STATE OF CONNECTICUT *v.* JOHN BOLTON
(SC 20856)

Mullins, C. J., and McDonald, D'Auria, Ecker, Alexander, Dannehy and Bright, Js.

Syllabus

Convicted of murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. After the jury foreperson announced that the jury had reached a verdict and the jurors collectively confirmed their guilty verdict, defense counsel asked that the jurors be polled individually. The first five jurors of the twelve person jury confirmed the verdict, but the sixth juror, S.C., expressed equivocation and disagreement with the guilty verdict. At that point, the court stopped polling the jurors and excused the jurors in order to consult with counsel. The court ultimately directed the jurors to resume deliberations, and, subsequently, the jurors returned a unanimous guilty verdict. The defendant claimed, inter alia, that the trial court had abused its discretion when it denied his motion for a mistrial following the court's decision to stop polling the jurors and to direct them to resume deliberations after polling S.C. *Held*:

The trial court did not abuse its discretion in denying the defendant's motion for a mistrial, as the record revealed that there was no impermissible coercion of S.C.

The circumstances of this case were not indicative of potential coercion beyond the pressure inherent in the ordinary process of reaching a unanimous jury verdict, and, without other evidence indicating coercion, such as misconduct or other negative reaction by the other jurors to S.C.'s dissent, the fact that S.C. expressed equivocation or disagreement with the verdict relatively early in the poll, took a break to relieve tensions, and then returned

to deliberate with her fellow jurors without incident demonstrated that S.C. had not abandoned her honest conviction in ultimately voting to find the defendant guilty.

Moreover, on the basis of the circumstances before it, and after soliciting input from counsel, the trial court opted for a minimal and neutral course of action in order to allow the deliberation process to continue, and, although it would have been within the court's discretion to give a Chip Smith charge, encouraging jurors to reach a unanimous verdict, it was not necessary to do so.

The defendant could not prevail on his unpreserved claim that the final verdict violated the constitutional requirement that a jury verdict be both unanimous and free from coercion on the ground that there was an unacceptable risk that S.C. had been coerced into assenting to a guilty verdict, as the alleged constitutional violation did not occur or deprive the defendant of a fair trial, and, therefore, the defendant's claim failed under the third prong of *State* v. *Golding* (213 Conn. 233), as modified by *In re Yasiel R.* (317 Conn. 773).

There was no evidence in the record indicating that S.C.'s decision with respect to the jury's verdict was the product of coercion, the trial court's decision to direct the jurors to resume the deliberation process after S.C. had indicated her equivocation or disagreement with the verdict did not coerce S.C. into reaching a guilty verdict, and a Chip Smith charge was not required to address juror coercion.

This court declined to review the defendant's unpreserved claim that the trial court had violated the applicable rule of practice (§ 42-31) when it discontinued the jury poll following S.C.'s equivocation or disagreement with the verdict, as that claim was not of constitutional magnitude, and, therefore, it failed under the second prong of *Golding*.

Argued May 14—officially released July 22, 2025

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Gustafson*, *J.*; verdict of guilty; thereafter, the court, *Gustafson*, *J.*, denied the defendant's motion for a mistrial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Shanna P. Hugle, deputy assistant public defender, for the appellant (defendant).

Rajan M. Doering and *Michael H. Coudert*, certified legal interns, with whom were *Ronald G. Weller*, senior assistant state's attorney, and, on the brief, *Sharmese L. Walcott*, state's attorney, and *Danielle O'Connell*, assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The principal issue in this appeal requires us to consider how a trial court should exercise its discretion when addressing, pursuant to Practice Book § 42-31, a juror's equivocation during a jury poll. The defendant, John Bolton, raises three claims on appeal from the judgment of conviction of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2019) § 53a-217 (a) (1). First, he claims that the trial court abused its discretion when it denied his motion for a mistrial following its decision to stop polling the jury when a juror reported her disagreement with the verdict. Second, he claims that the trial court's response to the juror's equivocation resulted in a coerced verdict. Third, he claims that the trial court failed to comply with Practice Book § 42-31 when it stopped polling the jury. We disagree with each of the defendant's claims and affirm the judgment of conviction.

The record reveals the following relevant facts and procedural history. On January 8, 2019, the defendant shot and killed the victim, Carl Spence, in Hartford, after an argument over illegal narcotics sales. The state charged the defendant with murder and criminal possession of a firearm.

The defendant elected a jury trial. After five days of evidence, the jury began its deliberations late in the afternoon of March 1, 2023. At 12:41 p.m. on March 2,

after approximately four and one-half hours of deliberation over two days, the jury informed the trial court that it had reached a verdict. The jury returned to the courtroom, and the foreperson announced that the jury had found the defendant guilty of murder and criminal possession of a firearm. The court clerk asked the jury to confirm the verdict, and, collectively, the jurors responded in the affirmative. Defense counsel requested that the jury be polled. During the jury poll, the first five jurors stood and individually affirmed the verdict. When the sixth juror, S.C.,[1] was asked to stand, she rose but did not speak. The court clerk asked S.C. whether she found the defendant guilty or not guilty of murder. S.C. initially did not respond but then asked: "I can't change my mind, right?" The trial court responded: "[Y]ou're having a question? So, you're not prepared to say 'guilty' at this point?" S.C. replied: "No." The court then sent the jury back to the jury room without further instruction, telling the jurors that it needed "to take up a question with the lawyers."

After the jury exited the courtroom, the court stated: "[S]o, at this point, I think, it was clear that one of the jurors has thoughts about saying publicly 'guilty' in court at this point. So, unless I hear different from the lawyers, my thinking would be to instruct the jury to continue deliberating the case." Defense counsel moved for a mistrial, arguing that S.C. would now face "undue pressure" in deliberations. The court took that motion "under advisement" and called a brief recess to make sure it was "not missing anything." Approximately ten minutes later, upon reconvening, the court conveyed the clerk's report that S.C. did not want to return to the jury room with the other jurors and that she had been provided with her own room. After conferring with the parties further, the court noted that the jury was "not deliberating right now" and that it

[1] "In accordance with our usual practice, we identify jurors by [their initials] in order to protect their privacy interests." (Internal quotation marks omitted.) *State* v. *Holmes*, 334 Conn. 202, 207 n.6, 221 A.3d 407 (2019).

intended to release the jury for lunch and to have it resume deliberations afterward. Defense counsel then suggested that the court speak with S.C. separately but withdrew that request immediately. Defense counsel agreed with the court's reluctance to speak separately with S.C. and that the jurors "need to communicate . . . with notes."

The jurors then reentered the courtroom. The court explained the polling procedure and observed that one of the jurors had indicated that she could not answer the clerk's question. The court continued: "[B]efore I send you to lunch . . . the threshold question . . . I need to resolve is—is that juror having . . . second thoughts about her decision on [guilt] or innocence or is it a matter of not being able to say something publicly? In other words, say the word 'guilty' in public or is it a question about the verdict itself that you don't want to . . . end your deliberation on that issue—on that question of guilt or innocence?" S.C. responded: "Both."

The trial court then stated, "at this point, it's clear we do not have a unanimous verdict in this case," and informed the jurors that they would continue their deliberations after a one hour lunch break. The court instructed the jurors to refer to the written copy of the jury instructions that they had previously received, a portion of which related to the deliberation process.[2] After the jury exited, defense counsel again moved for a mistrial because

[2] The jury instructions regarding the deliberation process provided in relevant part: "Each of you has taken an oath to deliver a true verdict according to the evidence. That is the strength of the jury system. Each of you takes into the deliberation room your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument, and give-and-take within the scope of your oath. That is the way in which a unanimous verdict is reached.

"In the jury room, you should talk with each other about the case. Each of you must make your own conscientious decision, but only after . . . you have considered all the evidence, discussed it fully with the others, and listened to the views of your fellow jurors. You should consider whether your views are fair and reasonable, and try your best to decide the case according to the law. Do not hesitate to reexamine your own views and to

S.C. had said that her problem was with the guilty verdict itself, and not merely with the act of announcing the verdict in open court. The court denied the motion, explaining: "I think it's clear we've got a situation [in which] eleven people have returned a verdict of guilty.[3] One person is [having] second thoughts and wants to continue deliberating. That's the process. . . . [S]o, we'll let the process play out, and we'll see what the afternoon brings."

Following the lunch break, the jury deliberated for approximately two more hours. At 4:30 p.m., the jury sent a note to the court asking whether a guilty vote would need to be stated out loud or if it could be written down and given to the court clerk. The court had the jury reenter the courtroom, explained that each juror would have to answer out loud, and sent the jurors back to the jury room to determine whether they wanted to continue deliberating until the end of the day or to resume the following morning. At 4:50 p.m., the jury sent a note indicating that it had reached a verdict. The jury returned to the courtroom and delivered a verdict of guilty on both counts. The defendant again asked for a jury poll, and, in that second poll, all twelve jurors, including S.C. individually, affirmed that their vote was guilty on both counts. The court accepted and recorded the verdict. Thereafter, the court rendered judgment in accordance with the verdict and imposed a total effective sentence of thirty years of imprisonment. This direct appeal followed. See General Statutes § 51-199 (b) (3).

I

The defendant's first claim is that the trial court abused its discretion when it denied his motion for a mistrial. The defendant contends that the totality of the

change your mind if you are persuaded that you should do so but do not surrender your honest opinion solely because your opinion is different from the other jurors or for the mere purpose of returning a verdict."

[3] Because the jury poll was not completed, it is unclear how the trial court determined that eleven jurors had returned a verdict of guilty.

circumstances did not support the court's decision and that returning the jury to deliberate substantially and irreparably prejudiced his case because S.C. was coerced into returning a guilty verdict. We disagree.

"[Although] the remedy of a mistrial is permitted under the rules of practice,[4] it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances [that] may arise during the trial in which his function is to [ensure] a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice. . . . The decision whether to grant a mistrial is within the sound discretion of the trial court." (Footnote added; internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 702, 911 A.2d 1055 (2006); see also *State* v. *Henderson*, 348 Conn. 648, 666–67, 309 A.3d 1208 (2024). It is the defendant's burden to establish the prejudice necessary to warrant a mistrial. See, e.g., *State* v. *Gore*, 342 Conn. 129, 169, 269 A.3d 1 (2022).

"The purpose of a jury poll is to test the uncoerced unanimity of the verdict by requiring each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman." (Internal quotation marks omitted.) *United States* v. *Gambino*, 951 F.2d 498, 502 (2d Cir. 1991), cert. denied sub nom. *D'Amico* v. *United States*, 504 U.S. 918, 112 S. Ct. 1962, 118 L. Ed. 2d 563

[4] See Practice Book § 42-43.

(1992); see also *United States* v. *Singer*, 345 F. Supp. 2d 230, 233 (D. Conn. 2004), aff'd, 241 Fed. Appx. 727 (2d Cir. 2007). "[T]he right to poll the jury, although not constitutional, is nonetheless a substantial right . . . that enables the court to ascertain with certainty that a unanimous verdict has in fact been recorded and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented." (Citation omitted; internal quotation marks omitted.) *State* v. *Pare*, 253 Conn. 611, 631–32, 755 A.2d 180 (2000).

Jury polling in criminal trials is governed by Practice Book § 42-31, which provides: "After a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the judicial authority's own motion. The poll shall be conducted by the clerk of the court by asking each juror individually whether the verdict announced is such juror's verdict. *If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged.*" (Emphasis added.)

Connecticut's appellate courts have had few opportunities to consider a trial court's response to a lack of unanimity revealed by a jury poll in a criminal trial. In *State* v. *Gullette*, 3 Conn. Cir. 153, 209 A.2d 259 (App. Div. 1964), after the trial court gave the jury a Chip Smith charge,[5] the first nine jurors announced a guilty verdict. Id., 155. The tenth juror stated that her verdict

[5] First articulated in *State* v. *Smith*, 49 Conn. 376 (1881), "[a] Chip Smith [charge] reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity. . . . A similar jury instruction, known as an *Allen* charge, is utilized in the federal courts." (Citations omitted; internal quotation marks omitted.) *State* v. *O'Neil*, 261 Conn. 49, 51 n.2, 801 A.2d 730 (2002); see *Allen* v. *United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528 (1896); see also *State* v. *Feliciano*, 256 Conn. 429, 439, 443, 778 A.2d 812 (2001) (reaffirming "fundamental logic underlying the Chip Smith charge," which "makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors" (internal quotation marks omitted)).

was "[n]ot guilty," and that she "was the last one that held out." (Internal quotation marks omitted.) Id. The trial court repeated the Chip Smith charge to the jury and then sent the jury back to the jury room to continue its deliberations. Id., 156–57. Four minutes later, the jury returned and announced a unanimous guilty verdict, which each juror confirmed after being polled again. Id., 157. The trial court denied the defendant's motion to set the verdict aside. Id., 163. The reviewing court found no abuse of discretion in the trial court's assessment that "what seemed originally to have been a dissent by one juror was, in fact, only confusion on her part, caused by an unfamiliar procedure," as confirmed by the jury's quick return. Id., 165. The court further concluded that the record did not support a claim of coercion and that reinstructing the jury on the Chip Smith charge did not prejudice the defendant, especially given the lack of any exception to the original charge. Id., 164–65.

This court has considered jury polling in several civil cases applying Practice Book § 16-32, which is almost identical to Practice Book § 42-31, and has held that polling in civil cases serves the same purpose of ensuring jury unanimity and lack of coercion. See *Wiseman* v. *Armstrong*, 295 Conn. 94, 102–104, 989 A.2d 1027 (2010). We find instructive *Tough* v. *Ives*, 162 Conn. 274, 294 A.2d 67 (1972), in which this court stated that, during a jury poll, a "[n]eutral inquiry by the trial judge as to the meaning of a juror's response is not erroneous," and clarified that, "[o]nly when such inquiry is coercive or seeks explanations, motives or information about occurrences in the jury room should it be found objectionable." Id., 280. In *Tough*, this court concluded that the trial court was correct *not* to send the jury back for further deliberations when its questioning of a dissenting juror revealed that she had simply been confused by the polling procedure. Id., 277–78, 280.

Similarly, in *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 3 A.3d 892 (2010), this court upheld the trial

court's denial of a motion for a mistrial following what appeared to be a juror's expression of disagreement with the verdict during the jury poll. Id., 388. Deferring to the trial court's "opportunity to observe the demeanor of [the juror] during the entire trial, especially during the return of the verdict and the polling process, and . . . presen[ce] when [the juror] made the statements at issue," this court concluded that the trial court did not abuse its discretion when it conducted a neutral inquiry into whether the juror disagreed with the verdict or was confused by the procedure. Id., 397. Because the juror's "final answer" with respect to the verdict controls; id., 398; see also *Josephson* v. *Meyers*, 180 Conn. 302, 309, 429 A.2d 877 (1980); *State* v. *Gullette*, supra, 3 Conn. Cir. 166; the trial court in *Hurley* had correctly determined that the confused juror's final answer was operative and accepted the verdict as unanimous. See *Hurley* v. *Heart Physicians, P.C.*, supra, 398.

In contrast to *Hurley*, in *State* v. *Bell*, 13 Conn. App. 420, 537 A.2d 496 (1988), the Appellate Court held that the trial court had used an erroneous polling procedure. Id., 428, 430. In *Bell*, a juror responded to a poll as to her verdict by asking, " '[d]o I have to answer that as a guilty or can I say something?' " Id., 428 n.4. The trial court answered that all she could say was whether the guilty verdict was her verdict. Id. When polled a second time, the juror responded, " 'I can't say.' " Id. The trial court attempted three additional times to obtain the juror's verdict, and only after the fifth request did the juror state that the defendant was guilty. Id., 428–29 and n.4. The Appellate Court held that the trial court should have either directed the jury to retire for further deliberations or discharged the jury and declared a mistrial. Id., 432. The Appellate Court determined that the juror's response of " 'I can't say' " should have signaled to the trial court that the juror still had questions about the defendant's guilt and, after the court continued to ask for her verdict, that her responses indicated doubt,

rather than confusion. Id., 431–32. The Appellate Court concluded that a new trial was required because the juror's final answer of " 'guilty' " had been "conduced by the trial court during the polling process." Id., 432.

Taken together, our state's cases are consistent with an approach used by numerous federal and state courts[6] in assessing whether a trial court's response to a dissenting juror during a poll has resulted in a verdict that is the product of impermissible coercion or merely reflects "[t]he persuasive impetus inherent in the requirement of [jury] unanimity . . . ." *Harris* v. *United States*, 622 A.2d 697, 701 (D.C. 1992), cert. denied, 510 U.S. 1129, 114 S. Ct. 1097, 127 L. Ed. 2d 410 (1994). This case law is instructive because these jurisdictions follow rules modeled after an American Bar Association model rule or rule 31 (d) of the Federal Rules of Criminal Procedure,[7] both of which are substantively identical to Practice Book § 42-31.

[6] See *United States* v. *Coulter*, 57 F.4th 1168, 1193 (10th Cir.), cert. denied, U.S. , 143 S. Ct. 2627, 216 L. Ed. 2d 1218 (2023); *United States* v. *Williams*, 819 F.3d 1026, 1030 (7th Cir. 2016); *United States* v. *Gambino*, supra, 951 F.2d 501–502; *United States* v. *Fiorilla*, 850 F.2d 172, 176–77 (3d Cir.), cert. denied, 488 U.S. 966, 109 S. Ct. 492, 102 L. Ed. 2d 529 (1988), and cert. denied, 488 U.S. 966, 109 S. Ct. 492, 102 L. Ed. 2d 529 (1988); *Browne* v. *State*, 215 Md. App. 51, 73, 79 A.3d 410 (2013); *State* v. *Ware*, 498 N.W.2d 454, 458–59 (Minn. 1993); *State* v. *Frederick*, 783 S.W.2d 469, 472 (Mo. App. 1990); *State* v. *Pyatt*, 300 Mont. 25, 29, 1 P.2d 953 (2000); *State* v. *Milton*, 178 N.J. 421, 437–38, 840 A.2d 835 (2004); *State* v. *Holloway*, 106 N.M. 161, 164, 740 P.2d 711 (App.), cert. denied, 106 N.M. 405, 744 P.2d 180 (1987).

[7] Standard 15-5.6 of the ABA Standards for Criminal Justice provides: "When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court's own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." A.B.A., ABA Standards for Criminal Justice: Discovery and Trial by Jury (3d Ed. 1996) standard 15-5.6.

Rule 31 (d) of the Federal Rules of Criminal Procedure provides: "After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury."

For example, the District of Columbia Court of Appeals has held that the reviewing court must assume the perspective of the jurors and make two inquiries to determine whether there has been an abuse of discretion by the trial court under the unique facts and circumstances of the particular case. See *Harris* v. *United States*, supra, 622 A.2d 701. "The first inquiry is into the inherent coercive potential of the situation before the court. The second inquiry requires an examination of the actions of the trial judge in order to determine whether these actions exacerbated, alleviated or were neutral with respect to coercive potential. Then the two factors should be viewed together to assess the possibility of actual coercion on any juror or jurors." Id., 701–702.

It follows, therefore, that the trial court must proceed carefully and cautiously in order to minimize the coercive potential when it takes action pursuant to its authority under Practice Book § 42-31. Depending on the circumstances before it, the court may choose to canvass the dissenting juror, to dismiss the jury and declare a mistrial, or to issue a Chip Smith charge or other instruction before returning the jury to its deliberations; it may also simply return the jury to deliberate without additional instruction. See id., 701. "Such actions by the court are perfectly acceptable in appropriate circumstances when carried out with care. Indeed, they are part of the normal functioning of the jury system. To release a 'hung' jury [when] a true deadlock does not exist constitutes an unnecessary and undesirable waste of resources, and the trial court has the right and duty to urge a jury to work diligently to reach a fair and freely arrived at verdict, if possible. What is impermissible is a situation [in which] the outcome is the result of coercion, i.e., [when] as a consequence of developments during jury deliberation or trial court action or inaction, one or more jurors feel forced to change their votes from what they individually in fact believe, and

thus the verdict is not freely and fairly given." Id. Impermissible coercion occurs "when jurors surrender their honest opinions for the mere purpose of returning a verdict." (Internal quotation marks omitted) *United States* v. *Williams*, 819 F.3d 1026, 1030 (7th Cir. 2016).

Having reviewed the record, we conclude that no impermissible coercion occurred in the present case. First, the trial court terminated the jury poll as soon as S.C., the sixth juror polled, noted her disagreement with the verdict. Particularly when the disagreement occurs early in the polling process, terminating a poll immediately "avoids revealing the number and identity of any dissenting jurors, reducing the poll's coercive effect." *United States* v. *Banks*, 982 F.3d 1098, 1104 (7th Cir. 2020); see, e.g., *United States* v. *Thomas*, 791 F.3d 889, 898–99 (8th Cir. 2015); *Leake* v. *United States*, 77 A.3d 971, 976–77 (D.C. 2013); cf. *United States* v. *Williams*, supra, 819 F.3d 1032 (completion of entire poll after first juror dissented resulted in "pressure on [the first juror] as the publicly known lone dissenter"); *Crowder* v. *United States*, 383 A.2d 336, 343 and n.14 (D.C. 1978) ("inevitable increase in potential coerciveness" occurs when twelfth juror dissents because numerical division of jury and identity of lone dissenter are revealed in open court).[8] Here, the polling stopped after six jurors had announced their verdict, and, although S.C.'s identity as a dissenter was known, the exact division of the jury was never revealed.[9]

The defendant also argues that S.C.'s choice to be in a separate room prior to resuming deliberations is

[8] Continuing to poll the jury after one juror states his or her dissent is not coercive per se. See, e.g., *United States* v. *Carraway*, 108 F.3d 745, 751 (7th Cir.), cert. denied, 522 U.S. 891, 118 S. Ct. 228, 139 L. Ed. 2d 160 (1997).

[9] Although the trial court, in denying the defendant's motion for a mistrial, surmised, "I think it's clear we've got a situation [in which] eleven people have returned a verdict of guilty" and that "[o]ne person is [having] second thoughts and wants to continue deliberating," it did not do so in the presence of the jury. Thus, because S.C. was not aware of the court's supposition, it could not have pressured her.

evidence of a high degree of isolation and that "the pressure inside the jury room was more than she could bear." Because S.C. was never questioned individually about her decision to separate herself from the other jurors, it would be speculative to ascribe any motives to her choice.[10] Indeed, S.C.'s choice to take a respite from the deliberation process could well have been beneficial after the first poll,[11] as such breaks help to relieve any tensions that may arise when a jury must renew deliberations following dissent in a poll. A break followed by a substantial amount of additional deliberation time may, in fact, indicate a lack of coercion. See, e.g., *Leake* v. *United States*, supra, 77 A.3d 979.

The circumstances of the present case, known to the trial court when it denied the defendant's motion for a mistrial, therefore, are not indicative of potential coercion beyond the pressure inherent in the ordinary process of reaching a unanimous jury verdict. Without other evidence indicating coercion, for example, misconduct or other negative reaction to S.C.'s dissent by the other jurors, the fact that S.C. expressed disagreement or equivocation regarding the verdict relatively early in the poll, took a break to relieve tensions, and then returned to deliberate with her fellow jurors without incident demonstrates that S.C. had not abandoned

[10] Speaking publicly in open court may be an intimidating experience for a layperson under even the best of circumstances, let alone during the difficult task of announcing a verdict in a serious criminal case, and S.C. acknowledged her reluctance to state the verdict in public when asked by the court.

[11] Even if we assume that S.C.'s decision to isolate herself reflected a higher potential that she felt coerced by the circumstances, courts have nevertheless held that trial courts do not abuse their discretion by resuming jury deliberations after a juror has openly attempted to leave or otherwise separated herself from the jury. See, e.g., *Wilson* v. *United States*, 419 A.2d 353, 356–57 (D.C. 1980) (there was no abuse of discretion when trial court individually reminded juror of her obligations after she attempted to leave, delivered deadlocked jury instruction, and then dismissed jury for day to resume deliberations next morning after receiving note revealing that juror who wished to leave was lone holdout).

her honest conviction in ultimately voting to find the defendant guilty. See *Smith* v. *United States*, supra, 542 A.2d 824.

Next, we review the trial court's actions in response to the situation to determine "whether these actions exacerbated, alleviated or were neutral with respect to coercive potential." *Harris* v. *United States*, supra, 622 A.2d 701. The greater the potential for coercion, the greater the need for the trial court to mitigate that risk. *Coley* v. *United States*, 196 A.3d 414, 421 (D.C. 2018).

The District of Columbia Court of Appeals' decisions in *Leake* v. *United States*, supra, 77 A.3d 971, and *Green* v. *United States*, 740 A.2d 21 (D.C. 1999), inform our analysis regarding whether a trial court's actions, following a jury poll, affected the coercive potential. These cases are also consistent with this court's emphasis on neutrality in *Hurley* and *Tough*. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 394, 397; *Tough* v. *Ives*, supra, 162 Conn. 277–78, 280.

In *Leake*, after a juror dissented from a jury poll following two days of deliberations, the trial court immediately stopped the polling. *Leake* v. *United States*, supra, 77 A.3d 973–74. After conferring with counsel, who agreed that a deadlocked jury instruction was unnecessary, the trial court stated: "I'm going to ask you to resume your deliberations and let me know when you've reached a verdict or if you have any more questions." (Internal quotation marks omitted.) Id., 974. The District of Columbia Court of Appeals viewed this language as neutral because it did not direct the jury to reach a unanimous verdict or impliedly encourage or pressure a known dissenter to agree with the majority. Id., 978 and n.5. Similarly, in *Green*, the court held that the trial court took an "essentially neutral course of action"; *Green* v. *United States*, supra, 740 A.2d 30; when it instructed the jury: "[I]n the polling of the jury . . . it became apparent that you had not actually

reached a unanimous verdict . . . . For this reason, I'm going to be asking you to return to the jury room for further consideration of your [verdict] . . . . If you are unanimous, your foreperson should send me a note so indicating and I will poll you again. If you are not unanimous, I will ask that you resume your deliberations and see if you can reach a unanimous verdict." (Internal quotation marks omitted.) Id., 25. Such instructions stand in stark contrast to the individualized pressure applied to the juror in *Bell*, in which the trial court's actions exacerbated the coercive atmosphere through repeated questioning of the dissenting juror. See *State* v. *Bell*, supra, 13 Conn. App. 428 and n.4, 430.

In the present case, the trial court stopped the polling of the jury immediately after S.C.'s dissent and excused the jury from the courtroom in order to discuss the matter with counsel. The defendant contends that this procedure was an abuse of discretion because the court gave no instructions to the jury upon this first excusal. We disagree. The trial court took a neutral course of action that allowed it, outside the presence of the jury, to consider all of the relevant circumstances and to solicit input from counsel as to how to proceed. When the jury returned to the courtroom, the court canvassed S.C. The canvass was neutral in tone and content. It was fashioned to help the court determine the appropriate procedure to follow and elicited only whether S.C.'s equivocation was related to the procedure, namely, speaking out loud in court, or to the verdict itself. The canvass was well within the court's discretion. The question was framed as a binary choice: was S.C. uncomfortable stating the verdict out loud or was she having second thoughts? There was no inquiry into her reasons, motivations, or any other internal processes that would reveal what took place in the jury room. See *Tough* v. *Ives*, supra, 162 Conn. 280. Upon learning that S.C. was concerned with both the substance of the

verdict and the need to state the verdict aloud, the court advised the jury to consult the jury instructions in its possession and to return to deliberations after the lunch break.

The defendant contends that this course of action ignored S.C.'s isolation and that the trial court failed to consider the totality of the circumstances in exercising its discretion. He further contends that the court should have given a Chip Smith charge to help the jury "assess the evidence and the opinions of the other jurors with an open mind." We are not persuaded. Although it would have been within the court's discretion to give a Chip Smith charge,[12] it was not necessary to do so.[13]

[12] The model criminal jury instructions on the Judicial Branch website provide the following Chip Smith charge: "The instructions that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict.

"Along these lines, I would like to state the following to you. The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence in the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other.

"In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

"But please remember this. Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry." Connecticut Criminal Jury Instructions 2.10-4, available at https://www.jud.ct.gov//JI/Criminal/Criminal.pdf (last visited July 15, 2025).

[13] Because antideadlock instructions may create additional coercion in a postpoll environment, the District of Columbia Court of Appeals has adopted a middle ground instruction, known as a *Crowder* charge, that may be given when a jury poll reveals a lack of unanimity. *Callaham* v. *United States*, 268 A.3d 833, 844 (D.C. 2022). The *Crowder* charge provides: "It is your

On the basis of the circumstances before it, and after soliciting input from counsel, the trial court opted for a minimal and neutral course of action in order to allow the deliberation process to continue. Because the trial court was "in the best position to observe the demeanor of the jurors"; *State* v. *Tirado*, 194 Conn. 89, 95–96, 478 A.2d 606 (1984); we conclude that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

II

The defendant raises a second, unpreserved claim, pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[14] and the plain

duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." (Internal quotation marks omitted.) *Crowder* v. *United States*, supra, 383 A.2d 342 n.11. The *Crowder* charge is intended to "allay" the fear that a "lone recalcitrant juror will conclude that the trial judge is requiring further deliberations in order to eliminate his dissent." Id. It differs from the Chip Smith charge insofar as it does not specifically ask the dissenting juror to consider why the majority of the jurors have a different view of the case. The *Crowder* charge is not intended for routine use but, rather, for use only in cases in which "there is a particularly high likelihood of juror coercion." (Internal quotation marks omitted.) *Green* v. *United States*, supra, 740 A.2d 29. The *Crowder* charge is very similar to the deliberation process charge the trial court initially gave the jury and later reminded the jury of when it instructed it to resume deliberations after the first poll failed. See footnote 2 of this opinion.

[14] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of the fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original, footnote

error doctrine.[15] He claims that the final verdict violated the constitutional requirement that a jury's verdict be both unanimous and free from coercion because there was an unacceptable risk that S.C. had been coerced into assenting to a guilty verdict. The defendant relies on *United States* v. *Pleva*, 66 F.2d 529 (2d Cir. 1933), and argues that undue pressure forced S.C. to "abandon her conscientiously held belief" and to acquiesce in the guilty verdict. He further argues that this pressure was the result of the trial court's failure to address S.C.'s isolation directly and to provide adequate guidance in the form of a Chip Smith charge when sending the jury back to deliberate a second time. We agree with the state's argument that this claim fails under the third prong of *Golding* because the alleged constitutional violation did not occur or deprive the defendant of a fair trial.

We understand the defendant's claim to have two separate predicates. The first is premised on the claim that the trial court's instructions to the jury upon resumption of deliberations were not adequate to address juror coercion because they did not include a Chip Smith charge. The second is that S.C.'s personal circumstances had, in fact, resulted in her being coerced into assenting to a guilty verdict. We address each in turn.

Our resolution of the defendant's instructional claim is governed by the following legal principles. "It is well settled that jury instructions are to be reviewed in their entirety. . . . When the challenge to a jury instruction is of constitutional magnitude, the standard of review

omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

[15] The plain error doctrine "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Blaine*, 334 Conn. 298, 305, 221 A.3d 798 (2019); see Practice Book § 60-5.

is whether it is reasonably possible that the jury [was] misled. . . . In determining whether it was . . . reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement . . . . Individual instructions also are not to be judged in artificial isolation . . . . Instead, [t]he test to be applied . . . is whether the charge . . . as a whole, presents the case to the jury so that no injustice will result. . . . Whether a jury [was] coerced by statements of the trial judge is to be determined by an examination of the record. . . . The question is whether in the context and under the circumstances in which the statements were made, the jury [was], actually, or even probably, misled or coerced." (Citation omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 170 Conn. App. 317, 323, 154 A.3d 528, cert. denied 325 Conn. 902, 157 A.3d 1146 (2017).

Since *State* v. *O'Neil*, 261 Conn. 49, 801 A.2d 730 (2002), this court has concluded that the Chip Smith charge is not coercive and is an acceptable method of facilitating the deliberation process when faced with a deadlocked jury. Id., 73. Nevertheless, this instruction is not required every time a jury indicates that it is unable to reach an agreement, and some authorities have stated that deadlocked jury instructions are themselves coercive when delivered in response to a jury poll breakdown. See, e.g., *Green* v. *United States*, supra, 740 A.2d 31. We agree with the state that the Appellate Court's decision in *State* v. *Mitchell*, supra, 170 Conn. App. 317, provides guidance in this context.

In *Mitchell*, the Appellate Court determined that, because the trial court's jury instruction to continue deliberating did not include language potentially coercing the jurors to reach a unanimous verdict, the cautionary language of the Chip Smith charge was not required. Id., 325–26. In fact, this court has never held that lan-

guage to be mandatory but, rather, has stated that "a defendant is entitled only to a jury unfettered by an order to decide and not to an instruction that a jury may hang." (Internal quotation marks omitted.) *State* v. *Smith*, 222 Conn. 1, 22, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992).

We conclude, therefore, that, when the trial court instructed the jurors to continue the deliberation process, it did not preclude the possibility that disagreement might occur. The court merely restated the requirement that any decision they reach must be unanimous, which is not coercive. The court's original instructions, which it directed the jurors to review, included the following instructions: "You should take as much time as you feel is necessary to [deliberate]"; "[e]ach of you has taken an oath to deliver a true verdict according to the evidence"; "[y]our task is to pool [your] experience and wisdom . . . by giving your views and listening to the views of others"; "[e]ach of you must make your own conscientious decision"; and "do not surrender your honest opinion solely because your opinion is different from the other jurors or for the mere purpose of returning a verdict."

We also disagree with the defendant's claim that S.C.'s verdict was the product of coercive circumstances. There is no evidence that S.C. faced undue pressure of the kind present in *United States* v. *Pleva*, supra, 66 F.2d 529. In *Pleva*, a juror made it known on the record that he was having a medical issue with his bladder. Id., 531–32. The court called in a physician to examine the juror, and he stated, on the record, that the juror was "going to be in for a lot of misery" due to his symptoms. (Internal quotation marks omitted.) Id., 532. After the jury delivered a guilty verdict, the juror "made known in open court that he agreed [to the verdict] only because he felt unable physically to maintain longer the position he thought was right . . . ." Id., 533.

By contrast, the record in the present case indicates that S.C. was comfortable communicating with the trial court on multiple occasions, including an email exchange prior to trial regarding her travel plans. She also was willing to express her second thoughts about the verdict during the first jury poll, and she removed herself from the jury room during the recess following that poll. Thereafter, the jury deliberated for an additional two hours after being sent back to the jury room, following approximately four and one-half hours of deliberation spanning two days. Other courts have found that similar lengths of additional deliberation are a strong indication that jurors do not "feel coerced into immediately returning a verdict." *United States* v. *Thomas*, supra, 791 F.3d 898; see id. (additional two hours of deliberation following *Allen* charge[16] indicates lack of coercion); *United States* v. *McDonald*, 825 F. Supp. 2d 472, 483 (S.D.N.Y. 2011) (one hour of additional deliberation following supplemental instruction was significant amount of time suggesting lack of coercion because jury had deliberated for less than four hours in total before returning initial, nonunanimous verdict), aff'd, 759 F.3d 220 (2d Cir. 2014). But see *United States* v. *Banks*, supra, 982 F.3d 1105 (twenty-nine minutes of additional deliberation following supplemental instruction that lacked language reminding jurors "not [to] surrender their honest beliefs" suggested coercion). During the second jury poll, when S.C. had another opportunity to voice concerns, she announced her verdict and affirmed it. S.C. never indicated that any coercion or intimidation had taken place, and there is no evidence in the record to support such an inference.

We conclude that the trial court's instruction to continue deliberations did not coerce S.C. into reaching a guilty verdict and that no additional jury instruction was required. For these reasons, we conclude that the

[16] See footnote 5 of this opinion.

defendant has failed to satisfy the third prong of *Golding* and cannot prevail on this unpreserved claim.[17]

III

The defendant's final claim is that the trial court violated Practice Book § 42-31 when it discontinued the jury poll following S.C.'s disagreement with the verdict. We decline to reach this claim because it is not preserved for appellate review.

"It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial, and [o]nly in [the] most exceptional circumstances can and will [an appellate] court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 643, 224 A.3d 147 (2020). The defendant's claim was not distinctly raised because he did not ask the trial court to complete the jury poll at that time and did not argue in his motion for a mistrial that an incomplete poll violated the rules of practice.

Moreover, this claim is not subject to *Golding* review. Although the right to a jury poll under the rules of practice is "a corollary to the defendant's right to a unanimous verdict," it is "not of constitutional dimension . . . ." (Internal quotation marks omitted.) *State* v. *Pare*, supra, 253 Conn. 623. Because the defendant's claim is not of constitutional magnitude, it fails to satisfy the second prong of *Golding*. See, e.g., *State* v. *Samuel*

[17] We also conclude that the defendant is not entitled to relief under the plain error doctrine. See, e.g., *State* v. *Blaine*, 334 Conn. 298, 305, 221 A.3d 798 (2019) ("plain error review is reserved for only the most egregious errors" (internal quotation marks omitted)); see also *State* v. *Stephens*, 301 Conn. 791, 797, 22 A.3d 1262 (2011) (concluding that defendant's claims, which failed under the third prong of *Golding* were "not entitled to the extraordinary relief available under the plain error doctrine").

U., 348 Conn. 304, 317, 303 A.3d 1175 (2023). Accordingly, we decline to review the defendant's unpreserved claim concerning the trial court's decision not to complete the jury poll after S.C. indicated her dissent from the verdict.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* GREGORY E. MCLAURIN (SC 20785)

Mullins, C. J., and McDonald, D'Auria, Ecker, Dannehy, Clark and Westbrook, Js.*

Syllabus

The defendant appealed, on the granting of certification, from the judgment of the Appellate Court, which had affirmed his conviction of numerous crimes, including first degree robbery, in connection with his role in an armed robbery of a restaurant. The perpetrators of the robbery had fled the restaurant, but the police apprehended the defendant shortly thereafter and detained him in a nearby parking lot. An officer then transported B, a restaurant employee who had witnessed the robbery, to the parking lot, where she identified the defendant as one of the perpetrators. The trial court denied the defendant's motion to suppress B's identification of the defendant, reasoning that the one-on-one showup identification procedure the police used to obtain the identification was not unnecessarily suggestive and that, even if it was, B's identification was nevertheless reliable under the totality of the circumstances. On appeal to this court, the defendant claimed, inter alia, that the Appellate Court, in upholding the trial court's denial of the defendant's motion to suppress, incorrectly had concluded that the showup procedure the police used to obtain the identification was not unnecessarily suggestive. *Held*:

Even if this court assumed that the challenged showup procedure was unnecessarily suggestive, the trial court correctly concluded that B's identifi-

* This case originally was argued before a panel of this court consisting of former Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy. Thereafter, former Chief Justice Robinson and Justice Alexander were removed from the panel, and the case was reargued before a panel consisting of Chief Justice Mullins, Justices McDonald, D'Auria, Ecker and Dannehy, and Judges Clark and Westbrook.

cation of the defendant was reliable under all of the relevant circumstances, and, accordingly, the Appellate Court properly upheld the trial court's denial of the defendant's motion to suppress.

Upon review of the record and consideration of the totality of the circumstances, this court concluded that there was substantial evidence in the record to support the trial court's finding that B's identification of the defendant was reliable.

B had the opportunity to view the defendant and his accomplice while they were in the restaurant, B was attentive, insofar as she was able to provide a detailed description of the perpetrators and the robbery, the description that B initially provided of the defendant to the police, before she was brought to identify him, was accurate and matched his general appearance, B demonstrated great certainty when she identified the defendant and did so without any hesitation, and only a short amount of time had elapsed between the commission of the robbery and B's identification of the defendant.

There was no merit to the defendant's claim that the reliability of B's identification was undermined by the application of certain estimator variables, which are factors that stem from conditions over which the criminal justice system has no control and generally arise out of the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime, and which this court identified in *State* v. *Harris* (330 Conn. 91) as additional considerations for evaluating the reliability of an identification under the state constitution.

There was, at best, conflicting evidence regarding whether B was high from smoking marijuana when she identified the defendant, although there was evidence that B was scared, being scared, in and of itself, does not render an identification unreliable, and the evidence did not support the defendant's contention that B was so focused on a gun handled by the perpetrators during the robbery that her identification was rendered unreliable.

Moreover, although the police did not employ a double-blind, sequential identification procedure, the challenged showup procedure occurred within eighty-six minutes of the robbery, and social science has demonstrated that there is no greater likelihood of misidentification when a showup rather than a lineup procedure is employed, so long as the showup identification occurs less than two hours after the witness viewed the perpetrator.

(*Three justices dissenting in one opinion*)

Argued November 15, 2023, and January 29, 2025—
officially released July 22, 2025

Procedural History

Substitute information charging the defendant with four counts of the crime of unlawful restraint in the

first degree and one count each of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, larceny in the fourth degree, and conspiracy to commit larceny in the fourth degree, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *P. Brown*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *P. Brown*, *J.*; verdict and judgment of guilty of four counts of unlawful restraint in the first degree and one count each of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, and conspiracy to commit larceny in the fourth degree, from which the defendant appealed to the Appellate Court, *Alvord*, *Seeley* and *DiPentima*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Nathan J. Buchok, assistant state's attorney, with whom, on the brief, was *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

MULLINS, C. J. A jury found the defendant, Gregory E. McLaurin, guilty of numerous offenses related to a 2018 robbery of a Smashburger restaurant in Milford.[1]

[1] The defendant was found guilty of robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-48 and § 53a-134 (a) (2), criminal possession of a firearm in violation of General Statutes (Rev. to 2017) § 53a-217 (a), carrying a pistol without a permit in violation of General Statutes (Rev. to 2017) § 29-35 (a), four counts of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and conspiracy to commit larceny in the fourth degree in violation of § 53a-48 and General Statutes § 53a-125.

The defendant listed on his appeal form the docket number corresponding to the judgment pertaining to the finding that he violated his probation, in

On appeal to the Appellate Court, the defendant claimed that the trial court had deprived him of his right to due process under the federal constitution by denying his motion to suppress a one-on-one showup identification of him by a restaurant employee. See *State* v. *McLaurin*, 216 Conn. App. 449, 466, 285 A.3d 104 (2022). The Appellate Court affirmed the trial court's judgment of conviction, concluding that the exigencies of the investigation justified the police's use of the showup identification procedure and, therefore, that the identification was not unnecessarily suggestive. See id., 466, 470, 479. We granted the defendant's petition for certification to appeal, limited to the issue of whether the Appellate Court properly upheld the trial court's denial of his motion to suppress.[2] See *State* v. *McLaurin*, 346 Conn. 903, 287 A.3d 136 (2023). We affirm the judgment of the Appellate Court and conclude that the defendant's constitutional right to due process was not violated because, even if the identification procedure was unnecessarily suggestive, the identification was reliable.

The Appellate Court's opinion sets forth a more detailed recitation of the facts and procedural history. See *State* v. *McLaurin*, supra, 216 Conn. App. 451–65. We provide a summary herein, as supplemented by the record and the trial court's articulation. One evening in January, 2018, at approximately 8:30 p.m., the defendant and Royshon Ferguson entered the Smashburger res-

addition to the docket number pertaining to his conviction of the foregoing offenses, but he has failed to brief any claim relating to that judgment. We therefore consider any claim concerning that judgment to be abandoned. See, e.g., *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012) ("[a]n appellant who fails to brief a claim abandons it" (emphasis omitted; internal quotation marks omitted)), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013).

[2] After a panel of this court heard the initial oral argument, we ordered the trial court to issue an articulation, which the trial court did on November 25, 2024. We also ordered the parties to appear for reargument on January 29, 2025.

taurant. They were wearing ski masks, but their eyes, mouths, and the skin around their eyes and mouths were visible. The defendant carried a semiautomatic gun. Three employees were working at the restaurant that night. Two of the employees, Jada Brinkley and Jamal McNeil, were working in the front of the restaurant. One employee, Casey Deloma, was working in the back room, where a small safe was located. When Ferguson and the defendant entered the restaurant, four customers were dining in the front of the restaurant. Two of the customers attempted to flee, but the defendant pointed the gun at them and told them, "don't run." He then directed Brinkley, McNeil, and all of the customers to the back room of the restaurant at gunpoint.

In the back room, the defendant handed the gun to Ferguson, who pointed it at Deloma and demanded that she unlock the safe. Deloma made two unsuccessful attempts to unlock the safe. After the second attempt, Ferguson said, "I'm going to give you ten seconds, or I'm going to shoot you." Deloma then attempted to unlock the safe a third time and was able to successfully open it. Ferguson took the money out of the safe and put it in his pockets. While this was happening, the defendant was standing next to Brinkley in the back room.

After stealing the money from the back room safe, Ferguson took Deloma to the front of the restaurant at gunpoint and demanded that she open the cash registers. She opened one register, and Ferguson stole the money inside of it. The defendant remained in the back room of the restaurant and demanded that Brinkley, McNeil and the customers give him their cell phones.

As Deloma was opening the second register, one of the customers, Garfield Stewart, who was lawfully carrying a concealed firearm, drew his gun on the defen-

dant. The defendant immediately ran to the front of the restaurant and out the front door, leaving Ferguson behind. Stewart, who had followed the defendant to the front of the restaurant, then pointed his gun at Ferguson. Stewart began "bang[ing]" Ferguson's hand until Ferguson released the gun he was holding. Ferguson then ran out of the restaurant, exiting within seconds of the defendant.

At approximately 8:40 p.m., the Milford Police Department received a call informing it that an armed robbery was in progress at the Smashburger restaurant. Officer Matthew Joy was dispatched to the scene and arrived approximately three minutes after the call, at approximately 8:43 p.m. Immediately after arriving at the restaurant, he located a gun on the floor, behind the front counter. After speaking with the employees and customers, he learned that two suspects had fled the restaurant on foot and that they had turned right after they exited through the front door. Officer Joy interviewed Brinkley, who told him that the suspects were two Black males. One suspect, later identified as Ferguson, was described as "a Black male, about five feet, six inches, heavyset, wearing jeans and a dark-colored . . . hooded sweatshirt . . . ." The other suspect, later identified as the defendant, was described as "a Black male, approximately six feet, six foot one, [with] a thinner build, wearing jeans [and] a red, hooded sweatshirt with a dark-colored topcoat layer." The eyewitnesses told Officer Joy that the suspects were wearing dark-colored ski masks, one black and one green.

Officer Joy promptly relayed a description of the suspects to his fellow officers. Shortly thereafter, a passing motorist flagged down police officers in the vicinity and reported that he had just seen two Black males run into a wooded area, behind a car dealership and a storage facility, which were located approximately 800 feet across the street from the Smashburger

restaurant. Responding officers eventually located Ferguson in the woods. When they found him, he had an eight to nine inch kitchen knife and $868 on his person.

At 8:50 p.m., Officer Joy, who had remained on scene at the restaurant, received a radio transmission informing him that other officers had apprehended a suspect. Sergeant Christopher Dunn, Officer Joy's commanding officer, instructed him to conduct a showup identification procedure with one of the eyewitnesses. Officer Joy selected Brinkley because she was the employee closest to the front of the restaurant when the suspects entered the restaurant, she was the first employee to encounter the suspects, she was able to give a description of the suspects, and she had been standing next to the defendant in the back room for a period of time. Prior to conducting the showup procedure, Officer Joy read the instructions for the showup to Brinkley. At no point did Officer Joy communicate to Brinkley that the police had one of the men responsible for the robbery in custody. Officer Joy drove Brinkley from the restaurant to the rear parking lot of the nearby car dealership in his cruiser, which took approximately one minute. The parking lot was well lit. At approximately 9:12 p.m., Brinkley positively identified Ferguson. Meanwhile, other officers continued to search for the second suspect.

About thirty minutes later, at 9:42 p.m., Officer Joy learned that other officers had detained a second suspect at the car dealership's parking lot. Officer Joy brought Brinkley back to the parking lot to conduct a second showup identification procedure. Once there, Officer Joy proceeded to the same location where Brinkley previously had identified Ferguson. Brinkley was seated in the rear of the driver's seat and viewed the defendant out of the open window. The area remained well lit. The defendant was seated in the back of an ambulance, approximately two to three car lengths from Officer Joy's cruiser. Officer Joy did not recall whether the

defendant was handcuffed at the time or whether there were officers standing near the defendant. At approximately 9:56 p.m., Brinkley identified the defendant as the second suspect; she did not hesitate in making the identification.

Prior to trial, the defendant filed a motion to suppress the identification evidence of him on the grounds that it was improper, unreliable, and unnecessarily suggestive. At the hearing on the motion to suppress, the state presented testimony from Officer Joy and Brinkley. Officer Joy testified that exigent circumstances necessitating a showup identification of the defendant existed. Specifically, he testified that an armed robbery had just occurred and that the suspects had left the scene of the crime on foot. After one suspect was detained, there was concern that the other suspect could still have other weapons on his person. Officer Joy explained that, during the course of the investigation, he learned that Ferguson had been apprehended with a knife and that he did not know how many weapons were involved in the incident. Officer Joy further testified that it was important to eliminate the defendant as a suspect in the event that the perpetrator remained in the community.

At the suppression hearing, Brinkley testified that she did not have any memory of the event or the night in question because she had recently been in a major car accident and smokes marijuana. Brinkley testified that she "[m]ost likely" smoked "weed" on the day of the robbery but ultimately stated that she did not know if she had done so.

The state also presented four clips of footage from the body camera (body cam) worn by Officer Joy on the night of the incident, Brinkley's written statement from the night of the incident, and other exhibits. In the body cam footage, Brinkley identified Ferguson and the defendant, and discussed the suspects' physical fea-

tures and clothing. At the hearing, Brinkley confirmed that it was her voice and image in the body cam footage, but she maintained that she had no recollection or memory of the night of the robbery.

In her written statement, Brinkley described the appearance of the robbers and detailed their actions during the robbery. See footnote 4 of this opinion. During the hearing, Brinkley confirmed that she wrote and signed the statement but said that she had no recollection of writing the statement or the contents of the statement. Brinkley also confirmed that she had signed and dated the document containing the eyewitness instructions for identification procedures, which Officer Joy testified that he had read to Brinkley prior to her identification of the defendant, but said that she did not remember them either.

The trial court denied the defendant's motion to suppress, concluding that "the identification, given all the facts and circumstances, was not unduly suggestive."[3]

At trial, Brinkley testified that she had recently been involved in an automobile accident and had no memory of the night of the incident because of that accident and her frequent marijuana use. On cross-examination, Brinkley further testified that she "most likely" smoked "weed" on the day of the robbery because she "get[s] high almost every day . . . ." She stated, "I don't remember too much . . . ." Detective Sergeant

[3] "Prior to filing his brief in the [Appellate Court], the defendant filed a motion for articulation pursuant to Practice Book [2021] § 66-5. The defendant presented several questions for articulation, including, '[w]hat subordinate findings, if any, did the trial court make to support its determination that Brinkley's identification "was not unduly suggestive?" ' The state did not oppose this particular request for articulation. The court denied the defendant's motion for articulation. [The Appellate Court] granted the defendant's motion for review of the denial of his motion for articulation but denied the relief requested therein." *State* v. *McLaurin*, supra, 216 Conn. App. 462 n.9. Nevertheless, as we explain herein, this court, sua sponte, ordered the trial court to issue an articulation in this case.

Michael Cruz testified that he spoke with Brinkley on the night of the robbery and that Brinkley did not appear to be under the influence of any drugs that evening. Detective Sergeant Cruz also testified that he did not have any concern about Brinkley's participation in the showup identification procedure that night.

Based on Brinkley's testimony, the trial court admitted into evidence, pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), her signed written statement that she had given to the police on the night of the robbery. After the court admitted the statement, Brinkley read the statement into the record.[4] The prosecutor also introduced into evidence the four video clips that were recorded on Officer Joy's body cam. In the first two clips, Brinkley can be heard identifying Ferguson. In the third clip, Brinkley can be seen and heard discussing the color of the mask worn by the "skinny"

[4] Brinkley's recitation of her statement was as follows: "On this day, January 19, 2018, at approximately 8:30 [p.m.], I was cleaning tables in the restaurant. As I was getting ready to walk in the back to grab a rag, I saw the door swing open, and then came two Black men, [one was] heavyset . . . with a dark blue hoodie, dark skin . . . and a mask; the other male was skinny, lighter skin, with a dark green mask, red camouflage coat on. I saw the gun in the skinny one's hand, and I immediately went to the back to let my coworkers know what was behind me. I showed him where the safe was. He grabbed my arm [and] walked me . . . [Deloma], [and McNeil] further to the back, where the safe was located. Then he pulled out the gun again and demanded someone to open the safe. [There] was silence. He started pointing the gun at everyone. [Deloma] asked, do you want me to open it and went to put the code in. She put it in a couple of times, but [the safe] didn't open. The heavy male then said she had ten seconds to open it or he was going to shoot her. She put the code in again, and the safe opened. He grabbed the drawer and started taking the money. Then, along came the skinny individual, with the four customers. The heavyset male took [Deloma] back to the front to empty out the registers. Meanwhile, [as] the skinny one was taking more money, he noticed one of the customers moving, and, before you know it, the customer pulled out his gun and started to chase the robber. [McNeil] told me to call the police. I stayed in the back until [McNeil] came there again, [and] I [knew that] it was clear [and] that the robbers were gone."

perpetrator. In the fourth clip, Brinkley can be heard identifying the defendant. When asked if she recognized the suspect's clothing, she stated: "Yep . . . I see. Can you put the light on his jeans?" Once the perpetrator stood up, Brinkley can be heard saying: "Yep, that's him." When asked how sure she was, she can be heard saying: "Yup, I'm sure."

The jury found the defendant guilty of all counts, except for larceny in the fourth degree. See footnote 1 of this opinion. The trial court sentenced the defendant to twenty-five years of incarceration, execution suspended after eighteen years, and five years of probation.

Before the Appellate Court, the defendant claimed that the trial court should have granted his motion to suppress Brinkley's identification because the showup procedure utilized by the police was unnecessarily suggestive, and, as a result, the identification was unreliable. *State* v. *McLaurin*, supra, 216 Conn. App. 466. "After setting forth his general contention that showup identifications are 'widely condemned' because they are inherently and significantly suggestive"; id., 468; and arguing that the exigency " 'exception' " permitting their use was intended to be a narrow one; id.; the defendant claimed that the procedure by which Brinkley had identified him was unnecessarily suggestive for three reasons: (1) the police officers involved admitted at the suppression hearing that they did not need to use a showup identification procedure, (2) approximately ninety minutes elapsed between the crime and when Brinkley identified him, which, according to the defendant, belied the state's claim of exigency, and (3) the showup procedure was "conducted . . . in a suggestive place and staged . . . in a suggestive manner." (Internal quotation marks omitted.) Id., 468–69.

The Appellate Court disagreed with each contention and, like the trial court, concluded that the showup

identification procedure was not unnecessarily suggestive. See id., 470. Consequently, the Appellate Court had no occasion to address whether the identification was otherwise reliable. See id., 479 n.23. Ultimately, the Appellate Court affirmed the judgment of the trial court. Id., 479.

The defendant filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly uphold the trial court's denial of the defendant's motion to suppress the one-on-one showup identification of the defendant?" *State* v. *McLaurin*, supra, 346 Conn. 903.

On appeal to this court, the defendant asserts that the Appellate Court incorrectly concluded that the challenged showup identification procedure was not unnecessarily suggestive. The defendant also urges this court to overrule its precedent holding that, on the heels of an armed robbery (or commission of another dangerous felony), a pretrial showup procedure in close temporal and geographic proximity to the crime is not unnecessarily suggestive in light of the exigencies of the criminal investigation. See, e.g., *State* v. *Revels*, 313 Conn. 762, 773–74, 99 A.3d 1130 (2014) (showup identification procedure was not unnecessarily suggestive when police reasonably believed that perpetrator "was likely . . . on the run, in the area, and armed," and "[s]afeguarding the public from a possibly armed and dangerous fugitive was an immediate and pressing need"), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). The defendant asserts that this court's precedents improperly equate exigency with convenience, and he urges us to adopt a more stringent standard for the admission of showup identification evidence. The defendant argues that, since *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), courts improperly have expanded the notion of what constitutes an exigency to include "a myriad" of situations that, in his

view, are not exigent. In order to effectuate the demands of the fourteenth amendment to the federal constitution, he contends, this court should adopt a "prophylactic" exclusionary rule limiting the use of showup identification procedures to "true exigencies . . . ." Under his proposed rule, showup identifications would be admissible only when (1) as in *Stovall* v. *Denno*, supra, 302, a showup procedure is " 'the only feasible procedure' " in light of a gravely injured witness, (2) the police lack probable cause to detain a suspect, or (3) the police are in pursuit of "an armed suspect who has harmed, or tried to harm," a member of the public. Adopting such a rule, the defendant argues, will not prevent the police from conducting showup procedures in other situations, but it will simply preclude the state from using those identifications in court.

The state contends that the Appellate Court properly affirmed the judgment of the trial court, concluding that the showup identification procedure was not unnecessarily suggestive and, therefore, does not violate the due process clause of the fourteenth amendment to the United States constitution. In the alternative, the state asserts that the challenged identification was reliable. The state further asserts that we should not adopt the prophylactic rule urged by the defendant. Specifically, the state contends that there is no merit to the defendant's claim that courts disdain showup identifications, as courts uniformly have approved the use of showup identifications in appropriate circumstances, and, indeed, "each of the jurisdictions relied [on] by the defendant to support his claim of universal disdain [for showup identifications has], like Connecticut, approved of [their use] under facts analogous to this case . . . ." The state further contends that "[n]othing in the [United States] Supreme Court precedent supports the defendant's contention that there must be a clear lack of probable cause [to make an arrest], a gravely injured witness, or armed

suspects who have tried to harm someone before a showup" procedure may be conducted. Relying on *Simmons* v. *United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), in which the court was "unwilling to prohibit [the use of an allegedly unnecessarily suggestive identification procedure], either in the exercise of [its] supervisory power or, still less, as a matter of constitutional requirement"; id., 384; the state argues that "the [United States] Supreme Court has long recognized that the use of a suggestive identification procedure may be necessary and, thus, comport with due process, when officers are searching for fleeing suspects shortly after a crime and need to quickly determine if they are on the right track or need to keep searching."

On November 15, 2023, a panel of this court consisting of then Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy heard the first oral argument in this matter. On September 17, 2024, this court notified the parties that retired Chief Justice Robinson and Justice Alexander would be replaced by Judges Clark and Westbrook and ordered the parties to appear for a rehearing. Before that hearing took place, pursuant to Practice Book § 60-5, we, sua sponte, ordered the trial court to articulate the following: (1) "What subordinate findings did the trial court make to support its determination that Brinkley's identification 'was not unduly suggestive?' In particular, what portions of Officer Joy's and . . . Brinkley's testimony did the court credit and what portions, if any, did the court reject? The court should also articulate any other findings of fact necessary to support its determination." (2) "Assuming the identification was unduly or impermissibly suggestive, articulate whether, under the totality of the circumstances, the identification was still reliable and the facts that support such a conclusion." And (3) "[a]rticulate the factual basis that supports the conclusion that an exigency existed under the circumstances

of this case that justified the showup identification." The trial court issued its articulation on November 25, 2024. Thereafter, on January 29, 2025, this court heard a second argument with the newly constituted panel. Additional facts will be set forth as necessary.

I

Whether a pretrial identification procedure violates a defendant's right to due process is a mixed question of law and fact subject to this court's plenary review. See, e.g., *State* v. *Marquez*, 291 Conn. 122, 136–37, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). Because the suggestiveness and reliability of an identification procedure implicate a defendant's constitutional right to due process, we must examine the record scrupulously to determine whether the facts found by the trial court are supported by substantial evidence. See, e.g., id., 137. Nonetheless, "we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Internal quotation marks omitted.) *State* v. *St. John*, 282 Conn. 260, 277, 919 A.2d 452 (2007).

"The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and, consequently, 'reliability is the linchpin in determining the admissibility of identification testimony . . . .' Id., 114. Thus, 'the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to

have been so, it must be determined whether the identification was nevertheless reliable based on [an] examination of the totality of the circumstances.' . . . *State* v. *Marquez*, [supra, 291 Conn. 141]." *State* v. *Harris*, 330 Conn. 91, 101, 191 A.3d 119 (2018).

"With respect to the first prong of this analysis, [b]ecause, [g]enerally, [t]he exclusion of evidence from the jury is . . . a drastic sanction, [it] . . . is limited to identification testimony [that] is manifestly suspect . . . . [Consequently] [a]n identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification. . . . We have recognized that [ordinarily] a one-to-one confrontation between a [witness] and the suspect presented . . . for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty." (Internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 622, 254 A.3d 905 (2020), quoting *State* v. *Revels*, supra, 313 Conn. 772–73; see also, e.g., *Neil* v. *Biggers*, supra, 409 U.S. 198 ("[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous"). For this reason, when not necessary, "the presentation of a single suspect to a witness by the police (as opposed to a lineup, in which several individuals are presented [by] the police, only one of whom is the suspect) . . . has . . . been widely condemned . . . ." (Citations omitted; internal quotation marks omitted.) *Brisco* v. *Ercole*, 565 F.3d 80, 88 (2d Cir.), cert. denied, 558 U.S. 1063, 130 S. Ct. 739, 175 L. Ed. 2d 542 (2009).

It is well established, however, that the use of a one-on-one showup identification procedure does not invariably constitute a denial of due process, as it may be justified by exigent circumstances. See, e.g., *State* v.

Revels, supra, 313 Conn. 773–74; *State* v. *Wooten*, 227 Conn. 677, 686, 631 A.2d 271 (1993). Thus, a showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable and, therefore, permissible for federal due process purposes when "it was prudent for the police to provide the victim with the opportunity to identify [his or] her assailant while [his or] her memory of the incident was still fresh . . . and . . . [the procedure] was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay, if the victim excluded the defendant as a suspect or was unable to identify him." (Citation omitted; internal quotation marks omitted.) *State* v. *Wooten*, supra, 686; accord *State* v. *Ledbetter*, 275 Conn. 534, 551, 881 A.2d 290 (2005) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Moreover, when the police take prompt steps to identify a detained suspect in order to achieve these objectives, the use of handcuffs and illumination does not necessarily render the identification unduly suggestive. See, e.g., *United States* v. *Bautista*, 23 F.3d 726, 730 (2d Cir.) ("The fact that the suspects were handcuffed, in the custody of law enforcement officers, and illuminated by flashlights . . . did not render the [pretrial] identification procedure unnecessarily suggestive. . . . Because the on-the-scene identification was necessary to allow the officers to release the innocent, the incidents of that identification were also necessary."), cert. denied sub nom. *Minier-Contreras* v. *United States*, 513 U.S. 862, 115 S. Ct. 174, 130 L. Ed. 2d 110 (1994); see also, e.g., *State* v. *Revels*, supra, 313 Conn. 767, 774 (showup identification procedure was not unnecessarily suggestive, even though identification took place while "the defendant was standing in the middle of the

road, handcuffed and surrounded by uniformed police officers . . . [one of whom] directed [a] spotlight on his cruiser toward the [defendant]").

II

The defendant claims that his right to due process was violated because the showup identification procedure used in the present case was unnecessarily suggestive. We acknowledge that the showup procedure in the present case was suggestive. Indeed, this court has frequently acknowledged that showup identification procedures are "inherently and significantly suggestive . . . . We also have recognized, however, that the existence of exigencies may preclude such a procedure from being *unnecessarily* suggestive." (Emphasis in the original; internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 772–73. We need not determine whether the showup procedure was unnecessarily or unduly suggestive in the present case, however, because, even if we assume, arguendo, that it was, the trial court correctly concluded that Brinkley's identification of the defendant was reliable under all of the relevant circumstances.[5] See, e.g., *State* v. *Ruiz*, supra, 337 Conn. 624 ("[w]e need not opine on the propriety of the procedure used by the police . . . because, even if we were to assume . . . that it was unnecessarily suggestive, [the] identification of the defendant was reliable under all of the relevant circumstances"); see also, e.g., *Van Pilon* v. *Reed*, 799 F.2d 1332, 1339 (9th Cir. 1986) (court may assume suggestiveness arguendo and review reliabil-

[5] Because we assume, without deciding, that the showup identification procedure was unnecessarily suggestive but conclude that the identification was nevertheless reliable under the totality of the circumstances, we do not address the defendant's contention that we should adopt a prophylactic rule, under the federal due process clause, barring the admission of identifications obtained through a showup procedure unless the police conducted the showup procedure to accommodate a gravely injured witness, there was a lack of probable cause to arrest a suspect, or an armed suspect had harmed (or attempted to harm) a member of the public.

ity); *Bonderer* v. *Jones*, Docket No. 2:20-cv-0415 DAD AC, 2024 WL 4453461, *6 (E.D. Cal. October 9, 2024) (court did not need to determine whether single photograph identification procedure was unduly suggestive because, assuming it was, identification itself was nevertheless reliable under totality of circumstances).

The following additional facts are necessary for our resolution of this issue. In its articulation, the trial court explained that, "[a]ssuming [this] court finds [that] the [showup] identification was unduly or impermissibly suggestive, the [trial] court articulates how, under the totality of the circumstances, the identification was still reliable.

"The identification was conducted in close temporal and geographical proximity to the alleged offense: an armed robbery in progress call was received by the police at 8:40 p.m., and . . . Brinkley was brought to the [car] dealership to conduct an identification at 8:50 p.m.; she identified . . . Ferguson at 9:12 p.m.; she was returned to the dealership at 9:42 p.m. for a second identification, and she identified the defendant at 9:56 p.m. . . . The restaurant was described as being across the street from the dealership, about [one] tenth of a mile away . . . . The police provided . . . Brinkley an opportunity to identify the defendant while her memory was still fresh. . . . Brinkley identified both suspects quickly and without hesitation. Officer Joy testified [that] a firearm was found on the floor of the restaurant, behind the front counter . . . . The court recalls in . . . Brinkley's statement that the skinnier suspect (identified as the defendant) was in possession of a gun at the time of the robbery . . . . Officer Joy also testified that . . . Ferguson was found with a knife on his person when he was apprehended. Officer Joy also stated [that] he did not know how many weapons were involved in this incident . . . ." (Citations omitted.)

Furthermore, the trial court explained in its articulation that it "credited all of the testimony of Officer Joy and . . . Brinkley and did not reject any of it. The court noted the issues . . . Brinkley herself raised regarding her lack of present memory, frequent marijuana use, and the possibility [that] she was not wearing glasses on the night of the incident."

This court has explained that, to determine whether an identification from an unnecessarily suggestive procedure is reliable for federal constitutional purposes, we look at the totality of the circumstances. See, e.g., *State* v. *Ruiz*, supra, 337 Conn. 624. To assist us, we examine the following factors (known as the *Biggers* factors): " '[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his [or her] prior description of the criminal, [4] the level of certainty demonstrated at the [identification], and [5] the time between the crime and the [identification]. *Manson* v. *Brathwaite*, supra, [432 U.S.] 114, citing *Neil* v. *Biggers*, supra, [409 U.S.] 199–200.' . . . *State* v. *Harris*, supra, 330 Conn. 108." *State* v. *Ruiz*, supra, 624–25.

We use these factors to guide our scrupulous review of the record to determine whether substantial evidence in the record supports the trial court's finding that Brinkley's identification of the defendant was reliable. We conclude that the relevant factors in the present case support the conclusion that the challenged identification was reliable.

First, we consider the opportunity of the witness to view the criminal at the time of the crime. The evidence established that Brinkley was in the front of the restaurant when Ferguson and the defendant entered, and that she then went into the back of the restaurant with them and stood next to the defendant while Ferguson ordered Deloma to open the safe. In addition, in its

articulation, the trial court explained that Officer Joy testified that "[h]e [had] selected . . . Brinkley to participate in the identification because she was the employee closest to the front of the [restaurant, who] encountered the suspects first . . . ." (Citation omitted.) On the basis of this evidence, we conclude that the first factor weighs in favor of reliability.

Turning to the second factor, the witness' degree of attention, we conclude that this factor also weighs in favor of reliability. The evidence demonstrates that Brinkley was able to provide a detailed description of the perpetrators, which matched the appearance of Ferguson and the defendant on the night in question, and that she communicated with Officer Joy during his investigation. In its articulation, the trial court explained that "Officer Joy testified that he [had] interviewed . . . Brinkley prior to the identification. She told him there were two Black male suspects, one short and heavyset, the other tall and thinner. She stated [that] they were wearing masks when they entered the restaurant." Indeed, Brinkley's statement to the police contains a detailed description of the events of that night. See footnote 4 of this opinion.

We acknowledge that, during trial, Brinkley testified that she had an automobile accident prior to trial that impacted her memory of the robbery. Also, during cross-examination, Brinkley testified that she "most likely" was smoking marijuana on the night in question and was not sure whether she was wearing her eyeglasses. In its articulation, the trial court explicitly took into account Brinkley's testimony in this regard, but it relied on her "written statement, made contemporaneous[ly] [with] the events in question," and her detailed descriptions therein.

We next examine the accuracy of the witness' prior description of the defendant. In this case, Officer Joy

testified that he had interviewed Brinkley and the other eyewitnesses before the identification. Brinkley had provided Officer Joy with a description of the suspects, one of which matched the general appearance of the defendant. Specifically, Brinkley had described one of the suspects as a skinny Black male, who wore a dark green mask and a red camouflage coat. See footnote 4 of this opinion. Brinkley's identification was consistent with how the defendant appeared when he was located on the night of the robbery. Furthermore, in its articulation, the trial court explained that "Officer Joy testified [that] a firearm was found on the floor of the restaurant, behind the front counter . . . . The [trial] court recalls in . . . Brinkley's statement that the skinnier suspect (identified as the defendant) was in possession of a gun at the time of the robbery . . . ." (Citations omitted.) Accordingly, we conclude that the accuracy of Brinkley's identification of the perpetrators of the crime weighs in favor of the reliability of the identification.

The next factor to consider is the level of certainty demonstrated by Brinkley with respect to the identification. Officer Joy testified that Brinkley had identified the defendant without any hesitation, and Officer Joy recorded that identification in writing. Moreover, the video clips from Officer Joy's body cam demonstrate that Brinkley had identified the defendant with certainty on the night of the robbery. In its articulation, the trial court explained that the prosecutor introduced video from Officer Joy's body cam and asked Brinkley to identify her voice in the video. She did so, and the following statements were attributed to her: " 'Yup, that's him'; '[c]an you put a light on his face because he had on a mask?' And 'I saw your big ass, I saw you . . . yup, that's you.' " In addition, in the video, when Officer Joy asked Brinkley whether she took a good look at the individuals who robbed the restaurant, she answered in the affirmative. When asked, in the video, if she

recognized the clothing, Brinkley responded, "yes." Furthermore, in the body cam video, when Officer Joy asked Brinkley whether she was sure that the defendant was one of the robbers, Brinkley responded, "I'm sure." (Internal quotation marks omitted.) Brinkley's statements in the body cam footage reveal that, at the time she identified the defendant, she did so with great certainty. Accordingly, we conclude that this factor weighs in favor of the reliability of Brinkley's identification of the defendant.

The final factor to consider is the time between the crime and the identification. The evidence established that the Milford Police Department received a call at 8:40 p.m., informing it that an armed robbery was in progress. Brinkley identified the defendant a little more than one hour later, at approximately 9:56 p.m. Therefore, we conclude that the time between the crime and the identification was quite short and that this factor weighs in favor of reliability. See, e.g., *Morris* v. *Carey*, 438 Fed. Appx. 634, 636 (9th Cir.) (field showup did not violate due process when it "was held just one hour after the crime" and when "the witnesses spent time with [the] [p]etitioner during [the] crime in very close quarters . . . [and] had ample time to observe the uncovered portions of [the] petitioner's face and his clothing"), cert. denied, 565 U.S. 1041, 132 S. Ct. 589, 181 L. Ed. 2d 433 (2011).

Considering the totality of the circumstances, we conclude that Brinkley's identification of the defendant was reliable. Consequently, we agree with the Appellate Court that the trial court properly denied the defendant's motion to suppress Brinkley's identification because its use by the state did not violate the defendant's rights under the due process clause of the fourteenth amendment to the United States constitution. See *State* v. *McLaurin*, supra, 216 Conn. App. 451, 466.

On appeal, the defendant asserts that the trial court's determination that the identification was reliable is undermined by a review of the factors that this court identified in *State* v. *Harris*, supra, 330 Conn. 118–19, 131, 133, as additional considerations for reliability under our state constitution. We are unpersuaded.

In *Harris*, this court identified the analytical framework required by our state constitution "for evaluating the reliability of an identification that is the result of an unnecessarily suggestive identification procedure." Id., 131. Relying on *State* v. *Henderson*, 208 N.J. 208, 288–89, 27 A.3d 872 (2011), this court, in *Harris*, explained that a court should consider how the reliability of an identification is affected by system variables, which are factors that are within the control of the criminal justice system, and estimator variables, which are factors that stem from conditions over which the criminal justice system has no control and typically arise out of the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime. *State* v. *Harris*, supra, 330 Conn. 131; see also *State* v. *Guilbert*, 306 Conn. 218, 236 n.11, 49 A.3d 705 (2012).

Specifically, in *Harris*, this court held that a trial court should consider the following eight estimator variables identified in *State* v. *Guilbert*, supra, 306 Conn. 253–54: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the

days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 118–19; see also id., 133.

Critically though, in *State* v. *Guilbert*, supra, 306 Conn. 218, we explained that, although the estimator variables "are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of [those variables] are counterintuitive."[6] (Footnote omitted.) Id., 239. Because of the counterintuitive nature of estimator variables, we allow for the defendant to introduce expert testimony to help the fact finder evaluate the likelihood of misidentification. See id., 251–54.

Although we are skeptical that the defendant truly makes out a reviewable claim under the state constitution in the present case, the state has, in its brief, responded to the defendant's argument under the *Harris* factors. We thus address the dissent's state constitutional discussion and still conclude that the identification was reliable.[7] The defendant has not asked us to revisit the

[6] "For example, people often believe that the more confident an eyewitness is in an identification, the more likely the identification is to be accurate. Similarly, the average person is likely to believe that eyewitnesses held at gunpoint or otherwise placed in fear are likely to have been acutely observant and therefore more accurate in their identifications. . . . Yet none of these beliefs is true." *State* v. *Guilbert*, supra, 306 Conn. 240–41. But laypersons are unaware of the effect of the factors on the reliability of a witness' testimony in this regard.

[7] In his motion to suppress, the defendant claimed that the identification violated his rights under both the state and federal constitutions. Nevertheless, the defendant did not ask the trial court to make findings under *State* v. *Harris*, supra, 330 Conn. 131, with respect to any estimator variables or

Harris factors or to adopt any additional factors to guide our review. Therefore, we do not.

It is important to note that, although *Harris* specifically allows for the defendant to introduce expert testimony on estimator variables, and these factors require the presentation of scientific evidence because they are unknown to the average fact finder, the defendant did not introduce any expert testimony. Despite his failure to introduce expert testimony on the *Harris* factors during the trial court proceedings, the defendant, on appeal, points to the following estimator variables as undermining the trial court's finding of reliability: "The decoupling of confidence and accuracy is one of 'eight

to introduce any expert testimony on the estimator variables or their import in this case. Indeed, in *Harris*, we explained that, for state constitutional purposes, "to obtain a pretrial hearing, the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) Id.; see also, e.g., *State* v. *Perez-Lopez*, 218 Conn. App. 555, 562, 582–83, 293 A.3d 1 (agreeing with defendant that it was error for trial court not to apply burden shifting framework adopted in *Harris* in connection with his state constitutional due process claim that identification was not reliable but concluding that error was harmless), cert. denied, 348 Conn. 902, 301 A.3d 529 (2023).

In the present case, the defendant did not seek to invoke the burden shifting framework under *Harris*, and it is questionable whether he even satisfied the first step of that framework, namely, showing that a system variable rendered the identification unreliable. To be sure, in *State* v. *Henderson*, supra, 208 N.J. 208, the case we relied on in *Harris* to adopt the system and estimator variables rubric; see *State* v. *Harris*, supra, 330 Conn. 131; the New Jersey Supreme Court noted that a showup identification procedure conducted *within* two hours of a crime is not a system variable sufficient to trigger a hearing because it does not undermine the reliability of an identification. See *State* v. *Henderson*, supra, 260–61 (noting study showing that "showups performed within minutes of an encounter were just as accurate as lineups" and that showups conducted more than two hours after event lead to decreased reliability).

estimator variables' that govern reliability under the state constitution. . . . The other relevant factors are: the negative impact on reliability if the witness was 'focus[ed] on a weapon'; the inability to accurately perceive and remember events due to 'high stress at the time of observation'; and the absence of a double-blind, sequential identification procedure." (Citation omitted.) Specifically, the defendant asserts that "Brinkley was probably high, petrified and focused on a gun, and did not identify the defendant during 'a double-blind, sequential identification procedure.' "

We disagree. First, the evidence does not establish that Brinkley was "high" when she made the identification. Although Brinkley testified that she "probably" had smoked marijuana on the night in question, Brinkley also testified that she had no memory of the night of the incident. Moreover, Detective Sergeant Cruz, who interacted with Brinkley the night of the incident, testified that Brinkley did not appear to be "high" or under the influence of any drugs that night. So, at best, there is conflicting evidence. Second, although there was evidence presented at trial that Brinkley was scared, fear, in and of itself, does not render an identification unreliable. See, e.g., *State* v. *Wooten*, supra, 227 Conn. 681, 688 (victim's identification of defendant was reliable despite victim's observation of defendant during sexual assault in which he threatened her with "sharp metal object"); *State* v. *Scott*, 191 Conn. App. 315, 339–40, 214 A.3d 871 (witness identification was reliable even though witness was in " 'panic mode' " during robbery in which witness was threatened with gun), cert. denied, 333 Conn. 917, 216 A.3d 651 (2019). Third, the evidence demonstrates that, although there was a weapon involved in the crime, most of the time that Brinkley was standing next to the defendant in the brightly lit back room, he did not have the gun. In fact, shortly after bringing Brinkley and the other individuals to the back room,

the defendant handed the gun to Ferguson, who led Deloma to the front of the restaurant. Therefore, the evidence does not support the defendant's contention that Brinkley was so focused on the gun that her identification was unreliable. Finally, although Brinkley did not identify the defendant in a double-blind, sequential identification procedure, the showup procedure occurred within eighty-six minutes of the incident. Social science demonstrates that there is no greater likelihood for misidentification in a showup than in a lineup if the showup procedure took place less than two hours after the witness viewed the perpetrator. See A. Yarmey et al., "Accuracy of Eyewitness Identifications in Showups and Lineups," 20 Law & Hum. Behav. 459, 465, 468 (1996). But see *State* v. *Henderson*, supra, 208 N.J. 261 (showup identification procedures conducted more than two hours after event in question present heightened risk of misidentification).

The judgment of the Appellate Court is affirmed.

In this opinion D'AURIA, DANNEHY and CLARK, Js., concurred.

McDONALD, J., with whom ECKER and WESTBROOK, Js., join, dissenting. The preeminent American legal scholar on the law of evidence long ago recognized that showup[1] identifications are "next to worthless" and that "there is no excuse for jeopardizing the fate of innocent

[1] "A [showup] is an identification procedure in which the police present a single suspect to an eyewitness and then ask the eyewitness whether the suspect is the perpetrator. Typically, [showups] are conducted in the area of, and shortly after, the alleged crime. Often, when the eyewitness views the sole suspect, the suspect will be in police custody and may even be [handcuffed] or locked in a police squad car. [Showups] are very convenient for law enforcement as they allow for a quick and easy resolution of the investigation, without having to take the time to assemble a lineup or [photographic] array." (Footnotes omitted.) M. Cicchini & J. Easton, "Reforming the Law on Show-Up Identifications," 100 J. Crim. L. & Criminology 381, 388–89 (2010).

men by such clumsy antiquated methods . . . .'' (Citations omitted.) 4 J. Wigmore, Evidence (3d Ed. 1940) § 1130, p. 214 n.1. More than eight decades after Professor John Henry Wigmore first made this statement in his treatise—a treatise retired United States Supreme Court Justice Felix Frankfurter properly noted was ''unrivaled as the greatest treatise on any single subject of the law''[2]—courts still regularly admit this highly unreliable evidence, despite an abundance of scholarship and science demonstrating that showup identifications are inherently suggestive, unnecessary, and inaccurate.

Today, this court considers whether such a highly suggestive and inherently unreliable showup identification was properly admitted into evidence at the trial of the defendant, Gregory E. McLaurin. The majority recognizes that the showup at issue was ''suggestive.'' Part II of the majority opinion. Although the trial court and the Appellate Court determined that an exigency made the identification procedure not unnecessarily suggestive, the majority concludes that it does not need to determine whether the showup was unnecessarily suggestive because, even if it was, the identification was reliable. I write separately for two reasons. First, I analyze the exigent circumstances exception on which the police often rely to justify unnecessarily suggestive identification procedures, which the majority declines to address. Second, I disagree with the majority that the identification at issue in the present case was reliable.

Despite the Appellate Court's conclusion to the contrary, I cannot conclude that there was an exigency in the present case that required this unnecessarily suggestive identification procedure. See *State* v. *McLaurin*,

[2] F. Frankfurter, ''John Henry Wigmore: A Centennial Tribute,'' 58 Nw. U. L. Rev. 443, 443 (1963). Justice Frankfurter continued: ''I make no exception to this superlative statement. It is not only a great treatise on the law of evidence, but it is a masterpiece of scholarship, conveyed through a distinguished style of writing.'' Id.

216 Conn. App. 449, 466, 470, 285 A.3d 104 (2022). Prior to the showup identification procedure, the police (1) already had two suspects in custody and had stopped searching for the perpetrators, (2) conceded they had probable cause to arrest the defendant without the showup identification, (3) had recovered the gun used in the robbery, and (4) knew that the identifying witness was not injured. Although it may well have been more convenient for the police to conduct a showup identification rather than to undertake the effort to formulate a more reliable photographic array or lineup identification; see General Statutes § 54-1p; mere convenience does not constitute an exigent circumstance in which the use of a showup is the only feasible identification procedure. If the situation at issue can be characterized as exigent, then I cannot imagine any situation in which the police would not be justified in conducting a showup identification shortly after a crime is committed. This supposition would almost completely undermine the legislature's goal in passing § 54-1p, which sets forth specific procedures for the state and municipal police to follow when conducting identifications. Our legislature passed § 54-1p, recognizing that eyewitness identifications are "prone on the one hand to stunning inaccuracy but at the same time [are] often the most compelling testimony in the courtroom." Conn. Joint Standing Hearings, Judiciary, Pt. 6, 2011 Sess., p. 1910, remarks of Senator Martin M. Looney. It is likely that the Appellate Court followed a line of cases from this court that have held that showups conducted under similar circumstances were not unnecessarily suggestive. These cases, which long predate the legislature's 2011 mandate for reliable identifications in § 54-1p, have incorrectly expanded the circumstances that may be characterized as "exigent." It is long past time that this court limit the admissibility of showup identifications to true exigencies, in which a showup is the only feasible identification proce-

dure available to law enforcement. The majority's application of the factors set forth in *Neil* v. *Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), highlights the dangers with both the exigency exception and the reliability analysis under the federal constitution. I also disagree with the majority's conclusion that, under the factors set forth in *State* v. *Harris*, 330 Conn. 91, 118–19, 131, 133, 191 A.3d 119 (2018), the identification was reliable. Accordingly, I respectfully dissent.

The context in which the showup identification occurred is critical to evaluating whether the identification procedure employed by the police was unnecessarily suggestive. In 2018, two individuals robbed a restaurant on a busy commercial street in Milford. At approximately 8:30 p.m., two Black men entered the restaurant; one was short and heavyset, and the other was tall and thin. Both men wore ski masks, jeans and hooded sweatshirts. The masks left their "eyes, mouths, and the skin around [them] . . . visible." *State* v. *McLaurin*, supra, 216 Conn. App. 451. The tall individual also wore a dark-colored coat and was holding a handgun. When the men entered the restaurant, there were three employees working and four customers present. The men ordered the two employees who were working in the front of the restaurant and all of the customers into the back office at gunpoint. One of the employees, Jada Brinkley, "was so petrified . . . [that] she was screaming . . . 'oh my fucking God, I'm so fucking scared. We're going to die.' " The taller man handed the gun to the shorter one, who then pointed it at one of the employees and told her to unlock the safe. The employee complied, and the shorter man emptied the safe and stuffed the money in his pockets. The shorter man then led the employee to the front cash registers and ordered her to empty one of the cash registers. Around the same time, the tall man ordered the remaining individuals in the back office to turn over

their cell phones. One of the customers, however, was armed, and, when he drew his weapon on the tall man, the tall man ran out of the restaurant. That customer then went to the cash register area and knocked the gun out of the shorter individual's hand. The shorter man then ran out of the restaurant as well.

A Milford police officer, Matthew Joy, arrived at the restaurant at approximately 8:43 p.m. The employees and customers described the two men to Joy and informed him that the two individuals fled on foot. Joy relayed this information to other officers over the police radio. Joy also located a gun on the floor, behind the front counter. As the Milford police began searching for the suspects, a passing motorist informed them that he saw two Black males run across the road and into a nearby vacant parking lot that bordered a wooded area. Officer Sean Owens and his police dog entered the woods behind the vacant parking lot, and the dog followed a scent to a path along the edge of the woods. Owens spotted an individual, approximately fifteen yards away, who matched the description of the shorter suspect. The man ignored Owens' command to "get [his] hands up" and to get "down on the ground," and the man, instead, reached for his waistband. Owens' police dog subdued the man by biting his leg. Owens and his dog subsequently left the area to search for the second suspect.

Officer Christopher Deida searched the suspect and found a kitchen knife and $868 in the front pockets of his sweatshirt. Deida asked the man several times, "where's the other guy you were with?" After initially claiming that he did not know what Deida was talking about, the man told Deida that "his friend 'jumped the fence' and pointed to a nearby chain-link fence with barbed wire that ran along the wooded area." *State* v. *McLaurin*, supra, 216 Conn. App. 454–55. The police then escorted the man to the nearby vacant parking

lot. The shift commander told Sergeant Christopher Dunn to "do the witness [identification]" in the parking lot. Dunn then instructed Joy to conduct an eyewitness showup identification in the parking lot. Joy chose to have Brinkley identify the suspect because she "had the best view of the suspects," and Joy thereafter drove Brinkley to the parking lot.

When they arrived at the parking lot, Joy read Brinkley a preprinted rules and instructions form for identification procedures. Specifically, he told Brinkley that "she was going to view some people. It may or may not be the person that she had seen during the incident but that it is important to clear innocent persons [of suspicion] as well, and . . . after making an identification, she shouldn't talk about the process to anyone." Joy then lowered the rear window of his patrol car, so that Brinkley could see the man whom the police had detained. Brinkley quickly identified the man as the shorter masked individual. The police later identified him as Royshon Ferguson. Joy then drove Brinkley back to the restaurant.

Meanwhile, Owens and his dog could not locate the second man after a twenty to thirty minute search. Eventually, Owens ended the search. As Owens walked toward his car, however, his dog alerted him to the presence of another individual. Owens saw an unmasked man, approximately fifty to sixty yards from where Ferguson was apprehended, who "was hunkered down in head-high thickets . . . ." Owens detained the man, and other officers brought him to the parking lot where the earlier identification had taken place.

At 9:42 p.m., Joy was instructed to bring Brinkley back to the parking lot for a showup identification of the second man. Joy drove Brinkley to the parking lot, read her the same instructions he had previously read her for the earlier identification, and lowered the rear

window. Joy's car was about "two or three car lengths" from the man, who was unmasked and sitting in the back of an ambulance. At approximately 9:56 p.m., Brinkley identified the man as the taller masked robber. The police later identified the man as the defendant.

Prior to trial, the defendant moved to suppress Brinkley's showup identification "as the [fruit] . . . of improper, unreliable and unnecessarily suggestive police identification procedures . . . [that were] so highly and unnecessarily suggestive and conducive to the making of irreparable misidentifications . . . [that they] render[ed] any identification[s] procured thereby unconstitutionally unreliable . . . ." On the first day of trial, the trial court heard arguments and testimony on the defendant's motion. Joy testified that he did not remember whether, at the time of the identification, the defendant was handcuffed, whether his hands were in front of his body or behind his back, or whether any police officers were next to him. There was testimony, however, that it is Milford Police Department policy to keep an armed robbery suspect handcuffed after having detained him. Joy also testified that exigent circumstances necessitated a showup identification of the defendant because an armed robbery involving a firearm had just occurred and the suspects, who had left the scene on foot, could possibly still have other weapons on their person. When questioned by defense counsel on cross-examination, Joy agreed that the police had "show[n] [Brinkley] somebody after a robbery, who was surrounded by the police and medical personnel [while Brinkley was] in the back of a police car, and [that Joy had asked her], is this the guy who did it . . . ?" Finally, Detective Sergeant Michael Cruz, who led the investigation, confirmed that nothing "prevent[ed] [the police from] doing a [photographic array or] a live lineup with the defendant . . . ."

For her part, Brinkley testified that she had no memory of the event or the night in question. She testified: "I just got into a car accident. I was unconscious, don't remember. I smoke weed. . . . I do not remember this night . . . ." The prosecutor then showed Brinkley several clips of video footage from Joy's body cam in which Brinkley can be heard identifying Ferguson, identifying the defendant, and discussing the suspects' physical features and clothing. Brinkley confirmed that it was her in the videos but, again, explained that she had no recollection of the captured events. Thereafter, Brinkley also testified that she "[m]ost likely" smoked "weed" on the day of the robbery but ultimately concluded that she did not know for sure if she had done so.

Relevant to this appeal, Dunn was asked by defense counsel at trial whether there was an emergency that necessitated a showup identification. Dunn responded, "[n]o, there was a request from the captain." Defense counsel cross-examined Cruz as to whether "there [was] anything that prevented [the police officers] from doing a [photographic array] of [the defendant] with the witnesses and the employees of [the restaurant]?" Cruz responded that, "for this case," based on "my training and experience, the showup was appropriate. I believe there [was] enough probabl[e] cause on that night to arrest the two [suspects] for the robbery." Cruz subsequently testified on cross-examination that there was nothing that prevented the officers from doing a photographic array with the eyewitnesses. Defense counsel then asked whether there was anything that prevented the officers from doing a lineup with the defendant and the restaurant employees, and Cruz responded, "[n]o."

In a brief ruling denying the motion to suppress, the trial court explained that it has "consider[ed] the testimony of . . . Joy and the testimony of . . . Brinkley . . . and . . . [found] that the identification, given all

the facts and circumstances, was not unduly suggestive." The trial court subsequently denied the defendant's motion for articulation, which sought, among other things, an explanation as to what subordinate findings the court made to support its conclusion that the identification was not unduly suggestive. At the conclusion of trial, the jury found the defendant guilty on nine of the ten counts, and he was sentenced to twenty-five years of imprisonment, execution suspended after eighteen years, and five years of probation. The Appellate Court subsequently upheld the trial court's denial of the motion to suppress on the basis of the exigent circumstances' exception and affirmed the judgment of conviction. See *State* v. *McLaurin*, supra, 216 Conn. App. 466, 470, 479.

Following the first oral argument heard by this court, we, sua sponte, ordered the trial court to articulate the following: (1) "What subordinate findings did the trial court make to support its determination that Brinkley's identification 'was not unduly suggestive?' In particular, what portions of . . . Joy's and . . . Brinkley's testimony did the court credit and what portions, if any, did the court reject? The court should also articulate any other findings of fact necessary to support its determination." (2) "Assuming the identification was unduly or impermissibly suggestive, articulate whether, under the totality of the circumstances, the identification was still reliable and the facts that support such a conclusion." And (3) "[a]rticulate the factual basis that supports the conclusion that an exigency existed under the circumstances of this case that justified the showup identification."

In its articulation, the trial court reiterated many of the facts of the robbery and subsequent identification procedure to conclude that Brinkley's identification was not unduly suggestive. The court explained that it "credited all of the testimony of . . . Joy and . . .

Brinkley and did not reject any of it." It also noted that it took into account Brinkley's frequent marijuana use and the possibility that she was not wearing eyeglasses on the night of the incident. The court concluded that, even if the identification was unduly suggestive, the identification was reliable because it was "conducted in close temporal and geographical proximity to the alleged offense . . . [t]he police provided . . . Brinkley an opportunity to identify the defendant while her memory was still fresh . . . [and] . . . Brinkley identified both suspects quickly and without hesitation."[3] (Citations omitted.) Finally, the court concluded that an exigency existed, given that the police were responding to an armed robbery of a restaurant, that a gun was found on the floor of the restaurant, and that Brinkley stated that, at some unspecified point in time, she saw one of the men holding a gun, before he fled the scene.

I

I agree with the majority that the proper standard for reviewing whether a pretrial identification procedure violates a defendant's due process rights is a mixed question of law and fact subject to our plenary review. See, e.g., *State* v. *Marquez*, 291 Conn. 122, 136–37, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). "The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the

[3] In making its reliability determination, the trial court also noted that it relied on, among other things, the facts that a firearm had been found in the restaurant and that Joy testified that he did not know how many weapons were involved in the incident. The court further explained that, "by conducting the showup identification . . . law enforcement [was able] to quickly eliminate any innocent parties so as to continue the investigation with a minimum of delay." These facts, however, have no bearing on the reliability determination.

United States Supreme Court in *Neil* v. *Biggers*, [supra, 409 U.S. 196–97], and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and, consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 621–22, 254 A.3d 905 (2020).

There can be little doubt that the showup identification at issue in the present case was highly suggestive. Without any discussion, the majority agrees that the showup was at least "suggestive" but concludes that it need not decide whether it was *unnecessarily* suggestive because, even if it was, the identification was reliable. Part II of the majority opinion. Because the suggestiveness inquiry dovetails with the reliability inquiry, I begin by analyzing the former issue.[4] We have recog-

[4] It bears emphasis that the reliability of an identification in substantial part depends on the identification procedure's degree of suggestiveness because the latter taints the former. Cf. *Neil* v. *Biggers*, supra, 409 U.S. 198 ("the primary evil to be avoided [by employing a nonsuggestive identification procedure] is a very substantial likelihood of irreparable misidentification" (internal quotation marks omitted)); National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification (The National Academies Press 2014) p. 9, available at https://nap.nationalacademies.org/read/18891/chapter/3 (last visited July 18, 2025) ("Accurate eyewitness identifications may aid in the apprehension and prosecution of the perpetrators of crimes. However, inaccurate identifications may lead to the prosecution of innocent persons while the guilty party goes free. It is therefore crucial to develop eyewitness identification procedures that achieve maximum accuracy and reliability." (Footnote omitted.)). Indeed, that is the purpose of a proper identification procedure—to make the resulting identification reliable.

nized that showup identifications are "inherently and significantly suggestive . . . ." (Internal quotation marks omitted.) *State* v. *Ruiz*, supra, 337 Conn. 622. This observation is based on the commonsense insight that, ordinarily, "a one-to-one confrontation between a [witness] and the suspect presented . . . for identification . . . conveys the message to the [witness] that the police believe the suspect is guilty." (Internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 772–73, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil* v. *Biggers*, supra, 409 U.S. 198. "For this reason, when not necessary, the presentation of a single suspect to a witness by the police (as opposed to a lineup, in which several individuals are presented to the [witness], only one of whom is the suspect) . . . has . . . been widely condemned . . . ." (Internal quotation marks omitted.) *State* v. *Ruiz*, supra, 622.

I recognize, however, that "the use of a one-on-one showup identification procedure does not invariably constitute a denial of due process, as it may be justified by exigent circumstances." Id. In *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), the seminal exigency case, the United States Supreme Court concluded that the showup identification at issue was admissible because it was "the only feasible procedure" when the victim was gravely injured. (Internal quotation marks omitted.) Id., 302. In 1993, in *State* v. *Wooten*, 227 Conn. 677, 686–87, 631 A.2d 271 (1993), this court went well beyond this rationale when it concluded that "enabling the police to focus their investigation and providing the victim an opportunity to identify her assailant while her memory was still fresh . . . were

sufficient [exigencies] to prevent the identification procedure from being unnecessarily suggestive." *State* v. *Ledbetter*, 275 Conn. 534, 550, 881 A.2d 290 (2005) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). This court has reached the same conclusion in subsequent cases that involved similar factual circumstances. See, e.g., *State* v. *Revels*, supra, 313 Conn. 773–74; *State* v. *St. John*, 282 Conn. 260, 278–79, 919 A.2d 452 (2007). We have also said, however, that an exigency exists only when the showup procedure "was *necessary* to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay, if the victim excluded the defendant as a suspect or was unable to identify him."[5] (Emphasis added; internal quotation marks omitted.) *State* v. *Ruiz*, supra, 337 Conn. 623.

I agree with the defendant that, since *Stovall*, numerous courts, including this one, have incorrectly expanded the scenarios that may constitute an exigency to include many situations in which a showup procedure is not the only feasible identification procedure and that, therefore, do not involve a true exigency. Despite widespread recognition for decades that showups are "next to worthless"; 4 J. Wigmore, supra, § 1130, p. 214 n.1; thirty-eight years have passed since this court or the

[5] The word "necessary" has more than one meaning in the law. See, e.g., *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 336–37, 857 A.2d 348 (2004) ("Webster's Third New International Dictionary defines the term 'necessary' as '[something] that cannot be done without: that must be done or had: absolutely required: essential, indispensable' "); *West Hartford* v. *Talcott*, 138 Conn. 82, 91, 82 A.2d 351 (1951) ("[n]ecessary, in legislative [a]cts according the right of eminent domain, does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary" (internal quotation marks omitted)). Under any definition, it was not necessary for the police to eliminate the suspects with great urgency in the circumstances of this case.

Appellate Court has concluded that a showup identification procedure must be suppressed. See *State* v. *Mitchell*, 204 Conn. 187, 200–204, 527 A.2d 1168, cert. denied, 484 U.S. 927, 108 S. Ct. 293, 98 L. Ed. 2d 252 (1987).

This court must rein in an ever-expanding meaning of "exigency" that has become so diluted in application that it allows the police to use a showup procedure in nearly all police investigations in which suspects are detained shortly after a crime has occurred, notwithstanding the fact that the resulting identifications are inherently and unnecessarily unreliable. See part II of this opinion. Indeed, in *Stovall*, the United States Supreme Court concluded that the showup identification was admissible because "[n]o one knew how long [the victim] might live . . . [and she] could not visit the jail, [so] the police followed *the only feasible procedure* and took [the suspect] to the hospital room" for the showup. (Emphasis added; internal quotation marks omitted.) *Stovall* v. *Denno*, supra, 388 U.S. 302. In the context of a showup identification, an exigency requires circumstances that render the showup procedure the only feasible option. Administrative convenience is not enough; nor is the mere hypothetical possibility that a dangerous person may remain at large if a showup is not conducted without delay.

In a truly exigent situation—such as when a showup is the only feasible identification procedure in light of a gravely injured witness—the totality of the circumstances may warrant a showup identification, despite the questionable benefit showups provide. As a result, I do not propose any categorical bans on the admission of showup identifications; rather, I would limit the factual circumstances under which an identification obtained by a showup procedure would be admissible at trial. The nature of the exigency must truly necessitate the use of this highly suggestive and unreliable identification procedure. After all, unnecessarily suggestive iden-

tification procedures increase the likelihood of misidentification, and that increased chance is gratuitous. See, e.g., *Neil* v. *Biggers*, supra, 409 U.S. 198. Accordingly, I would limit the use of showup identifications to true exigencies, in which there is a demonstrated need for the showup that law enforcement can actually articulate, and which is detailed and specific to the circumstances presented. Generalized concerns for public safety are present in every criminal investigation. By definition, not every investigation can create an exigency. See, e.g., The American Heritage College Dictionary (4th Ed. 2007) p. 489 (defining "exigency" as "[a] pressing or urgent situation"); Ballentine's Law Dictionary (3d Ed. 1969) p. 1021 (defining "public exigency" as "[a] sudden and unexpected happening, an unforeseen occurrence or condition"); see also, e.g., *United States* v. *Hawkins*, 499 F.3d 703, 707 (7th Cir. 2007) (exigency requires "extraordinary urgency"), cert. denied, 555 U.S. 858, 129 S. Ct. 129, 172 L. Ed. 2d 99 (2008); *United States* v. *Concepcion*, 983 F.2d 369, 377 (2d Cir. 1992) (showup may be permissible only when there is "overriding necessity"), cert. denied sub nom. *Frias* v. *United States*, 510 U.S. 856, 114 S. Ct. 163, 126 L. Ed. 2d 124 (1993).

The present case highlights the problems inherent in showup identifications. It is clear that no exigency existed that made a showup identification the only feasible identification procedure. The police admitted that they did not need to conduct a showup, and nothing prevented them from conducting either a lineup or photographic array procedure, as mandated in § 54-1p. Moreover, Brinkley and the other victims were unhurt, the defendant and his accomplice, who had large amounts of cash stuffed in the pockets of his sweatshirt, were in police custody, and the police had recovered a gun in the restaurant. Although I recognize that Joy testified that "you don't know if they're still armed,"

such a generalized concern is not sufficient to create an exigent circumstance in which a showup identification is the *only* feasible identification procedure. This is not a situation in which a suspect had used a weapon to seriously injure a victim and then fled with the weapon. Here, the perpetrators used only one gun during the robbery, which was recovered by the police at the scene, and no one was physically injured during the robbery. Accordingly, I conclude that the showup identification procedure in the present case was impermissibly suggestive.

II

Having concluded that Brinkley's showup identification of the defendant was unnecessarily suggestive, I must consider whether the trial court correctly concluded that Brinkley's identification of the defendant was nevertheless reliable under the totality of the circumstances. An identification that is the product of an unnecessarily suggestive identification procedure will nevertheless be admissible, despite the suggestiveness of the procedure, if the identification is reliable in light of all of the relevant circumstances. See, e.g., *State* v. *Marquez*, supra, 291 Conn. 141–42. The defendant contends that "different factors govern reliability under the federal constitution and the state constitution; [see *State* v. *Harris*, supra, 330 Conn. 108, 118–19, 131, 133; and that] Brinkley's identification satisfies neither [test]."[6] I conclude that Brinkley's identification was not reliable.

In *Neil* v. *Biggers*, supra, 409 U.S. 188, the United States Supreme Court set forth the following list of

[6] The majority states that it is "skeptical that the defendant truly makes out a reviewable claim under the state constitution . . . ." Part II of the majority opinion. Insofar as the defendant analyzes the factors for determining reliability under our state constitution, which we first articulated in *State* v. *Harris*, supra, 330 Conn. 118–19, 131, 133, I disagree.

factors to aid courts in determining whether an unnecessarily suggestive identification is reliable under the federal constitution: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his [or her] prior description of the criminal, [4] the level of certainty demonstrated at the [identification], and [5] the time between the crime and the [identification]." *Manson* v. *Brathwaite*, supra, 432 U.S. 114, citing *Neil* v. *Biggers*, supra, 199–200.

Recognizing that the federal constitution establishes a minimum national standard and that states are permitted to afford greater protections, in *State* v. *Harris*, supra, 330 Conn. 91, we considered whether the due process provision of article first, § 8, of the state constitution "affords greater protection than the federal due process clause with respect to the admissibility of an eyewitness identification following an unnecessarily suggestive identification procedure." Id., 114. We concluded, "as a matter of state constitutional law, that it [was] appropriate to modify the *Biggers* framework to conform to recent developments in social science and the law."[7] Id., 115. Accordingly, "we endorse[d] the fac-

[7] Given the numerous problems posed by showup identifications, some courts have modified the factors they will consider when deciding if a showup identification is admissible. For example, the Kansas Supreme Court now requires a more thorough analysis of the circumstances under which the identification was made. It considers, among other things, "(1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; (3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." *State* v. *Hunt*, 275 Kan. 811, 817–18, 69 P.3d 571 (2003). I agree with our sister court that these factors "present an approach to the identification issue [that] heightens . . . the reliability of such identification." Id., 818. Nevertheless, these enhanced factors may offer only marginal improvement because the problem remains that the showup procedure is inherently suggestive. See, e.g., T. O'Toole & G. Shay, "*Manson* v. *Brathwaite* Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Proce-

tors for determining the reliability of an identification that we identified as a matter of state evidentiary law in *State* v. *Guilbert*, [306 Conn. 218, 253–54, 49 A.3d 705 (2012)]; and we adopt[ed] the burden shifting framework embraced by the New Jersey Supreme Court in [*State* v. *Henderson*, 208 N.J. 208, 288–89, 27 A.3d 872 (2011)] for purposes of allocating the burden of proof with respect to the admissibility of an identification that was the product of an unnecessarily suggestive procedure."[8] *State* v. *Harris*, supra, 115.

We concluded that a trial court should consider the eight "estimator variables" identified in *State* v. *Guilbert*, supra, 306 Conn. 253–54, which, we noted, "overlap considerably with the estimator variables" articulated by the New Jersey Supreme Court in *Henderson*. *State* v. *Harris*, supra, 330 Conn. 133. These variables include "the following propositions: (1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time

dures," 41 Val. U. L. Rev. 109, 122 (2006).

Still other courts have taken a more revolutionary approach to showup identification procedures. Courts in New York and Massachusetts have rejected the factor-based analyses employed by the majority of jurisdictions and have opted instead for a simpler approach. If it is determined that the initial identification was unduly suggestive, then no further inquiry is needed, and the identification evidence is excluded. See *Commonwealth* v. *Johnson*, 420 Mass. 458, 462–63, 465, 471–72, 650 N.E.2d 1257 (1995); *People* v. *Adams*, 53 N.Y.2d 241, 250–51, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981). Both of these states, however, have recognized exceptions that amount to nothing more than police convenience and, as a result, swallow the general rule of inadmissibility. See, e.g., M. Cicchini & J. Easton, "Reforming the Law on Show-Up Identifications," 100 J. Crim. L. & Criminology 381, 395 n.70 (2010).

[8] "Under *Henderson*, the defendant bears the burden of adducing evidence indicating that the identification procedure undermined the reliability of the identification; if the defendant makes such a showing, the state must offer evidence to demonstrate that the identification nevertheless was reliable under the totality of the circumstances; if the state adduces such evidence, the defendant assumes the burden of proving a very substantial likelihood of misidentification. See *State* v. *Henderson*, supra, 208 N.J. 288–89 . . . ." (Citation omitted.) *State* v. *Harris*, supra, 330 Conn. 115 n.18.

of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." (Internal quotation marks omitted.) Id., 118–19, quoting *State* v. *Guilbert*, supra, 253–54. Importantly, we emphasized that "these variables are neither 'exclusive' nor 'frozen in time.' " *State* v. *Harris*, supra, 134.

Our decision in *Harris* relied in large part on our understanding of the developments in the science behind eyewitness identifications. We now know that eyewitness identification is the leading cause of wrongful convictions. See, e.g., *Tatum* v. *Commissioner of Correction*, 349 Conn. 733, 736–37, 322 A.3d 299 (2024); *State* v. *Guilbert*, supra, 306 Conn. 248–50. In one study, "three fourths of . . . convictions of innocent persons involved mistaken eyewitness identifications . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *White*, 334 Conn. 742, 778, 224 A.3d 855 (2020). In fact, numerous studies "have confirmed that eyewitness testimony is often hopelessly unreliable." *Commonwealth* v. *Johnson*, 420 Mass. 458, 467, 650 N.E.2d 1257 (1995). We know that eyewitness identification testimony is untrustworthy due to "the many vagaries of memory encoding storage and retrieval; the mallea-

bility of memory, the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and . . . other factors . . . .'' (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 130.

Research has shown that ''[showups] are the *least reliable* of all the identification procedures, and their use further increases the incidence of wrongful convictions.'' (Emphasis added.) M. Cicchini & J. Easton, ''Reforming the Law on Show-Up Identifications,'' 100 J. Crim. L. & Criminology 381, 381 (2010). Showups have even ''been called the most grossly suggestive identification procedure now or ever used by the police.'' (Internal quotation marks omitted.) *People* v. *Sammons*, 505 Mich. 31, 41–42, 949 N.W.2d 36 (2020). Empirical findings demonstrate that innocent suspects are more often identified in showups than lineups. Id., 44. Unlike a lineup or a photographic array, a showup pressures the eyewitness to identify ''the individual [who] has been singled out as the suspect by law enforcement''; *Morales* v. *United States*, 248 A.3d 161, 172–73 (D.C. 2021); and leaves no room for error. See, e.g., *People* v. *Sammons*, supra, 44 (''in a showup, any mistaken identification will fall on the suspect''). As a result, identifications obtained through a showup procedure are ''less reliable than properly administered lineup identifications . . . .'' *State* v. *Lawson*, 352 Or. 724, 742–43, 291 P.3d 673 (2012). This court has also recognized the problems with showup identifications. See, e.g., *State* v. *Wooten*, supra, 227 Conn. 686 (''almost any one-to-one confrontation between a victim of a crime and a person whom the police present as a suspect is presumptively suggestive . . . because it conveys the message to the victim that the police believe the suspect is guilty'' (citation omitted; internal quotation marks omitted)).

Still more troublesome, as we acknowledged in *Harris*, is the fact that the approach used to evaluate the reliability of showups under the federal constitution "employs a malleable and outdated [facts and circumstances] analysis [using the *Biggers* factors]. As a result, unreliable [showup] evidence is routinely used against defendants in criminal trials."[9] M. Cicchini & J. Easton, supra, 100 J. Crim. L. & Criminology 381; see also, e.g., P. Nardulli, "The Societal Costs of the Exclusionary Rule Revisited," 1987 U. Ill. L. Rev. 223, 226 (discussing research showing that motions to suppress identifications are rarely granted). These malleable analyses tend to "[confuse] exigency with police convenience." M. Cicchini & J. Easton, supra, 402. The *Biggers* factors often fail to weed out unreliable identifications because these factors do not accurately assess reliability. See, e.g., id., 392 ("[s]ocial science research . . . has shown that most of the *Biggers* factors do not accurately measure reliability and, therefore, do not address the risk of misidentification"). We acknowledged as much in *Harris*, explaining that "*Guilbert* supports the proposi-

[9] The pitfalls of showup identifications are not confined to the wrongful conviction of an innocent person—which would be severe enough to warrant extreme caution by itself. For example, when a witness makes a false identification during a showup procedure, the innocent suspect will very likely be arrested and prosecuted, and law enforcement will stop looking for the perpetrator. See, e.g., M. Cicchini & J. Easton, supra, 100 J. Crim. L. & Criminology 390; see also, e.g., K. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process," 41 Tex. Tech L. Rev. 133, 138 (2008); cf. Conn. Joint Standing Hearings, Judiciary, Pt. 7, 2011 Sess., p. 2034 ("Misidentification . . . harms everyone, not just the innocent who suffer the unique horror of wrongful conviction. It harms the police who find that their investigations are impeded . . . . It really harms prosecutions because when investigations are refocused the witness is rendered unusable . . . . And the community suffers because the real perpetrator is at large."). In contrast, with a lineup or a photographic array, if the witness makes an incorrect identification, she will identify an individual that the police know was purposefully inserted as a filler. E.g., M. Cicchini & J. Easton, supra, 390–91. As a result, "the [witness'] misidentification will be known to the police, who can then continue with their investigation and their search for the true perpetrator." Id., 391.

tion that, under our state constitution, the *Biggers* analysis is inadequate to prevent the admission of unreliable identifications that are tainted by an unduly suggestive procedure." *State* v. *Harris*, supra, 330 Conn. 121. Unfortunately, not only are showup identifications unreliable, and not only do the analyses used for determining their admissibility under the federal constitution provide little protection for a criminal defendant, but juries also find eyewitness identifications highly persuasive. See, e.g., M. Cicchini & J. Easton, supra, 411; see also, e.g., *State* v. *Guilbert*, supra, 306 Conn. 241–42.

In *Harris*, this court noted that another justification for concluding that our state constitution affords greater protection than the federal constitution was that our legislature has recognized the pervasive issue of misidentification. See *State* v. *Harris*, supra, 330 Conn. 134 n.32. In 2011, the legislature addressed the significant pitfalls of eyewitness identifications by mandating specific procedures for identifications that are conducted by the state or municipal police in No. 11-252, § 1, of the 2011 Public Acts (P.A. 11-252), titled "An Act Concerning Eyewitness Identification." See General Statutes § 54-1p (c) (requiring, among other things, that identification procedures be double-blind and that they include minimum number of "fillers" who fit suspect's description). As we have explained, § 54-1p "demonstrates a clear legislative concern that suggestive identification procedures are a significant cause of erroneous convictions and should be eliminated to the extent possible." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 134 n.32. One of the vice chairpersons of the Judiciary Committee remarked that, "[a]s many members of the [c]hamber may know . . . in cases [in which] we have wrongful identification, about 75 percent of them have to do with the procedure for having a witness identify what would be a potential perpetrator. This bill looks to incorporate into our statutes the latest

scientific and best procedures." 54 H.R. Proc., Pt. 23, 2011 Sess., pp. 7812–13, remarks of Representative Gary A. Holder-Winfield. Similarly, retired Justice David M. Borden testified before the Judiciary Committee, explaining that "we now know because of the many DNA exonerations in the past several years, that in the area of eyewitness identification we are doing something wrong. Of the approximately 270 DNA exonerations nationwide in the past several years, including several in Connecticut, more than 75 percent involve positive yet false eyewitness identifications." Conn. Joint Standing Hearings, Judiciary, Pt. 6, 2011 Sess., p. 1809. Senator Looney testified that, as a result of the highly inaccurate nature of eyewitness identifications, "we have an obligation to [e]nsure that [eyewitness] testimony is as accurate as possible."[10] Id., p. 1910. Overreliance on showup identifications frustrates the legislature's purpose of reducing the number of wrongful convictions based on suggestive identification procedures. See, e.g., *State* v. *Harris*, supra, 134 n.32.

We noted in *Harris* that, as the cognitive science of eyewitness identification has developed, so, too, has our jurisprudence. See id., 118–21. In *State* v. *Guilbert*, supra, 306 Conn. 218, we determined that "expert testimony on eyewitness identification is admissible upon a determination by the trial court that the expert is qualified and the proffered testimony is relevant and will aid the jury." Id., 226. In doing so, we overruled earlier decisions from this court that held that the factors affecting eyewitness identification are within the

[10] A primary focus of the legislature in discussing P.A. 11-252, § 1, was whether, when showing an eyewitness a photographic array, the police should present the photographs sequentially or simultaneously. See, e.g., Conn. Joint Standing Hearings, Judiciary, Pt. 7, 2011 Sess., p. 2018. There was broad consensus that "the . . . single most important issue . . . seems to . . . [be] the [double-blind] administration" of the photographic array. Id.; see also id., p. 2022. Even in 2011, showups were presumably so unreliable that legislators did not envision that practice being a significant part of criminal investigations and did not significantly address the practice.

knowledge of an average juror. See id., 234–53. We reasoned that our prior case law was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This [broad-based] judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." (Footnotes omitted.) Id., 234–36.

Four years later, in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), we further developed protections against inherently suggestive identifications. We concluded that "*any* [first-time] in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." (Emphasis in original.) Id., 426 n.11.

Finally, just last year, this court expanded the framework set forth in *Teague* v. *Lane*, 489 U.S. 288, 299–314, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion), for evaluating whether a new rule applies retroactively on collateral review by adopting a third exception to the *Teague* rule of nonretroactivity. See *Tatum* v. *Commissioner of Correction*, supra, 349 Conn. 752–53. In *Tatum*, we concluded that, "[g]iven the developments in the science of eyewitness identification, the heightened risk of a wrongful conviction, and the fact that the petitioner raised eyewitness identification claims in his direct appeal . . . the rule articulated in *Dickson* must be applied retroactively on collateral review in the petitioner's case." Id., 763–64. Ongoing advancements in our understanding of the science

behind eyewitness identifications serves only to bolster our reasoning in *Harris*, and many of the cases decided by this court prior to the legislature's adoption of § 54-1p should be reexamined and viewed through the lens of the public policy of the statute.

Applying the estimator variables that this court adopted in *Harris* to the present case, I conclude that, at the time of the identification, Brinkley was scared and probably "high," could not see the perpetrators' faces, may not have been wearing her eyeglasses, and, at trial, had no memory of the incident or the defendant. During the robbery, Brinkley was clearly, and understandably, terrified. She was described as "screaming . . . 'oh my fucking God, I'm so fucking scared. We're going to die.' " Science tells us that the reliability of an eyewitness identification can be diminished by a witness' focus on a weapon and that high stress at the time of the observation may render a witness less able to retain an accurate memory of the observed events. See, e.g., *State* v. *Guilbert*, supra, 306 Conn. 253. Thus, the second and third estimator variables support the defendant's contention that the identification was not reliable. See id.; see also *State* v. *Harris*, supra, 330 Conn. 118–19, 133. What's more, Brinkley testified that she "[m]ost likely" smoked "weed" on the day of the robbery. We know that a "witness' drug use . . . at the time of the events in question . . . place[s] the issue of the witness' ability to perceive and to recall, and, ultimately, the witness' credibility, before the jury." (Footnote omitted.) *State* v. *Clark*, 260 Conn. 813, 823–24, 801 A.2d 718 (2002). The suspects were also wearing masks, which hid most of their faces from Brinkley's view. A perpetrator's wearing a mask "weigh[s] against reliability." *United States* v. *Garcia-Alvarez*, 541 F.3d 8, 14 (1st Cir. 2008). Brinkley also testified: "I just got into a car accident. I was unconscious, don't remember. . . . I do not remember this night . . . ." After viewing

the clips of footage from Joy's body cam, in which she can be heard identifying the defendant, Brinkley confirmed that it was her in the videos but again explained that she had no recollection of the captured events. Finally, the first and sixth estimator variables also support a conclusion that the identification was unreliable because there is a weak correlation between Brinkley's confidence in her identification and the identification's accuracy, and the showup procedure was, of course, not a double-blind, sequential procedure. See, e.g., *State* v. *Guilbert*, supra, 253; see also *State* v. *Harris*, supra, 118–19, 133. Accordingly, guided by the estimator variables, I conclude that Brinkley's identification, which was the product of an unnecessarily suggestive procedure, was unreliable under our state constitution.

Despite the numerous indicia of unreliability, the majority concludes, on the basis of its analysis of the *Biggers* and *Harris* factors, that Brinkley's identification was sufficiently reliable to avoid any due process violation. See part II of the majority opinion. As I explained, showup identifications are "hopelessly unreliable." *Commonwealth* v. *Johnson*, supra, 420 Mass. 467. This case highlights why. The majority concludes that the first *Biggers* factor—the opportunity of the eyewitness to view the criminal at the time of the crime; see *Neil* v. *Biggers*, supra, 409 U.S. 199; weighs in favor of reliability. See part II of the majority opinion. The majority so concludes, even though Brinkley may not have been wearing her eyeglasses and the suspects were wearing masks during the robbery. The majority overcomes these facts, reasoning that "Brinkley was in the front of the restaurant when Ferguson and the defendant entered, and that she then went into the back of the restaurant with them and stood next to the defendant while Ferguson ordered [one of the employees] to open the safe." Id. The majority also notes that the trial court articulated that Joy testified that he chose

Brinkley to participate in the identification "because she was the employee closest to the front of the [restaurant, who] encountered the suspects first . . . ." (Internal quotation marks omitted.) Id. But proximity to a suspect is of little consequence when the suspect was wearing a mask.

As to the second *Biggers* factor, the majority concludes that Brinkley's "degree of attention" weighs in favor of reliability. Id.; see *Neil* v. *Biggers*, supra, 409 U.S. 199. In reality, Brinkley's "degree of attention" lends little support for reliability given that she was understandably terrified. See, e.g., *State* v. *Guilbert*, supra, 306 Conn. 253 (reliability of eyewitness identification can be diminished by eyewitness' focus on weapon and high stress). Employing the fourth *Biggers* factor, the majority also concludes that Brinkley's certainty that she was correctly identifying the perpetrator weighed in favor of reliability. See part II of the majority opinion; see *Neil* v. *Biggers*, supra, 199. Specifically, the majority concludes that "Brinkley's statements in the [police] body cam footage reveal that, at the time she identified the defendant, she did so with great certainty." Part II of the majority opinion. But it is now well established that "there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy . . . ." (Internal quotation marks omitted.) *State* v. *Harris*, supra, 330 Conn. 118.

Even if the third and fifth *Biggers* factors—the accuracy of Brinkley's prior description of the defendant and the amount of time between the crime and the identification; see *Neil* v. *Biggers*, supra, 409 U.S. 199–200; weigh in favor of reliability, on balance, I cannot conclude that Brinkley's identification was reliable, even under the federal constitution. In sum, despite knowing that showup identifications are "next to worthless"; 4 J. Wigmore, supra, § 1130, p. 214 n.1; the majority

concludes that an identification in which the eyewitness was scared and probably "high," may not have been wearing her eyeglasses, could not see the perpetrators' faces and, at trial, had no memory of the incident or the defendant, was reliable. I simply cannot agree.

The admission of a suggestive and unreliable identification requires reversal of a defendant's conviction unless the state establishes that it was harmless beyond a reasonable doubt. See, e.g., *State* v. *Artis*, 314 Conn. 131, 149, 156–57, 101 A.3d 915 (2014). This requires the state to prove that there was "strong, independent evidence of the defendant's guilt." Id., 157. If, however, the improperly admitted identification "may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id., 159. No strong, independent evidence of guilt exists in this case. Brinkley's unnecessarily suggestive and unreliable identification was the only identification of the defendant as one of the perpetrators. No physical evidence connected the defendant to the crime. In fact, the state laboratory eliminated the defendant as a source of DNA "from all [of] the evidence that [the laboratory] was able to make comparisons to," including the interior of one of the ski masks, the magazine of the discarded gun, the kitchen knife, and the drawer of the cash register. I cannot conclude that the state has established that the improperly admitted identification had no tendency to influence the judgment of the jury. Accordingly, I would reverse the judgment of the Appellate Court and order a remand of the case for a new trial.

CONCLUSION

"It is estimated [that] . . . more than 10,000 people a year [are] wrongfully convicted, most of whom were convicted as a result of a mistaken identification." S. Gambell, Comment, "The Need to Revisit the *Neil* v.

Biggers Factors: Suppressing Unreliable Eyewitness Identifications," 6 Wyo. L. Rev. 189, 190–91 (2006). Even the more "reliable" eyewitness identification procedures are hopelessly unreliable. A showup identification procedure is even less reliable, which makes poor quality evidence even worse and increases the likelihood that this procedure will result in false identifications and wrongful convictions. It has long been a fundamental value determination of our society that "it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring). I agree. Not only are showups much more likely to result in wrongful convictions than other forms of identification, but showups conducted in situations that are not truly exigent, such as the present case, do not sufficiently serve the public interests of ensuring the safety of residents and holding guilty perpetrators to account. Thus, they have limited value in our criminal justice system. I cannot sanction the broad admissibility of showup identifications and would, instead, limit the admissibility of such identifications to true exigencies, in which a showup was the only feasible identification procedure. I also cannot subscribe to the majority's conclusion that the identification at issue in the present case was reliable because, on balance, the facts point, unmistakably, in the opposite direction—toward unreliability. With concern for the number of wrongfully convicted citizens in this state, I respectfully dissent.

STATE OF CONNECTICUT *v.* ROBERT C. SIMMONS (SC 20846)

Mullins, C. J., and D'Auria, Ecker, Alexander, Dannehy and Bright, Js.

Syllabus

Convicted of murder, home invasion, and burglary in the first degree, the defendant appealed to this court. The defendant claimed, inter alia, that the evidence was insufficient to support his conviction and that the trial court had improperly declined to instruct the jury on his third-party culpability defense. *Held*:

The state presented sufficient evidence to satisfy its burden of establishing the defendant's guilt beyond a reasonable doubt, as it was reasonable and logical for the jury to infer that the defendant was the perpetrator of the crimes of which he was convicted on the basis of certain video surveillance footage and forensic evidence presented at trial, as well as certain contradictory statements that he had made during his interviews with the police.

Contrary to the defendant's assertion, it was of no consequence that the jury could have construed the evidence consistently with a casual visit to the victim's home, as he had claimed during one of his interviews with the police, because the jury was not barred from drawing those inferences consistent with guilt and was not required to draw only those inferences consistent with innocence.

The trial court did not abuse its discretion in declining to instruct the jury on the defendant's third-party culpability defense, which was premised on his argument that a certain DNA profile found on a bloody hammer found near the victim's body directly connected an unknown male to the crimes.

Although a bloody hammer found near the victim's body was the likely the murder weapon and therefore had a close and proximate relationship to the murder, the video surveillance footage, the results of the police investigation, and the quotidian nature of the hammer led this court to conclude that the totality of the evidence adduced at trial was insufficient to permit a reasonable juror to infer that a third party was responsible for the victim's murder.

There was no merit to the defendant's claim that certain of the prosecutor's remarks made during closing and rebuttal arguments were improper and deprived him of a fair trial.

With respect to the prosecutor's comments regarding DNA evidence found on the defendant's jeans and "in" the victim's fingernails, and a comment regarding the victim's fight or struggle with the defendant, the prosecutor did not mischaracterize the facts in evidence or encourage the jury to make

unreasonable factual inferences, as those comments were rooted in the evidence presented and the reasonable inferences that could be drawn therefrom.

With respect to the prosecutor's comment during rebuttal argument characterizing defense counsel's theory of the case as "deceptive," the prosecutor did not disparage defense counsel personally or his institutional role in the proceedings but, rather, criticized defense counsel's theory of the case on the ground that it was "deficient," "dismissive," and "deceptive" because it did not account for the evidence of the defendant's guilt, particularly the video surveillance footage and DNA evidence, and the prosecutor's comment was in direct response to defense counsel's closing argument, in which he described the state's case as "deficient, dismissive, [and] deceptive" in the first instance.

Argued May 12—officially released July 22, 2025

Procedural History

Information charging the defendant with the crimes of murder, home invasion, felony murder, and burglary in the first degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White*, *J.*; verdict of guilty; thereafter, the court, *White*, *J.*, vacated the conviction of felony murder and rendered judgment of conviction of murder, home invasion, and burglary in the first degree, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, assistant public defender, with whom, on the brief, were *Taryn Henderson* and *Kaylyn Terry*, law student interns, for the appellant (defendant).

Nathan J. Buchok, assistant state's attorney, with whom were *Elizabeth K. Moran*, assistant state's attorney, and, on the brief, *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. On the evening of September 25, 2019, the ninety-three year old victim, Isabella Mehner, was robbed and bludgeoned to death in her own home. The police investigation led to the arrest of the defendant,

Robert C. Simmons, who was tried and convicted of the crimes of murder, home invasion, and burglary in the first degree. In this direct appeal,[1] the defendant claims that (1) the evidence was insufficient to support his conviction, (2) the trial court improperly declined his request to instruct the jury on third-party culpability, and (3) the prosecutor committed multiple improprieties during closing and rebuttal arguments, which deprived him of his due process right to a fair trial. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. The victim lived by herself in a single-family residence located at the corner of Willowbrook Avenue and Cove Road in Stamford. On September 25, 2019, the victim spoke to her cousin on the telephone at about 3:30 p.m. She was later seen in her garden at 5:15 p.m. By 6 p.m., however, the victim's daughter, Ellen Blanchard, was unable to reach her by telephone. After repeated calls went unanswered, Blanchard decided to visit the victim to check on her well-being. Blanchard arrived at the victim's house at 8 p.m., where she was met by her brother and his wife. As they approached the victim's house via the back door on Willowbrook Avenue, Blanchard was surprised to see that the screen door was unlocked and that the back door was standing wide open—the victim normally kept those doors closed and locked. Blanchard, her brother, and her sister-in-law entered the unlocked house and searched for the victim, eventually finding her lying in a pool of blood at the bottom of the basement stairs.

Blanchard's brother called 911, and the police arrived soon thereafter. Emergency medical responders found the victim cold to the touch and unresponsive. Attempts to resuscitate the victim were unsuccessful, and she was pronounced dead at the scene at 8:22 p.m.

[1] See General Statutes § 51-199 (b) (3).

The police immediately suspected that the victim's death was not an accident. The amount of blood at the bottom of the stairs and the nature and extent of the victim's injuries appeared to be inconsistent with an accidental fall, and the unlocked screen door and open back door were unusual given the victim's habit of keeping those doors closed and locked. Moreover, the victim's wallet, which normally contained cash and was stored in her purse, was found empty and covered in blood at the bottom of the basement stairs near her body. The police also determined that the victim's wedding rings, which she always wore on her left hand, were missing and that her left hand was severely wounded. Lastly, the lid to the jewelry box in the victim's bedroom was left open, which was unusual, although no jewelry appeared to be missing.

An autopsy confirmed that the victim's death was a homicide. According to the medical examiner, the victim suffered multiple focal impact injuries to the head, many of which were curvilinear in nature, consistent with those that would be caused by the hammer found near the victim's body.[2] Additionally, there were abrasion injuries on her neck, bruising on her legs, and a deep laceration on her left hand.

The police investigated possible avenues of entry and exit from the victim's home other than the unlocked, open back door. They discovered that there was another door, the front door facing Cove Road, but that door was closed, locked, and showed no signs of forced entry. All of the windows also were closed and locked,

[2] On direct examination, Jacqueline Nunez, the medical examiner who performed the victim's autopsy, testified that the curvilinear injuries to the victim's skull were "consistent with being struck with a hammer multiple times . . . ." On recross examination, Nunez clarified that she could not "say with 100 percent certainty" that the hammer was the murder weapon, but it was her opinion "to a reasonable degree of medical certainty [that the] hammer caused these injuries . . . ."

except for one broken window in the basement covered in an undisturbed layer of dust and cobwebs. The police inspected the perimeter of the residence, looking for footprints in the dirt, scuff marks, or trampled grass outside of the windows. They found no signs of disturbance.

Video surveillance footage was acquired from surrounding homes and businesses. One business located across the street from the victim's house, Chelsea Piers, had a camera pointed directly at the intersection of Willowbrook Avenue and Cove Road with a clear view of the premises. The Chelsea Piers video depicts only one person entering the victim's house between 2:30 and 8 p.m. on the day of the victim's murder: an older Black man wearing a dark colored hat, a dark sweatshirt, and baggy jeans. The man initially can be seen walking past the victim's house on Willowbrook Avenue and glancing briefly up her driveway. The man walks out of sight but then returns approximately one minute later, striding up Willowbrook Avenue to the victim's house. He enters the house via the back door at 5:39 p.m., remains inside for eight minutes, and exits the back door at 5:47 p.m. The man then walks up Willowbrook Avenue, turns left onto Cove Road, and walks out of sight.

The police were able to track the man's progress up Cove Road through additional video surveillance footage. The man walked to a mini-mart located at 138 Cove Road, where he bought a beverage. The mini-mart video reveals further details regarding the man's appearance: he had a graying beard, a black bracelet on his left wrist, black shoes, and baggy, cuffed jeans with a distinctive design on the back pockets. The police patrolled the area looking for a suspect matching this description.

On September 27, 2019, Sergeant Christian DiCarlo of the Stamford Police Department saw a man fitting the

suspect's description at the intersection of Woodland Avenue and South Pacific Street in Stamford. Like the suspect, the man was an older Black man with a greying beard and was wearing a black hat, a dark colored shirt, a black bracelet on his left wrist, and baggy, cuffed jeans with a distinctive design on the back pockets. DiCarlo asked the man for identification and learned that he was the defendant. Because DiCarlo wanted to seize the defendant's clothing for forensic testing, he asked the defendant to accompany him to the police station. The defendant complied.

At the police station, the defendant's clothing and shoes were seized, and he was provided with a Tyvek suit and booties. The defendant waived his *Miranda*[3] rights and agreed to answer DiCarlo's questions. During the interview, the defendant denied knowing the victim or being in the area of Cove Road on September 25, 2019. The defendant told the police that he was homeless and had spent the day of the murder on the west side of Stamford at the train station and the soup kitchen. The defendant voluntarily provided a DNA sample at the end of the interview.

The police continued their investigation, learning that the defendant had been employed intermittently for three or four years by the victim's grandson-in-law, Richard Sachs. Sachs was the owner of a sewer and drain business, and he and the defendant had visited the victim's house five or six times together to fix the sink and main sewer drain in the victim's basement. The defendant left Sachs' employ approximately six months before the burglary, home invasion, and murder. The day after the victim's death, Sachs texted the

[3] Miranda v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); see id., 444 (prior to custodial interrogation, suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

defendant a link to a news article about the crimes, asked him if he knew anything about the incident, and offered to pay the defendant money to relay any information that he might learn about the victim's murder from people on the street.

The defendant returned to the police station on October 2, 2019. He again waived his *Miranda* rights and consented to a police interview. During his second interview, the defendant admitted that he was on Cove Road on September 25, 2019, and that he knew the victim. The defendant said he knocked on some doors because Sachs had asked him to get information but denied going into anyone's house or killing anyone. When DiCarlo pointed out that Sachs had asked the defendant to seek out information the day after the victim's murder, not the day of the victim's murder, the defendant steadfastly maintained that he never went inside the victim's house or killed anyone.

In the meantime, the police submitted various items collected from the victim's home for forensic testing. Four items found near the victim's body that appeared to be stained with blood were tested: a wallet, a hammer, a heavy ceramic jar, and a mop handle with a flattened end. The wallet, ceramic jar, and mop handle were tested for fingerprints, but no fingerprints were found. The hammer was not tested for fingerprints because DiCarlo was informed that the surface would not yield any identifiable prints. The four items also were tested for DNA. It was determined that the victim's blood was present on all four items, but no other DNA was found on the ceramic jar or mop handle. The wallet contained a second DNA profile in addition to that of the victim, but there was insufficient data to include or exclude the defendant as a contributor.[4] A male DNA

[4] A result is inconclusive if the "likelihood ratio" that the DNA belongs to a known individual rather than an unknown individual is between one and 10,000.

profile was found on a portion of the handle of the hammer that was not stained with blood, but this profile did not belong to the defendant. The jewelry box in the victim's bedroom also was subject to forensic testing, and there were three different DNA profiles present, one of which was that of a male, but the defendant was excluded as a contributor.

The defendant's clothing and the victim's fingernails were submitted for forensic testing, as well. Four small, reddish brown stains were found on the defendant's jeans, each of which tested positive for the presence of blood via an initial screening test. Two of those stains were submitted for subsequent DNA testing, and both contained the victim's DNA.[5] With respect to the victim's fingernails, male DNA was found, but there was insufficient data to generate an individualized DNA profile. A "Yfiler" test was performed, which is a specialized DNA test that isolates the Y chromosome in a male DNA sample. The results of the Yfiler test revealed that the DNA from the victim's fingernails was consistent with that of the defendant.[6]

On November 20, 2019, the defendant was interviewed for a third time after waiving his *Miranda* rights. During his third interview, the defendant admitted that he was on Cove Road on the day of the victim's murder, that he knew the victim, that he knocked on the victim's door, and that he went inside the victim's home. According to the defendant, he went to the victim's home because he hoped that she would give him some money. The defendant explained that the victim invited

[5] Lana Ramos, a forensic science examiner at the state forensic laboratory, testified that the "likelihood ratio" was 100 billion, meaning that it was 100 billion times more likely that the DNA originated from the victim than from an unknown individual.

[6] The likelihood that the male DNA belonged to the defendant or someone in his paternal lineage was 1 out of 230, which is less than 1 percent of the male population.

him inside and that, after exchanging pleasantries, he went downstairs to the basement to ensure that the sink and sewer line were draining properly. In return, the victim gave him $11. After thanking the victim, the defendant left the house, walked to the mini-mart on Cove Road, and purchased a beer and a cigarette. The defendant was adamant that he was in the victim's home for less than ten minutes and that the victim was alive and well when he left.

The defendant was arrested and charged with felony murder, murder, home invasion, and burglary in the first degree. A jury found the defendant guilty of all charges, but the trial court vacated the felony murder conviction on double jeopardy grounds. The trial court rendered a judgment of conviction on the remaining charges and sentenced the defendant to a total effective sentence of eighty-five years of imprisonment. This appeal followed.

I

We first address whether the evidence was sufficient to support a reasonable inference that the defendant committed the crimes of which he was convicted. The defendant acknowledges that there was abundant evidence placing him at the scene of the crimes at the approximate time of their commission but argues that this evidence failed to establish his guilt beyond a reasonable doubt because it was consistent with a casual and uneventful visit to the victim's house, as described by the defendant in his third police interview. We find no merit to this claim.

"[T]he question of identity of a perpetrator of a crime is a question of fact that is within the sole province of the jury to resolve. . . . To determine whether the evidence was sufficient to establish the essential element of identity, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining

the verdict. Second, we determine whether upon 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 . . . . In doing so, we are mindful that the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Patrick M.*, 344 Conn. 565, 574–75, 280 A.3d 461 (2022).

We conclude that the evidence was sufficient to establish beyond a reasonable doubt that the defendant was the individual who invaded the victim's home and murdered the victim. The Chelsea Piers video clearly depicts an individual, later identified as the defendant, entering the victim's house at the approximate time that the crimes were committed and exiting the house eight minutes later. The video shows no one else arriving at or leaving the victim's home during the relevant time period. The police investigation revealed that all of the doors and windows other than the back door and undisturbed basement window were closed and locked and that there were no signs of entry or egress by different means. The defendant's DNA was found on the fingernails of the victim's wounded left hand, the same hand from which her wedding rings were stolen, and the jury reasonably could have found that the victim's blood was present on the defendant's jeans.[7]

[7] We reject the defendant's claim that "[n]o reasonable fact finder could have concluded that the stains were human blood—let alone [the victim's] blood—because no confirmatory testing was conducted to determine if they were actually human blood." Jennifer Green, a forensic science examiner at the state forensic laboratory, testified that there were four, reddish brown stains on the defendant's jeans, all of which tested positive for the presence of blood via the Kastle-Meyer test. The Kastle-Meyer test is an initial screening test that detects the presence of blood, although it cannot distinguish

Additionally, the defendant lied to the police multiple times about his whereabouts on the afternoon of September 25, 2019, his familiarity with the victim, and his presence inside the victim's home. The foregoing evidence is more than sufficient to fulfill the state's burden of establishing the defendant's guilt beyond a reasonable doubt. See, e.g., *State* v. *Honsch*, 349 Conn. 783, 812–16, 322 A.3d 1019 (2024) (consciousness of guilt evidence and direct physical forensic evidence tying defendant to victim's body was sufficient to establish defendant's identity); *State* v. *Abraham*, 343 Conn. 470, 477–79, 274 A.3d 849 (2022) (evidence of defendant's identity was sufficient because defendant's blood was found at scene of shooting, and he was apprehended nearby suffering from recent gunshot wound).

The defendant contends that the evidence adduced at trial was equivocal because it could be construed consistently with a casual visit to the victim's house, as he described in his third interview. This claim carries no force under the present circumstances. "That the jury might have drawn other possible inferences from [the] facts is not sufficient to undermine its verdict, since proof of guilt must be established beyond a reasonable doubt, not beyond a possible doubt. . . . [I]n viewing evidence [that] could yield contrary inferences,

between animal blood and human blood, and may yield a false positive in the presence of an oxidized substance, such as rust. According to Green, there are two ways to verify that the substance tested is indeed human blood—a confirmatory test to detect the presence of human blood, or a DNA test to detect the presence of human DNA. In the present case, the samples derived from the defendant's jeans were insufficient to conduct both tests, so Green elected the second method to ascertain whether two of the stains contained human DNA and, if so, to whom the DNA belonged. The results of the DNA tests revealed that the two, reddish brown stains on the defendant's jeans contained human DNA, which was 100 billion times more likely to belong to the victim than to an unknown individual. See footnote 5 of this opinion. This evidence was sufficient to support a reasonable inference that the substance on the defendant's jeans was human blood belonging to the victim.

the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 74, 43 A.3d 629 (2012). On the basis of the video surveillance footage, the forensic evidence, and the defendant's contradictory statements to the police, it was reasonable and logical for the jury to infer that the defendant was the perpetrator of the crimes of which he was convicted.

II

The defendant next claims that the trial court improperly declined to give a third-party culpability jury instruction because, in his view, there was forensic evidence directly connecting an unknown male individual to the crimes.

The following additional facts are relevant to this claim. On the last day of evidence, the defendant submitted a request to charge the jury on his third-party culpability defense on the ground that there was unknown male DNA on both the jewelry box located in the victim's bedroom and the likely murder weapon, the hammer found near the victim's body.[8] The trial court

[8] The defendant requested the following jury instruction: "There has been evidence that a third party, not the defendant, committed the crime[s] with which the defendant is charged. This evidence is not intended to prove the guilt of the third party but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt.

"It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crime[s] with which the defendant is charged. If, after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that the alleged third party, the unknown, male DNA profile discovered on the hammer in [the victim's] basement, may be responsible for the crime[s] the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the accused, [the defendant].

"This evidence is not intended to prove the guilt of the third party but is part of the total evidence for you to consider. The burden remains on the

included the requested charge in its first draft of the jury instructions but reconsidered after the prosecutor objected to the instruction at the charge conference. The prosecutor argued that the hammer was a common household object native to the victim's home, the unknown male DNA on its handle could have been deposited at any time, and there was no evidence tying the unknown male DNA to the murder, home invasion, or burglary. The prosecutor pointed out that the time period during which the crimes occurred was very narrow, between 5:15 and 8 p.m. on September 25, 2019, and the evidence was consistent with only one person entering or exiting the victim's residence during that time—the defendant. The trial court sustained the prosecutor's objection, reasoning that there was no evidence indicating that a third party had the opportunity to commit the charged crimes or had unlawfully entered the victim's home, the video surveillance footage depicted the defendant entering and exiting the premises during the relevant time period, the defendant admitted to the police that he was present in the home at that time, and there was DNA evidence implicating the defendant in the crimes. Although the court declined to issue the requested third-party culpability instruction, it informed defense counsel that he was free to argue to the jury "anything that's based in the evidence," such as "the unknown male DNA profile on the hammer . . . ." Consistent with the trial court's ruling, defense counsel argued to the jury in closing that the unknown male DNA profile on the hammer and the jewelry box amounted to reasonable doubt requiring an acquittal.

A trial court's failure to issue a requested third-party culpability jury instruction generally is reviewed for

state to prove each and every element of the offense beyond a reasonable doubt." (Internal quotation marks omitted.) See generally Connecticut Criminal Jury Instructions 2.6-10, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 18, 2025).

abuse of discretion.[9] See, e.g., *State* v. *Ashby*, 336 Conn. 452, 498, 247 A.3d 521 (2020); *State* v. *Schovanec*, 326 Conn. 310, 320–23, 163 A.3d 581 (2017); *State* v. *Jackson*, 304 Conn. 383, 424, 40 A.3d 290 (2012). A defendant is entitled to a third-party culpability jury instruction if the evidence, construed in the light most favorable to supporting the requested charge, demonstrates that there is a "direct connection between a third party and the crime with which the defendant has been charged . . . ." (Internal quotation marks omitted.) *State* v. *Schovanec*, supra, 320; see id., 318–19; see also *State* v. *Arroyo*, 284 Conn. 597, 610, 935 A.2d 975 (2007) ("if the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury").

Whether a direct connection exists "is necessarily a fact intensive inquiry" that depends on "the context of the entire case . . . ." (Internal quotation marks omitted.) *State* v. *Schovanec*, supra, 326 Conn. 320. A direct connection requires more "than merely tenuous evidence of [third-party] culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt." (Internal quotation marks omitted.) Id., 319. Although the evidence of a third party's commission of

[9] In his primary brief, the defendant acknowledges that, under our existing case law, the applicable standard of review is abuse of discretion. In his reply brief, however, the defendant urges this court to adopt a more stringent standard of review, arguing that a trial court's refusal to issue a third-party culpability instruction should be reviewed de novo because "the standard for giving a proposed instruction is akin to that in evidentiary insufficiency cases, [in which] de novo review is conducted." We decline to address the defendant's claim because it was raised for the first time in his reply brief. See, e.g., *State* v. *Graham*, 344 Conn. 825, 858, 282 A.3d 435 (2022); *State* v. *Devalda*, 306 Conn. 494, 519 n.26, 50 A.3d 882 (2012).

the crimes "need not exonerate the defendant . . . it must provid[e] a credible, alternative theory as to who committed the crime . . . ." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 812, 91 A.3d 384 (2014). For example, we have held that there is a direct connection between a third party and the crimes charged when (1) there is "proof of a third party's physical presence at a crime scene, combined with evidence indicating that the third party would have had the opportunity to commit the crime with which the defendant has been charged," (2) "physical evidence links a third party to a crime scene and there is a lack of similar physical evidence linking the charged defendant to the scene," or (3) there are "statements by a victim that implicate the purported third party, combined with a lack of physical evidence linking the defendant to the crime with which he . . . has been charged . . . ." (Internal quotation marks omitted.) Id., 811–12.

When it comes to forensic evidence recovered from a crime scene, such as fingerprint or DNA evidence, physical proximity on its own normally is insufficient to merit a jury instruction on third-party culpability. See *State* v. *Ashby*, supra, 336 Conn. 503. "[*C*]*ontext*, and not proximity alone, is necessary to establish a direct connection between forensic evidence and a third party to the crime." (Emphasis in original.) Id. Compare *State* v. *West*, 274 Conn. 605, 626–27, 877 A.2d 787 (unidentified latent finger and palm prints found at periphery of crime scene lacked direct connection to crimes), cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005), with *State* v. *Cerreta*, 260 Conn. 251, 258–62, 796 A.2d 1176 (2002) (hair and fingerprints found on victim's body and on ligatures used to bind victim's hands and feet had direct connection to crimes). Often, it is unknown and unknowable when the forensic evidence was deposited, but such evidence nonetheless may have a direct connection to the crimes if the nature

and location of that evidence in relation to the other admissible evidence support a reasonable inference that it was left by the perpetrator of the crimes during his commission or flight therefrom. See, e.g., *State* v. *Ashby*, supra, 502–504; *State* v. *Cerreta*, supra, 260–62.

Our decision in *Ashby* is instructive. In that case, we addressed whether a defendant was entitled to a third-party culpability instruction on the basis of three types of forensic evidence found at the scene of the victim's sexual assault and murder: (1) unidentified male DNA from a swab of the victim's vagina, (2) unidentified male saliva from the victim's shoulder, and (3) unidentified male DNA in a bloody handprint on the doorframe of the victim's bedroom.[10] See *State* v. *Ashby*, supra, 336 Conn. 496–97, 503–504. We held that the unidentified male DNA in the saliva and bloody handprint necessitated a third-party culpability instruction; the unidentified male DNA in the victim's vagina, by contrast, did not warrant the instruction, even though it was recovered directly from the victim's body. See id., 503–504. According to the expert testimony adduced at trial, "the unidentified male DNA found on the victim's vaginal swab could have lasted for up to three days," and, "[g]iven this longer timeframe," that evidence, "in and of itself, would have been insufficient to require a third-party culpability instruction as a matter of law." Id. In contrast, the "male DNA on the victim's shoulder . . . would have existed for a more limited duration and was not otherwise explained by the record." Id., 504. "Finally, the unidentified male DNA on the door-

[10] See *State* v. *Ashby*, Conn. Supreme Court Briefs & Appendices, April Term, 2019, Defendant's Brief p. 8 ("There were blood pattern stains in the shape of handprints, with fingers outstretched and pointing up, on both sides of the doorframe entering [the victim's] bedroom from the kitchen . . . . DNA results from the bloody handprints on the bedroom doorframe were consistent with a mixture including [the victim] and another male, but [the defendant] was excluded as a contributor." (Citations omitted; footnotes omitted.)).

frame of the victim's bedroom was recovered from a location that was, undisputedly, covered in the victim's blood during the commission of the crimes charged." Id. "Viewing all of the evidence contained in the record in the light most favorable to supporting the proposed charge," we concluded that the jury reasonably could have inferred that the unidentified male DNA found in the saliva on the victim's shoulder and the bloody handprint on the victim's doorframe had been deposited by a third-party perpetrator and that "the trial court abused its discretion by declining to provide such an instruction to the jury." Id., 504–505.

Applying these principles to the facts of this case, we conclude that the trial court did not abuse its discretion by declining to instruct the jury on the defendant's third-party culpability defense.[11] The issue is a close one because the bloody hammer was the likely murder weapon, and the instrumentality of a crime, like the body of a victim, certainly has a close and proximate relationship to the crime.[12] But our precedent clearly

[11] This does not mean that the unidentified male DNA improperly was admitted into evidence. Forensic evidence recovered from a crime scene may be admissible for reasons other than establishing that a third party was culpable for the commission of the crimes. For example, such evidence may be relevant and admissible because it is "exculpatory of the defendant"; *State* v. *Cerreta*, supra, 260 Conn. 262; or because it supports a defense of inadequate police investigation, such as the one raised by the defendant. See, e.g., *State* v. *Gomes*, 337 Conn. 826, 853, 256 A.3d 131 (2021) (defendant has "[a] right to rely [on] relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt," and jury has "[a] concomitant right to consider any such deficiencies in evaluating whether the state has proved its case beyond a reasonable doubt" (internal quotation marks omitted)). Even if forensic evidence is admitted for the purpose of establishing third-party culpability, a defendant is not entitled to a third-party culpability jury instruction as a matter of right because the totality of "the evidence actually admitted at trial [might fall] short of proving a direct connection." *State* v. *Ashby*, supra, 336 Conn. 503 n.51; see id. (trial court may properly exercise its discretion "to admit forensic evidence demonstrating the presence of a third party at a crime scene" while simultaneously "act[ing] within its discretion by declining to give a third-party culpability instruction").

[12] Unlike the hammer, the unidentified male DNA profile on the jewelry box was "at the periphery of the crime scene" and lacked a "close and

establishes that the connection between the evidence of third-party culpability and the crime charged must rest on grounds beyond mere proximity. When, as here, forensic evidence is offered to supply that connection, its sufficiency must be considered in the context of the entire factual record to determine whether the totality of the circumstances supports a reasonable inference that the evidence at issue was left by the perpetrator of the crimes. In this case, the video surveillance footage, the results of the police investigation, and the quotidian nature of the hammer all lead us to conclude that the totality of the evidence produced at trial was insufficient to permit a reasonable juror to infer that a third party was culpable for the commission of the charged crimes.

Importantly, the time of the victim's death was narrowed down to a short window, between 5:15 and 8 p.m. on September 25, 2019, and there was video surveillance footage that clearly depicted the victim's home during that entire time. The evidence demonstrated that the unlocked screen door and open back door on Willowbrook Avenue was the sole point of entry because all of the other doors and windows were closed, locked, and/or undisturbed. Although the open back door cannot be seen on the video surveillance footage due to the camera angle, the walkway approaching that door is clearly visible, and anyone who arrived at or left the victim's house would have been captured on camera.[13]

direct" relationship to the crimes of conviction. (Internal quotation marks omitted.) *State* v. *Ashby*, supra, 336 Conn. 499. There was no evidence that the perpetrator of the crimes took anything from the victim's jewelry box or entered the bedroom where the jewelry box was located. The murder and theft occurred in the basement of the victim's home, where the victim's body and empty wallet were found. Under these circumstances, the presence of unidentified male DNA on the jewelry box did not warrant a third-party culpability jury instruction.

[13] Similarly, the front door on Cove Road is not visible, but the video surveillance footage clearly depicts the walkway leading up to the front door. The defendant nonetheless contends that this evidence does "not exclude the possibility of someone else entering the home in the . . . two

The defendant was the only person who entered or exited the victim's home that afternoon, entering through the back door at 5:39 p.m., and leaving through the back door at 5:47 p.m.

Additionally, the hammer did not appear to be new, and there was no indication that it was brought to the crime scene by the assailant. It was a common household item, and there was no reason to believe that the assailant was the sole person to have touched the hammer or to have deposited his DNA on its handle. Under these unique factual circumstances, the unknown male DNA profile on the hammer, standing alone, is insufficient to fulfill the defendant's burden of providing a credible, alternative theory that a third party committed the charged crimes. See, e.g., *State* v. *Baltas*, supra, 311 Conn. 812; *State* v. *Hedge*, 297 Conn. 621, 647, 1 A.3d 1051 (2010). The trial court did not err by denying the defendant's request for a third-party culpability jury instruction.

III

The defendant's final claim is that the prosecutor made two types of improper remarks during closing and rebuttal arguments that deprived the defendant of his due process right to a fair trial. First, the defendant contends that the prosecutor mischaracterized the evidence and urged the jury to draw unreasonable factual

hours and fifteen minutes after [he] left" because the walkway on Willowbrook Avenue is partially obscured by shrubbery and the clarity of the video declined as night fell. Having reviewed the video surveillance footage, we conclude that it would be highly speculative to infer that a third party could have entered the victim's home through the back or front doors undetected by the Chelsea Piers cameras. See, e.g., *State* v. *Bemer*, 340 Conn. 804, 816, 266 A.3d 116 (2021) ("When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight . . . the inference is less reasonable." (Internal quotation marks omitted.)).

inferences from that evidence. Second, the defendant argues that the prosecutor improperly denigrated defense counsel's theory of the case by characterizing it as "deceptive." We conclude that the challenged remarks were not improper.

We apply our familiar two step process to evaluate claims of prosecutorial impropriety. "First, we examine whether an impropriety occurred. . . . If the prosecutor's remarks were improper, then we move on to the second step and examine whether the impropriety deprived the defendant of his constitutional right to a fair trial. . . . [T]he 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Diaz*, 348 Conn. 750, 770, 311 A.3d 714 (2024). In conducting our inquiry, we focus on "the fairness of the trial, and not the culpability of the prosecutor," mindful that "we must view the prosecutor's [remarks] in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007).

A

The defendant claims that the prosecutor mischaracterized the facts in evidence and encouraged the jury to make unreasonable factual inferences by arguing that (1) the victim's DNA was on all four stains on the defendant's jeans, (2) the defendant's DNA was "in" the victim's fingernails, and (3) the victim fought or struggled with the defendant.[14] We reject these claims.

[14] The defendant also claims that the prosecutor improperly argued that (1) the blood found on the defendant's jeans was human blood that belonged to the victim, and (2) no one else entered the victim's home after the defendant left. We reject these claims for the reasons explained in part I of this opinion.

"It is not . . . improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 435, 902 A.2d 636 (2006). The prosecutor is permitted to argue the reasonable inferences the jury may draw from the evidence without being "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." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 41, 100 A.3d 779 (2014). "[W]e must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] 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." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 45–46.

The prosecutor's challenged remarks did not misrepresent the evidence or ask the jury to draw unreasonable factual inferences. With respect to the four, reddish brown stains on the defendant's jeans, there was evidence before the jury that all four stains had tested positive for the presence of blood pursuant to an initial screening test. Further forensic testing was conducted on two of the four stains, revealing that they both contained human DNA that was 100 billion times more likely to belong to the victim than to an unknown individual. See footnote 7 of this opinion. On the basis of this evidence, it was not improper for the prosecutor to argue the reasonable inference that all four stains derived from the same source containing the victim's DNA.[15]

[15] To the extent that the prosecutor indiscriminately referred to the bloodstains collectively, thereby implying that all four stains had tested positive for the presence of the victim's DNA, we conclude that the prosecutor's imprecise language did not rise to the level of an impropriety. See, e.g., *State* v. *Harris*, 198 Conn. App. 530, 552–53, 233 A.3d 1197 (prosecutor's

The defendant fares no better with his argument that it was improper for the prosecutor to state that the defendant's DNA was "in" the victim's fingernails because there was no evidence as to precisely where on the victim's fingernails the defendant's DNA was found. Jennifer Green, a forensic science examiner at the state forensic laboratory, testified that a sexual assault collection kit had been used to collect DNA samples from the victim's body. She explained that such collection typically involves "fingernail swabs of the left hand and then of the right hand. [The clinician collecting the samples] would usually swab underneath the fingernails of the individual, like this, and then [the clinician] sometimes will clip the actual fingernails off the individual, as well, and then those [clippings] are put within [an] envelope and then within [the sexual assault collection] kit itself." Likewise, Jacqueline Nunez, the medical examiner who performed the victim's autopsy, testified that a sexual assault kit usually includes "samples from underneath the fingernails" and "clip[pings] [of] the fingernails themselves . . . to preserve DNA, if there is any there." Although Nunez stated that that she did not swab the victim's fingernails prior to clipping them and submitting them for forensic analysis, Green testified that she received both "fingernail swabs and clippings" for forensic analysis from the medical examiner's office. The jury reasonably could have inferred that the fingernail swabs from the victim's left hand came from underneath the victim's fingernails, consistent with the general collection practice.

There also was evidence from which the jury reasonably could have inferred that the defendant's DNA was

misstatement as to location of defendant's confession did not constitute prosecutorial impropriety because "[w]hat [was] significant [was] that the admission was made, not where it was made"), cert. denied, 335 Conn. 961, 239 A.3d 1214 (2020); *State* v. *Danovan T.*, 176 Conn. App. 637, 652, 170 A.3d 722 (2017) ("in the heat of argument, counsel may be forgiven for hitting the nail slightly off center but not wholly inventing 'facts' "), cert. denied, 327 Conn. 992, 175 A.3d 1247 (2018).

deposited on the victim's fingernails during a fight or struggle. Stamford police officer Edward Rondano testified that, from the condition of the crime scene, "there appeared to [have been] a fight" between the victim and her assailant. Additionally, DiCarlo testified that the blood patterns at the bottom of the basement stairs led him to conclude that "the victim had struggled either to get up or [to] fight off somebody . . . ." The prosecutor properly relied on this evidence to ask the jurors to use their common sense in determining whether it was more reasonable to believe that the defendant's DNA ended up on the victim's left hand "from a handshake or . . . from a fight . . . ." See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 347–48, 260 A.3d 1152 (2021) (prosecutor may "appeal to [the jurors'] common sense in closing remarks, so long as the prosecutor's arguments are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom" (internal quotation marks omitted)). Because the prosecutor's comments were rooted in the evidence and the reasonable inferences that could be drawn therefrom, they were not improper.

B

Finally, the defendant claims that the prosecutor improperly characterized defense counsel's theory of the case as "deceptive." The state "acknowledges that, under different circumstances, calling defense counsel's argument 'deceptive' multiple times could constitute impropriety" but argues that it was not improper in this case for two reasons: (1) the prosecutor's rebuttal argument was directly responsive to defense counsel's closing argument, and (2) the prosecutor's comments did not disparage defense counsel or his institutional role in the proceeding. We agree with the state.

The following additional background is pertinent to this claim. During closing argument, defense counsel

described the state's case as "[d]eficient, dismissive, [and] deceptive," arguing that the police had "tunnel vision on [the defendant, which] prevented them from considering how the different facts [that] they [had] developed and [that the state] just presented to you . . . seemingly contradict one another and simply do not fit together. Deceptive. Deficient, dismissive, deceptive." Defense counsel continued with this theme when discussing the defendant's DNA on the victim's fingernails: "Which fingernail did it come from? Don't know. Was it above or below the nail, the DNA? Don't know. Was it from a fingertip or the nail? Don't know. So . . . this is the deceptive part. What sounds 'oh my gosh, wow,' maybe isn't so 'wow' when you look at the science." According to defense counsel, DiCarlo's testimony that the defendant's "DNA was under [the victim's] fingernails . . . was just inaccurate, and ask yourself why. He had the reports, he spoke to the analyst . . . . Why would he make that misrepresentation to you? . . . Again, we just went over the science. Why would he tell you that? Deficient, dismissive, deceptive." In conclusion, defense counsel argued that "[d]eficient, dismissive, and deceptive lead to one more word with a D. You probably know what it is. Doubt. Reasonable doubt. The state must disprove every reasonable hypothesis. If [it] can't based [on] what I've just told you, then you'll need to find the defendant not guilty."

During rebuttal, the prosecutor responded to defense counsel's argument utilizing the same "[d]eficient, dismissive, deceptive" framework. The prosecutor argued that "[t]he defendant's theories are dismissive of the facts in evidence. They are deficient in that they ignore all of the evidence you have, and they are deceptive in saying that this case isn't simple, that it isn't thorough, and that's not to be confused with that it's not serious." Concerning the defendant's DNA on the victim's fingernails, the prosecutor stated that defense counsel "pointed

out that we don't know where that swabbing came from, but we do. That's deceptive. Lana Ramos [a forensic science examiner with the state forensic laboratory who testified at trial] may not have known where it came from because that's not her job. But . . . Nunez, the one who took the swabs, the one who [clipped] the fingernails, she did. She showed you on her own hand where she takes swabs from, and she told you where that was."[16] In sum, the prosecutor argued that defense counsel's theory of defense was "dismissive of the evidence . . . deficient in argument, and . . . deceptive in light of all of the evidence that we have."

It is well established that "[t]he prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel. . . . There is a distinction [however] between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense." (Internal quotation marks omitted.) *State* v. *Dabate*, 351 Conn. 428, 454 n.16, 331 A.3d 1159 (2025). The prosecutor may "forcefully criticize a defense theory on the permissible bases of the evidence and the common sense of the [jurors] . . . ." *State* v. *James*, 141 Conn. App. 124, 150, 60 A.3d 1011, cert. denied, 308 Conn. 932, 64 A.3d 331 (2013). In doing so, the prosecutor must abstain from sarcastic, inflammatory, or vituperative language, but "the limits of legitimate argument and fair comment cannot be determined precisely by rule and line . . . ." (Internal quotation marks

[16] The prosecutor appears to have misspoken because Nunez, the medical examiner who performed the victim's autopsy, testified that she did not collect fingernail swabs from the victim, choosing instead to submit only intact fingernail clippings. See part III A of this opinion. Green, the forensic science examiner who prepared the collection kit for DNA analysis in this case, however, testified that she received fingernail swabs and clippings of the victim's left hand from the medical examiner's office and that such swabs "would usually [come from] underneath the fingernails of the individual, *like this* . . . ." (Emphasis added.)

omitted.) *State* v. *Jose R.*, 338 Conn. 375, 387–88, 258 A.3d 50 (2021). To determine whether a prosecutor's challenged remarks were improper in the context of the entire trial, we may consider whether they were made "in direct response to matters raised by defense counsel . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 256 Conn. 291, 309, 772 A.2d 1107 (2001); see also *Valentine* v. *Commissioner of Correction*, 219 Conn. App. 276, 303, 295 A.3d 973 ("both [this court] and [the Appellate Court] frequently have considered whether a challenged remark of a prosecutor was responsive to a defense theory or argument in determining whether the remark was improper in the first instance"), cert. denied, 348 Conn. 913, 303 A.3d 602 (2023).

Viewing the prosecutor's remarks in context, we conclude that they were not improper. First, the prosecutor did not disparage defense counsel personally or denigrate his institutional role in the proceedings. Instead, the prosecutor criticized defense counsel's theory of the case, contending that his theory was "deficient," "dismissive," and "deceptive" because it did not account for the evidence of the defendant's guilt, particularly the video surveillance footage, the DNA found on the victim's fingernails and the defendant's jeans, and the consciousness of guilt evidence. Second, and significantly in our view, it was defense counsel who first used the "[d]eficient, dismissive, deceptive" framework to critique the state's theory of the case. Having done so, "the defendant has no grounds for complaint" when the prosecutor uses the same exact turn of phrase in response. (Internal quotation marks omitted.) *State* v. *Brown*, supra, 256 Conn. 309; see also *State* v. *Thompson*, 266 Conn. 440, 469, 832 A.2d 626 (2003) (prosecutor's challenged remark was not improper because it "was a reasonable response to one of the primary theories advanced by the defense in the case"); *State* v.

Singh, 259 Conn. 693, 716 n.22, 793 A.2d 226 (2002) (prosecutor's challenged "comment was invited by defense counsel's argument and, therefore, was not improper"). We perceive no impropriety.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* RICKEY TRAYNHAM (SC 20883)

Mullins, C. J., and McDonald, D'Auria, Ecker, Alexander, Dannehy and Bright, Js.

Syllabus

Convicted of murder, robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. The defendant claimed that the trial court had improperly admitted testimony from two witnesses, S and J, about certain statements that R, the defendant's accomplice, had made to them under the statement against penal interest exception to the hearsay rule set forth in the Connecticut Code of Evidence (§ 8-6 (4)). *Held*:

The trial court did not abuse its discretion in admitting the testimony of S and J about R's statements, which inculpated both R and the defendant, under § 8-6 (4) of the Code of Evidence, as R's statements to S and J were against R's penal interest and were sufficiently trustworthy.

The defendant conceded that the challenged statements were against R's penal interest, and those statements were trustworthy insofar as R made them voluntarily, in close temporal proximity to the crimes, and to people with whom R had a trusting relationship, namely, a romantic partner, S, and a close family member, J.

Moreover, R's statements were corroborated by the evidence presented at trial, and, although there were some discrepancies between R's statements to J and the evidence presented at trial, this court concluded that those inconsistencies, on balance, did not undermine the trustworthiness of the statements to J.

Furthermore, although defendant claimed that R's statements were not trustworthy because R had engaged in blame shifting by attempting to minimize his participation in the homicide, R's statements to S and J nevertheless exposed him to the risk of criminal liability for the same type of crimes

with which the defendant was charged, and, therefore, fully and equally implicated both R and the defendant.

Argued May 15—officially released July 22, 2025

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit, and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the charges of felony murder, murder, robbery in the first degree, and conspiracy to commit robbery in the first degree were tried to the jury before *Vitale, J.*; verdict of guilty; thereafter, the charges of carrying a pistol without a permit and criminal possession of a firearm were tried to the court, *Vitale, J.*; finding of guilty; subsequently, the court vacated the felony murder conviction and rendered judgment of guilty of murder, robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit, and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Chad L. Edgar, assigned counsel, for the appellant (defendant).

Meryl R. Gersz, assistant state's attorney, with whom, on the brief, were *John Doyle, Jr.*, state's attorney, *Seth Garbarsky*, supervisory assistant state's attorney, and *Gregory Borrelli*, senior assistant state's attorney, for the appellee (state).

Opinion

MULLINS, C. J. The defendant, Rickey Traynham, in collaboration with his accomplice, Jordan Rudel, conspired to rob the victim, Rondell Atkinson. After telling the victim that they would pay him for a ride in his vehicle, the defendant and Rudel forced the victim to

drive to a park in Woodbridge. Upon arriving at the park, the defendant and Rudel ordered the victim out of the car and took his wallet, watch, and cell phone. Both men then brandished firearms and each shot the victim, fatally wounding him. After the shooting, Rudel confided in two people about what he and the defendant had done to the victim: Adrianna Santiago, his then girlfriend and the mother of his children; and Monique Jackson, his father's longtime girlfriend. In the present case, the trial court permitted the state to introduce Rudel's statements to Santiago and Jackson into evidence against the defendant as dual inculpatory statements under the statement against penal interest exception to the hearsay rule.[1]

The sole issue in this direct appeal[2] is whether the trial court improperly allowed the testimony from Santiago and Jackson as dual inculpatory statements under the statement against penal interest exception to the hearsay rule. Because Rudel's statements were indisputably against his penal interest and were sufficiently trustworthy, we affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to the defendant's claim. On June 7, 2021, the night he was killed, the victim was working as an unofficial rideshare

[1] After a trial, the jury found the defendant guilty of felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes §§ 53a-8 (a) and 53a-54a (a), 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 (a) and § 53a-134 (a) (2). The felony murder conviction was vacated at sentencing as violative of double jeopardy. The state also charged the defendant with carrying a pistol without a permit in violation of General Statutes (Rev. to 2021) § 29-35 (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2021) § 53a-217 (a) (1). Following a bench trial, the court found the defendant guilty of those firearms charges as well. The court imposed a total effective sentence of eighty years of incarceration.

[2] See General Statutes § 51-199 (b) (3).

driver—providing rides for hire without working through a rideshare company, such as Uber or Lyft. At some point that night, the defendant and Rudel made plans to hire the victim as a rideshare driver and then rob him. When the victim picked them up, Rudel and the defendant instructed him to drive to a park in Woodbridge. Once there, the defendant and Rudel robbed the victim of his belongings and killed him.

On June 8, 2021, a passerby found the body of the victim at the Pease Road playground in Woodbridge. The victim had been shot multiple times. Once the police arrived, they located seven spent shell casings near the victim's body. The victim did not have any identification or other personal belongings on his person. The victim's vehicle also was missing.

After the murder, also on June 8, 2021, Rudel called Santiago. At that time, Santiago was on vacation in Florida, so he used the FaceTime feature to show her the driver's license of a man. Rudel then told Santiago to search for the man's name on the Internet. Santiago searched the Internet for the man's name and discovered that he was the victim of a homicide. When Santiago asked Rudel what he had done, he said he would not discuss it over the phone and hung up.

On or around June 14, 2021, Santiago returned home from Florida. She met Rudel in Waterbury, and they sat in her vehicle and spoke for approximately two hours. Rudel explained that he and the defendant, known to Santiago as "Slikk," had created a plan to rob the victim. On the evening of the murder, the victim picked up Rudel from Santiago's house and took him to the defendant's house on Fountain Street in New Haven. When the defendant entered the back seat, he put a gun to the victim's head and ordered him to drive to a park in Woodbridge.

According to Santiago, Rudel told her the following additional details about the murder. Once they arrived at the park, Rudel and the defendant forced the victim to get out of the vehicle and to start walking. They told the victim to disconnect his iCloud account, to erase his passwords, and to turn off the Find My Phone function on his cell phone. They then took the cell phone. At that point, the victim started praying, which annoyed Rudel. Rudel told the victim to "shut up" and then shot him in the leg. The victim fell to the ground. The defendant then became concerned, saying that he did not want to go to jail and that the victim had seen their faces and knew where they lived. Consequently, the defendant walked over to the victim and shot him four to five times. They then took the victim's wallet and cell phone and left the park in the victim's vehicle. Their plan had been to rob the victim and to leave him in the park, but when Rudel shot the victim in the leg, it "mess[ed] [their] plans up."

Approximately five days after the murder, on June 12, 2021, Rudel went to see Jackson, his father's longtime girlfriend, with whom he had a close relationship. According to Jackson, Rudel told her the following about the murder. He said that "he fucked up . . . ." He then showed her a driver's license belonging to someone with the last name of Atkinson. Jackson recognized the name as being associated with a murder that she had seen in the news. Rudel then explained to her that he and one or two other people planned to rob a rideshare driver whom he knew from previous rides. Rudel said that he had the rideshare driver pick him up down the street from where Santiago lived, then he and the rideshare driver picked up the other men. Rudel did not identify the other men. Rudel said that they went to a park in Woodbridge. Rudel told Jackson that, after the men arrived at the park, he shot the driver in the leg once or twice. He then told her that the other

men then became concerned that the victim had seen their faces, so they "finished him off." Rudel told Jackson that they then put the victim's body in the vehicle and submerged the vehicle in the water.

Prior to trial, the state filed a motion in limine in which it sought, in pertinent part, to admit into evidence Rudel's statement to Jackson. The state asserted that Rudel was unavailable to testify because he planned to invoke his fifth amendment right against self-incrimination and that the statement was admissible under Connecticut Code of Evidence § 8-6 (4) because it was against his penal interest and was trustworthy. Thereafter, the defendant filed a motion to suppress, which the trial court treated as a motion in limine, in which he argued that all of Rudel's statements, including those to Jackson and Santiago, should be suppressed. Although the defendant conceded that the statements were not testimonial and were against Rudel's penal interest, he claimed that they should be suppressed because they were not trustworthy or corroborated.

The trial court denied the defendant's motion to suppress. In ruling on the state's motion and the defendant's motion, the court noted that the defendant had conceded that the statements were not testimonial. Thus, the court explained, the admissibility of these statements was governed solely by the rules of evidence and did not implicate the confrontation clause.[3] Accordingly, the trial court analyzed the admission of the statements under the hearsay exception for statements against penal interest. See Conn. Code Evid. § 8-6 (4). The trial court explained that the statements were against Rudel's penal interest, and, "after considering

[3] Notwithstanding the trial court's statement that the defendant conceded that his confrontation rights were not implicated, the court, in an abundance of caution, nevertheless determined that admitting Rudel's statements into evidence did not violate the defendant's confrontation rights. The defendant does not renew any constitutional claim on appeal.

the totality of the circumstances," the court "conclude[d] that the statements made by Rudel to Jackson and Santiago [were] admissible under the Connecticut Code of Evidence [§] 8-6 (4) . . . ." As a result, at trial, Santiago and Jackson testified about the events relayed to them by Rudel. Rudel continued to invoke his privilege against self-incrimination and, therefore, did not testify at trial.

We begin with the standard of review and relevant legal principles. "The law regarding out-of-court statements admitted for the truth therein is well settled. An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule. . . . Section 8-6 (4) of the Connecticut Code of Evidence carves out an exception to the hearsay rule for an out-of-court statement made by an unavailable declarant if the statement was trustworthy and, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." (Citation omitted; internal quotation marks omitted.) *State* v. *Graham*, 344 Conn. 825, 835, 282 A.3d 435 (2022). "[W]hen viewing this issue through an evidentiary lens, we examine whether the trial court properly exercised its discretion." (Internal quotation marks omitted.) Id., 836–37.

In the present case, the state offered Rudel's statements as dual inculpatory statements. "A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 359, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). "We evaluate dual inculpatory statements using the same criteria that we use for statements against penal interest." Id.

Admission of a hearsay statement against penal interest pursuant to § 8-6 (4) of the Connecticut Code of Evidence "is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017); see also, e.g., *State* v. *Pierre*, 277 Conn. 42, 67, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). Dual inculpatory statements, such as those inculpating both the declarant and the defendant, are admissible if the circumstances demonstrate that the statements are trustworthy. See, e.g., *State* v. *Camacho*, supra, 282 Conn. 361–63. Because the defendant concedes that Rudel's statements were against his penal interest, only the second part of this inquiry, whether the statements were sufficiently trustworthy, is at issue in this appeal.

When assessing the trustworthiness of such statements, our Code of Evidence directs trial courts to consider the following factors: "(A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest." Conn. Code Evid. § 8-6 (4). "[N]o single factor . . . is necessarily conclusive. . . . Thus, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, 254 Conn. 309, 316, 757 A.2d 542 (2000); see also *State* v. *Patel*, 342 Conn. 445, 450, 477, 270 A.3d 627 (finding that there was no abuse of discretion when trial court admitted into evidence

codefendant's dual inculpatory statement to jailhouse informant), cert. denied, U.S. , 143 S. Ct. 216, 214 L. Ed. 2d 86 (2022). We consider each of these factors in turn.

Rudel made the statements to Jackson and Santiago in close temporal proximity to the crimes. Rudel spoke to Jackson approximately five days after the crimes and to Santiago the day after the crimes and then again approximately one week later. As this court has explained, "[i]n general, declarations made soon after the crime suggest more reliability than those made after a lapse of time [when] a declarant has a more ample opportunity for reflection and contrivance." (Internal quotation marks omitted.) *State* v. *Camacho*, supra, 282 Conn. 361; see also *State* v. *Pierre*, supra, 277 Conn. 70–72 (statements against penal interest made within "couple of weeks" of homicide were trustworthy); *State* v. *Rivera*, 268 Conn. 351, 370–71, 844 A.2d 191 (2004) (dual inculpatory statement made within five months of homicide was trustworthy). Therefore, in the present case, the timing of the statements, just days after the murder, supports their trustworthiness.

In addition, the persons to whom the statements were made also support their trustworthiness. "[W]e note that the declarant's making the contested statements of his own volition, to people with whom he had a trusting relationship . . . is further indication of the reliability of the statements." *State* v. *Camacho*, supra, 282 Conn. 361. As the trial court found, Rudel, on his own initiative, made the statements to "a close family member and a romantic partner." The evidence at trial demonstrated that Jackson was the longtime girlfriend of Rudel's father and that Rudel would often visit her and talk to her about what was going on in his life.[4]

[4] The defendant asserts that the statement to Jackson may be less trustworthy because Jackson overstated her relationship with Rudel and had known him for only a short time before he told her about the murder. We disagree. The trial court's finding that Rudel and Jackson had a close familial relation-

Specifically, the court found that, when Rudel made his statement to Jackson, Rudel went to Jackson's home of his own volition, unannounced, and told her, "listen, I need to talk, and I think I really [fucked] up." Additionally, Santiago is the mother of Rudel's children and was his girlfriend at the time of the crimes. This bespeaks of a trusting relationship. See, e.g., *State* v. *Pierre*, supra, 277 Conn. 69–70 (finding implication of reliability when declarant "made the statements on his own initiative, to an individual who was a friend and someone he routinely socialized with, and not in the coercive atmosphere of official interrogation" (internal quotation marks omitted)); *State* v. *Rivera*, supra, 268 Conn. 369–70 (that statement was made, "upon [witness'] own initiative, to a close family member, and not in the coercive atmosphere of official interrogation," was strongly indicative of statement's reliability (internal quotation marks omitted)).

Further, we are unpersuaded by the defendant's argument that this factor ignores the possibility that Rudel may have been motivated to minimize his role in the crimes when speaking to a family member. As the defendant acknowledges, his argument is not supported by the case law. See *State* v. *Graham*, supra, 344 Conn. 843 ("It is well settled that statements made to friends and close associates 'are significantly more trustworthy than statements obtained by government agents for the purpose of creating evidence that would be useful at a future trial. . . . In short, neither facing arrest nor being under arrest when making his statements to [the witness], [the declarant] lacked the obvious incentive to shift blame or [to] curry favor with the police.' "). Moreover, a review of Rudel's statements in the present case demonstrates that Rudel admitted to his role in

ship is supported by the evidence, and we cannot conclude that the trial court abused its discretion in finding that this factor supported the trustworthiness of Rudel's statement to Jackson.

the planning and commission of the robbery and to being the first person to shoot the victim. Accordingly, we agree with the trial court that this factor supports the court's decision to admit the statements into evidence.

Turning to the second factor, whether there was corroborating evidence in the case, we conclude that this factor also supports the trial court's decision to admit Rudel's statements into evidence. Rudel admitted that he and the defendant planned to rob a rideshare driver but that their plan went awry and resulted in murder. The evidence at trial established that the victim was a rideshare driver and was found without any of his personal belongings, including his wallet and cell phone. Significantly, while making his statements to Santiago and Jackson shortly after the murder, Rudel showed them both a driver's license belonging to the victim. Rudel also told both Santiago and Jackson that he and another individual took the victim to a park in Woodbridge, consistent with the location of where the victim's body was found.

In addition to the foregoing, Rudel's statements about the shooting itself were corroborated by the facts established at trial. Rudel told Santiago and Jackson that both he and the other participant had guns and that they both shot the victim. Indeed, Rudel said that he shot the victim once or twice in the leg and that the other participant shot the victim four or five times. These details are consistent with the forensic evidence presented at trial. The police recovered seven shell casings at the scene, and the testing revealed that two of the casings were fired from one firearm and five of the casings were fired from another firearm. Furthermore, the police found two guns in the car belonging to the defendant's girlfriend, and the ballistics testing demonstrated that they were consistent with the guns used during the crimes. The medical examiner's testimony also corroborated Rudel's statements to Santiago and

Jackson that Rudel fired one or two shots into the victim's leg. Thus, the existence of the other five casings at the scene not attributable to Rudel also corroborates Rudel's statement to Santiago that the defendant fired multiple shots.

The defendant asserts that the trustworthiness of Rudel's statements was undermined by the "material differences" between his statement to Jackson and the evidence presented at trial. Specifically, the defendant asserts that the evidence did not corroborate what Rudel told Jackson, namely, that there were multiple participants in the crimes other than himself, that they put the victim's body in the trunk of the car, and that they then submerged the car in water. Although there were some discrepancies between Rudel's statement to Jackson and the other evidence presented at trial, we cannot conclude that such discrepancies demonstrate that the trial court abused its discretion in admitting Rudel's statements to Jackson and Santiago into evidence.

Indeed, the trial court addressed the discrepancies and concluded that they did not undermine the reliability of Rudel's statement to Jackson. Specifically, with respect to Rudel's statement that there were multiple participants in the crimes, the court concluded that, "at the crucial time the events actually unfolded in the park in Woodbridge, according to what [Jackson] indicated, [Jackson] recalls that Rudel . . . describes just 'the other guy that he was with,' which is a singular term, meaning used in the singular; and 'whoever the other guy is, had a gun as well,' again, singular; and maintained that both Rudel and 'the other guy fired their weapons,' although the other guy was unnamed." Thus, the court concluded that, when the murder occurred, Rudel told Jackson about only himself and one other man.

With respect to Jackson's testimony that Rudel told her that they had placed the victim's body in the trunk

of the victim's car and submerged the car in water, the trial court acknowledged that this portion of the statement was inconsistent with the evidence. As the court noted, however, "[t]he fact that some of [Rudel's] statements may contradict [with], or differ from, each other or other evidence is not fatal to their admission." The court pointed out that the "alleged inconsistencies pale in comparison to the myriad details of the crime[s] that Rudel shared with [Jackson] and [Santiago] that overlap and that could only be known to a participant in the crime[s]." In particular, the court highlighted the following consistencies: "[T]he name and license of [the victim], the town [in which] the robbery occurred, [that] the location was a park, [that there were] multiple shots at the crime scene . . . [including] the shot to the [victim's] leg, and the fact that [the victim] was [a rideshare] driver."

We agree with the trial court that the inconsistencies, on balance, did not undermine the trustworthiness of Rudel's statement to Jackson and, accordingly, conclude that the court did not abuse its discretion in allowing Jackson's testimony. It was within the court's discretion to weigh those inconsistencies against the other evidence, and we find nothing untoward in its weighing or analysis. See, e.g., *State* v. *Patel*, 194 Conn. App. 245, 275, 221 A.3d 45 (2019) ("It was within the trial court's discretion to evaluate the consistencies and inconsistencies to conclude that, on balance, the second factor weighed in favor of a determination that the statements are reliable. Indeed, the trial court noted the inconsistencies identified by the defendant and found that they 'pale[d] in comparison to the myriad details of the crime that could only be known to a participant in the crime.' "), aff'd, 342 Conn. 445, 270 A.3d 627, cert. denied, U.S. , 143 S. Ct. 216, 214 L. Ed. 2d 86 (2022). In the present case, the trial court explained that, in conformance with *Patel*, it had "evalu-

ated the foregoing consistencies and inconsistencies and conclude[d] . . . that, on balance, the statements to . . . Jackson are reliable and admissible under [§] 8-6 (4) [of the Connecticut Code of Evidence]." Therefore, we find no abuse of discretion as to the second factor in view of the myriad of corroborating evidence presented at trial.

We now turn to the third factor, namely, the extent to which Rudel's statements were against his penal interest. Although the defendant concedes that Rudel's statements were against his penal interest, he asserts that the third factor does not support the trustworthiness of Rudel's statements because Rudel engaged in blame shifting. Specifically, the defendant asserts that Rudel attempted to minimize his participation in the homicide by stating that the defendant was the one who shot the victim five times and that these shots were the ones that killed the victim. We disagree.

As this court explained in *State* v. *Graham*, supra, 344 Conn. 825, "[t]he essential characteristic as to what is against penal interest is the exposure to risk of punishment for a crime." (Internal quotation marks omitted.) Id., 837. In *Graham*, the declarant "admitted his participation in a robbery that gave rise to a homicide and exposed himself to the possibility of a charge of felony murder" while also stating that it was the defendant who shot and killed the victim. Id. This court concluded that, although the declarant's statement was intended to distance the declarant from the murder or to minimize his participation in the crimes, the declarant's "statement was indeed inculpatory, as it exposed him to potential criminal liability for the same types of crimes with which the defendant was charged. A difference in degree of inculpation, rather than in kind, does not affect the conclusion that it is still an inculpatory statement." Id., 838. In the present case, Rudel's statements to both Santiago and Jackson exposed him to

the risk of punishment for several crimes. He inculpated himself in the crimes by stating that he had helped to plan and had participated in the robbery of the victim, thus exposing himself to a charge of felony murder. He also told them that he had shot the victim in the leg once or twice.

In *State* v. *Rivera*, supra, 268 Conn. 351, this court addressed a similar factual situation. In *Rivera*, the declarant had "admitted his participation in a burglary that had given rise to a homicide, and thus exposed himself to the possibility of a charge of felony murder. As the trial court correctly noted, even if [the declarant's] statement had attempted to minimize his participation in the homicide, the minimization would have been limited to 'one type of murder versus another type of murder.' The statement further implicated [the declarant] as a principal in the crime of burglary, and [as] an accomplice in the crimes of arson and tampering with evidence. Therefore, [the declarant's] statement exposed him to potential liability for the same types of crimes with which the defendant has been charged and, accordingly, the statement fully and equally implicated both [the declarant] and the defendant." (Footnote omitted.) Id., 368.[5]

Similarly, in the present case, Rudel's statements simply put forth a difference in degree of inculpation, not a difference in kind. Indeed, like in *Rivera*, even if

[5] In his brief, the defendant asserts that "felony murder charges present unique challenges in the context of dual inculpatory statements by an accomplice whose statement engages in blame shifting" by inculpating himself in the underlying felony while exculpating himself in the murder. Citing to the concurring opinion in *State* v. *Graham*, supra, 344 Conn. 858 (*Ecker*, *J.*, concurring), the defendant asserts that "an overturning of *Rivera* for the purpose of this appeal would be welcome . . . ." He does not, however, expressly ask us to do so or provide briefing in that regard, and, at oral argument, the defendant's appellate counsel conceded that he was not asking this court to overrule *Rivera* or *Graham*. Accordingly, we do not address this issue.

Rudel's statement that he shot the victim only in the leg was an attempt to minimize his participation in the homicide, that minimization does not affect the conclusion that his statements to Jackson and Santiago were inculpatory. Attributing the final gun shots to the defendant simply means that Rudel was guilty of "one type of murder versus another type of murder." (Internal quotation marks omitted.) Id. Put differently, the statements exposed Rudel to potential liability for the same types of crimes, i.e., felony murder and robbery, with which the defendant has been charged. Thus, because Rudel's statements fully and equally implicated both himself and the defendant, we cannot conclude that the trial court abused its discretion in concluding that this factor supported a finding that the statements were trustworthy.

The judgment is affirmed.

In this opinion the other justices concurred.