclude the defendant from making lesser included offense requests that are not precisely aligned with a prosecution's theory at trial." We disagree that the theory of the case doctrine is irrelevant to our application of the fourth element of *Whistnant* under the circumstances of the present case.

The fourth *Whistnant* element, which requires the jury to consistently be able to find the defendant not guilty of the greater offense but guilty of the lesser, is in place in order "to prevent a jury from capriciously convicting on the lesser included offense when the evidence requires either conviction on the greater offense or acquittal." (Internal quotation marks omitted.) *State* v. *Manley*, supra, 195 Conn. 579. Because the state cannot sustain a conviction on the basis of a theory of guilt that it never presented; see *State* v. *Fourtin*, supra, 307 Conn. 211; it cannot be said that the jury could "consistently" find the defendant not guilty of the greater offense but guilty of the lesser for purposes of the fourth element of *Whistnant*, if the only way for the jury to find that the state proved the elements of the lesser offense would be to adopt a theory of guilt as to those elements that the state never presented at trial.

the reasons explained previously in this opinion, if the jury accepted the defendant's theory that PSC lacked authority to ban people indefinitely, it could not rationally then have found that these admonishments from Castillo, a PSC employee, rendered the defendant's entry unlawful on November 28, 2015.

Finally, the defendant argues that the jury reasonably could have found that Salati's communication to the defendant on November 27, 2015, did not amount to an "order" not to enter mall property within the meaning of § 53a-107 (a) (1) but was nonetheless sufficient to provide the defendant with the requisite knowledge that he was not permitted to enter the property the following day. We disagree.

Section 53a-107 (a) (1) requires the defendant to have entered the property in defiance of a prior "order . . . not to enter" communicated by an authorized person. Because the term "order" is not defined in the statute, we look to the dictionary to ascertain its commonly approved meaning. See, e.g., *State* v. *Drupals*, 306 Conn. 149, 161–62, 49 A.3d 962 (2012); see also General Statutes § 1-1 (a). The word "order" is defined as "[a]n authoritative indication to be obeyed; a command or direction." American Heritage College Dictionary (4th Ed. 2007) p. 979. This definition unquestionably encompasses Salati's November 27, 2015 communication to the defendant. Salati testified that she approached the defendant while in full police uniform and told him that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property, he's going to be arrested" for trespassing. Salati further testified that she "could [not] have been more clear" about this. Salati's November 27, 2015 communication was undoubtedly an "order" not to enter mall property. The jury could not reasonably have concluded otherwise.[13]

[13] As the defendant notes in his brief, defense counsel also questioned Salati's credibility and urged the jury to disregard her testimony because she

Accordingly, in light of the evidence introduced by the parties at trial, we can exclude as a matter of law the possibility that the jury rationally could have found the defendant guilty only of simple trespass, and not criminal trespass in the first degree. The trial court properly denied the defendant's request for an instruction on the lesser included offense.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

TOWN OF REDDING ET AL. *v.* GEORGETOWN LAND DEVELOPMENT COMPANY, LLC, ET AL.
(SC 20322)

Robinson, C. J., and Palmer, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiffs, the town of Redding, the town water pollution control commission, and a regional fire district, sought to foreclose municipal liens against the defendant R Co., a tax lien investment company and assignee of certain real estate tax liens originally levied on real property by a special taxing district authorized by the legislature. The town and the fire district filed motions for partial summary judgment with respect to priority, claiming that, under a 2007 public act (P.A. 07-196, § 4 (b) (3)) giving the special taxing district's liens priority "over all other liens or

had shown a propensity in the past to target the defendant. The defendant, however, did not offer any evidence to contravene the substance of Salati's testimony that she unequivocally ordered the defendant, on November 27, 2015, not to reenter mall property. Defense counsel merely made an unsubstantiated argument regarding her general credibility. We conclude that this is insufficient to place the differentiating element of criminal trespass in the first degree in sufficient dispute so as to warrant an instruction on a lesser included offense. See *United States* v. *Whitman*, supra, 887 F.3d 1246–47 ("[in the absence of] any evidence to support the bare assertion of [a defendant's] lawyer that the government failed to prove an element of the greater offense, the trial court [i]s not required to instruct the jury about lesser included offenses" (internal quotation marks omitted)).

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

encumbrances except a lien for taxes of the town of Redding," their tax liens had priority over the liens that R Co. had acquired from the special taxing district. R Co. also filed a motion for partial summary judgment, claiming that its liens were of equal priority, rather than subordinate, to those of the town and the fire district. The trial court determined that the liens of the town and the fire district were superior to the liens acquired by R Co., granted the motions for partial summary judgment filed by the town and the fire district, denied R Co.'s motion, and rendered a judgment of strict foreclosure in favor of the town and the fire district. R Co. appealed from the judgment of strict foreclosure, claiming that the trial court incorrectly had concluded that its liens were subordinate to those of the town and the fire district. *Held* that the trial court correctly determined that the liens acquired by R Co. from the special taxing district were subordinate to those of the town but incorrectly concluded that they also were subordinate to those of the fire district; Connecticut statutes addressing the subject of lien priority indicate that the legislature intended the phrase "except a lien for taxes of the town" in the priority clause of P.A. 07-196, § 4 (b) (3), to convey, not just the absence of priority of the special taxing district's liens over the town's liens, but subordination to them, and the priority clause also clearly and unambiguously provided the special taxing district's lines with priority over those of the fire district.

Argued December 17, 2019—officially released September 21, 2020**

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendant Georgetown Special Taxing District et al. were defaulted for failure to appear; thereafter, the case was transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Miller*, *J.*, granted the motions for partial summary judgment with respect to priority filed by the named plaintiff and by the plaintiff Georgetown Fire District and denied the motion for partial summary judgment with respect to priority filed by the defendant RJ Tax Lien Investments, LLC; subsequently, the court, *Schuman*, *J.*, rendered judgment of strict foreclosure, from which the defendant RJ Tax Lien Investments,

** September 21, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

LLC, appealed. *Reversed in part*; *vacated in part*; *judgment directed.*

Anthony J. LaBella, with whom, on the brief, were *Deborah M. Garskof* and *Neal L. Moskow*, for the appellant (defendant RJ Tax Lien Investments, LLC).

Adam J. Cohen, with whom were *Michael LaVelle* and *Lukas J. Thomas*, for the appellees (named plaintiff et al.).

Opinion

MULLINS, J. This appeal requires us to determine the priority of tax liens levied on real property by the Georgetown Special Taxing District (taxing district) pursuant to No. 07-196, § 4 (b) (3), of the 2007 Public Acts (P.A. 07-196)[1] relative to tax liens held by other municipal entities on that same property. The plaintiffs, the town of Redding (town), the Redding Water Pollution Control Commission (commission), and Georgetown Fire District (fire district), brought this action to foreclose municipal liens against the defendant RJ Tax Lien Investments, LLC,[2] an assignee of real estate tax

[1] Public Act 07-196, § 4 (b) (3), provides: "In order to provide for the collection and enforcement of its taxes, fees, rents, benefit assessments and other charges, the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section. Such taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as delinquent property taxes. Each such lien may be continued, recorded and released in the manner provided for property tax liens and shall take precedence over all other liens or encumbrances except a lien for taxes of the town of Redding. Each such lien may be continued, recorded and released in the manner provided for property tax liens."

[2] Numerous other entities, as well as one individual, were named as defendants, including the taxing district and Georgetown Land Development Company, LLC, which owned the properties at issue in the foreclosure action. None of these other defendants is a party to this appeal. For the sake of clarity, we refer to RJ Tax Lien Investments, LLC, as the defendant throughout this opinion, and the other, nonparticipating defendants by name when necessary.

liens originally levied by the taxing district. The town and the fire district filed motions for partial summary judgment with respect to priority, asserting that, under P.A. 07-196, § 4 (b) (3), their tax liens had priority over the liens that the defendant had acquired from the taxing district. The trial court agreed, granted their motions for partial summary judgment, and subsequently rendered a judgment of strict foreclosure in favor of the town and the fire district. The defendant appeals from the judgment of strict foreclosure, claiming that the trial court incorrectly concluded that its liens were subordinate to those of the town and the fire district.[3] Although we agree with the trial court that the liens acquired by the defendant from the taxing district are subordinate to those of the town, we agree with the defendant that the trial court incorrectly concluded that they are subordinate to those of the fire district. Accordingly, we reverse the judgment insofar as the trial court granted the fire district's motion for partial summary judgment with respect to priority, and we remand the case with direction to vacate that portion of the judgment subordinating the liens acquired by the defendant to the fire district's liens, to render judgment consistent with this opinion, and for the setting of new law days.

The relevant facts of this case are undisputed. At all relevant times, Georgetown Land Development Company, LLC (Georgetown), owned, and was in the process of developing, approximately fifty-one acres of property located in the town (property).[4] In order to facilitate the financing and development of this project,

[3] The parties that moved for summary judgment with respect to priority stipulated during the trial court proceedings that the commission's liens for unpaid sewer charges are subordinate to the tax liens held by the defendant, the town, and the fire district. See General Statutes §§ 7-254 (b) and 7-258 (a). Accordingly, we need not address the priority of the commission's liens in this opinion.

[4] Although the property is comprised of dozens of individual parcels of real estate, the parties in the present appeal do not differentiate between them for purposes of litigating the issue of priority. For simplicity, we refer to the individual parcels collectively as the property throughout this opinion.

the legislature enacted No. 05-14 of the 2005 Special Acts, which later was amended by P.A. 07-196. These acts authorized the creation of a special taxing district that could finance the project by issuing municipal bonds and by assessing taxes and other charges on the real property located within the taxing district's territorial boundaries. See P.A. 07-196, § 4 (b) (1).[5] Georgetown established the taxing district pursuant to this legislative grant.

The taxing district assessed real estate taxes against the property for the 2007 through 2014 grand lists, which automatically became liens once they were not timely paid,[6] in the total amount of $19,992,861.84. The taxing district assigned certain of these liens, totaling $1,159,692 in unpaid taxes, to the defendant.

The town and the fire district also levied real estate taxes against the property. The town obtained tax liens for the 2009 through 2014 grand list years totaling $3,055,802.01. The fire district's liens, pertaining to the same grand list years, total $145,069.

[5] Public Act 07-196, § 4 (b) (1), provides that the taxing district "shall have the power to fix, revise, charge, collect, abate and forgive reasonable taxes, fees, rents and benefit assessments, and other charges for the cost of the improvements, financing costs, operating expenses and other services and commodities furnished or supplied to the real property in the [taxing] district in accordance with the applicable provisions of the general statutes which apply to districts established under section 7-325 of the general statutes, and special act 05-14, as amended by this act, and in the manner prescribed by the [taxing] district. Notwithstanding any provision of the general statutes, the [taxing] district may pay the entire cost of any improvements, including the costs of financing such improvements, capitalized interest and the funding of any reserve funds necessary to secure such financing or the debt service of bonds or notes issued to finance such costs, from taxes, fees, rents, benefit assessments or other revenues and may assess, levy and collect said taxes, fees, rents or benefit assessments concurrently with the issuance of bonds, notes or other obligations to finance such improvements based on the estimated cost of the improvements prior to the acquisition or construction of the improvements or upon the completion or acquisition of the improvements."

[6] See P.A. 07-196, § 4 (b) (3) ("taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof").

In July, 2015, the plaintiffs commenced this foreclosure action against Georgetown, the defendant, and numerous other lienholders. The town and the fire district each filed motions for partial summary judgment on the issue of priority only, maintaining that their tax liens on the property were superior in priority to the tax liens that the defendant had acquired by assignment from the taxing district. The defendant filed a motion for partial summary judgment, asserting that its liens were of equal priority, rather than subordinate, to those of the town and the fire district.

The trial court, *Miller*, *J.*, agreed with the town and the fire district, and concluded that their tax liens had priority over the liens assigned to the defendant by the taxing district. Judge Miller relied on P.A. 07-196, § 4 (b) (3), specifically the phrase providing that any liens obtained by the taxing district "shall take precedence over all other liens or encumbrances except a lien for taxes of the town . . . ." Judge Miller construed this phrase as subordinating the taxing district's liens to those of the town. With respect to the fire district, Judge Miller reasoned that the fire district's liens were of equal priority to the town's liens pursuant General Statutes § 7-328 (a),[7] and that, because the town's liens were superior to those of the taxing district, so, too, were the fire district's liens. Accordingly, Judge Miller determined that the liens of the town and the fire district were superior to the liens acquired by the defendant, granted each of their motions for partial summary judg-

[7] In concluding that the fire district's liens were of equal priority to those of the town, Judge Miller relied on a clause in § 7-328 (a) that provides that tax liens held by a "district" created pursuant to General Statutes § 7-325 (a) "shall be a lien upon the property in the same manner as town taxes . . . and foreclosed in the same manner as liens for town taxes or enforced in accordance with any provision of the general statutes for the collection of property taxes. . . ." For purposes of § 7-328 (a), the term "district" is defined to include "any fire district . . . ." General Statutes § 7-324.

ment with respect to priority, and denied the defendant's motion.

Thereafter, the trial court, *Schuman*, *J.*, rendered a judgment of strict foreclosure in favor of the town and the fire district. The defendant appealed to the Appellate Court from that judgment of strict foreclosure, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the defendant claims that the liens it acquired from the taxing district are of equal priority to those of the town and the fire district, rather than subordinate to them.[8] The defendant contends that Judge Miller misconstrued P.A. 07-196, § 4 (b) (3), and failed to properly adhere to other Connecticut statutes that generally recognize that liens held by municipal entities are of equal priority for purposes of a foreclosure action. We agree with the trial court that the defendant's liens are subordinate to the town's liens. We agree with the defendant, however, that the trial court incorrectly determined that the defendant's liens are subordinate to the fire district's liens.

We begin with the general principles governing our review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the

[8] The parties in the present appeal agree that the taxing district's assignment of the tax liens to the defendant does not affect the priority of those liens pursuant to General Statutes § 12-195h, which provides in relevant part: "Any municipality . . . may assign, for consideration, any and all liens filed by the tax collector to secure unpaid taxes on real property as provided under the provisions of this chapter. . . . The assignee or assignees of such liens shall have and possess the same powers and rights at law or in equity as such municipality and municipality's tax collector would have had if the lien had not been assigned with regard to the precedence and priority of such lien . . . ." The taxing district qualifies as a "municipality" for purposes of § 12-195h. See General Statutes § 12-171 (adopting definition of "municipality" set forth in General Statutes § 12-141, which includes taxing districts).

moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

The material facts are undisputed in the present case. The sole issue is whether, under the relevant provisions of the taxing district's enabling legislation, its tax liens are subordinate, rather than equal in priority, to the liens held by the town and the fire district. This issue is one of statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019). Questions of statutory construction are matters of law subject to plenary review. E.g., *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020).

The taxing district's power to obtain liens for property taxes and other charges is set forth in P.A. 07-196, § 4 (b) (3), which provides in relevant part: "In order to provide for the collection and enforcement of

its taxes, fees, rents, benefit assessments and other charges, the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section. Such taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as delinquent property taxes. *Each such lien . . . shall take precedence over all other liens or encumbrances except a lien for taxes of the town . . . .*" (Emphasis added.) It is the meaning of this final sentence of P.A. 07-196, § 4 (b) (3) (priority clause), that is at the heart of the parties' dispute.

Because we reach different conclusions regarding how this language applies to the town and the fire district, we first address the priority of the town's liens. The town contends that the priority clause indicates the legislature's intent to subordinate the taxing district's liens to its liens, whereas the defendant contends that the priority clause merely puts their respective liens on parity with each other. We conclude that the town's interpretation is the only reasonable one.

The priority clause provides the taxing district's liens with priority over "all other liens or encumbrances *except* a lien for taxes of the town . . . ." (Emphasis added.) P.A. 07-196, § 4 (b) (3). "In determining whether the statutory language is plain and unambiguous, words and phrases [must] be construed according to the commonly approved usage of the language . . . . General Statutes § 1-1 (a). We ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 718, 207 A.3d 493

(2019). The word "except" is defined with substantial similarity in dictionaries. For instance, Webster's Third New International Dictionary defines "except" to mean "to take or leave out . . . from a number or a whole: exclude or omit . . . ." Webster's Third New International Dictionary (2002) p. 791. Similarly, The American Heritage Dictionary of the English Language defines "except" as "[w]ith the exclusion of; other than . . . ." The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 618. The dictionary definitions of "except" lead us to believe that the legislature intended to remove the town's tax liens from the class of liens over which the taxing district's liens have priority.

The defendant is correct in pointing out, however, that, although this exclusion provides that the taxing district's liens do not have priority over the town's liens, it does not necessarily indicate that they are subordinate, rather than equal, to the town's liens.[9]

A review of other statutes addressing the subject of lien priority, however, persuades us that the legislature intended the phrase "except a lien for taxes of the town" in the priority clause to convey, not just the absence of priority over the town's liens, but subordination to them. See, e.g., *Board of Education* v. *Tavares Pediatric Center*, 276 Conn. 544, 557 n.10, 888 A.2d 65 (2006) ("[w]hen interpreting statutory language, we may seek guidance from statutory provisions relating to the same subject matter" (internal quotation marks omitted)); *Connecti-*

[9] We note that the priority clause is not ambiguous merely because, when considered in a vacuum, it is silent as to whether the taxing district's liens are subordinate to the town's liens rather than equal to them. "[T]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citations omitted; internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 653–54, 969 A.2d 750 (2009).

cut Light & Power Co. v. *Dept. of Public Utility Control*, 266 Conn. 108, 123, 830 A.2d 1121 (2003) ("[b]ecause the legislature is always presumed to have created a harmonious and consistent body of law, the proper construction of any statute must take into account the mandates of related statutes governing the same general subject matter" (internal quotation marks omitted)).

The language in the priority clause is similar to that consistently used by the legislature in numerous other statutes in order to subordinate various types of liens to municipal tax liens. See, e.g., General Statutes § 7-239 (b) (water use lien "shall take precedence over all other liens or encumbrances except taxes"); General Statutes § 7-339ii (e) (2) (municipal benefit assessments "shall take precedence over all other liens or encumbrances except a lien for property taxes"); General Statutes § 8-29 (town planning commission benefit assessment lien "shall take precedence of all other encumbrances except taxes"); General Statutes § 17b-125 (a) (town reimbursement agreement lien "shall have precedence over all subsequently recorded encumbrances, except tax liens or other municipal liens of such towns"); General Statutes § 47-258 (b) (unit owners' association lien "is prior to all other liens and encumbrances on a unit except . . . liens for real property taxes"); General Statutes § 49-73b (b) (town expenditures lien "shall take precedence over any other encumbrance except municipal tax assessments on such real estate").

Like the priority clause at issue in the present case, none of these statutes expressly provides that the subject liens are "subordinate" or "inferior" to tax liens. Nonetheless, in light of General Statutes § 12-172, which provides that tax liens on real property have priority over all other types of encumbrances unless other-

wise provided by law,[10] it is clear that, in these statutes, the legislature used the phrase "except taxes," or a substantially similar phrase, for the purpose of indicating that the subject liens are subordinate to tax liens.[11] See *Brock* v. *State ex rel. Wyoming Workforce Services*, 394 P.3d 460, 463, 465 (Wyo. 2017) (statute providing that compensation fund liens "have priority over all claims except taxes" clearly and unambiguously "indicates that a lien for taxes is superior to a claim for contributions to the unemployment compensation fund" (emphasis omitted; internal quotation marks omitted)). That the legislature phrased the priority clause in nearly identical fashion suggests a similar result was intended. Indeed, the exception in the priority clause is even more specific because it applies, not to tax liens generally, but specifically to tax liens held by the town.

Conversely, if the legislature wants to establish equal priority between certain types of liens and taxes, it does so with explicit language. See, e.g., General Statutes § 8-268 (a) (relocation assistance lien for displaced tenant

[10] General Statutes § 12-172 provides in relevant part that tax liens on real property, "unless otherwise specially provided by law . . . shall take precedence of all transfers and encumbrances in any manner affecting such interest in such item, or any part of it. . . ." See *Brown* v. *General Laundry Service, Inc.*, 139 Conn. 363, 367, 94 A.2d 10 (1952) (observing that, under Connecticut law municipal tax liens "would take precedence over any other [e]ncumbrance on the property, irrespective of the time at which that [e]ncumbrance might have attached"), vacated on other grounds sub nom., *United States* v. *New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954); see also *United States* v. *Gilmore*, 62 F. Supp. 2d 576, 582 (D. Conn. 1999); *Wilcox* v. *Bliss*, 116 Conn. 329, 334, 164 A. 659 (1933).

[11] Indeed, the town and the fire district concede that, in the present case, the "except taxes" language conveys subordination to tax liens. Specifically, they concede that the commission's liens for unpaid sewer charges are subordinate to the parties' tax liens pursuant to General Statutes §§ 7-254 (b) and 7-258 (a); see footnote 3 of this opinion; both of which provide that such liens "shall take precedence over all other liens and encumbrances except taxes . . . ."

"shall have the same priority as . . . a lien for municipal taxes"); General Statutes § 8-270 (a) (relocation assistance lien "shall have the same priority as . . . a lien for municipal taxes"); General Statutes § 12-124a (b) ("[l]iens recorded under the provisions of this subsection shall have the same precedence as tax liens under section 12-172"); General Statutes § 32-602 (e) (payments to Capital Region Development Authority in lieu of real property taxes "shall have the same lien and priority, and may be enforced by the authority in the same manner, as provided for municipal real property taxes"); General Statutes § 47a-56i (c) (town expenditures to make rental dwellings habitable "shall be secured by a lien on such property which shall have the same priority as a lien for municipal taxes").

Although these statutes did not address lien priority between municipal entities, as is the situation in the present case, they nonetheless demonstrate that, when the legislature provides a particular lien with priority over all other encumbrances "except" a particular other type of lien, it generally intends the former to be subordinate to the latter. Consistent with these statutes, we conclude, in the present case, that the phrase in the priority clause, "shall take precedence over all other liens or encumbrances except a lien for taxes of the town," was intended to subordinate the taxing district's liens to those of the town. Had the legislature intended to place the town's and the taxing district's liens on parity with each other, it easily could have said so explicitly, as it has done in the numerous aforementioned statutes. See, e.g., *Plourde* v. *Liburdi*, 207 Conn. 412, 416, 540 A.2d 1054 (1988) ("[t]he use of different words [in the context of] the same [subject matter] must indicate a difference in legislative intention" (internal quotation marks omitted)).

Nonetheless, the defendant argues that, under General Statutes §§ 12-181[12] and 12-192,[13] municipal entities, such as the town and the taxing district, have equal priority and cannot foreclose each other's tax liens. We disagree.

Whether §§ 12-181 and 12-192 permit a municipality to foreclose another municipality's tax liens is largely beside the point. There is, of course, nothing precluding *the legislature*, which has exclusive and broad discretion to exercise the power of taxation; see *Pepin* v. *Danbury*, 171 Conn. 74, 82, 368 A.2d 88 (1976); from enacting legislation that subordinates the tax liens of a specially created taxing district to those of the municipality in which it sits (or any other municipal entity) if it deems such action appropriate. As previously

[12] General Statutes § 12-181 provides in relevant part: "[A]ll municipalities having tax liens upon the same piece of real estate may join in one complaint for the foreclosure of the same . . . . If all municipalities having tax liens upon the same piece of real estate do not join in a foreclosure action, any party to such action may petition the court to cite in any or all of such municipalities as may be omitted, and the court shall order such municipality or municipalities to appear in such action and be joined in one complaint. . . . If one or more municipalities having one or more tax liens upon the same piece of property are not joined in one action, each of such municipalities shall have the right to petition the court to be made a party plaintiff to such action and have its claims determined in the same action, in which case the same court shall continue to have jurisdiction of the action and shall have the same rights to dispose of such action as if all municipalities had originally joined in the complaint. . . . If one or more municipalities foreclose one or more tax liens on real estate and acquire absolute title thereto and if any other municipality having one or more tax liens upon such real estate at the time such foreclosure title becomes absolute has not, either as plaintiff or defendant, been made a party thereto, the tax liens of each of such other municipalities shall not be thereby invalidated or jeopardized."

[13] General Statutes § 12-192 provides in relevant part: "If two or more municipalities have tax liens against any of such properties, they may join in the proceeding. Upon foreclosure in such a case, the court shall decree that each municipality has an undivided interest in such property in proportion to the amount due upon the tax lien or liens it has against it, plus any interest, lien fees and other charges which have accrued upon them since the bringing of the petition. . . ."

explained, that is precisely what the legislature did in enacting P.A. 07-196, § 4, which unambiguously provides the town with the requisite authority to foreclose on the taxing district's liens.

In any event, to the extent that there is any tension between §§ 12-181 and 12-192 and our construction of P.A. 07-196, § 4 (b) (3), we are mindful of "the well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." (Internal quotation marks omitted.) *Studer* v. *Studer*, 320 Conn. 483, 497–98, 131 A.3d 240 (2016).

Sections 12-181 and 12-192 are statutes of general applicability, whereas P.A. 07-196, § 4 (b) (3), was specially enacted by the legislature to address the issue of priority between these specific parties relative to this particular development project. The legislature was free to draft P.A. 07-196, § 4 (b) (3), in whatever manner it thought best to address any unique issues it had identified, including, if it deemed appropriate, to ensure that the town maintained primary authority to assess and levy real estate taxes. See *Windham First Taxing District* v. *Windham*, 208 Conn. 543, 557, 546 A.2d 226 (1988) ("special tax districts [created pursuant to chapter 105 of the General Statutes] are authorized to supply services where lacking, or to augment them when they are already provided by the municipality, but cannot displace or preempt the town's primary authorized power to provide and tax for such services"). Put simply, the specific provisions of P.A. 07-196, § 4 (b) (3),

must prevail over the generally applicable §§ 12-181 and 12-192.[14]

Having concluded that the defendant's liens are subordinate to those of the town, we next address their priority relative to the tax liens held by the fire district. We conclude that the priority clause of P.A. 07-196, § 4 (b) (3), which gives the taxing district's liens priority "over all other liens or encumbrances except a lien for taxes of the town," clearly and unambiguously provides the taxing district with priority over the fire district. By listing the town's tax liens as the only type of lien

[14] The defendant also relies on *Stratford* v. *Thorough*, Superior Court, judicial district of Fairfield, Docket No. CV-12-6030347-S (April 21, 2015) (*Jennings*, *J.*) (60 Conn. L. Rptr. 216), and *Cordani* v. *Stramiglia*, Superior Court, judicial district of Litchfield, Docket No. CV-94-0066507 (March 15, 1995) (*Pickett*, *J.*) (14 Conn. L. Rptr. 164), as support for its position that taxing districts' tax liens are of equal priority to town tax liens. Both decisions concluded that tax liens held by taxing districts were of equal priority to those of the municipalities in which the taxing districts were based. See *Stratford* v. *Thorough*, supra, 217; *Cordani* v. *Stramiglia*, supra, 165. We find those decisions inapposite, however, because the taxing districts in those cases were established pursuant to General Statutes § 7-325 and, thus, were subject to the distinct provisions set forth in chapter 105 of the General Statutes, whereas the taxing district in the present case was established by a special act of the legislature and is subject to the priority clause of P.A. 07-196, § 4 (b) (3), which is worded differently than any of the provisions in chapter 105.

We acknowledge that the initial clause of P.A. 07-196, § 4 (b) (3), provides that "the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section." Nevertheless, insofar as the liens of taxing districts created pursuant to § 7-325 are in fact entitled to equal priority to town liens, we are not persuaded that this reference to § 7-325 sheds any light on the meaning of the priority clause. As previously stated, the priority clause unambiguously provides the town's liens with priority over the taxing district's liens. Because the priority clause addresses the specific subject of lien priority, generalized references elsewhere in the statute to the powers provided by § 7-325 do not compel a different construction. See *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 809, 873 A.2d 965 (2005) ("[i]t is well settled that [when] statutes contain specific and general references covering the same subject matter, the specific references prevail over the general" (internal quotation marks omitted)).

that is not inferior to the taxing district's liens, the legislature is presumed to have intended to exclude all other types of liens and encumbrances, including tax liens held by the fire district, to be inferior to the taxing district's liens. "[W]e consider the tenet of statutory construction referred to as expressio unius est exclusio alterius, which may be translated as the expression of one thing is the exclusion of another. . . . [When] express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850–51, 937 A.2d 39 (2008).

That the priority clause gives the taxing district priority "over *all other* liens or encumbrances except a lien for taxes of the town" leaves no doubt that the legislature intended no further exceptions. (Emphasis added.) P.A. 07-196, § 4 (b) (3). "There cannot be any broader classification than the word all. . . . In its ordinary and natural meaning, the word all leaves no room for exceptions." (Citation omitted; internal quotation marks omitted.) *Burkle* v. *Car & Truck Leasing Co.*, 1 Conn. App. 54, 56–57, 467 A.2d 1255 (1983); see also *Canton* v. *Cadle Properties of Connecticut, Inc.*, 316 Conn. 851, 858, 114 A.3d 1191 (2015) (legislature's use of word "all" "support[s] the broadest possible reading" of statute). We therefore conclude that the defendant's tax liens are superior to those of the fire district.[15]

In sum, the fire district's tax liens are subordinate to those of the defendant, which are, in turn, subordinate

[15] We note that our construction of the priority clause is not inconsistent with § 12-172, which, as previously noted; see footnote 10 of this opinion and accompanying text; provides that tax liens on real property have priority over all other encumbrances on the property "unless otherwise specially provided by law . . . ." The priority clause of P.A. 07-196, § 4 (b) (3), fits within this caveat of § 12-172 because, as we have explained, it clearly and unambiguously sets forth the relative priority of tax liens held by the taxing district vis-à-vis the town and all other liens.

to those of the town. The trial court properly granted the town's motion for partial summary judgment but improperly granted the fire district's motion.

The judgment is reversed insofar as the trial court granted the motion for partial summary judgment with respect to priority filed by Georgetown Fire District and the case is remanded with direction to vacate that portion of the judgment subordinating the liens acquired by RJ Tax Lien Investments, LLC, to Georgetown Fire District's liens, to render judgment consistent with this opinion, and for the setting of new law days; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* CODY M.*
(SC 20213)

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

Syllabus

Convicted, after a jury trial, of two counts of violating a standing criminal protective order and two counts of threatening in the second degree, the defendant appealed to the Appellate Court, claiming, inter alia, that his conviction of two counts of violating a protective order violated the constitutional prohibition against double jeopardy and that the trial court improperly instructed the jury as to the one of the counts of violating a protective order by incorrectly defining the term "harassing." The defendant's conviction stemmed from his actions toward the victim when they appeared before a juvenile court for a hearing relating to their children. At the time, the defendant was subject to a standing criminal protective order that, with limited exceptions, prohibited him from contacting the victim in any manner and from threatening or harassing her. As the hearing began, the defendant attempted to engage in

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

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

small talk with the victim, telling her that he still loved her and asking her why she had blocked his phone calls, but she ignored him. The defendant's tone then changed, he whispered to the victim that she was going to have problems, and, when she looked at him, he mouthed that he was going to kill her. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that the defendant's double jeopardy claim failed because his conviction of each count of violating a protective order was supported by a separate and distinct act even though those acts arose from the same conversation. The Appellate Court also concluded that the trial court did not improperly instruct the jury as to the definition of the term "harassing." On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the defendant's conviction of two counts of violating a standing criminal protective order did not violate the constitutional prohibition against double jeopardy: because the purpose of the statute (§ 53a-223a) under which the defendant was convicted is to protect victims of domestic violence by increasing the penalty for violating protective orders, the legislature intended to punish separately each discrete act that violates a protective order, rather than to punish only the course of action that those acts constitute, and, therefore, conviction of multiple counts is permitted for distinct acts that constitute separate violations of § 53a-223a; in the present case, the defendant's statements, although made in quick succession, constituted two distinct acts in violation of two different conditions of the protective order and, thus, were separately punishable, as the defendant's act of whispering to the victim that he loved her and asking her why she had blocked his phone calls violated the protective order's no contact provision, and the defendant's escalation of his behavior by asserting that she was going to have problems and mouthing that he would kill her was in violation of the order's provision prohibiting him from threatening the victim.
2. The defendant could not prevail on his claim that the Appellate Court improperly upheld the trial court's jury instruction as to the second count of violating a standing criminal protective order because, even if the trial court incorrectly defined the term "harassing," any error was harmless beyond a reasonable doubt; the state having alleged in that second count that the defendant had violated the protective order by either threatening or harassing the victim, and the jury having found the defendant guilty of threatening in the second degree on the basis of the same underlying conduct as that on which the second count was based, the jury necessarily found the defendant guilty of threatening the victim as charged in the second count.

(*Two justices concurring and dissenting in one opinion*)

Argued November 14, 2019—officially released September 21, 2020***

*** September 21, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with two counts each of the crimes of criminal violation of a standing criminal protective order and threatening in the second degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Sheldon*, *Elgo* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

John L. Cordani, *Jr.*, assigned counsel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Laura DeLeo*, senior assistant state's attorney, and *Bruce R. Lockwood*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. The principal issue in this certified appeal is whether multiple convictions for violation of a standing criminal protective order, arising from a series of statements made during a court hearing by the defendant, Cody M., to the person protected by the order, violate the constitutional protection from double jeopardy. The Appellate Court affirmed the judgment, rendered after a jury trial, convicting the defendant of two counts of criminal violation of a standing criminal protective order in violation of General Statutes § 53a-223a,[1] one count of threatening in the second degree

[1] General Statutes § 53a-223a provides: "(a) A person is guilty of criminal violation of a standing criminal protective order when an order issued pursuant to subsection (a) of section 53a-40e has been issued against such person, and such person violates such order.

"(b) No person who is listed as a protected person in such standing criminal protective order may be criminally liable for (1) soliciting, requesting, commanding, importuning or intentionally aiding in the violation of the standing criminal protective order pursuant to subsection (a) of

in violation of General Statutes (Rev. to 2015) § 53a-62 (a) (2),[2] and one count of threatening in the second degree in violation of § 53a-62 (a) (3). *State* v. *Meadows*, 185 Conn. App. 287, 290, 197 A.3d 464 (2018). We granted the defendant's petition for certification to appeal,[3] and the defendant now claims that the Appellate Court incorrectly concluded that (1) his conviction of two counts of violating a standing criminal protective order did not violate his constitutional right against double jeopardy, and (2) the trial court's jury instruction correctly defined the term "harassing" with respect to the penalty enhancement under § 53a-223a (c) (2). We conclude that the defendant's conviction of two counts of violating a standing criminal protective order did not violate his right against double jeopardy and that any possible instructional error in the trial court's definition of "harassing" was harmless, and, accordingly, we affirm the judgment of the Appellate Court.

section 53a-8, or (2) conspiracy to violate such standing criminal protective order pursuant to section 53a-48.

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

[2] As the Appellate Court aptly noted, "[No.] 16-67 of the 2016 Public Acts . . . amended subsection (a) of § 53a-62 by redesignating the existing subdivisions (2) and (3) as subdivision (2) (A) and (B) without modifying the language of that provision. We refer to the 2015 revision of § 53a-62 (a) (3) because that is the statute under which the defendant was charged and convicted." *State* v. *Meadows*, 185 Conn. App. 287, 290 n.1, 197 A.3d 464 (2018).

[3] We granted the defendant's petition for certification to appeal, limited to the following issues: "Did the Appellate Court [correctly] conclude that (1) the defendant's constitutional right to be free from double jeopardy was not violated when he was convicted of two counts of violation of a standing criminal protective order on the basis of different words spoken to the protected person during a single, brief, and uninterrupted statement, and (2) the jury was properly instructed that to 'harass' means to 'trouble, worry or torment' for purposes of an enhanced penalty for violating a standing criminal protective order?" *State* v. *Meadows*, 330 Conn. 947, 947–48, 196 A.3d 327 (2018).

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On May 12, 2015, the trial court, *Keegan*, *J.*, issued a standing criminal protective order against the defendant, ordering that he, inter alia, "not assault, threaten, abuse, harass, follow, interfere with . . . stalk" or "contact . . . in any manner, including by written, electronic or telephone contact," the victim, who is the mother of his children. One exception to the order permitted contact with the victim "for purposes of visitation, as directed by [the] family court." Subsequently, on September 1, 2015, both the victim and the defendant were present at a juvenile court hearing. The defendant, who was incarcerated at the time, was brought to the hearing and placed near the victim.

When the hearing began, the defendant tried to engage in "small talk" with the victim, but she ignored him and did not make eye contact. The victim testified that the defendant had "whispered to me that he still loved me and had asked me why I had a block on the phone and that I said I would never do this to him . . . . [W]hen I wasn't responding to him, his tone changed and he told me that 'you're going to have problems when I get home, bitch,' and . . . I looked at him, and he told me that he was going to fucking kill me." The conversation was only as loud as a whisper, except for the last statement, which the defendant mouthed to the victim. The victim then told the defendant to stop threatening her, and he responded that he was not. The victim thought the statements were threats, and she was afraid. At some point, an assistant attorney general present for the hearing informed the court that the defendant was speaking to the victim.

After the hearing ended, a judicial marshal removed the defendant from the courtroom. Once the defendant was outside of the courtroom, he continued to make remarks about the victim, saying, "I'm gonna get that bitch when I get out. . . . I'm gonna kill that fucking

bitch, I'm gonna fuck that bitch up, I'm gonna fucking kill her." Subsequently, the defendant reiterated these statements while meeting with a social worker, also stating that, "if he's not with [the victim], he's going to make sure nobody else is with her," and that, "if she chooses not to be with him, he will beat the f'ing shit out of her." He also said "he would make her another Tracey Morton."[4]

In the operative information,[5] the state charged the defendant with two counts of violation of a standing criminal protective order and two counts of threatening in the second degree.[6] The case was tried to a jury, which found the defendant guilty on all four counts, and the trial court rendered a judgment of conviction in accordance with the jury's verdict.[7]

The defendant appealed from the judgment of conviction to the Appellate Court, which affirmed the judgment of conviction. *State* v. *Meadows*, supra, 185 Conn.

[4] It appears that the defendant's reference to "Tracey Morton" is a misstatement of the name of the victim in a high profile case of family violence. See part I A of this decision.

[5] The state initially charged the defendant with one count of violation of a standing criminal protective order, threatening in the second degree, and disorderly conduct in violation of General Statutes § 53a-182.

[6] Count one of the operative information provides: "In the Superior Court of Connecticut, New Haven judicial district, geographical area twenty-three, Assistant State's Attorney Laura DeLeo accuses the defendant, CODY [M.], of VIOLATION OF A STANDING CRIMINAL PROTECTIVE ORDER, and charges that, on or about September 1, 2015, at or about the location of 239 Whalley Avenue, in the city of New Haven, CODY [M.], did violate the terms of a standing criminal protective order that had issued against him, to wit: by having contact with the protected person, in violation of [§] 53a-223a."

Count two provides: "In the Superior Court of Connecticut, New Haven judicial district, geographical area twenty-three, Assistant State's Attorney Laura DeLeo accuses the defendant, CODY [M.], of VIOLATION OF A STANDING CRIMINAL PROTECTIVE ORDER, and charges that, on or about September 1, 2015, at or about the location of 239 Whalley Avenue, in the city of New Haven, CODY [M.], did violate the terms of a standing criminal protective order that had issued against him, to wit: by threatening and harassing the protected person, in violation of [§] 53a-223a."

[7] The trial court sentenced the defendant to a total effective sentence of eight years imprisonment with seven years of special parole.

App. 308. With respect to the issues relevant to this certified appeal, the Appellate Court first rejected the defendant's claim that his two convictions for violating a standing criminal protective order were a double jeopardy violation, concluding that each conviction was supported by a "separate and distinct [act], and it matters not that they arose from the same conversation."[8] Id., 298. The Appellate Court also disagreed with the defendant's claim that the trial court improperly defined the term "harassing conduct" when instructing the jury as to the second count of violating a standing criminal protective order, holding that the definition used was consistent with the decision in *State* v. *Larsen*, 117 Conn. App. 202, 209 n.5, 978 A.2d 544, cert. denied, 294 Conn. 919, 984 A.2d 68 (2009). See *State* v. *Meadows*, supra, 299–301. This certified appeal followed. See footnote 3 of this opinion. Additional facts and procedural history will be set forth in the context of each claim on appeal.

I

We begin with the defendant's claim that his two convictions under § 53a-223a for violations of a standing criminal protective order violated the constitutional prohibition against double jeopardy. The Appellate Court's analysis of this issue centered on the premise that the defendant violated "two separate provisions" of the order; one count originated from his initial contact, and the second count was based on the defendant's threat to the victim. See *State* v. *Meadows*, supra, 185 Conn. App. 298. The Appellate Court considered each violation "distinct" and deemed its decision in *State* v. *Nixon*, 92 Conn. App. 586, 886 A.2d 475 (2005), which had held a series of knife stabs to be a single, continuous act, inapposite. See *State* v. *Meadows*, supra, 297–99.

[8] Although the defendant did not preserve this double jeopardy claim at trial, the Appellate Court considered it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Meadows*, supra, 185 Conn. App. 293–94.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses protection against double jeopardy." (Citation omitted; internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013).

"In accordance with *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), double jeopardy claims challenging the constitutional validity of convictions pursuant to two distinct statutory provisions are traditionally analyzed by inquiring whether each provision requires proof of a fact of which the other does not require proof. . . . We prefer a different form of analysis in the circumstances of this case, in which only one statutory provision is at issue.[9] The proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute." (Citations omitted; emphasis in original; footnote added; internal quotation marks

[9] For an example of a case that reviews a similar issue but analyzes double jeopardy under separate statutory provisions, see *State* v. *Culver*, 97 Conn. App. 332, 338–39 n.7, 904 A.2d 283, cert. denied, 280 Conn. 935, 909 A.2d 961 (2006).

omitted.) *State* v. *Garvin*, 242 Conn. 296, 304, 699 A.2d 921 (1997). Put differently, we must determine the "unit of prosecution" intended by the legislature in enacting § 53a-223a. See *Bell* v. *United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (employing unit of prosecution analysis to determine whether Congress intended "cumulative punishment for each woman" transported in violation of Mann Act); *State* v. *Garvin*, supra, 306–307 (legislature intended unit of prosecution to be number of bail bonds breached rather than number of times defendant failed to appear); *State* v. *Tweedy*, 219 Conn. 489, 498–99, 594 A.2d. 906 (1991) (legislature intended "the course of committing a larceny . . . as the time frame for completion of the offense of robbery" (internal quotation marks omitted)).

"The issue, [although] essentially constitutional, becomes one of statutory construction." *State* v. *Rawls*, 198 Conn. 111, 120, 502 A.2d 374 (1985). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same gen-

eral subject matter . . . .”[10] (Internal quotation marks omitted.) *State* v. *Terwilliger*, 314 Conn. 618, 653–54, 104 A.3d 638 (2014).

A

We begin our analysis by determining the requisite unit of prosecution under § 53a-223a. The defendant asserts that the Appellate Court incorrectly concluded that the statutory language of § 53a-223a, specifically, the word “involves” in subsection (c), clearly indicates that the legislature intended the unit of prosecution to be on a “transactional basis.” The defendant contends that a violation of a protective order is a continuing offense and that, because the conversation at issue in this case lasted only for a short time, it should be viewed as a single violation. Finally, the defendant requests that we apply the rule of lenity to resolve any statutory ambiguity on this point.

In response, the state argues that the text and purpose of § 53a-223a support viewing separate violations as distinct criminal acts, and, as a result, each distinct contact or threat to the victim may be punished. The state argues that a violation of a protective order is more analogous to sexual assault, which is a separate act crime, than kidnapping, which is a continuous act crime. The state contended at oral argument before this court that § 53a-223a is unambiguous and argues in its brief that the statute clearly permits multiple convic-

[10] “Of course, [w]e have long held that [c]riminal statutes are not to be read more broadly than their language plainly requires . . . . Moreover, [a] penal statute must be construed strictly against the state and liberally in favor of the accused. . . . [A]mbiguities are ordinarily to be resolved in favor of the defendant. . . . In the interpretation of statutory provisions [however] the application of common sense to the language is not to be excluded. . . . Thus, [e]ven applying the view that a penal statute should be strictly construed, the words of a statute are to be construed with common sense and according to the commonly approved usage of the language.” (Citations omitted; internal quotation marks omitted.) *State* v. *Love*, 246 Conn. 402, 412 n.13, 717 A.2d 670 (1998).

tions for separate acts because, inter alia, the statutory text does not expressly state that a violation is a continuing act. The state supports this argument by contrasting § 53a-223a with a related statute, General Statutes § 53a-222, which governs violations of conditions of release and includes language specifically indicating that a violation is a continuing offense. See General Statutes § 53a-222 (a) ("intentionally violates one or more of the imposed conditions of release"). We agree with the state and conclude that the defendant's multiple convictions in this case did not violate his double jeopardy rights.

We begin with the language of § 53a-223a, which provides in relevant part: "(a) A person is guilty of criminal violation of a standing criminal protective order when . . . such person violates such order.

* * *

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

The plain language of the statute does not define when a violation begins and ends; instead, it states only that one is guilty if "such person violates such order." General Statutes § 53a-223a (a). The statute can reasonably be read to prohibit either a course of conduct or discrete acts, each of which may be sufficient to constitute a violation. As a result, we must look outside the statutory text for indicators of legislative intent. When § 53a-223a is construed in light of similar, surrounding statutes, it is apparent the legislature purposefully omitted language that was included in those provisions. We are cognizant of "the principle that the

legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have upon any one of them." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 21, 981 A.2d 427 (2009). In contrast, § 53a-222 follows a similar structure to § 53a-223a but provides in relevant part: "(a) A person is guilty of violation of conditions of release in the first degree when, while charged with the commission of a felony, such person is released . . . and intentionally violates *one or more* of the imposed conditions of release. . . ." (Emphasis added.) This "one or more" language in § 53a-222 (a) demonstrates that, regardless of whether a defendant violates the conditions of release once or more than once, he nevertheless is guilty of only one count. The absence of such language in § 53a-223a indicates that the legislature did not have a similar intent with respect to a standing criminal protective order and, as a result, supports a reading permitting violations of multiple provisions of an order to support multiple convictions under the statute.

We disagree with the defendant's construction of § 53a-223a, which does not resolve the ambiguity in the statute. Specifically, the defendant relies on subsection

(c) of the statute and contends that the legislature's use of "the open-ended term 'involve' thereby impl[ies] that the occurrence or transaction constituting the violation of the protective order can be broader than the acts in the proscribed list." We disagree. The word "involves" in subsection (c) is irrelevant to determining the unit of prosecution because it does not, in the first instance, define whether a violation, as provided in subsection (a), is a discrete act or a continuing course of conduct. Simply because a violation involves threatening does not, under the statutory text, preclude punishment for additional violations because subsection (c) functions only as a sentence enhancement for certain types of violations that are made punishable under subsection (a), namely, those implicating harassing or threatening conduct. In the absence of explication of what it means to "[violate] such order" in subsection (a) itself, the word "involves" in subsection (c) provides no meaningful guidance.

Additionally, under the defendant's interpretation, persons who violate an order repeatedly would be shielded from prosecution because any violation would be continuous. See *State* v. *Snook*, 210 Conn. 244, 262, 555 A.2d 390 ("If we adopted the defendant's reasoning, the commission of one act likely to impair the health and morals of a minor would insulate the perpetrator from further criminal liability for any additional acts of the same character perpetrated on the same minor in subsequent encounters. Such a result defies rationality."), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989); *In re Walker* v. *Walker*, 86 N.Y.2d 624, 628, 658 N.E.2d 1025, 635 N.Y.S.2d 152 (1995) ("Under [the] appellant's argument, a violator already penalized for [wilfully] failing to obey an order of protection would garner immunity from further official sanction for persistent, separate violations . . . . Such an approach is in no way compelled or warranted by the

governing statutes, sentencing principles or reasonable statutory analysis. Its incongruous and untenable result would also constitute an invitation to violate and no incentive to obey." (Citation omitted.)).

The result portended by the defendant's interpretation of § 53a-223a, which suggests that violations of that statute are continuous in nature, is inconsistent with the purpose of the statute, as demonstrated by its legislative history. The legislature enacted § 53a-223a as No. 96-228 of the 1996 Public Acts, entitled "An Act Concerning Domestic Violence." In this act, the legislature created the standing criminal restraining order[11] in response to the well-known tragedy involving Tracey Thurman Motuzick, who had been abused by her ex-husband after his release from jail in 1996. See 39 H.R. Proc., Pt. 10, 1996 Sess., p. 3326, remarks of Representative Ellen Scalettar. In response to this notorious case, the legislature created a new type of restraining order that judges could issue at a defendant's sentencing in a family violence case. Id. The bill's leading proponent, Representative Scalettar, stated that the bill "imposes a significant penalty on those who violate the order. It would be a [c]lass D [f]elony. . . . [T]his bill will give to victims of domestic violence . . . increased protection and increased peace of mind, which they well deserve."[12] Id., p. 3327. Under the defendant's proposed

[11] This language was later amended to read "standing criminal protective order . . . ." Public Acts 2010, No. 10-144, § 6.

[12] The legislative history also indicates that the legislature was aware of the statute's ambiguity at the time of its enactment. Representative Arthur J. O'Neill discussed this issue: "[T]he way it reads, it seems to say that a person is guilty of a violation if a person violates the order. . . . [I]s that existing language? *It seems a little circular to me* . . . ." (Emphasis added.) 39 H.R. Proc., supra, p. 3341. Representative Scalettar responded: "I believe that is existing language . . . . It would either be [General Statutes § 46b-38c] or the civil restraining orders statute." Id. Earlier in the discussion, Representative Scalettar explained that "[t]his is the same language as used in [§] 46b-38c (e) with respect to criminal protective orders *and it would have the same meaning as that statute has been interpreted.*" (Emphasis added.) Id., p. 3340. The statutory language in civil statutes does not, how-

interpretation, a defendant may contact a victim and later assault her, each in violation of an order, but only be convicted of one count. Such a result would be inconsistent with the legislature's desire to protect victims by increasing the penalty for violating protective orders, suggesting that § 53a-223a should be read to permit criminal liability for each discrete act in violation of an order.[13] As the unit of prosecution is no longer ambiguous after considering the surrounding statutory scheme and legislative history, we decline to apply the rule of lenity, as urged by the defendant. See, e.g., *State* v. *Lutters*, 270 Conn. 198, 219, 853 A.2d 434 (2004) ("courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope *even after resort to the language and structure, legislative history, and motivating policies of the statute*" (emphasis in original; internal quotation marks omitted)).

Numerous other jurisdictions consider protective order violations to be discrete acts. For example, in *Jacobs* v. *State*, 272 So. 3d 838 (Fla. App. 2019), review denied, Florida Supreme Court, Docket No. SC19-1008 (November 22, 2019), the Florida District Court of Appeal affirmed the defendant's conviction of two counts of violating a stalking injunction after he approached and threatened the victim. Id., 839–40. The court held his two violations to be "distinct criminal acts," namely,

ever, provide assistance when determining the unit of prosecution. Because of the importance of this issue, the legislature may want to consider the consistency of § 53a-223a with the surrounding penal statutes.

[13] Indeed, separate punishment for each act that constitutes a violation of a protective order is responsive to the nature of domestic violence offenses. "An abuser's recurrent exertion of power and control over the survivor pervades the survivor's experience, and without effective intervention, battering *typically escalates in frequency and severity over time*. . . . Intimate partner abuse rarely consists only of a single, isolated event; instead, the abusive partner more commonly engages in an ongoing process of violence and control." (Emphasis added; footnotes omitted.) J. Stoever, "Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders," 67 Vand. L. Rev. 1015, 1023–24 (2014).

one when he approached the victim and a second when he contacted her. Id., 841. The fact that the acts occurred nearly simultaneously was of no consequence because "[e]ach act is of a separate character and type, and each is born of a separate impulse." Id., 842; see also *Triggs* v. *State*, 382 Md. 27, 50, 852 A.2d 114 (2004) (upholding defendant's conviction on eighteen counts because "each separate [telephone] call constitutes contact in violation of a protective order"); *Commonwealth* v. *Housen*, 83 Mass. App. 174, 177, 982 N.E.2d 66 (permitting multiple convictions for violations of protective order for separate contacts with victim and her children), review denied, 465 Mass. 1105, 989 N.E.2d 898 (2013); *State* v. *Strong*, 380 Mont. 471, 478, 356 P.3d 1078 (2015) (upholding trial court's denial of defendant's motion to dismiss three of four counts of violating order of protection arising from four telephone calls made over seven hours); *State* v. *McGee*, 135 N.M. 73, 78–79, 84 P.3d 690 (2003) (conviction of several counts of violating order of protection, when four telephone calls were made within minutes of each other, did not violate double jeopardy), cert. denied, 135 N.M. 160, 85 P.3d 802 (2004); *In re Walker* v. *Walker*, supra, 86 N.Y.2d 626, 630 (upholding defendant's convictions for three violations of a protective order when defendant sent victim three letters); *Hill* v. *Randolph*, 24 A.3d 866, 871–73 (Pa. Super. 2011) (permitting multiple contempt counts for violations of protective order when defendant entered victim's home and assaulted victim); *Cable* v. *Clemmons*, 36 S.W.3d 39, 43 (Tenn. 2001) (upholding three of defendant's six convictions for criminal contempt for violating protective order in one interaction when defendant "abused [the victim] physically; produced a knife and threatened to kill her; and then vandalized [the victim's] personal property"); *State* v. *Medina*, Docket No. 48053-1-II, 2016 WL 6599649, *4 (Wn. App. November 8, 2016) (decision without pub-

lished opinion, 196 Wn. App. 1054) (upholding seven counts for violation of court order for multiple text messages sent in one day because "[e]ach time [the defendant] messaged [the victim], he took the affirmative action of picking up the phone, typing a message to [the victim], and pressing 'send' "), review denied, 187 Wn. 2d 1028, 391 P.3d 448 (2017); *State* v. *Brown*, 159 Wn. App. 1, 11, 248 P.3d 518 (2010) ("the unit of prosecution is each single violation of a no-contact order"), review denied, 171 Wn. 2d 1015, 249 P.3d 1029 (2011).

B

Having determined that the legislature permitted convictions for multiple distinct acts that constitute separate violations of § 53a-223a, we must next consider whether the defendant's statements in this case constituted a single act or multiple acts. According to the defendant, a violation of a protective order is analogous to the knife assaults in *State* v. *Nixon*, supra, 92 Conn. App. 589, which were held to be a single, continuous act. The defendant argues that the temporal closeness of the statements is determinative when deciding whether the violations should be considered one act or two. In response, the state contends that the jury could have reasonably found two distinct acts because the defendant violated two distinct conditions of the protective order and each was a completed offense. Additionally, the state argues that the two acts were separated by an "intervening event," that is, when the victim ignored the defendant. We agree with the state and conclude that each conviction was supported by a separate act.

"[D]istinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause. . . . The same transaction, in other words, may constitute separate and distinct crimes

where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. . . . [T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Citations omitted; internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 122–23, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002).

"We look to the following factors to determine whether, on this record, the defendant engaged in distinct courses of conduct and, therefore, separately punishable [acts]: (1) the amount of time separating the acts; (2) whether the acts occurred at different locations; (3) the defendant's intent or motivation behind the acts; and (4) whether any intervening events occurred between the acts, such that the defendant had the opportunity to reconsider his actions." *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 241, 244 A.3d 908 (2020).

We conclude that the defendant's statements constitute two distinct acts because the victim's resistance, effectuated by her silence, was an intervening event causing the defendant to escalate his behavior. The defendant's initial statement, in which he explained that he loved the victim and inquired as to why she had a block on her phone, constituted a completed offense, namely, contacting the victim in violation of that provision of the order. In contrast, the second set of statements occurred only after "[the victim] wasn't responding to him" and "his tone [had] changed." The defendant stated that the victim was "going to have problems when [he got] home, bitch." The victim then "looked at him, and he told [her] that he was going to fucking kill [her]." What separates the defendant's statements into two criminal acts is the defendant's clear escalation, showing a "fresh impulse" to move from nonthreat-

ening conversation to threatening conversation.[14] *State* v. *Schoonover*, 281 Kan. 453, 497, 133 P.3d 48 (2006). Put differently, the statements supporting count one are a nonthreatening contact, but, upon realizing the victim was not responding, the defendant effectuated a different purpose and made a threatening statement to the victim, supporting a second, distinct count. This renders this case distinguishable from *State* v. *Nixon*, supra, 92 Conn. App. 586, on which the defendant relies. Compare id., 591 ("the defendant twice stabbed the same victim, at the same place and during the same time period, with the same instrument, with the same common intent to inflict physical injury"), with *State* v. *Brown*, 299 Conn. 640, 653–54, 11 A.3d 663 (2011) (first act of attempted robbery ended after "the victim slapped the gun away . . . then escaped," and second act began when defendant chased and shot victim). This escalation, after the victim's intervening resistance, separates the statements into discrete acts. But see *Whylie* v. *United States*, 98 A.3d 156, 165 (D.C. 2014) (one week break in calls by defendant does not necessarily create "fresh impulse").

Although the defendant made his statements at two points close in time, the criminal acts nevertheless are distinct. "It is not dispositive in a double jeopardy analysis that multiple offenses were committed in a short time span and during a course of conduct that victimized a single person." *State* v. *Urbanowski*, 163 Conn.

[14] At oral argument before this court, the state asserted that, if the defendant had said only "I'm going to kill you," that would be one distinct act supporting one count of violating a protective order, even though it violated two conditions, namely, a contact and a threat. According to the state, charging the defendant in this case with two counts without running afoul of double jeopardy protections "depends on some separation in time, however brief." Therefore, the state concedes the limits on its ability to charge a defendant for protective order violations. In other words, if the violations in this case arose from a single act, such as a violation for contacting the victim and a violation for threatening her, as presented by the "I'm going to kill you" hypothetical, there could be only one charge.

App. 377, 393, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017); see also *State* v. *D'Antonio*, 274 Conn. 658, 717, 877 A.2d 696 (2005) (conviction of two counts of interference with officer stemming from acts toward different officers does not violate double jeopardy, even though acts were "within minutes of each other"); *State* v. *Scott*, 270 Conn. 92, 100, 851 A.2d 291 (2004) (conviction of two counts of sexual assault was permissible, "irrespective of the brief period of time separating them"), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005); *State* v. *Lytell*, 206 Conn. 657, 667, 539 A.2d 133 (1988) (defendant's actions toward two victims supported conviction of two counts of robbery, "irrespective of whether the robbery was spatially linked with another robbery"); *State* v. *Marsala*, 93 Conn. App. 582, 589, 889 A.2d 943 (each telephone call violates § 53a-183 (a), "regardless of how close in time the calls were made"), cert. denied, 278 Conn. 902, 896 A.2d 105 (2006). Accordingly, we conclude that the defendant's two convictions for violation of a standing criminal protective order did not violate the constitutional protection against double jeopardy.

II

The defendant next claims that the Appellate Court improperly upheld the trial court's jury instruction with respect to the second count of violation of a standing criminal protective order because it incorrectly defined "harassing" as "to trouble, worry, or torment" for purposes of the penalty enhancement under § 53a-223a (c). The defendant asserts that (1) harassment involves "persistence," which is absent from the trial court's definition, (2) the legislature did not intend "harassing" to mean "troubling" or "worrying," (3) the lower standard utilized by the trial court will encompass virtually any contact in violation of a protective order because defendants may easily "trouble" or "worry" their victims, and (4) the Appellate Court incorrectly relied on

other cases utilizing these jury instructions. In response, the state argues the trial court's definition was proper, and, in any event, any error was harmless beyond a reasonable doubt. We agree with the state and conclude that any error in the trial court's instruction was harmless.[15]

Because the defendant did not object to the jury instructions at trial; *State* v. *Meadows*, supra, 185 Conn. App. 299;[16] we review his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "*Golding* provides that a defendant may prevail on an unpreserved claim when (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 49–50, 225 A.3d 668 (2020).

For purposes of this *Golding* analysis, we assume that the trial court's instructional definition of harassing was improper, but we nevertheless conclude that,

[15] We note that the defendant contends that (1) the claimed instructional error was not harmless beyond a reasonable doubt, and (2) contrary to the United States Supreme Court's decision in *Neder* v. *United States*, 527 U.S. 1, 15–17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), the Connecticut constitution does not permit harmless error review if a jury instruction incorrectly states the elements of the crime. For its part, the state contends that this court should not consider the defendant's state constitutional claim because the argument is inapplicable to this case and the claim fails on the merits.

[16] Although the defendant did not object to the instructions at trial or expressly seek review under *State* v. *Golding*, supra, 213 Conn. 239–40, the Appellate Court extended review under *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014), because the claim was one of "constitutional magnitude." *State* v. *Meadows*, supra, 185 Conn. App. 299. We note that preservation and reviewability are not at issue in this certified appeal, and we consider the defendant's claim accordingly.

because the jury found the defendant guilty of threatening as charged in the third count, the jury necessarily found him guilty of threatening the victim as charged in connection with the second count, as the charges were based on the same underlying conduct. As such, any error as to the definition of "harassing" was harmless.[17] Under § 53a-223a (c) (2), a defendant is guilty of a class C felony for criminal violation of a protective order for "threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order . . . ." In the present case, the trial court instructed the jury on count two in the following manner: "The defendant is charged in count . . . two with criminal violation of a standing criminal protective order. . . . For you to find the defendant guilty of this charge, the state must prove

[17] The defendant argues that the state abandoned the harmless error analysis by failing to brief it below. Specifically, the defendant argues that the state briefed only that the instructional error was waived under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and plain error. The state counters that it essentially briefed harmlessness below by arguing "the absence of 'manifest injustice' under the plain error doctrine." We agree with the state.

We recognize that the state bears the burden of establishing harmlessness. See, e.g., *State* v. *Peeler*, 271 Conn. 338, 384, 857 A.2d 808 (2004) ("[i]f the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt" (internal quotation marks omitted)), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). Because this is the state's burden, the Appellate Court has declined to reach harmlessness when the state has failed to argue the issue on appeal. See, e.g., *State* v. *Liam M.*, 176 Conn. App. 807, 824 n.14, 172 A.3d 243, cert. denied, 327 Conn. 978, 174 A.3d 196 (2017); *State* v. *Perez*, 147 Conn. App. 53, 124, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016).

In the present case, however, the state has sufficiently asserted harmlessness below to merit our review. First, the defendant did not clearly brief either plain error or *Golding* review in his initial brief to the Appellate Court. The state, therefore, could not be sure under what standard the defendant was proceeding. Second, the state's argument asserting that there was no manifest injustice with respect to plain error implicitly incorporated a harmless error analysis. As such, we will proceed to analyze harmlessness in this certified appeal.

the following elements beyond a reasonable doubt. . . . [T]he first element is that a court issued a standing criminal protective order against the defendant. . . . The second element is that the defendant violated a condition of the order. To violate a condition means to act in disregard of or to go against the condition. *In this case, the state alleges that threatening or harassing the* [*victim*] was forbidden by the order, and you have the order. As far as what's the definition of a threat, use the same definition that I'm going to give you on threatening.[18] As far as what's harassing, harassing is to trouble, worry, or torment; that's the legal definition. Trouble, worry, or torment." (Emphasis added; footnote added.)

In *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008), the United States Supreme Court held that, when a jury is instructed on multiple theories of guilt and one is improper, the error may be reviewed for harmlessness.[19] "An instructional error

[18] With respect to the third count, charging threatening in violation of § 53a-62, the trial court instructed: "A threat can . . . be punishable [only] when it is a true threat, that is, a threat that a reasonable person would understand is a serious expression of an intent to harm or assault and not mere puffery, bluster, jest, or hyperbole, or a—and then you see the little arrow up there, I added something—or a spontaneous act of frustration. In determining whether the threat is a true threat, consider the particular factual context in which the allegations—in which the allegedly threatening conduct occurred, which could include the reaction of the person allegedly being threatened and the defendant's conduct before and after the alleged threatening conduct."

[19] The defendant contends that the harmlessness rule in *Neder* v. *United States*, 527 U.S. 1, 15–17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), guides the analysis in the present case. See id., 17 ("[when] a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"). We disagree. Although the court in *Hedgpeth* v. *Pulido*, supra, 555 U.S. 57, relied on *Neder* to extend harmlessness to a multiple theories of guilt case, which was not at issue in *Neder*, it indicated that the "substantial and injurious effect" standard applied rather than the uncontested element and overwhelming evidence analysis used in *Neder*. Id., 61–62. For this reason, we do not reach the defendant's claim

arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." (Emphasis omitted.) Id. When reviewing instructional errors based on multiple theories of guilt, "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.' " Id., 58, quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); see also *Skilling* v. *United States*, 561 U.S. 358, 414 n.46, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) (*Hedgpeth*'s harmless error analysis "applies equally to cases on direct appeal").

Federal courts of appeals applying this harmlessness standard to cases involving multiple theories of guilt have required varying degrees of proof of harm.[20] See *Sorich* v. *United States*, 709 F.3d 670, 674 (7th Cir. 2013) ("[w]e have described the [harmless error] inquiry . . . as a question of whether the trial evidence was such that the jury must have convicted the petitioners on both [alternative] theories"), cert. denied, 571 U.S. 1131,

that the Connecticut constitution does not permit harmless error review of element instructional errors or the issue of "whether [this court should] adopt the controversial *Neder* rule as a state constitutional matter" under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992).

[20] "[*Hedgpeth*] requires a reviewing court to determine whether the relevant error 'had substantial and injurious effect or influence in determining the jury's verdict.' However, the circuits are divided in their interpretation of this standard. Some [federal courts of appeals] have interpreted the rule as imposing a less demanding standard on the defendant-appellant to establish grounds for reversal, merely requiring it to be shown, for example, that the jury did not necessarily make the findings to rely on the valid theory of guilt. Other [courts], however, impose a more demanding standard, for example, finding an error harmless unless the defendant-appellant can show not only that the jury did not necessarily rely on the valid theory of guilt, but also had evidence that could rationally lead to an acquittal on the basis of the valid theory." E. Khalek, Note, "Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions," 83 Fordham L. Rev. 295, 295–96 (2014).

134 S. Ct. 952, 187 L. Ed. 2d 786 (2014); *United States* v. *Jefferson*, 674 F.3d 332, 361 (4th Cir.) ("if the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground, the conviction may be affirmed" (internal quotation marks omitted)), cert. denied, 568 U.S. 1041, 133 S. Ct. 648, 184 L. Ed. 2d 482 (2012); *United States* v. *Skilling*, 638 F.3d 480, 482 (5th Cir. 2011) (discussing how one way to show "an [alternative theory] error is harmless" is "if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory"), cert. denied, 566 U.S. 956, 132 S. Ct. 1905, 182 L. Ed. 2d 807 (2012); see also *United States* v. *McKye*, 734 F.3d 1104, 1110 n.6 (10th Cir. 2013) (not relying on *Hedgpeth* but concluding that "the submission of an alternative theory for making [a] finding cannot sustain the verdict unless it is possible to determine the verdict rested on the valid ground" or "the jury necessarily made the findings required to support a conviction on the valid ground" (internal quotation marks omitted)). Nevertheless, we are persuaded by the common thread in several of these cases that permits a finding of harmlessness if the jury necessarily found facts to support the conviction on a valid theory.

In the present case, the state charged the defendant with violating a criminal protective order under two alternative theories, threatening *or* harassing the victim. The defendant does not raise an instructional error claim as to the trial court's instruction on threatening.[21]

[21] The defendant does argue that there was a limiting instruction in place that restricted the jury on the evidence it could consider under counts three and four, so the jury could not have relied on the same evidence for each count. This is inconsistent with the record. The trial court provided several limiting instructions, including one that limited what evidence could be considered under each count. But this instruction actually provided that evidence regarding certain statements made by the defendant should be considered under the first two counts. As a result, there was less evidence

As the jury found the defendant guilty on count three for threatening, the jury necessarily found that the defendant threatened the victim in violation of the criminal protective order in connection with count two.[22] See *United States* v. *Jefferson*, supra, 674 F.3d 362–63 (considering jury's findings on other counts in harmlessness analysis); *United States* v. *Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011) ("[T]he jury's guilty verdict on the separate substantive count of bribery [of a public official] in violation of 18 U.S.C. § 201 confirms beyond any reasonable doubt that the jury would have convicted [the defendant] of honest services fraud . . . . Any error

to prove intent in connection with the third and fourth counts, and the limiting instruction would not affect the jury's verdict on these counts.

The court instructed the jury, after hearing evidence on the May hearing at which the protective order was put in place, to limit the use of certain statements made by the defendant. Initially, the court limited the statements in the following manner: "[The defendant's] statements in part are offered as circumstantial evidence of what his mental state might've been on September 1 with regard to count three, which is a specific intent crime, and count four, which—in which he's charged with uttering a threat with—with reckless disregard of the consequences that might occur, and I'll explain further in my final instructions, okay?" Then, the court corrected its original instruction and stated: "I said the statements of—recorded on May 12 were admitted—the statements of the defendant were recorded for a limited purpose, and I said [that] they're offered to show his intent with regard to the threatening. I misspoke there, and I'll go through these all again, and I'll have a list. Actually, they're offered with regard to [the defendant's] intent on the violation of the standing criminal restraining order counts and not the threatening, okay?"

[22] In a statement before the court and outside the presence of the jury, defense counsel conceded that the factual basis for count three is incorporated into count two. Defense counsel stated: "So, the proposed limiting instruction that I am asking for is that, if you find beyond a reasonable doubt [that] the defendant is guilty of threatening in the second degree as alleged in count three of the information, you may use that finding when determining whether the defendant is also guilty beyond a reasonable doubt of committing the crime of violating the standing criminal restraining order, as alleged in count two of the information.

* * *

"[*The*] *defense cannot argue and would concede that . . .* [*count*] *three is incorporated into count . . . two and, therefore, could be a basis of this violation.*" (Emphasis added.)

concerning the jury instruction was harmless."), cert. denied, 566 U.S. 981, 132 S. Ct. 2119, 182 L. Ed. 2d 881 (2012). In the present case, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error . . . ." *Neder* v. *United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). As a result, we conclude that any instructional error as to count two was harmless under the fourth prong of *Golding*. See, e.g., *State* v. *Peeler*, 271 Conn. 338, 399, 857 A.2d 808 (2004) ("we need not reach the merits of the defendant's constitutional claims because, even if we were to assume that the defendant's claims are valid, the state has established beyond a reasonable doubt that any impropriety was harmless"), cert. denied, 546 U.S. 845, 126 S.C. 94, 163 L. Ed. 2d 110 (2005).

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, D'AURIA and MULLINS, Js., concurred.

ECKER, J., with whom McDONALD, J., joins, concurring in part and dissenting in part. I agree with the majority that multiple, distinct acts constitute separate violations of a standing criminal protective order, contrary to General Statutes § 53a-223a.[1] I disagree, however, that the statements made in the present case by the defendant, Cody M., were separate and distinct acts.

[1] General Statutes § 53a-223a provides in relevant part: "(a) A person is guilty of criminal violation of a standing criminal protective order when an order issued pursuant to subsection (a) of section 53a-40e has been issued against such person, and such person violates such order.

* * *

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

The record reflects that the defendant's statements were uttered within seconds of each other in a continuous and uninterrupted stream of contact with the victim. In my view, there was neither an intervening event between the defendant's statements nor a change in the defendant's intent; his statements concerned the same general subject matter and were undertaken with a singular purpose. The defendant therefore committed only a single violation of the standing criminal protective order, for which he may be punished only once under the double jeopardy clause. Accordingly, I respectfully dissent from part I B of the majority opinion. I agree with the majority that any alleged error in the jury instruction on the definition of "harassing" was harmless and, therefore, join part II of the majority opinion.

The record reflects that there was a valid standing criminal protective order, which prohibited the defendant from, among other things, (1) "assault[ing], threaten[ing], abus[ing], harass[ing], follow[ing], interfer[ing] with, or stalk[ing]" the victim, or (2) "contact[ing] the [victim] in any manner . . . ." On September 1, 2015, the defendant was in the custody of the Department of Correction, which transported the defendant to a juvenile court proceeding regarding his children with the victim. Despite the existence of a formal court order prohibiting the defendant from contacting the victim, except as "allowed for purposes of visitation, as directed by [the] family court," he was placed in a seat at the same table as the victim in the courtroom, with nothing but one empty chair between them. At some point during the proceeding, the defendant began "trying to make small talk" with the victim. Specifically, the defendant whispered to the victim that he still loved her and asked her why she had a block on her phone. The defendant also reminded the victim that she had said she "would never do this to him . . . ." The victim "just ignored" the defendant and kept her eyes focused on the trial

judge. The defendant's "tone changed," and he told the victim that she was "going to have problems" when he got "home, bitch," which "caught [the victim's] attention . . . ." The victim looked at the defendant, who mouthed "that he was going to fucking kill" her. The victim responded by saying "stop threatening me, I can hear you . . . ." The defendant replied "I didn't or I'm not." One of the attorneys informed the trial judge that the defendant was "speaking to the [victim] while Your Honor is presiding." The trial judge admonished the defendant that "this is not the time for visit[ation] or socialization."

On the basis of his in-court statements to the victim, the defendant was charged with two counts of violating a standing criminal protective order under § 53a-223a and one count of threatening under General Statutes (Rev. to 2015) § 53a-62 (a) (2). Specifically, count one charged the defendant with violation of a standing criminal protective order "by having contact with" the victim, count two charged the defendant with violation of a standing criminal protective order "by threatening and harassing" the victim, and count three charged the defendant with threatening the victim. The defendant also was charged, in count four of the information, with a second count of threatening on the basis of threats he made to the victim outside of the courtroom after the conclusion of the juvenile court proceeding. The jury found the defendant guilty of all of the crimes charged. The trial court sentenced the defendant to five years of incarceration on the first count of violation of a standing criminal protective, followed by a consecutive sentence of three years of incarceration and seven years of special parole on the second count of violation of a standing criminal protective order. The trial court also imposed two concurrent one year terms of incarceration on the threatening counts, to be served concurrently with the first count of violation of a standing criminal protective order. Thus, the total effective sen-

tence was eight years of incarceration followed by seven years of special parole.

On appeal, the defendant claims that, on these facts, his conviction under counts one and two of two offenses under the same statutory provision, § 53a-223a, violates his constitutional right to be free from double jeopardy. As the majority rightly points out, "[t]he proper double jeopardy inquiry when a defendant is convicted of multiple violations of the same statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute." (Emphasis omitted; internal quotation marks omitted.) Part I of the majority opinion, quoting *State* v. *Garvin*, 242 Conn. 296, 304, 699 A.2d 921 (1997). Thus, to resolve the issue on appeal, we must "determine the 'unit of prosecution' intended by the legislature in enacting § 53a-223a."

I agree with the majority that, in enacting § 53a-223a, the legislature intended "to permit criminal liability for each discrete act in violation" of a standing criminal protective order. I further agree with the majority that, to determine whether the defendant's statements constituted a single act or multiple acts, we should consider the following factors: "(1) the amount of time separating the acts; (2) whether the acts occurred at different locations; (3) the defendant's intent or motivation behind the acts; and (4) whether any intervening events occurred between the acts, such that the defendant had the opportunity to reconsider his actions." (Internal quotation marks omitted.) Part I B of the majority opinion, quoting *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 241, 244 A.3d 908 (2020). Our agreement ends, however, with the application of these factors, which leads the majority to conclude that the defendant's statements during the juvenile court proceeding can be separated into multiple, discrete acts. Instead, given the proximity in time and space, the defendant's singular intent, and

the lack of any intervening events between the defendant's statements, it is clear to me that the defendant committed a single violation of the standing criminal protective order under § 53a-223a.

It is undisputed that the first and second factors in the analysis, namely, the amount of time separating the defendant's statements and the location where they were uttered, favor the defendant. The defendant and the victim were seated in the same place in the courtroom throughout the encounter. The amount of time between the defendant's initial statements and his threatening statements was extremely brief. Indeed, as the trial court observed, "this is a trial about what happened in the course of about ten seconds." These factors are not dispositive, of course, because spatial and temporal proximity alone do not always trigger a double jeopardy violation. "[D]istinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause." (Citation omitted; internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 122, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). But the immediate proximity of the statements in place and time are an important part of any analysis turning on discreteness and severability, and the fact that the statements were made during a brief and uninterrupted verbal contact with the victim strongly supports the conclusion that the defendant committed a single violation of the standing criminal protective order rather than two separate violations.

The third and fourth factors only bolster this conclusion. I reject the majority's characterization of the victim's silence as an "intervening event" that separated the defendant's initial affectionate statements from the threatening statements that followed immediately thereafter. To begin with, the victim's response—whether silent or spoken—strikes me as a red herring

in this particular context. The defendant's verbalizations to the victim over a ten second time span constituted one act or transaction, whether delivered as a monologue or part of a dialogue, in the same way that a single, short telephone call from the defendant to the victim would have been one act or transaction, regardless of the parties' speaking roles. If the majority's analysis is sustainable, it must explain why its logic would not subject a defendant to multiple violations of § 53a-223a (perhaps many, if the communication consisted of a back and forth dialogue) for a single, short telephone call consisting of content similar to that occurring here. I believe that an unacceptable degree of arbitrariness enters the analysis when the number of criminal violations depends on the speaker's punctuation choices, sentence or paragraph structure, or the conversational turns occurring in a brief, uninterrupted communication.

Moreover, even if such considerations were appropriate in the present context, it is more accurate, in my view, to characterize the victim's silence as a *non*event, or perhaps a *continuation* of the same event, rather than an intervening event in these circumstances. The victim did nothing and said nothing. There was no change of location or alteration of any other objective condition that would fit our normal understanding of what constitutes an intervening event. Silence, of course, can mean many different things, and the victim's failure to respond clearly meant something to the defendant, but it changed nothing except his emotional stratagem; he quickly replaced affectionate overtures with angry threats in his effort to persuade the victim to unblock his phone calls. The fact is that nothing happened between the defendant's initial statements and his threatening statements—nothing was said and nothing was done by the victim or anyone else in the courtroom. I am unaware of any case law, and the majority

has cited none, holding that silence or inaction is an intervening event in the double jeopardy context.[2]

This brings me to the final factor on which the majority relies—its perception of a change in the defendant's intent. This point, in my estimation, confuses the defendant's singular intention during the prohibited contact—to persuade the victim to accept his phone calls—with the rapid change in tone or tactics used to achieve that objective. The fact that the defendant substituted threats for affection does not mark the end of one crime and the beginning of another. Whether through statements of endearment or intimidation, his purpose and intent remained the same, namely, to manipulate the victim into unblocking his phone number. I disagree with the majority that, during the few seconds between the defendant's initial statements and his threatening statements, he developed a " 'fresh impulse' " or a "different purpose . . . ." Part I B of the majority opinion; see *Whylie* v. *United States*, 98 A.3d 156, 165 (D.C.

[2] The one case on which the majority relies, *State* v. *Brown*, 299 Conn. 640, 11 A.3d 663 (2011), illustrates precisely what is missing from this case—an actual intervening event that creates a temporal or spatial break sufficient to provide the defendant with a "clear opportunity . . . to reconsider his actions" and "[to formulate] a new criminal intent that was separate and distinct from the intent behind the initial [offense]." *State* v. *Ruiz-Pacheco*, supra, Conn. ; see id., (holding that defendant's two assault convictions did not violate double jeopardy clause because there was "[a] distinct break" in both time and place in fighting, and second assault was motivated by "a separate and distinct criminal intent"). In *Brown*, the defendant attempted to rob the victim, but the victim fought back by "slapp[ing] the gun away," "struggl[ing] for control of the gun," and "escap[ing] and [running] down" the street. *State* v. *Brown*, supra, 653. The victim's escape was an intervening event because it represented a fork in the road; the defendant could either chase after the victim or flee the scene of the crime. The defendant chose to chase the victim, shoot him, and rob him. Id., 653–54. The defendant's first crime (attempted robbery) and his second crime (completed robbery) were "two separate and severable crimes"; id., 654; because they were separated by time and space, the victim's escape, and the defendant's formulation of a new and distinct criminal intent. The facts of *Brown* contrast sharply with the facts of the present case, and *Brown* provides no support for the outcome reached here.

2014) (holding that it would be "rank speculation" to conclude that one week break between phone calls "cor responded to a fork in the road and a fresh impulse not in evidence"); cf. *United States* v. *Chipps*, 410 F.3d 438, 449 (8th Cir. 2005) (under "impulse test," which "treat[s] as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single impulse," there was only "a single impulse underlying [the defendant's] assaultive conduct" in light of "the uninterrupted nature of the attack on [the victim]" (internal quotation marks omitted)); *Hagood* v. *United States*, 93 A.3d 210, 226 (D.C. 2014) (describing "fresh impulse or fork-in-the-road test," which asks whether, "at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest," and holding "that something more than a momentary interruption is required to sever the singular continuous possession of a weapon into distinct, separately punishable criminal actions" (internal quotation marks omitted)).

Under the majority's holding today, an individual who violates a standing criminal protective order by uttering an uninterrupted stream of vile threats commits only one violation of § 53a-223a, but an individual who precedes, intersperses, or concludes his threats with "small talk" commits two or more separate violations of the statute. I can perceive no reason, and the majority offers none, why the legislature would want to punish the latter individual more harshly in this context than the former. Indeed, given the purpose of the statute and the legislative policy that it was designed to implement—to protect victims of domestic violence—it makes no sense to punish individuals who pose an unequivocal threat to the victim less harshly than those who do not. Such an outcome is not only illogical but also results "in convictions that are disproportionate to an offender's

conduct,'' in violation of the double jeopardy clause. *State* v. *Morales*, 174 Wn. App. 370, 388, 298 P.3d 791 (2013); see id., 387–88 (holding that threat to cause bodily harm to single identified person at particular time and place was only one unit of prosecution of harassment, regardless of how many times threat was communicated to others).

The defendant's statements were made as part of a brief, one-sided verbal contact with the victim. As such, his conduct constituted only a single violation of the standing criminal protective order under § 53a-223a. Because the defendant stands convicted of two offenses under the same statutory provision for a single act or transaction in violation of the double jeopardy clause, I would reverse the defendant's conviction under count one of the information and remand the case for resentencing.[3] See *State* v. *Miranda*, supra, 260 Conn. 130 (''[u]nder the aggregate package view . . . the court may reconstruct the sentence in any way necessary to ensure that the punishment fits both the crime and the defendant''). I therefore dissent from part I B of the majority opinion.

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[3] Although the defendant was convicted twice under the same statute for the same conduct, his conviction under count two of the information is the greater of the two offenses because any violation of a standing criminal protective order that involves, among other things, threatening or harassing is a class C felony rather than a class D felony. See General Statutes § 53a-223a (c); see also General Statutes § 53a-35a (1) (A) (7) and (8) (providing that class C felony is punishable by ''a term not less than one year nor more than ten years,'' whereas class D felony is punishable by ''a term not more than five years''). It is well established that, ''when a defendant has been convicted of greater and lesser included offenses'' in violation of the double jeopardy clause, ''the trial court must vacate the conviction for the lesser offense . . . .'' *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).