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CONNECTICUT REPORTS

Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

TATAYANA OSBORN ET AL. *v.* CITY OF WATERBURY ET AL.
(SC 20129)

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

Syllabus

The plaintiff mother and her minor child, T, an elementary school student, sought to recover damages from the defendant city of Waterbury and the defendant Waterbury Board of Education for injuries that T sustained when she was physically assaulted by two or more schoolchildren on a Waterbury public school playground during recess. The plaintiffs alleged, inter alia, that the defendants and their employees failed to adequately supervise the schoolchildren, including T, both in and out of the classroom. The case was tried to the court, which found that T's injuries were the result of the defendants' failure to provide sufficient personnel to exercise proper control over the number of students on the playground at the time. There was evidence introduced at trial that the school had a student population of about 400 and that at least 2 paraprofessionals who attended the incident involving T ran from inside the building to address the situation. The defendants appealed to the Appellate Court from the judgment in favor of the plaintiffs, claiming that the trial court improperly rejected the defendants' special defense of governmental immunity, incorrectly concluded that T's injuries were caused when an inadequate number of staff members were assigned to

supervise up to 400 students when there was evidence that there were no more than 50 students on the playground at the time in question, improperly found, in the absence of expert testimony, that the number of assigned staff members was insufficient to control as many as 400 students, and improperly awarded certain damages. The Appellate Court concluded that, in the absence of expert testimony, the trial court could not properly have found that the defendants breached their duty of care to T on the basis that there was an allegedly inadequate number of adults on the playground to supervise the students. Accordingly, the Appellate Court reversed the trial court's judgment and remanded the case to that court with direction to render judgment for the defendants. The Appellate Court did not reach any of the defendants' other claims. On the granting of certification, the plaintiffs appealed to this court. *Held* that, under the facts of the present case, expert testimony was not required to establish the plaintiffs' claim of inadequate supervision, and, because the Appellate Court incorrectly concluded that the trial court could not determine that the defendants breached their duty of care to T without such testimony, the judgment of the Appellate Court was reversed and the case was remanded to that court for consideration of the remaining issues on appeal: although the education profession is a highly regulated field, the fact finder was required to determine only whether there was adequate supervision of children under the circumstances of the case, a task that was within the common knowledge of a layperson and that did not require the fact finder to apply scientific or specialized knowledge; moreover, even if there had been expert testimony regarding the desired ratio of staff to children and the facts demonstrated that the school met that ratio, the fact finder still could have determined that the supervision was inadequate because adequacy was not based simply on numbers, and nothing in the complaint limited the plaintiffs' inadequate supervision claim to a mere numerical calculation between the number of students and the number of adults.

(*Three justices dissenting in one opinion*)

Argued March 27—officially released December 3, 2019

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the action was withdrawn as to the defendant Stephanie Pascale et al.; thereafter, the case was tried to the court, *Hon. Barbara J. Sheedy*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which

the named defendant et al. appealed to the Appellate Court, *Lavine*, *Prescott* and *Harper*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to render judgment for the named defendant et al., and the plaintiffs, on the granting of certification, appealed to this court. *Reversed*; *further proceedings.*

Richard M. Franchi, for the appellants (plaintiffs).

Daniel J. Foster, acting assistant corporation counsel, for the appellees (named defendant et al.).

Opinion

MULLINS, J. This appeal arises from an action filed by the plaintiffs, Tatayana Osborn (child), a minor child, by and through her mother, Tacarra Smith, alleging negligence on the part of the defendant city of Waterbury (city) and the defendant Waterbury Board of Education (board) for injuries sustained by the child during an altercation with other students during recess at a Waterbury public school.[1] In this certified appeal,[2] we must determine whether the Appellate Court correctly concluded that expert testimony was necessary to

[1] The plaintiffs also brought this action against Stephanie Pascale, a fifth grade teacher; Charles Stango, the president of the board; Danielle Avalos, a paraprofessional at the school; and Donna Perreault, the school principal. They withdrew the action against Pascale and Stango in the trial court. In its articulation, the court clarified that it did not find that Avalos and Perreault were liable for the plaintiffs' injuries. Avalos and Perreault, therefore, withdrew from the present appeal. In this opinion, we refer to the city and the board as the defendants.

[2] We granted the plaintiffs' petition for certification to appeal, limited to the following issues: (1) "In reversing the judgment of the trial court, did the Appellate Court properly determine that expert testimony was necessary to establish the standard of care?"

(2) "Did the plaintiffs receive adequate notice of the need for expert testimony to determine the scope of the duty of care such that a directed judgment was appropriate in this case?" *Osborn* v. *Waterbury*, 329 Conn. 901, 184 A.3d 1214 (2018).

Because we conclude that expert testimony was not necessary in the present case, we need not address the second certified question.

establish the standard of care in this negligence action. We conclude that, under the facts of the present case, expert testimony was not necessary. Accordingly, we reverse the Appellate Court's judgment and remand the case to that court for consideration of the remaining issues on appeal.

The opinion of the Appellate Court, as supplemented by the record, sets forth the following facts and procedural history. "On April 25, 2012, the child was an elementary school student when she was assaulted by other students while they were on the playground during the lunchtime recess. As a result of the assault, the child sustained a cut to her face that required sutures . . . and [that] resulted in scarring. The plaintiffs commenced the present action against the city [and] the board, [among others]." *Osborn* v. *Waterbury*, 181 Conn. App. 239, 241–42, 185 A.3d 675 (2018). In their complaint, the plaintiffs alleged, inter alia, that the plaintiffs' injuries and damages "were caused by the negligence and carelessness of the defendant[s] in that [they] . . . failed to adequately supervise the children both in and out of the classroom, including the [child]."

"The parties tried the case to the court. Following the presentation of evidence, the court issued a memorandum of decision in which it found that the child was a fifth grade student at Sprague Elementary School in Waterbury when she was assaulted by two or more students on the playground. The playground was surrounded by brick walls and fencing, and, following lunch, students occupied the area for play and exercise. More specifically, the child was surrounded by a circle of students who physically assaulted her and pushed her into a stone wall, causing injuries to her nose and cheek with resulting facial scarring. The child experienced posttraumatic headaches for a sustained period of time, but the most serious effect of this schoolyard

assault was its lingering effect on the child's emerging personality and self-image.

"The court also found that Danielle Avalos, a school paraprofessional, was assigned to monitor the students on the playground during recess. She was not provided with written documents that listed her duties during the lunchtime recess. Her two day professional development training occurred prior to the first day of school and focused on the forms of student bullying and the need to distinguish between bullying and students merely 'picking on' other students or otherwise being unkind to them." *Osborn* v. *Waterbury*, supra, 181 Conn. App. 242–43.

The trial court found that "[t]here was also no evidence to suggest that only portions of the student body were released for [lunch] at a given time; it is more likely the student body ate together in the [lunch] room and then went outside for recreation—in large numbers." The trial court further found that, "[a]t the time of the incident, classroom teachers were on [lunch] recess (and there was no evidence to establish that staff lunch times were staggered). The court concludes that 1 student intern and 3 or 4 staff members were not sufficient to exercise control over as many as 400 students [on the playground]."

"With respect to the incident during which the child was injured, the court found that Avalos saw a student repeatedly punch the child in the face and push her into a wall. A precis prepared by the nursing division of the Waterbury Health Department referenced, 'a large, deep cut on the [child's] left cheek' and 'a cut of lesser depth on the bridge of her nose.' " *Osborn* v. *Waterbury*, supra, 181 Conn. App. 243–44. The court rendered judgment in favor of the plaintiffs.

After trial, the defendants sought an articulation from the trial court pursuant to Practice Book §§ 61-10 and

66-5. Specifically, the defendants requested that the trial court articulate "(1) whether the court found either or both of the individual defendants who remain in the case to be liable for the plaintiffs' injuries and losses, and, if so, on what basis, and (2) whether the court found that the plaintiffs' injuries and losses were caused by the fact, as found by the court, that the number of adults present on the playground where the injuries took place was insufficient to exercise proper control over the number of students present."

The trial court responded to the defendants' request for articulation as follows:

(1) "This court did not find any remaining individual (specifically . . . Avalos or Donna Perreault) was liable for the plaintiffs' injuries or losses . . . .

(2) "This court found [that] the injuries and/or losses were as a result of the [city's] failure to exercise proper control over the number of students present.

(3) "The court (in [an] August 12, 2016 ruling) found [that] the plaintiffs' injuries were caused by insufficient staffing of personnel to exercise proper control over the number of students on the playground at the time (perhaps as many as 400 students) . . . .

(4) "The court concluded [that] the injuries to the plaintiffs were proximately caused by an insufficient number of staff personnel—to monitor the actions of students on the playground on the date of injury." (Citation omitted; emphasis in original.)

The defendants appealed from the judgment of the trial court to the Appellate Court, claiming that "the trial court improperly (1) rejected their special defense of governmental immunity for discretionary acts, (2) concluded that the plaintiffs' injuries were caused when an inadequate number of adults were assigned to supervise up to 400 students when there was evidence that

there were no more than 50 students on the playground, (3) found in the absence of expert testimony that 1 student intern and 3 or 4 staff members were insufficient to control as many as 400 students on the playground, and (4) awarded damages intended to encourage continued therapy and occupational training for the child in the absence of evidence that she would need such services in the future." *Osborn* v. *Waterbury*, supra, 181 Conn. App. 241.

The Appellate Court concluded, "as a matter of law, that without expert testimony, the court could not properly have found that the defendants breached their duty of care to the child [on the basis that] there was an inadequate number of adults on the playground to supervise the students at the time the child was injured." Id. As a result, the Appellate Court reversed the judgment of the trial court and remanded the case with direction to render judgment for the defendants. Id., 247. The Appellate Court did not reach any of the defendants' other claims on appeal. This certified appeal followed.

On appeal to this court, the plaintiffs assert that the Appellate Court incorrectly concluded that, without expert testimony, the trial court could not determine that the defendants breached their duty of care to the child. The defendants respond that the Appellate Court correctly determined that expert testimony was necessary to establish the standard of care. We agree with the plaintiffs that the Appellate Court incorrectly concluded that the trial court could not determine that the defendants breached their duty of care to the child without expert testimony.

Before we begin our analysis, it is important to clarify two points. First, we read the plaintiff's complaint and the trial court's ruling thereon to involve a claim of inadequate supervision. Unlike the defendants and

the Appellate Court, we understand the trial court's response to the request for articulation, namely, that "the injuries and/or losses were as a result of the [city's] failure to exercise proper control over the number of students present," as a conclusion that there was inadequate supervision, not that there was solely an inadequate number of staff on the playground.[3] Such a conclusion is consistent with the well established principle that "we read the record in the light most favorable to sustaining the trial court's judgment." *Weiss* v. *Smulders*, 313 Conn. 227, 232 n.2, 96 A.3d 1175 (2014). As a result, we consider whether expert testimony was required for the plaintiffs' negligence claim of inadequate supervision.[4]

Second, we understand that the linchpin of the Appellate Court's decision is that, because schools are highly regulated areas, expert testimony was required. We disagree that the fact that a particular area is highly regulated necessarily means that expert testimony is

[3] In response to the defendants' request for an articulation, the trial court also stated that "[t]he court concluded [that] the injuries to the plaintiffs were proximately caused by an insufficient number of staff personnel—to monitor the actions of students on the playground on the date of injury." It was this statement on which the Appellate Court based its analysis. Nevertheless, a review of the allegations of the plaintiffs' complaint, the evidence presented at trial, the transcripts of the trial, and a fair reading of the memorandum of decision and articulation in the light most favorable to sustaining the trial court's judgment demonstrate that the issue for the trial court to determine was whether the supervision was adequate, not merely whether the number of staff was sufficient.

[4] The dissent is premised on an interpretation of the trial court record with which we fundamentally disagree. The dissent repeatedly asserts that "the *sole basis* of the trial court's conclusion that the defendants' supervision of the children was negligent was the supervisor to student ratio . . . ." (Emphasis added.) This conclusion ignores the articulation of the trial court that "the injuries and/or losses were as a result of the [city's] failure to exercise proper control over the number of students present." This articulation makes clear that the supervisor to student ratio was not the *sole basis* of the trial court's conclusion that the defendants were negligent but that, regardless of the supervisor to student ratio, the defendants did not exercise proper control over the students.

required for claims of negligence arising in that area. Rather, we conclude that, irrespective of the heightened regulations of a particular field, whether expert testimony is required to support a claim of negligence turns on whether the alleged claim of error is within the common knowledge of a layperson.[5]

[5] The dissent seems to agree that the fact that schools are a highly regulated area is not dispositive of whether expert testimony was required for this claim of negligence. Instead, the dissent's conclusion that expert testimony was required in this case is premised on the existence of a board policy regarding a supervisor to student ratio for supervision, about which the principal testified. Specifically, the dissent asserts that "[t]he issue presented in this appeal . . . is whether expert testimony was required to enable the trier of fact to determine that the defendants' supervision of the playground was negligent, *notwithstanding the fact that the supervisor to student ratio complied with or exceeded the goals set forth in the board's policy*." We disagree with the dissent that, on this record, the trial court had to accept that any supervisor to student ratio was established merely because the principal testified that one existed.

The dissent acknowledges that "[t]he written policy . . . was not admitted into evidence, and the court made no finding in that regard." Thus, the principal's testimony is the only evidence of the existence of the policy and what the policy contained; that testimony, of course, was subject to the court's finding it credible. The fact that the court made no finding regarding the policy or what it contained demonstrates to us that the court did not credit the principal's testimony regarding the policy or the ratio. Because the court did not credit the principal's testimony, we conclude that, as matter of fact, no particular supervisor to student ratio was established at trial.

The dissent also "disagree[s] . . . with the majority's suggestion that there was not enough evidence in the record to allow the trial court, as fact finder, to draw the reasonable inference that the policy testified to by the principal was one that was in existence and applicable at the time of the incident." This misconstrues our conclusion. First, it is axiomatic that the trial court was not required to credit the principal's testimony regarding the policy—neither when the policy was established nor what the policy contained. See, e.g., *In re Gabriella A.*, 319 Conn. 775, 798, 127 A.3d 948, 960 (2015) (it is undisputed that "the trial court, as the fact finder, was free to accept or reject portions of [each witness'] testimony"). Indeed, the dissent concedes that the trial court made no findings in this regard.

Second, we agree that there was evidence, *if credited*, for the court to make a finding that the policy testified to by the principal was applicable. However, there is simply nothing in the record to demonstrate that the trial court did credit the principal's testimony. Instead, having had that testimony before it, the trial court did not make a finding regarding the policy or any

"As an initial matter, we note that the [trial] court's determination of whether expert testimony was needed to support the plaintiff's claim of negligence against the defendant was a legal determination, and, thus, our review is plenary." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 373, 119 A.3d 462 (2015).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty. . . . We sometimes refer to the scope of that duty as the requisite standard of care. . . .

"[O]ur threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? . . . The idea of risk in this context necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly follow. . . . Accordingly, the fact finder must consider whether

ratio it may have contained. Therefore, we will not elevate that testimony to a factual finding regarding the proper supervisor to student ratio when the trial court itself did not do so. Rather, on appeal, "we read the record in the light most favorable to sustaining the trial court's judgment." *Weiss* v. *Smulders*, 313 Conn. 227, 232 n.2, 96 A.3d 1175 (2014). Accordingly, the fact that there was testimony in the record to support a finding that is contrary to the judgment of the trial court is irrelevant.

the defendant knew, or should have known, that the situation at hand would obviously and naturally, even though not necessarily, expose [the plaintiff] to probable injury unless preventive measures were taken." (Citations omitted; internal quotation marks omitted.) *LePage* v. *Horne*, 262 Conn. 116, 123–24, 809 A.2d 505 (2002).

"[E]xpert testimony . . . serves to assist lay people, such as members of the jury and the presiding judge, to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard. . . . Expert testimony is required when the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 125; see *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 374; see also *Doe* v. *Yale University*, 252 Conn. 641, 686–87, 748 A.2d 834 (2000) ("[w]hether expert testimony was required to support the plaintiff's claim compels us to consider whether the determination of the standard of care requires knowledge that is beyond the experience of [the] fact finder" [internal quotation marks omitted]). Indeed, this court has often said that "[t]he trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters." *Way* v. *Pavent*, 179 Conn. 377, 380, 426 A.2d 780 (1979); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 375 ("[j]urors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct" [internal quotation marks omitted]).

Typical cases in which expert testimony is required are those that "are akin to allegations of professional

negligence or malpractice . . . .'' *Santopietro* v. *New Haven*, 239 Conn. 207, 226, 682 A.2d 106 (1996). Nevertheless, expert testimony is not required for all claims arising from a professional relationship despite the fact that those areas are highly specialized and regulated.

There are two types of cases arising from a professional relationship in which expert testimony is not required. In one type of case, expert testimony is not required because the negligence is so gross as to be clear to a layperson. See *Davis* v. *Margolis*, 215 Conn. 408, 416 n.6, 576 A.2d 489 (1990) (expert testimony is not required in legal malpractice cases ''where there is present such an obvious and gross want of care and skill that the neglect is clear even to a layperson'' [internal quotation marks omitted]). In the other type of case, expert testimony is not required because the alleged claim of error involves a task that is within the common knowledge of a layperson. See *Doe* v. *Cochran*, 332 Conn. 325, 337, 210 A.3d 469 (2019) (explaining that expert testimony was not necessary because ''alleged error [was] not one involving professional medical judgment or skill''). The present case falls within the second category.

Indeed, *Badrigian* v. *Elmcrest Psychiatric Institute, Inc.*, 6 Conn. App. 383, 505 A.2d 741 (1986), highlights this second category of cases. The Appellate Court concluded that expert evidence was not necessary in a negligence claim against a psychiatric hospital, when that claim alleged that the hospital failed to supervise its patients, particularly in crossing a state highway. Id., 385. The Appellate Court explained that ''[t]he defendant is attempting to transform this case from one of simple negligence into that of medical malpractice requiring expert medical testimony to prove a medical standard of care and a breach thereof.'' Id., 386. The Appellate Court further explained that ''one need not be guided by medical experts in determining whether

a mentally ill person should be allowed to cross on foot a heavily traveled four lane state highway without supervision. There was no esoteric or uniquely medical issue to be determined under the allegations of [the] case, and the court correctly categorized the negligence charged against the hospital as involving 'no materia medica, nor any complex issue requiring specialized knowledge.' " Id., 387.

Similarly, in *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 751–52, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014), the Appellate Court concluded that expert testimony was not necessary in a case involving a claim of legal malpractice. The claim of legal malpractice centered on the defendant lawyer's act of giving a check payable to his client to another individual, notwithstanding the fact that the defendant had been warned that that individual was untrustworthy. Id., 751 and n.6. The Appellate Court explained that "[t]he question of whether expert testimony is required is not resolved by characterizing the case as sounding in legal malpractice or ordinary negligence, but rather by determining whether the issue, unaided by expert testimony, is within the realm of a jury's ordinary knowledge. Thus, professional negligence claims do not necessarily require expert testimony, and claims of ordinary negligence may require expert testimony. The appropriate question is whether the issue can be reliably decided by a jury without the assistance of expert testimony." Id., 751.

In the present case, the Appellate Court concluded that, "as a matter of law . . . the standard of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground is not a matter of common knowledge; far from it. The policies and procedures of our public school system are highly regulated by governing bodies and accreditation organizations. School teachers and

administrators are required to be accredited in accordance with educational standards."[6] *Osborn* v. *Waterbury*, supra, 181 Conn. App. 246. Although we agree with the Appellate Court that the education profession is a highly regulated field, our case law demonstrates the fact that a profession that is highly regulated does not mean that expert testimony is always required in cases alleging negligence against a professional in that field. Instead, whether expert testimony is required in a particular case depends on whether the alleged error is within the common knowledge of a layperson.

In this case, the plaintiffs claimed, inter alia, that their injuries and damages were caused by "the negligence and carelessness" of the defendants in that they "failed to adequately supervise the children both in and out of the classroom, including the [child] . . . ." Therefore, we must determine whether the alleged error here, namely, the supervision of children, involves pro-

[6] It is important to note that, although the principal testified at trial that the board had a "policy" of 1 staff member to 125 students, there was no evidence regarding whether that was a written or verbal policy, whether the policy even existed at the time of the incident four years prior to trial or whether it was adopted in response to the incident. Tellingly, no written policy was ever introduced into evidence.

Furthermore, and perhaps more important, even if the board had adopted a written policy prior to the incident that the school should maintain a ratio of 1 staff member to 125 students, the fact that the school and the board complied with its own policy is not determinative of whether the school was negligent in its supervision of the students in the present case. "This court has stated that, [a]lthough a violation of an employer's work rules can be viewed as evidence of negligence . . . [self-imposed] rules, regulations and policies do not themselves establish the standard of care. . . .The rule is well established and is consistent with the general principle that the standard of care in a negligence action is an objective one, determined by external standards, and not a rule derived from individual practices." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 279, 72 A.3d 929 (2013) (*Zarella*, *J.*, dissenting). There was no evidence presented in the present case regarding any regulation or accreditation standard regarding the supervision of students.

fessional judgment or skill, or whether it is a task comparable to those that laypeople routinely perform.

We find this court's recent decision in *Doe* v. *Cochran*, supra, 332 Conn. 325, instructive. In *Doe*, we addressed a claim against a physician for incorrectly reporting the results of a test for sexually transmitted diseases to a patient. Id., 329. In concluding that the plaintiff had alleged a claim of ordinary negligence, we explained that "the alleged error is not one involving professional medical judgment or skill. If the defendant misread [the patient's] lab result, then he failed to perform what was, in essence, a simple, ministerial task. The index to the report states that a result greater than 1.1 indicates a positive test, and the report states that [the patient's] result was 4.43. No advanced medical training was necessary to determine that [the patient] had tested positive for herpes; elementary reading and arithmetic skills should have been sufficient. Indeed, laypeople routinely perform comparable tasks, such as reading and interpreting meat thermometers, oil dipsticks, pool and spa test strips, and insulin tests." Id., 336–37.

This court further explained that, "[o]f course, the same conclusion holds to an even greater extent if the genesis of the error was that the defendant simply told his staff member the wrong test result or the staff member relayed the wrong result to [the patient]. That sort of careless miscommunication could occur in any setting and has nothing to do with the exercise of professional medical judgment or skill." Id., 337. "[R]egardless of whether the alleged error arose from a misreading or a miscommunication, proving that it constituted negligence would not require expert medical testimony or the establishment of a professional standard of care. A jury will not need expert testimony to determine whether the defendant's staff was negligent in leading [the patient] to believe that he was free of [sexually transmitted diseases] when the defendant knew, or

should have known, that [the patient] had tested positive for herpes, a contagious [sexually transmitted disease], and intended to engage in sexual activity. Such a determination is well within the ken of a layperson." Id.

Like the alleged claim of error in *Doe* v. *Cochran*, supra, 332 Conn. 336–37, the task of supervising children is one that laypeople routinely perform. It was not an issue that required scientific or specialized knowledge. To the contrary, a determination of adequate supervision of children is common knowledge, based on everyday life. The fact that this incident occurred on a playground during school hours, rather than on the same playground after school hours, does not change the fact finder's ability to determine what constitutes adequate supervision.

Moreover, we disagree with the Appellate Court that the plaintiffs' claim required the fact finder to determine "the standard of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground . . . ." *Osborn* v. *Waterbury*, supra, 181 Conn. App. 246. The fact finder was not asked to determine solely the required ratio of children to staff members; instead, the question confronting the fact finder, based on the allegations in the complaint and the evidence presented at trial, was whether there was adequate supervision of the children involved in this particular incident.[7] Indeed, even if there had been

[7] In their complaint, the plaintiffs alleged, inter alia, that their "injuries and damages were caused by the negligence and carelessness of the defendant[s] in that [they] . . . failed to adequately supervise the children both in and out of the classroom including the [child] . . . ."

At trial, the plaintiffs' counsel explained as follows: "A couple of things we know: even though [Avalos is] on recess duty . . . [s]he wasn't there during recess, at least part of it, the part where my client got injured. Also, there was another person who was supposed to be on duty; her name was Marlene. She was not on the playground as her recess duty schedule required, while my client was being assaulted. What we know is they looked out a window inside the building, at least one of them, and at that point in time . . . Avalos sees something happening. She then runs through the cafeteria carrying two walkie-talkies. She gives one to Marlene, goes outside, and

expert testimony regarding the desired ratio of staff to children and the facts demonstrated that the school met that ratio, the fact finder still may have determined that the supervision was not adequate because adequacy is not based just on numbers, and nothing in the complaint limited the plaintiffs' claim to a mere numerical calculation between the number of students and the number of adults. This was an inadequate supervision case.[8]

starts running toward some people. Supposedly, Marlene is in back of her; this is what she says."

[8] The following colloquy between the trial court and the defendants' counsel demonstrates that the issue before the trial court was whether the supervision on the playground was adequate, not merely whether the number of supervisors on the playground was adequate:

"The Court: Well, let me ask you another question, Counsel . . . . Do you claim that, at the time the injury was inflicted upon the [child], there was anybody providing supervision and guidance on the playground?

"[The Defendants' Counsel]: Yes.

"The Court: Who?

"[The Defendants' Counsel]: The paraprofessional . . . Avalos, was at the door, as well as—

"The Court: What door? What door?

"[The Defendants' Counsel]: The door from the cafeteria leading to—

"The Court: That's not where the injury occurred.

"[The Defendants' Counsel]: Well, the injury occurred on the playground.

"The Court: Well, yeah, I mean that's like saying, you know, I live in—

"[The Defendants' Counsel]: Well then, no, Your Honor, then no one was at the exact scene where this incident occurred.

"The Court: Okay.

"[The Defendants' Counsel]: But for—

"The Court: And there was nobody on the playground at the time.

"[The Defendants' Counsel]: Well, no, I disagree with that, as well. There is—

"The Court: Well, then tell me who they are so that I can correct that misimpression.

"[The Defendants' Counsel]: The gym teacher and—is Ms. Thompson, I think; and then Ms. Yago (phonetic), who—the health teacher, I believe. There were two—One was playing kickball and one was walking around. That was—

"The Court: But nobody—nobody was there for the purpose of supervising the students at—on the playground.

"[The Defendants' Counsel]: The purpose of those individuals being on the playground is to supervise, as well as to interact with students.

The trial court found that "[a] large group of students surrounded [the child]. They threw stones at her—most of which were aimed at her face. . . . It was . . . Avalos' testimony that she saw a student repeatedly punch the [child] in the face and push her into a wall." The trial court further found that, "[a]t the time of the incident, classroom teachers were on [lunch] recess (and there was no evidence to establish that staff lunch times were staggered)." Furthermore, the evidence in the present case demonstrated that the paraprofessionals who broke up the incident and attended to the child after the child was hurt had to run from *inside* the building to address the situation.

Specifically, Avalos testified that she was assigned to supervise students on the playground during recess but that she was inside the school building when she saw the incident and had to run outside to stop the incident. Although Avalos testified at trial that she saw other teachers on the playground when she arrived at the scene of the incident, the defendants did not present any testimony from those staff members or any other staff member who was actually on the playground supervising the children.[9] Furthermore, there was no evidence that any staff member who was allegedly on the playground responded to the incident.[10]

"The Court: Oh, so you can supervise and play kickball at the same time, Counsel?

"[The Defendants' Counsel]: I don't know if they were supposed to be playing kickball, per se, but they're on the playground in order to interact [with] and supervise the students."

[9] The trial court commented as follows: "[T]hat's why I come back again to who was out there supervising the children. It doesn't appear clear to me at all from the evidence that was submitted, and you could have put on somebody who would have so testified clearly."

[10] In its memorandum of decision, the trial court explained: "The court concludes that 1 student intern and 3 or 4 staff members were not sufficient to exercise control over as many as 400 students [on the playground]." It is important to note that the trial court did not find that 4 teachers and 1 student intern were on the playground. Indeed, the testimony at trial was not clear on this point. Although Avalos testified at trial that other staff members were on the playground when she arrived outside to break up the

Therefore, the issue in the present case was whether the supervision of the children was adequate when a large group of children was able to gather around the child, throwing stones at her, and with one student repeatedly punching the child in the face and pushing her into a wall. We conclude that the fact finder in the present case did not need to apply scientific or specialized knowledge to determine whether the defendants adequately supervised the children in the present case. Accordingly, we conclude that the Appellate Court improperly reversed the judgment of the trial court on the ground that, without expert testimony, judgment could not be rendered for the plaintiffs.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the defendants' remaining claims on appeal.

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

KAHN, J., with whom ROBINSON, C. J., and McDONALD, J., join, dissenting. I respectfully disagree with the majority's conclusion that the Appellate Court incorrectly concluded that the number of supervisors necessary to provide adequate supervision on an elementary

incident, contradictory testimony from her deposition was also admitted into evidence. At her deposition, Avalos testified that she did not recall any other staff members being on the playground when she arrived outside to break up the incident. This understanding is bolstered by the fact that, during closing arguments, the trial court remarked as follows: "The court's concern is whether or not there was in fact anyone [on the playground]." The court certainly appeared skeptical of the principal's testimony that four staff members were on the playground. Indeed, as we have mentioned, the court pointed out that it did not hear from any of the people the principal claims were on the playground and, if they were on the playground, that they were adequately supervising the children. In light of these facts, we understand the trial court's conclusion to be that, even if the facts were as favorable to the defendants as the defendants allege, the court's conclusion, based on all of the evidence, was that the supervision was still inadequate.

school playground is not within the field of ordinary knowledge and experience of judges and jurors and, therefore, expert testimony was required. See *Osborn* v. *Waterbury*, 181 Conn. App. 239, 246, 185 A.3d 675 (2018); see also, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 375, 119 A.3d 462 (2015); *LePage* v. *Horne*, 262 Conn. 116, 125, 809 A.2d 505 (2002). The present case demonstrates that the question of what constitutes adequate supervision of children on a school playground is a complex one, not readily resolved by a fact finder without the assistance of expert testimony. Given the procedural and factual background of the present case, I would conclude that the plaintiffs, Tatayana Osborn (child) and Tacarra Smith, were required to introduce expert testimony to establish the applicable standard of care. Therefore, I respectfully dissent.

The unfortunate incident that gave rise to this case has clearly impacted the life of a child. The child, at the time a fifth grade student at a Waterbury public elementary school, was attacked by her peers on the playground at recess, resulting in two lacerations on her face—one of which resulted in a permanent scar—and recurring headaches. Keeping children safe while they are at school is of the utmost importance to cities, boards of education, and schools, and the provision of adequate supervision serves the goals of engaging students and keeping playgrounds safe. Unfortunately, even with the most stringent supervision, fights, bullying, and accidents occur on playgrounds. See, e.g., *Despres* v. *Greenwich Boys & Girls Club Assn., Inc.*, Docket No. CV-97-0155783-S, 1999 WL 487565, *5 (Conn. Super. July 2, 1999) ("[e]ven assuming arguendo that there was one supervisor, supervising only one child, standing directly below her and warning her to use the monkey bars properly by not skipping any bars, it is still possible that the plaintiff could fall off and injure

her elbow"). Therefore, when an incident such as this occurs on a playground during recess, the question of adequate supervision turns on whether the school made reasonable efforts to prevent a risk of injury to children on the playground. See *Santopietro* v. *New Haven*, 239 Conn. 207, 228–30, 682 A.2d 106 (1996) (concluding that plaintiff failed to prove, by expert testimony, that softball umpires breached their duty of care to prevent unreasonable risk of injury to spectators).

In the present case, the principal of the elementary school at the time of the incident testified at trial that the defendant Waterbury Board of Education (board) had a supervision policy requiring a minimum of 1 supervisor for every 125 students on the playground.[1]

[1] The written policy, however, was not admitted into evidence, and the court made no finding in that regard. The following testimony was given by the principal at trial:

"[The Plaintiff's Counsel]: Okay. Now, as far as you're concerned, did you ever give your paraprofessionals and your staff any training having to do with harassment and bullying?

"[The Witness]: We've had a lot of different things regarding that.

"[The Plaintiff's Counsel]: Okay. And prior to [April], 2012, for that school year, what training did you give them?

"[The Witness]: We had had reviewed the definition of bullying, talked about, you know, being proactive, monitoring, you know, areas of the school, the—where those transition areas are, at recess, at lunch, all the down times, PE, different areas. We had a guidance counsel[or] who spoke with the classes as well, participated in our, you know, staff meetings if it occurred on days that they were in the building.

"[The Plaintiff's Counsel]: And part of that procedure was to have recess monitors out there, so to speak, is that correct, I believe on the recess grounds?

"[The Witness]: Well, they're required out there to begin with. It wasn't added because of—

"[The Plaintiff's Counsel]: And they're required why?

"[The Witness]: For safety and monitoring of all students.

"[The Plaintiff's Counsel]: Okay. And were you the one [who] made this requirement?

"[The Witness]: No, it was from the [board] and, you know, in the handbook for policies and procedures.

"[The Plaintiff's Counsel]: All right. And do you know how many people were required at the recess and who they would be?

"[The Witness]: By the [board], the policy was 1—1 staff to 125 students."

That testimony was the only evidence presented at trial regarding an appropriate supervisor to student ratio.[2] The trial court found, in its memorandum of decision, that "1 student intern and 3—or 4—staff members were not sufficient to exercise proper control over perhaps as many as 400 students."[3] As found by the trial court, there was a maximum of 400 students and a minimum of 4 supervisors on the playground at the time of the incident, resulting in a supervisor to student ratio of 1:100.[4] The trial court concluded that this ratio of supervisors to students was insufficient to satisfy the duty

[2] I agree with the majority that the record on appeal could be clearer as to whether the policy was in effect at the time of the incident. I disagree, however, with the majority's suggestion that there was not enough evidence in the record to allow the trial court, as fact finder, to draw the reasonable inference that the policy testified to by the principal was one that was in existence and applicable at the time of the incident.

[3] On appeal to this court, the parties do not dispute the trial court's findings and, therefore, I do not review the underlying factual basis of this finding. I offer, however, the following observations. The testimony at trial described varying numbers of children on the playground at the time of the incident. The paraprofessional who arrived first to the incident testified that there were no more than fifty students on the playground at the time the fight occurred. The principal testified that there were approximately 400 students *in the entire school* from kindergarten through fifth grade, and that those students ate lunch in 3 waves. The principal further testified that fourth and fifth grade students ate lunch together, there were 3 classes of each grade for a total of 6 classes, and there were about 25 students in each class, totaling 150 students in the lunch wave in question. When the students had finished eating lunch, they left the cafeteria and went to the playground for recess. There was no testimony that conflicted with these statements by the principal and, in fact, the plaintiffs' lawyer in his closing argument before the trial court conceded that there were probably between 90 and 150 students on the playground at the time of the incident. Despite this testimony, the trial court found that the entire school ate lunch and attended recess at the same time. In addition, "perhaps as many as 400 students" is an indeterminate number of students that encompasses everything from a handful of students to 400 students, for which 4 or 5 total supervisors may have been sufficient.

[4] If I consider the maximum number of students and the maximum number of supervisors on the playground at the time of the incident found by the trial court, then there was a supervisor to student ratio of 1:80.

of the defendants, the city of Waterbury and the board,[5] to make reasonable efforts to prevent a risk of injury to the children on the playground. The trial court's finding, that there was an inadequate number of supervisors on the playground at the time of the incident, was the *sole* basis for its conclusion that the defendants were liable for negligent supervision. By predicating its conclusion on a ratio that exceeded the only one testified to at trial—the board's policy of 1:125—the trial court not only held that supervision was inadequate under the circumstances of this case, but also implicitly concluded that the board's policy does not comply with the applicable standard of care. The issue presented in this appeal, therefore, is whether expert testimony was required to enable the trier of fact to determine that the defendants' supervision of the playground was negligent, notwithstanding the fact that the supervisor to student ratio complied with or exceeded the goals set forth in the board's policy.[6]

The trial court's determination of whether expert testimony was required to support the plaintiffs' claim of negligence against the defendants was a legal determination subject to plenary review. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 373. "[E]xpert testimony . . . serves to assist lay people, such as members of the jury and the presiding judge, to understand the applicable standard of care and to evaluate the defendant's actions in light of

[5] See footnote 1 of the majority opinion for other individuals named as defendants in the plaintiffs' complaint.

[6] Although rules and policies do not establish the standard of care, under these circumstances, an expert should have been required to testify as to the standard of care and whether the board's policy failed to meet that standard of care. See, e.g., *Van Steensburg* v. *Lawrence & Memorial Hospitals*, 194 Conn. 500, 506, 481 A.2d 750 (1984) ("[W]e point out that hospital rules, regulations and policies do not themselves establish the standard of care. . . . The failure to follow such rules and regulations is, however, evidence of negligence." [Citations omitted.]).

that standard. . . . Expert testimony is required when the question involved goes beyond the field of ordinary knowledge and experience of judges or jurors." (Citation omitted; internal quotation marks omitted.); *LePage* v. *Horne*, supra, 262 Conn. 125; see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 374; *Doe* v. *Yale University*, 252 Conn. 641, 686–87, 748 A.2d 834 (2000) ("[w]hether expert testimony was required to support the plaintiff's claim compels us to consider whether the determination of the standard of care requires knowledge that is beyond the experience of [the] fact finder" [internal quotation marks omitted]).

The question of whether expert testimony is required does not turn solely on whether the issue presented is one of ordinary or professional negligence. Expert testimony is most commonly associated with cases that are "akin to allegations of professional negligence or malpractice," such as legal malpractice or medical malpractice. *Santopietro* v. *New Haven*, supra, 239 Conn. 226; see, e.g., *Downs* v. *Trias*, 306 Conn. 81, 88 and n.5, 49 A.3d 180 (2012). Even in professional malpractice actions, however, expert testimony is not required "where there is present such an obvious and gross want of care and skill that the neglect is clear even to a layperson." (Internal quotation marks omitted.) *Davis* v. *Margolis*, 215 Conn. 408, 416 n.6, 576 A.2d 489 (1990). In many cases of ordinary negligence, the issues presented at trial may be matters of common knowledge with which the fact finder has familiarity and, therefore, no expert is needed to testify as to the standard of care and whether the defendant breached that duty. In other cases of ordinary negligence, however, issues related to the standard of care and whether that duty was breached are beyond the ken of the average fact finder and expert testimony is required. Therefore, "[t]he question of whether expert testimony is required is not resolved by characterizing the case as sounding in [pro-

fessional] malpractice or ordinary negligence, but rather by determining whether the issue, unaided by expert testimony, is within the realm of a jury's ordinary knowledge. Thus, professional negligence claims do not necessarily require expert testimony, and claims of ordinary negligence may require expert testimony. The appropriate question is whether the issue can be reliably decided by a jury without the assistance of expert testimony." *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 751, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

This court's reasoning and holding in *Santopietro* is directly applicable to the present case. See *Santopietro* v. *New Haven*, supra, 239 Conn. 226–27, 229–32. In *Santopietro*, a spectator at a softball game brought a negligence action against the umpires of the game to recover for injuries he suffered when he was struck by a bat thrown by a player. Id., 209. We noted that "[a]n umpire obtains, through formal training and experience, a familiarity with the rules of the sport, a technical expertise in their application, and an understanding of the likely consequences of officiating decisions. As a result, the umpire possesses knowledge of the standard of care to which an umpire reasonably may be held, and of what constitutes a violation of that standard, that is beyond the experience and ken of the ordinary fact finder." Id., 227. Furthermore, we held that the "fact finder's lack of experience [was] exacerbated by the highly discretionary nature of the umpire's task" to control the softball game so as to prevent an unreasonable risk of injury to spectators. Id. Thus, the fact finder must determine "not just whether in hindsight the umpire erred, but also whether the umpire's error constituted an abuse of his broad discretion." Id. Relying on these principles, we concluded that the fact finder's decision would require specialized knowledge. The breach of duty, therefore, was required to be proved,

in the absence of exceptional circumstances, by expert testimony. Id., 229.

In the present case, the question of whether 4 to 5 supervisors for up to as many as 400 students, as found by the trial court, was sufficient to satisfy the duty owed by the defendants is not within the realm of a fact finder's ordinary knowledge. Although many fact finders may be familiar with the supervision of children, and even the supervision of large numbers of children, that familiarity does not preclude the need for expert testimony when the fact finder would not be familiar with the procedures and considerations of education professionals when determining appropriate supervisor to student ratios. See *Franck* v. *Minisink Valley School District*, 136 App. Div. 2d 588, 588–89, 523 N.Y.S.2d 573 (1988) (when fifth grade student was kicked in head at recess by another student doing cartwheels, court held that, "[i]n applying the proper standard, familiarity of the jury with cartwheeling should not preclude expert testimony where the jury would not be familiar with accepted professional procedures for supervising cartwheeling"). The need for a board policy setting forth ratios supports the view that the appropriate supervision ratio for an elementary school playground based on the unique circumstances of that setting is not a simple issue with which every adult would be automatically familiar. Instead, expert guidance is necessary to establish the standard of care.

Similar to the umpires' control of a softball game to protect spectators from injury, schools and boards of education develop and apply policies related to the supervision of students at recess based on their formal training and experience, familiarity with applicable rules and statutes, and an understanding of the injuries that may result if they fail to implement sufficient policies. In addition, the decision of how many supervisors is required is complex and highly discretionary

in nature.[7] In arranging for appropriate supervision on playgrounds during recess, consideration should be given to the size and visibility of the playground area, the playground equipment, the age and disability status of the students, and a history of incidents, among other criteria. See generally Alliance of Schools for Cooperative Insurance Programs, Student Supervision Guidelines, p. 3, available at http://ascip.org/wp-content/uploads/2014/05/Student-Supervision-Guidelines.pdf (last visited November 22, 2019). There are no set standards available for appropriate ratios of supervisors to students, and each play area uniquely determines the amount of supervision needed. Id.

I acknowledge that there will be some exceptional circumstances in which expert testimony is not required. See *Santopietro* v. *New Haven*, supra, 239 Conn. 229; see also *David* v. *Margolis*, supra, 215 Conn. 416 n.6 (noting expert testimony is not required, even in professional negligence cases, "where there is present such an obvious and gross want of care and skill that the neglect is clear even to a layperson" [internal quotation marks omitted]). The present case, however, does not involve such circumstances. The present situation is not one in which the trial court found no supervisors present at recess or found that the supervisors present were engaged in a nonsupervisory activity and clearly not pay-

[7] Our legislature recognized the important role that supervision plays in the prevention of bullying and intervention strategies regarding bullying, and acknowledges that effective strategies may include "adequate adult supervision of outdoor areas, hallways, the lunchroom and other specific areas . . . ." General Statutes § 10-222g. The development of policies by schools and boards that provide for adequate supervision of students to prevent bullying or to promote general safety is a complicated process. In recognition of this complexity, the Department of Education has compiled various resources to provide guidance on the provision of safe playgrounds and made them available through the Connecticut government website. The website includes links to federal resources provided by the United States Departments of Education, Health and Human Services, and Justice as well as other organizations, such as the Peace Education Foundation and Peaceful Playgrounds, which can be consulted when developing individual plans and playgrounds. See Connecticut Department of Education, Bullying and Harassment, available at https://portal.ct.gov/SDE/School-Climate/Bullying-and-Harassment/Related-Resources (last visited November 22, 2019).

ing attention (e.g., on their cell phones), which would be an obvious want of care clear even to a layperson. Instead, the trial court's findings establish that there was a supervisor to student ratio of at least 1:100, and there were no additional findings that would suggest that exceptional circumstances demonstrated a gross want of care. Because the standard of care to which a board may reasonably be held in providing adequate supervision and what constitutes a violation of that standard are beyond the ken of the ordinary fact finder, and there are no extraordinary circumstances present that would demonstrate an obvious and gross want of care to the ordinary fact finder, I would hold that expert testimony was required in the present case.

While this court has not had previous occasion to apply the principles of *Santopietro* to the playground supervision context, our trial courts have done so and applied similar reasoning. See, e.g., *Miller* v. *Bridgeport*, Docket No. CV-14-6041193-S, 2017 WL 1333986 (Conn. Super. March 20, 2017), aff'd, 188 Conn. App. 901, 201 A.3d 1160 (2019); *Despres* v. *Greenwich Boys & Girls Club Assn., Inc.*, supra, 1999 WL 487565, *4–5. In *Despres*, a student attending an after-school program claimed that the Greenwich Boys and Girls Club Association, Inc., provided negligent supervision when the student was injured on the playground after falling from the monkey bars. *Despres* v. *Greenwich Boys & Girls Club Assn., Inc.*, supra, *1, 2. At the time, there was "no written policy for child supervision and no mandatory adult-child ratio," but "the informal policy of the facility was that one supervisor would be responsible for ten to fifteen children depending on the activity." Id., *2. The trial court found that, at the time of the incident, there were no more than fifteen children on the playground and one supervisor, which was in compliance with the unwritten policy. Id. The trial court also made explicit findings that the supervisor was "positioned in a place where she could see the entire playground area and per-

formed the 'seven second scan' which she learned from her experience as a lifeguard . . . and nothing unusual was happening that afternoon . . . ." Id., *4. In that case, the trial court relied on the reasoning of this court in *Santopietro*, which held that, " '[i]f the determination of the standard of care requires knowledge that is beyond the experience of an ordinary fact finder, expert testimony will be required.' " Id., *4 (quoting *Santopietro* v. *New Haven*, supra, 239 Conn. 226). The trial court in *Despres*, finding that a determination of the standard of care of the supervisors of an after-school program and whether that duty was breached was beyond the experience of an ordinary fact finder, concluded that expert testimony was required and that, "[w]ithout such expert testimony, there [was] no evidence that the defendant provided careless or negligent supervision of the plaintiff." *Despres* v. *Greenwich Boys & Girls Club Assn., Inc.*, supra, *5.

In *Miller*, a three year old child attended a program at Skane Center School run by the Bridgeport Board of Education. See *Miller* v. *Bridgeport*, supra, 2017 WL 1333986, *1. Each school day, three or four classes of students participated in recess at the same time and all of the teachers and paraprofessionals from each classroom would supervise the recess. Id., *2. The plaintiff was struck by a tricycle being ridden by another student at recess and suffered injuries; the plaintiff then brought a negligent supervision claim against the defendant Bridgeport Board of Education. Id. The trial court found that "[t]he evidence before the court fail[ed] to establish that the defendant was negligent as alleged. There was no evidence from any expert witnesses that the defendant's conduct with regard to the amount of supervision that they provided students during recess was inadequate or failed to meet appropriate educational standards for schools such as Skane." Id., *3. In concluding that the plaintiffs failed to prove that the defendant was negligent, the trial court specifically

found that "there was a lack of expert testimony with regard to the applicable standard of care and whether that duty was breached" as well as "an absence of evidence that the conduct of the defendant and any of its employees violated a school policy or directive . . . [and] [t]he plaintiff did not provide evidence of any rule, policy, or directive requiring the defendant to undertake any specific safety precautions in connection with the activities conducted during recess." Id.

Because, in the present case, the sole basis of the trial court's conclusion that the defendants' supervision of the children was negligent was the supervisor to student ratio, an expert witness should have been required and, without one, the plaintiffs failed to meet their evidentiary burden. I agree with the Appellate Court that "the plaintiffs failed to present expert testimony as to the standard of care related to the number of supervisors needed on an elementary school playground to ensure the safety of the students during recess" and that "[t]he plaintiffs also failed to present expert testimony that the number of staff on the playground supervising the children at the time [of the incident] constituted a breach of the standard of care." *Osborn* v. *Waterbury*, supra, 181 Conn. App. 247. Because these determinations are beyond the knowledge and experience of the ordinary fact finder, the Appellate Court correctly concluded that the trial court erred as a matter of law by not requiring expert testimony.[8]

For these reasons, I respectfully dissent.

[8] The second certified issue was: "Did the plaintiffs receive adequate notice of the need for expert testimony to determine the scope of the duty of care such that a directed judgment was appropriate in this case?" *Osborn* v. *Waterbury*, 329 Conn. 901, 184 A.3d 1214 (2018). It is unclear precisely what the plaintiffs are arguing. The plaintiffs appear to suggest that the defendants' claim in their closing argument before the trial court, that the plaintiffs improperly failed to meet their evidentiary burden in the absence of expert testimony, suggested that the plaintiffs' claim sounded in professional negligence and not ordinary negligence. The plaintiffs then claim on appeal to this court that the defendants were required to provide the plaintiffs with

notice that expert testimony was required. I find no merit in the plaintiffs' argument. The plaintiffs rest their argument on the premise that requiring an expert witness transforms the present case from one of ordinary negligence to one of professional malpractice, thereby altering the standard of care. This proposition mischaracterizes the need for expert testimony in negligence claims. The use of an expert witness to support a claim of ordinary negligence case does not transform it into a claim of professional malpractice. As this court has made clear, "professional negligence claims do not necessarily require expert testimony, and claims of ordinary negligence may require expert testimony. The appropriate question is whether the issue can be reliably decided by a jury without the assistance of expert testimony." *Cammarota* v. *Guerrera*, supra, 148 Conn. App. 751. Therefore, even though the plaintiffs' claim sounded in ordinary negligence, an expert could have—and, in the present case, *should* have—been required. In addition, the burden is on the plaintiffs to present sufficient evidence at trial to support their claim of negligent supervision. There is no requirement that the defendants alert the plaintiffs or the court when that burden is not met in order to provide the plaintiffs an opportunity to present more evidence. The plaintiffs were on notice from the time they filed their original complaint that they were required to meet their evidentiary burden that the defendants were negligent in their supervision of students on the playground. Without expert testimony, they failed to do so. For these reasons, I would hold that the defendants were not required to provide notice to the plaintiffs that they failed to meet their evidentiary burden without expert testimony.

ORDERS

CONNECTICUT REPORTS

VOL. 333

STATE OF CONNECTICUT *v.* JAMAAL COLTHERST

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 738 (AC 40828), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court had followed the statutory requirements under General Statutes § 54-91g in resentencing the defendant to eighty years of incarceration?"

Michael W. Brown, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided November 19, 2019

STATE OF CONNECTICUT *v.* MICHAEL FOX

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 221 (AC 41009), is denied.

ROBINSON, C. J., did not participate in the consideration of or decision on this petition.

Megan L. Wade, assigned counsel, and *Emily Graner Sexton*, assigned counsel, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided November 19, 2019

RAFAEL FERNANDEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Rafael Fernandez' petition for certification to appeal from the Appellate Court, 193 Conn. App. 746 (AC 37692), is denied.

Dante R. Gallucci, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided November 19, 2019

SERGIO ECHEVERRIA *v.* COMMISSIONER OF CORRECTION

The petitioner Sergio Echeverria's petition for certification to appeal from the Appellate Court, 193 Conn. App. 1 (AC 40903), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Vishal K. Garg, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided November 19, 2019

ERIC STIGGLE *v.* COMMISSIONER OF CORRECTION

The petitioner Eric Stiggle's petition for certification to appeal from the Appellate Court, 193 Conn. App. 902 (AC 41336), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

Linda F. Currie-Zeffiro, assistant state's attorney, in opposition.

Decided November 19, 2019

MICHAEL LABARGE *v.* COMMISSIONER OF CORRECTION

The petitioner Michael LaBarge's petition for certification to appeal from the Appellate Court, 193 Conn. App. 904 (AC 41972), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided November 19, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 194

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MICHAEL T.*
(AC 41053)

DiPentima, C. J., and Devlin and Sullivan, Js.

Syllabus

Convicted, after a jury trial, of five counts of the crime of risk of injury to a child, two counts of the crime of unlawful restraint in the first degree, and of the crimes of assault in the first degree, criminal attempt to commit assault in the first degree, and assault in the second degree, the defendant appealed to this court. The defendant lived in an apartment with N, his girlfriend, and her five daughters, including the victims, J and D. The defendant, after an argument with N, began to yell at the victims for disobeying a rule about hanging out of their bedroom window. The defendant then grabbed J, lifted her off the ground and carried her to the stove in the kitchen, where he ignited the gas burner and placed J's right hand over the flame. The defendant dropped J, but he then picked up D and carried her to the stove, where he placed both of her hands on top of the flame for up to one minute. Subsequently, D received medical treatment at a hospital for her severe burns and underwent several surgical procedures, including the amputation of several fingertips. Forensic interviews of the victims were recorded and, in those recordings, the victims identified the defendant as the individual who had burned their hands on the open flame from the stove burner. Prior to trial, the defendant filed a motion in limine to preclude the state from entering video recordings of the forensic interviews into evidence, which the trial court denied on the first day of trial. At the close of the state's case, and again at the close of the defendant's case, the defendant moved for a judgment of acquittal with respect to two counts that charged him with risk of injury to a child, and the court denied those motions. Following the jury's verdicts, the defendant filed a motion for a new trial on the ground that the admission into evidence of the forensic interviews necessitated a new trial, which the court denied prior to sentencing. *Held*:

1. The defendant's unpreserved claim that the trial court abused its discretion by admitting the forensic interviews into evidence because they failed to satisfy the requirements of the medical diagnosis and treatment exception to the rule against hearsay, as established in *State* v. *Griswold* (160 Conn. App. 528), was not reviewable; the defendant's appellate argument differed from what was presented to the trial court, defense counsel

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

having claimed before the court that *Griswold*, a case where the defendant sexually abused the victims, was inapplicable to the present case and that the admission of a forensic interview pursuant to the medical treatment and diagnosis exception required evidence of a sexual assault.

2. The defendant could not prevail on his claim that the forensic interviews of the victims were not relevant: the relevancy argument raised by defense counsel to the trial court, which focused on the connection between forensic interviews, cases involving sexual assault and the constancy of accusation doctrine, contradicted existing precedent and was wholly without merit because the medical diagnosis and treatment exception to the rule against hearsay has no direct connection to the constancy of accusation doctrine and is not limited to sexual assault cases; moreover, the defendant's claim on appeal that the recordings of the forensic interviews failed to meet the standard of the applicable provision (§ 4-1) of the Connecticut Code of Evidence in that they did not tend to make the existence of any material fact more or less probable than it would be without such evidence, was unavailing, as, during the forensic interviews, the victims identified the defendant as the person who had burned their hands and discussed the extent of the injuries they suffered, which satisfied the low hurdle of relevance and had obvious value to the state's case.

3. The defendant's claim that the prejudicial impact of the forensic interviews of the victims outweighed their probative value and that those interviews were cumulative and, therefore, should not have been admitted into evidence, was not reviewable; the defendant failed to brief that claim adequately, as he addressed the claim in a single sentence and failed to cite any authority or to present any reasoning to support his claim regarding the prejudicial impact or cumulative nature of the forensic interviews.

4. The defendant could not prevail on his claim that the trial court improperly denied his motions for a judgment of acquittal with respect to two counts of risk of injury to a child, which was based on his claim that neither J nor D were placed at risk of injury to their physical or mental health because neither victim actually witnessed the burning of the other; it was undisputed that D was present in the apartment when the defendant burned J and that J was in the apartment when he burned D, the jury reasonably could have concluded, on the basis of N's testimony and the photographs admitted into evidence that depicted the layout of the apartment, that the defendant created a situation that was likely to result in injury to D's mental health as a result of her witnessing the burning of J, and although there was conflicting evidence as to whether J directly observed the burning of D, evidence is not insufficient because it is conflicting or inconsistent, as it is the jury's exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses, and the jury can decide what part of a witness' testimony to accept or reject.

5. The defendant could not prevail on his claim that the trial court made a constitutional and evidentiary error when it improperly precluded him from presenting evidence of third-party culpability by not allowing him to testify about N's prior statement to him that she had burned the victims, which was based on his claim that the court improperly determined that the statement against penal interest exception to the rule against hearsay did not apply to N's alleged admission to the defendant that she had burned the victims: the defendant had to establish the unavailability of N to use the statement against penal interest hearsay exception, and although the defendant claimed that N was unavailable because she was reluctant at trial to make a statement against her penal interest, there were pauses in her testimony, her version of the events was opposite to that of the defendant, her testimony would not be favorable to the defendant, and she had demonstrated a willingness to lie to protect herself, those contentions, unsupported by case law or other legal authority, failed to acknowledge that N testified during the defendant's criminal trial and were not encompassed within the five situations of unavailability previously set forth by our Supreme Court; accordingly, the trial court did not abuse its discretion in ruling that the statement against penal interest exception to the rule against hearsay did not apply, and, therefore, the defendant could not prevail on his evidentiary or constitutional claims.

Argued September 9—officially released December 3, 2019

Procedural History

Substitute information, in the first case, charging the defendant with three counts of the crime of risk of injury to a child, and with the crimes of assault in the first degree and unlawful restraint in the first degree, and substitute information, in the second case, charging the defendant with three counts of the crime of risk of injury to a child, and with the crimes of criminal attempt to commit assault in the first degree, assault in the second degree, and unlawful restraint in the first degree, brought to the Superior Court in the judicial district of New Haven, where the cases were consolidated and tried to the jury before *B. Fischer*, *J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; subsequently, the court denied the defendant's motions for a judgment of acquittal as to two counts of risk of injury to a child; verdicts of guilty of five counts of risk of injury to a child, two counts of

unlawful restraint in the first degree, and one count each of assault in the first degree, criminal attempt to commit assault in the first degree, and assault in the second degree; thereafter, the court denied the defendant's motion for a new trial, and rendered judgments in accordance with the verdicts, from which the defendant appealed to this court. *Affirmed.*

Judie Marshall, with whom, on the brief, was *Freesia Singngam*, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Maxine Wilensky*, senior assistant state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Michael T., appeals from the judgments of conviction,[1] rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (2), five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), two counts of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (2), and assault in the second degree in violation of General Statutes § 53a-60 (a) (2). On appeal, the defendant claims that the trial court (1) abused its discretion by admitting into evidence the forensic interviews of the two minor victims, (2) improperly denied his motions for a judgment of acquittal with respect to two counts of risk of injury to a child and (3) improperly precluded the defendant from presenting evidence of

[1] These convictions arose from charges set forth in two separate informations that had been consolidated and tried together.

third-party culpability. We disagree and, accordingly, affirm the judgments of conviction.

The jury reasonably could have found the following facts. In August, 2015, the defendant lived in a New Haven apartment with N, his girlfriend,[2] and her five daughters, including eight year old J and four year old D. J and D shared a bedroom with their sibling, S. In the early afternoon of August 16, 2015, the defendant, N and her five children, one of whom was the defendant's child, were in the apartment when a neighbor came to the door. N spoke to the neighbor and their conversation escalated into an argument over the actions of J, S and D. After this interaction with the neighbor, N went into the bedroom and observed J and D "hanging out of the window." Previously, the defendant had placed screws in the window frame to prevent the children from engaging in this behavior. Upon seeing J and D hanging out of the window, N "yelled" and then "spanked" them each one time with her hand. N then sent the two girls into the living room.

The defendant, after an argument with N, subsequently came out of his bedroom and ordered J, S and D to exit their room. After the three girls came out of their room, the defendant began to yell at them for disobeying the rule about hanging out of their window. He then grabbed J, lifted her off the ground and carried her to the stove in the kitchen. The defendant ignited the front gas burner and placed J's right hand over the flame. J, in pain and crying out, began to kick and, as a result, the defendant dropped her.

[2] In connection with the events of this case, N was arrested on August 28, 2015. On November 21, 2016, she pleaded guilty to five counts of risk of injury to a child in violation of § 53-21 (a) (1). Her sentence, which had not been imposed at the time of the defendant's trial, was capped at twenty years incarceration, execution suspended after ten years, with the right to argue for a lesser sentence.

The defendant then picked up D and carried her to the stove, where he placed both of her hands "on top of the flame." D yelled and screamed as the defendant kept her hands in the fire for up to one minute. Afterward, the defendant, a former emergency medical technician, instructed N to submerge D's hands into the bathtub filled with warm water. He further instructed N to go to a nearby pharmacy for medical supplies to treat D's burns.

By the time N returned to the apartment from the pharmacy, D had white blisters on her hands, and the defendant indicated that she needed to go to the hospital due to third-degree burns. The defendant spoke to his mother to obtain transportation to the hospital. He then instructed N, J, S and D to falsely state that D's burns had resulted from an accident. The defendant, N and D went to the hospital, while the other girls stayed with the defendant's mother.

As a result of her burns, D screamed and cried during the car ride to the Saint Raphael Campus of the Yale New Haven Hospital. At this point, N observed that D's hands appeared white and "bubbly." Upon arriving at the emergency department, D received immediate treatment from the medical staff. Mark Shapiro, a physician and the head of the emergency department, observed pronounced burns on both sides of D's hands. Although D's left hand sustained greater damage, Shapiro determined that both hands exhibited second-degree and third-degree burns.[3] He also described the

[3] Shapiro described a first-degree burn as "something analogous to a sunburn. . . . It can be a thermal burn, it can be from chemicals. It's a very superficial burn that only involves the outer layer of the skin called the epidermis . . . ." Shapiro further explained that "[a] second-degree burn is one that is deeper and goes into the dermis, which is the layer below the epidermis where there's nerves and fat and other structures. And that can be either partial or full thickness second-degree burns based on how deep it goes within that layer. . . . [A] third-degree burn basically is a full thickness burn, meaning that it goes through all the layers of the skin . . . ." In the emergency department, burn classification is determined by the appear-

charring under D's fingernails as indicative of a fourth-degree burn.[4] After evaluating D and prescribing pain medication, Shapiro arranged for her transfer to the burn treatment unit at Bridgeport Hospital.[5] D received medical treatment at Bridgeport Hospital for approximately six weeks, undergoing several surgical procedures, including the amputation of several fingertips.

In the early morning hours of August 17, 2015, Khristine Cuddy, a New Haven police detective, went to Bridgeport Hospital to investigate the circumstances of D's injuries. N provided Cuddy with consent to search the New Haven apartment. Cuddy proceeded to the apartment, arriving at approximately 7 a.m. After further investigation, Cuddy interviewed J. Cuddy observed a blistered burn on the bottom portion of J's right hand. Later that day, the Department of Children and Families invoked a ninety-six hour hold[6] on the five children and obtained an order of temporary custody on August 21, 2015.[7]

Monica Vidro, a licensed clinical social worker employed by the Yale Child Sexual Abuse Clinic, conducted forensic interviews of J and D on August 28, 2015, and October 13, 2015, respectively. In these

ance of the burned area, with "first [degree] being pink, second [degree] being blistered, [and] third [degree] being white."

[4] Specifically, Shapiro stated: "When you see black or brown or charring, that can indicate a deeper burn. Brown or black is when it gets through the skin and starts to get down into the muscle and the bone, but on a fingernail it just may be the nail itself is charred, but the thing is, usually black or brown is a sign of even—what we call a fourth-degree burn, which is when you get to the muscle and the bone." Richard Garvey, a surgeon at the Bridgeport Hospital, stated that the presence of this black material indicated a heat source of approximately 700 degrees Fahrenheit.

[5] Shapiro also testified that the defendant had told the nurses that D's injuries resulted from touching a hot stove. Shapiro stated that this statement was inconsistent with the burns on both sides of D's hands that he observed because a person generally does not touch something with the back of their hand, or with both hands.

[6] See General Statutes § 17a-101g (e) and (f).

[7] See General Statutes (Rev. to 2015) § 46b-129 (b).

recordings, J and D identified the defendant as the individual who had burned their hands on the open flame from the stove burner. Afterward, Vidro recommended that both children receive mental health treatment, which they did.

The state charged the defendant in two long form informations. The first information set forth the following alleged crimes with respect to J: criminal attempt to commit assault in the first degree in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (2); assault in the second degree in violation of § 53a-60 (a) (2); three counts of risk of injury to a child in violation of § 53-21 (a) (1) by placing J's hand over an open flame, failing to seek medical attention for J and causing J to witness the burning of D; and unlawful restraint in the first degree in violation of § 53a-95 (a). The second information set forth the following alleged crimes with respect to D: assault in the first degree in violation of § 53a-59 (a) (2); three counts of risk of injury to a child in violation of § 53-21 (a) (1) by placing D's hand over an open flame, denying D medical attention and causing D to witness the burning of J; and unlawful restraint in the first degree in violation of § 53a-95 (a).

At the conclusion of the trial, held in July, 2017, the jury found the defendant guilty on all counts, with the exception of the count charging risk of injury to a child by failing to seek medical attention for J. The court rendered judgments of conviction in accordance with the verdicts and imposed a total effective sentence of thirty-eight years of incarceration, execution suspended after twenty-eight years, and five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court abused its discretion by admitting into evidence the forensic interviews of the two minor victims. Specifically, he

argues that the forensic interviews of J and D (1) did not meet the requirements of the medical diagnosis and treatment exception to the rule against hearsay, (2) were irrelevant and (3) were more prejudicial than probative and were cumulative. The state counters that these arguments are unreviewable, meritless or harmless. We conclude that the defendant cannot prevail on this claim.[8]

The following additional facts and procedural history are necessary for our discussion. On June 16, 2017, the

[8] As a result of our conclusion that the defendant failed to demonstrate that the trial court abused its discretion in admitting the forensic interviews into evidence, we need not reach the issue of harm. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 231–32, 215 A.3d 116 (2019); see also *State* v. *Tarasiuk*, 192 Conn. App. 207, 218, A.3d (2019) (incumbent on defendant to show that nonconstitutional evidentiary error was harmful in order to obtain new trial).

Assuming, arguendo, that this court were to reach the issue of harm, we would conclude that the defendant had failed to meet his burden that an evidentiary error substantially affected the verdict. The defendant argued that the admission of the forensic interviews was harmful because the jury heard from J and D more than once, the forensic interviews occurred in a sympathetic setting and the prosecutor focused on these interviews in her closing argument. The state countered that the evidence against the defendant was overwhelming in that four witnesses identified the defendant as the person who burned J and D, and the medical testimony established that the burns were neither accidental nor self-inflicted. Additionally, the state presented consciousness of guilt evidence supporting its case against the defendant. Thus, if this court were to reach the issue of harm, we would

defendant filed a motion in limine to preclude the state from entering video recordings of the forensic interviews into evidence. In his motion, the defendant primarily argued that the recordings were irrelevant.[9] On July 6, 2017, the state filed a memorandum of law in support of admitting the recordings of the forensic interviews into evidence.[10] Five days later, the defendant filed a reply, iterating his claim of irrelevance.[11]

On the first day of trial and outside of the presence of the jury, the court heard argument on the admissibility of the forensic interviews. The prosecutor emphasized that the interviews satisfied the requirements for the medical treatment exception to the rule against hearsay and, thus, were admissible into evidence. Defense counsel argued that forensic interviews

conclude that the defendant had failed to meet his burden that an evidentiary error substantially affected the verdict.

[9] Specifically, the defendant stated that "most cases involving a forensic interview involve an allegation of sex abuse . . . [and that] most sex abuse cases involve a delay in disclosing the actual abuse . . . ." The defendant further argued that the relevancy of forensic interviews usually is based on the constancy of accusation doctrine. We note that this doctrine "permits a person to whom a sexual assault victim has reported the alleged assault to testify regarding the fact and timing of the victim's complaint." *State* v. *Samuels*, 273 Conn. 541, 547, 871 A.2d 1005 (2005); see generally Conn. Code Evid. (2009) § 6-11 (c); *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996). More recently, our Supreme Court concluded that "the constancy of accusation doctrine should continue to be employed in Connecticut to counter implicit juror bias against victims, including children, who delay in reporting sexual abuse, but in a modified form intended to address the potential prejudice to defendants caused by the testimony of multiple constancy witnesses." *State* v. *Daniel W. E.*, 322 Conn. 593, 618, 142 A.3d 265 (2016).

[10] In its memorandum, the state, inter alia, acknowledged that the recordings contained the hearsay statements of J and D, but asserted that they were admissible under the medical treatment or tender years exceptions to the rule against hearsay.

[11] Specifically, the defendant contended that the constancy of accusation doctrine is limited to cases of sexual assault, that this was not a case of "incremental disclosure" by J and D and that the concept of incremental and delayed disclosure by abused children is "well-known." (Internal quotation marks omitted.)

were admissible only in cases involving a sexual assault. He further contended that "the reason [forensic interviews] usually are allowed in terms of relevance is because we have this theory of constancy, that a sex assault victim is going—is not going to—or normally is not going to say anything. That's usually the relevance." He also claimed that the present matter, involving physical abuse, was distinguishable from *State* v. *Griswold*, 160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015), a sexual assault case.[12] The prosecutor countered, inter alia, that the existence of sexual abuse is not a prerequisite for the admissibility of a forensic interview.

The court issued a preliminary ruling that, subject to an offer of proof, the forensic interviews of J and D would be admitted into evidence pursuant to the medical treatment hearsay exception and the reasoning set forth in *State* v. *Griswold*, supra, 160 Conn. App. 528. After both J and D had testified, the state called Vidro as a witness outside the presence of the jury. Vidro described her educational background, her employment with the Yale Child Sexual Abuse Clinic and the purpose of and the manner in which a forensic interview is conducted.[13] Vidro emphasized that the particular

[12] Specifically, defense counsel stated: "If you look at *Griswold*, that obviously involved a sex assault case. Although it doesn't talk about the underlying reasons for why it was relevant in the first place, I think it's presupposed that those forensic interviews were relevant because we had a constancy issue because most people, according to our law, most people don't think that sex assault victims are going to—or they think that sex assault victims, if they were raped, would tell immediately. That's the purpose of allowing that interview in. I understand what *Griswold* says. I don't really have an answer, this, you know, this forensic interview was pretty much done exactly the way they said in *Griswold*. I don't have a problem with that. My point is, this is not *Griswold* because it's an assault, a physical assault. And there's no question as to when it took place and what the kids said. . . . And I still haven't heard what the state's relevance is relative to either [J's] or [D's] interviews. . . . This is an extremely big stretch of *Griswold*, and I think that's inappropriate."

[13] Our law recognizes that the statement sought to be admitted pursuant to this hearsay exception need not be made to a physician, so long as the

purpose of a forensic interview was to assess any needs regarding the child's safety, medical treatment and mental health treatment. Vidro conducted a forensic interview of J and D following a referral due to abuse concerns. Following the interviews, Vidro recommended that both children continue receiving mental health treatment at the trauma clinic of the Yale Childhood Violent Trauma Center.

At the conclusion of the state's offer of proof, defense counsel again challenged the relevancy of the recordings of the forensic interviews of J and D. The court admitted the recordings into evidence, stating: "I'm going to stand by my preliminary ruling, and I do make the following findings regarding the medical treatment exception: that this court concludes that the statements are admissible because the purpose of the interviews, despite being primarily to establish or prove past events potentially relevant to later criminal prosecutions, [was] at least, in part, to determine whether the victims were in need of medical treatment. That would include physical and/or mental health. The statements were reasonably pertinent to obtain a medical diagnosis or treatment, and the interviewers—the interviewer occupied a position within the chain of medical care. Again, this court follows the reasoning of *State* v. *Griswold*, [supra, 160 Conn. App. 528]."

Vidro then testified before the jury. She stated her training, qualifications and general information regarding a forensic interview of a child.[14] She noted that

interviewer is acting within the chain of medical care. See *State* v. *Cruz*, 260 Conn. 1, 10, 792 A.2d 823 (2002); *State* v. *Eddie N. C.*, 178 Conn. App. 147, 171, 174 A.3d 803 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018); *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266, cert. denied, 291 Conn. 910, 969 A.2d 174 (2009).

[14] Specifically, Vidro defined a forensic interview as "a nonleading fact-finding interview of a child where there is a concern of abuse." She also stated that the purposes of such an interview are to assess whether the child is safe, requires medical care or requires mental health treatment. Vidro noted that the interview is recorded and that the child is made aware

the forensic interview with J occurred in August, 2015, following a referral due to suspected abuse. The prosecutor played a redacted recording of J's forensic interview for the members of the jury and provided a typed transcript. During the interview, Vidro informed J that her job was to speak with children to ensure their safety and health. Vidro also indicated that a pediatrician and other individuals were observing the interview from a nearby room. Following the interview, Vidro recommended that J engage in mental health treatment and have no contact with the defendant.

Vidro conducted the forensic interview of D in October, 2015,[15] as a result of suspected abuse. The prosecutor again provided a transcript to the jury and played a redacted recording. During the interview, Vidro informed D that her job was to make sure "kids are safe and healthy" and that her coworkers, such as physicians and nurses, would observe the conversation. Vidro subsequently recommended mental health treatment and that D have no contact with the defendant.

Following the jury's verdicts, the defendant filed a motion for a new trial pursuant to Practice Book § 42-53. He argued, inter alia, that the admission into evidence of the forensic interviews necessitated a new trial. The court denied the defendant's motion for a new trial prior to sentencing.

A

On appeal, the defendant claims that the court abused its discretion by admitting the forensic interviews into evidence. He first contends that the forensic interviews

that others will observe the interview. The purpose of the recording and the presence of observers, such as an employee of the Department of Children and Families or a member of a law enforcement agency, is to minimize the trauma of multiple interviews.

[15] Vidro explained that D's hospitalization caused the delay of her forensic interview.

failed to satisfy the requirements of the medical diagnosis and treatment exception to the rule against hearsay as established in *State* v. *Griswold*, supra, 160 Conn. App. 528, and *State* v. *Estrella J.C.*, 169 Conn. App. 56, 148 A.3d 594 (2016). The state counters that this appellate argument differs from what was presented to the trial court and, thus, is unpreserved and not reviewable. We agree with the state.

We begin with the applicable legal principles. "Our standard of review for evidentiary claims is well settled. To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 181, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019); see also *State* v. *Miguel C.*, 305 Conn. 562, 571–72, 46 A.3d 126 (2012).

Hearsay is an out-of-court statement offered for the truth of the matter asserted and generally is inadmissible. *State* v. *Burton*, 191 Conn. App. 808, 828, 216 A.3d 734, cert. denied, 333 Conn. 927, A.3d (2019); see also *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014); see generally Conn. Code Evid. § 8-1 and Conn. Code Evid. (2009) § 8-2. The rules of evidence, however, recognize that certain out-of-court statements warrant an exception to the general rule that hearsay constitutes inadmissible evidence. *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002). Section 8-3 (5) of the

Connecticut Code of Evidence provides that "[a] statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment" is not excluded by the hearsay rule, even though the declarant is available as a witness.

In *State* v. *Griswold*, supra, 160 Conn. App. 528, this court set forth the relevant legal principles regarding the medical diagnosis and treatment exception to the hearsay rule. "Out-of-court statements made by a patient to a [medical provider] may be admitted into evidence if the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving these ends. . . . The rationale for excluding from the hearsay rule statements made in furtherance of obtaining treatment is that we presume that such statements are inherently reliable because the patient has an incentive to tell the truth in order to obtain a proper medical diagnosis and treatment. . . . The term medical encompasses psychological as well as somatic illnesses and conditions. . . . Statements made by a sexual assault complainant to a social worker may fall within the exception if the social worker is found to have been acting within the chain of medical care. . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially." (Citations omitted; internal quotation marks omitted.) Id., 555–56; see also *State* v. *Abraham*, 181 Conn. App. 703, 711, 187 A.3d 445, cert. denied, 329 Conn. 908, 186 A.3d 12 (2018); see generally E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.17.2, pp. 566–67.

Before the trial court, defense counsel argued that the admission of a forensic interview pursuant to the medical treatment and diagnosis exception required evidence of a sexual assault. Defense counsel concluded by noting that because the present case involved physical abuse, *Griswold*, a case where the defendant sexually abused the victims, was inapposite.

On appeal, however, the defendant altered his argument regarding the admission of the forensic interviews. Rather than arguing that *Griswold* was inapplicable to the present case, the defendant contended in his appellate brief that the state had failed to establish the necessary elements for application of the medical diagnosis and treatment hearsay exception, as set forth in *Griswold*. Our law does not permit such a tactic. "It is . . . well established that [a]ppellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by . . . trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Rogers*, 183 Conn. App. 669, 680, 193 A.3d 612 (2018); see also *State* v. *Bennett*, 324 Conn. 744, 761, 155 A.3d 188 (2017). Accordingly, we decline to review the defendant's argument, raised for the first time on appeal, that the state failed to establish that the forensic interviews in this case should have been admitted into evidence pursuant to *Griswold*.[16]

[16] After the verdict, the defendant filed a motion for a new trial pursuant to Practice Book § 42-53. He argued, inter alia, that the forensic interviews "did not fall under the medical diagnosis exception to the general prohibition against hearsay." An evidentiary argument raised for the first time in a postverdict motion for a new trial is not preserved for appellate review. See *State* v. *Daniel W.*, 180 Conn. App. 76, 96 n.7, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018); see also *State* v. *Messam*, 108 Conn. App. 744, 760, 949 A.2d 1246 (2008) (problems inherent in allowing counsel to wait until after adverse verdict to raise objections to evidence are too obvious to warrant discussion).

B

The defendant next argues that the forensic interviews of J and D were not relevant. Initially, he notes that the court did not rule on the relevancy objection made in his motion in limine and at the proceedings on July 19 and 24, 2017. The defendant also asserts, in a general manner, that the recordings of the forensic interviews failed to satisfy § 4-1 of the Connecticut Code of Evidence. The state counters that recordings of the interviews tended to make more probable the facts that the crimes had occurred and had been committed by the defendant. We conclude that the defendant's relevancy arguments are without merit.

As an initial matter, we set forth the applicable legal principles. "Section 4-1 of the Connecticut Code of Evidence provides: Relevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. As it is used in [the Connecticut Code of Evidence], relevance encompasses two distinct concepts, namely, probative value and materiality. . . . Conceptually, relevance addresses whether the evidence makes the existence of a fact material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . In contrast, materiality turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. . . . If evidence is relevant and material, then it may be admissible. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable

presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624, 635–36, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017); see also *State* v. *Pena*, 301 Conn. 669, 674, 22 A.3d 611 (2011).

The relevancy argument raised by defense counsel to the trial court focused on the connection between forensic interviews, cases involving sexual assault and the constancy of accusation doctrine. Specifically, defense counsel stated: "The point being that in my opinion, and I think the cases are pretty clear, the reason we do the forensic interviews and the reason they're usually allowed in terms of relevance is because we have this theory of constancy, that a sex assault victim is going—is not going to—or normally is not going to say anything. That's usually the relevance. And so what the state usually does is they put in the forensic interview to show that they are consistent with what they testified to or what has been said in—in the case. That's why it's relevant. In this case that didn't happen. . . . So, there's no constancy issue in this case. So, really there's no reason to need to put in the forensic interview in the first place. . . . There's no constancy issue, so there's no relevance."

In its preliminary ruling on the admissibility of the forensic interviews, the court implicitly rejected the defendant's relevancy argument premised on the constancy of accusation doctrine. After restating § 8-3 (5) of the Connecticut Code of Evidence, the court referred to *State* v. *Griswold*, supra, 160 Conn. App. 528. In that case, we specifically stated that the rationale for the medical diagnosis and treatment hearsay exception is that "statements made in furtherance of obtaining treatment [are presumed to be] inherently reliable because the patient has an incentive to tell the truth in order

to obtain a proper medical diagnosis and treatment." (Internal quotation marks omitted.) Id., 555; see also *State* v. *Cruz*, supra, 260 Conn. 7–8; *State* v. *Miller*, 121 Conn. App. 775, 780, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). To the extent that the defendant has reasserted this specific relevancy argument in this appeal, we conclude that it contradicts existing precedent and is wholly without merit. The medical diagnosis and treatment hearsay exception has no direct connection to the constancy of accusation doctrine and is not limited to sexual assault cases.

The defendant also argues that the recordings of the forensic interviews failed to meet the standard of § 4-1 of the Connecticut Code of Evidence, in that they did not tend to make the existence of any material fact more or less probable than it would be without such evidence. We do not agree. In the forensic interviews, J and D identified the defendant as the person who had burned their hands and discussed the extent of the injuries they suffered. Mindful that our jurisprudence has recognized the "low hurdle of relevance"; see *State* v. *Nowacki*, 155 Conn. App. 758, 773, 111 A.3d 911 (2015); and the obvious value of this evidence to the state's case, we conclude that this argument fails.

C

The defendant next argues that the prejudicial impact of the forensic interviews of J and D outweighed their probative value. He also contends that these interviews were cumulative and, therefore, should not have been admitted into evidence. The state counters that these arguments are unreviewable due to an inadequate brief. We agree with the state.

The defendant's appellate brief contains the following single sentence addressing these arguments. "Even if the trial court believed the forensic interviews were relevant, they should have been excluded pursuant to

. . . § 4-3 [of the Connecticut Code of Evidence] because [their] probative value was outweighed by the danger of unfair prejudice, and the evidence was cumulative." The defendant failed to cite any authority or to present any reasoning to support his arguments regarding the prejudicial impact or cumulative nature of the forensic interviews.

"We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018). "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *State* v. *Claudio C.*, 125 Conn. App. 588, 600, 11 A.3d 1086 (2010), cert. denied, 300 Conn. 910, 12 A.3d 1005 (2011). Accordingly, we decline to review these unsubstantiated arguments regarding the prejudicial impact and cumulative nature of the recordings of the two forensic interviews. We also conclude, therefore, that the defendant's claim that the court improperly admitted into evidence the forensic interviews of J and D must fail.

II

The defendant next claims that the court improperly denied his motions for a judgment of acquittal with respect to two counts of risk of injury to a child. Specifically, he argues that the state failed to produce evidence that J witnessed the burning of D, and that D witnessed the burning of J. He contends that neither J nor D were placed at risk of injury to their physical or mental health

because neither victim actually witnessed the burning of the other. We disagree.

The following additional facts are necessary for the resolution of this claim. In count four of the first information, the state charged the defendant with violating § 53-21 (a) (1) by causing or permitting D to be placed in a situation that her life or limb was endangered, or her health was likely to be injured, by allowing her to witness the burning of J. In count five of the second information, the state alleged the same violation of § 53-21 (a) (1) with respect to J as a result of her witnessing the burning of D. The defendant moved for a judgment of acquittal with respect to these two counts at the close of the state's case[17] and his case.[18] In both instances, the court denied the defendant's motions.

On appeal, the defendant argues that the state failed to produce evidence that each girl directly observed the burning of the other, and therefore the defendant's conduct fell outside the ambit of § 53-21 (a) (1).[19] We are not persuaded.

[17] At the close of the state's case, defense counsel argued: "These are the counts where, essentially, [the defendant] is alleged to have forced one of the kids to watch the burning of both kids, and there's two counts because there's two injuries or two victims. My recollection is that there's no evidence of that. He didn't deliberately do that. In fact, I think the testimony for [J] is that she was in the bedroom, at least during the part of it when it happened, and she certainly wasn't—he was deliberately forcing her to watch. But I think that that's—that covers both counts . . . ."

[18] Specifically, defense counsel stated: "I would just say just for the record I'm going to—we move for motion for judgment of acquittal based on the prior arguments I made."

[19] At trial, the defendant challenged the absence of the general intent element with respect to § 53-21 (a) (1); see, e.g., *State* v. *Euclides L.*, 189 Conn. App. 151, 161–62, 207 A.3d 93 (2019); while on appeal, he focuses his sufficiency claim on whether each child was present when the other was burned. To the extent that his appellate argument is unpreserved, it is nevertheless reviewable by this court. See *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); *State* v. *Griffin*, 184 Conn. App. 595, 613, 195 A.3d 723, cert. denied, 330 Conn. 941, 195 A.3d 692 (2018), and cert. denied, 330 Conn. 941, 195 A.3d 693 (2018).

We begin our analysis by setting forth the relevant legal principles germane to this claim. "A defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . The standard of review [that] we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . Simply stated, [o]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Berrios*, 187 Conn. App. 661, 671–72, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019); see also *State* v. *Harper*, 184 Conn. App. 24, 30, 194 A.3d 846, cert. denied, 330 Conn. 936, 195 A.3d 386 (2018).

Next, we turn to the relevant statutory language. Section 53-21 (a) provides in relevant part: "Any person

who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a class C felony . . . .'' In construing this statute, our Supreme Court has long recognized that ''subdivision (1) of § 53-21 [(a)] prohibits two different types of behavior: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the [child's] moral or physical welfare . . . and (2) acts directly perpetrated on the person of the [child] and injurious to his [or her] moral or physical well-being. . . . Thus, the first part of § 53-21 [(a) (1)] prohibits the creation of situations detrimental to a child's welfare, while the second part proscribes injurious acts directly perpetrated on the child.'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *James E.*, 327 Conn. 212, 219, 173 A.3d 380 (2017); see also *State* v. *Padua*, 273 Conn. 138, 147–48, 869 A.2d 192 (2005). This statute criminalizes the creation of a situation likely to result in injury to the mental health of a child. See *State* v. *Scruggs*, 279 Conn. 698, 713–14, 905 A.2d 24 (2006); *State* v. *Aziegbemi*, 111 Conn. App. 259, 265–66, 959 A.2d 1, cert. denied, 290 Conn. 901, 962 A.2d 128 (2008). Finally, ''[w]e are mindful that § 53-21 (a) (1) is broadly drafted and was intended to apply to any conduct, illegal or not, that foreseeably could result in injury to the health of a child.'' *State* v. *Scruggs*, supra, 724–25.

Applying these principles to the facts of the present case, we conclude that the defendant's claim of evidentiary insufficiency must fail. It is undisputed that D was present in the apartment when the defendant burned J and that J was in the apartment when he burned D. N stated that she was cleaning the kitchen when the

defendant called J, S and D out of their room. The defendant, after screaming at the girls, picked up J, carried her to the stove, ignited the flame and burned her. On the basis of this testimony, and the photographs admitted into evidence that depicted the layout of the apartment, the jury reasonably could have concluded that the defendant created a situation that was likely to result in injury to D's mental health as a result of her witnessing the burning of J.

With respect to J, there was conflicting evidence as to whether she directly observed the burning of D. In her forensic interview, J stated that she and N attempted to stop the defendant when he was holding D's hands over the flame. D also indicated during her forensic interview that J saw the defendant burn D's hands. J testified at trial, however, that after the defendant had burned her hands, she went to her bedroom. She heard D cry out as she was getting burned. J saw D after the burning, when D placed her hands in the bathtub filled with water. D testified at trial that J was in her bedroom when the defendant burned her. We are mindful that "[e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Young*, 174 Conn. App. 760, 766, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017). Accordingly, we conclude that the defendant's claims of evidentiary insufficiency are without merit.

III

Finally, the defendant claims that the court improperly precluded him from presenting evidence of third-party culpability. The defendant contends that this preclusion resulted in constitutional and evidentiary error.

Specifically, he argues that the court should have permitted him to testify about N's prior statement to him that she had burned J and D. We disagree.

The following additional facts are relevant to this claim. On direct examination, N testified that the defendant had physically assaulted her and burned J and D. She also admitted to lying to Detective Cuddy about the burnings, both at the hospital and a few days later. The police arrested N on August 28, 2015, and interviewed her again. During this interview, N inquired to the police detective: "Why can't you just say it was me and call it a day?" N later testified that she made this untruthful remark from a desire to conclude the investigation. N also iterated that she did not burn the victims but that it was the defendant who had done so.

The defendant testified at his trial and stated on direct examination that N had made an "admission" to him. The prosecutor objected on the basis of hearsay, which the court sustained. On redirect examination, defense counsel asked if the defendant ever had told the police that N confessed to him. The prosecutor raised an objection, which the court sustained. At this point, the court excused the jury, and the prosecutor indicated that the objection was based on hearsay. Defense counsel responded that N's admission constituted a statement against a penal interest and had not been offered for the truth of the matter asserted. The court disagreed and again sustained the prosecutor's objection.

The court permitted defense counsel to make an offer of proof. The defendant testified that N had confessed to burning the victims and that the defendant had informed the police of this confession. The jury returned, and the court stated it had sustained the prosecutor's objection. In his motion for a new trial, dated August 3, 2017, the defendant reasserted this claim, arguing that the evidence was not hearsay because (1)

it was not offered for the truth of the matter asserted or (2) it constituted a statement against civil or penal interests.

On appeal the defendant claims, for the first time, that the court's ruling violated his sixth amendment right to present a defense.[20] He also claims that the court improperly determined that the statement against penal interest exception to the hearsay rule did not apply to N's admission to the defendant that she had burned the victims. We conclude that the court did not abuse its discretion in ruling that this hearsay exception did not apply, and therefore the defendant cannot prevail on either his evidentiary or constitutional claims.

First, we set forth the applicable legal principles and our standard of review. "When a trial court improperly excludes evidence in a criminal matter, the defendant's constitutional rights may be implicated. It is fundamental that the defendant's [right] . . . to present a defense [is] guaranteed by the sixth amendment to the United States constitution. . . . In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . .

"Nevertheless, [i]t is well established that a trial court has broad discretion in ruling on evidentiary matters . . . . Accordingly, the trial court's ruling is entitled to every reasonable presumption in its favor . . . and we will disturb the ruling only if the defendant can demonstrate a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Watson*, 192 Conn. App. 353, 375–76, A.3d (2019); see also *State* v. *Durdek*, 184 Conn. App. 492, 499 n.5, 195 A.3d 388

[20] The defendant requests review of this 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).

(defendant is bound by rules of evidence in presenting defense, and if proffered evidence constitutes inadmissible hearsay, defendant's constitutional right to present defense is not violated by its exclusion), cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018); *State* v. *Ramos*, 182 Conn. App. 604, 614, 190 A.3d 892 (sixth amendment rights, although substantial, do not suspend rules of evidence), cert. denied, 330 Conn. 917, 193 A.3d 1213 (2018).

Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (4) . . . A trustworthy statement against penal interest that, 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. In determining the trustworthiness of a statement against penal interest, the court shall consider (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. . . ." See also *State* v. *Bryan*, 193 Conn. App. 285, 299, A.3d (2019); *State* v. *Azevedo*, 178 Conn. App. 671, 685–86, 176 A.3d 1196 (2017), cert. denied, 328 Conn. 908, 178 A.3d 390 (2018); E. Prescott, supra, § 8.34.2, pp. 631–32.

To use the statement against penal interest exception to the rule against hearsay, "the proponent of the evidence must demonstrate that the declarant is unavailable. See *State* v. *Schiappa*, 248 Conn. 132, 141, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999)." *State* v. *Rodriguez*, 146 Conn. App. 99, 109, 75 A.3d 798, cert. denied, 310 Conn. 948, 80 A.3d 906 (2013). Thus, in the present case, the defen-

dant had to establish the unavailability of N to use the statement against penal interest hearsay exception. See *State* v. *Bryant*, 202 Conn. 676, 694, 523 A.2d 451 (1987).

Our Supreme Court has employed the definitions of "unavailability" from rule 804 (a) of the Federal Rules of Evidence with respect to this hearsay exception. *State* v. *Lopez*, 239 Conn. 56, 74–75, 681 A.2d 950 (1996); see also *State* v. *Wright*, 107 Conn. App. 85, 89–90, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008). "Rule 804 (a) lists five situations in which the declarant witness may be considered unavailable: (1) the court has determined that the witness has a testimonial privilege; (2) the witness persists in refusing to testify despite a court order to do so; (3) the witness has a lack of memory; (4) the witness is unable to be present or testify because of death or existing physical or mental illness or infirmity; and (5) the witness is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . [or testimony] by process or other reasonable means." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980).

The defendant argues that N "was unavailable, pursuant to the rules of evidence and, therefore, her statement should have come in as a statement against penal interest." Specifically, he noted that N was "reluctant" at trial to make a statement against her penal interest, there were "pauses" in her testimony, her version of the events was "opposite" to that of the defendant, her testimony would not be "favorable" to the defendant and she had demonstrated a willingness to lie to protect herself. These contentions, unsupported by case law or other legal authority, fail to acknowledge that N *testified* during the defendant's criminal trial and are not encompassed within the five situations of unavailability set forth by our Supreme Court. As a result of

the defendant's inability to meet the threshold requirement of N's unavailability, the statement against penal interest hearsay exception cannot provide a path to admit this testimony into evidence. Further, as a result of the court's proper evidentiary ruling, the defendant's constitutional claim must fail.

The judgments are affirmed.

In this opinion the other judges concurred.

ERIC STEVENS *v.* EDWARD KHALILY ET AL.
(AC 41801)

DiPentima, C. J., and Alvord and Flynn, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, intentional infliction of emotional distress from the defendants E and T, who filed a motion to dismiss for lack of personal jurisdiction due to improper service of process as a result of the plaintiff's failure to serve them at their last known addresses, and neither of whom was a resident of this state. The trial court granted the motion to dismiss and rendered judgment in part thereon, concluding that where, as here, there was a challenge to personal jurisdiction of nonresident individuals, it was the plaintiff's burden to produce evidence adequate to establish such jurisdiction, and that the plaintiff had failed to use diligent and persistent efforts to properly serve E and T at their last known addresses. On the plaintiff's appeal to this court, *held* that the trial court properly granted the motion to dismiss filed by E and T: because there was a dispute as to the location of the last known addresses of E and T, once their affidavits raised a factual question challenging the court's jurisdiction for insufficient service of process, the burden shifted to the plaintiff to prove the court's jurisdiction over the nonresident defendants, the plaintiff did not cite to any counter authority to disclaim his burden to prove jurisdiction, nor did he provide evidence of his diligent and persistent efforts to locate the last known addresses of E and T within a reasonable time of his attempt to serve process on them, as mere notice of the action is not sufficient to confer personal jurisdiction over a party who has not been properly served, and the plaintiff failed to account for his efforts to remain current on the whereabouts of E and T before attempting service of process to commence this action; accordingly, because the plaintiff failed to sustain his burden that he properly served E and T at their respective last known addresses and that he made a

reasonably diligent search to find out their last known addresses, within a reasonable time, before attempting service of process, the court lacked personal jurisdiction over E and T.

Argued September 24—officially released December 3, 2019

Procedural History

Action to recover damages for, inter alia, intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, granted the motion to dismiss for lack of personal jurisdiction filed by the named defendant et al. and rendered judgment in part thereon, from which the plaintiff appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (plaintiff).

Sarah F. D'Addabbo, with whom was *Matthew G. Conway*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Eric Stevens, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants Tiffany Khalily and Edward Khalily,[1] which was based on lack of personal jurisdiction due to improper service of process in that the plaintiff did not serve the defendants at their last known addresses. Specifically, the plaintiff argues that the trial court improperly relied on "conclusory and self-serving affidavits of the defendants which were insufficient to rebut the presumption of proper service." We disagree and affirm the judgment of the trial court.

For the first time on appeal, the plaintiff claims that in assessing his due diligence in determining the defendants' last known addresses: (1) the court should have conducted an evidentiary hearing, despite the court's

[1] Although there were other defendants named at trial, only Tiffany Khalily and Edward Khalily filed the motion to dismiss. We, therefore, refer to them as the defendants in this opinion.

finding that he had never requested one; (2) the court should have considered that the plaintiff is a victim of a crime; and (3) the defendants have "fled to parts unknown." The plaintiff did not raise these issues before the trial court and we, therefore, decline to review them for the first time on appeal. See *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006).

The following facts are relevant to this appeal. The plaintiff commenced this matter on October 10, 2017. On December 20, 2017, the defendants filed a motion to dismiss the complaint for lack of personal jurisdiction due to insufficient service of process. Neither defendant in this case is a resident of Connecticut. The court granted the defendants' motion to dismiss, concluding that when there is a challenge to the personal jurisdiction of nonresident individuals, " 'it [is] the plaintiff's burden to produce evidence adequate to establish such jurisdiction,' " citing *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 515–16, 923 A.2d 638 (2007). The court held that the plaintiff had failed to meet the statutory requirements of using " 'diligent and persistent efforts' "; *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 533, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014); to properly serve the defendants at their last known addresses. See General Statutes § 52-59b (c). This appeal followed.

The plaintiff claims that the trial court improperly granted the defendants' motion to dismiss for lack of personal jurisdiction based solely on the affidavits of the defendants, asserting that the affidavits were insufficient to rebut the presumption of proper service. The defendants counter that the court properly found from the affidavits that the plaintiff failed to follow the requirements of § 52-59b.

We first set forth the appropriate standard of review. "The standard of review for a court's decision on a

motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 516.

Although it is generally a defendant's burden to disprove personal jurisdiction, our Supreme Court has explained that this burden can shift in two ways. Id., 515. In particular, the court noted: "When a motion to dismiss for lack of personal jurisdiction raises a factual question which is not determinable from the face of the record, the burden of proof is on the plaintiff to present evidence which will establish jurisdiction. . . . If the defendant challenging the court's personal jurisdiction is a . . . nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction." (Citation omitted; internal quotation marks omitted.) Id.

At issue in this appeal is the requirement, pursuant to Connecticut's long arm statute, § 52-59b,[2] that the

[2] General Statutes § 52-59b (a) provides in relevant part that "a court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent: (1) [t]ransacts any business within the state; (2) commits a tortious act within the state. . .; (3) commits a tortious act outside the state causing injury to person or property within the state. . . .; (4) owns, uses or possesses any real property situated within the state; or (5) uses a computer, as defined in subdivision (1) of subsection (a) of section 53-451, or a computer network, as defined in subdivision (3) of subsection (a) of said section, located within the state."

Subsection (c) of § 52-59b explains the proper service of process on nonresident individuals, providing, in relevant part: "Any nonresident individual . . . as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual . . . may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual . . . . The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant

plaintiff serve the nonresident defendants at their "last-known address[es]." General Statutes § 52-59b (c). With respect to this requirement, our Supreme Court has stated that "last-known address does not mean the last address known to the plaintiff but does mean the last address of the defendant so far as it is known, that is, by those who under the ordinary circumstances of life would know it. Unless the defendant has departed for parts unknown, it means his actual address; if he has disappeared it means his last address so far as it is reasonably possible to ascertain it. This address the plaintiff must learn at his peril and only if the copy is mailed to it is there a compliance with the statute. . . . Interpreted in the sense which the legislature intended, our statute, if complied with, will certainly bring about a reasonable probability of actual notice of the pendency of the action to the defendant." (Internal quotation marks omitted.) *Cadlerock Joint Venture II, L.P.* v. *Milazzo*, 287 Conn. 379, 393, 949 A.2d 450 (2008).

This court has noted that "[a] plaintiff must use diligent and persistent efforts . . . to determine the actual address of the defendant and unless a defendant has departed for parts unknown, the plaintiff must learn the defendant's actual address at his peril." (Citation omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, supra, 149 Conn. App. 533.

In support of his motion to dismiss the defendant Edward Khalily swore in his affidavit that he had left New York in 2014 and changed his address from that

at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon of the service upon the Secretary of the State. The officer serving such process upon the Secretary of the State shall leave with the Secretary of the State, at the time of service, a fee of twenty-five dollars, which fee shall be taxed in favor of the plaintiff in the plaintiff's costs if the plaintiff prevails in any such action. The Secretary of the State shall keep a record of each such process and the day and hour of service."

state, and that he was not registered to vote in that state or licensed to drive in New York.

In support of her motion to dismiss, the defendant Tiffany Khalily swore in her affidavit that she moved from 4 Portico Court, New York, New York, in November, 2016, and has lived at her present address since January, 2017, where she received forwarded mail.

As previously noted, it is generally the defendant's burden to disprove jurisdiction. However, our Supreme Court held in *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 53–54, 459 A.2d 503 (1983), that "[t]he general rule putting the burden of proof on the defendant as to jurisdictional issues raised is based on the presumption of the truth of the matters stated in the officer's return. When jurisdiction is based on personal or abode service, the matters stated in the return, if true, confer jurisdiction. . . . There should be no presumption of the truth of the plaintiff's allegation of the additional facts necessary to confer jurisdiction. . . . Placing the burden on the plaintiff to prove contested factual issues pertaining to jurisdiction is in accord with rulings in other states which have addressed the same question." (Citation omitted; internal quotation marks omitted.) In the present case, because there is a dispute as to the location of the defendants' last known addresses, once the defendants' affidavits raised a factual question challenging the court's jurisdiction for insufficient service of process, the burden shifted to the plaintiff to prove the court's jurisdiction. Furthermore, because the defendants are nonresident individuals and they challenge personal jurisdiction, the burden lies with the plaintiff to prove the court's jurisdiction. See *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 515. In his counter affidavit the plaintiff swore, inter alia, that he had relied on information from "common people [the parties] know," including Jessie Popowich, to help him locate where his daughter was residing. Popowich

told him in October, 2016, that his daughter resided with the defendant Tiffany Khalily at 4 Portico Court, Great Neck, New York. Furthermore, he has had no contact with the defendant Edward Khalily since 2012, but was told in the fall of that year that he resided at 845 United Nations Plaza, Unit 77C, New York, New York. The plaintiff does not cite to any counter authority to disclaim his burden to prove jurisdiction nor does he provide evidence of his "diligent and persistent efforts" to locate the defendants' last known addresses within a reasonable time of his attempt to serve process on the defendants. He simply asserts that because the defendants received actual notice of the summons and complaint, he has met the requirements of § 52-59b. However, this court held in *Matthews* v. *SBA, Inc.*, supra, 149 Conn. App. 539, that a defendant's "[m]ere notice of an action is not sufficient to confer personal jurisdiction" over a party who has not been properly served. (Internal quotation marks omitted.)

In its memorandum of decision, the trial court stated that "[r]egardless of [the] steps that the plaintiff took to find the defendants' addresses, even if the court were to find that the plaintiff's efforts in 2012 and 2016 were reasonably diligent, the plaintiff has failed to account for his efforts to remain current on their whereabouts before attempting service of process in October, 2017, to commence this present action. Here, the plaintiff relied on information that was approximately a year old for [Tiffany] Khalily and five years old for [Edward] Khalily. Thus, it appears that the plaintiff relied on old information without attempting to verify that the addresses he had were still current. Such reliance indicates that the plaintiff was not reasonably diligent in attempting to determine the last known addresses of the defendants. . . . The plaintiff, therefore, has failed to meet his burden of proving that he used reasonably diligent efforts to find the defendants' last known

address[es] and that the court can exercise personal jurisdiction over them."

The record and law support the trial court's judgment that it lacked personal jurisdiction over these nonresident defendants. The plaintiff has failed to sustain his burden that he properly served the defendants at their respective last known addresses and that he made a reasonably diligent search to find out their last known addresses, within a reasonable time, before attempting service of process. We, therefore, conclude that the trial court properly granted the defendants' motion to dismiss.

The judgment is affirmed.

IN RE CAMERON W.*
(AC 42678)

DiPentima, C. J., and Keller and Bright, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, C. She claimed that the trial court erroneously concluded, pursuant to the applicable statute (§17a-112 [j] [1]), that the Department of Children and Families made reasonable efforts to reunify her with C, and that she was unable or unwilling to benefit from reunification efforts. The trial court found, inter alia, that because of the mother's involvement with the criminal justice system and repeated return to substance abuse, she had not sufficiently rehabilitated to the extent that she could assume a responsible position in C's life in view of his age and needs or within a reasonable period of time. *Held*:

1. The trial court properly found that the petitioner, the Commissioner of Children and Families, proved by clear and convincing evidence that the respondent mother was unable or unwilling to benefit from reunification efforts: in making that determination, the court relied primarily on its

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

subordinate findings that, prior to the date on which the petitioner filed the petition, the mother, who was incarcerated, did not plan on assuming the role of a parent to C or want to work toward reunification with C and stated a desire that C be adopted, and the mother's claim that, in analyzing the issue of reasonable efforts at reunification under § 17a-112 (j), the court improperly failed to consider events that occurred after the adjudication date, which was the date on which the petitioner filed coterminous petitions for neglect and termination of parental rights, was unavailing, as it is a well settled principle that courts are required to consider only facts that occurred prior to the filing of a termination petition when making an assessment of whether reasonable efforts to reunify the parent with the child were made or whether there was sufficient evidence that a parent is unable or unwilling to benefit from reunification efforts, and, therefore, even though the mother argued that after the adjudication date she had made progress in terms of her sobriety, the court properly limited its analysis to events preceding the adjudication date; moreover, the court's finding that the mother was unwilling to benefit from reunification efforts was supported by clear and convincing evidence, as the evidence and testimony in the record showed that the mother had reported to social workers that her plan was for C to be adopted, she was working with a private adoption agency to effectuate the adoption, she met with adoptive parents of her choosing, she wanted to have visitations with C but did not want to work toward reunification, and the planned adoption did not occur because the putative father did not agree with it, not because the mother had changed her mind about the nature of her relationship with C, and in light of the mother's stated desire to pursue adoption, her reference to "services" in a statement to a social worker reasonably could have been interpreted as an indication that she wanted to receive services for her own benefit, as opposed to an indication that she wanted to work toward reunification with C.

2. It was not necessary for this court to reach the merits of the respondent mother's claim that the trial court improperly found that the department made reasonable efforts to reunify her with her child; the trial court found that the mother was unable or unwilling to benefit from reunification efforts and, alternatively, that the department made reasonable reunification efforts, and given that this court rejected the mother's challenge to the court's finding that she was unable or unwilling to benefit from reunification efforts and that, under § 17a-112 (j) (1), a court may grant a petition to terminate parental rights upon a finding that the parent is unable or unwilling to benefit from reunification efforts or that the department has made reasonable reunification efforts, the petitioner did not need to prove that reasonable reunification efforts were made.

Argued September 25—officially released November 26, 2019**

** November 26, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Coterminous petitions by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected and to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Middletown, Juvenile Matters, where the court, *Sanchez-Figueroa*, *J.*, adjudicated the child neglected and committed the child to the custody of the petitioner; thereafter, the termination of parental rights petition was tried to the court; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Karen Oliver Damboise, for the appellant (respondent mother).

Cynthia E. Mahon, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

KELLER, J. The respondent, Shannon W., appeals from the judgment of the trial court terminating her parental rights with respect to her biological son, Cameron W. (Cameron), pursuant to General Statutes § 17a-112 (j) (3) (E). The respondent claims that the court improperly found that (1) she was unable or unwilling to benefit from reunification efforts and (2) the Department of Children and Families (department) made reasonable efforts to reunify her with her child.[1] We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. Cameron was born on February 21,

[1] In this appeal, Cameron's attorney has adopted the brief filed by the petitioner, the Commissioner of Children and Families. See Practice Book §§ 67-13 and 79a-6 (c).

2018. On February 28, 2018, the petitioner, the Commissioner of Children and Families, filed coterminous petitions for neglect and for the termination of the parental rights of the respondent and Cameron's putative biological fathers.[2]

In the neglect petition, the petitioner alleged that Cameron was neglected as having been abandoned and because he was being denied proper care and attention physically, educationally, emotionally, or morally. See General Statutes § 46b-120 (4) (defining "neglected"). In the termination of parental rights petition, the petitioner alleged that termination of the respondent's parental rights with respect to Cameron was warranted pursuant to § 17a-112 (j) (3) (E), which provides in relevant part that a court may grant a petition for the termination of parental rights if it finds by clear and convincing evidence that "the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ." In the termination petition, the petitioner also alleged that the

[2] The court found, and it is not in dispute, that the identity of Cameron's biological father is unknown. On February 28, 2018, the petitioner brought the coterminous petitions against Alexander R. and John Doe as putative fathers of the child. On April 27, 2018, the court, having obtained the results of DNA testing of Alexander R., issued a finding of nonpaternity and removed Alexander R. from the case. On August 28, 2018, the court granted the petitioner's motion for permission to cite in Kyle Matthew B. as a putative father of the child. On October 2, 2018, the court, having obtained the results of DNA testing of Kyle Matthew B., issued a finding of nonpaternity and removed Kyle Matthew B. from the case. Pursuant to General Statutes § 52-108, "parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require." John Doe was served by publication and was later defaulted for failing to appear.

termination of the respondent's parental rights with respect to Cameron was in Cameron's best interests.[3] Additionally, in the termination petition, the petitioner alleged that the respondent was unable or unwilling to benefit from reunification efforts.

On February 26, 2018, two days prior to filing the petitions, the petitioner invoked a ninety-six hour hold on Cameron, while he was still hospitalized following his birth. On February 28, 2018, the court granted the petitioner's ex parte motion for an order of temporary custody, thereby vesting temporary custody of Cameron in the petitioner. The order of temporary custody was sustained at the initial hearing that took place on March 9, 2018, at which time the court ordered preliminary specific steps for the respondent.[4] On August 13,

Following the trial in this case, the court terminated the parental rights of John Doe as to Cameron, and no appeal has been filed on behalf of John Doe.

[3] In this appeal, the respondent does not raise a claim related to the court's findings that the petitioner proved, by clear and convincing evidence, that the ground alleged for termination of parental rights existed and that termination was in Cameron's best interests.

[4] As noted previously, an ex parte motion for temporary custody, a neglect petition and a termination of parental rights petition were filed simultaneously. Practice Book § 33a-6 (d) requires a court to issue preliminary specific steps at the time it grants an ex parte motion for temporary custody, pending the required preliminary ten day hearing to determine whether the court should vest temporary care of the child in the petitioner pending disposition of the petitions. At the preliminary hearing, if the order of temporary custody is sustained, as it was in the present case, the court again is required to issue specific steps that the petitioner and the parent shall take for the parent to regain custody of the child. General Statutes § 46b-129 (c) (6); Practice Book § 33a-7. The issuance by the court of specific steps at the time the ex parte temporary custody order is issued and at the time of the preliminary hearing on temporary custody is automatically required, and not contingent on whether a respondent indicates a willingness to reunify with the child. The issuance of such steps, therefore, should not be construed as indicative of any determination by the court that, at the time the steps are issued, the respondent is willing or able to benefit from reunification services. Nor should the failure of the court to issue specific steps at the time it signs an ex parte custody order or at the time of the preliminary ten day hearing be construed as indicative of a determination by the court that, at that time, the respondent was unable or unwilling to benefit from reunification services.

2018, the petitioner filed a motion to amend the neglect petition and the petition for termination of parental rights by citing in Kyle Matthew B. as the putative father. On August 28, 2018, the court granted the petitioner's motion.

Prior to the start of the trial, which occurred on October 2, 2018, the respondent entered a written plea of nolo contendere with respect to the ground of the neglect petition that was based on the denial of proper care. The court accepted the plea, adjudicated Cameron to be neglected, and determined that committing Cameron to the custody of the petitioner was in his best interests.

During the trial on the petition for termination of parental rights, during which the respondent and Cameron were represented by counsel, the court received written evidence and heard testimony from the respondent; Michele Gargiulo, a social worker employed by the department; and Marie Levesque, a social work supervisor employed by the department. In its thorough memorandum of decision of January 29, 2019, the court set forth its findings of fact, which were made under the clear and convincing evidence standard. With respect to the respondent, the court found as follows: "[The respondent] is twenty-nine years old. . . . [The respondent] was raised in East Haven and Westbrook . . . together with her younger brother . . . . All went well for [the respondent] until her parents divorced when she was five years old. At the time of the divorce, [the respondent] primarily lived with her mother. The divorce was the beginning of [the respondent's] disrupted childhood. During the eighth grade, she began having conflicts with her mother and moved in with her father until his death in 2009. [The respondent] graduated from high school in 2007 and chose not to further her education. [The respondent] has never been married. [The respondent] has a total of three children,

none of whom are in her care. All three children tested positive for substances at birth. [The respondent] has had a history with [the department] dating back to 2008 due to her issues with [substance] abuse.

"Shortly after high school, [the respondent] had her first child, Hallie W., who was born on July 8, 2007. On March 25, 2008, after [Hallie W.] was born, the maternal grandmother obtained custody of her . . . through the Westbrook Probate Court. On June 3, 2015, the maternal grandmother filed a petition for termination of parental rights with the Westbrook Probate Court. On May 10, 2016, [the respondent] consented [to the termination of her parental rights] and the court granted the [petition with respect to] Hallie W. as to [the respondent] and John Doe. On November 23, 2011, [the respondent] gave birth to her second child, Eric W., who tested positive for opiates at birth and experienced withdrawal symptoms. On November 23, 2011, [the petitioner] was granted an [order of temporary custody] by the Middletown Superior Court for Juvenile Matters. On January 19, 2012, a termination of parental rights petition was filed by [the petitioner] and on February 3, 2012, the court accepted [the respondent's] consent to terminate her rights and ordered the termination of the parental rights as to Eric's putative father, John Doe.

"On February 21, 2018, [the respondent] gave birth to her third child, Cameron W., at Lawrence + Memorial Hospital in New London. [The respondent] reported that she did not know she was pregnant with Cameron until six months into the pregnancy and continued to use her drugs of choice, heroin and cocaine. When Cameron was born, [the respondent] had been incarcerated since November of 2017, and [the respondent] did not receive prenatal care prior to her incarceration. Because Cameron was exposed to heroin, cocaine, and alcohol in utero, he was diagnosed with [Neonatal]

Abstinence Syndrome[5] at birth. Cameron tested positive for methadone at birth. It was not until [the respondent] was arrested and subsequently incarcerated that she involuntarily stopped using heroin and cocaine and was prescribed methadone. When she gave birth to Cameron on February 21, 2018, three months after her incarceration [began], [the respondent] tested positive for only methadone and benzodiazepine, as she had not been using heroin or cocaine due to her incarceration.

"Before the department invoked the ninety-six hour hold on Cameron, the social worker assigned to the case had a telephone conference with [the respondent], who had been released from the hospital on February 25, 2018, and was returned to the York Correctional Institute (York) where she had been incarcerated since November of 2017. At this time, [the respondent] was put on notice that [the department] had concerns regarding Cameron. [The respondent] reported to the [department] social worker that the plan for her son was adoption and that she had been working with Connecticut Adoption Center, a private adoption agency, to effectuate that plan. [The respondent] reported that she had met with the identified adoptive parents and that she continued to want adoption for Cameron. [The respondent] further stated that she wanted to have visitation with Cameron, but did not want to work towards reunification. The adoption plans were halted due to the putative father's (Alexander R.) disagreement with the adoption. On February 26, 2018, the adoption social worker contacted [the department] explaining that both parents were incarcerated, that there was no agreement with the adoption, and that the child would need to be

[5] "Neonatal Abstinence Syndrome" is defined as "[a] disorder of newborns exposed to addictive drugs (especially opioids) either in the womb or at birth, characterized by a complex of symptoms associated with withdrawal, including high-pitched crying, tremor, inadequate food intake, fever, sweating, and vomiting." American Heritage Dictionary of the English Language (5th Ed. 2019).

placed with a family. After she learned that the plans for adoption would not happen, [the respondent] was unable to or refused to provide [the department] with names of potential resources for Cameron. Although her mother had adopted her first born child, [the respondent] did not believe that the maternal grandmother could be a resource due to their troubled relationship. [The respondent] was adamant that she did not want her mother involved as a possible placement for Cameron. In spite of [the respondent] not wanting the child placed with her mother, [the department] did its due diligence and determined that, for independent reasons, [the] maternal grandmother could not be a resource for Cameron.

"[The respondent] was unsure of the identity of Cameron's father and named two potential fathers who were later tested and were each excluded as probable fathers. . . .

"[The respondent] is a convicted felon and has an extensive criminal and substance abuse history dating back to 2009. [The respondent] has admitted to the use of cocaine and heroin. [The respondent's] criminal charges included: disorderly conduct, failures to appear, violations of probation, possession of a controlled substance, possession of narcotics, and several larceny in the sixth degree charges. Most recently, [the respondent] was arrested on November 14, 2017, and charged with smuggling, possession of a controlled substance, criminal impersonation, and [possessing] drug paraphernalia. [The respondent] was incarcerated at the York facility with [the department of correction] when she gave birth to Cameron on February 21, 2018. [The respondent] was incarcerated from November, 14, 2017, and released in June of 2018.

"During her incarceration at York, the department was unable to provide [the respondent] with any rehabilitative services as she was not available to comply

with the services. To her credit, however, [the respondent] took advantage of programs offered to her by the [department of correction] and participated in programs such as Stride, which focused on employment and vocational services; Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings; and she participated in a child development program. In mid-June, 2018, [the respondent] was released to a [department of correction] halfway house, Next Steps, in Willimantic. Next Steps is a structured setting, supervised and restricted by the [department of correction], and she was not allowed to come and go in the community. [The respondent] engaged in services offered by [the department] such as early recovery group therapy, trauma based group therapy, individual counseling and medication management through Perceptions. As a direct result of her incarceration, [the respondent] was not available to be referred to treatment services. Therefore, [the respondent] was unable to benefit from any treatment services [the department] could have provided.

"On August 20, 2018, [the respondent] was moved to Healthy Lifestyles, a sober house in New London, where she continued with the services she was receiving and became employed. The sober house is privately run and not supervised by [the department] and it allowed [the respondent] the flexibility to go into the community. [The respondent] testified that she has been prescribed Vivitrol monthly injections; a medication used to prevent relapse in opioid dependent patients. The department made a referral for [the respondent] to SCADD (Southeastern Council on Alcohol and Drug Dependence) for [substance] abuse and mental health rehabilitation and evaluations.

"During her incarceration, [the respondent] received monthly visitation with Cameron and upon her release from incarceration and the [department] halfway house,

the department increased the frequency of visits to weekly. Although the visits have gone well with appropriate interaction, there is no clear bond between [the respondent] and Cameron. To her credit, however, [the respondent] has been consistent with the visits both during and after her incarceration. It has been reported that the visits are enjoyed by both Cameron and [the respondent].

"[The respondent's] substance abuse history includes use of heroin and cocaine, which she reported she began using eight to nine years ago and continued to use until the time of her incarceration on November 14, 2017. [The respondent] reports that she has been sober for ten months from the time she was arrested on November 14, 2017, and has remained sober up until the trial date of October 2, 2018. [The respondent] testified that she had, some years ago, maintained a six month period of sobriety while in the community. After those six months, [the respondent] relapsed and returned to the drug use. [The respondent] explained that this current attempt at sobriety is different because she is doing it for herself and for Cameron and not at the insistence of her family. [The respondent's] Exhibit A, a letter from the sober house, Healthy Lifestyles, showed that [the respondent] had two recent negative urine drug screens on September 17, 2018, and on September 30, 2018, only two weeks prior to the trial date. To her credit, [the respondent] has participated in substance abuse recovery and relapse prevention programs while in the halfway house and during her current stay in the sober house. [The respondent] testified that she continues to participate in NA and AA meetings on a weekly basis. [The respondent] has obtained employment and expressed a desire to be reunified with Cameron.

"At trial, [the respondent] testified that she made plans for adoption based on her belief that she did not

stand a chance to keep Cameron or care for him given her history with [the department]. [The respondent] has had two other children for whom her parental rights were previously terminated. [The respondent] testified that after Cameron was born, her plans changed and she wanted to be reunified with her son. Contrary to her testimony, the evidence shows that [the respondent] had no plans to be reunified with Cameron as she unilaterally initiated the plans to have him adopted prior to the intervention of [the department]."

The court set forth findings of fact with respect to Cameron, as follows: "[Cameron] was born on February 21, 2018, and is now eleven months old. At the time of the trial, Cameron was seven months old. He was born to [the respondent] and John Doe at Lawrence + Memorial Hospital in New London . . . . Cameron has been in [the department's] care since February 26, 2018, when he was placed in a legal risk [department] foster family in Connecticut where he presently remains. Cameron was born while his mother was incarcerated at the York facility. Cameron was diagnosed with Neonatal Abstinence Syndrome and having Fetal Alcohol [Syndrome],[6] as he was exposed to heroin, cocaine, and alcohol in utero and experienced withdrawal after birth. While in the hospital, Cameron was prescribed morphine to assist him with the withdrawal symptoms and was connected to a Continuous Positive Airway Pressure (CPAP) machine for the first eighteen hours of his life. Cameron requires a competent caregiver that will meet his specialized needs.

"The foster mother reports that Cameron is a happy baby who is developing appropriately. Cameron was

[6] "Fetal Alcohol Syndrome" is defined as "a variable cluster of birth defects that may include facial abnormalities, growth deficiency, mental retardation, and other impairments, caused by the mother's consumption of alcohol during pregnancy." Random House Webster's Unabridged Dictionary (2d Ed. 2001), p. 711.

eating and sleeping well with a few struggles with constipation that the foster mother properly addressed. It was reported that Cameron had been assessed by Birth to Three in April, 2018, and was found not to be eligible. The foster mother reports that Cameron has no developmental issues or concerns. The foster family has provided Cameron with a safe, secure, and caring home life, and he has bonded well to his foster mother and family.

"Cameron is adjusting well to daycare and the KinderCare staff also reports that Cameron is a happy baby and they have not observed any developmental concerns. All of Cameron's medical, dental, emotional, and specialized needs are being met and [he] is medically up to date. Cameron is thriving in his foster family's care. The foster family [is] willing and able to adopt Cameron if the reunification efforts made are not successful.

"Cameron visited with [the respondent] on a monthly basis during her incarceration, and then on a weekly basis when she was released to the sober house. It was reported that both [the respondent] and Cameron enjoyed the visits. Cameron has a happy disposition and appears to enjoy the visits with [the respondent]. [The respondent] engages Cameron and is reportedly appropriate during her visits. Cameron continues to look to his foster family for all of his needs. Cameron has never seen his father, as John Doe's identity is unknown and his whereabouts remain unknown. John Doe has not come forward to be assessed or to offer himself as a resource for Cameron."

In setting forth its determinations with respect to the adjudicatory phase of the trial, the court, citing relevant case law and Practice Book § 35a-7, observed that, in the adjudicatory phase, it was limited to making its assessment on the basis of facts preceding the filing of the petition for termination of parental rights or the

latest amendment thereto. Then, the court evaluated whether, pursuant to General Statutes § 17a-112 (j) (1),[7] the department met its burden of proving by clear and convincing evidence that it had made reasonable efforts to locate the respondent and to reunify the respondent and Cameron or, in the alternative, that the respondent was unable or unwilling to benefit from reunification efforts. After setting forth relevant legal principles, the court stated as follows: "[The department] has proven by clear and convincing evidence that it used reasonable efforts to locate [the respondent]. [The respondent] was found on March 9, 2018, to have been served in-hand with the [termination of parental rights] petition and has appeared in this action and was represented by counsel . . . .

"[The department] has alleged as to [the respondent] that at the time it filed its coterminous petitions, it made reasonable efforts to reunify [the respondent] with her child, and in the alternative, has alleged that [the respondent] was unwilling to benefit from reunification efforts. The court finds that this allegation was based on [the respondent's] status at the time of the filing . . . of the [termination of parental rights] petition. [The respondent] was incarcerated, and according to the [department's] investigation protocol, the conversations with [the respondent] were about her intentions to put the child up for adoption. The adoption process was only halted due to the putative father's

[7] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required . . . ."

disagreement, and not the department's intervention. [The respondent] wanted the child adopted and she was unwilling and unable to benefit from reunification efforts. In fact, the evidence shows that [the respondent] explicitly informed the adoption social worker that she wanted visitation with the child, but did not want to work toward reunification with the child. The court finds that [the respondent] was unable and unwilling to take advantage of any services [the department] could provide her, as she had no plans to raise Cameron and was not available for Cameron due to her incarceration. However, the specific steps provided to [the respondent] clearly guided her to take advantage of all programs offered to her by [the department of correction]. Minimal or no services were provided to [the respondent] due to her incarceration and her unwillingness to benefit from the efforts to reunify her with her child. She, however, engaged in services offered to her by [the department of correction] as she was unavailable to take advantage of any referrals and services [that the department] could provide while she was incarcerated. [The respondent] was therefore unable to benefit from [the department's] reunification efforts.

"The court acknowledges that incarceration alone cannot be the basis for terminating parental rights, but observed, nevertheless, that [the respondent's] incarceration posed restraints on her ability to visit more frequently with her child and meet his needs, particularly given his significant medical issues at birth.

"It was evident that [the respondent] had continued to use substances for the last eight to nine years which has resulted in the termination of her parental rights to her two older children. [The respondent] also continued her involvement with the criminal justice system that resulted in three different periods of incarceration with the most recent being in November, 2017. In spite of [the respondent's] presenting problems with incarceration,

long history of involvement with the criminal justice system, and her ongoing [substance] abuse, [the department] attempted in reunifying [the respondent] with her child and provided her with visits with Cameron during and after her incarceration at York. The court finds that [the department] has proven by clear and convincing evidence that it made reasonable efforts under the circumstances to reunify Cameron with [the respondent] even when [the respondent] made it clear that she had no desire to work towards reunification. The court further finds that [the respondent] was unable or unwilling to benefit from the reunification efforts made by [the department]. The court notes that the law does not require a continuation of reasonable efforts on the part of [the department] when such efforts will be futile." (Internal quotation marks omitted.)

The court observed that the petitioner brought the termination of parental rights petition pursuant to § 17a-112 (j) (3) (E), on the ground that the respondent failed to rehabilitate. After setting forth relevant legal principles, the court determined whether the petitioner had met its burden of proving that this statutory ground existed by clear and convincing evidence. The court's findings, which are not challenged in this appeal, are as follows: "The evidence here proves . . . convincingly that Cameron has been found to have been neglected. As noted above, Cameron was adjudicated neglected on October 2, 2018. Cameron is under the age of seven years old as he was born on February 21, 2018. It is also established that [the respondent's] rights to another child were terminated. In fact, [the respondent's] rights to two other children were terminated, as discussed above. The evidence clearly and convincingly shows that [the respondent] is unable to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, she

could assume a responsible position in the life of . . . Cameron. . . .

"The evidence clearly shows that [the respondent] has a repeated pattern in her history with her involvement in the criminal justice system, repeated attempts at sobriety, and repeated return to [substance] abuse. At the time the petitions were filed, [the respondent's] primary presenting problems arose from her incarceration, involvement with the criminal justice system, her [substance] abuse issues, and her inability to care for and to provide for the needs of her infant child, Cameron. The court acknowledges that [the respondent] has satisfied a great deal of her specific steps by her engagement in the services and programs she was provided at [the department of correction] while she was incarcerated, during her time at the halfway house, and her current involvement at the sober house. However, compliance with the specific steps is not the equivalent to rehabilitation. The parent's compliance with the court ordered expectations or specific steps is relevant, but not dispositive to the rehabilitation finding. . . .

"To her credit, [the respondent] has made progress as she is employed and has reportedly tested negative [for] substances on only two shown instances just a few weeks prior to the trial date of October 2, 2018. The evidence shows that [the respondent] tested negative for substances on September 17, 2018, and again on September 30, 2018. [The respondent] reports to have been sober for the last ten months, from November, 2017, and has plans to remain sober. Certainly, this court applauds [the respondent's] efforts and hopes that she will maintain her sobriety for her own sake. The court acknowledges that it has been the longest time of sobriety for [the respondent] in the last eight to nine years. However, the court also finds that the first six months of [the respondent's] sobriety began when she was arrested and subsequently incarcerated.

Although her sobriety began involuntarily, to her credit, [the respondent] has recently demonstrated a desire to maintain her sobriety. The court further finds that [the respondent] has only been sober in the community for two months from August 20, 2018, to the trial date of October 2, 2018.

"[The respondent] remains under the supervision of a sober house, and given [the respondent's] long history of drug dependency, two months in the community is insufficient time for the court to find that she has achieved the level of personal rehabilitation that would encourage this court to believe that she would be able to assume a responsible position in Cameron's life. [The respondent], through her testimony, has expressed love for Cameron and a desire to be reunified with her child. It is clear that [the respondent] has a renewed desire to parent Cameron. However, the fact that the respondent may love the child does not in itself show rehabilitation. . . . Unfortunately, given her history of significant involvement with the criminal justice system and her long history of [substance] abuse issues and the totality of the evidence, the court does not find that [the respondent] has rehabilitated to a level where she can take care of Cameron either now or in the foreseeable future. There was no evidence presented to show that [the respondent] has gained the necessary insight and ability to care for her child given his age and needs within a reasonable period of time. . . . [The respondent] has very recently attempted to reach a level of sobriety, and although the court is hopeful that she is able to maintain it, the court cannot draw a conclusion of rehabilitation as her sobriety is in its very early stages. The court is not convinced that [the respondent's] current attempt at sobriety rises to the level necessary for a finding of rehabilitation. Cameron cannot wait to see if [the respondent] can maintain her sobriety, on her

own, when she is not in a highly structured and monitored environment.

"The child is in need of a permanent and competent caregiver who will provide permanency, care, safety, and well-being. The child needs permanency, and to provide [the respondent] additional time to prove that she has reached the level of rehabilitation necessary to care for Cameron is not in his best interest. Providing [the respondent] more time is not consistent with Cameron's age and needs for structure, nurturing and permanency in his young life. Cameron has been in [the department's] care for his entire young life since he was discharged from the hospital on February 26, 2018, a mere five days after his birth.

"Thus, the evidence clearly and convincingly establishes that as of the end of the trial on this matter, [the respondent] had *not* sufficiently rehabilitated to the extent she could assume a responsible position in Cameron's life in view of his age and needs or within a reasonable period of time. Accordingly, the court finds that, based upon the credible testimony and documentary evidence presented, and pursuant to the requirements of General Statutes §§ 17a-112 (j) (1) and 17a-111b (a), [the department] has met its burden of proof by the rigorous standard of clear and convincing evidence that [the respondent] has failed to achieve the degree of rehabilitation which would reasonably encourage the belief that at some future date she can assume a responsible position in her child's life. The court, therefore, finds that [the respondent] has failed to and is unable to rehabilitate within a reasonable time, as it has been statutorily defined and has been proven by clear and convincing evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.)

With respect to the dispositional phase of the trial, the court stated in relevant part, as follows: "The court

concludes that it is in the best interest of the child to terminate the parental rights of the respondent . . . . The court finds that the evidence is clear and convincing that the only way this child will find stability, continuity, development, and growth is through permanency. There is not enough evidence that [the respondent] will be able to rehabilitate at any time in the foreseeable future. Although she has shown some movement towards rehabilitation in the time since the child was placed in [the department's] care, that time is not enough given [the respondent's] extensive history with the criminal justice system and her long history of [substance] abuse. The court further finds that two months of sobriety after her release from the structured environment of incarceration and a halfway house, both of which are supervised by [the department of correction], is insufficient time to adequately assess the necessary level of personal rehabilitation. The child has now been in foster care for all of his life and is in need of stability and permanency in order to grow and develop in a healthy manner. While [the respondent] has been compliant with her visitations and has created a relationship with the child during the visits, it does not rise to the level of a parent-child relationship or the parent-child bond that is formed from the day-to-day caring and providing for a child. [The respondent's] testimony showed a desire to parent her child and to love him. As stated above, love is not enough to show this court that she has rehabilitated. Moreover, [the respondent] was unable [or] unwilling to form a parental bond. [The respondent] has not [established] the parent-child relationship that is necessary to enable her to provide Cameron with stability and an environment that would foster his growth and development, all due to her extensive history of [substance] abuse and incarceration. [The respondent's] circumstances today are the same circumstances she was in during 2007 and again in 2011.

[The respondent's] circumstances have not changed for the last eight to nine years. To allow [the respondent] further time to rehabilitate to show that she may possibly assume a responsible position in Cameron's life is not fair to Cameron, and more importantly, the court finds that it is not in his best interest. Therefore, the court finds that it is in the child's best interest to terminate [the respondent's] parental rights."

The court set forth findings with respect to the seven criteria set forth in General Statutes § 17a-112 (k).[8] With respect to the first criterion, the court found: "As discussed above, the department has made reasonable efforts to work towards reunification of Cameron with [the respondent] and putative father. [The department]

[8] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

has offered timely and appropriate services since the opening of the case in an effort to facilitate reunion with Cameron. However, [the respondent] was very clear and adamant that she did not want reunification but wanted adoption for the child. Initially, the department had been unable to offer [the respondent] appropriate services toward reunification of Cameron, as she was incarcerated . . . . The department has provided [the respondent] with monthly supervised visits that were increased to weekly supervised visits with Cameron. All of the recommended services were reasonable and appropriate, and offered on a consistent, timely and sufficient basis."

With respect to the second criterion, the court found: "As discussed above, the department offered reasonable efforts in order to work towards reunification of Cameron with [the respondent] or putative father, as [the respondent] was incarcerated at the time. [The respondent] was unable to benefit from any efforts as she had no intentions of caring for Cameron. . . . However, [the department] made efforts to provide [the respondent] visits during and after her incarceration. The court finds that [the respondent] has failed to meet her own expected reasonable efforts to benefit from [the department's] reasonable efforts. The findings made above are incorporated herein by reference."

With respect to the third criterion, the court found: "The Superior Court for Juvenile Matters of Middletown offered specific steps for [the respondent] on February 28, 2018. Due to [the respondent's] incarceration, she was unable to fulfill the court ordered specific steps. [The respondent], however, took advantage of programs offered to her while under the strict supervision of [the department of correction]."

With respect to the fourth criterion, the court found: "Cameron is now eleven months old and does not fully

understand why he is in foster care. Cameron has been in [the department's custody] for all of his short life and he looks to his foster parents to meet his every need. Although Cameron has supervised visits with [the respondent], both while she was incarcerated and after her release, he has bonded with his foster family and looks to them to have his needs met. Cameron enjoys his visits with [the respondent], but he does not have a parent-child bonded relationship with her. . . . Cameron is in need of a home and caretaker who understands his needs and responds to him in a consistent nurturing and developmentally appropriate manner. The foster parents are ready, willing, and able to be his permanent caregivers, and they are ready and willing to adopt Cameron."

With respect to the fifth criterion, the court reiterated its finding that Cameron was born on February 21, 2018, and that he was nearly eight months old at the time of the trial.

With respect to the sixth criterion, the court stated: "As discussed above, [the respondent] was incarcerated and was offered monthly supervised visits with Cameron. After her release from incarceration, [the respondent] was offered supervised visits on a weekly basis. [The respondent] has failed to sufficiently adjust her circumstances, conduct, or conditions to make it in the best interest of the child to be reunified with [the respondent] in the foreseeable future. Although [the respondent] has consistently visited with the child and has made some progress in achieving a level of sobriety, the short period of sobriety does not rise to the level of rehabilitation. [The respondent] has been unable or unwilling to sufficiently address the child protection concerns and is not in a position to provide Cameron with a safe, permanent and stable home environment where he would be able to thrive."

With respect to the seventh criterion, the court stated: "The court finds there is no credible evidence provided to show that the parents have been prevented from maintaining a meaningful relationship with Cameron. [The department] has encouraged [the respondent] to maintain a relationship with the child. In fact, [the department] requested [the respondent] to provide names of relatives or other potential resources for Cameron, but she focused only on her desire to have Cameron adopted. No unreasonable act or conduct by any person or agency or by the economic circumstances of the parents has prevented [them] from maintaining a meaningful relationship with [their] child. . . . For [the respondent], it has only been through her own actions and circumstances of incarceration and [substance] abuse that caused her to fail to maintain a meaningful relationship with her child. At the time of Cameron's birth, [the respondent] was not able to maintain a meaningful relationship with her son and therefore not able to create an emotional bond with him."

Thereafter, the court terminated the parental rights of the respondent with respect to Cameron.[9] This appeal followed. Additional facts will be discussed as necessary.

I

We first address the respondent's claim that the court improperly found that she was unable or unwilling to benefit from reasonable efforts to reunify her with her child. We disagree.

As we have discussed previously in this opinion, in this nonconsensual termination of parental rights petition brought under § 17a-112, the petitioner alleged that the respondent was unable or unwilling to benefit from

[9] The court also terminated the parental rights of John Doe with respect to Cameron. See footnote 2 of this opinion. This aspect of the court's judgment is not a subject of this appeal.

reunification efforts. With respect to the issue of whether the respondent was unable or unwilling to benefit from reunification efforts, the court, focusing on events that occurred prior to the date on which the petitioner filed the petition, concluded that the petitioner sustained her burden of proof by clear and convincing evidence. We previously have set forth the court's analysis of the issue. It suffices to observe that, the court relied primarily on its subordinate findings that, prior to the date on which the petitioner filed the petition, the respondent, who was incarcerated, did not plan on assuming the role of a parent to Cameron, she desired that he be adopted, and she did not want to work toward reunification with him.[10]

The respondent broadly asserts that this court should review the court's determination that she was unable or unwilling to benefit from reunification efforts for evidentiary sufficiency. Yet, we observe that, in challenging the court's determination that she was unable or unwilling to benefit from reunification efforts, the respondent does not argue distinctly before this court that, in light of the evidence, the court erroneously found that, prior to the adjudication date,[11] she did not plan on parenting Cameron and was unwilling to work toward reunification with him. We do not interpret the respondent's arguments to suggest that the subordinate factual findings specifically made by the court and set forth in its memorandum of decision were not based on the evidence related to events preceding the adjudication date. In substance, the respondent argues before

[10] In addition to finding that the respondent was unable or unwilling to benefit from reunification efforts, the court found that the department made reasonable efforts to reunify the respondent and Cameron. This finding is the subject of the respondent's second claim which we address in part II of this opinion.

[11] The adjudication date is the date on which the termination of parental rights petition or the latest amendment thereto is filed. See Practice Book § 35a-7.

this court that the court's ultimate finding, that she was unable or unwilling to benefit from reunification efforts, was erroneous because (1) the court failed as a matter of law to consider events that occurred after the adjudication date and (2) the court's finding that reunification efforts would have been futile is not supported by clear and convincing evidence in light of, among other things, the court's findings concerning events that transpired after the adjudication date. The respondent draws our attention to the evidence, as well as the court's findings, that, after the adjudication date, she made progress in terms of her sobriety and assimilating in the community. Thus, she relies, in part, on the court's detailed findings, as set forth previously in this opinion, that she took advantage of several programs that were offered to her by the department of correction, she participated in visitations with Cameron, and she achieved a period of sobriety for several months following her release from prison.

As a threshold matter, we address the respondent's argument that, in analyzing the issue of reasonable efforts under § 17a-112 (j),[12] the court improperly failed to consider events that occurred *after* the adjudication date. We observe that, in the present case, the adjudication date is February 28, 2018, the date on which the petitioner filed the coterminous petitions for neglect and for termination of parental rights.[13] In this appeal,

[12] See footnote 7 of this opinion.

[13] We observe that, on August 13, 2018, the petitioner filed a "Motion to Cite in Party and Amend Neglect Petition." In the motion, the petitioner sought permission "to amend the neglect petition and petition for termination of parental rights filed on February 28, 2018, by citing in Kyle Matthew [B.] as a putative father of the minor child." No proposed amended petitions were attached to the motion. In support of the motion, the petitioner represented that Alexander R. was proven by DNA testing not to be Cameron's biological father and that the respondent recently had advised the department that Kyle Matthew B. may be Cameron's biological father. On August 28, 2018, the court granted the motion, however, the petitioner did not thereafter file amended petitions. The record reflects that Kyle Matthew B. appeared and waived any defects in service as to the petitions. There is no return of service as to Kyle Matthew B. in the court file.

the respondent does not dispute that the adjudication date is the date on which the petitioner filed the petition.

We reject the respondent's argument that the court's failure to have considered events following the adjudication date was contrary to § 17a-112 (j) or controlling precedent. "In order to terminate parental rights under § 17a-112 (j), the [petitioner] is required to prove, by clear and convincing evidence,[14] that [the department] has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification [efforts] . . . . [Section 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the

In light of the fact that the petitioner's motion did not in any way seek to alter the substantive allegations brought against the respondent by way of the coterminous petitions filed on February 28, 2018, and, having obtained permission to amend the petitions, the petitioner did not thereafter file amended petitions in this case, we conclude that the court's ruling on August 28, 2018, did not give rise to a new adjudication date in the present case.

[14] "The clear and convincing standard of proof is substantially greater than the usual civil standard of a preponderance of the evidence, but less than the highest legal standard of proof beyond a reasonable doubt. It is sustained if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . .

"Although we have characterized this standard of proof as a middle tier standard . . . and as an intermediate standard . . . between the ordinary civil standard of a preponderance of the evidence, or more probably than not, and the criminal standard of proof beyond a reasonable doubt, this characterization does not mean that the clear and convincing standard is necessarily to be understood as lying equidistant between the two. Its emphasis on the high probability and the substantial greatness of the probability of the truth of the facts asserted indicates that it is a very demanding standard and should be understood as such . . . . We have stated that the clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Giovanni C.*, 120 Conn. App. 277, 279–80, 991 A.2d 638 (2010).

department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Footnote added; internal quotation marks omitted.) *In re G.S.*, 117 Conn. App. 710, 716, 980 A.2d 935, cert. denied, 294 Conn. 919, 984 A.2d 67 (2009).

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights . . . exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Shaiesha O.*, 93 Conn. App. 42, 47, 887 A.2d 415 (2006).

"[I]n determining whether the department has made reasonable efforts to reunify a parent and a child or whether there is sufficient evidence that a parent is unable or unwilling to benefit from reunification efforts, the court is required in the adjudicatory phase to make its assessment *on the basis of events preceding the date on which the termination petition was filed*. . . . This court has consistently held that the court, [w]hen making its reasonable efforts determination . . . *is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition* . . . ." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *In re Kyara H.*, 147 Conn. App. 855, 870–71, 83 A.3d 1264, cert. denied, 311 Conn. 923, 86 A.3d 468

(2014); see also *In re Joseph M.*, 158 Conn. App. 849, 862, 120 A.3d 1271 (2015) (stating well settled principle that courts are required to consider only facts that occurred prior to filing of termination petition when making reasonable efforts assessment); *In re Kylik A.*, 153 Conn. App. 584, 596, 102 A.3d 141 (same), cert. denied, 315 Conn. 902, 104 A.3d 106 (2014); *In re Paul O.*, 141 Conn. App. 477, 484, 62 A.3d 637 (same), cert. denied, 308 Conn. 933, 64 A.3d 332 (2013). Practice Book § 35a-7 (a) codifies this procedural rule by providing: "In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights."

The respondent relies primarily on *In re Oreoluwa O.*, 321 Conn. 523, 139 A.3d 674 (2016), to demonstrate that, with respect to the issue of reasonable efforts under § 17a-112 (j), the court should not have confined its analysis to events that occurred prior to the adjudication date. We conclude that the respondent interprets our Supreme Court's reasoning in that case too broadly. In *In re Oreoluwa O.*, our Supreme Court determined that, in light of the unique circumstances that existed in that case, it was not improper for the trial court to have considered events subsequent to the adjudication date. Id., 544. The court explained its rationale for this conclusion, which was heavily influenced by the fact that, as of the adjudication date, "there was uncertainty as to when [the child] would be cleared to travel [to be with the respondent] and his medical status was in a state of flux." Id., 543–44. Such obvious factors that could have affected the practicality of reunification efforts, however, do not exist in the present case and, thus, do not warrant a departure from the general rule. Accordingly, we do not conclude that it is appropriate

to extend a case specific analysis in *In re Oreoluwa O.*, to the present case.[15]

Having determined that the court properly limited its analysis to events preceding the adjudication date, we next consider whether the court's finding that the respondent was unwilling to benefit from reunification efforts was supported by clear and convincing evidence. Our Supreme Court has clarified the standard of review that governs our analysis of a court's finding with respect to reasonable efforts pursuant to § 17a-112 (j): we review the court's "subordinate factual findings for clear error" and then "we review the trial court's

[15] Additionally, the respondent urges us to conclude that *In re Kyara H.*, supra, 147 Conn. App. 871, supports the conclusion that, in determining whether reasonable efforts would be futile, the court had an obligation to consider events that occurred subsequent to the adjudication date. The respondent correctly notes that, in *In re Kyara H.*, this court observed that, in the absence of a court order that otherwise relieves the department of its reasonable efforts obligation, it must continue to make reasonable efforts up to the time of the trial's conclusion. Id. This observation, however, is not inconsistent with the court's unambiguous statement that "[w]hen making its reasonable efforts determination during the adjudicatory phase . . . [the court] is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . ." (Internal quotation marks omitted.) Id., 870–71. Thus, the court in *In re Kyara H.* set forth and relied on the legal principle that the respondent challenges in the present case.

The respondent also relies on language in *In re Vincent B.*, 73 Conn. App. 637, 809 A.2d 1119 (2002), cert. denied, 262 Conn. 934, 815 A.2d 136 (2003), to support her argument. The respondent draws our attention to a sentence in *In re Vincent B.*, in which, unlike the present case, this court reviewed a trial court's finding that the department had made reasonable reunification efforts in a case involving a petition brought under § 17a-112 (j) (3) (E). Id., 640. This court observed that clear and convincing evidence did not demonstrate that the respondent was unable or unwilling to benefit from reasonable reunification efforts "at all times prior to the date of [the respondent's] termination hearing . . . ." Id., 646. Although the significance of the court's statement is not as clear as is could be, we decline to interpret the court's reference to reunification efforts leading up to the termination hearing to reflect a change in this court's well settled jurisprudence with respect to the proper scope of the court's inquiry in the adjudicative phase of a termination of parental rights trial.

ultimate determination that a respondent parent was unwilling or unable to benefit from reunification services for evidentiary sufficiency . . . .'' *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015); see also *In re Elijah C.*, 326 Conn. 480, 501, 165 A.3d 1149 (2017) (same).

The court's dispositive subordinate factual findings in the present case included the findings that, prior to the adjudication date, the respondent reported to department social workers that her plan was for Cameron to be adopted, she was working with a private adoption agency to complete the adoption, she had met with the adoptive parents of her choosing, and ''she wanted to have visitations with Cameron, but did not want to work towards reunification.'' The court also found that the adoption plan formulated by the respondent was thwarted because the putative father, Alexander R., disagreed with the plan. Subsequently, the respondent was unable or refused to provide the department with names of other potential resources for Cameron.

''A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made.'' (Internal quotation marks omitted.) *In re Bianca K.*, 188 Conn. App. 259, 269, 203 A.3d 1280 (2019). In light of the following evidence, we conclude that the court's subordinate factual findings are not clearly erroneous.

Among the evidence before the court was a document titled ''Investigation Protocol'' that reflected some of the information that was learned by department social workers during their investigation in the present case. Among the relevant information set forth therein were intake notes that reflected that the department became involved in the case after a social worker at Lawrence

+ Memorial Hospital reported that Cameron may be a neglected child. The department learned that the respondent planned for a private adoption, but that Cameron's putative father refused to consent to the adoption. According to the notes, the respondent "still wants the baby to be adopted and was tearful about this change in plan."

There are additional notes concerning a telephone call between Gargiulo and the respondent, who was then residing at York, on February 26, 2018. Gargiulo noted that the respondent stated that "she did not have any other resources than the chosen adoptive couple" and that the respondent "did not have a plan to parent Cameron . . . ."

Another entry in the department's notes sets forth information concerning a telephone conference between the respondent and one or more department social workers on February 26, 2018. It reflected the following information: "[The respondent] reported that she would like to engage in services and establish a period of sobriety, [six] months is the longest she has been able to be sober. [The respondent] reported that her plan was for her son to be adopted and she has been working with an adoption agency to effectuate this plan. She reported that she has met the adoptive parents and this continues to be her wish for them to be able to adopt her son. [The respondent] reported that she would like to be able to visit with her son but she does not want to work towards reunification. [The respondent] reported she provided her adoption [social worker] with [information pertaining to putative father Alexander R.] approximately two months ago. She reported that it was her understanding that the prison failed to reach out to her adoption worker."

Additional information learned by the department during a telephone conference with the respondent on February 26, 2018, includes the following facts: "[The

respondent] indicated she wanted to use the adoptive family she had chosen and no one else. She indicated she didn't want her baby in foster care. She stated [that] the father is [Alexander R.] and she didn't have his date of birth. . . . She stated she met . . . the adoptive family she chose only [two] times. She stated she didn't want him part of foster care and she chose them for her baby. [The department social worker] asked what traits she liked best about them. She stated she didn't know and she just did. She stated they knew her wishes and knows they would have given him a good life. She indicated she wanted ongoing contact with the baby after adoption."

A social study that was prepared by department social workers on April 26, 2018, and filed in support of the coterminous petition, was also admitted as evidence. Among the matters discussed in the social study was a reference to the fact that the respondent's plan was to pursue a private adoption for Cameron, but that such plan did not move forward because Alexander R. disagreed with such plan.

At trial, Gargiulo testified that the respondent indicated to her that her plan for Cameron was not to work toward reunification with him, but to pursue adoption.

Most importantly, during the respondent's trial testimony, she testified in relevant part that, once she realized that she was pregnant during her sixth month of pregnancy, she wanted to "get sober" but did not have any other plans for her child. She testified that she gave birth to Cameron while she was incarcerated and, in the period leading up to Cameron's birth, she had arranged for him to be adopted. She testified, however, that problems arose "from the father's side" concerning the adoption and that it "fell through." Specifically, the respondent explained that she initially had identified Alexander R. as Cameron's putative father, but that

testing later revealed that he was not, in fact, Cameron's father. She testified that, "once . . . it came back that he wasn't his father, the adoption fell through . . . ."

The respondent also testified that, on February 26, 2018, one or more representatives of the department spoke with her about plans for Cameron, including alternate plans for adoption, but that she replied that she did not agree with these plans. The respondent testified that, after her plan for Cameron to be adopted proved to be unsuccessful for the reasons she had explained, which were related to Alexander R., she recognized that she wanted to be reunited with Cameron.

Among its findings, the court found that the person first identified by the respondent as Cameron's putative father, Alexander R., "was properly served by certified mail on March 9, 2018, and on March 23, 2018, was appointed counsel and a paternity test was ordered. On April 27, 2018, the court received and reviewed the results of the DNA tests . . . . On this date, Alexander R. was found not to be the father of the minor child and a finding of nonpaternity issued . . . . The respondent Alexander R. and his appointed counsel were removed from the case." These findings concerning Alexander R. are not in dispute.

In light of these findings concerning Alexander R., and the respondent's testimony that she had a change of heart with respect to being reunited with Cameron only *after* it was discovered that Alexander R. was not Cameron's father on April 27, 2018, the evidence supported a finding that the respondent changed her position with respect to reunification well after the adjudication date of February 28, 2018.[16] Indeed, there

[16] As we have discussed previously, there was evidence that, as early as February 23, 2018, the department and the respondent were aware that Alexander R. would not consent to the respondent's plan to pursue a private adoption. We emphasize, however, that although there was evidence that, prior to the adjudication date, the respondent was unhappy to learn that Alexander R. would not agree to Cameron's adoption, there was no evidence

was no evidence to support a finding that, prior to Febjyruary 28, 2018, the respondent no longer wanted to pursue adoption, as she had made known to the department, or that she wanted to pursue reunification.

Next, we consider the court's ultimate finding that the respondent was unable or unwilling to benefit from reunification efforts. The court observed that the respondent's incarceration significantly hampered her ability to take advantage of services and referrals that could be provided to her by the department, as well as her ability to visit more frequently with Cameron. Primarily, however, the court focused on its subordinate findings that, prior to the adjudication date, the respondent attempted, unsuccessfully, to effectuate an adoption and that she had expressed her desire not to be reunified with Cameron.

As our Supreme Court explained in *In re Gabriella A.*, supra, 319 Conn. 789, in evaluating a trial court's ultimate finding that the respondent was unable or unwilling to benefit from rehabilitation efforts for evidentiary sufficiency, we ask "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in the light most favorable to sustaining the judgment of the trial court. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor

that, prior to the adjudication date, the respondent represented to the department that she wanted to abandon plans for adoption and pursue reunification. As we have explained, the respondent testified that she changed her mind about reunifying with Cameron only after she learned that Alexander R. was not his biological father.

of the trial court's ruling." (Citations omitted; internal quotation marks omitted.)

The facts established in the present case reflected that, as of the adjudication date, the respondent did not intend to play a parental role in Cameron's life and that she communicated this fact to department social workers. The facts showed that the respondent wanted to end her parental relationship with Cameron in a very obvious manner, by having Cameron adopted, and that she took steps to effectuate this plan for a private adoption by a couple of her choosing. As the court found, the planned adoption did not occur because the putative father, Alexander R., did not agree with it, not because the respondent had changed her mind about the nature of her relationship with Cameron. We recognize that there was evidence in the form of the department's investigative notes, that, prior to the adjudication date, the respondent stated to one or more department social workers that she wanted to engage in "services" and achieve a period of sobriety. In light of the respondent's unambiguous statements, as reflected in the investigative notes, that she wanted to pursue adoption and did not want to work toward reunification, however, the respondent's reference to "services" reasonably and logically could be interpreted as an indication that the respondent wanted to engage in services of some type for her own benefit; they were not necessarily inconsistent with her stated desire to pursue adoption for Cameron and to have the ability to visit with him, yet not be a parent to him. In light of the relevant evidence with respect to these events preceding the adjudication date and the court's subordinate findings, we conclude that the court reasonably determined that the petitioner proved by clear and convincing evidence that the respondent was unable or unwilling to benefit from reunification efforts. Accordingly, we reject the respondent's claim.

II

Next, the respondent claims that the court improperly found that the department made reasonable efforts to reunify her with her child. We need not reach the merits of this claim.

As our discussion of the court's decision reflects, in its analysis under § 17a-112 (j) (1), the court found that the respondent was unable or unwilling to benefit from reunification efforts. Alternatively, the court found that the department made reasonable reunification efforts in this case. The respondent, accurately observing that the petitioner did not allege in the petition to terminate her parental rights that reasonable efforts had been made, argues that the court improperly relied on this ground. See, e.g., *In re Christian P.*, 98 Conn. App. 264, 267–68, 907 A.2d 1261 (2006) (petitioner limited to grounds set forth in termination of parental rights petition). Further, the respondent argues that, even if the court could rely on this ground, the court's finding that reasonable efforts had been made was clearly erroneous. The petitioner acknowledges that it did not allege in the termination of parental rights petition that reasonable efforts had been made and for purposes of this appeal does not rely on this ground to support the court's judgment.

Under § 17a-112 (j) (1), the court may grant a petition to terminate parental rights after finding that the parent is unable or unwilling to benefit from reunification efforts *or* that the department has made reasonable reunification efforts. See footnote 7 of this opinion. In part I of this opinion, we rejected the respondent's challenge to the court's finding that she was unable or unwilling to benefit from reunification efforts. Accordingly, the petitioner did not need to prove that reasonable reunification efforts had been made.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GAYLORD SALTERS (AC 41597)

Alvord, Bright and Eveleigh, Js.

Syllabus

The defendant, who had been convicted of one count of assault of an employee of the Department of Correction, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claimed, inter alia, that the trial court abused its discretion because the sentencing court substantially relied on the state's materially inaccurate information at sentencing. *Held* that the trial court did not abuse its discretion when it denied the defendant's motion to correct an illegal sentence: the defendant could not establish that the sentencing court relied on certain claimed inaccurate information in the state's sentencing memorandum and an attached affidavit from a police detective that the defendant was a leader of a gang and that he was the subject of an active investigation by North Carolina law enforcement for ongoing criminal activity, as the police detective's sworn testimony far exceeded the minimum indicia of reliability required of information relied on by a court in sentencing and the defendant offered no evidence refuting the state's claims regarding his affiliation with the gang or that undermined the state's claim that he was a leader of the gang at the time he was sentenced; moreover, the record confirmed the trial court's finding that the sentencing court did not specifically refer to any information from a North Carolina police detective in its sentencing remarks, and the trial court discussed and applied correctly the appropriate standard of actual reliance in that it determined appropriately that there was nothing in the record that indicated that the sentencing court relied on information regarding the defendant's activities in North Carolina to fashion the defendant's sentence; furthermore, because the defendant failed to establish that the sentencing court relied on inaccurate or unreliable information, his other claims on appeal necessarily failed.

Argued September 17—officially released December 3, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of assault of an employee of the Department of Correction, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Devlin, J.*; verdict and judgment of

guilty of one count of assault of a Department of Correction employee, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the court, *Clifford*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Gaylord Salters, appeals from the judgment of the trial court, *Clifford*, *J.*, denying his motion to correct an illegal sentence. On appeal, the defendant claims that (1) the trial court abused its discretion by denying his motion to correct an illegal sentence because the sentencing court substantially relied on the state's materially inaccurate information at sentencing, (2) the trial court applied an incorrect legal standard regarding the reliability of testimonial evidence, (3) the use of materially inaccurate information at the defendant's sentencing hearing was structural error, and (4) the prosecutor's use of the allegedly inaccurate information constituted prosecutorial impropriety. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On November 24, 1994, while incarcerated at the Manson Youth Institution of the Connecticut Department of Correction for a prior offense, the defendant, who was nineteen years old at the time, was arrested and charged with two counts of assault on a correction officer in violation of General Statutes (Rev. to 1993) § 53a-167c. More than

five years later, on March 17, 2000, when the defendant was not incarcerated, the state filed an information in connection with the defendant's 1994 alleged assaults. The defendant pleaded not guilty to the charges and proceeded to trial.[1] Following a jury trial, the defendant was convicted of one of the counts of assault and acquitted of the other.[2] On May 25, 2001, the court sentenced the defendant to ten years of incarceration, execution suspended after five years, with five years of probation. On July 5, 2017, the defendant filed a motion to correct an illegal sentence, alleging that the sentencing court relied on inaccurate information submitted by the state.[3] A hearing took place on the defendant's motion on October 20, 2017. On November 1, 2017, the court denied the defendant's motion, concluding that the defendant (1) failed to establish that the state presented inaccurate information to the sentencing court and (2) failed to establish that the sentencing court relied on the purported inaccuracies. This appeal followed. Additional facts will be set forth as necessary.

We begin with our standard of review and the relevant legal principles. "[I]t is axiomatic that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . . Practice Book § 43-22. A motion to correct an illegal sentence constitutes a narrow exception to the [common-law] rule that,

[1] The state filed nearly identical informations on March 7, 2001, and March 9, 2001, and the defendant was tried based on the March 9, 2001 information.

[2] The first count was in connection with the defendant's alleged assault on Officer Patrick Marangone and the second count was in connection with the defendant's alleged assault on Officer Patrick Sampson. The defendant was found guilty of assaulting Marangone.

[3] The defendant was convicted in 2002 on unrelated charges arising out of a 1996 shooting. The court in that case sentenced the defendant to forty years of imprisonment, execution suspended after twenty-four years, with five years of probation. That sentence was consecutive to the defendant's 2001 sentence at issue in this case.

once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . Indeed, [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 783, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019).

"We review the [trial] court's denial of [a] defendant's motion to correct [an illegal] sentence under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . .

"An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is inherently contradictory. . . . Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates the defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or *his right to be sentenced by a judge relying on accurate information* or considerations solely in the record, or his right that the government keeps its plea agreement promises . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 287–88, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

The defendant first claims that the trial court abused its discretion by denying his motion to correct an illegal sentence. More specifically, the defendant contends that he established—both in his motion and at the hearing—that the state presented to the sentencing court

materially inaccurate information that the court relied on in sentencing. We disagree.

The following additional facts are relevant to our resolution of the defendant's claim on appeal. On May 23, 2001, after the defendant's conviction but prior to sentencing, Assistant State's Attorney James Clark filed a sentencing memorandum on behalf of the state. In its sentencing memorandum, the state asserted that the defendant was a leader of a violent New Haven street gang known as the Island Brothers. The state further argued that the defendant's continued affiliation with gang activity and the sale of narcotics directly contradicted any claim by the defendant in the presentence investigation report that he was changing his life for the better. Attached to the state's sentencing memorandum was an affidavit signed on May 10, 2001, by Detective Richard Pelletier, of the New Haven Police Department. According to the affidavit, Pelletier was qualified as an expert witness on New Haven gangs, particularly the Island Brothers, and he averred that the defendant was one of the operational leaders of the Island Brothers. Pelletier also averred that he had received information from Donald Eck, a detective in Greenville, North Carolina, that North Carolina authorities actively were investigating ongoing narcotic sales involving the defendant and other members of the Island Brothers.[4] Finally, Pelletier averred that Eck had informed him of the defendant's involvement in a 1997 gang related shootout in Wilmington, North Carolina.

The court conducted the defendant's sentencing hearing on May 25, 2001. At the sentencing hearing, the court reflected on the circumstances of the defendant's conviction[5] before commenting on his prior conduct

[4] Between 1997 and 1998, the defendant lived in North Carolina.

[5] The court stated that "[w]hatever happened between Officer Sampson and Officer Frazier started out as their dispute . . . which [should have] and [could have] been resolved there. . . . [T]he jury heard the evidence and they by their verdict essentially ruled that you had no business leaving

and criminal history.[6] The court then addressed the state's information regarding the defendant's affiliation with the Island Brothers. "On the negative side is this. . . . [T]his question about the Island Brothers. It's not Al Capone justice where just because someone thinks you're a member of some organization that . . . has a negative connotation all of a sudden you max somebody out. . . . I don't subscribe [to] that.

"On the other hand, belonging to an organization like that, they've got a reputation, and everybody knows their reputation. So if you choose to affiliate yourself with them, it's not like having a job at some place where you go to work every day from nine to five, come home, and bring your paycheck home. . . . So, to that extent, [it] . . . doesn't suggest a lot of positive things, but I don't see that as a major point." The court, thereafter, sentenced the defendant. The defendant did not object during sentencing to the state's sentencing memorandum or to the information contained therein.

On July 5, 2017, the defendant filed a motion to correct an illegal sentence, arguing that the court's sentence was predicated on the state's materially inaccurate information and, therefore, improper as a matter of law. In particular, the defendant claimed that Pelletier's statements in his affidavit regarding the defendant's affiliation with the Island Brothers and his purported criminal activities in North Carolina were false.

your cell to enter into that dispute. It wasn't with you. . . . [A]nd the jury found that you caused physical injury to Officer Marangone. They acquitted you on the charge involving Officer Sampson. You may disagree with that. The state may disagree with that. [But for] today everybody's got to take that as what happened."

[6] The court stated: "I think people should get the benefit of . . . the positive things in their life and, to some extent, the detriment of the negative things in their life at sentencing. You present a mixed picture. You present someone who is young when this happened. You present someone who, although charged with a serious crime, only has a misdemeanor conviction after this happened. . . . And you present yourself with someone who has declared an intent to maybe . . . make some different choices. . . . That's

The defendant contended: "[T]he sentencing court stated its view was that to some extent the defendant would get the detriment of the negative things in his life at sentencing. Further, the sentencing court articulated its position that the state's allegation of gang affiliation and activity did not have a positive effect on its sentencing decision. The sentencing court then stated that it considered this inaccurate information in crafting its sentence. . . . Therefore, the inaccurate unreliable information contained in the state's sentencing memorandum and argument resulted in a procedural violation that was committed by the trial court and that materially impacted the sentence." (Citation omitted.)

In support of his argument, the defendant relied on correspondence and freedom of information requests between the Connecticut Public Defender's Office and the Greenville, North Carolina Police Department, the Oak Island, North Carolina Police Department, the Leland, North Carolina Police Department, the Northwest, North Carolina Police Department, and the Brunswick County Sheriff's Office[7] regarding records

on the positive side. My job is to take that into consideration and I'm going to do that."

[7] In a letter from the City of Greenville dated December 5, 2013, the director of human resources stated that "the City of Greenville has not employed nor currently employs an individual by the name of Donald Eck."

In a letter from the Oak Island Police Department dated October 23, 2013, the chief of police stated that "[a] search of our records management system did not reveal any investigation/cases involving the [defendant]."

In a letter from the Leland Police Department dated October 18, 2013, the office's administrative assistant stated that "I have reviewed all case files that we have and completed a thorough search on the individuals you requested. Unfortunately I have been unable to locate anything on [the defendant]."

In a letter from the Northwest Police Department dated November 19, 2013, the sergeant stated that "Donald [Eck] is [no] longer with the Northwest Police Department and there are no files in or around May 2001 relating to [the defendant] . . . ."

In a letter from the Brunswick County Sheriff's Office dated January 22, 2014, the office's administrative assistant stated that "Donald Eck has not been employed by the Brunswick County Sheriff's Office. He was employed

concerning Eck, the defendant, and two other Island Brothers affiliates.[8] In his motion, the defendant argued: "At a minimum, the response from the director of human resources for the city of Greenville indicating that at no time did the city employ a Donald Eck, calls Detective Pelletier's veracity into question. Moreover, the lack of any record of any investigation into the defendant, Johnny Johnson, or Kwane Taylor by any North Carolina police department that employed an individual named Donald Eck, contradicts Detective Pelletier's statement that in 2001 he learned of 'active investigations' regarding these individuals."

The court, *Clifford*, *J.*, held a hearing on the defendant's motion to correct an illegal sentence on October 20, 2017. At the hearing, the defendant examined Pelletier regarding his affidavit and the assertions therein. Pelletier testified that he was surprised to hear that, contrary to his sworn statement, Eck was never employed with the Greenville Police Department. Additionally, Pelletier was unable to confirm with specificity when he had spoken with Eck about the defendant's alleged criminal activity in North Carolina. Despite averring initially that his communications with Eck happened in 2001, Pelletier later testified that he spoke with Eck during his work with the Connecticut police task force, which could have been anytime between 1995 and 1999. On cross-examination, Pelletier stated that he was more concerned with the information regarding the defendant's activities in North Carolina

by the Oak Island Police Department and was part of a task force that assisted the Sheriff's Office during the date in question."

[8] The two other Island Brothers affiliates were Kwane Taylor and the defendant's brother, Johnny Johnson. Pelletier stated in his May 10, 2001 affidavit that Kwane Taylor—along with the defendant—served as an operational leader of the Island Brothers. Pelletier added that, according to Eck, North Carolina authorities were investigating ongoing narcotics sales involving Taylor, Johnson, and the defendant, as well as a 1997 shootout in Wilmington, North Carolina involving Taylor and the defendant.

than he was with the specific police department that employed Eck.

The defendant also examined Clark regarding the sentencing memorandum and Pelletier's affidavit. Clark testified that he could not remember who drafted Pelletier's affidavit and whether the information therein was true. Clark further testified that the principal purpose of his sentencing memorandum was to refute the assertion in the presentence investigation report that the defendant was bettering his life and was no longer involved in gang activity.

After the hearing on the defendant's motion to correct an illegal sentence, the court, in a November 1, 2017 memorandum of decision, denied the motion. In its decision, the court noted that, although there may have been discrepancies in Pelletier's affidavit regarding the specific police agency that employed Eck, the letter from the Brunswick County Sheriff's Office confirmed that Eck, in fact, was employed in North Carolina with the Oak Island Police Department as part of a task force that assisted the Sheriff's Department. The court further noted that any discrepancies regarding Eck's involvement, or lack thereof, in investigations concerning the defendant and other Island Brothers associates around May, 2001, did not render the sentencing memorandum or affidavit materially inaccurate because Pelletier testified at the hearing that his conversations with Eck could have taken place in the late 1990s.

To the extent that Eck and Pelletier had ongoing telephone discussions during the late 1990s regarding the defendant's criminal activity, the court found that the defendant's arrest in 1997 in Brunswick County, North Carolina, at least corroborated his presence there. Specifically, the court stated: "This court finds from this evidence that the information Detective Pelletier received from North Carolina occurred closer to 1999. The information concerning the defendant's activities in North Carolina was more important than

which police agency the caller was employed by in that state. Besides the information from North Carolina, Detective Pelletier's affidavit also indicates his own expertise in the Island Brothers gang and the defendant's involvement with it." Finally, the court concluded that even if some of the information provided to the sentencing court was inaccurate, the defendant could not prove that the sentencing court materially relied on it in sentencing. The court stated: "The sentencing court did not specifically refer to any information from a Detective Eck or North Carolina in [its] sentencing remarks. It appears that the sentencing court discounted the value of any relevance of gang activity or the Island Brothers in the sentencing and did not rely on those claims to the detriment of the defendant."

The defendant now claims that the court improperly denied his motion to correct an illegal sentence because he established that the sentencing court relied on inaccurate information when sentencing him. We disagree.

"It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come. . . .

"Nevertheless, [t]he trial court's discretion . . . is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability. . . . As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." (Internal quotation marks omitted.) *State* v. *Robert S.*, 179 Conn. App. 831, 843–44, 181 A.3d 568, cert. denied, 328 Conn. 933, 183 A.3d 1174 (2018).

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [presentence investigation report] [a] defendant [cannot] . . . merely alleg[e] that [his report] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was *materially* inaccurate and that the [sentencing] judge *relied* on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Emphasis in original; internal quotation marks omitted.) *State* v. *Bennett*, 182 Conn. App. 71, 80–81, 187 A.3d 1200 (2018).

Applying these principles to the present case, we conclude that the court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence. The defendant maintains that the state's sentencing memorandum and Pelletier's affidavit together contained material inaccuracies on which the sentencing court relied. The first is that the defendant was a leader of the Island Brothers. The second is that the defendant, in 2001, was the subject of an active investigation by North Carolina law enforcement for ongoing criminal activity. We will address each of these purported inaccuracies in turn.

The state, through Pelletier's sworn affidavit, presented to the trial court evidence of the defendant's involvement with the Island Brothers. According to the affidavit, Pelletier testified as a qualified expert witness on New Haven gang culture in November, 1999 and December, 2000. On both occasions, Pelletier testified that the defendant was involved in gang activity as a leader of the Island Brothers. Pelletier's sworn testimony far exceeds the minimum indicia of reliability

required of information relied on by a court in sentencing. See *State* v. *Yates*, 169 Conn. App. 383, 403, 150 A.3d 1154 (2016) (concluding that trial court did not abuse discretion by denying motion to correct illegal sentence because sentencing court relied on pending arrest warrants and affidavits during sentencing), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017). Conversely, the defendant offered no evidence refuting the state's claims regarding the defendant's affiliation with the Island Brothers.[9] Short of claiming that Pelletier's statements were uncorroborated and therefore inaccurate,

[9] The defendant did argue on appeal that the state's information was inaccurate insofar as it was not based on evidence solely in the record. "[The state] also tried to persuade the court of the defendant's alleged leadership in the street gang by referring to other considerations not solely in the record. [The state] specifically referred to some photos that purportedly were entered into the [*Adams* v. *Commissioner of Correction*, 309 Conn. 359, 71 A.3d 512 (2013)] trial involving the other individuals and the defendant's brother." The state referenced these photos before the sentencing court to further corroborate Pelletier's testimony. "One of the things . . . to take note of is that although he was representing a different member of the group, Darcus Henry, who was also part of the leadership of that gang at the trial in 1999 from which the transcript is taken, John Williams was there and elected not to challenge the gang testimony by Detective Pelletier. I would submit that the reason he didn't challenge it was because of the detail that was available. There are literally dozens of photographs of this group together. There are photographs in that case that came into evidence of [the defendant] with other known members of the gang including Darcus Henry and . . . Sean Adams . . . making gang symbols, showing the Island Brothers sign . . . it's my belief, that that's why the cross wasn't done. . . . But there is a lot of information in the hands of the gang people at the New Haven Police Department that supports Detective Pelletier's testimony and his sworn affidavit done just a couple of weeks ago asserting that [the defendant] is a leader of this gang." The defendant argued in his principal appellate brief that the state made reference to the photographs to imply that the defendant was a member of the Island Brothers merely by association. Because the state's information was based on evidence not solely within the record, the defendant argues that the information is inherently inaccurate and renders any subsequent reliance on it improper. This argument fails for two reasons. First, a sentencing court is permitted to consider—and often times does—information that may not be admissible at trial under the rules of evidence. See *State* v. *Yates*, supra, 169 Conn. App. 400. Thus, the mere fact that the photographs allegedly depicting the defendant with members of the Island Brothers were not entered into

the defendant did not present any evidence that undermined the state's claim that he was a leader of the Island Brothers at the time that he was sentenced. Although the defendant proffered his arrest records as evidence of his discontinued criminal activity after a 1998 conviction, those records alone do not render Pelletier's affidavit inaccurate or unreliable. Therefore, the defendant's argument as to the first claimed inaccuracy fails.

Turning to the second claimed inaccuracy, the defendant did present evidence to the trial court that the statement in Pelletier's May 10, 2001 affidavit that "North Carolina authorities are actively investigating ongoing narcotics sales involving [the defendant] . . . and other members of the Island Brothers" was factually incorrect. In fact, the court found that Pelletier received information about the defendant from North Carolina "closer to 1999."

Nevertheless, the defendant's claim fails because he cannot establish that the sentencing court relied on the inaccurate information. The trial court concluded that the sentencing court did not rely on any inaccuracies relating to the information from North Carolina, noting that "[t]he sentencing court did not specifically refer to any information from a Detective Eck [of] North Carolina in its sentencing remarks." The record confirms the trial court's finding. The defendant responds to this dearth of evidentiary support by claiming that the trial court misapplied the reliance standard by only weighing whether the sentencing court "specifically

evidence before the sentencing court does not render the state's information inaccurate. Second, and more importantly, because the record does not reflect that the state actually presented any such photographs to the court and the court did not mention them in its sentencing remarks, the defendant cannot establish that the court relied on the photographs during sentencing, which is necessary for him to prevail on this claim even if the information was inaccurate. See *State* v. *Robert S.*, supra, 179 Conn. App. 844.

referred" to the challenged information as opposed to giving "explicit attention" to it. We fail to see any material difference in these two phrases. Furthermore, in its memorandum of decision denying the defendant's motion to correct an illegal sentence, the trial court discussed and applied correctly the appropriate standard. As stated by the trial court, actual reliance requires that the sentencing court either give explicit attention to the information, base its sentence, at least in part, on the information, or give specific consideration to the information before imposing a sentence. See *State* v. *Bennett*, supra, 182 Conn. App. 80–81. The trial court applied this standard and determined appropriately that there was nothing in the record that indicated that the sentencing court relied on information regarding the defendant's activities in North Carolina to fashion the defendant's sentence. Therefore, the trial court did not abuse its discretion when it denied the defendant's motion to correct an illegal sentence.

We have considered the three remaining issues and conclude that because the defendant failed to establish that the sentencing court relied on inaccurate or unreliable information, those claims necessarily fail.[10] Consequently, they warrant no further discussion.

The judgment is affirmed.

In this opinion the other judges concurred.

[10] In addition, the defendant's claim that we should abandon the minimal indicium of reliability standard for information considered by a sentencing court in favor of a more rigorous standard is rejected. The minimal indicium of reliability standard was set forth by our Supreme Court in *State* v. *Huey*, 199 Conn. 121, 127, 505 A.2d 1242 (1986), and has been consistently followed ever since. See *State* v. *Pena*, 301 Conn. 669, 683, 22 A.3d 611 (2011); *State* v. *Yates*, supra, 169 Conn. App. 400–403. In fact, in *Pena*, our Supreme Court explicitly declined the defendant's request that it overrule *Huey*. *State* v. *Pena*, supra, 684. As an intermediary court of appeals, we are bound by our Supreme Court precedent and may not disregard or overturn it.

STATE OF CONNECTICUT *v.* KENYON JOSEPH (AC 41379)

Lavine, Devlin and Bear, Js.

Syllabus

Convicted of the crime of assault of public safety personnel arising out of an incident in which the defendant struck a correction officer, the defendant appealed to this court. During the trial, the defendant asserted an affirmative defense of mental disease or defect. Both the state and the defendant offered testimony from expert witnesses who conducted separate competency evaluations of the defendant. The defendant's expert witness presented testimony that the defendant lacked the capacity to control his behavior in accordance with the law, while the state's expert witness testified that the defendant was capable of controlling his behavior. On appeal, the defendant claimed that the jury's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence and that the jury improperly disregarded his expert witness' conclusion that he lacked the substantial capacity to conform his conduct within the law. *Held* that the defendant could not prevail on his claim that the jury's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence, as the jury was entitled to accept or reject the expert testimony presented at trial; the defendant's claim that the jury was obligated to accept his expert witness' testimony and that its failure to do so constituted reversible error was unavailing because the jury, as the finder of fact, was the sole arbiter of the credibility of the witnesses, and the defendant failed to demonstrate any basis on which to overturn the jury's determination of the credibility of the expert witnesses.

Argued October 7—officially released December 3, 2019

Procedural History

Substitute information charging the defendant with the crime of assault of public safety personnel, brought to the Superior Court in the judicial district of New London at Norwich, geographical area number twenty-one, and tried to the jury before the court, *Jongbloed, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Thomas DeLillo*, senior assistant state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Kenyon Joseph, appeals from the judgment of conviction, rendered after a jury trial, of assault of a correction officer in violation of General Statutes § 53a-167c (a).[1] On appeal, the defendant asserts that the jury's rejection of his affirmative defense of mental disease or defect was not reasonably supported by the evidence.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant was serving a fifty-five year sentence after a 2008 conviction of felony murder, murder as an accessory, conspiracy to commit robbery in the first degree, and two counts of assault in the first degree as an accessory. *Joseph* v. *Commissioner of Correction*, 153 Conn. App. 570, 574, 102 A.3d 714 (2014), cert. denied, 315 Conn. 911, 106 A.3d 304 (2015). Following a 2010 incident in which the defendant was beaten by two fellow inmates at Corrigan-Radgowski Correctional Center (Corrigan), he was transferred to MacDougall-Walker Correctional Institution (MacDougall). Two years later, on July 3, 2012, the defendant was scheduled

[1] General Statutes § 53a-167c (a) provides in relevant part: "A person is guilty of assault of public safety . . . personnel when, with intent to prevent a reasonably identifiable . . . employee of the Department of Correction . . . from performing his or her duties, and while such . . . employee . . . is acting in the performance of his or her duties . . . (1) such person causes physical injury to such . . . employee . . . ."

[2] The affirmative defense of mental disease or defect is codified under General Statutes § 53a-13 (a), which provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

to be transferred back to Corrigan. On that day, the defendant told a correction officer at MacDougall that he did not want to return to Corrigan and, if he were returned, "he was going to assault the officers when he got there." Initially, in response to this statement, the defendant remained at MacDougall; later that month, however, he was transferred to Corrigan.

Upon his return to Corrigan, the defendant was placed on high security status, which entailed greater restrictions on his activity and more frequent searches of his cell. The defendant informed the unit manager of his cell pod that he did not want to be at Corrigan and was displeased about his high security status. The defendant requested a transfer from Corrigan on August 25, 2012, but that request was denied.

On September 10, 2012, while touring the defendant's cell pod, Warden Scott Erfe and Deputy Warden Stephen Bates stopped on the first floor of the cell pod to address the inmates about various issues. A number of inmates, including the defendant, gathered to listen to Erfe speak. While Erfe was speaking, the defendant began to pace and loudly state that he did not want to be at Corrigan, progressively getting louder as he spoke. In response, Erfe ordered the defendant to return to his cell and instructed staff to accompany the defendant. As the staff led the defendant to his cell on the second floor, he continued to shout that he did not want to be at Corrigan. When they reached the defendant's cell, he shouted something that was perceived as a threat and Erfe ordered that the defendant be brought to the restricted housing unit. As the staff led the defendant back toward the stairs, he broke free of their grasp, climbed over the railing on the second floor, and climbed down to the first floor. After landing on the floor, he approached the officers' station, where Bates and Erfe were standing, and resumed shouting, saying that he would do anything to get out of Corrigan. Bates

exited the officers' station and, with the help of Captain Robert Judd, began to lead the defendant away by the shoulder from the officers' station. After taking a few steps, the defendant swung a closed fist at Bates and struck him on the right side of his face. Judd responded by using his chemical agent on the defendant, while Bates tackled the defendant to the floor. As Bates wrestled with the defendant, he noticed that the defendant had a makeshift weapon in his hand, which Bates later learned was a sharpened toothbrush. As this was happening, other correction officers quickly rushed over and subdued the defendant, holding him to the floor. While the defendant was on the floor, one of the correction officers retrieved the makeshift weapon from next to the defendant's head.

Beginning with the defendant's descent from the second floor, the entire incident was recorded by the surveillance system. After the defendant was subdued, his escort to the restricted housing unit was filmed by a handheld camera. Following the assault, Bates' cheek was bleeding and required medical treatment.

The state charged the defendant with assaulting a correction officer in violation of § 53a-167c (a). During the trial, the defendant did not contest the allegation that he assaulted Bates; instead, he raised the affirmative defense of mental disease or defect. In regard to this defense, both the defendant and the state offered testimony from expert witnesses who conducted separate competency evaluations of the defendant. The defendant offered testimony from Andrew Meisler, a psychologist, who concluded that the defendant "lacked the capacity to effectively control his behaviors in accordance with the law" at the time of the assault. In rebuttal, the state offered the testimony of Catherine Lewis, a psychiatrist, who concluded that, at the time

of the altercation, the defendant was capable of controlling his behavior and his actions evinced a deliberate intent to assault Bates.

At the conclusion of evidence, the jury found the defendant guilty of assaulting a correction officer in violation of § 53a-167c (a). Thereafter, the defendant filed a motion to set aside the verdict and for a new trial. In support of his motion, consistent with Meisler's testimony, the defendant contended that he had proved, by a preponderance of the evidence, that he lacked substantial capacity to control his conduct within the requirements of the law and, thus, the jury's verdict was against the weight of the evidence. The court denied the motion and, subsequently, sentenced the defendant to ten years of imprisonment to be served consecutively to the sentence he already was serving. This appeal followed.

On appeal, the defendant claims that the jury's rejection of the affirmative defense of mental disease or defect was not reasonably supported by the evidence. He claims that the jury improperly disregarded his expert witness' conclusion that he lacked the substantial capacity to conform his conduct within the law. We disagree.

"The evaluation of . . . evidence on the issue of legal insanity is [within] the province of the finder of fact . . . . We have repeatedly stated that our review of the conclusions of the trier of fact . . . is limited. . . . This court will construe the evidence in the light most favorable to sustaining the trial court's [judgment] and will affirm the conclusion of the trier of fact if it is reasonably supported by the evidence and the logical inferences drawn therefrom. . . . The probative force of direct and circumstantial evidence is the same. . . . The credibility of expert witnesses and the weight to be given to their testimony and to that of lay witnesses

on the issue of sanity is determined by the trier of fact." (Internal quotation marks omitted.) *State* v. *Campbell*, 169 Conn. App. 156, 161, 149 A.3d 1007, cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016).

"Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because the demeanor, conduct and other factors are not fully reflected in the cold, printed record. . . . We, therefore, defer to the [trier of fact's] credibility assessments . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 183 Conn. App. 54, 61, 191 A.3d 1102, cert. denied, 330 Conn. 914, 193 A.3d 50 (2018).

At trial, the jury was confronted with conflicting expert testimony as to the defendant's mental capacity at the time of the incident. On appeal, the defendant challenges the jury's decision to credit Lewis' testimony over the testimony of Meisler. The defendant claims, in essence, that the jury was obligated to accept Meisler's testimony and, because it failed to do so, it was reversible error. We disagree. Our law is well settled that the finder of fact is the sole arbiter of witness credibility. See id. Accordingly, the jury was entitled to accept or reject the expert testimony presented at trial. The defendant has not provided us with any basis on which to overturn the jury's determination of the credibility of the expert witnesses.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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H. F. *v.* M. M. ET AL.
(AC 42229)

DiPentima, C. J., and Keller and Harper, Js.

Argued November 14—officially released December 3, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *Brazzel-Massaro*, *J.*

Per Curiam. The judgment is affirmed.

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NOTICE

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of November 18, 2019:

Joshua Mullin	United Technologies Corporation
Joanna Myers	Aetna, Inc.

Certified as of November 21, 2019:

Mary A. Luther	Lex Products, LLC

Certified as of November 22, 2019:

Robert L. Huffman	General Electric Company
Randy S. Saluck	Libertas Funding, LLC

Hon. Patrick L. Carroll III
Chief Court Administrator