STATE OF CONNECTICUT *v.* JOVANNE BROWN (SC 20408)

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

Syllabus

Pursuant to statute (§§ 53a-133 and 53a-136 (a)), a person commits robbery in the third degree when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, or compelling the owner of such property or another person to deliver up the property or to engage in other conduct that aids in the commission of the larceny.

Pursuant further to statute (§ 53a-119), "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

Convicted of the crimes of felony murder and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, the defendant appealed to this court. After agreeing to assist in a drug transaction in exchange for a large sum of money, the defendant met with another individual, H, and got into the back seat of H's car. H told the defendant that there was a gun on the floor and that the defendant's

role was to "make sure that nothing happened." H then parked on a street near the victim's parked car. Sometime after their arrival, the defendant, who never saw any money in H's car, twice asked H if he had brought any money with him. Thereafter, the victim entered the front passenger seat of H's car, discussed the details of the transaction, which involved a substantial amount of marijuana, and returned to his own car. H then drove around the block a few times before returning and parking his car a second time. H exited his car to retrieve the marijuana from the victim's car, after which the victim got into the front passenger seat of H's car. The defendant, who was sitting behind the victim at that point, used the gun on the car floor to exchange gunfire with the victim, who was shot five times. The defendant was shot once. H then returned to his car with the marijuana, pushed the victim out of the car, and drove the defendant to a hospital. The next morning, the police interviewed the defendant at the hospital. The police told the defendant that they had viewed surveillance footage of the scene of the shooting, but the defendant denied knowing anything about the shooting or the victim's death. Later that day, the police interviewed the defendant a second time at his home. At that point, the defendant admitted that he had participated in the drug transaction and had shot the victim, but he claimed that the victim had shot him first, after the defendant made a noise that startled the victim. When asked if "the intent was to rob" the victim of the marijuana, the defendant said "I guess so." At trial, the defendant testified and claimed that he had acted in self-defense, reiterating that he shot the victim only because the victim, who had been startled by a noise he made, shot at him first. The defendant further testified that he did not intentionally kill the victim and that he took nothing from the victim. Although the defendant had been charged with murder, among other crimes, the jury found the defendant not guilty of murder but guilty of the lesser included offense of intentional manslaughter in the first degree, as well as felony murder, with robbery in the third degree as the predicate felony, and carrying a pistol or revolver without a permit. The trial court ultimately vacated the conviction of intentional manslaughter in the first degree on the ground that the defendant could not be convicted of multiple homicide charges for the same act. On appeal, the defendant claimed that there was insufficient evidence to support his conviction of felony murder, that the vacated conviction of first degree manslaughter could not be reinstated in the event that this court agreed that there was insufficient evidence to support his felony murder conviction because the state failed to prove beyond a reasonable doubt that he did not act in self-defense, and that the prosecutor engaged in certain improprieties during closing argument. *Held*:

1. The evidence was sufficient to support the defendant's conviction of felony murder, based on the predicate felony of robbery in the third degree, and, because this court rejected the defendant's insufficiency

claim, it declined to address his claim related to the vacated manslaughter conviction:

a. The jury reasonably could have concluded, beyond a reasonable doubt and on the basis of all of the evidence, that the defendant intended to commit a larceny, insofar as he intended to deprive the victim of the marijuana:

The circumstantial evidence was sufficient to support the jury's conclusion that the defendant had the requisite intent to deprive the victim of the marijuana, as the defendant knew at the time of the shooting that H did not have the means to or intend to pay for the marijuana and that the defendant's role was to participate in the robbery by using a gun to make sure "nothing happened," the defendant shot the victim and then left the scene with H and the marijuana, the defendant responded, "I guess so," when asked by the police if the plan had been to rob the victim, and, applying common sense, the jury reasonably could have inferred that the defendant had intended to use the gun to ensure that the victim, upon getting into H's car and discovering that there was no money, would not leave the car to get the marijuana back from H and that there would have been no reason for the victim to shoot the defendant while H was retrieving the marijuana from the victim's car unless the victim believed that H and the defendant had intended to take the marijuana without paying for it.

Because the jury was entitled to discredit the defendant's exculpatory testimony while crediting his testimony that was corroborated by other evidence admitted at trial, the jury reasonably could have rejected the defendant's testimony that he had shot at the victim only after the startled victim shot at him and reasonably could have concluded that the victim had shot the defendant because the defendant was attempting to hold him at bay with the gun, was about to shoot him, or already had shot him to prevent him from interfering with H's taking of the marijuana.

Moreover, in light of the fact that the defendant was aware, after his first interview with the police, that the police had surveillance footage of the scene of the shooting, that the police suspected that the car in that footage was the same car in which the defendant arrived at the hospital, and that the police knew that the defendant had been shot, the jury reasonably could have found that the defendant must have realized, after the initial police interview, that his continued insistence that he had not shot the victim and knew nothing about the incident would simply not be believable, and that the statements the defendant made during his second interview with the police, in which he generally tended to inculpate himself in the victim's murder, were true, and the jury reasonably could have rejected the defendant's claim that he was promised a large sum of money and provided access to a gun to do nothing more than sit in H's car.

b. There was no merit to the defendant's claim that the evidence was insufficient to support the conclusion that he had committed a larceny insofar as there was no evidence that the defendant himself, rather than H, physically took the victim's marijuana, as the jury reasonably have concluded that the defendant wrongfully withheld the marijuana from the victim:

Pursuant to § 53a-119, a person commits larceny when he "takes, obtains or withholds . . . property from [its] owner," the state did not limit its theory of the defendant's commission of larceny to any one of those three statutory terms, the trial court included all three terms in its jury instruction, and, accordingly, the jury could find that the defendant had committed larceny if it found that he obtained or withheld the marijuana, even if he did not physically take it.

Because § 53a-119 did not define the term "withholds," this court considered dictionary definitions of that term, including "[t]o refrain from giving, granting, or permitting," and concluded that there was sufficient evidence that the defendant had committed larceny in light of the meaning of that term, as the defendant sat behind the victim in H's car and was armed with a gun, the purpose of the defendant's involvement in the drug transaction was to make sure "nothing happened" while H retrieved the marijuana from the victim's car, and the jury reasonably could have inferred that the defendant was in the back seat of H's car with access to the gun for the purpose of "refrain[ing] from giving, granting, or permitting" the victim access to the marijuana.

Moreover, the jury also could have reasonably inferred that the defendant had shot the victim as part of an effort to refrain from permitting or allowing the victim access to the marijuana once H had effectuated the plan to deprive the victim of the marijuana without paying for it.

c. The evidence was sufficient to establish, under §§ 53a-133 and 53a-136a, that the defendant used or threatened the immediate use of force for the purpose of preventing or overcoming the victim's resistance to the taking of the marijuana or compelling the victim to deliver up the marijuana:

The jury reasonably could have found that H would not have gone to retrieve the marijuana from the victim's car unless he and the defendant had come to an understanding that the defendant would prevent the victim from interfering with H's taking of the marijuana and that the victim would have had no apparent reason to shoot the defendant unless the defendant was using or threatening to use force to prevent the victim from interfering with H.

2. The defendant could not prevail on his claim that the prosecutor committed certain improprieties during closing argument by arguing facts that were not in evidence and making inferences that were unsupported by

the evidence, in violation of the defendant's due process right to a fair trial:

The prosecutor's remarks that H had brought no money with which to purchase the marijuana and that the victim was startled by the lack of money the second time he entered H's car were supported by the evidence, insofar as the defendant twice asked H whether he had money, never saw any money in H's car, and responded that he "guess[ed]" that it was their intent to rob the victim, and that evidence supported the inference that H did not have any money to pay the victim for the marijuana.

Insofar as the other alleged instances of impropriety related exclusively to the defendant's claim on appeal in connection with his vacated manslaughter conviction, and because that claim was not before this court in light of its conclusion that the evidence was sufficient to support the defendant's felony murder conviction, this court declined to address those prosecutorial impropriety claims.

Argued January 12—officially released December 6, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Russo*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charges of robbery in the first degree and conspiracy to commit robbery in the first degree; subsequently, verdict of guilty of the lesser included offense of intentional manslaughter in the first degree, and of felony murder and carrying a pistol or revolver without a permit; thereafter, the court, *Russo*, *J.*, vacated the conviction as to intentional manslaughter in the first degree and rendered judgment of guilty of felony murder and carrying a pistol or revolver without a permit, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *C. Robert Satti, Jr.*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Jovanne Brown, was convicted, following a jury trial, of felony murder in violation of General Statutes § 53a-54c, with robbery in the third degree in violation of General Statutes § 53a-136 (a) as the predicate felony; intentional manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1); and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a).[1] The trial court vacated the manslaughter conviction on the ground that the defendant could not be convicted of multiple homicide charges for the same act but otherwise rendered judgment in accordance with the verdict.

On appeal, the defendant claims that the evidence was insufficient to support his conviction of felony murder. Specifically, he contends that there was no evidence that he intended to commit a larceny, that he committed a larceny, or that he used or threatened the immediate use of physical force to effectuate a taking, as required to establish that he committed robbery in the third degree. The defendant also contends that, if this court agrees with his claim of insufficient evidence of felony murder, it cannot reinstate his vacated conviction of the intentional manslaughter in the first degree charge because the state failed to prove beyond a reasonable doubt that he did not shoot the victim in self-defense. Finally, the defendant claims that his convic-

[1] Initially, the state had also charged the defendant with, inter alia, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and conspiracy to commit robbery in the first degree in violation of General Statutes § 53a-48 and § 53a-134 (a) (2). After the prosecutor rested the state's case-in-chief, the trial court granted defense counsel's motion for a judgment of acquittal on those charges.

tion must be reversed because the prosecutor engaged in prosecutorial improprieties during closing argument. We reject the defendant's insufficiency claim and, therefore, need not address his claim related to the manslaughter conviction. We also reject the defendant's claims of prosecutorial impropriety and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the evening of February 24, 2017, the defendant received a phone call from a person known to him as "Marley," who asked the defendant whether he would be willing to assist in a deal involving the purchase and sale of three pounds of marijuana. Marley offered to pay the defendant $2000 to do so. The defendant agreed to participate in the drug deal so that he could get the money he needed to fix his car's transmission.

Shortly after speaking with Marley, the defendant went to the parking lot of the Duchess restaurant in Bridgeport, where Willard Hargrove, an individual unknown to the defendant, drove up in a white Hyundai Sonata. Hargrove told the defendant to sit in the back seat, so that the person who they were going to meet could sit in the front passenger seat and discuss the drug deal. When the defendant got into the car, Hargrove told him that there was a gun on the floor[2] and that the

[2] Some of the evidence presented at trial suggested that Marley may have told the defendant about the gun. Although the defendant testified that Hargrove had told him that there was a gun on the floor in the back seat, Brian Fitzgerald, a captain with the Bridgeport Police Department, testified that, when he interviewed the defendant on the day after the shooting, the defendant had told him that "[h]e was supposed to pick up the gun that was [going to] be inside a car that he was picked up in . . . ." Fitzgerald also testified that the defendant had indicated that, "when he was picked up in [Hargrove's white Hyundai Sonata] . . . there would be a gun in the car." Thus, Fitzgerald's testimony arguably suggests that the defendant indicated that Marley had told him, before Hargrove picked the defendant up at the Duchess restaurant, that there would be a gun in the car.

defendant's role was to "make sure the deal went right" or to "make sure that nothing happened." He also told the defendant that he should "wipe [the gun] down."

Hargrove drove to Berkshire Avenue in Bridgeport and parked on the street. The victim, Michael Watkins, got out of a car that was parked nearby, approached Hargrove's car, and got into the front passenger seat. The defendant was sitting behind him. After discussing the drug deal with Hargrove, the victim left the car and returned to his own car. Hargrove then left the scene and drove around the block a few times.

Meanwhile, Dave Depass, the person who had provided the victim with the three pounds of marijuana to sell, was watching the transaction from the window of his third floor apartment at the corner of Berkshire Avenue and Orchard Street.[3] When Depass saw Hargrove leave the scene and drive around the block, he suspected that something was amiss and called the victim by cell phone and warned him two or three times not to get back into Hargrove's car when he returned.

After driving around for several minutes, Hargrove parked his car on Berkshire Avenue again, at which point he exited the car and went to the victim's car to get the marijuana. Shortly thereafter, the victim got into the front passenger seat of Hargrove's car. The defendant was still sitting in the back seat. Using the gun that was on the floor of the car, the defendant shot the victim five times in his back. At some point during this shooting, the defendant received a gunshot wound to his right upper chest. The victim died from his wounds.

[3] Earlier in the evening, Depass explained to the victim that he had made a deal to sell the marijuana for $9600. Depass had also given the victim a bag containing the marijuana and watched him place it in his car. At some point in the evening, the victim told Depass that he was carrying a gun.

After shooting the victim, the defendant crawled over him and exited the car through the front driver side door because the childproof safety locks on the back doors of the Hyundai Sonata were activated. At that point, Hargrove returned to the car carrying a bag of marijuana,[4] and the defendant told him that he had been shot. Hargrove got into the driver's seat, put the bag in the back seat and pushed the victim out of the car. The defendant then stepped over the victim and got into the front passenger seat. Hargrove drove the defendant to St. Vincent's Medical Center, a hospital in Bridgeport, helped him inside and immediately drove away.

The gun that the defendant used to shoot the victim, a .32 caliber Smith & Wesson revolver, was later found in an abandoned car in Bridgeport. When the police searched the crime scene after the removal of the victim's body, the only items of evidence they found were a blood-like substance on the ground and the victim's cell phone. During a subsequent investigation, the police were able to determine that Hargrove possessed a white Hyundai Sonata, but they never found the car.

At about 12:50 a.m. on the morning after the shooting, February 25, 2017, Christopher Lamaine, a lieutenant with the Bridgeport Police Department, went to St. Vincent's Medical Center to interview the defendant. Brian Fitzgerald, a captain with the police department, and Vincent Larrichia, a detective, were there when Lamaine arrived. Before interviewing the defendant, Lamaine viewed a surveillance video recording taken from a house on Brooks Street, adjacent to the scene of the shooting. The video recording, which was of poor quality and repeatedly skipped, showed a white car turning onto Berkshire Avenue and parking at approximately 9:34 p.m. on February 24, 2017. Several minutes later,

[4] Depass testified that he saw Hargrove enter the victim's car and remove the container of marijuana.

an individual exited the driver's door and walked in the direction of the victim's car. A few seconds after that, the victim approached the back of the white car and attempted unsuccessfully to open the back door on the passenger side.

After that unsuccessful attempt to enter the rear of the car, the victim, at approximately 9:38 p.m., opened the door to the front passenger seat and got in. Shortly thereafter, the driver's door opened, and an individual, later identified as the defendant, got out. The video then skipped several seconds, after which the defendant could be seen following the car as it moved slowly down the street.[5] As the defendant approached the front driver side door, the car stopped, and the door opened. The defendant then ran around the front of the car. At that point, the front passenger side door was opened from the inside, and a body emerged from the door and fell to the ground. The defendant stepped over the body, which appeared to be moving, and got into the front passenger seat. The car then left the scene.

During the interview with Lamaine, the defendant stated that, earlier in the evening, he had left his home on Glenwood Avenue in Bridgeport, on the city's east side, to walk several miles to the west side of the city to buy $10 worth of marijuana from an acquaintance. While he was walking, a car pulled up beside him, and a passenger in the car shot him. After he was shot, a white car pulled up beside him, and an individual whom he did not know asked him if he was alright. The defendant said that he was not and got into the car, at which point the individual drove him to the hospital. Lamaine, who suspected that the white car in which the defendant

[5] The quality of the video recording was not sufficient to allow the identification of facial features. Other evidence, including the defendant's own testimony that he had shot the victim, established, however, that the defendant was the person who got out of the car and then followed the car as it moved down the street.

had been driven to the hospital[6] was the same white car that was shown on the surveillance video of the crime scene, told the defendant that he had viewed the surveillance video.

Lamaine also told the defendant that the victim was dead and asked the defendant if he knew what happened to the victim. The defendant denied knowing anything about the victim's death. Lamaine also asked the defendant whether, if the police found the white car in which the defendant had arrived at the hospital, they would find his blood in the back seat. The defendant stated that he had initially gotten into the back seat of the car that picked him up and then climbed into the front seat.

In the afternoon of February 25, 2017, Fitzgerald and Larrichia went to the defendant's home on Glenwood Avenue in Bridgeport to interview him again. At that interview, the defendant's parents, his sister and a cousin who identified himself as a correction officer were present. The defendant admitted, at that point, that he had shot the victim with a revolver. The defendant also told Fitzgerald and Larrichia that the victim shot him after he made a noise that startled the victim. The defendant stated that he had agreed to be paid $2000 to "make sure that nothing happened" during the drug deal because he wanted the money to fix his car. When Fitzgerald asked the defendant if "the intent was to rob" the victim of the marijuana, the defendant said, "I guess so."

Shortly after the interview, the police arrested the defendant. The police subsequently charged the defen-

[6] Surveillance video taken at the entrance to the hospital showed a white car pulling up to the entrance and two men exiting from the car. The video also showed Hargrove and another person, later identified as a bystander, supporting the defendant as he entered the hospital. Depass testified that, after the victim was shot, he went to the Bridgeport police station, where he viewed the surveillance video. He recognized one of the persons who was supporting the defendant as the person he saw removing the marijuana from the car on Berkshire Avenue.

dant with murder, felony murder with the predicate felony of robbery in the third degree, robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol or revolver without a permit. After the prosecutor presented the prosecution's case at trial, defense counsel moved for a judgment of acquittal on the charges of robbery in the first degree and conspiracy to commit robbery in the first degree. The trial court granted the motion. The court stated in its ruling that "the elements of robbery in the third degree [which is a lesser included offense of robbery in the first degree] are: a person is guilty of robbery in the third degree when he, in the course of committing a larceny, uses or threatens the immediate use of physical force [on] another person for the purpose of either preventing or overcoming resistance to the taking of the property, or compelling the owner of such property or another person to deliver up the property. Here, the court simply is constrained to find any evidence in the record . . . that would support a finding, at this juncture, that there was a prevention or overcoming resistance to the taking of . . . the marijuana out of the car or that [the victim] was compelled to deliver up the property."

With respect to the charge of conspiracy to commit robbery in the first degree, the trial court concluded that, considered in context, the evidence that the defendant had said "I guess so" when asked whether "the intent was to rob" and that Hargrove had told the defendant to wipe down the gun was not sufficient to support the charge. Thus, the jury was left to determine the defendant's guilt with respect to the remaining charges, namely, murder, felony murder with the predicate felony of robbery in the third degree, and carrying a pistol or revolver without a permit.[7]

[7] At oral argument before this court, counsel for the defendant suggested that the trial court may have violated the defendant's double jeopardy rights when it submitted the felony murder charge to the jury after it had ruled that there was insufficient evidence to support the predicate felony of robbery

Thereafter, the defendant testified in his own defense. He testified that, when he got into a white Hyundai at the Duchess restaurant on the evening of February 24, 2017, he had never seen Hargrove before. The defendant did not know where Hargrove was going when they left the restaurant. He explained that, when they arrived at Berkshire Avenue and parked, the victim got into Hargrove's car. The victim then told Hargrove that he should go to the victim's car to get the marijuana while the victim retrieved the money from Hargrove's car. The defendant did not know the victim.

The defendant further testified that, when the victim got into Hargrove's car the second time, after Hargrove and the defendant had returned from driving around the block, the victim was startled by the rustling of the defendant's "puffer jacket" and turned toward the defendant. The defendant then tried "to grab for whatever [the victim was] reaching for," but, before he could do so, the victim shot him. When the defendant tried to leave the car, the victim would not let him and said that he was going to kill him. The defendant then grabbed the gun that was on the floor of the car and shot the victim. The defendant had never seen the gun before he got into the car. The defendant testified that he did not intentionally kill the victim and that he took nothing from the victim.

On cross-examination, the defendant testified that he had no money when he got into Hargrove's car and never saw any money in the car, but he did not know that there was no money in the car. Hargrove told the defendant to sit in the back seat of the car when he got

in the third degree. There was also some discussion at oral argument about the possibility that the guilty verdict on the felony murder charge was legally inconsistent with the trial court's ruling. Because the defendant did not raise either of these claims in his brief, we do not address them. See, e.g., *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 328 n.20, 71 A.3d 492 (2013) ("it is well settled that arguments cannot be raised for the first time at oral argument").

into the car at the Duchess restaurant, but the defendant was not "hiding" there. The defendant asked Hargrove twice, after "he pulled up," whether he had any money. When the victim got into Hargrove's car the second time and pulled out his gun, the defendant grabbed the gun with his left hand and wrestled with the victim, even though the defendant, who was five feet, six inches tall and weighed approximately 120 pounds at the time of the shooting, was much smaller than the victim, who was a "big" man, more than six feet tall.

The defendant further testified that, when Hargrove returned to his car after the defendant shot the victim, the defendant asked Hargrove if he could call an ambulance for the victim, but Hargrove said that the victim was already "gone . . . ." The defendant admitted that he never told the police, after the shooting, that he had asked Hargrove to call an ambulance. With respect to the police interview at the hospital, the defendant acknowledged that the police told him that, when they found the white car that was at the scene of the shooting, they would do a DNA analysis of any blood that they found inside the car. The defendant denied that "the plan . . . all along . . . was to rob [the victim] of his property . . . ."

After the conclusion of evidence, the trial court instructed the jury that the defendant was claiming self-defense with respect to the murder charge and the lesser included offenses of that charge, and on the elements of that claim. The court further instructed the jury that, if the jury found that the state had established the elements of murder or the lesser included offenses of manslaughter, it must find that the state had disproved one of the elements of self-defense beyond a reasonable doubt before it could find the defendant guilty.

The jury found the defendant not guilty of murder but guilty of intentional manslaughter in the first degree,

felony murder, and carrying a pistol or revolver without a permit. The jury found, in special interrogatories, that the defendant had used a firearm to commit intentional manslaughter in the first degree and felony murder.

At sentencing, the trial court vacated the conviction of intentional manslaughter in the first degree on the ground that the defendant could not be convicted of multiple homicide charges for the same act. See, e.g., *State* v. *John*, 210 Conn. 652, 695–97, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989). The trial court sentenced the defendant to an effective sentence of forty-two years of imprisonment, execution suspended after forty years, and five years of probation on the remaining convictions.

This direct appeal followed. The defendant claims that (1) there was insufficient evidence to support the conviction of felony murder with the predicate felony of robbery in the third degree because there was no evidence that the defendant intended to or did commit a larceny or that he used or threatened the immediate use of physical force to effectuate the taking of the marijuana, and (2) the prosecutor engaged in improprieties during closing argument that deprived the defendant of his right to a fair trial. We reject both claims.

I

We first address the defendant's claim that there was insufficient evidence to support his conviction of felony murder.[8] We disagree.

[8] Although this claim was not raised at trial, "it is entitled to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) [as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], because any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*." (Footnote omitted; internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 73, 3 A.3d 783 (2010).

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Ordinarily, intent can only be inferred by circumstantial evidence; it may be and usually is inferred from the defendant's conduct. . . . Intent to cause death

may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 503–505, 180 A.3d 882 (2018).

"[A]n inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts." (Internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 519, 782 A.2d 658 (2001).

To establish the elements of felony murder in the present case, the state was required to establish that, acting either alone or with one or more persons, the defendant committed or attempted to commit robbery in the third degree and, in the course of and in furtherance of such crime, the defendant caused the death of a person other than one of the participants. General Statutes § 53a-54c. Thus, to secure a conviction of felony murder, the state was required to prove, beyond a reasonable doubt, all of the elements of robbery in the third degree. See, e.g., *State* v. *Lewis*, 245 Conn. 779, 786, 717 A.2d 1140 (1998).

Section 53a-136 (a) defines robbery in the third degree as "robbery as defined in section 53a-133." General Statutes § 53a-133, in turn, provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property *or* to appropriate the same to himself or a third person, he wrongfully takes, obtains *or* withholds such property from an owner. . . ." (Emphasis added.) "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11). "[I]ntent [can] be formed instantaneously and [does] not require any specific period of time for thought or premeditation for its formation." (Internal quotation marks omitted.) *State* v. *Carter*, 317 Conn. 845, 857, 120 A.3d 1229 (2015).

A

The defendant first claims that the state failed to establish that he intended to commit a larceny because there was no evidence that he had any intent to deprive the victim of the marijuana or to appropriate it to himself or to Hargrove. See General Statutes § 53a-119. Rather, the defendant contends, the evidence compels the conclusion that his only intent was "to sit in [Hargrove's] car while the victim and Hargrove conducted the sale." The state responds that the "evidence showed

that the defendant had a dishonest purpose or intention to deprive the victim of his marijuana by assisting Hargrove to wrongfully exercise control over it."

For the reasons that follow, we agree with the state that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant had the requisite intent to deprive the victim of his marijuana. As a result, we need not address whether there was sufficient evidence for the jury to find that the defendant also had the intent to appropriate the marijuana to himself or a third person. See General Statutes § 53a-119.

The evidence showed that (1) Hargrove told the defendant that his role was to "make sure that nothing happened," that there was a gun on the floor in the back seat of Hargrove's car, and that he should "wipe [the gun] down," (2) the defendant never saw any money in Hargrove's car, and, at some point after arriving at Berkshire Avenue, he asked Hargrove twice whether he had any money, (3) the victim told Hargrove, when he got into Hargrove's car the first time, that Hargrove should get the marijuana from the victim's car while the victim got the money from Hargrove's car, (4) Hargrove did not immediately complete the drug transaction after meeting with the victim but, instead, left the scene and drove around the block a few times, (5) Depass, who had arranged the drug transaction, warned the victim not to get back into Hargrove's car when Hargrove returned from driving around the block because Depass was concerned that something was amiss, (6) after the victim entered Hargrove's car the second time, the defendant killed the victim by shooting him five times in the back, (7) Hargrove and the defendant left the scene with the bag of marijuana and the victim dead or dying in the street, and (8) when asked by the police on the day after the

shooting whether the intent was to rob the victim, the defendant responded, "I guess so."

Applying the proper standard of review to the evidence in the present case, we conclude that, although there was no direct evidence that the defendant and Hargrove intended to rob the victim, the circumstantial evidence was sufficient to support the jury's conclusion that the defendant intended to deprive the victim of his marijuana. Specifically, the jury reasonably could have inferred that the defendant knew, at least from the time that Hargrove parked on Berkshire Avenue for the second time, that Hargrove did not intend to pay for the marijuana and that the defendant's role was to participate in the robbery by using the gun to "make sure that nothing happened." The defendant then used that gun to shoot the victim five times in the back. Afterward, the defendant and Hargrove left with the marijuana. Indeed, the defendant himself responded, "I guess so," when asked by the police if the plan had been to rob the victim.[9]

[9] The defendant testified that he asked Hargrove twice, between the time that they first arrived on Berkshire Avenue and the time that they parked there a second time, whether he had any money, and that he never saw any money in Hargrove's car. The jury reasonably could have concluded that, if there was no money visible in Hargrove's car when Hargrove parked a second time on Berkshire Avenue, there was no money. Indeed, it would have made little sense for Hargrove to conceal the money in the car or to carry it with him to the victim's car if he intended to pay the victim for the marijuana. Thus, the evidence supports the inference that the defendant knew, before Hargrove left the car, that there was no money, that the plan all along had been to rob the victim, and that the defendant's role was to participate in the robbery. It is well established that "intent [can] be formed instantaneously and [does] not require any specific period of time for thought or premeditation for its formation." (Internal quotation marks omitted.) *State* v. *Carter*, supra, 317 Conn. 857.

At the very least, the defendant's testimony that he never saw any money in Hargrove's car supports the inference that the victim did not see any money when he got into the car, as there is no apparent reason why the money would have been visible to the victim but not to the defendant. In turn, this supports an inference that Hargrove had no intention of paying for the marijuana. Finally, although the defendant's response of "I guess so" to Fitzgerald's inquiry whether "the intent was to rob" the victim does

On the basis of the foregoing evidence, the jury, applying common sense, could have inferred that the defendant had intended to use the gun to ensure that the victim, upon getting into Hargrove's car and discovering that there was no money, would not leave the car to get his marijuana back, and that the defendant had intentionally used or threatened to use the gun to prevent the victim from interfering with the plan to deprive the victim of the marijuana. The jury also reasonably could have concluded that there would have been no reason for the victim to shoot the defendant while Hargrove was retrieving the drugs from the victim's car unless the victim believed that Hargrove and the defendant intended to deprive him of his marijuana without paying for it. Based on all of the foregoing, and construing the evidence in a light most favorable to sustaining the verdict, we conclude that the jury reasonably could have inferred from this evidence that the defendant had the intent to deprive the victim of the marijuana.

Finally, we note that the jury reasonably could have rejected altogether the defendant's testimony that the victim had been "startled" by a noise and, instead, concluded that the victim had shot the defendant because the defendant was attempting to hold him at bay with the gun, was about to shoot him, or already had shot him to prevent him from interfering with Hargrove. Indeed, the jury was entitled to discredit the defendant's exculpatory testimony while crediting his testimony that was corroborated by other evidence; see, e.g., *Barrila* v. *Blake*, 190 Conn. 631, 639, 461 A.2d 1375 (1983)

not necessarily suggest that that was the defendant's intent from the outset, it does support the reasonable inference that the defendant knew, at some point during the events leading up to the shooting, that Hargrove intended to rob the victim, and, therefore, that the defendant's role was to facilitate the robbery. See, e.g., *State* v. *Green*, 261 Conn. 653, 668, 804 A.2d 810 (2002) ("the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence" (internal quotation marks omitted)).

("[a] trier of fact is free to reject testimony even if it is uncontradicted . . . and is equally free to reject part of the testimony of a witness even if other parts have been found credible" (citations omitted)); and it would have been reasonable for it to do so. The evidence showed that the defendant knew, after his first interview with the police at the hospital, that the police had a video recording of the scene of the shooting. The defendant also knew that the police suspected that the car shown in that video recording was the same car in which the defendant arrived at the hospital, and they knew that the defendant had been shot. Moreover, the defendant knew that, if the police found Hargrove's car, they would find the defendant's blood in the back seat and the victim's blood in the front seat.

Accordingly, the jury reasonably could have concluded that the defendant must have realized after the initial police interview—during which he gave false information to the police—that his continued insistence that he had not shot the victim and knew nothing about the incident would simply not be believable. There were several hours between that interview and the second interview at the defendant's home during which the defendant, by himself or in consultation with others, had the opportunity to come up with a version of events in which he would admit that he agreed to participate in the drug deal and that he shot the victim—for which the police already had compelling evidence—but would claim that he knew nothing about any plan to rob the victim and that the shooting was in self-defense. Thus, the jury reasonably could have concluded that the statements that the defendant made during his second interview with the police that were consistent with the other evidence that the police had—which generally tended to inculpate the defendant—were true, whereas the statements that tended to exculpate him were not.

The defendant correctly points out that "the jury was not free to infer the opposite of what the defendant asserted in his statements based solely on its disbelief of those assertions." *State* v. *Copas*, 252 Conn. 318, 343 n.31, 746 A.2d 761 (2000). As we previously explained, however, there was affirmative evidence and reasonable inferences the jury could have drawn therefrom that would support the conclusion that the defendant did not intend simply to observe a drug deal between Hargrove and the victim and that he intentionally used or threatened the immediate use of physical force to prevent the victim from interfering with Hargrove's taking of the victim's marijuana.

The defendant also relies on this court's decision in *State* v. *Stovall*, 316 Conn. 514, 115 A.3d 1071 (2015). In *Stovall*, the defendant contended that there was insufficient evidence to support his conviction of possession of narcotics with intent to sell within 1500 feet of a housing project when "the state failed to introduce any evidence to prove beyond a reasonable doubt that he intended to sell narcotics at a particular location in or within 1500 feet of [the housing project at issue]." Id., 522. In support of its claim to the contrary, the state relied on "testimony that the defendant regularly visited [an] apartment in [the housing project] two or three times per week, that [the housing project was] known for drug trafficking, that the defendant made a business arrangement with [an acquaintance] to store items in the hallway closet in her apartment in [the housing project], and that narcotics packaged for sale and other materials suggesting the packaging and sale of narcotics were recovered from the hallway closet during the search of [the] apartment." Id., 522–23.

This court concluded that, although the "evidence provided ample support for the inference that the defendant intended to store and package narcotics in [the acquaintance's] apartment for sale, it did not have any

probative value with respect to the intended location of the sales, that is, whether the defendant intended to sell the narcotics in [the] apartment or in another location within 1500 feet of [the housing project]." Id., 523–24. "The evidence was equally supportive of an inference that the defendant intended to sell the drugs outside of the prohibited zone or anywhere that the opportunity presented itself. This court has concluded that [when] the evidence is in equipoise or equal, the [s]tate has not sustained its burden [of proof] . . . . *State* v. *Moss*, 189 Conn. 364, 369, 456 A.2d 274 (1983); see also *United States* v. *Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) (if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt . . .)." (Internal quotation marks omitted.) *State* v. *Stovall*, supra, 316 Conn. 527.

In the present case, the defendant contends that, under *Stovall*, the evidence was insufficient to establish that he intended to commit larceny because, at best, it would equally support a finding that he participated in the drug deal simply to "make sure that nothing happened" and that he shot the victim in self-defense or a finding that he intended to steal the victim's marijuana and that he used or threatened to use physical force to prevent the victim from interfering with Hargrove. We disagree. For the reasons that we already stated, viewing the evidence in a light most favorable to sustaining the verdict, we conclude that the jury reasonably could have concluded beyond a reasonable doubt, on the basis of all of the evidence, that the victim and the defendant exchanged gunfire because the defendant was using or threatening to use force against the victim to carry out his intent to deprive the victim of his marijuana. The jury also reasonably could have rejected the defendant's claims that he was promised $2000 and

given a gun to do nothing more than sit in the car and that he shot the victim during the course of a drug sale only because the victim shot at the defendant after the defendant startled him. Accordingly, we reject this claim.

B

The defendant also claims that there was insufficient evidence to support the conclusion that he committed a larceny because there was no evidence that he himself took the victim's marijuana. Rather, he claims that the evidence compels the conclusion that, if there was a larceny, it was Hargrove who took the marijuana. The defendant further contends that he cannot be found guilty as an accessory because the jury was not instructed on accessorial liability. See, e.g., *State* v. *Williams*, 187 Conn. App. 333, 348–49, 202 A.3d 470 (2019); *State* v. *Holley*, 160 Conn. App. 578, 592, 127 A.3d 221 (2015) (overruled on other grounds by *State* v. *Gore*, 342 Conn. 129, 269 A.3d 1 (2022)), rev'd on other grounds, 327 Conn. 576, 175 A.3d 514 (2018).

As we explained, § 53a-119 provides in relevant part that "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ." Having concluded that there was sufficient evidence to support a finding that the defendant had the intent to deprive the victim of his marijuana; see part I A of this opinion; we must determine whether there was sufficient evidence to demonstrate that the defendant wrongfully took, obtained or withheld the marijuana from the victim.[10]

[10] After oral argument before this court, we requested supplemental briefs on the following issues: (1) "Given that the jury was instructed on all the statutory elements of felony murder, and the predicate felony of robbery in the third degree, analyze whether the defendant's claim that the evidence was insufficient to support his conviction on the predicate felony of robbery in the third degree is more properly framed as a claim that the trial court

At the outset, we note that § 53a-119 provides three distinct terms that can be used to establish what action the defendant must engage in to satisfy that element of larceny: "takes, obtains or withholds . . . property from an owner." General Statutes § 53a-119. In interpreting the meaning of these terms, we are mindful of the "basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010).

The defendant asserts that the jury could not reasonably have found that he committed larceny because he

improperly failed to instruct the jury on the statutory definitions of 'appropriate,' set forth in General Statutes § 53a-118 (a) (4) (A), and 'obtain,' set forth in § 53a-118 (a) (2). See *State* v. *Russell*, 101 Conn. App. 298, 327 and n.30, 922 A.2d 191 [cert. denied, 284 Conn. 910, 931 A.2d 934] (2007)." And (2) "[i]f the defendant's claim is more properly characterized as a claim of instructional error, was the trial court's failure to instruct the jury on the definitions set forth in § 53a-118 (a) (2) and (4) (A) error and, if so, was the error harmful? See *State* v. *Spillane*, 255 Conn. 746, 757–58, 770 A.2d 898 (2001)."

After reviewing the supplemental briefs, we conclude that it would not be appropriate to construe the defendant's sufficiency claim as an unpreserved claim of instructional error. Although we acknowledge that it may have been preferable for the jury to be instructed on the statutory definitions of these terms; see, e.g., id., 755; neither party requested that the jury be charged on the statutory definitions or objected to the instructions on that basis. Moreover, because we find that there was sufficient evidence for the jury to find that the defendant committed larceny under the term "withholds," which is not statutorily defined, we need not address this issue. We thus address the defendant's sufficiency claim as it was raised on the merits. Nevertheless, we do caution trial judges to ensure that jury instructions include statutory definitions of the terms used in statutes defining criminal offenses.

did not physically take the marijuana and the jury was not instructed on accessorial liability. Therefore, the defendant asserts, there is not sufficient evidence to support the jury's finding regarding the commission of the predicate felony of robbery in the third degree under the instruction as given. We disagree.

In the present case, although the state argued that Hargrove physically took the marijuana, the state did not limit its theory of the defendant's guilt of larceny to any one of the three statutory terms—takes, obtains or withholds.[11] Consistent therewith, the jury was not limited to concluding that it could find the defendant guilty of larceny only if it found that he physically took the marijuana, as opposed to either obtaining or withholding the marijuana. Indeed, the jury was instructed: "To prove that the defendant was committing or attempting to commit a larceny, the state must prove beyond a reasonable doubt that [1] the defendant wrongfully took property, or obtained property, or withheld property from an owner, and [2] that, at the time, he intended to deprive the owner of the property or to appropriate such property to himself or a third person." Therefore, in the present case, in determining whether there was sufficient evidence to support the jury's finding regarding the defendant's commission of the predicate felony of robbery in the third degree, we must consider whether there was sufficient evidence of any of these three distinct ways of committing larceny.

We conclude that there was sufficient evidence that the defendant committed larceny under the term "withholds." The term "withholds" is not defined for pur-

[11] On appeal to this court, the state also does not limit its theory of the defendant's guilt to any one of these terms but asserts that the evidence was sufficient to support the defendant's conviction under any of these three terms. Because we conclude that there was sufficient evidence for the jury to find that the defendant committed larceny under "withholds," we need not address the other means of committing larceny under § 53a-119.

poses of § 53a-119. "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 322, 258 A.3d 1 (2021); see also General Statutes § 1-1 (a). Webster's Third New International Dictionary defines "withhold" as "to hold back," "keep from action," "check" or "restrain . . . ." Webster's Third New International Dictionary (2002) p. 2627. The American Heritage College Dictionary defines "withhold" as "[t]o refrain from giving, granting, or permitting." American Heritage College Dictionary (4th Ed. 2007) p. 1574.

In the present case, the evidence established that the defendant "was offered some money to go make sure nothing happened during [the drug] deal." The defendant testified that he was promised $2000. The defendant also testified that, when he got into Hargrove's car the first time, he was told that there was a gun in the back seat and that he should "wipe it down . . . ." The defendant further testified that he had been told that Hargrove was going to go to the victim's car to get the marijuana and that the victim expected to get the money from Hargrove's car, in which the defendant was sitting. The evidence further established that the defendant was never instructed to pay the victim for the marijuana; nor did the defendant have any reason to believe that Hargrove intended to pay the victim. Indeed, the defendant had no money of his own and never saw any money in the car, and Hargrove never affirmed that he had money to pay the victim.

Therefore, the evidence established that the defendant sat in the back seat of Hargrove's car, behind the

victim, who sat in the front passenger seat, that the defendant was armed with a gun, and that the purpose of the defendant's being in on the deal was to "make sure nothing happened" while Hargrove got the marijuana from the victim's car. On the basis of the foregoing evidence, the jury reasonably could have inferred that the defendant was in the back seat of Hargrove's car with the gun for the purpose of "refrain[ing] from giving, granting, or permitting" access to the marijuana. American Heritage College Dictionary, supra, p. 1574. The jury reasonably could have also inferred that the defendant shot the victim as part of his effort to refrain from permitting or allowing the victim access to the marijuana once his cohort had effectuated their plan to deprive the victim of the marijuana without paying for it. On the basis of the evidence and the reasonable inferences drawn therefrom, we conclude that there was sufficient evidence for the jury to have found that the defendant committed larceny.

C

The defendant finally claims that the evidence was insufficient to establish that he used or threatened the immediate use of physical force "for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." General Statutes § 53a-133 (defining "robbery").[12] In support of this claim, the defendant

[12] In support of this claim, the defendant points out that the trial court granted defense counsel's motion for a judgment of acquittal on the charge of robbery in the first degree because the court concluded that the state had failed to prove that "there was a prevention or overcoming resistance to the taking of . . . the marijuana out of the car or that [the victim] was compelled to deliver up the property," and, therefore, the state failed to establish that the defendant committed robbery in the third degree. As we already explained, the defendant has raised no claim that the trial court violated his double jeopardy rights by submitting the felony murder charge, with the predicate felony of robbery in the third degree, to the jury, or

relies on this court's holding in *State* v. *Coston*, 182 Conn. 430, 435, 438 A.2d 701 (1980), that "[t]he fact that the defendant committed a larceny while carrying a concealed weapon and later assaulted the victims of the larceny in an attempt to escape does not by itself permit [this court] to sustain his conviction for attempted robbery" because there was no evidence that the defendant used the weapon with the purpose of preventing resistance to the taking or compelling the owner to deliver up the property. We disagree.

We concluded in part I A of this opinion that the jury reasonably could have found that Hargrove would not have gone to retrieve the marijuana from the victim's car unless he and the defendant had come to an understanding that the defendant would prevent the victim from interfering with Hargrove. We also concluded that the victim would have had no apparent reason to shoot the defendant unless the defendant was using or threatening to use force to prevent the victim from interfering with Hargrove. Thus, the evidence was sufficient to establish that the defendant used or threatened the immediate use of physical force for the purpose of overcoming the victim's resistance to the taking of the marijuana or to the retention thereof immediately after the taking.[13]

II

The defendant next claims that he was deprived of his due process right to a fair trial when the prosecutor

that his conviction on the felony murder charge is invalid because it was inconsistent with the trial court's judgment of acquittal on the charge of robbery in the first degree. See footnote 7 of this opinion. We conclude, therefore, that we may consider all of the evidence presented at trial that the jury considered in determining whether the evidence was sufficient to establish that the defendant used or threatened to use physical force for the purposes set forth in § 53a-133.

[13] Because we conclude that the evidence was sufficient to establish that the defendant committed robbery, we need not address the defendant's claim that the evidence was insufficient to establish that he *attempted* to commit robbery.

engaged in prosecutorial improprieties during closing argument by arguing facts that were not in evidence and making inferences that were unsupported by the evidence. We are not persuaded.

The defendant contends that the prosecutor improperly relied on facts that were not in evidence or made unsupported inferences on four occasions. First, the defendant claims that, during the prosecutor's main closing argument to the jury, the prosecutor improperly argued that "[t]he defendant has agreed that there was a drug deal that was going to go down, that *they showed up with no money*." (Emphasis added.) Second, he claims that the prosecutor improperly argued that the defendant did not know that he was shot, thereby suggesting that he was not acting in self-defense when he shot the victim. Third, he argues that, during rebuttal argument, the prosecutor improperly argued that the victim was startled when he got into Hargrove's car the second time because there was no money in the car.[14] Fourth, he claims that the prosecutor improperly stated, during rebuttal argument, that Depass "assume[d] that [the victim] had a gun because he had it in the past," when Depass testified, instead, that the victim told him that he had a gun.

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [improper

[14] Specifically, the prosecutor argued that, on the night of the shooting, "the defendant was there as muscle. And, as part of the role of muscle, is it reasonable to believe that a conversation occurred that wasn't testified to by the [defendant]? [The defendant's] story is, and I'd suggest that he wasn't [going to] change that, that [the victim] gets in the car, and he's startled. Remember, [the judge] talked about you can believe some, all or none of what's said; you can believe that [the victim] was startled. Was it reasonable to believe that he was startled when he found out that there was [$9600] worth of drugs in that car behind him, he was told not to get in the car, and, when he gets in there, he finds out there's no money? There's no money. That would startle him."

conduct] occurred in the first instance; and (2) whether that [improper conduct] deprived a defendant of his due process right to a fair trial. Put differently, [improper conduct] is [improper conduct], regardless of its ultimate effect on the fairness of the trial; whether that [improper conduct] caused or contributed to a due process violation is a separate and distinct question . . . . As we have indicated, our 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 [improper conduct] was objected to at trial." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 361–62, 897 A.2d 569 (2006). "These factors include the extent to which the [improper conduct] was invited by defense conduct or argument, the severity of the [improper conduct], the frequency of the [improper conduct], the centrality of the [improper conduct] to the critical issues in the case, the strength of the curative measures adopted, and the strength of the state's case." Id., 361.

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical

devices is simply fair argument." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 727, 127 A.3d 164 (2015).

We first address the defendant's claim that the prosecutor's argument that Hargrove had no money with him was improper because it was supported by no evidence. We already concluded that the evidence that the defendant asked Hargrove twice whether he had money, that the defendant never saw any money in Hargrove's car, and that the defendant responded "I guess so" to Fitzgerald's inquiry whether "the intent was to rob" the victim supports the inference that Hargrove did not have any money to pay the victim for the marijuana. See part I A of this opinion. Accordingly, we reject this claim. For the same reason, we reject the defendant's claim that the prosecutor improperly argued that the victim was startled when he entered Hargrove's car the second time because he saw that there was no money.

With respect to the defendant's claim that the prosecutor improperly argued that the defendant did not know that he had been shot when he shot the victim, this claim appears to relate exclusively to the defendant's claim, with respect to his intentional manslaughter in the first degree charge, that the state failed to prove beyond a reasonable doubt that he was not acting in self-defense, which we need not address because we rejected his insufficiency claims. See part I of this opinion. In turn, because the self-defense claim is not before us, we need not address this claim of prosecutorial impropriety. We reach a similar conclusion with respect to the defendant's claim that the prosecutor improperly argued that Depass testified that he had "assume[d] that [the victim] had a gun because he had it in the past," when, in fact, Depass testified that the victim told him that he had a gun. Because the defendant contends that the claim relates solely to his claim of self-defense, we need not address it.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* GARY S.*
(SC 20438)

McDonald, D'Auria, Mullins, Ecker,
Alexander and Keller, Js.

Syllabus

Pursuant to statute (§ 53a-71 (a) (4)), "[a] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare . . . ."

Convicted of numerous crimes, including sexual assault in the second degree and risk of injury to a child, in connection with the sexual abuse of S and A, the defendant appealed to this court. S is the biological daughter of the defendant and his former spouse, D, and A is D's granddaughter, whom D was raising. The defendant allegedly began to abuse S when she was twelve years old, after the defendant married D for the first time. At that point, the defendant was living with D, S, and A, and caring for S and A while D was at work. Over the course of approximately four years, the defendant forced S to have vaginal and oral intercourse with him numerous times. On some of those occasions, the defendant told S that her "pussy was his" and that she "better not give it up to anybody." On one occasion, S successfully resisted the defendant's advances, leading him to say, "fuck you, bitch." Following these incidents, the defendant often would threaten to kill S and D, if S told anyone what had happened. One or two years after the defendant last had vaginal intercourse with S, he attempted to force A, who was six or seven years old, to perform oral sex on him. A was able to resist those efforts, but the defendant proceeded to digitally penetrate A's vagina. At some point during this period, D separated from, and eventually divorced, the defendant due to his domestic abuse toward her. The defendant and D later remarried but separated again due to the defendant's continued abuse. Several years later, S disclosed to T, D's

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

daughter from a prior relationship, that the defendant had sexually assaulted her. T then told S that she also had been sexually assaulted by the defendant. Upon hearing of T's and S's disclosures, A made her own disclosure. The state subsequently charged the defendant in an eight count information with various crimes, including, in count three, risk of injury to a child for allegedly subjecting A to contact with the defendant's intimate parts, and, in counts five, six, and seven, sexual assault in the second degree in violation of § 53a-71 (a) (4) for his assaults on S on "uncertain dates" during a specified four year period of time, while he purportedly was responsible for the general supervision of S's welfare. At trial, there was conflicting testimony as to where the defendant was living when those sexual assaults took place. Specifically, certain dates D provided at trial with respect to when she and the defendant separated and whether they had resumed living together contradicted certain dates provided by S and A during their respective testimonies. D had testified, however, that her memory with respect to dates was adversely affected by her tendency to block out trauma. During closing argument, the prosecutor highlighted the "vulgar" and "disgusting" remarks that the defendant made to S and remarked that D could not explain why she remarried the defendant because she was exposed to trauma and was a victim of domestic violence. On the defendant's appeal from the judgment of conviction, *held*:

1. Although the evidence was sufficient to support the defendant's conviction of the counts of sexual assault in the second degree pertaining to S, the evidence was insufficient to support his conviction of risk of injury to a child pertaining to A:

a. A testified that she successfully resisted the defendant's efforts to force her to perform oral sex on him, the state conceded that there was no evidence presented at trial that A had contact with the defendant's intimate parts, which was required under the portion of the risk of injury statute (§ 53-21 (a) (2)) under which the defendant had been charged in connection with his conduct toward A, and, accordingly, this court accepted the state's concession that there was insufficient evidence to support the defendant's conviction of risk of injury to a child pertaining to A, reversed the defendant's conviction as to that charge, and remanded the case with direction to render a judgment of acquittal as to count three of the information.

b. The evidence presented at trial was sufficient to support the defendant's conviction of the three counts of sexual assault in the second degree pertaining to S, as the jury reasonably could have concluded that the defendant was S's guardian or otherwise responsible for the general supervision of her welfare at the time of the charged sexual misconduct:

Contrary to the defendant's claim that he was acting as a mere babysitter to S during the relevant time period, when the sexual assaults took

place, the jury reasonably could have concluded that the defendant was exercising sufficient authority and control over S such that he was responsible for her general supervision for purposes of § 53a-71 (a) (4) at the time of the assaults, especially in light of the fact that the defendant is S's biological father and S's testimony that the defendant assaulted her on numerous occasions while he lived in the same residence as her and that the incidents of abuse occurred when D was working and when the defendant was the only adult in the home.

Moreover, although S's and D's testimony conflicted as to whether the defendant was residing with them when the assaults occurred, the jury was free to resolve any inconsistencies by crediting S and A's combined testimony over the admittedly dubious recollection of D, who testified that she had a difficult time recalling dates due to past trauma.

2. The defendant could not prevail on his claim that the prosecutor had committed certain improprieties during closing and rebuttal arguments, in violation of the defendant's due process right to a fair trial:

a. The prosecutor did not improperly appeal to the jurors' emotions by emphasizing certain "vulgar" and "disgusting" comments that the defendant had made while he sexually assaulted S, as the challenged remarks were based on the evidence presented at trial, were relevant to the charges, and supported the state's theory that S delayed in her disclosure of the sexual abuse because she was afraid of the defendant:

The prosecutor's remark that the defendant got so angry and frustrated with S that he said, "fuck you, bitch," was relevant to the charge of attempt to commit sexual assault with respect to S because it illustrated that the defendant had the intent to sexually assault S and became so frustrated when he was unsuccessful that he addressed his own daughter using vulgar language.

The prosecutor's reference to the defendant's comments, made while he was having intercourse with S, regarding S's "pussy" having belonged to him, was relevant to the charge of sexual assault in the second degree because it illustrated that the defendant and S engaged in sexual intercourse and was also relevant to the charge of risk of injury to a child because it illustrated that the defendant caused S to have contact with his intimate parts in a sexual and indecent manner that was likely to impair her morals, and those comments also supported the state's theory that S delayed in her disclosure of the sexual abuse because of her fear of the defendant and the embarrassing nature of the incidents.

The prosecutor's characterization of the defendant's comments as "vulgar" and "disgusting," and his remark that "[t]his is how he talks to a twelve year old, his own biological daughter," did not amount to an impermissible personal attack on the defendant, as that commentary

was based on S's testimony and was not so gratuitous, crudely phrased, or inflammatory as to rise to the level of an improper personal attack.

b. Although not all of the prosecutor's challenged remarks constituted unsworn testimony or improperly vouched for the credibility of the state's witnesses, as the defendant claimed, certain remarks the prosecutor made regarding the defendant's domestic abuse of D were improper:

The prosecutor's remark, regarding the disclosures made by T, S, and A, that "[t]his isn't a case of [the three girls] get[ting] together and get[ting] [their] stories straight" did not constitute unsworn testimony or improperly vouch for the credibility of the state's witnesses, as it was based on evidence presented at trial, namely, the testimony of T, S, and A regarding how their disclosures occurred and the lack of any evidence that they had conversations to conspire against the defendant prior to their disclosures, the jury reasonably could have inferred from that evidence that the girls had not coordinated their accusations out of some conspiratorial vengeance, and there was no merit to the defendant's contention that the prosecutor improperly relied on constancy of accusation evidence in making the challenged remark.

The prosecutor's remark that S had a "flat affect" while testifying did not improperly usurp the jury's role in judging S's credibility but, instead, served to urge the jury to draw a reasonable inference from the evidence presented at trial, including S's testimonial demeanor and certain expert testimony on the effects of trauma, that S's demeanor was consistent with the demeanor of individuals who have experienced trauma, and this court found unavailing the defendant's argument that such an inference involved a matter requiring the jury to have special expertise, akin to that of making a psychiatric diagnosis.

The prosecutor's remarks regarding how D could not explain why she remarried the defendant because she was exposed to trauma and was a victim of domestic violence were improper because they violated a limiting instruction that the trial court had given to the jury that evidence of the defendant's abuse of D was to be used only for the purpose of explaining why S and A had delayed in their disclosures of the sexual abuse, and evidence that properly was admitted at trial could not be used for a purpose for which it was not admitted.

c. The prosecutor's improper remarks regarding the domestic abuse of D did not deprive the defendant of his right to a fair trial, as the jury's verdict would not have been different in the absence of the prosecutor's improper remarks:

The improper remarks were not frequent or severe, defense counsel did not object to the remarks, and they were counterbalanced by the trial court's instructions following closing arguments that evidence of the

defendant's abuse of D could be used only to explain why S and A had delayed in their disclosures of the sexual abuse.

Moreover, although the credibility of the witnesses was a central issue in the case and the remarks had some bearing on credibility, the defense, at least in part, invited the remarks, and the state's case, which included the testimony of T, S, and A, all of whom had experienced the defendant's sexual abuse, was not overshadowed by those improper remarks as to D, especially in view of the trial court's jury instructions.

Argued September 12—officially released December 6, 2022

Procedural History

Substitute information charging the defendant with three counts of the crime of sexual assault in the second degree, two counts each of the crimes of attempt to commit sexual assault in the first degree and risk of injury to a child, and one count of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Suarez*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Reversed in part*; *judgment directed.*

John R. Weikart, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Thadius L. Bochain, assistant state's attorney, with whom were *Russell Zentner*, senior assistant state's attorney, and, on the brief, *Michael A. Gailor*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Gary S., appeals[1] from the judgment of conviction, rendered after a jury trial, of two counts of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (2), one count of sexual assault in the first degree in violation of General Statutes § 53a-

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

70 (a) (2), three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (4), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction on certain counts, and (2) the prosecutor made improper remarks during closing and rebuttal arguments that deprived the defendant of his constitutional right to a fair trial. Because the state concedes that the evidence presented at trial was insufficient to support the defendant's conviction on the charge of risk of injury to a child pertaining to one of the complainants, A, we reverse the trial court's judgment with respect to that count. We reject each of the defendant's remaining claims and, accordingly, affirm the judgment of conviction in all other respects.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. In 1990, the defendant and his girlfriend, D, had a daughter, S. At that time, D also had two children from a previous relationship, a daughter, T, and a son, C. For most of that decade, the defendant, D, S, and C lived together in a three bedroom home located in Middletown. Although T resided with her grandmother, she would occasionally come to visit overnight. In 1993, D started working the "third shift" as a certified nurse assistant. As a result, the defendant was normally the only adult in the home from 11 p.m. to 7 a.m.

Evidence adduced during the course of the trial suggested that, between 1994 and 1996, the defendant sexually assaulted T more than ten times. T testified at trial that, during her overnight visits at the Middletown residence, the defendant would sometimes take her to the master bedroom, engage in vaginal intercourse with her, and then direct her not to tell anyone about it. At

that time, T was between the ages of eleven and thirteen years old.[2]

Subsequently, the defendant married D for the first time when S was approximately ten years old.[3] In 2001, C fathered his own daughter, A. C moved out of the Middletown residence shortly thereafter, leaving A to be raised by D. D testified at trial that, around this same time, she was working between forty and eighty hours per week at a hospital and left the defendant home alone with S and A.

In the summer of 2002, when S was twelve years old, the defendant forced her to have vaginal intercourse with him while they were alone in the basement of the Middletown residence. As he was having intercourse with her, the defendant said that her vagina was "his pussy" and that she "better not give it up to anybody." On another occasion that summer, the defendant attempted to have vaginal intercourse with S while A, then an infant, was present, but S was able to resist, leading the defendant to respond, "fuck you, bitch."[4]

Between the summer of 2002 and the end of December, 2006, the defendant forced S to have vaginal intercourse with him more than twenty times and to perform oral sex on him more than ten times, and he performed cunnilingus on S more than ten times. The last time

[2] The state did not ultimately bring any charges against the defendant related to his alleged sexual assault of T because the relevant statute of limitations had expired. The trial court admitted testimony from T about these assaults solely as evidence of the defendant's prior uncharged misconduct. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 463, 953 A.2d 45 (2008).

[3] As previously indicated, S was born in 1990.

[4] This incident of attempted sexual intercourse with S is the first incident relevant to the charges brought by the state against the defendant in connection with the defendant's assaults on S. In count four of the operative information, the state alleged that, "on an uncertain date in the summer of 2002," the defendant attempted to commit sexual assault, in violation of §§ 53a-49 (a) (2) and 53a-70 (a) (2). The state's eight count information will be discussed subsequently in this opinion.

the defendant had vaginal intercourse with S was in December, 2006, when she was sixteen years old. Each time the defendant sexually assaulted S during this period, no other adults were present in the house. The defendant usually would assault S inside the master bedroom with the door locked. Following these incidents of sexual abuse, the defendant often would threaten to kill S and D, if S told anyone what had happened. S took these threats seriously and feared the defendant. In addition, on numerous occasions when the defendant had vaginal intercourse with S during this period, he would continue to tell her that her "pussy was his" and that she "better not be giv[ing] it to anybody . . . ."

In 2007 or 2008, when A was six or seven years old, the defendant entered the master bedroom, which he shared with D, where A was watching television. The defendant then proceeded to pull his penis out of his pajama pants and attempted to force A to perform oral sex on him "by putting his hand on the back of [her] head . . . ." At trial, A testified that she "moved it," "kept saying no," and was ultimately able to resist his efforts. The defendant then undressed A and digitally penetrated her vagina. A testified that the defendant stopped only after he heard a knock at the front door of the residence. The defendant told A that he would kill her if she told anyone about what had happened. The defendant was the only adult at home during this incident, and this was the only time that the defendant sexually assaulted A. A testified that, when she was growing up, the defendant supervised her "[a]ll the time" while D was at work and that he played the role of a father. A also testified that the defendant was residing in the home when this particular assault against her took place.

D separated from, and eventually divorced, the defendant after separate incidents of domestic abuse.[5] D later

[5] S often witnessed the defendant abusing D. As we discuss subsequently

remarried the defendant in "secret" because he needed to obtain health insurance. When asked why she remarried the defendant despite the abuse, D testified that she could not explain why. During the second marriage, the defendant was still abusive, and the pair separated once again in 2011 or 2012.[6]

For years, S and A did not report what the defendant had done to them to anyone out of fear that he would harm them.[7] S also did not disclose the incidents to D because she thought D would not believe her. S indicated that D would always put men first before her own children. In March, 2017, S called T and revealed to her for the first time that the defendant had sexually assaulted her. T, in turn, told S that she also had been sexually assaulted by the defendant.

A few days after the conversation between S and T, T disclosed to D that the defendant had assaulted both her and S.[8] A was present at the time and told D and T that the defendant had also assaulted her in 2007 or 2008. This was the first time that A had told anyone about what the defendant had done to her. D then called the Middletown Police Department, which commenced a criminal investigation. Detective Derek Puorro obtained

in this opinion, evidence related to these incidents was admitted at trial for the limited purpose of explaining S's and A's delay in reporting the defendant's sexual assaults.

[6] The testimony at trial from S, D, and A conflicted as to the precise date on which the defendant was no longer residing in the Middletown residence. D's and A's testimony also conflicted as to the date when D and the defendant subsequently remarried. The testimony addressing these topics will be discussed in part I B of this opinion.

[7] At trial, S testified that she previously had disclosed the sexual abuse to a friend, E, and to C, but there was no evidence indicating that either of them had ever reported the information. At trial, E testified as to the disclosures of sexual abuse that S had made to her.

[8] T previously disclosed to D that she had been sexually assaulted by the defendant before D remarried him. D did not contact the authorities at that time because she was "afraid" of the repercussions she would face from the defendant.

statements from S, A, T, and D. S, A, and T were each interviewed separately by Puorro. No forensic evidence of the sexual assaults was obtained because of the amount of time that had passed between the assaults and disclosure.

Following his arrest, the state charged the defendant, in a third substitute information, with eight counts. Counts one through three pertain to the defendant's assault on A, while counts four through eight pertain to the defendant's assaults on S. As to the assaults on A, the state charged that, "on an uncertain date between December 31, 2007, and December 31, 2009," the defendant attempted to commit sexual assault in the first degree, namely, attempted fellatio, in violation of §§ 53a-49 (a) (2) and 53a-70 (a) (2) (count one); sexual assault in the first degree, namely, digital vaginal penetration, in violation of § 53a-70 (a) (2) (count two); and risk of injury to a child, namely, subjecting A to contact with the defendant's intimate parts, in violation of § 53-21 (a) (2) (count three).

As to S, the state charged the defendant with one count of attempt to commit sexual assault in the first degree in violation of §§ 53a-49 (a) (2) and 53a-70 (a) (2), alleging attempted vaginal intercourse on "an uncertain date in the summer of 2002" (count four); three counts of sexual assault in the second degree in violation of § 53a-71 (a) (4), alleging vaginal intercourse (count five), fellatio (count six), and cunnilingus (count seven) on "uncertain dates between March 30, 2003, and December 31, 2006"; and one count of risk of injury to a child in violation of § 53-21 (a) (2), alleging that the defendant had caused S to come in contact with his intimate parts on "uncertain dates between March 30, 2003, and December 31, 2006" (count eight).

After the state rested its case, the defendant moved for a judgment of acquittal as to all eight counts of the

state's information, arguing that the evidence presented was insufficient to support a conviction. The trial court denied the motion, and the defense rested its case without presenting any evidence. The jury found the defendant guilty on all eight counts. The defendant then filed a motion for a judgment of acquittal as to counts five, six, and seven on the basis that the state had failed to establish that the defendant was S's "guardian" or "otherwise responsible for the general supervision of [S's] welfare" between the period of March 30, 2003, and December 31, 2006. (Internal quotation marks omitted.) The trial court denied the motion, concluding that "the jury could reasonably infer that, at the time of the alleged sexual assault, the defendant was [S's] guardian and/or responsible for her general supervision." The trial court sentenced the defendant to a term of thirty years of imprisonment, with five years of special parole.[9] This direct appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to support his conviction of risk of injury to a child relating to A and his convictions of sexual assault in the second degree relating to S. For the reasons that follow, we accept the state's concession that the evidence was insufficient to support the defendant's conviction of risk of injury to a child pertaining to A, as charged in count three of the state's information, but we conclude that the state's evidence was sufficient to support the defendant's convictions of sexual assault

[9] For the crimes against A alleged in counts one, two and three, the trial court imposed three concurrent sentences of fifteen years of imprisonment and five years of special parole, with special conditions. For the crimes against S alleged in counts four, five, six, seven, and eight, the trial court imposed four sentences of fifteen years of imprisonment, to be served concurrently with one another but consecutively to the sentences imposed on counts one, two, and three.

in the second degree pertaining to S, as charged in counts five, six, and seven of the information.

The standard of review applicable to both of these claims is well established. "When reviewing a sufficiency of the evidence claim, we do not attempt to weigh the credibility of the evidence offered at trial, nor do we purport to substitute our judgment for that of the jury. . . . [W]e construe the evidence in the light most favorable to sustaining the verdict. . . . We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty. . . . When a claim of insufficient evidence turns on the appropriate interpretation of a statute, our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 755, 250 A.3d 648 (2020). We consider the defendant's claims of insufficiency of the evidence in turn.

A

The defendant first claims that the evidence presented in connection with the charge of risk of injury to a child pertaining to A, in violation of § 53-21 (a) (2),[10] as charged in count three of the state's information,

[10] General Statutes § 53-21 (a) (2) provides in relevant part that a person is guilty of risk of injury to a child when that person "has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ."

We note that § 53-21 was amended by No. 13-297, § 1, of the 2013 Public Acts and No. 15-205, § 11, of the 2015 Public Acts. Those amendments made certain changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

was insufficient to support his conviction because there was no evidence that A had contact with the defendant's "intimate parts." In particular, the defendant argues that, because A testified that, on one occasion, she successfully resisted the defendant's efforts to force her to perform fellatio on him, there was no evidence that she came in contact with the defendant's genital area during that incident. The state concedes that the evidence presented during the trial on this count was insufficient in this regard. Accordingly, we accept the state's concession, reverse the defendant's conviction as to that charge, and remand the case to the trial court with direction to render a judgment of acquittal as to count three.

B

The defendant next claims that the evidence presented in connection with the charges of sexual assault in the second degree, relating to S, in violation of § 53a-71 (a) (4), as charged in counts five, six, and seven of the state's information, was insufficient to support his convictions on those counts. Specifically, he contends that he was not responsible for S's "general supervision," as required under the charged portion of the statute, between the period of March 30, 2003, and December 31, 2006.

The following additional facts are relevant to this claim. At trial, the state called multiple witnesses to testify, including S, D, and A. There was conflicting testimony from S and D as to whether the defendant was living in the Middletown residence when the sexual assaults on S took place between March 30, 2003, and December 31, 2006, the period relevant to counts five, six, and seven of the state's information. On direct examination, after describing the incidents of sexual assault that occurred after the summer of 2002, S indicated that, at some point, the defendant and D sepa-

rated, and the defendant moved out of the residence. S testified that, after this separation, the defendant would continue to reside in the residence periodically. She testified that the assaults would stop when the defendant did not live with them but would resume when he moved back in.[11] S also testified that she would stay outside "all day" or go to her grandmother's house to avoid the defendant. On cross-examination, S testified that, although she resided at the Middletown residence until 2017, the defendant only lived there for "some of those years," "[f]rom, like, 1996 to 2006 . . . maybe."

[11] The following colloquy occurred between the prosecutor and S during direct examination:

"Q. Did these incidents [of sexual assault] eventually end or stop for you? Did [the defendant] eventually stop doing this? And, if so, why?

"A. It did when he—when he moved out.

"Q. When he moved out?

"A. Yes.

"Q. Were there ever times when he had left the house and then come back?

"A. Yes.

"Q. Okay. And why was that? Why did he leave and then come back, do you know?

"A. Him and mom split apart. Then, they got back together.

"Q. There were times when they would split apart and then they would come back together?

"A. Yes.

"Q. And, when the times that he was out of the house, did any of the incidents happen then?

"A. No.

"Q. When he would move back in, what would happen with regard to these incidents?

"A. It would start up again.

"Q. Okay. And he would . . . do the same things that you mentioned?

"A. Yes.

"Q. Just so the record is clear, he would—he would do vaginal intercourse with you?

"A. Yes.

"Q. And, then, he would perform oral sex on you?

"A. Yes.

"Q. And, then, you would have to do it on him?

"A. Yes."

Subsequently, S testified that the last time the defendant had sexually assaulted her was in the master bedroom around "[t]he end of 2006."

D's recollection did not follow the same chronology as S's with respect to the defendant's presence in the household. D testified that she and the defendant separated in 2003 or 2004, and that the defendant was no longer living with them or watching S or A while D was at work. D could not remember when she and the defendant formally divorced after their first marriage but thought that the defendant did not resume living in the Middletown residence until after their remarriage in 2010 or 2011. D testified that she and the defendant then separated for a second time in 2011 or 2012, due to the continued physical and verbal abuse she experienced, and that the defendant again moved out of the residence at that time. D testified, however, that her memory for dates is adversely affected because she "block[s] [traumatic] stuff out" and "[t]hat's how [she] cope[s]." D's testimony also conflicted with the testimony of A, who testified that the defendant was residing in the residence when he sexually assaulted her in 2007 or 2008, until "[m]aybe a few years after," and that the defendant and D remarried before the end of 2007.

The defendant contends that, because the state was unable to prove that he was a permanent fixture in the Middletown residence from the relevant period of March 30, 2003, to December 31, 2006, when it is alleged that he sexually assaulted S, he cannot be held criminally responsible under § 53a-71 (a) (4). The defendant argues that, on the basis of the evidence presented at trial, the jury reasonably could have concluded only that he was acting as a mere "babysitter" to S during the relevant period and that such a person falls outside the class of persons that can be held liable under § 53a-71 (a) (4). We disagree with the defendant's assertion that he was acting as a mere "babysitter" to S.

Section 53a-71 (a)[12] provides in relevant part: "A person is guilty of sexual assault in the second degree

[12] We note that, although § 53a-71 has been amended by the legislature several times since the events underlying the present case; see, e.g., Public

when such person engages in sexual intercourse with another person and . . . (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare . . . ."[13] In counts five, six, and seven of the information, the state charged that the defendant committed sexual assault in the second degree while he was responsible for S's general supervision.[14]

The defendant argues that his convictions cannot be sustained under our holding in *State* v. *Burney*, 189 Conn. 321, 455 A.2d 1335 (1983). In that case, this court held that "the proximity of the words 'or otherwise responsible for' to the word 'guardian' [in § 53a-71 (a)] indicates that the legislature intended the categories to be roughly equivalent, with the obligations and degree of control of the actor over the child . . . to be similar to those of legal guardianship." Id., 327. The complain-

Acts 2013, No. 13-47, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[13] Section 53a-71 (a) (4) is derived from § 213.3 of the Model Penal Code, which, in turn, was drafted to reach "one kind of illegitimate use of authority to gain sexual gratification" and "illicit intercourse achieved by misuse of a position of authority or control." 2 A.L.I., Model Penal Code and Commentaries (1980) § 213.3, comment 3, p. 387. The official commentary to the Model Penal Code cites the relationship between a stepparent and a stepchild as "a frequent instance of sexual imposition within the family unit," and also emphasizes that "probation officers, camp supervisors, and the like" are individuals who ultimately have responsibility for the general supervision of a child's welfare. Id.

[14] By law, both biological parents of a child are legally the child's guardian, unless removed as such. See, e.g., General Statutes § 45a-606 ("The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor shall be equal. If either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor.") However, because the state did not charge the defendant as a guardian under § 53a-71 (a) (4), our analysis and conclusion in this appeal rest solely on whether the defendant was responsible for the general supervision of S during the relevant period.

ant in *Burney* had left Hartford with the defendant for a trip to New York. Id., 323. The defendant drove the complainant as far as New Haven, where he obtained a motel room and proceeded to have vaginal intercourse with her. Id. Afterward, the defendant and the complainant returned to the defendant's home in Hartford, where the complainant had been living for one and one-half months. Id. When they returned to the defendant's home, the complainant received a message that her mother wanted her to return home. Id. Once she returned home, the complainant told her mother what had happened, and the two of them went to the police station to file a complaint. Id.

We concluded that the terms "responsible for" and "general supervision," as used in § 53a-71 (a) (4),[15] were ambiguous. (Internal quotation marks omitted.) Id., 325. Relying on traditional principles of statutory construction, we held that, "[although] it is clear that a judicial decree is not necessary in order to become responsible for the general supervision of a minor under [the statute], neither is the mere assumption by a third person of the temporary care of a minor enough to bring that third party within the class of persons to whom the statute applies."[16] Id., 326. In determining that the evidence was insufficient to establish that the defendant was responsible for the complainant's general supervision at the time of the assault, we considered whether the mother had intended to relinquish responsibility for the supervision and control of the complainant to the defendant. Id., 328. Specifically, we observed that "[t]here [was] no evidence that responsibility for the complain-

[15] When this court decided *Burney*, subdivision (4) of § 53a-71 (a) was subdivision (3). In 1983, the legislature renumbered subdivision (3) as subdivision (4). See Public Acts 1983, No. 83-326, §1.

[16] Although there was some evidence to support the conclusion that the defendant in *Burney* was, in fact, the biological father of the complainant, her birth certificate listed another man as the father. See *State* v. *Burney*, supra, 189 Conn. 323–24.

ant's welfare had been vested in the defendant by court order or award, nor [was] there any evidence that the . . . mother had intended to relinquish responsibility for the supervision of [the complainant's] welfare to the defendant. Instead, the . . . mother testified that she had placed a call to the defendant's home leaving instructions for [the complainant] to come home." Id.

The present case is readily distinguishable from *Burney*, in which this court held that a putative father whose paternity had never been legally established; id., 323–24; has no responsibility for the welfare of his purported child under § 53a-71 (a) (4)[17] unless the child's mother bestows it on him.[18] Id., 328. Here, unlike in *Burney*, it is undisputed that the defendant is S's biological father. In addition, as discussed previously, the jury heard testimony from S that, from the summer of 2002 to the last incident of vaginal intercourse in December, 2006, the defendant sexually assaulted her on numerous occasions. S testified that the defendant resided in the Middletown residence from 1996 to 2006 and that, each time the defendant sexually assaulted her after the summer of 2002, he was residing in the residence. S indicated that the incidents would stop when the defendant moved out but would resume when he moved back in. The jury also heard testimony that these incidents of abuse occurred when D was working and that the defendant was the only adult in the home at the time. On

[17] See footnote 15 of this opinion.

[18] We recognize that this court placed great emphasis on the mother's decision not to transfer supervision of her child to the defendant in *Burney*; see *State* v. *Burney*, supra, 189 Conn. 328; but the mother's intention to relinquish control is not necessarily dispositive. It is only one factor, among a multitude of others, that courts in this state have considered. See, e.g., *State* v. *Richard S.*, 143 Conn. App. 596, 604–605, 70 A.3d 1110 (considering defendant's parent-child relationship with victim in concluding that there was sufficient evidence to find guilt under § 53a-71 (a) (4)), cert. denied, 310 Conn. 912, 76 A.3d 628 (2013). We add here the obvious fact that a biological mother is not solely responsible for the care and supervision of a child, to the exclusion of a biological father. See footnote 14 of this opinion.

the basis of this evidence, viewed in a light most favorable to sustaining the verdict, the jury reasonably could have concluded that the defendant, a biological father who resided with and was caring for his own daughter, was exercising sufficient authority and control over S to fall within the ambit of § 53a-71 (a) (4).[19]

Although S's and D's testimony conflicted as to when the defendant was living at the Middletown residence, the jury was free to resolve inconsistencies by crediting S and A's combined testimony over D's admittedly dubious recollection. See *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony" (internal quotation marks omitted)). It was especially reasonable for the jury to conclude that S was more credible than D on the issue considering that D testified that she had a difficult time recalling dates due to trauma and that D's testimony also conflicted with the accounts that S and A had provided. D testified that the defendant moved out of the residence in 2003 or 2004, after she and the defendant first separated, but that the defendant did not resume living in the home until their remarriage in 2010 or 2011. S testified that the defendant was residing in the residence whenever he assaulted her after the summer of 2002 to the last incident of abuse at the end of 2006, and A testified that D and the defendant remarried before the end of 2007, and that the defendant was, in fact, residing in the home in 2007 or 2008.

[19] The present case does not require us to reconsider our suggestion in *Burney* that being responsible for the general supervision of a child is equivalent to legal guardianship; see *State* v. *Burney*, supra, 189 Conn. 327; but we do question that gloss in light of the very large number of children placed under the supervision of adults—relatives, foster parents, daycare and other childcare providers, and the like—whose status, although not akin to that of a legal guardian, makes them "responsible for the general supervision of [a child's] welfare" within the meaning of § 53a-71 (a) (4).

Accordingly, after reviewing the evidence in a light most favorable to sustaining the jury's verdict and the circumstances surrounding the incidents of abuse that took place between the period of March 30, 2003, and December 31, 2006,[20] we conclude that there was sufficient evidence presented at trial from which the jury reasonably could have concluded that the defendant, a father who was cohabitating with S and was the only adult at home responsible for her care while D was working, was exercising general supervision over S's welfare during the time period relevant to the charges of sexual assault in the second degree, as set forth in counts five, six, and seven of the state's information.[21]

II

We next address the defendant's claim that the prosecutor made improper remarks during closing and rebut-

[20] We likewise reject the defendant's argument that the state must specify the dates when the defendant assaulted S. See *State* v. *Stephen J. R.*, 309 Conn. 586, 601, 72 A.3d 379 (2013) ("[t]o require [a child victim] . . . to recall specific dates or additional distinguishing features of each incident would unfairly favor the defendant for the commission of repetitive crimes against a child victim"). The state has presented sufficient evidence from which a jury could conclude that each time S was sexually assaulted between March 30, 2003, and December 31, 2006, the defendant was an individual responsible for the general supervision of S.

[21] Contrary to the defendant's assertion, this conclusion also does not conflict with our holding in *State* v. *Snook*, 210 Conn. 244, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). In that case, the issue centered on whether the defendant, as a biological parent of the victim, could be subject to prosecution under § 53a-71 (a) (4). Id., 266. We held that biological parents are not exempt from prosecution under subsection (a) (4), as long as they are either the victim's legal guardian or responsible for the general supervision of the victim's welfare. Id., 267–68; see also *State* v. *Richard S.*, 143 Conn. App. 596, 604–605, 70 A.3d 1110 (defendant was responsible for victim's care and general supervision when defendant, as biological parent, provided victim with food, shelter, and transportation, and cultivated parent-child relationship, and victim had been residing with defendant for one month at time of sexual assault), cert. denied, 310 Conn. 912, 76 A.3d 628 (2013). In the present case, we find that the defendant, as S's biological parent, falls within the "general supervision" category under § 53a-71 (a) (4).

tal arguments, in violation of the defendant's constitutional right to a fair trial. The defendant argues that (1) certain remarks by the prosecutor improperly appealed to the jurors' passions, emotions, and prejudices, and (2) certain other remarks constituted unsworn testimony and improperly vouched for the credibility of witnesses. Although we agree with the defendant that some of the prosecutor's remarks were improper, after applying the factors in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), we conclude that those improprieties were harmless.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of a constitutionally protected right. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Citation omitted; internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 340, 260 A.3d 1152 (2021).

"It is well established that prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or

diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider." (Internal quotation marks omitted.) Id., 341–42. We address the defendant's claims of impropriety in turn.

A

The defendant first claims that the prosecutor improperly appealed to the jurors' emotions by emphasizing in his closing and rebuttal arguments certain comments that the defendant had made in the course of sexually assaulting S. We conclude that those remarks did not improperly appeal to the jurors' emotions.

The following additional facts are relevant to this claim. During his closing argument, when describing the incidents of sexual assault on S between March 30, 2003, and December 31, 2006, the prosecutor stated: "[The defendant] says—again, I apologize, but this is the testimony. He says the most vulgar, upsetting things. He says it during these acts. Whose pussy is this? She doesn't answer him. Don't give your pussy to anyone. This is a biological father talking [in] this way to his daughter." During his rebuttal argument, the prosecutor further stated: "There was never a motive established, again, through the cross-examination of any of these people what motive they may have had to come into court and testify, particularly [S] who took the brunt of this, as I've said several times now, and the defendant

uttering the most vulgar and disgusting things to her while this is going on, this is—whose pussy is this, have you—don't give it up to anybody else, [and] have you had sex with anyone else." While describing the incident that took place in the summer of 2002, when S was able to fight off the defendant, the prosecutor stated: "But she's able to successfully fight him off and he—he gets so angry and so frustrated, he says, well, fuck you, bitch. This is how he talks to a twelve year old, his own biological daughter."

The defendant argues that the prosecutor's references to the defendant's language were irrelevant to the offenses with which he was charged, and, accordingly, the only possible reason for the prosecutor to mention such language was to appeal to the jurors' emotions, passions, and prejudices. The defendant further argues that the prosecutor's commentary that the defendant uttered "the most vulgar, upsetting things" and "the most vulgar and disgusting things," and that "[t]his is how [the defendant] talks to a twelve year old, his own biological daughter," was irrelevant and an improper personal attack on the defendant.

Our case law establishes that "[a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . Therefore, a prosecutor may argue the state's case forcefully, [but] such argument must be fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 719, 793 A.2d 226 (2002).

Not only were the remarks in this case based on the evidence presented at trial, to which defense counsel

posed no objection, but they also were relevant to the charges brought by the state. The prosecutor's remark that, during the incident in the summer of 2002, "[the defendant] gets so angry and so frustrated, he says, well, fuck you, bitch" is relevant to count four, the state's charge of attempted sexual assault of S during "an uncertain date in the summer of 2002," because it illustrates that the defendant had an intent to sexually assault S and became so frustrated that he addressed his own daughter in vulgar language when he was unsuccessful. Similarly, the prosecutor's reference to the defendant's comments regarding S's "pussy" while having vaginal intercourse with her is relevant to count five, charging sexual assault in the second degree, because it illustrates that the defendant and S engaged in sexual intercourse.[22] This reference is also relevant to count eight, charging risk of injury to a child, because it illustrates that the defendant caused S to have contact with his intimate parts in a sexual and indecent manner that was likely to impair her morals.[23]

In addition, the defendant's comments that S should not give her "pussy" to anyone but him are of a threatening nature and support the state's theory that S delayed in her disclosure of the sexual abuse because she was afraid of the defendant. In fact, all of the prosecutor's references support the state's theory that S also delayed in her disclosure because of the embarrassing nature of the incidents. See *State* v. *Felix R.*, 319 Conn. 1, 11, 124 A.3d 871 (2015) (prosecutor's remarks were proper when, "[a]lthough the underlying crime was, by its nature, inherently charged with emotion, the prosecutor . . . was summarizing evidence that supported [the

[22] "Sexual intercourse" is defined as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex." General Statutes § 53a-65 (2).

[23] The term "intimate parts" is defined as "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts." General Statutes § 53a-65 (8).

state's] theory of the case") Accordingly, contrary to the defendant's assertion, the prosecutor was not appealing to the jurors' emotions when he made those remarks; the defendant's vulgar statements had significant evidentiary value.

Likewise, we disagree with the defendant that the prosecutor's characterization of the defendant's comments as "vulgar" and "disgusting," and the prosecutor's remark that "[t]his is how he talks to a twelve year old, his own biological daughter," amounted to an impermissible personal attack on the defendant. We conclude that the prosecutor's commentary, which was based on S's testimony, was not so gratuitous, crudely phrased, or inflammatory as to rise to the level of an improper personal attack. But cf. *State* v. *Singh*, supra, 259 Conn. 721 n.27 (prosecutor's remark that "[the defendant] acted innocent the whole time . . . but I submit to you that that shows the same kind of arrogance that you saw here" was improper personal attack on defendant that was unsupported by evidence (emphasis omitted; internal quotation marks omitted)); *State* v. *Williams*, supra, 204 Conn. 546 (prosecutor's remarks during closing argument that defendant was, among other epithets, "child-beater," "baby-beater," "evil man," and "drunken bum," were improper personal attacks on defendant (internal quotation marks omitted)).

B

The defendant next claims that certain of the prosecutor's remarks constituted unsworn testimony and improperly vouched for the credibility of the state's witnesses. We conclude that some of the challenged remarks, but not all, were improper.

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the

facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 717. Although prosecutors may not express opinions as to a witness' credibility, "[i]t is not improper for [a] prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the [jurors] the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. [A prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 465–66, 832 A.2d 626 (2003). A prosecutor may also comment on a witness' testimonial demeanor, as "a witness' demeanor while testifying is visible to the jurors and properly before them as evidence of . . . credibility." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 356.

The defendant first claims that the prosecutor's remark that "[t]his isn't a case of let's get together and get our stories straight and make this up," was improper because the prosecutor vouched for the credibility of the state's witnesses. During his rebuttal argument, the prosecutor stated: "Let's look at how this came about as well, none of these girls who testified, [T], [S], [A], who are all related to each other, discussed with each other what happened. This isn't a case of let's get together and get our stories straight and make this up. That was not the case." The defendant argues that the

challenged remark amounted to unsworn testimony. We are unpersuaded.

The prosecutor's remark was based on evidence presented at trial, and he argued an inference that the jury might draw therefrom. T, S, and A all testified as to how the disclosures came about. As we noted previously, S testified that the first time she told T about the incident was in March, 2017. During that conversation, T revealed to S that the defendant also had sexually assaulted her. A few days later, with S not present, T told D about the assaults on both her and S, and A, who was present at the time, then revealed what had happened to her. There was no evidence presented that T, S, and A had conversations to conspire against the defendant prior to this chain of disclosures in 2017. Accordingly, the jury reasonably could have inferred, on the basis of this evidence, that T, S, and A had not coordinated the numerous accusations of sexual abuse that they ultimately levied against the defendant in March, 2017, out of some conspiratorial vengeance. See *State* v. *Stevenson*, 269 Conn. 563, 584, 849 A.2d 626 (2004) (prosecutor's comment "posited a reasonable inference that the jury itself could have drawn without access to the [prosecutor's] personal knowledge of the case").[24]

[24] Although the defendant argues that the prosecutor was improperly referring to the chain of disclosures that initially occurred in 2017, he also argues that the prosecutor's remark could have been an improper reference to the witnesses' preparations for trial. We disagree with this argument as well. First, after making that remark, the prosecutor immediately proceeded to discuss the specific chain of disclosures that occurred in March, 2017. Read in context, it is clear that the prosecutor was asking the jury to infer that T, A, and S did not "get together" prior to their disclosures in 2017. Second, even if some ambiguity remained with respect to that issue, we would not simply assume that such an improper form of argument was intended. See, e.g., *State* v. *Luster*, 279 Conn. 414, 441, 902 A.2d 636 (2006) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations" (internal quotation marks omitted)).

We also reject the defendant's contention that the prosecutor improperly relied on constancy of accusation evidence when making this remark.[25] In his closing argument, defense counsel attacked the state's case, in part, due to S's and A's delayed reporting of the sexual abuse. In response, the prosecutor appeared to use evidence of out-of-court statements, not for its substance, but, in accordance with the trial court's instruction, only "to negate any inference that [A] and [S] failed to tell anyone about the sexual [abuse] and, therefore, that [A's] and [S's] later assertion[s] could not be believed."[26]

The defendant next claims that the prosecutor's remark regarding S's "flat affect" while testifying was improper because it usurped the jury's role in judging S's credibility. During trial, the state called Catherine Lewis, a forensic psychiatrist, as an expert witness to testify regarding the effects of child sexual abuse on victims and the reasons for victims' delays in disclosing their experiences. While discussing the external expressions of trauma victims, Lewis noted that individuals who experience trauma can be "very flat." Specifically, Lewis testified: "So, what we do see, though, is less ability—you know, we see less ability to have normal—

[25] The defendant argues that the prosecutor improperly used evidence regarding S's and A's out-of-court statements about the incidents of sexual assault, which was admitted by the trial court under the constancy of accusation exception for prior consistent statements, for its substance.

[26] The state claims that the defendant's argument that the prosecutor violated the trial court's instruction regarding constancy of accusation evidence is an improper new claim raised for the first time in the defendant's reply brief. We disagree. The defendant does not cite new instances of impropriety in his reply brief. Instead, he raises a new argument in support of a preexisting claim of impropriety. See *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 197, 982 A.2d 260 (2009) ("[a]lthough the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely *new claim of error*" (emphasis added; internal quotation marks omitted)).

for example, normal affect, and that's, like, the external expression of emotional. So, traumatized people can be very flat. You know, they can be talking to you about very horrible things and just no emotion." Lewis had no familiarity with the case or the parties when she testified during the trial. At the conclusion of his closing argument, the prosecutor commented: "I think it's fair to say, if you saw [S] testify, she had, you can infer, sort of a flat affect, if you watched her demeanor and the inflection in her voice and things of that nature."

The defendant argues that the prosecutor unduly influenced the jury by commenting on S's demeanor and linking it to Lewis' testimony. We disagree. The prosecutor called on the jury to draw a reasonable inference from the evidence presented at trial, including S's testimonial demeanor and Lewis' testimony on the effects of trauma, that S's demeanor and inflection were consistent with the demeanor of individuals who have experienced trauma. See *State* v. *Courtney G.*, supra, 339 Conn. 355–56 (concluding that it was not improper for prosecutor to comment on witness' testimonial demeanor and to argue inferences to be drawn from facts in evidence). We find unavailing the defendant's argument that this is a matter requiring the jury to have special expertise, akin to that of making a psychiatric diagnosis.[27]

[27] The defendant further argues that this was an improper comment on the defendant's guilt. We are unpersuaded. The prosecutor's comment did not rise to the level of an improper opinion on the defendant's guilt, such as those that this court has previously condemned. See, e.g., *State* v. *Singh*, supra, 259 Conn. 721–22 n.27; see also *State* v. *Whipper*, 258 Conn. 229, 270, 780 A.2d 53 (2001) (prosecutor's remarks that "[t]his is an overwhelming case of guilt . . . [the defendant] over there is guilty beyond all doubt" was improper personal opinion by prosecutor regarding defendant's guilt (internal quotation marks omitted)), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004), and *State* v. *Grant*, 286 Conn. 499, 535, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008).

The defendant's final claim relates to the prosecutor's remarks during closing and rebuttal arguments that D could not explain why she remarried the defendant because she was exposed to trauma and is a victim of domestic violence. During closing argument, the prosecutor stated: "You know, using, again, your common sense and experience, if she's physically abused for years and all this, I think it's consistent to say [D] may be someone—considered as someone who has been exposed to much domestic violence or abuse for many years, things you can't explain. She says that she tends to black out traumatic stuff. This is how—maybe that's how she copes with it. Many people deal with something that traumatic and that pervasive over a long period of time." During his rebuttal argument, the prosecutor reiterated: "[D] can't explain why she married [the defendant] a second time. Again, emotionally none of us may ever understand this, maybe even intellectually, none of us may ever understand. But that's what happened, because I would submit, using your common sense and experience, she may be consistent with someone who is a classic domestic violence victim."

The defendant argues that the prosecutor's remarks ignored the trial court's express instruction to the jury, after granting a motion in limine, that the evidence of the defendant's abuse toward D was for a limited purpose: to explain why S and A had delayed in their disclosures of the sexual abuse.[28] We agree. Although a prosecutor has significant leeway in closing argument, evidence that properly was admitted at trial "may not be used for a purpose for which it was not admitted." *State* v. *Camacho*, 282 Conn. 328, 377, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273

[28] The state claims that the defendant's argument that the prosecutor violated the trial court's limiting instruction is also an improper new claim raised for the first time in a reply brief. We again disagree. See footnote 26 of this opinion.

(2007). In the present case, the trial court admitted the prior misconduct of the defendant as it relates to D for the limited purpose of explaining why S and A had delayed in their disclosures of the sexual abuse that they experienced. The trial court instructed the parties that the evidence was not to be used for other purposes. As such, the prosecutor's remarks, which tie the defendant's misconduct to D's decision to remarry the defendant and her inability to explain why she did so, were improper because they violated the trial court's limiting instruction.[29]

C

Having determined that some of the prosecutor's remarks were improper, we now consider whether those specific remarks deprived the defendant of his due process right to a fair trial. In deciding whether an impropriety deprived the defendant of a fair trial, this court considers whether "(1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak due to a lack of physical evidence." *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007), citing *State* v. *Williams*, supra, 204 Conn. 540. We must ultimately determine if the prosecutorial improprieties "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process . . . ." *State* v. *Fauci*, supra, 26 n.2.

The prosecutor's remarks were not frequent or severe. During his lengthy closing argument, the prose-

[29] The defendant also claims that the prosecutor's remarks constitute unsworn testimony because they are not based on reasonable inferences drawn from the evidence. Having already concluded that the prosecutor's remarks on this topic were improper, we need not reach this particular claim.

cutor briefly insinuated that D could not explain her remarriage to the defendant because she was exposed to domestic abuse. During his rebuttal argument, the prosecutor then made a separate, isolated comment that D is a "classic domestic violence victim." See, e.g., *State* v. *Payne*, 303 Conn. 538, 567, 34 A.3d 370 (2012) (defendant's due process rights were not violated when prosecutor's statements were isolated and occurred within lengthy closing argument).

In addition, when evaluating severity, "we take into consideration whether defense counsel object[ed] to any of the improper remarks, request[ed] curative instructions, or move[d] for a mistrial." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 398, 897 A.2d 569 (2006). Defense counsel did not object to the prosecutor's misuse of the defendant's prior misconduct as it relates to D, a choice that "demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 449, 64 A.3d 91 (2013). The improper remarks were also counterbalanced by the trial court's instructions following closing arguments. At the conclusion of the trial, the trial court clearly and unequivocally instructed the jury that the evidence of the defendant's abuse toward D could only be used to explain why the victims had delayed their disclosures. See *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003) ("[i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions" (internal quotation marks omitted)).[30] As such, we con-

[30] After closing arguments concluded, the trial court instructed the jury as follows: "[T]he state offered evidence of the defendant's allegedly being physically abusive toward [D]. This evidence was admitted for a limited purpose only. The evidence is not being admitted to prove any bad character, propensity, or criminal tendencies of the defendant. Such evidence, if you believe it, is being admitted solely to explain why the alleged victims delayed in the responding of the alleged sexual abuse." The trial court gave an almost

clude that the remarks were not so severe as to rise to the level of egregious conduct and were adequately addressed by the trial court's limiting instructions.[31]

We next consider whether the prosecutorial improprieties were central to critical issues in the case and whether the improprieties were invited by the defense. Although the credibility of the witnesses was a central issue and the remarks had some bearing on credibility, the defendant's reliance on centrality is counterbalanced by the fact that the defense, at least in part, invited the remarks. During closing argument, defense counsel argued that the state's case was weak because D had remarried the defendant and "the dates that [D gave did] not square with the dates that are charged and . . . the testimony of [S] and [A]." The prosecutor's remark in his rebuttal argument, although improper, appeared to be a response to defense counsel's argument that D's remarriage to the defendant and her recollection of dates that contradicted some of the dates provided by S and A, in turn, weakened S's and A's credibility.

Finally, we consider whether the state's case was strong. "[T]he sexual abuse of children is a crime [that], by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given

identical jury instruction after S testified to the incidents of domestic abuse against D that she had witnessed.

[31] In addition, the defendant's argument that the remarks regarding domestic violence amounted to the prosecutor's injecting his own views as to the credibility of witnesses is further counterbalanced by the court's jury instruction after closing arguments. The court stated: "You should also keep in mind that arguments and statements by the attorneys and final arguments or during the course of the case are not evidence. You should not consider as evidence their recollection of the facts, nor their personal beliefs as to any facts or as to the credibility of any witness, nor any facts that any attorney may have presented to you in argument from the attorney's knowledge that was not presented to you as evidence during the course of the trial."

the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . . [W]e have 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 365–66.

In the present case, although there was no forensic evidence collected, the state presented numerous witnesses during trial. The jury heard testimony from S and A, who described in detail the assaults to which the defendant had subjected them. In addition, S, when testifying, provided the jury with an explanation it reasonably could have inferred was the reason for D's remarriage to the defendant and the resulting delay in S's disclosure—D always put men first before her children. The jury also heard testimony from T, who established the defendant's propensity to commit similar crimes of a sexual nature against other children in his family, and from E, a friend to whom S had disclosed the sexual abuse in the past. See footnote 7 of this opinion. Although the prosecutor's improper remarks related to D's credibility, the state's case, which included the testimony of S, A, and T, all three of whom had experienced the defendant's sexual abuse, was not overshadowed by those improper remarks as to D, especially considering the trial court's jury instructions. On this record, we are confident that the jury's verdict would not have been different in the absence of the prosecutor's improper use of the defendant's prior misconduct. See *State* v. *Warholic*, supra, 278 Conn. 396 (whether defendant is ultimately prejudiced "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" (internal quotation marks omitted)).

The judgment is reversed only with respect to count three of the information and the case is remanded with direction to render a judgment of acquittal on that count and to resentence the defendant on the remaining counts of conviction; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.