STATE OF CONNECTICUT *v.* RAFAEL ORTIZ
(SC 20348)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed to this court, claiming, inter alia, that he was deprived of his due process right to a fair trial as a result of prosecutorial impropriety during the state's rebuttal argument. The

victim and his friend, L, who had been using phencyclidine (PCP), drove to an area in Hartford to purchase more PCP. After L parked the car, the victim exited the car while L remained in the car, and the victim approached the defendant. The victim and the defendant engaged in discussion concerning drugs, after which the victim returned to the car. The defendant then approached the car, aimed a gun at the victim, and shot the victim through the front passenger window. L and two other individuals, I and R, the latter of whom was spending time and smoking PCP with the defendant at and around the time of the shooting, witnessed the events as they unfolded. L, I, and R each identified the defendant in a photographic array as the perpetrator. R thereafter provided a written statement to investigators and testimony to a grand jury implicating the defendant in the murder. Prior to the defendant's trial, however, R indicated to defense counsel that she wanted to recant both her written statement and grand jury testimony. The state subsequently discovered that the defendant had sent text messages to R while he was incarcerated in an attempt to influence her testimony. Insofar as this evidence could have demonstrated the defendant's consciousness of guilt, both defense counsel and the state entered into an agreement pursuant to which the prosecutor, on direct examination of R, would question her about whom she was with and what she saw on the night of the murder but would not question her about her communications with the defendant while he was incarcerated. Pursuant further to that agreement, defense counsel would limit his cross-examination of R to whether R was using PCP on the night of the murder. The prosecutor and defense counsel proceeded to examine R consistent with the agreement. During closing argument, however, defense counsel stated that, if the jury felt that he made a tactical mistake by not cross-examining R, it should not hold that against the defendant. During his rebuttal argument, the prosecutor responded by stating that there was no question about who R was with and what she saw, and that defense counsel "didn't even [cross-examine] her on any of that." *Held*:

1. The defendant could not prevail on his claim that the prosecutor's rebuttal argument referencing defense counsel's failure to cross-examine R as to certain issues violated the intrinsic character of the parties' agreement regarding R's testimony and, therefore, constituted prosecutorial impropriety that deprived him of his right to a fair trial: this court could not conclude that, even if the prosecutor's argument was improper, that impropriety deprived the defendant of a fair trial, as the prosecutor's argument was brief, defense counsel did not object to it or ask the trial court to take any curative measures, and defense counsel invited the prosecutor's argument to some extent, as it was only after defense counsel raised the issue by arguing that the jury should not draw an adverse inference from his decision not to cross-examine R more thoroughly that the prosecutor commented on the issue; moreover, the alleged impropriety was relatively minor, as the jury likely would have

noticed defense counsel's unusually truncated cross-examination of R, even without the prosecutor's argument, and, although the alleged impropriety related to R's credibility, an important issue in the case, the state's case was not dependent on R's testimony, as L's and I's testimony was mostly consistent with R's testimony, and both L and I were also familiar with the defendant prior to the shooting; accordingly, the state's case was not so weak that there was a reasonable probability that the verdict would have been different in the absence of the alleged impropriety.

2. The trial court did not abuse its discretion in precluding defense counsel from impeaching L and I with evidence of certain prior felony convictions and in requiring two of I's prior convictions to be referred to only as unnamed felonies punishable by more than one year of imprisonment: the trial court properly excluded evidence of L's 2006 convictions of possession of narcotics and failure to appear in the first degree, and I's 2004 and 2005 convictions of sale of a controlled substance, as each of those convictions was at least thirteen years old at the time of trial, none was directly probative of the witnesses' veracity, and, therefore, the probative value of that evidence was diminished and outweighed by the remoteness of the convictions; moreover, the trial court properly allowed defense counsel to refer to I's 2017 convictions of second degree assault and violation of a protective order only as unnamed felonies, as neither conviction bore directly on I's veracity, and, therefore, the court's ruling avoided unwarranted prejudice to I that might have arisen if counsel referred to those convictions by their specific names.

3. The defendant could not prevail on his claim that the trial court improperly had declined to provide the jury with his requested instruction that he was not obligated to present any evidence and that the jury could not draw any unfavorable inference from his decision not to do so; it was not reasonably possible that the jury was misled by the trial court's failure to give such an instruction, as the substance of the requested instruction was subsumed within and implicit in the court's preliminary and final instructions on the defendant's option to testify, the presumption of innocence, and the state's burden of proof.

4. The trial court properly declined the defendant's request to include the word "conclusively" in its jury instruction on the use of evidence of the defendant's uncharged misconduct: although the defendant's request was based on language set forth in instruction 2.6-5 of the model criminal jury instructions on the Judicial Branch website, which provides that a jury may consider evidence of a defendant's uncharged misconduct only if it believes it and, then, only if it finds that the evidence "logically, rationally and conclusively" supports the issue or issues for which it was offered by the state, the model instruction was an incorrect statement of the law insofar as it required a jury to find that uncharged misconduct "conclusively" supports the issue for which it is offered; moreover, the court properly declined to instruct the jury that it could consider the defendant's prior misconduct evidence only if it found that it conclu-

sively supported the state's theory as to the defendant's motive, as motive is not an element of the crime of murder, and the court properly instructed the jury that, even if it credited certain testimony that the defendant was engaged in the sale of drugs on the night of the murder, the jury could consider that evidence only if it found that it logically and rationally supported the state's theory of motive.

Argued January 10—officially released June 14, 2022

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Rafael Ortiz, appeals[1] from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a).[2] The defendant claims that (1) prosecutorial impropriety deprived him of his right to a fair trial, (2) the trial court committed evidentiary and constitutional error by precluding defense counsel from using certain prior felony convictions to impeach two of the state's witnesses, and (3) the trial court erred in its charge to the jury. We disagree with each of these claims and, accordingly, affirm the judgment of the trial court.

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On the evening of June 10, 2003, the victim, Benjamin Baez, Jr., and his friend, Enrique Lugo, were "hanging out" and smoking phencyclidine (PCP). Shortly before midnight, Lugo drove the two men in his car to Main Street in Hartford, near Salvin Shoes, to buy more PCP. Once there, the victim got out of the parked car while Lugo remained in it. Shortly after the victim returned to the car, Lugo saw the defendant, whom he had known for many years and considered a friend, approach the car, aim a gun at the victim, and shoot the victim through the front passenger side window. After the shooting, Lugo rushed the victim to Saint Francis Hospital and Medical Center, where he was later pronounced dead.

Wilbur Irizarry and Lisa Rosario also witnessed the shooting.[3] Irizarry and his cousin had gone to Main Street to "hang out" with friends in front of Bashner's Liquors, across the street from Salvin Shoes. When they arrived, Irizarry noticed that the defendant, whom he knew as "Felo," was there with a man who went by the name "Lu-Rock." Although Irizarry was aware that the defendant sold drugs, it was unusual to see him doing so at this location. Irizarry heard the defendant arguing with another man whom Irizarry did not know but who was later identified as the victim. Initially, he could not hear what the men were arguing about. As he got closer, however, he heard the victim ask the defendant, "[Felo], can you give me some work?" Irizarry, who previously had been involved in the sale of drugs, understood this to mean that the victim was

[3] We note that neither Lugo, Irizarry, nor Rosario came forward with information about the shooting until they were contacted by investigators from the cold case unit of the Office of the Chief State's Attorney, in late 2015 and early 2016. As discussed subsequently in this opinion, all three witnesses separately identified the defendant as the shooter in a double-blind, sequential photographic array procedure and gave statements implicating the defendant in the victim's murder.

asking the defendant to "give [him] some drugs so [that he could] make some money." In response, Irizarry heard the defendant say that "he wasn't going to give him [any]," to which the victim replied that he was "going to rob [the defendant] anyways." Irizarry then watched the victim walk toward a car that was double parked a short distance away and get in the front passenger seat.

Because the victim and the defendant were "not talking friendly," Irizarry "figure[d] something [was] going to happen" and decided to leave. While walking away, Irizarry looked over his right shoulder and saw the defendant rush over to his vehicle, open the front passenger door, and reach inside for something. He then saw the defendant walk to the front passenger side of the car in which the victim was seated, stop approximately three to four feet away, extend his arm, and shoot the victim.[4] After hearing the shot, Irizarry and his cousin jumped into their own vehicle and sped away. Irizarry did not report the shooting at the time because he was afraid that, if he contacted the police, then what "happened to [the victim] . . . [would] happen to [him]."

Rosario was with the defendant on the night of the murder. She, her sister, and her cousin had spent the evening driving around Hartford with the defendant—who was driving his friend "Lu-Rock's" vehicle—drinking, smoking PCP, and generally "having a good time." On Main Street, across from Salvin Shoes, the defendant exited the vehicle, while Rosario and the other women remained in it. Rosario later heard the defendant arguing loudly with the victim, whom she knew as "Benji." Subsequently, she saw the defendant fire a gun into the car in which the victim was seated. After the shooting,

[4] Irizarry testified that, although he could not see whether the defendant was holding a gun from where he was standing, he heard a gunshot approximately one second after the defendant extended his arm toward the victim.

the defendant got back into his own vehicle, and he and Rosario immediately left the scene. Rosario never reported the shooting to the Hartford police because she was afraid.

The day after the shooting, police officers searched Lugo's car, discovered a defect in the right front passenger seat, and thereafter found and seized a .40 caliber lead projectile from the seat cushion. In an effort to determine the trajectory that the bullet had traveled from the time it left the weapon until the time it came to its resting point or, in other words, to determine the angle from which the bullet had been fired into Lugo's car, the officers placed "trajectory rods" between two fixed points—namely, the location where the bullet entered the seat and the location where the bullet ultimately rested. On the basis of these points, coupled with the position of the entry and exit wounds found on the victim's body and the presence of gunpowder on the shirt that the victim had been wearing when he was killed, the officers and examiners from the state forensic science laboratory concluded that the bullet had been fired into the victim at close range—approximately two feet—and from an angle slightly over the car's door frame.

Despite their best efforts, the police were unable to develop any viable leads, and the case soon went cold. In 2015, however, investigators from the cold case unit of the Office of the Chief State's Attorney (cold case unit) learned that Lugo, Irizarry, and Rosario were all present when the shooting occurred. After all three witnesses identified the defendant in a double-blind, sequential photographic array procedure, an investigatory grand jury was convened pursuant to General Statutes § 54-47c.[5] Between December 2, 2015, and April

[5] General Statutes § 54-47c (a) provides: "Any judge of the Superior Court, Appellate Court or Supreme Court, the Chief State's Attorney or a state's attorney may make application to a panel of judges for an investigation into the commission of a crime or crimes whenever such applicant has reasonable

22, 2016, the appointed grand juror heard testimony and received exhibits. On May 24, 2016, the grand juror found probable cause to believe that the defendant had murdered the victim.

Following his arrest, the defendant pleaded not guilty and elected a trial by jury. A trial subsequently was held, after which the jury found the defendant guilty of murder. On September 16, 2019, the court sentenced the defendant to fifty years of imprisonment, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We begin with the defendant's claim that he was denied his due process right to a fair trial due to prosecutorial impropriety. Specifically, the defendant contends that the prosecutor engaged in impropriety during his rebuttal closing argument when he made reference to defense counsel's failure to cross-examine Rosario. The defendant argues that the prosecutor's argument violated the "intrinsic character" of an agreement between defense counsel, William F. Dow III, and the state, whereby Dow agreed to limit his cross-examination of Rosario to a single question in exchange for the state's promise not to introduce highly damaging consciousness of guilt evidence that had recently been revealed by Rosario. The defendant further contends, in the alternative, that, if the prosecutor's argument did not rise to the level of a due process violation, this court should grant the defendant a new trial pursuant to its inherent supervisory authority over the administration of justice. The state responds that, even assuming arguendo that the prosecutor's argument violated the parties' agreement, it did not deprive the defendant of a fair trial and

belief that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed."

that exercise of this court's supervisory authority is unwarranted under the circumstances of this case. We agree with the state.

The following additional facts are relevant to our resolution of this claim. As we previously indicated, although Rosario witnessed the victim's murder, she did not come forward until contacted by the cold case unit in December, 2015. Rosario was initially hesitant to speak with investigators but ultimately agreed to provide a written statement and testimony to the grand jury implicating the defendant in the victim's murder. On the day that she was scheduled to testify at trial, however, Dow informed the court that, in November, 2018, and again on February 4, 2019—just days before the start of the defendant's trial—Rosario had phoned his office indicating that she wanted to recant her prior statement and testimony. According to Dow, Rosario stated that investigators had pressured her into implicating the defendant in the victim's murder and that, contrary to what she previously had told them, she was not with the defendant on the night in question and did not see him shoot the victim. Dow provided the court with a copy of a recording and transcript he had prepared of Rosario's February 4th recantation, after which the court called a recess to allow the prosecution to investigate the circumstances surrounding the alleged recantation.

Later, the court noted for the record that prosecutors had met with Rosario during the recess and elicited from her a wealth of information that they believed explained her phone calls to Dow. The court further noted that the parties had reached an agreement regarding Rosario's testimony. It then asked Andrew Reed Durham, one of two prosecutors assigned to the case, to "place on the record the type of information that [he was] intending to offer in [his] examination . . . of . . . Rosario, that [he] allege[d] bore on her attempted

recantation and that may have led to further incriminating information being elicited regarding the defendant in the nature of consciousness of guilt." Durham responded that, during the recess, Rosario had admitted to calling Dow and to recanting her prior statement and testimony. Durham stated that Rosario had told him that, in the fall of 2018, the defendant's close associate, Angel Rodriguez, also known as Lu-Rock, whom Rosario knew to be involved in gang activity and the sale of drugs, had contacted her via cell phone and asked that she download an encrypted cell phone application called "Wickr," which "allows people to text message back and forth with one another, and the text messages are automatically deleted, thus not leaving a trail of those conversations." Even though the defendant was incarcerated and should not have been in possession of a cell phone, Rodriguez informed Rosario that she would be receiving text messages from him through Wickr, and Rosario did in fact receive numerous messages from the defendant. Although the messages were not overtly threatening—most were of a sexual nature—they "repeatedly suggest[ed] to her that she should say that she wasn't [with the defendant on the night of the murder] . . . ." When Rosario expressed concern to the defendant and Rodriguez that she could be charged with perjury if she changed her grand jury testimony, they "assured her that they would take care of her" and that "[t]hey weren't going to hang her out to dry."

Durham further stated that the state was prepared to introduce evidence that prison officials had confiscated an illegal cell phone from the defendant in November, 2018, after which the defendant's text messages to Rosario stopped. Durham also advised the court that, if the defense were to introduce evidence of Rosario's attempted recantation, it would open the door for the state to introduce evidence "that [Rosario] was placed in witness protection at her request following her grand

jury testimony and that she was, with the state's assistance, moved out of state." The state would also introduce evidence that Rosario recently had contacted authorities and asked to return to witness protection in light of the defendant's and Rodriguez' efforts to influence her testimony. Finally, Durham stated that Rosario was prepared to take the witness stand that day and to testify, consistent with her prior written statement and grand jury testimony, that she was with the defendant on the night of the murder and that she saw him shoot the victim.

When Durham finished speaking, the court observed that the state's proffered evidence, if adduced at trial, "might also warrant a consciousness of guilt instruction, which would alert the jurors to the fact that, if they found [that] the defendant [had been messaging Rosario] and did so because of this case and his concerns of being convicted, they could view the defendant's actions as being evidence that the defendant himself is conscious of his own guilt, and that could be used by the jury [against the defendant]." The court further stated that, in light of these developments, Dow had sought to make a deal with the state. The court then asked Dow to state for the record the nature of that deal. Dow responded that, "[w]hile there were grounds [on] which to cross-examine . . . Rosario, principally based on her recantation," the proffered evidence concerning the defendant's attempts, via an illegal cell phone, to influence Rosario's testimony was "a significant piece of [new] information" that he viewed as "very damaging" to the defendant and that, if introduced at trial, would be "fatal or near fatal to [the defendant's] case, whether or not there was a consciousness of guilt [instruction] or a tampering charge brought [against him] at a later point in time." Dow further stated that, during the recess, after extensive discussions with the defendant, he asked the state if it would be willing to

forgo introducing evidence of the defendant's cell phone communications with Rosario if the defense were to limit its cross-examination of Rosario to a single question, namely, whether it was true that she was on PCP on the night of the murder.

When Dow finished speaking, the court confirmed that the parties had agreed that, on direct examination, the prosecutor would question Rosario about whom she was with and what she saw on the night of the murder but would not question her about her recent communications with the defendant, and Dow would limit his cross-examination to a single question regarding Rosario's PCP use, and "[t]hat will be it for . . . Rosario." The court then stated that it "thought it . . . important that, given these somewhat unique circumstances . . . the record be clear and not later examined without a clear reason for both sides' having chosen the course of action that they've chosen." When the trial resumed, consistent with the aforementioned agreement, the prosecutor questioned Rosario about who she was with and what she saw on the night of the murder, but did not elicit testimony from Rosario regarding the defendant's recent communications with her, and Dow limited his cross-examination to whether Rosario was on PCP on the night in question.

During his closing argument, Dow argued that "[o]ne of the big issues" at trial was the fact that two of the state's witnesses, Rosario and Lugo, were on PCP on the night of the shooting, thus potentially undermining their observations of what occurred that night. Dow further stated: "[*N*]*ow*, *if you feel that*, *tactically*, *I made a wrong decision by not examining* [*Rosario*] *or cross-examining her*, *don't hold that against* [*the defendant*]. But her memory, talk about details, she can't remember what was said in the car even before or afterward, can't remember what happened in the car afterward, that is, where they went, can't remember,

according to her, if there was a gun, can't remember anything, where there's a gun. And, significantly, listen to her testimony in comparison to Irizarry's. Irizarry [testified that] there's an argument. The shooter then goes back, pulls the gun out of the car, comes back, and does the shooting. Rosario, left the car, went over to the shooting." (Emphasis added.) The prosecutor responded in his rebuttal argument as follows: "Now, let's talk about . . . Rosario and PCP. Again, she was not asked about any level of intoxication at the time she witnessed the shooting of [the victim] by [the defendant]. She was in the car with the defendant the entire night. It wasn't like she showed up on Main Street and happen[ed] to see him. He was driving, except when he got out, went across the street, and she witnesses him shoot [the victim], and then return to the car with that semi-automatic weapon. *There's no question on who she was with, and what she saw. The defendant didn't even cross her on any of that.* He didn't talk about, again, with Lugo or her, levels of how [PCP] affects you individually or what you see, do you react poorly with it, none of that. He just wants you to discredit them because the word PCP was used." (Emphasis added.) At no point during or after the prosecutor's rebuttal argument did defense counsel object to any aspect of that argument.

On appeal, however, the defendant claims that two sentences of the prosecutor's rebuttal argument violated the parties' agreement regarding Rosario's testimony, namely, "[t]here's no question on who [Rosario] was with, and what she saw. The defendant didn't even cross her on any of that." Although the agreement itself related to the scope of the direct examination and cross-examination of Rosario and not to permissible inferences to be drawn from that evidence, and despite the fact that the trial court did not make a specific ruling or order prohibiting the state—or either party for

that matter—from making an adverse comment during closing argument on defense counsel's failure to cross-examine Rosario, the defendant contends that the prosecutor "knew or should have known that such a comment would violate the intrinsic character of the agreement." The defendant further contends that the prosecutor's rebuttal argument "unfairly suggested and implied that the reason [defense counsel] didn't . . . [cross-examine Rosario] on who she was with and what she saw was because [counsel] essentially accepted her testimony." (Emphasis omitted; internal quotation marks omitted.) We agree with the state that, even if we assume, for purposes of our analysis, that the prosecutor's argument violated the "intrinsic character" of the parties' agreement and, therefore, was improper, it did not deprive the defendant of a fair trial.

Although the defendant's claim is unpreserved, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . .

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560–61, 34 A.3d 370 (2012).

It is well established that prosecutorial impropriety can occur during final or rebuttal argument. See, e.g., *State* v. *Weatherspoon*, 332 Conn. 531, 551, 212 A.3d 208 (2019). "To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 37, 975 A.2d 660 (2009).

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 561.

Applying these principles to the present case,[6] we have no difficulty in concluding that the prosecutor's

[6] In its appellate brief, the state urges us, due to the "unique circumstances of the present case," to forgo deciding whether the prosecutor engaged in impropriety during his rebuttal argument and, instead, to assume, arguendo,

brief argument during his rebuttal argument referencing defense counsel's failure to cross-examine Rosario, even assuming it was improper because it violated the "intrinsic character" of the parties' agreement, did not deprive the defendant of a fair trial. First, the argument was clearly not perceived by Dow to have been so improper as to elicit an objection from him. See, e.g., *State* v. *Weatherspoon*, supra, 332 Conn. 558 (defense counsel's failure to object to allegedly improper comments is "a strong indication that they did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm"); *State* v. *Ceballos*, 266 Conn. 364, 414, 832 A.2d 14 (2003) (emphasizing that "[defense] counsel's failure to object at trial, [although] not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error" (emphasis omitted)). Second, although no curative measures were adopted, the absence of such measures is attributable to Dow's failure to object or request any curative instruction from the court. Thus, Dow "bears much of the responsibility for the fact that [the] claimed impropriet[y] went uncured." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 291, 973 A.2d 1207 (2009); see id. (emphasizing court's "continue[d] . . . adhere[nce] to the well established maxim that defense counsel's failure to object to the prosecutor's argument . . . when [it is] made suggests that defense counsel did not believe that [it was] unfair in light of the record of the case at the time" (internal quotation marks omitted)).

In terms of the extent to which the alleged impropriety was invited by defense counsel's conduct or argu-

that the prosecutor's argument was improper and to proceed directly to a due process analysis under the *Williams* factors. The state argues that such analysis compels the conclusion that "any brief, isolated impropriety could not have deprived the defendant of his due process right to a fair trial."

ment, we agree with the state that Dow bears at least partial responsibility for inviting the prosecutor's allegedly improper argument. As previously indicated, the prosecutor made no mention of Dow's failure to cross-examine Rosario during his initial closing argument. It was only after Dow raised the issue by arguing that the jury should draw no adverse inference from his decision not to cross-examine Rosario more thoroughly that the prosecutor likewise commented on the issue during his rebuttal argument. See, e.g., *State* v. *Jordan*, 314 Conn. 89, 114, 101 A.3d 179 (2014) (there was no due process violation when prosecutor's improper comment "was in direct response to a similar statement by defense counsel"); *State* v. *Northrop*, 213 Conn. 405, 421, 568 A.2d 439 (1990) (there was no impropriety or due process violation when state's closing argument "was in direct response to the defendant's prior argument"); *State* v. *Graham*, 200 Conn. 9, 13, 509 A.2d 493 (1986) (it is axiomatic that party who initiates discussion opens door to rebuttal by opposing party). In such circumstances, "the prejudicial impact [of the comment is] not as great as when [the] comment is totally unprovoked." *State* v. *Falcone*, 191 Conn. 12, 23–24, 463 A.2d 558 (1983).

With respect to the severity of the alleged impropriety, it is clear that the jury did not need the prosecutor to tell it about Dow's failure to cross-examine Rosario. Jurors likely would have noticed the unusually truncated nature of the cross-examination entirely on their own, irrespective of the prosecutor's argument, and drawn from it the logical inference that the defendant had little with which to challenge Rosario's testimony concerning who she was with and what she saw on the night of the murder, apart from assertions that her use of PCP had affected her perception and recollection of the details of that evening. In light of the foregoing, we conclude that the alleged impropriety was relatively minor.

We turn now to the final two *Williams* factors: the centrality of the impropriety to the critical issues in the case and the strength of the state's case. Although Rosario was an important state's witness whose credibility was undeniably important, the state's case was not dependent on her. Two other individuals, Lugo and Irizarry, also witnessed the murder, and their testimony was largely consistent with each other as well as with Rosario's testimony. Despite the passage of time, their testimony, like Rosario's, carried the added weight of coming from people who knew the defendant prior to the murder. See, e.g., *State* v. *Guilbert*, 306 Conn. 218, 259–60, 49 A.3d 705 (2012) ("identification of a person who is well known to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not well known to the eyewitness"); *State* v. *Outing*, 298 Conn. 34, 100 n.8, 3 A.3d 1 (2010) (*Palmer*, *J.*, concurring) (inherent dangers of eyewitness identifications "are generally limited to eyewitness identifications of strangers or persons with whom the eyewitness is not very familiar"), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). At the time of the murder, Lugo had known the defendant for several years and considered him a friend, and, although Irizarry may not have known the defendant as well, he knew him well enough to know his name and to greet him when they passed on the street. He was also familiar enough with him to note that his presence at the crime scene on the night of the murder was out of the ordinary. In short, although the state's case may not have been overwhelming, it was not so weak as to think that there is a reasonable probability that the verdict would have been different in the absence of the alleged impropriety.[7] See

[7] Because we do not view the prosecutor's alleged impropriety as overtly offensive or egregious, we decline the defendant's request that we invoke our supervisory authority over the administration of justice to grant him a new trial. We previously have explained that "[w]e may invoke our inherent supervisory authority in cases in which prosecutorial [impropriety] is not

State v. *Thompson*, 266 Conn. 440, 483, 832 A.2d 626 (2003) ("[this court has] never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial"). Accordingly, the defendant cannot prevail on his claim that prosecutorial impropriety deprived him of his right to a fair trial.

II

The defendant next claims that the trial court committed both constitutional and evidentiary error in precluding defense counsel from impeaching Lugo and Irizarry with certain prior felony convictions and in requiring two of Irizarry's prior convictions to be referred to only as "unnamed" felonies punishable by more than one year of imprisonment. We disagree.

The following additional facts are relevant to our resolution of this claim. During jury selection, the state provided defense counsel with copies of Lugo's and Irizarry's criminal records. Lugo's record revealed that he had three prior felony convictions: a 2010 conviction of possession of marijuana, a 2006 conviction of failure to appear in the first degree, and a 2006 conviction of possession of narcotics. Irizarry's record included five prior felony convictions: a 2017 conviction of assault in the second degree, a 2017 conviction of violation of a protective order, a 2005 conviction of sale of a con-

so egregious as to implicate the defendant's . . . right to a fair trial . . . [but] when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper. . . . *We have cautioned, however, that* [*s*]*uch a sanction generally is appropriate . . . only when the* [*prosecutor's*] *conduct is so offensive to the sound administration of justice that only a new trial can effectively present such assaults on the integrity of the tribunal.* . . . Accordingly, in cases in which prosecutorial [impropriety] does not rise to the level of a constitutional violation, we will exercise our supervisory authority to reverse an otherwise lawful conviction only when the drastic remedy of a new trial is clearly necessary to deter the alleged prosecutorial [impropriety] in the future." (Emphasis added; internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 405–406, 897 A.2d 569 (2006).

trolled substance, a 2005 conviction of larceny in the second degree, and a 2004 conviction of sale of a controlled substance.

On the day that Lugo and Irizarry were scheduled to testify, the court ruled on the admissibility of each of their prior convictions. The court aptly noted that, pursuant to § 6-7 (a) of the Connecticut Code of Evidence and this court's caselaw, three factors determine whether a prior conviction may be admitted to impeach a witness' credibility: (1) the extent of the prejudice likely to arise from the evidence, (2) whether the conviction is indicative of the witness' untruthfulness, and (3) the conviction's remoteness in time. See, e.g., *State* v. *Skakel*, 276 Conn. 633, 738, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). Applying these factors, the court concluded that Lugo's 2006 convictions of possession of narcotics and failure to appear in the first degree were inadmissible because both were more than ten years old and neither was probative of Lugo's veracity. The court permitted Lugo's 2010 conviction of possession of marijuana to be used, but only as an unnamed felony, unless the state elicited the name of the felony first, as the state ultimately did in this case.[8]

With respect to Irizarry, the court allowed the defense to use his 2017 convictions of assault in the second degree and violation of a protective order but required defense counsel to refer to them only as unnamed felonies. Despite its remoteness in time, the court permitted the use of Irizarry's 2005 larceny conviction because larceny is a crime that bears directly on a person's general disposition toward untruthfulness. The court excluded Irizarry's 2004 and 2005 convictions of sale of a controlled substance, however, due to their remote-

[8] During his direct examination of Lugo, the prosecutor elicited from him the fact that the 2010 conviction was for possession of marijuana.

ness in time and because neither bore on Irizarry's veracity.

The following standard of review and legal principles guide our analysis of the defendant's claim. "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 252, 856 A.2d 917 (2004).

"Generally, evidence that a witness has been convicted of a crime is admissible to impeach his credibility if the crime was punishable by imprisonment for more than one year. General Statutes § 52-145 (b); Conn. Code Evid. § 6-7 (a). . . . [I]n evaluating the separate [factors] to be weighed in the balancing process, there is no way to quantify them in mathematical terms. . . . Therefore, [t]he trial court has wide discretion in this balancing determination and every reasonable presumption should be given in favor of the correctness of the court's ruling . . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done. . . . With respect to the remoteness prong of the balancing test, we have endorsed a general guideline of ten years from conviction or release from confinement for that conviction, whichever is later, as an appropriate limitation on the use of a witness' prior conviction. . . . [T]he ten year benchmark . . . [however] is not an absolute bar to the use of a conviction that is more than ten years old, but, rather, serves merely as a guide to assist the trial judge in evaluating the conviction's remoteness. . . . We have recognized, moreover, that convictions having some special significance [on] the issue of veracity sur-

mount the standard bar of ten years and qualify for the balancing of probative value against prejudice." (Citations omitted; internal quotation marks omitted.) *State* v. *Skakel*, supra, 276 Conn. 738–39.

"Not all felony crimes bear equally on a defendant's veracity. [This court] has recognized that crimes involving larcenous intent imply a general disposition toward dishonesty or a tendency to make false statements. . . . [I]n common human experience acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct [reflecting] on a man's honesty . . . ." (Internal quotation marks omitted.) *State* v. *Tarasiuk*, 192 Conn. App. 207, 217, 217 A.3d 11 (2019). "Although drug addiction or drug use may be probative of a witness' credibility for other reasons, such as a witness' ability to accurately perceive and to remember events, this court has rejected the proposition that drug addiction is probative of veracity." *State* v. *Rivera*, 335 Conn. 720, 732, 240 A.3d 1039 (2020).

Applying these principles to the present case, we cannot conclude that the trial court abused its discretion in precluding defense counsel from (1) impeaching Lugo with his 2006 convictions of possession of narcotics and failure to appear in the first degree, and (2) impeaching Irizarry with his 2004 and 2005 convictions of sale of a controlled substance. As the trial court properly noted, each of these convictions was at least thirteen years old at the time of trial, and none was directly probative of the witnesses' veracity. See, e.g., *State* v. *Clark*, 314 Conn. 511, 515, 103 A.3d 507 (2014) ("it is rare for a felony conviction that is more than ten years old [to retain] the minimal probative value sufficient to overcome its prejudice" (internal quotation marks omitted)). Acknowledging that the convictions were remote in time and not probative of the witnesses' truthfulness, the defendant nevertheless contends that they should have been admitted because "[all] crimes

involving sentences of more than one year affect the credibility of a witness." (Internal quotation marks omitted.) He further contends that Lugo's conviction for failure to appear should have been admitted because it involved "willful disobedience of a court order" and, therefore, demonstrated "a lack of respect for the authority of the judicial process."

Although we recognize the possibility that any criminal conviction may reflect poorly on a person's character and suggest a lack of respect for the rule of law, we have long held that "only a conviction [of] perjury or some kind of fraud bears directly [on] untruthfulness." *State* v. *Nardini*, 187 Conn. 513, 523, 447 A.2d 396 (1982); see also *State* v. *Geyer*, 194 Conn. 1, 13, 480 A.2d 489 (1984) ("[a]lthough [narcotics] convictions reflect adversely on [a witness'] general character, they have no special or direct materiality to [a witness'] credibility"). We have also held that, for purposes of assessing a witness' credibility, the probative value of *any* conviction, even one involving dishonesty, is "greatly diminished by the extended period of time [that] ha[s] elapsed since [its] occurrence." *State* v. *Nardini*, supra, 187 Conn. 528. Thus, we repeatedly have held that, "unless a conviction ha[s] some special significance to untruthfulness, the fact that it [is] more than ten years old [will] most likely preclude its admission under our balancing test." (Emphasis omitted.) *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 309, 852 A.2d 703 (2004); see also id., 313–14 ("the fact that a prior conviction is more than ten years old should greatly increase the weight carried by the third prong in the balancing test set forth in § 6-7 of the Connecticut Code of Evidence, unless that prior conviction relates to the witness' veracity"). We can perceive no reason, and the defendant has proffered none, to deviate from these well established principles.

We also disagree with the defendant that the trial court abused its discretion by requiring defense counsel to refer to Irizarry's 2017 convictions for assault in the second degree and violation of a protective order as unnamed felonies, rather than by their proper names. We previously have stated that, "[t]o avoid unwarranted prejudice to the witness, when a party seeks to introduce evidence of a felony that does not directly bear on veracity, a trial court ordinarily should permit reference only to an unspecified crime carrying a penalty of greater than one year that occurred at a certain time and place." *State* v. *Pinnock*, 220 Conn. 765, 780, 601 A.2d 521 (1992). "Th[is] prudent course [of permitting evidence of unnamed felony convictions] allows the jury to draw an inference of dishonesty from the prior conviction without the extraordinary prejudice that may arise from naming the specific offense. . . . Ultimately, [t]he trial court, because of its intimate familiarity with the case, is in the best position to weigh the relative merits and dangers of any proffered evidence. . . . This principle applies with equal force to the admissibility of prior convictions." (Citations omitted; internal quotation marks omitted.) *State* v. *Muhammad*, 91 Conn. App. 392, 401, 881 A.2d 468, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005).

Acknowledging that "the ultimate decision whether to allow the 'name' of a conviction is a discretionary one," the defendant argues nonetheless that the trial court should have allowed the names of Irizarry's 2017 convictions to be used because Irizarry was on probation for the assault conviction at the time of trial and because the violation of a protective order "reflects disrespect for the authority of a judicial officer." We disagree. "Whe[n] the name of a prior conviction is not probative of truthfulness, and may entice the trier of fact to view the witness negatively because of the prior bad act, the trial court has [wide] discretion to conclude

that it should not be admitted." *State* v. *Pinnock*, supra, 220 Conn. 781; see also *State* v. *Geyer*, supra, 194 Conn. 13 ("[C]onviction of a crime not directly reflecting on credibility clearly lacks the direct probative value of a criminal conviction indicating dishonesty or a tendency to make [a] false statement. Thus, the balance used to measure admissibility of prior convictions is *weighted less heavily toward admitting the prior conviction when it involves a crime related only indirectly to credibility*." (Emphasis added.)). So long as our trial courts adhere to the principles discussed herein governing the admission of prior conviction evidence, their decisions with respect to such matters will not be disturbed.

III

The defendant's final claim is that the trial court erred in relation to two portions of its charge to the jury. Specifically, the defendant claims that the court improperly declined to charge the jury that the defendant was not obliged to present any evidence and that the jury should draw no adverse inference from his decision not to present any. The defendant further claims that the court improperly declined to insert the word "conclusively" into its instruction on uncharged misconduct. Specifically, the defendant claims that the court committed reversible error by declining to instruct the jury, in accordance with the model criminal jury instructions on the Judicial Branch website, that it could consider evidence of his involvement in the sale of drugs only to the extent that the jury believed that the defendant was, in fact, involved in the sale of drugs and, then, only to the extent that the jury found that it " 'logically, rationally *and conclusively*' " supported the issue for which it was being offered—namely, to establish the defendant's motive for killing the victim. (Emphasis added.) We disagree with these claims.

The following additional facts are relevant to our analysis of these claims. On the third day of trial, the trial court e-mailed a copy of its proposed jury charge to the parties in preparation for the charge conference scheduled for later that week. The court indicated that the parties could e-mail any requests for changes to the court and that the court would discuss them with the parties at the upcoming charge conference. Prior to the charge conference, the defendant filed his requests to charge, seeking several modifications to the court's proposed instructions. Specifically, although the court's proposed instructions included an instruction on the "[d]efendant's [o]ption to [t]estify" and provided that the defendant "had no obligation to testify," that he "has a constitutional right not to testify," and that the jury "must draw no unfavorable inferences from the defendant's choice not to testify," defense counsel requested that the court add a complementary instruction stating: "Similarly, [the defendant] is not obliged to present any evidence, and you may not draw any unfavorable inference from that, either." The court ultimately declined to add that instruction, stating that it would adhere to its proposed instruction, which mirrored the model criminal jury instruction on the Judicial Branch website concerning the defendant's option to testify.[9]

The defendant also requested a change to the court's proposed instruction on uncharged misconduct evidence. At trial, the state presented uncharged misconduct evidence through Irizarry's testimony that the defendant had sold heroin and was doing so on the night of the murder. In his closing argument, the prosecutor

[9] The court's final instruction on the defendant's option to testify was as follows: "The defendant has not testified in this case. An accused person has the option to testify or not testify at the trial. The defendant here thus had no obligation to testify. He has a constitutional right not to testify. You must draw no unfavorable inferences from the defendant's choice not to testify."

argued that the defendant had killed the victim because of a dispute over the sale of drugs. At the conclusion of Irizarry's testimony, the court gave the jury a limiting instruction and indicated that it would explain the purpose for which the evidence could be used during its final charge to the jury. Subsequently, the court provided the parties with a copy of its proposed jury instructions. The instruction on uncharged misconduct was titled "Evidence Admitted for a Limited Purpose" and provided in relevant part: "You may recall that you heard testimony from . . . Irizarry regarding his understanding that the defendant had been engaged in the selling of illegal drugs in Hartford at and around the date of the charged offense. As I indicated to you shortly after this testimony was received, the defendant's involvement in such activity is relevant and may be considered by you in your deliberations only to the extent that you believe such testimony to be true and, then, only to the extent that it helps to put the events of June 11, 2003, into context and to provide evidence as to a motive for the defendant to have committed the crime with which he is here charged. Beyond that stated purpose, however, the fact that the defendant may have been engaged in such drug activities may not be considered by you as evidence that the defendant, simply by virtue of that activity, is a bad person or one who is, by nature, more likely to commit a crime." In his request to charge, the defendant requested that the court replace the word "understanding" with the word "belief" and add language to the effect that the misconduct evidence could be considered by the jury only if the jury believed it and, then, only if the jury found that it "logically, rationally and conclusively" supported the purpose for which it was offered.

At the charge conference, the court granted the defendant's request to replace the word "understanding" with the word "belief" and heard arguments from the parties

regarding the defendant's request to add that the jury could consider the prior misconduct evidence only if it found that the evidence "logically, rationally and conclusively" supported the purpose for which it was offered. Defense counsel argued that, in its present form, the court's proposed instruction "left out some of the meat of the standard" and lacked "the amount of oomph that's necessary on this particular subject matter." He further noted that the requested language was copied "verbatim" from or was "essentially equivalent" to instruction 2.6-5 of the model criminal jury instructions on the Judicial Branch website.[10] The prosecutor responded that the defendant's requested charge went "too far." The next morning, the court inquired whether the parties had received its updated jury instructions incorporating "some of the changes that were discussed [during the charge conference] and reflect[ed] the court's rulings in the areas where there was not full agreement." Defense counsel stated that, although the court had added that the jury could consider the uncharged misconduct only to the extent that it found that the evidence "logically and rationally" supported the state's theory as to motive, it had failed to include the word "conclusively," which defense counsel "felt strongly about

[10] Instruction 2.6-5 provides in relevant part: "The state has offered evidence of other acts of misconduct of the defendant. This is not being admitted to prove the bad character, propensity, or criminal tendencies of the defendant. Such evidence is being admitted solely to show or establish . . . a motive for the commission of the crimes alleged. . . . You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. *You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issue*[*s*] *for which it is being offered by the state*, but only as it may bear on the issue[s] of [motive]. On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issue[s] for which it is being offered by the state, namely [to establish a motive for the commission of the crimes alleged], then you may not consider that testimony for any purpose. . . ." (Emphasis added; footnotes omitted.) Connecticut Criminal Jury Instructions 2.6-5, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 7, 2022).

. . . .” The court indicated that it was still considering whether to include the word. Ultimately, however, the court did not include it.[11]

Our standard of review for claims of instructional error is well settled. “To determine whether an error in the charge to the jury exists, we review the entire charge to determine if, taken as a whole, the charge adequately guided the jury to a correct verdict. . . . In appeals not involving a constitutional question [we] must determine whether it is reasonably probable that the jury [was] misled . . . .” (Citations omitted; internal quotation marks omitted.) *State* v. *Woods*, 234 Conn. 301, 307–308, 662 A.2d 732 (1995). “[I]n appeals involving a constitutional question, [however, the standard is] whether it is reasonably *possible* that the jury [was] misled.” (Emphasis added; internal question marks omitted.) Id., 308. “[Although] a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court’s failure to give a charge in exact

[11] The court’s final instruction on uncharged misconduct was as follows: “[Y]ou heard testimony from . . . Irizarry regarding his *belief* that the defendant had been engaged in the selling of illegal drugs in Hartford at and around the date of the charged offense. As I indicated to you shortly after this testimony was received, the defendant’s involvement in such activity is relevant and may be considered by you in your deliberations only to the extent that you believe that the defendant was, in fact, involved in drug selling and, if so, only to the extent that such activities of the defendant *logically and rationally* provide evidence as to a motive for him to have committed the crime with which he is charged.

“On the other hand, if you do not credit . . . Irizarry’s claim regarding the defendant’s drug selling activity, or, even if you do, if you find that it does not *logically and rationally* support the state’s theory of motive, then you may not consider that testimony to bear on motive nor for any other purpose. Beyond the issue of motive, however, the fact that the defendant may have been engaged in such drug activities may not be considered by you as evidence that the defendant simply by virtue of that activity is a bad person or one who is by nature more likely to commit a crime.” (Emphasis added.)

conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Cutler*, 293 Conn. 303, 317, 977 A.2d 209 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014). Finally, "[a] challenge to the validity of jury instructions presents a question of law over which [we exercise] plenary review." (Internal quotation marks omitted.) *State* v. *Gomes*, 337 Conn. 826, 849–50, 256 A.3d 131 (2021). With these principles in mind, we turn to the defendant's claims.

A

We begin with the defendant's claim that the trial court improperly declined to instruct the jury that the defendant "is not obliged to present any evidence, and [the jury] may not draw any unfavorable inference from that . . . ." Because "[t]he presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice"; (internal quotation marks omitted) *State* v. *Brawley*, 321 Conn. 583, 587, 137 A.3d 757 (2016); we must determine whether it is reasonably possible that the jury was misled by the trial court's failure to give the requested instruction. See *State* v. *Walton*, 227 Conn. 32, 64–65, 630 A.2d 990 (1993) ("[w]e have recognized . . . that . . . claimed instructional errors regarding the burden of proof or the presumption of innocence . . . are constitutional in nature" (citations omitted)).

Our review of the jury charge as a whole compels the conclusion that it is not reasonably possible that the jury was misled by the trial court's omission of the requested instruction because the substance of that instruction was clearly contained in the court's other

instructions. See, e.g., *State* v. *Cutler*, supra, 293 Conn. 317 ("[A] [trial] court need not tailor its charge to the precise letter of . . . a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal." (Internal quotation marks omitted.)); see also *State* v. *Denby*, 235 Conn. 477, 485, 668 A.2d 682 (1995) ("[t]he test of a court's charge is not whether it is as accurate [on] legal principles as the opinions of a court of last resort but [rather] whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law" (internal quotation marks omitted)).

Specifically, as the state contends, the requested instruction, which sought to include language instructing the jury that the defendant was not obliged to present any evidence and that it must draw no adverse inference from his decision not to do so, was subsumed within the trial court's instructions that (1) the defendant is presumed to be innocent unless and until proven guilty beyond a reasonable doubt, and this presumption continues with him unless and until such time as all the evidence produced at trial satisfies the jury beyond a reasonable doubt that the defendant is guilty, (2) this presumption of innocence may be overcome only if the state introduces evidence that establishes the defendant's guilt beyond a reasonable doubt, (3) the burden to prove the defendant guilty of the crime with which he is charged is on the state, and "[*t*]*he defendant does not have to prove his innocence*," and (4) the defendant was under no obligation to testify, has a constitutional right not to testify, and the jury must draw no unfavorable inferences from the defendant's choice not to testify. (Emphasis added.) These instructions, taken together, clearly informed the jury that the defendant was under no obligation to present evidence or to other-

wise prove his innocence. Indeed, the court's instruction that "[t]he defendant does not have to prove his innocence" necessarily conveyed that the defendant did not have to *produce evidence to prove his innocence*. In addition, the record reflects that, during its preliminary jury instructions at the start of trial, the trial court did, in fact, instruct the jury that the defendant was not obliged to present evidence. Specifically, the court stated in relevant part: "Following the presentation of the state's evidence, the defendant may, if he wishes, present evidence on his own behalf. But remember, as I told you, the defendant is under no obligation to do so. The law does not require a defendant to prove his innocence or to present any evidence." Furthermore, the court emphasized the defendant's presumption of innocence, stating in relevant part: "[E]very defendant in a criminal case is presumed to be innocent, and this presumption remains with the defendant throughout the trial unless and until the defendant is proven guilty beyond a reasonable doubt. . . . The law does not require the defendant to prove his innocence."

We recognize that the defendant's requested instruction was an accurate statement of the law and relevant to the issues at hand. As this court repeatedly has stated, however, "[although] a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request." (Internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 309, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006); see also *State* v. *Berger*, 249 Conn. 218, 236, 733 A.2d 156 (1999) ("trial court was not obligated to provide the requested instruction to the jury because the substance of the requested instruction was implicit in the court's charge and did not require further explication"). Accordingly, because we conclude that the defendant's

requested instruction was subsumed within and implicit in the court's preliminary and final instructions on the defendant's option to testify, the presumption of innocence, and the state's burden of proof, the defendant cannot prevail on his first claim of instructional error.

B

We next consider the defendant's claim that the trial court erred in omitting the word "conclusively" in its instruction on uncharged misconduct. Specifically, the defendant argues that the trial court improperly declined to instruct the jury, in accordance with instruction 2.6-5 of the model criminal jury instructions on the Judicial Branch website; see footnote 10 of this opinion; that it could consider evidence of the defendant's uncharged misconduct only if the jury believed it and, then, only if it found that "it logically, rationally *and conclusively* supports the issue[s] for which it is being offered by the state . . . ." (Emphasis added.) We conclude that instruction 2.6-5, titled "Other Misconduct of Defendant," is an incorrect statement of the law insofar as it requires the jury to find that uncharged misconduct "conclusively" supports the issue for which it is offered. Accordingly, the defendant cannot prevail on his second claim of instructional error.

As we previously explained, the defendant asked the court to instruct the jury that it could consider the uncharged misconduct evidence only if the jury believed it and, then, only if it found the evidence "logically, rationally *and conclusively*" supported the purpose for which it was offered. (Emphasis added.) In its charge to the jury, however, the court omitted the word "conclusively," instructing the jury in relevant part that, "if you do not credit . . . Irizarry's claim regarding the defendant's drug selling activity or, even if you do, if you find that it does not logically and rationally support the state's theory of motive, then you may not consider that testimony to bear on motive nor for any other

purpose." On appeal, the defendant claims that the trial court committed reversible error by omitting the requested word.[12] We disagree.

We begin our analysis by noting that "[t]he language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court. . . . [W]e previously have cautioned that the . . . jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy. See, e.g., *State* v. *Reyes*, 325 Conn. 815, 821–22 n.3, 160 A.3d 323 (2017) (The Judicial Branch website expressly cautions that the jury instructions contained therein [are] intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency. . . .)." (Citation omitted; internal quotation marks omitted.) *State* v. *Gomes*, supra, 337 Conn. 853 n.19; see also *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 775, 212 A.3d 646 (2019) (*Ecker*, *J.*, concurring) ("The [model jury] instructions are promulgated by a distinguished panel

[12] Citing only three cases, the defendant argues that "Connecticut criminal juries are routinely if not invariably instructed that they can consider evidence of uncharged misconduct if they 'believe it' and if they 'find that it logically, rationally and conclusively' supports the issue or issues for which it was offered by the state." We note, however, that our research uncovered many cases in which our juries were not instructed in this regard but, rather, were charged using the "logically and rationally" standard that the trial court utilized in the present case. See, e.g., *State* v. *Collins*, 299 Conn. 567, 581 n.15, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011); *State* v. *Cutler*, supra, 293 Conn. 316; *State* v. *Beavers*, 290 Conn. 386, 407 n.21, 963 A.2d 956 (2009); *State* v. *Lopez*, 199 Conn. App. 56, 63 n.15, 234 A.3d 990, cert. denied, 335 Conn. 951, 238 A.3d 21 (2020); *State* v. *Morales*, 164 Conn. App. 143, 175, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016); *State* v. *Urbanowski*, 163 Conn. App. 377, 398 n.10, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017); *State* v. *Dougherty*, 123 Conn. App. 872, 884, 3 A.3d 208, cert. denied, 299 Conn. 901, 10 A.3d 521 (2010); *State* v. *Henry*, 41 Conn. App. 169, 180 n.5, 674 A.2d 862 (1996).

of . . . members [of the Criminal Jury Instruction Committee] who have undertaken the Sisyphean task of synthesizing and articulating the law governing a broad variety of . . . cases in a form readily understandable to a lay jury. They provide commendable guidance. But precisely because the task is so difficult—the law is not always certain, nor is it static, nor is it always produced or pronounced in 'one size fits all' formulations—it is fair to suggest that trial lawyers are well advised to 'trust but verify' these model instructions to ensure that they are correct, current, and properly crafted to fit the particular case at hand.").

This court previously has considered and rejected claims that a heightened standard of proof should apply to the admission and use of prior misconduct evidence. In *State* v. *Aaron L.*, 272 Conn. 798, 865 A.2d 1135 (2005), for example, we were required to determine "whether the trial court, before admitting prior misconduct evidence, must find by a heightened standard of proof that the prior misconduct in fact occurred . . . ." Id., 821. In considering this issue, we "examined the ways in which our Code of Evidence already protects parties against any unfair prejudice that might arise from the admission of prior misconduct evidence. In particular, we identified the sections of the Code of Evidence that provide this protection, including, but not limited to, § 4-5 (b), which requires that prior misconduct evidence be offered for a proper purpose, § 4-1, which requires that prior misconduct evidence be relevant to an element in issue, and § 4-3, which requires the trial court to determine whether the probative value of the evidence is outweighed by its potential for unfair prejudice. . . . We also found significant the limiting instructions the trial court is required to give the jury under § 1-4 [of the Connecticut Code of Evidence] that the evidence is to be considered only for the proper purpose for which it was admitted. . . . We concluded that following application of these requirements, what-

ever inferences should be drawn from the defendant's prior [mis]conduct are for the jury to determine. . . . Accordingly, we decline[d] to adopt a rule requiring that the trial court make a preliminary finding by clear and convincing evidence that prior misconduct occurred before submitting that evidence to the jury. . . .

"Thus, our conclusion . . . implicitly reject[ed] the notion that any particular standard of proof is necessary in a trial court's jury instructions regarding prior misconduct evidence, and [made] clear that prior misconduct evidence may be considered by the jury for a proper purpose if there [is] evidence from which the jury reasonably could . . . [conclude] that the prior act of misconduct occurred and that the defendant was the actor." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Cutler*, supra, 293 Conn. 320–21.

In *Cutler*, we relied on our reasoning in *Aaron L.* in concluding that the trial court was not required to instruct the jury that it must "find the existence of a prior act of misconduct by a preponderance of the evidence before considering it for a proper purpose." Id., 315. Although we recognized that the issue in *Aaron L.* was one of the admissibility of prior misconduct evidence, whereas, in *Cutler*, the issue before us was the propriety of jury instructions on the use of prior misconduct evidence, we concluded that such a distinction did not prevent us "from employing our well reasoned conclusion in *Aaron L.* as guidance in the present case." Id., 320. In so doing, we concluded that, "[when] the admission of prior misconduct evidence depends on the trial court's determination that there is sufficient evidence from which the jury reasonably could conclude that the prior acts of misconduct occurred and that the defendant was the actor . . . we see no reason to impose on trial courts a jury instruction that requires jurors to consider the properly admissible prior misconduct evidence at a higher standard. . . . Accordingly,

we conclude[d] that it is not necessary that a trial court instruct the jury that it must find, by a preponderance of the evidence, that prior acts of misconduct actually occurred at the hands of the defendant. Instead, a jury may consider prior misconduct evidence for the proper purpose for which it is admitted if there is evidence from which the jury reasonably could conclude that the defendant actually committed the misconduct." (Citations omitted; footnote omitted.) Id., 321–22. We concluded, therefore, that the trial court properly instructed the jury that "it could consider the state's prior misconduct evidence if it 'believe[d]' that evidence and found that it 'logically and rationally' supported the issue for which it was being offered."[13] Id., 322.

Guided by this prior case law, it is apparent that the trial court properly declined to instruct the jury that it could consider the prior misconduct evidence only if

[13] The defendant argues that *Aaron L.* and *Cutler* are inapplicable to the present case because those cases "involved the issue of whether a particular standard of proof is needed in order to establish that an act of misconduct has occurred," whereas, here, the issue involves the omission of the word "conclusively" in a jury charge, which "does not relate to the burden of proof for an act of misconduct [and] . . . serves an entirely different function." (Emphasis omitted; internal quotation marks omitted.) Specifically, the defendant argues that "[t]he state fails to recognize that the phrase 'logically, rationally and conclusively' . . . does not relate to whether an act of misconduct occurred; the phrase relates to whether the act of misconduct (if proved to the jury's satisfaction under the 'believe' standard) supports the proposition or issue for which the misconduct was offered . . . ." (Citation omitted; emphasis omitted.) We are not persuaded. Although we acknowledge that *Aaron L.* differs slightly insofar as it involved the question of whether the *trial court* was required to find, by a preponderance of the evidence, that the alleged prior misconduct had occurred, *Cutler* is wholly applicable to the present case as it, too, involved the question of whether a trial court was required to instruct a jury that it must find prior misconduct evidence to be proven by a heightened standard. Notably, and as we explained, this court expressly rejected that proposition and concluded that it saw "*no reason to impose on trial courts a jury instruction that requires jurors to consider the properly admissible prior misconduct evidence at a higher standard*." (Emphasis added.) *State* v. *Cutler*, supra, 293 Conn. 321–22.

it found that it "conclusively" supported the state's theory as to motive. It is axiomatic that motive is not an element of the crime of murder; see, e.g., *State* v. *Pinnock*, supra, 220 Conn. 792; and, therefore, the state was not required to prove it by a standard different from the reasonable and logical standard applicable to all other facts. "[Although] the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . *If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Newsome*, 238 Conn. 588, 617, 682 A.2d 972 (1996).

In light of the foregoing, we conclude that the trial court properly declined the defendant's request to include the word "conclusively" in its instruction on the use of prior misconduct evidence. Rather, the court properly instructed the jury that, even if it credited Irizarry's testimony that the defendant was engaged in the sale of drugs on the night in question, the jury could consider that evidence only if it found that it "logically and rationally support[ed] the state's theory of motive . . . ."[14]

The judgment is affirmed.

In this opinion the other justices concurred.

[14] We note that our decision today is in no way intended to diminish the importance of a trial court's duty to safeguard against undue prejudice in cases involving uncharged misconduct evidence. Indeed, we emphasize that our trial courts are required to take great caution in admitting this evidence and in ensuring that our juries use it only for its proper purpose. In that

STATE OF CONNECTICUT *v.* NASIR R. HARGETT (SC 20517)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The victim had approached the defendant's home, where the defendant and three other individuals, including M, were talking on the porch. The victim abruptly took a soda bottle from the porch and immediately left the area without any confrontation. After the victim left, M and two others left the porch and began walking toward M's home, in the direction that the victim was headed. Meanwhile, the defendant went into his home, retrieved a rifle, and then caught up with M and the others. Near M's home, the victim

regard, we previously have explained that such evidence is admissible only if (1) it is relevant and material to at least one of the circumstances encompassed by the exceptions enumerated under § 4-5 of the Connecticut Code of Evidence, and (2) its probative value outweighs its prejudicial effect; see *State* v. *DeJesus*, 288 Conn. 418, 440, 953 A.2d 45 (2008); and we also have required that the admission of such evidence be accompanied by an appropriate cautionary instruction to the jury to minimize the risk of undue prejudice to the defendant. See, e.g., *State* v. *Snelgrove*, 288 Conn. 742, 759, 954 A.2d 165 (2008); see also Conn. Code Evid. § 4-5 (b), commentary. We have done so because of the inherent risk of prejudice involved in the admission of this type of evidence. See, e.g., *State* v. *Braman*, 191 Conn. 670, 675, 469 A.2d 760 (1983) ("As a general rule, evidence of guilt of other crimes is inadmissible to prove that a defendant is guilty of the crime charged against him. . . . The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the predisposition to commit the crime with which he is now charged." (Citations omitted; internal quotation marks omitted.)); see also *State* v. *Santiago*, 224 Conn. 325, 347, 618 A.2d 32 (1992) (*Berdon*, *J.*, concurring and dissenting) ("When the sole purpose of the other crimes evidence is to show some propensity to commit the crime at trial, there is no room for ad hoc balancing. The evidence is then unequivocally inadmissible—this is the meaning of the rule against other crimes evidence. . . . It is fundamental to American jurisprudence that a defendant must be tried for what he did, not for who he is." (Citations omitted; internal quotation marks omitted.)). Thus, although we conclude that our trial courts are not required to instruct that a jury find that prior misconduct evidence "conclusively" supports the issue for which it was offered, we emphasize and highlight that such evidence is nonetheless unique and should continue to be handled with great caution.

turned around and locked eyes and exchanged words with the defendant. The defendant then fired his rifle at the victim, and the victim sustained two gunshot wounds. During jury selection, which occurred approximately two and one-half years after the shooting, the prosecutor filed a supplemental notice of disclosure, in which she represented that she recently had become aware of the recovery of the rifle allegedly used by the defendant in the shooting and that she did not have that evidence in her case file until that morning. Although the rifle had been seized by the police in connection with an unrelated robbery that occurred two months after the shooting of the victim, the files in the unrelated robbery case and the defendant's murder case had not been cross-referenced. Although the trial court granted the defense a continuance, which the defense declined, the defendant requested, in light of the state's late disclosure, that the case be dismissed or that the rifle be excluded from evidence. The trial court declined to dismiss the case or to exclude the rifle from evidence. During the defendant's trial, the trial court excluded from evidence M's testimony that, as he was leaving the porch, an unidentified woman told him that the victim had assaulted or robbed her at knifepoint earlier in the day and a toxicology report showing that the victim had drugs in his system at the time of his death. The trial court also declined the defendant's request to charge the jury on his claim of self-defense. The Appellate Court upheld the trial court's rulings, rejected the defendant's claim that the trial court had abused its discretion in declining to dismiss the case or to exclude the rifle from evidence on the basis of the state's late disclosure, and affirmed the defendant's conviction. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in excluding as irrelevant and inadmissible hearsay M's testimony that an unidentified women told him prior to the shooting that the victim had assaulted or robbed her at knifepoint earlier that day: even if M's testimony was improperly excluded, any error in excluding that testimony was harmless beyond a reasonable doubt, as there was overwhelming circumstantial evidence demonstrating that the defendant had the specific intent to kill the victim, despite his assertion that he was merely trying to scare the victim into leaving the neighborhood rather than trying to kill him; moreover, although the jury may have inferred from M's testimony, if it had been admitted, that the defendant feared the victim, which would have been relevant to the defendant's motive, the probative value of the excluded testimony as to the defendant's specific intent was minimal, as evidence that the defendant feared the victim provided little to no context for why he shot at the victim multiple times; furthermore, there was no merit to the defendant's claim that the exclusion of M's testimony was harmful because it affected his

entitlement to an instruction on self-defense, as the defendant ultimately failed to establish that he was entitled to such an instruction.

2. The defendant's claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in excluding a toxicology report showing that the victim had phencyclidine (PCP) in his system at the time of his death was unavailing; even if the trial court had improperly excluded the toxicology report insofar as it implicated his right to present a claim of self-defense, any error was harmless because, although the evidence would have allowed the jury to reasonably infer that the defendant reasonably feared the victim, the defendant failed to demonstrate that he reasonably believed that deadly force by the victim was imminent and that it was necessary to use deadly force to prevent the victim's use of such force.

3. The Appellate Court correctly concluded that the trial court had not violated the defendant's right to due process by declining to charge the jury on self-defense: although the jury reasonably could have concluded, on the basis of the evidence, that the defendant feared the victim and believed that he possessed a knife, there was no evidence from which the jury could have found that it was objectively reasonable for the defendant to have believed that the victim was using or was about to use deadly force against the defendant and that it was necessary for the defendant to use deadly force himself to prevent the victim from using such force, as there was nothing in the record to indicate that the victim threatened the defendant, acted aggressively, or reached for or brandished a weapon; moreover, the defendant's belief that the victim had a knife, by itself, did not suffice to show that the victim was imminently going to use it, and the victim's alleged possession of a knife, while he was standing still and not acting aggressively, did not demonstrate that the defendant reasonably believed that he needed to use a gun to prevent the victim from using the knife; furthermore, M's statement to the defendant while they were walking toward the victim that the defendant's "life was on the line" did not establish that the defendant would have suffered any harm or risk of harm if he had waited and not fired at the victim or had retreated, as there was no evidence in the record that would have allowed the jury to reasonably infer anything other than that the defendant acted preemptively, which the defense of self-defense did not encompass.

4. The Appellate Court correctly concluded that the trial court had not abused its discretion in declining the defendant's request to dismiss the case or to exclude the rifle as a sanction for the state's late disclosure of that evidence: this court had previously held that a trial court does not abuse its discretion by granting a continuance rather than excluding untimely disclosed evidence unless the defendant shows that his right to a speedy trial has been violated; in the present case, although the state's actions in failing to produce the rifle sooner resulted from a lack of due diligence, and although it was inappropriate for the trial court,

which granted the defendant a continuance during the course of jury selection, to expect the defense to prepare a response to the new evidence while jury selection was ongoing, the defendant failed to establish that his right to a speedy trial would have been violated if he had accepted an offer of a reasonable continuance of two weeks, even if jury selection had to be paused or to begin anew, and the defendant failed to establish that those two weeks would have been insufficient for the defense to respond to the new evidence; moreover, in light of the trial court's undisputed finding of a lack of bad faith on the part of the prosecution, the trial court's offer of both a continuance and the continuation of plea bargaining in light of the new evidence, and the possibility that the defendant could have received a reasonable continuance without any impact to his right to a speedy trial, the exclusion of the rifle or the dismissal of the case was not the only appropriate remedy for the state's late disclosure; nevertheless, this court observed that the state has a duty to defendants, the public, and the courts to act with diligence in the disclosure of evidence, that courts should in the first instance encourage compliance with this obligation and penalize noncompliance, and that, although the trial court did not abuse its discretion in declining to dismiss the case or to exclude the rifle, the trial court likely would have been well within its discretion to deny the admission of the rifle, especially in light of the fact that the state was apparently ready to proceed to trial without that piece of evidence.

Argued January 13—officially released June 14, 2022

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pavia*, *J.*, denied the defendant's motion for sanctions; thereafter, the case was tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the appeal was transferred to the Appellate Court, *Lavine*, *Elgo* and *Moll*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Jennifer Bourn, chief of legal services, with whom, on the brief, were *Lauren Graham* and *Shannon Q. Lozier*, certified legal interns, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Ann F. Lawlor*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, the defendant, Nasir R. Hargett, appeals from the judgment of the Appellate Court affirming the trial court's judgment of conviction, rendered after a jury trial, of one count of murder. On appeal, the defendant claims that the Appellate Court incorrectly determined that the trial court had not (1) violated his sixth amendment right to present a defense by excluding from evidence (a) a statement purportedly made by an unknown female bystander and (b) an autopsy toxicology report, (2) violated his right to due process by declining to give a jury instruction on self-defense, and (3) abused its discretion by declining to sanction the state for its late disclosure of the murder weapon and related expert reports by excluding this evidence or dismissing the murder charge. We affirm the Appellate Court's judgment but not without strongly cautioning the state regarding the late disclosure of evidence.

On October 13, 2014, Kaishon McAllister and his friends, Romy and Kahdeem,[1] walked to the defendant's house on East Main Street in Bridgeport. While McAllister, Romy, Kahdeem, and the defendant were talking on the porch of the defendant's home, the victim, Davon Robertson, walked up to the porch, although he did not step onto it, and slowly put his hands in his pockets. Without speaking, the victim grabbed a soda bottle off the porch and then left the area, walking toward Pearl Street.

After the victim moved on, McAllister, Romy, and Kahdeem left the porch and began walking toward McAllister's home on Pearl Street in the same direction

[1] The last names of Romy and Kahdeem are not apparent from the record.

as the victim. The defendant, however, went into his home and retrieved a sawed-off rifle. He subsequently caught up to McAllister, Romy, and Kahdeem, and a group of young men who were with them. The group of young men, including the defendant and McAllister, continued walking toward Pearl Street behind the victim. Near McAllister's home, the victim turned around.[2] The defendant and the victim "locked eyes" and exchanged unknown words. The defendant then fired the gun two or three times at the victim.[3] McAllister, Romy, and Kahdeem ran into McAllister's home. The defendant also ran from the scene but not into McAllister's home. The victim, who sustained gunshot wounds to his left upper chest and right lower leg, was taken to Bridgeport Hospital where he was pronounced dead. No weapon was found on his body.

Later that day, the police searched the crime scene and recovered two .22 caliber shell casings and a soda

[2] Although the Appellate Court's opinion states that the victim turned around in reaction to the defendant's calling out, "yo," the record is unclear whether the victim turned around of his own accord or in response to the defendant's speaking to him. McAllister testified that the defendant said "yo" to the victim, but it is not clear from his testimony whether this occurred while the defendant was on the porch of his home or on the street before the victim turned around and "locked eyes" with him.

[3] McAllister gave contradictory testimony as to whether the victim was facing or turned away from the defendant at the time of the first gunshot. Additionally, he gave contradictory testimony about the number of gunshots that were fired. He testified on direct examination that three gunshots were fired but that only two hit the victim. On cross-examination and redirect, he testified that the defendant fired three gunshots. Later, on recross-examination, he testified, "I don't remember," when asked if the defendant had fired only two gunshots. We note that the Appellate Court based its statement that the third gunshot was fired while the victim was on the ground on the testimony of the state's medical examiner, who inferred from the fact that the bullet to the victim's left upper chest traveled to the right and slightly downward, that the victim was lying down when he was shot in the chest. The defendant argues that, as there was no actual testimony that he shot the victim while the victim was on the ground, this inference is not drawn in the light most favorable to the defendant, as is required on appellate review of a self-defense claim. Because the state never argued the medical examiner's inference to the jury, we do not apply it in reviewing the evidence.

bottle. They also executed a search warrant at the defendant's home and seized a hacksaw and a file from his bedroom. The defendant was arrested the following day and charged with murder. The state subsequently filed a substitute information charging the defendant with murder and, pursuant to General Statutes § 53-202k, sought an enhancement of his sentence, if convicted, for having used a firearm in the commission of a class A, B or C felony.

At trial, the state relied primarily on the testimony of McAllister, the only eyewitness to testify. The jury subsequently found the defendant guilty of murder.[4] The defendant appealed, and the Appellate Court affirmed the judgment of conviction. See *State* v. *Hargett*, 196 Conn. App. 228, 230, 229 A.3d 1047 (2020). The defendant then sought certification to appeal to this court, which we granted.[5] We will discuss additional facts and procedural history of record as required.

I

The defendant claims that the Appellate Court incorrectly held that the trial court had not abused its discretion in excluding from evidence (a) a statement purport-

[4] In addition, the jury also found, pursuant to an interrogatory, that "the defendant employed the use of a firearm in the commission of a felony," and the court accordingly enhanced his sentence, ultimately imposing a total effective sentence of forty-five years of imprisonment. (Internal quotation marks omitted.) *State* v. *Hargett*, 196 Conn. App. 228, 230, 229 A.3d 1047 (2020).

[5] We limited our grant of certification to the following issues: (1) "Did the Appellate Court correctly conclude that the evidence was insufficient to entitle the defendant to a jury instruction on self-defense?" (2) "Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in excluding as irrelevant evidence that the victim was under the influence of phencyclidine (PCP) at the time of the murder and that a woman had informed a group of individuals, including the defendant, that the victim had just robbed her at knifepoint?" And (3) "[d]id the Appellate Court correctly conclude that the trial court did not abuse its discretion in declining to sanction the state for its late disclosure of the murder weapon and related materials?" *State* v. *Hargett*, 335 Conn. 952, 952–53, 238 A.3d 730 (2020).

edly made by an unidentified female bystander and (b) the victim's autopsy toxicology report. He argues that this evidence was admissible and relevant and that its exclusion violated his sixth amendment right to present a defense. Even assuming that the trial court improperly excluded this evidence, and that its exclusion violated the defendant's constitutional right to present his claim of self-defense, we conclude that this error was harmless beyond a reasonable doubt.

"A [criminal] defendant has a constitutional right to present a defense, but he is [nonetheless] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded." (Internal quotation marks omitted.) *State* v. *Mark T.*, 339 Conn. 225, 231–32, 260 A.3d 402 (2021). If, however, the trial court improperly excluded the evidence, thereby depriving the defendant of his constitutional right to present his claim of self-defense, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. See *State* v.*Osimanti*, 299 Conn. 1, 16, 6 A.3d 790 (2010).

A

The defendant first claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion by excluding as irrelevant and inadmissible hearsay McAllister's testimony that an unidentified woman told him prior to the shooting that the victim had assaulted or robbed her at knifepoint earlier in the day. We conclude that any error was harmless.

At trial,[6] defense counsel elicited from McAllister on cross-examination that, after the victim left the porch of the defendant's house, as McAllister was leaving the porch, an African American woman with purple hair approached him and was yelling. Although defense counsel never asked McAllister if the defendant was present when this unknown woman approached, McAllister did testify that the defendant remained on the porch until McAllister left the porch, at which time the defendant went inside his house. Because McAllister testified that the woman spoke to him as he was leaving the porch, it is unclear whether the defendant heard what she said or whether he already had gone inside his house. When defense counsel asked McAllister what the woman said to him, the prosecutor, with no further specificity, stated: "I'm going to object, Your Honor." The trial court, likewise with no specificity, sustained the objection.[7] In

[6] Prior to the start of evidence, the state filed a motion in limine to preclude the defendant from offering any testimony about the unidentified woman. The state argued that such testimony would amount to hearsay and that it was irrelevant and prejudicial and would lead to unfair character evidence as to the victim. Defense counsel responded that he intended to offer the statement as an excited utterance. The trial court reserved ruling on the motion, explaining that either it would wait to see how the evidence came in or that one of the parties could ask for an evidentiary hearing if they believed one was needed. Specifically, the court stated: "[W]hat I'm going to say to both sides is that you have to tell me if either of you are asking for any type of a hearing with regard to this particular motion."

[7] After trial, the court articulated that it had sustained the state's objection because defense counsel did not ask to be heard outside the presence of the jury or to make an offer of proof, and did not advance any argument that the statement came within one of the exceptions to the rule against hearsay or articulate the basis of its relevancy. Although it is not critical to our resolution of this issue, we point out that it was the state that had sought to preclude this evidence by way of a pretrial motion in limine. See footnote 6 of this opinion. The trial court deferred ruling on the motion, stating instead, "let's make sure that we come back to that," and directing *both* parties to bring to the court's attention the issue of how to approach testimony regarding the unknown woman's statement when the appropriate witness testified. Nevertheless, when the defendant asked McAllister what the unknown woman had said, the state merely posed a one sentence objection, which was not followed by a request to excuse the jury. The trial court responded with a one word ruling without waiting to hear the basis for the

response, defense counsel argued that he was not offering the statement for its truth but "just [to show] that she said it." The trial court, however, explained that "[j]ust the fact that somebody said something certainly doesn't warrant an exception to the hearsay rule."

Even if we assume that the trial court improperly excluded McAllister's testimony as to what the woman said, and that its exclusion implicated the defendant's constitutional right to present his claim of self-defense, we conclude that this error was harmless beyond a reasonable doubt. The defendant first argues that excluding this evidence was harmful because it was relevant to his intent. He argues that, because he was charged with murder, and the court, at the state's request, had given the jury an instruction on the lesser included offense of manslaughter in the first degree with a firearm, McAllister's testimony could have affected the verdict because the jury reasonably could have inferred that the defendant acted out of fear and with the intent to ensure that the victim left the neighborhood, not to kill the victim. Even if this evidence had been admitted, however, there was overwhelming circumstantial evidence of the defendant's specific intent to kill the victim. Specifically, the defendant retrieved a firearm from his home and then followed the victim, who had been walking away from him and evidently was leaving the neighborhood of his own accord. Then, rather than allowing the victim to leave the neighborhood, while the victim was standing still, the defendant shot at him at least twice, based on the number of shell casings and bullets the police recovered from the scene of the crime. This evidence belies any argument that the defendant was merely trying to scare the victim into leaving the neighborhood. The jury could not have reasonably inferred from this evidence that the defendant was merely attempting to

objection. This is not a practice we encourage. See *State* v. *Mark T.*, supra, 339 Conn. 267 n.9 (*Kahn*, *J.*, concurring in part and dissenting in part).

scare the victim away from the neighborhood. Rather, in light of the defendant's pursuit of the victim with a firearm and the firing of multiple shots at him, the only reasonable inference the jury could have made was that the defendant intended to kill the victim. Moreover, although the jury may have inferred from this testimony, had it been admitted, that the defendant feared the victim, which would have been relevant to the defendant's motive,[8] its probative value as to the defendant's specific intent at the time of the shooting is minimal. See *State* v. *Miller*, 186 Conn. 654, 666, 443 A.2d 906 (1982) (jury must find that defendant had "specific intent to cause serious physical injury to the victim *at the time of the discharge* of the gun," and, therefore, evidence of "motive at the time [the defendant] took possession of the gun . . . is not the time the jury must focus [on] in finding specific intent" (emphasis added)). Evidence that the defendant feared the victim provides little to no context as to why he shot at the victim multiple times.

The defendant further claims that the exclusion of the evidence was harmful because it affected his entitlement to an instruction on self-defense. Specifically, he argues that this testimony showed that he reasonably feared the victim and reasonably believed the victim to be armed and dangerous, allowing the jury to reasonably infer that the defendant acted out of fear of imminent violence from the victim. We will discuss this argument in detail in part II of this opinion, in which we conclude that, even if this evidence had been admitted, when considered in the light most favorable to the

[8] To the extent the defendant argues that the exclusion of this testimony was harmful because it was relevant to motive, we note, as we will discuss in part II of this opinion, that there was some evidence in the record that the defendant feared the victim. Additionally, exclusion of this evidence of motive was harmless beyond a reasonable doubt because its admission would not have affected the jury's finding of specific intent or whether the defendant was entitled to a self-defense instruction.

defendant, it would not have affected the verdict because the defendant failed to establish that he was entitled to an instruction on self-defense.

B

The defendant also claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in excluding as irrelevant the toxicology report showing that the victim had PCP[9] in his system at the time of his death. He argues that the exclusion of this evidence was not harmless beyond a reasonable doubt because it corroborated McAllister's testimony about the victim's "frightening" behavior, from which the jury could infer that the defendant reasonably feared the victim, thereby supporting his claim of entitlement to an instruction on self-defense.

In its case-in-chief,[10] the state offered the testimony of Susan Williams, an associate medical examiner with the Office of the Chief Medical Examiner, who performed an autopsy of the victim's body. On cross-examination, defense counsel elicited from Williams that, as part of the autopsy, she sent a toxicology specimen to a laboratory for testing and received back a report, which became part of her autopsy report. When defense counsel asked Williams if the victim's toxicology report was made in the ordinary course of business, the state objected on the ground that she did not create the toxicology report. Outside the jury's presence, Williams testified that she did not conduct the toxicology test and that the results of the toxicology report had no impact on

[9] "Phencyclidine, a hallucinogen, is commonly referred to as PCP." *State* v. *Hargett*, supra, 196 Conn. App. 234 n.3.

[10] Prior to the start of evidence, the state filed a motion in limine to preclude the toxicology report, which showed that the victim had PCP in his system at the time of his death, on the grounds of irrelevance and undue prejudice. The trial court reserved its ruling, explaining that its ruling would be based on how the evidence came in during trial and ordering that the parties initially seek to introduce the report outside the presence of the jury.

her conclusions regarding the cause and manner of the victim's death.

Although the trial court indicated that the business record exception to the rule against hearsay might apply; see Conn. Code Evid. § 8-4; it determined that the toxicology report was irrelevant, as the presence of PCP in the victim's system had no bearing on Williams' conclusions.[11] Defense counsel responded by arguing that there already was evidence in the record that made the results of the toxicology report relevant—namely, McAllister's testimony that the victim "was just out of it" and "looked like he was high off something."[12]

Even if we assume that the trial court improperly excluded the toxicology report and that its exclusion implicated the defendant's constitutional right to present his claim of self-defense, we conclude that this error was harmless beyond a reasonable doubt. Specifically, this evidence would not have affected the verdict, because, as we will discuss in detail in part II of this opinion, although this evidence would have allowed the jury reasonably to infer that the defendant reasonably feared the victim, he failed to lay a sufficient foundation to show that he reasonably believed both that deadly force on the part of the victim was imminent and that it was necessary for him to use deadly force to prevent the victim from using force.

II

The defendant also claims that the Appellate Court incorrectly determined that the trial court had not vio-

[11] The trial court also ruled that hearsay commentary about the effects of PCP contained in the toxicology report was inadmissible without additional evidence. The defendant does not challenge this portion of the trial court's ruling.

[12] The defendant requested and was allowed to make another proffer, during which Williams testified that, although she was familiar with the effects of PCP, she could not say how the victim in the present case was acting at the time of his death based on the toxicology results. Williams explained that she would consider toxicology results only to determine

lated his right to due process by refusing to charge the jury on self-defense. He argues that the trial court incorrectly concluded that there was insufficient evidence to entitle him to a self-defense instruction by "(1) drawing inferences against the defense, (2) ignoring reasonable inferences that could be drawn in the defendant's favor, and (3) focusing on what the court believed a reasonable juror would do instead of what a reasonable juror could find on this record." We disagree.

The following additional facts, viewed in the light most favorable to the defendant, are relevant to this claim. The jury could have credited McAllister's testimony that, while McAllister, Romy, Kahdeem, and the defendant were talking on the porch of the defendant's home, the victim walked up to the porch, appearing to be "high." Specifically, the victim seemed "out of it" and was not interacting with the young men on the porch. McAllister thought this behavior was odd, but it did not make him fearful of the victim.[13] The victim then slowly reached into his pockets, which made McAllister nervous because he did not know if the victim had a weapon and thought that "[the] porch could've got[ten] shot up." As a result, McAllister, Romy, and Kahdeem went inside the defendant's house and closed the door behind them. The defendant remained on the porch. At some point, the victim grabbed a soda bottle that McAllister had set down on the porch and then left the area, walking toward Pearl Street. At no point during this interaction did the victim speak, brandish a weapon, or step onto the porch.

After the victim walked away from the defendant's house, McAllister began walking home in the same direction, and the defendant went into his home. McAllister

whether the amount of a narcotic in a person's system was significant enough to be the cause of death.

[13] Specifically, McAllister was asked if "the fact that he had this—that [the victim] appeared to be high, did that add to your fear?" McAllister responded: "No."

believed that the defendant intended to call the police. Instead, the defendant retrieved a wooden, sawed-off rifle and, shortly thereafter, caught up to McAllister and the group of young men. While walking next to the defendant, McAllister said to him: "[W]hatever you do, don't do this . . . don't do this like your life is on the line." Near McAllister's home, the victim turned around and "locked eyes" with the defendant. Although the defendant and the victim exchanged unknown words, the victim did not make any threats, reach into his pockets, or brandish any weapon. The defendant then fired the gun two or three times at the victim, who was standing still. McAllister, who was "in shock" when he saw the victim lying on the ground, then ran into his apartment with Romy and Kahdeem. The defendant fled the scene. No weapon was found on the victim's body.

As discussed previously, to bolster McAllister's testimony that the victim was "high," the defendant unsuccessfully sought to admit into evidence the toxicology report attached to the medical examiner's autopsy report, which showed that the victim had PCP in his system at the time of his death. See part I B of this opinion. Additionally, defense counsel unsuccessfully attempted to elicit testimony from McAllister that, as he was leaving the defendant's porch, he heard an unidentified woman state that the victim had robbed or assaulted her at knifepoint earlier that day. See part I A of this opinion.

Following evidence, defense counsel, via e-mail, requested that the trial court charge the jury on the defense of self-defense, although he provided no specific language.[14] Subsequently, on the record, defense

[14] After trial, defense counsel moved to rectify the trial court record to include a copy of his request to charge on self-defense. The trial court initially denied the motion, as the defendant never filed a request to charge. Subsequently, the defendant moved for review of the trial court's denial of his motion for rectification, which the Appellate Court granted. As a result, the record was rectified to include the e-mail defense counsel had sent to the trial court, in which he generally requested a charge on self-defense.

counsel contended that there was sufficient evidence to warrant a self-defense instruction, arguing that "there was evidence from . . . McAllister that [the defendant and the victim] locked eyes, and there appear[ed] to be some sort of exchange between the two and then, per [McAllister's] testimony, [the defendant] fired gunshots." The state objected, arguing that there was no evidence to warrant an instruction on self-defense. The trial court again agreed with the state and declined to issue the instruction, explaining that, "just the idea of locking eyes, without more, is not enough to at least make some level of a finding that self-defense has now become part of this case."

A review of the principles related to a defendant's claimed right to a self-defense instruction is useful at the outset of our discussion. Whether the defendant was entitled to a self-defense instruction is an issue of law, subject to plenary review. See, e.g., *State* v. *Lewis*, 245 Conn. 779, 809, 717 A.2d 1140 (1998). A defendant's due process right to a fair opportunity to establish a defense "includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. See General Statutes § 53a-12 (a). . . . Thus, [i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . .

"Under our Penal Code[15] . . . a defendant has no burden of persuasion for a claim of self-defense; he

[15] "The [defense] of self-defense . . . [is] codified [at General Statutes] § 53a-19 (a), which provides in relevant part: [A] person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict

has only a burden of production. That is, he merely is required to introduce sufficient evidence . . . [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . .

"An instruction on a legally recognized theory of defense, however, is warranted only if the evidence indicates the availability of that defense. . . . The trial court should not submit an issue to the jury that is unsupported by the facts in evidence. . . .

"[T]o submit a [self-defense] defense to the jury, a defendant must introduce evidence that the defendant reasonably believed [the attacker's] unlawful violence to be imminent or immediate. . . . Under [General Statutes] § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that [the] attacker is using or about to use deadly force against [himself] and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable. . . . [I]n reviewing the trial court's rejection of [a] defendant's request for a jury charge on [self-defense], we . . . adopt the version of the facts most favorable to the defendant which the evidence would reasonably support." (Citations omitted; footnote added; footnote omitted; internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–36, 60 A.3d 246 (2013).

great bodily harm." (Internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832, 60 A.3d 246 (2013).

As to whether the defendant had a reasonable belief that the attacker was using or was about to use deadly force, it is not enough for a defendant to fear the victim to entitle him to an instruction on self-defense. Rather, "a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be 'imminent' . . . ." *State* v. *Carter*, 232 Conn. 537, 545–46, 656 A.2d 657 (1995). Evidence of imminent violence "must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." *State* v. *Lewis*, supra, 245 Conn. 811.

As to whether the defendant had a reasonable belief that deadly force was necessary to repel the attacker's use of deadly force, there are "two essential parts [to this] necessity requirement," which are that "force should be permitted only (1) when necessary and (2) to the extent necessary. The actor should not be permitted to use force when such force would be equally as effective at a later time and the actor suffers no harm or risk by waiting." (Internal quotation marks omitted.) *State* v. *Bryan*, supra, 307 Conn. 833. For example, if the only evidence in the record shows that the victim was fleeing at the time the defendant used deadly force, then a self-defense instruction is unnecessary because the record could not support a finding that it was objectively reasonable for the defendant to have believed both that the victim was about to use deadly physical force and that it was necessary for the defendant to use deadly force to prevent such conduct. See *State* v. *Erickson*, 297 Conn. 164, 197, 997 A.2d 480 (2010); *State* v. *Anderson*, 201 Conn. App. 21, 36–38, 241 A.3d 517, cert. denied, 335 Conn. 984, 242 A.3d 105 (2020). "[T]he defense of self-defense does not encompass a preemptive strike . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 54, 128 A.3d 431 (2015).

In several cases, this court has upheld the trial court's refusal to give a self-defense instruction when, despite evidence of the defendant's fear of the victim, the record contained no evidence that deadly force by the victim was imminent or that deadly force was necessary to repel an imminent attack by the victim. For example, in *State* v. *Lewis*, 220 Conn. 602, 617–20, 600 A.2d 1330 (1991), the defendant shot and killed the victim and posited a defense of self-defense. At trial, there was testimony that the defendant feared the victim, whom he believed to be a dangerous drug dealer, and that he killed the victim because he thought the victim would have killed him at some future point. Id., 619–20. This court explained that this "evidence, if credited, would have allowed the jury to believe that the defendant feared for his life." Id., 620. This evidence, however, did not establish that, at the time of the shooting, it was reasonable for the defendant "to believe that the victim was about to use deadly physical force or inflict great bodily harm, and that it was necessary to kill the victim to prevent such conduct." Id. Rather, this court described the defendant's actions as "a preemptive strike," which the defense of self-defense does not encompass. Id.

Similarly, in *State* v. *Bryan*, supra, 307 Conn. 832–39, the defendant stabbed the victim and claimed self-defense and defense of others, the latter of which is governed by the same legal principles as those applicable to a claim of self-defense.[16] Construing the facts in the light most favorable to the defendant, we determined that the jury reasonably could have concluded that the victim was a violent person who previously had threatened the defendant. See id., 836. The defendant was aware of this violent history, feared the victim, and believed that he was a threat. Id. However, there

[16] The defendant in the present case did not raise the defense of defense of others.

was no evidence in the record that, "at the time [the defendant] stabbed the victim, it was objectively reasonable for him to believe that it was necessary to do so in order to defend" his girlfriend, who was with him. (Emphasis omitted.) Id., 836–37. Specifically, the evidence showed that, although there was a brief struggle between the defendant, his girlfriend and the victim, at the time of the shooting, the victim was running away, in the opposite direction from the defendant and his girlfriend. Id., 837–38. Based on the record, this court concluded that no evidence permitted a reasonable jury to infer, without resorting to speculation, that the victim was "using or about to use deadly physical force" against the defendant's girlfriend. (Internal quotation marks omitted.) Id., 838. As a result, we held that the trial court properly declined to instruct the jury on defense of others. See id., 839.

We now turn to the present case. We conclude that the trial court properly declined to instruct the jury on self-defense. Adopting the version of the facts most favorable to the defendant, including evidence the trial court arguably excluded erroneously, we have little trouble determining that the record evidence, if credited, would have sufficed for a reasonable jury to conclude that he feared the victim and believed he was armed with a knife.[17]

[17] We agree with the defendant that there was more evidence in the record from which the jury could infer that he feared the victim than the fact that he and the victim "locked" eyes. Specifically, the jury could have credited McAllister's testimony that, when the victim approached the defendant's porch, the victim's act of putting his hands into his pockets as he acted "out of it" and "looked like he was high" made McAllister nervous. From this testimony, which would have been corroborated by the results of the toxicology report, assuming the report had been admitted, the jury could have inferred that the defendant likewise was fearful of the victim at that moment based on his demeanor and conduct. Although the jury could have inferred that the defendant did not fear the victim when the victim approached the porch because the defendant remained on the porch and did not flee inside the house, as McAllister did, considering this testimony in the light most favorable to the defendant, the jury also could have inferred

Evidence of fear alone, however, is insufficient to entitle the defendant to an instruction on self-defense because there was no evidence from which a reasonable jury could find that it was objectively reasonable for him to have believed both that the victim was using or about to use deadly force and that it was necessary for the defendant to use deadly force to prevent the victim from using that force. In the moments leading up to the shooting, the victim was walking away from the defendant. Although it is not clear why the victim eventually turned around, "lock[ing] eyes" with the defendant and exchanging unknown words, there is no evidence that the victim threatened the defendant, acted aggressively, reached for a weapon, or brandished a weapon. Rather, the evidence in the record shows only that the victim stood still as the defendant shot at him. The fact that the defendant believed that the victim had a knife by itself does not suffice to show that the victim was imminently going to use it. Nor does the victim's alleged possession of a knife, while standing still and not acting aggressively, provide any foundation to show that the defendant reasonably believed that he needed to use a gun to prevent the victim from using the knife.

The defendant contends, however, that McAllister's testimony that he told the defendant, "your life is on the line," was evidence of the defendant's belief that the victim posed an imminent threat to his life. Although the jury could have inferred this testimony to mean that the defendant and McAllister subjectively believed that

from this same evidence that the defendant was fearful. This favorable inference is supported by McAllister's testimony that, after the victim walked away from the porch, the defendant went into his house and then came out with a firearm, from which the jury could have inferred that the defendant believed the victim presented a threat. The jury also could have credited McAllister's testimony, if it had been admitted, that an unknown woman told him that the victim had robbed or assaulted her at knifepoint earlier in the day. Even if we assume that the defendant likewise heard this statement, the jury reasonably could have inferred that it bolstered the defendant's fear of the victim and led him to believe that the victim had a knife.

the victim presented an imminent threat,[18] to be entitled to an instruction on self-defense, the defendant had to provide a foundation that the defendant also *reasonably believed* that the victim presented an *imminent threat* of deadly physical force. As discussed, at the time of the shooting, there was no such evidence. McAllister's statement to the defendant does not establish even the slightest possibility that, had the defendant waited and not fired at the victim or, more appropriately, decided not to follow the victim or retreated, he would have suffered any harm or risk of harm. No evidence in the record would allow the jury to reasonably infer anything other than that the defendant acted preemptively, which the defense of self-defense does not encompass. Accordingly, reviewing the facts in the light most favorable to the defendant and even assuming that the trial court should have admitted the unidentified woman's statement and the results of the toxicology report, we conclude that the defendant failed to meet his burden of production to establish a foundation for the jury to infer that it was objectively reasonable for him to believe it was necessary to shoot the victim to defend himself from imminent deadly force. Therefore, the Appellate Court correctly held that the defendant was not entitled to an instruction on self-defense.

III

Finally, the defendant challenges the Appellate Court's conclusion that the trial court did not abuse its discretion in declining to sanction the state for its late disclosure of the murder weapon and related expert reports. He argues that the late disclosure was caused by the state's "egregious lack of diligence" and deprived him of his right to adequately prepare his defense. Specifi-

[18] The jury, however, also reasonably could have inferred this testimony to mean that McAllister was warning the defendant that his intention to shoot the victim could ruin the defendant's life if he were arrested and charged with murder.

cally, the defendant contends that, because he had invoked his right to a speedy trial; see U.S. Const., amend. VI; General Statutes § 54-82m; the only appropriate remedy was either exclusion of the evidence or dismissal of the murder charge, and the trial court's offer of a continuance to temper any prejudice improperly forced him to choose between his constitutional right to a speedy trial and his constitutional right to prepare his defense.

On the record before us, we cannot agree that the trial court abused its discretion. But, the issue is a close one. In our view, the trial court did the best it could with a situation created by governmental mistake, indifference, or ineptitude, and we caution the state that it must be more diligent in complying with its obligation to disclose evidence timely, and we admonish trial courts to enforce this obligation.

The following facts are relevant to the defendant's claim. At the defendant's arraignment on October 14, 2014, the court appointed a public defender to represent him. On March 11, 2015, the defendant requested that the state disclose any tangible objects, documents, and reports or statements of experts, including the results of physical examinations or scientific tests that the state intended to offer into evidence during its case-in-chief or that were material to the defendant's case. The court placed the case on the trial list on September 29, 2015. New counsel appeared for the defendant on October 24, 2016, and filed a motion for a speedy trial on February 21, 2017. The court granted the speedy trial motion, and jury selection began on February 27, 2017. Jurors were informed that evidence would begin on March 20, 2017.

When jury selection began, the state already had timely disclosed Marshall Robinson, a firearms expert whom it intended to call as a witness at trial. At that time, the state disclosed only that Robinson would tes-

tify regarding a report he created in which he concluded that both .22 caliber shell casings recovered from the crime scene in the present case had been fired by the same gun.[19] At the time Robinson created the report in October, 2014, the murder weapon had not yet been discovered and, thus, was not examined by Robinson.

On March 7, 2017, in the midst of jury selection, the state filed a supplemental notice of disclosure regarding what it claimed was newly discovered evidence: namely, the murder weapon, a sawed-off rifle that recently had been recovered. In fact, the Bridgeport police had seized the gun in connection with an unrelated robbery that occurred in December, 2014. Robinson examined the weapon from that robbery in December, 2014, and realized that it might be associated with the present case, leading him to also examine the weapon in relation to this case. The defendant in the robbery case pleaded guilty to the charge against him and was sentenced in 2015. Although that case and the defendant's case were not handled by the same prosecutor, both were handled by the same state's attorney's office. Therefore, presumably, that state's attorney's office had knowledge of the information concerning the weapon, but the defendant's file and the other file had not been in any way cross-referenced.

In addition to disclosing the murder weapon, the state also supplemented its March 7, 2017 disclosure with two reports generated as a result of Robinson's exami-

[19] In his original report, Robinson stated that the shell casings recovered at the scene of the crime were nine millimeter casings. He amended his report on the eve of trial to state that they were .22 caliber casings. Robinson testified that his field notes indicated that the casings recovered from the crime scene were .22 caliber casings and that the error in his report was a scrivener's error. The trial court ruled that the amendment to Robinson's original report did not constitute a late disclosure of evidence but, rather, an amendment to correct a scrivener's error and that defense counsel could address the timing of this amendment on cross-examination of Robinson, which he did.

nation of the murder weapon in December, 2014. Despite Robinson's having realized the connection between the weapon and the present case, and his creation of these reports in December, 2014, the reports never were included in the defendant's file, and the prosecutor in the present case was not personally aware of them until March 7, 2017.[20] In these untimely disclosed supplemental reports, Robinson classified the recovered gun as a Marlin model 980 caliber .22 long rifle and concluded that the two .22 caliber shell casings recovered from the crime scene had been fired from this rifle. On March 9, 2017, Robinson further supplemented the untimely disclosed reports by including his conclusions that one of the bullets recovered from the victim's body was fired from the rifle but that he was unable to determine if another bullet fragment recovered from the victim's body had been fired from this rifle.

Defense counsel objected to the late disclosure, stating that he had not had sufficient time to review the new evidence and had concerns regarding prejudice to the defendant, especially as he alleged that the police had possession of the gun for more than two years. The prosecutor clarified that she did not have this evidence in her file regarding the defendant until that morning and disclosed it as soon as she was aware of it. Defense counsel requested time to review everything and to be heard at a later date. The trial court ordered the state to make Robinson available to the defense in an "expedited fashion" and to make the weapon available for review by the defense.

On March 13, 2017, the defendant filed a motion for sanctions, arguing that, regardless of the prosecutor's personal knowledge, the state was aware of the gun's existence for more than two years and that the late disclosure prejudiced him by preventing him from inspect-

[20] The record does not reveal where these untimely disclosed reports were kept prior to March 7, 2017.

ing and/or testing the gun during pretrial discussions and by denying him adequate time to properly prepare his defense by the March 20, 2017 trial date. He further argued that a continuance was not a proper remedy because it would force him to choose between his constitutional right to a speedy trial and his constitutional right to prepare a defense. Thus, the defendant requested either dismissal of the murder charge or the exclusion of the gun and associated reports from evidence. The state responded that the defendant had suffered no prejudice from the late disclosure because, in the ten days since the disclosure, he had taken no steps to prepare his defense, including consulting with Robinson, attempting to retain and consult with his own expert, or inspecting the gun.

The court ruled that, although the state's disclosure of the gun was clearly late and that the state's attorney's office and the Bridgeport Police Department clearly had not employed the "best practice" to ensure compliance with discovery requirements in both files, the court found "no evidence of bad faith." Addressing the appropriate remedy for the late disclosure, the court also did not find sufficient prejudice to justify either dismissal of the murder charge or exclusion of the evidence.[21] Specifically, the court noted that it had been ten days since the untimely disclosure and that it had offered the defendant the opportunity to speak with Robinson, inspect the gun, request a continuance, and retain its own firearms expert. The court found that the defendant chose not to avail himself of any of these options.[22]

[21] The court explained that it considered "the prejudice that has resulted by way of this late disclosure to the defense, the amount that it would affect the . . . ability [of the defense] to form a proper defense to participate in the plea negotiations, to acquire expert testimony, to have any examination of their own with regard to any of these items and the extent to which it would affect the . . . ability [of the defense] to really decide a strategy and a defense for the trial itself."

[22] The prosecutor represented that defense counsel had responded, "what's the point," when the state offered to have Robinson speak with him.

The court found that, "at this juncture, there is no evidence that the late disclosure has provided such prejudice to the defense or to the accumulation of [its] ability to try this case or form a proper defense for purposes of trial such as to warrant a granting of a motion to dismiss or a granting of a motion to exclude, in total, the evidence." However, because the gun and associated reports were not disclosed at the time of plea negotiations, the trial court found that the late disclosure had prejudiced the defendant with respect to plea negotiations, stating that it would allow him to "go back and participate in any plea negotiations," if he so requested.

At trial, Robinson testified that both .22 caliber shell casings the police found at the crime scene were fired from the Marlin .22 caliber sawed-off rifle that the state entered into evidence. He also testified that the bullet recovered from the victim's body was fired from this same rifle but that the bullet fragment recovered from the victim's body was too damaged for him to conclude that it also was fired from this rifle. He further testified that portions of the firearm, including the barrel, buttstock, and forearm, had been altered and/or sawed off. He testified that the tool marks on the barrel of the gun could have been made by the file found in the defendant's bedroom or "another one like it."

Following the verdict, the defendant moved for a new trial on the ground that the state's late disclosure and the court's failure to exclude the gun and associated reports deprived him of his right to prepare a defense. The court denied the motion.

Recently, in *State* v. *Jackson*, 334 Conn. 793, 224 A.3d 886 (2020), this court detailed the relevant standard of review and legal principles applicable in determining whether the trial court had imposed an appropriate sanction for the state's late disclosure of evidence: "Practice Book § 40-11 (a) (3) [requires that] upon writ-

ten request by a defendant, the state shall disclose any reports or statements of experts made in connection with the offense charged including results of . . . scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . . . The state has a continuing duty to disclose such documents, and, if there is a failure to comply with disclosure, the trial court must take appropriate action, including the imposition of an appropriate sanction. . . .

"Practice Book § 40-5 [grants] broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery. . . . The court may enter such orders as it deems appropriate, including . . . (2) [g]ranting the moving party additional time or a continuance . . . (4) [p]rohibiting the noncomplying party from introducing specified evidence . . . (5) [d]eclaring a mistrial . . . [or] (8) [e]ntering such other order as it deems proper. Practice Book § 40-5. [T]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with [court-ordered] discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue is whether the trial court could reasonably conclude as it did. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter

so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jackson*, supra, 334 Conn. 810–11.

In *Jackson*, the state untimely disclosed an expert in cell site location information seven days before the start of evidence, despite knowing for at least two months that it anticipated calling the expert to testify. Id., 812–13. Although it found the delay avoidable, the trial court denied the defendant's request for a six week continuance, without considering a shorter continuance. Id., 809, 813. On appeal, this court agreed with the trial court that the delay was avoidable: "The state's failure to prepare for trial in a timely fashion is not a valid reason for a late disclosure of an expert witness to the defense." Id., 813. We concluded that the trial court abused its discretion, however, in failing to afford the defendant a reasonable continuance to obtain his own expert, although not necessarily six weeks long. See id., 816. In so holding, we noted that "[a] continuance is ordinarily the proper method for dealing with a late disclosure. . . . A continuance serves to minimize the possibly prejudicial effect of a late disclosure . . . ." (Internal quotation marks omitted.) Id., 815. By comparison, we have classified a defendant's request for suppression of the evidence, dismissal of all charges, or a mistrial as "severe sanction[s] which should not be invoked lightly." (Internal quotation marks omitted.) *State* v. *Festo*, 181 Conn. 254, 265, 435 A.2d 38 (1980).

Consistent with these principles, in prior cases involving untimely disclosed evidence, if the trial court offered the defendant a continuance but denied a request for suppression and/or dismissal, our appellate courts have concluded that the trial court did not abuse its discretion "by affording the defendants more time to examine and analyze the evidence in lieu of granting their motions for a mistrial and motions for suppression of evidence,"

especially if the state did not act in bad faith. Id., 266; see also *State* v. *Troupe*, 237 Conn. 284, 312, 677 A.2d 917 (1996) (trial court did not abuse its discretion when it denied suppression of untimely disclosed evidence but granted continuance); *State* v. *Beaulieu*, 118 Conn. App. 1, 7–9, 982 A.2d 245 (defendant did not demonstrate prejudice when he did not accept court's offer of additional time to investigate two witnesses), cert. denied, 294 Conn. 921, 984 A.2d 68 (2009). Although a continuance may not always be a sufficient remedy for the untimely disclosure of evidence, suppression of the evidence, dismissal of all charges, or a mistrial is a severe sanction that courts should invoke only when absolutely necessary.

In the present case, however, the defendant argues primarily that, although the trial court offered him a continuance and he declined, he nonetheless suffered significant prejudice because he had filed a speedy trial motion, which the court granted. The trial court's offer, he contends, required him to choose between his right to a speedy trial, which a continuance would have delayed, and his right to present a defense, which would have been hindered without a continuance. As a result, he argues, the only proper remedy for the untimely disclosure was either suppression of the gun, expert reports, and expert testimony or dismissal of the murder charge.

We have recognized that "[a] defendant in a criminal proceeding is entitled to certain rights and protections [that] derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent [on] the forbearance of another, both rights are corrupted." (Internal quotation marks omitted.) *State* v. *Francis*, 317 Conn. 450, 466, 118 A.3d 529 (2015). When two separate constitutional rights "are not mutually exclusive and vindicate different interests, we find it intolerable that one constitutional right should have

to be surrendered in order to assert another." (Internal quotation marks omitted.) *State* v. *Wang*, 312 Conn. 222, 239, 92 A.3d 220 (2014).

We are aware of no case law from this court or any federal courts holding that the fundamental protections of due process and the right to a speedy trial are mutually exclusive. Rather, in the context of late disclosure of evidence, this court has held that a trial court does not abuse its discretion by granting a continuance rather than excluding the untimely disclosed evidence unless the defendant shows that his federal constitutional right to a speedy trial was actually violated.[23] See, e.g., *State*

[23] The defendant cites four cases from other states to support his argument that untimely disclosure of evidence after the trial court has granted a defendant's motion for a speedy trial necessarily requires suppression of the evidence or a mistrial because the offer of a continuance improperly forces the defendant to choose between his right to a speedy trial and his right to present a defense. Two of these cases, however, do not stand for that proposition. Rather, these cases hold that a defendant does not waive his right to a speedy trial if he consents to or requests a continuance as a result of the state's untimely disclosure of evidence. See *Feast* v. *State*, 126 So. 3d 1168, 1169–70 (Fla. App. 2012); *Dillard* v. *State*, 102 N.E.3d 310, 312–13 (Ind. App. 2018). In those cases, the applicable rules of practice required the defendant's trial to begin within a certain time frame, otherwise the defendant would waive his right to a speedy trial, and the issue before the appellate courts was whether the defendant's agreement to or request for a continuance as a remedy for the state's late disclosure of evidence tolled the waiver of this right. These courts answered this question in the affirmative.

As to the third case, *State* v. *Brooks*, 149 Wn. App. 373, 392–93, 203 P.3d 397 (2009), the court did hold that a continuance was not an adequate remedy based on the specific facts of that case, in which the court described the state's actions as "a total failure to provide [any] discovery in a timely fashion . . . ." (Internal quotation marks omitted.) Id., 388. That case, however, does not hold that any time a defendant has invoked his right to a speedy trial, a continuance is an inadequate remedy for the state's late disclosure of evidence.

As to the fourth case, *Jimenez* v. *Chavez*, 234 Ariz. 448, 453, 323 P.3d 731 (App. 2014), the court held that a continuance was not an appropriate remedy when the continuance would have meant that the defendant was required to waive his right to a speedy trial under Arizona's rules of practice, which required a defendant in custody to be tried within 150 days of arraignment. As we discuss in this opinion, the defendant in the present case could have

v. *Troupe*, supra, 237 Conn. 313 ("[T]he defendant has not demonstrated any prejudice flowing from the late disclosure of the report, with respect to either his speedy trial rights or his ability to present a defense. Accordingly, the defendant has not satisfied his burden of establishing that the trial court improperly failed to prohibit the state from introducing the test results." (Footnote omitted.)). In the present case, because the defendant declined the trial court's offer of a continuance, we must determine whether a reasonable continuance, if accepted by the defendant, would have violated his right to a speedy trial.

"In *Barker* v. *Wingo*, [407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)], the United States Supreme Court adopted a four factor balancing test to determine whether a defendant's speedy trial right has been violated." *State* v. *Smith*, 289 Conn. 598, 612 n.17, 960 A.2d 993 (2008). The court explained that "the determination of whether such rights have been violated requires a case-by-case approach in which the court examines the [relevant] factual circumstances [including] . . . [the] [l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (Internal quotation marks omitted.) Id., 613. "[T]he question of whether the defendant's claims of injury to his defense constitute sufficient prejudice to establish a denial of the right to a speedy trial can only be answered after examining the other factors in the case. Greater specificity and harm must be shown [when] the other factors weigh in the state's favor, while a lesser showing will constitute sufficient prejudice when the other facts support a defendant's argument." *State* v. *L'Heureux*, 166 Conn. 312, 319, 348 A.2d 578 (1974).

The defendant's argument in the present case implicates the third *Barker* factor, the defendant's assertion

received a continuance without waiving his right to a speedy trial under our court rules.

of his right to a speedy trial. Our appellate courts have analyzed this factor in light of a defendant's statutory right to a speedy trial. Specifically, a defendant's claim that his right to a speedy trial has been violated is weaker if he failed to assert his statutory right to a speedy trial. See *State* v. *Lacks*, 58 Conn. App. 412, 419, 755 A.2d 254, cert. denied, 254 Conn. 919, 759 A.2d 1026 (2000); see also *State* v. *Rosario*, 118 Conn. App. 389, 399–400, 984 A.2d 98 (2009), cert. denied, 295 Conn. 903, 988 A.2d 879 (2010). Even if a defendant asserts this right, however, such assertion "is afforded little weight in the *Barker* balancing test" if trial commences within the statutorily provided time period. Id. In Connecticut, the defendant's statutory right to a speedy trial is codified at § 54-82m[24] and Practice Book § 43-41,[25] which provide that, if the defendant's trial does

[24] General Statutes § 54-82m provides: "In accordance with the provisions of section 51-14, the judges of the Superior Court shall make such rules as they deem necessary to provide a procedure to assure a speedy trial for any person charged with a criminal offense on or after July 1, 1985. Such rules shall provide that (1) in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of a criminal offense shall commence within twelve months from the filing date of the information or indictment or from the date of the arrest, whichever is later, except that when such defendant is incarcerated in a correctional institution of this state pending such trial and is not subject to the provisions of section 54-82c, the trial of such defendant shall commence within eight months from the filing date of the information or indictment or from the date of arrest, whichever is later; and (2) if a defendant is not brought to trial within the time limit set forth in subdivision (1) of this section and a trial is not commenced within thirty days of a motion for a speedy trial made by the defendant at any time after such time limit has passed, the information or indictment shall be dismissed. Such rules shall include provisions to identify periods of delay caused by the action of the defendant, or the defendant's inability to stand trial, to be excluded in computing the time limits set forth in subdivision (1) of this section."

[25] Practice Book § 43-41 provides: "If the defendant is not brought to trial within the applicable time limit set forth in Sections 43-39 and 43-40, and, absent good cause shown, a trial is not commenced within thirty days of the filing of a motion for speedy trial by the defendant at any time after such time limit has passed, the information shall be dismissed with prejudice, on motion of the defendant filed after the expiration of such thirty day

not begin within twelve months from the filing of the information or from the date of his arrest, whichever is later, he may file a motion for a speedy trial. If, in the absence of "good cause shown, a trial is not commenced within thirty days of the filing of a motion for speedy trial by the defendant at any time after such time limit has passed, the information shall be dismissed with prejudice, on motion of the defendant filed after the expiration of such thirty day period." Practice Book § 43-41. Commencement of a trial is defined as "the commencement of the voir dire examination in jury cases and the swearing-in of the first witness in nonjury cases." Practice Book § 43-42. Thus, if, pursuant to a defendant's state law guarantees; see General Statutes § 54-82m; Practice Book § 43-41; trial commences within thirty days of his filing of a motion for a speedy trial, the defendant's constitutional claim is of little merit.

In the present case, the defendant filed his speedy trial motion on February 21, 2017. Under § 54-82m and Practice Book § 43-41, he therefore was entitled to a trial that commenced—defined as the beginning of jury selection—by March 23, 2017. Jury selection in fact began on February 27, 2017, well within the time period outlined by § 54-82m and Practice Book § 43-41. On March 7, 2017, in the midst of jury selection, the state untimely disclosed the evidence at issue. Jury selection ended on March 17, 2017, the same day the court heard oral argument on the defendant's motion for sanctions. After the defendant declined the trial court's offer of a continuance, evidence began on March 20, 2017.

The defendant argues that the trial court and the Appellate Court incorrectly focused on the ten day time

period. For the purpose of this section, good cause consists of any one of the reasons for delay set forth in Section 43-40. When good cause for delay exists, the trial shall commence as soon as is reasonably possible. Failure of the defendant to file a motion to dismiss prior to the commencement of trial shall constitute a waiver of the right to dismissal under these rules."

period between the state's disclosure and oral argument on his motion for sanctions, arguing that this period of time was insufficient to prepare his defense—including time to speak with Robinson, inspect the gun, and to retain and meet with his own expert—all while continuing to participate in jury selection. We agree with the defendant that it was inappropriate to expect him to prepare a response to the untimely disclosure of a firearm and associated expert reports during those ten days, all while jury selection continued. Turning the government's failure—including the mistakes by the prosecutor's office and the police—into the defendant's problem, and thereby saddling his counsel with an additional burden while picking a jury and preparing for trial, is not a remedy for the untimely disclosure of expert evidence. Nor is it a satisfactory response to this government created dilemma that defense counsel did not even try to speak to Robinson under these circumstances. Like any trial lawyer, counsel had to make judgments, whether they are called "tactical" or by some other name, about how to spend the precious days and hours before trial, and it is hardly fair—and not helpful to our analysis—to criticize counsel for failing to take steps to manifest or mitigate harm created by the errors of a variety of state actors.

The defendant's argument, however, has failed to establish that a reasonable continuance of two weeks would have caused his trial to begin beyond the statutory deadline, even if jury selection had to be paused or to begin anew. At the time of the state's disclosure, March 7, 2017, the defendant could have requested a two week continuance and still have had jury selection recommence, or begin anew, by March 21, 2017, within the statutory deadline. Additionally, the defendant has not shown that two weeks would have been insufficient time for him to speak with Robinson, inspect the gun, attempt to obtain an expert, or otherwise prepare a

response to the new evidence. This is especially so in light of the fact that the defendant has presented no argument, other than general speculation, regarding how the untimely disclosed evidence altered his theory of defense, particularly regarding the shooter's identity. Although we are not holding that two weeks necessarily constitutes a reasonable continuance in all cases, in the present case, because the firearms evidence was not central to the state's case or to the defense, the defendant has failed to establish that he could not have received a reasonable continuance without jeopardizing his statutory right to a speedy trial. As a result, "it [is] difficult for the defendant to prove that he was denied a speedy trial." *State* v. *Lacks*, supra, 58 Conn. App. 419.[26] Consequently, the third *Barker* factor does not weigh in favor of the defendant's claim.

Implicating the second *Barker* factor, the defendant also argues that a continuance was an inadequate remedy because the state's untimely disclosure was the result of "an egregious lack of diligence," although he does not contest the trial court's finding that the state did not act in bad faith. The defendant argues that the prosecutor in the present case should have been aware of this evidence two years before trial because the prosecutor's office was aware of the gun's existence and the Bridgeport police (also a state actor) possessed the gun.

We cannot disagree with the defendant that the state's actions lacked due diligence and that, if the appropriate state actors had acted with due diligence, the evidence would have been disclosed sooner. Although the prose-

[26] Given the extraordinary nature of that remedy, we decline the defendant's request to exercise our supervisory authority over the administration of justice to create a rule requiring either exclusion of evidence or dismissal of all charges when the state untimely discloses evidence after a defendant has invoked his right to a speedy trial. See, e.g., *Halladay* v. *Commissioner of Correction*, 340 Conn. 52, 67 n.9, 262 A.3d 823 (2021).

cutor in this case clearly was not aware of the evidence, it was the combined actions of several state actors—the police, the prosecutor in this case, and the prosecutor in the unrelated robbery case—that caused the late disclosure.[27] And yet, as is too often the case, any consequences for the late disclosure fell on the defendant, with the state suffering little for its own neglect.

Nevertheless, considering all relevant facts, including the trial court's undisputed finding of a lack of bad faith, the trial court's offer of both a continuance and the continuation of plea bargaining, and the possibility that the defendant could have received a reasonable continuance without hindering his right to a speedy trial, we conclude that the defendant has failed to establish that his right to a speedy trial would have been violated if he had accepted the trial court's offer of a reasonable continuance. The weight of these same factors also shows that exclusion of the evidence or dismissal of the murder charge was not the only appropriate remedy for the state's late disclosure. As a result, we cannot disagree with the Appellate Court that the trial court did not abuse its discretion in declining to exclude the evidence or to dismiss the murder charge.

Our conclusion should not be cause for self-satisfaction on the part of the state, however. In particular, although we conclude that the trial court did not abuse its discretion, the state should note well that the trial

[27] Although the defendant argues that we should impute to the prosecutor in this case the awareness of this evidence by the police for two years, he does not provide any case law or analysis in support of his argument. Thus, we do not consider this argument. Nevertheless, we note that the police and the prosecutor regularly work together in criminal cases. Additionally, in the present case, another prosecutor in the state's attorney's office clearly was aware of this evidence at some point in the unrelated robbery case. It is clear that the combined actions of multiple state actors caused the late disclosure. Regardless of whether the knowledge of the police may be imputed to the prosecutor's office, we caution all state actors that they must be diligent in their disclosure of discoverable materials in criminal cases.

court also likely would have been well within its discretion to *deny* the admission of the weapon and accompanying reports. This is especially so considering that the state was quite apparently ready to go to trial without the weapon, and the record of what precisely went awry in this case is not clear. For example, we do not know on this record the procedures in place and the technology available to the state and local police that would have enabled them to avoid what took place with the untimely disclosed evidence and to comply with their obligations.

But, we are many years removed from a time when governmental actors, sometimes (but not always) without all the resources of the private sector or some larger governmental entities, are resigned to rely on primitive tickler systems, handwritten notes, or an individual employee's memory to comply with discovery obligations. This cannot have been the only time in recent history when evidence—tangible or written—was relevant or necessary to two prosecutions, even unrelated prosecutions. A particular prosecutor's or staff person's negligence in failing either to ask for or to forward the evidence at issue can simply no longer constitute an acceptable excuse for the state's lack of compliance with its discovery obligations to the defendant's detriment. Prosecuting authorities must plan for the fact that personnel will turn over, memories will fail, and the press of other business will often interfere with the state's obligations unless measures are taken to ensure compliance. Too often, these foreseeable problems result in untimely disclosures, followed by the state's arguing that justice would not be served by enforcing the letter of the rule through the exclusion of evidence. We caution the state that, although in many cases, including this case, a continuance may be an appropriate remedy for the untimely disclosure of evidence, the state has a duty to defendants, to the public, and to the courts to act with diligence in the disclosure of

evidence. And, as our abuse of discretion standard of review appropriately makes clear, it is the solemn obligation of our trial courts in the first instance to encourage compliance with these obligations and to penalize noncompliance.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.