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ORDERS

CONNECTICUT REPORTS

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SHELDON SCHULER *v.* COMMISSIONER OF CORRECTION

The petitioner Sheldon Schuler's petition for certification to appeal from the Appellate Court, 200 Conn. App. 602 (AC 41886), is denied.

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

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided January 12, 2021

STATE OF CONNECTICUT *v.* RICKIE LAMONT KNOX

The state's petition for certification to appeal from the Appellate Court, 201 Conn. App. 457 (AC 41168/AC 41644), is denied.

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

James M. Ralls, assistant state's attorney, in support of the petition.

Erica A. Barber, assigned counsel, in opposition.

Decided January 12, 2021

STATE OF CONNECTICUT *v.* RICKIE LAMONT KNOX

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 457 (AC 41168/AC 41644), is denied.

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

Erica A. Barber, assigned counsel, in support of the petition.

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

Decided January 12, 2021

ALINA LEONOVA *v.* STANISLAV LEONOV

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 285 (AC 42539), is denied.

McDONALD and KELLER, Js., did not participate in the consideration of or decision on this petition.

Campbell D. Barrett, *Jon T. Kukucka* and *Johanna S. Katz*, in support of the petition.

Charles D. Ray and *Angela M. Healey*, in opposition.

Decided January 12, 2021

STATE OF CONNECTICUT *v.* TERRY FREEMAN

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 555 (AC 43014), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court properly denied the defendant's motion to dismiss on the basis of its determination that the state had executed the arrest warrant without unreasonable delay?"

James E. Mortimer, assigned counsel, in support of the petition.

Samantha L. Oden, deputy assistant state's attorney, in opposition.

Decided January 12, 2021

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION

The petitioner Chrysostome Kondjoua's petition for certification to appeal from the Appellate Court, 201 Conn. App. 627 (AC 43322), is denied.

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

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided January 12, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 202

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

NORTHEAST BUILDERS SUPPLY & HOME CENTERS, LLC *v.* RMM CONSULTING, LLC, ET AL.

(AC 41486)

Keller, Prescott and Devlin, Js.

Syllabus

The plaintiff, a building supply company, sought to recover damages from the defendants for breach of contract after they failed to make payments owed for building materials sold to them pursuant to a credit agreement. The credit agreement was signed by the defendant M, who was the sole member of the defendants R Co. and T Co., and by the defendant J, M's husband and a building contractor, in their capacities as both buyers and personal guarantors. The defendants filed a five count counterclaim and the plaintiff moved to strike four of the counts on the ground that they did not arise out of the same transaction that formed the basis for the plaintiff's complaint. The trial court granted the motion to strike and later rendered judgment in favor of the plaintiff on the four stricken counts. Following a trial to the court, the trial court rendered judgment for the plaintiff on its complaint and on the remaining count of the counterclaim alleging breach of contract, from which the defendants appealed to this court. *Held*:

1. The trial court did not abuse its discretion in granting the plaintiff's motion to strike four counts of the defendants' counterclaim because the counts did not arise out of the same transaction that formed the basis for the complaint: the stricken counts involved issues relating to the plaintiff's use of prejudgment remedies, the propriety of the prejudgment remedies, and their legal effect, and the plaintiff's motivation in utilizing such remedies presented factual and legal issues distinct from those necessary to adjudicate whether the defendants breached the credit agreement; accordingly, the court should have rendered judgment dismissing the counts on the ground of improper joinder, and the case was remanded with direction to render a judgment of dismissal with respect to the stricken counts of the counterclaim.
2. The trial court properly rendered judgment on the merits of the complaint and the counterclaim in favor of the plaintiff:
   a. The trial court's finding that the plaintiff was the seller of the building supplies at issue in the complaint was not clearly erroneous: the defendants failed to provide any basis for this court to conclude that the court erred in viewing an uncontested allegation in the defendants' surviving count of its counterclaim as a judicial admission that the plaintiff was the seller; moreover, even if the court should not have treated the defendants' pleadings as constituting a judicial admission, there was sufficient evidence in the record to support the court's finding that the plaintiff was the seller, including the fact that the credit application identified the plaintiff as the party extending the credit, invoices

provided to the defendants had the plaintiff's name and logo printed on them and indicated that payment should be remitted to the plaintiff, all funds paid by the defendants were deposited into accounts owned by the plaintiff, and the plaintiff was the actual owner of the materials provided to the defendants.

b. The trial court's finding that J and M acted in dual capacities as buyers and guarantors was not clearly erroneous; the court was entitled to rely on the defendants' allegation in the surviving count of its counterclaim that the defendants collectively, including J and M, purchased goods and materials from the plaintiff as a judicial admission that J and M were buyers under the credit agreement.

c. Contrary to the defendants' claim, the trial court applied the proper standard in considering the defendants' defense of revocation; the court found that the defendants had failed to present evidence that established to what extent any defects in the building materials had impaired the value of the goods delivered to the defendants, which was a necessary element to justify revocation of acceptance.

d. The defendants' claim that the trial court misapplied a provision (§ 42a-2-714) of the Uniform Commercial Code in rendering judgment for the plaintiff on the breach of contract count of their counterclaim was unavailing; although the court found that the defendants had shown that some of the goods may have been nonconforming, the defendants failed to establish the value of the goods as accepted, which prevented the court from comparing the value of the goods as received to the value of the goods had they been received in proper condition.

e. The trial court's award of damages to the plaintiff was not clearly erroneous; there was evidence before the court from which it could make a fair and reasonable calculation of the amount of damages, including copies of statements that accounted for all charges and payments from the time the defendants opened the credit account through the filing of the action and it was free not to credit the evidence submitted by the defendants in support of their challenges to the damages claimed by the plaintiff.

Argued June 15, 2020—officially released January 26, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe, J.*, granted the plaintiff's motion to strike certain counts of the defendants' counterclaim and rendered judgment thereon; thereafter, the matter was tried to the court, *Arnold, J.*; judgment for the plaintiff on the complaint and the counterclaim, from which the defendants appealed

to this court. *Improper form of judgment*; *affirmed in part*; *reversed in part*; *judgment directed.*

Irve J. Goldman, with whom was *Bruce W. Diamond*, for the appellants (defendants).

Bruce L. Elstein, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The action underlying this appeal involves a dispute over payment for building supplies provided by the plaintiff, Northeast Builders Supply & Home Center, LLC, to the defendants, RMM Consulting, LLC (RMM); Todd Hill Properties, LLC (Todd Hill Properties); Maureen Morrill; and Clifford Jones. The defendants appeal, following a trial to the court, from the judgment rendered in favor of the plaintiff on its one count breach of contract complaint and from the court's earlier partial judgment rendered against the defendants on several counts of their counterclaim following the granting of a motion to strike those counts.[1]

On appeal, the defendants claim that the court improperly (1) granted the plaintiff's motion to strike four counts of their counterclaim on the ground that the counts were improperly joined because they failed the transaction test set forth in Practice Book § 10-10,[2] and (2) rendered judgment in favor of the plaintiff on its complaint and on the sole remaining count of the counterclaim because the court (a) incorrectly determined that the plaintiff was the seller of the goods at issue, (b)

[1] Because the judgment rendered on those counts of the counterclaim did not dispose of all of the counts brought by the defendants against the plaintiff, it was not immediately appealable at the time the court rendered judgment on the stricken counterclaims. See Practice Book § 61-4.

[2] Practice Book § 10-10 provides in relevant part: "In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint; and if necessary, additional parties may be summoned in to answer any such counterclaim . . . ."

wrongly concluded that the individual defendants, Jones and Morrill, were liable as buyers of the goods rather than as guarantors only, (c) failed to properly consider the defendants' defense of revocation of acceptance, (d) rendered judgment for the plaintiff despite having found that some of the goods at issue were defective and that the plaintiff had refused to remedy or replace them, and (e) incorrectly found that the plaintiff proved its damages to a reasonable degree of certainty.[3] We conclude that the court properly granted the motion to strike, but that the form of the judgment rendered on the stricken counts of the counterclaim was incorrect, and, accordingly, we reverse the judgment on the stricken counts of the counterclaim and remand with direction to render a judgment of dismissal on those counts. We otherwise affirm the judgment of the court.

The record reveals the following facts and procedural history relevant to our review of the claims on appeal.[4] In September, 2006, the defendants executed a credit application form (agreement) provided to them by an employee of the plaintiff for the purpose of establishing a $100,000 open line of credit with the plaintiff in the names of the defendants RMM and Todd Hill Properties.

[3] We have reordered, combined, or restated some of the defendants' appellate claims for purposes of clarity and comprehension. We also note that the defendants raised a number of additional claims on appeal directed at the court's decision to grant the motion to strike. Specifically, the defendants claim that the court (1) impermissibly relied on grounds not raised by the plaintiff in its motion to strike or supporting memorandum of law, (2) incorrectly concluded that the defendants had failed to state a proper cause of action for abuse of process, and (3) misinterpreted the defendants' allegation that they had not purchased goods from the plaintiff but from the plaintiff's wholly owned subsidiary as failing to state a legally cognizable counterclaim. Because we conclude that the court did not abuse its discretion by striking the four counts of the counterclaim on the basis that they failed the transaction test, it is not necessary for us to reach the merits of these additional claims of error. See also footnote 18 of this opinion.

[4] We rely on the facts as found and set forth by the court in its memorandum of decision on the merits of the plaintiff's complaint as well as on additional undisputed facts disclosed in the record.

The agreement was approved and signed by the plaintiff on September 26, 2006.

The "general terms and conditions" section of the agreement provides in relevant part that, in exchange for the extension of credit by the "[s]eller," the "[b]uyer" agrees to make payments in accordance with the terms specified in the agreement.[5] The agreement expressly defines the term "[s]eller" as including "[the plaintiff], *its subsidiaries*, divisions, or its assigns and Divisions: Bridgeport 'Do It Best' Lumber, Weed & Duryea Lumber and Home Center, and The Kitchen & Home Planning Center . . . ."[6] (Emphasis added.) The term "[b]uyer" is defined in the agreement as including "any member of the business entity" seeking credit. In addition to agreeing to make all required payments, the buyer agreed that, if legal action was needed to enforce payment, "the [b]uyer will be responsible for all reasonable costs and expenses of collection, including [attorney's] fees and court costs . . . ." As a condition of approval by the plaintiff, the agreement required that a "[p]ersonal [g]uarantor or [i]ndividual [b]uyer" sign the agreement to ensure an "unlimited guaranty of payment and a primary and unconditional obligation intending to cover

[5] Specifically, the agreement provided: "All purchases made during the statement period will be paid for within [thirty] days from the statement date. Purchases paid within such time shall not incur a [finance charge]. . . . If payment is not made in accordance with the terms specified above, the [b]uyer will be deemed to be in default, and agrees to pay finance charges computed at the rate of [1.5 percent] per month on outstanding balances remaining unpaid [thirty] days after the prior statement date for the month in which purchase was made."

[6] The record shows that these enumerated "[d]ivisions"—whose names, addresses, and phone numbers appeared with the plaintiff's name and company logo on the agreement's header—corresponded with the plaintiff's retail business names and locations, presumably as they existed when the credit application form was printed. The parties executed the agreement nearly one year after the plaintiff had acquired Northwest Lumber and Hardware as a wholly owned subsidiary, but the credit application form does not reflect this acquisition.

all existing and future indebtedness of the [b]uyer to the [s]eller including but not limited to payment of interest and attorney's fees and costs due upon default as provided above and including an[y] indebtedness in excess of the credit limit approved."

Morrill, who was the sole member of both RMM and Todd Hill Properties, signed the agreement in two places—once on a line designated for the buyer and, again, on a separate line marked "Personal Guarantor (2nd/Spouse)." Jones, who is Morrill's husband and a building contractor, signed on a line marked "Personal Guarantor or Individual Buyer."

Soon after establishing their line of credit with the plaintiff, the defendants began to purchase and receive various building materials from the plaintiff for use in several construction projects, including a project converting a property located at 11 Cornwall Road from a multifamily residence into a bed and breakfast.[7] The plaintiff provided the defendants with invoices for all materials purchased and also provided regular monthly statements for the credit account, which included any outstanding balances due.[8] Beginning in June, 2008, the defendants failed to make payments when they were due, and, by the end of July, 2008, the defendants' account had fallen into arrears.

[7] The defendants primarily were engaged in residential real estate development and construction.

[8] Invoices were generated on a triplicate form. As found by the court, "[i]f materials were delivered, the plaintiff's driver left a delivery copy of the invoice with the purchaser and brought the other two carbon copies to the plaintiff's office." The court noted that the "defendants admitted that they did not keep copies of the delivery portion of the invoice, despite some having been left at the job site." The court also indicated that the defendants presented no evidence contradicting the testimony of the plaintiff's manager, Jan Cohen, that "the prices charged for the goods and materials were the fair and reasonable amount," noting that the substance of the defendants' claims against the plaintiff concerned the delivery of allegedly defective or nonconforming goods rather than a dispute over pricing.

The plaintiff commenced the underlying action on December 31, 2008. In its one count complaint, the plaintiff alleged that the defendants had failed to pay amounts due and owing to it under the parties' agreement, despite its demands for payment. According to the complaint, the balance due and owing on the defendants' credit account was $68,886.58, plus interest. The plaintiff also alleged that it was entitled to recover attorney's fees that it incurred in seeking to collect payment. Together with the complaint, the plaintiff served the defendants with notice of an ex parte prejudgment remedy in accordance with General Statutes § 52-278f.[9]

The defendants filed their initial answer to the complaint in April, 2009. In that answer, the defendants admitted "that they purchased some items from the plaintiff" but denied that they had done so at any agreed upon price or that they had failed to make required payments. The initial answer included four special defenses and a two count counterclaim directed against the plaintiff. The counts of the counterclaim sounded in breach of contract and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

In June, 2010, the plaintiff filed notice with the court that Morrill had filed a Chapter 11 bankruptcy petition in March, 2010. This resulted in a stay of further proceedings in the underlying action until July, 2015, at which time the Bankruptcy Court, with the consent of the parties, granted relief from the automatic bankruptcy stay to allow the parties "to proceed with the state court action to conclusion."

On September 2, 2015, the defendants filed an amended answer, special defenses, and counterclaim.

[9] The agreement states that it constitutes a commercial transaction as defined by General Statutes § 52-278a, and that the buyer and guarantor expressly agreed to waive all rights to notice and a hearing before prejudgment remedies could be imposed by the seller, which remedies include the garnishment of bank accounts and the attachment of property.

In the amended answer, the defendants no longer admitted to having purchased items from the plaintiff, leaving the plaintiff to its proof on that allegation. The defendants also added a fifth special defense in which they asserted that they had not purchased any of the goods and materials referenced in the complaint from the plaintiff and that any such items were supplied by and purchased from the plaintiff's subsidiary, Northwest Lumber and Hardware (Northwest Lumber). The defendants also added two new counts to the counterclaim. Counts one and two continued to sound, respectively, in breach of contract based on the defendants' alleged receipt of defective materials and a CUTPA violation. The third count challenged, inter alia, whether the agreement was "an effective obligation or guarantee of debts incurred as a result of goods and materials sold and delivered by Northwest [Lumber]."[10] The fourth count sought to recover damages that had arisen because of the plaintiff's allegedly improper use of prejudgment remedies in this matter.

The plaintiff filed a motion to strike the amended counterclaim, arguing that the defendants had failed to join Northwest Lumber as a party despite the allegations that suggested that Northwest Lumber was the proper party plaintiff and counterclaim defendant, and that the allegations of damages arising as a result of prejudgment attachments were insufficient to state any cause of action upon which the court could grant relief. The defendants filed an objection. The court, *Radcliffe, J.*, issued an order granting the motion to strike as to counts two and four of the counterclaim without prejudice to the defendants' refiling within fifteen days. As part of that order, the court also stated: "The court makes a further finding that there is only one counterclaim defendant, which is the [plaintiff] and there is no other party to the counterclaim."

[10] It also purported to allege in the alternative that the defendants had overpaid for the goods and materials at issue or that those items were defective.

The defendants timely amended their counterclaim for a second time on March 8, 2016. Count one of the counterclaim, which they labeled as "breach of contract/reasonable reliance," and count three, which remained unidentified as to the cause of action it purported to allege, were essentially unchanged. Count two contained several new factual allegations and was labeled by the defendants as asserting a cause of action for "abuse of process/CUTPA." The defendants also made changes to count four, which purportedly now asserted a cause of action for slander of title resulting from the prejudgment remedies of attachment pursued by the plaintiff in conjunction with this action.

In response to the second amended counterclaim, the plaintiff filed an extensive request to revise, to which the defendants objected. On May 17, 2016, the court, *Hon. George N. Thim*, judge trial referee, issued an order overruling the defendants' objections with respect to the requested revisions except for a couple of objections with respect to which the court agreed with the defendants that the plaintiff improperly sought the disclosure of evidentiary materials.

Following the court's order, the defendants filed a revised counterclaim on June 22, 2016, which is the operative counterclaim at issue in this appeal. The first count of the counterclaim continued to allege breach of contract by the plaintiff. The second count of the counterclaim, which previously had asserted both abuse of process and a violation of CUTPA, now sounded in abuse of process only. The defendants moved the CUTPA allegations to a new fifth count. Significantly, the defendants revised the opening paragraphs of their first and second counts to now allege that the defendants collectively had "purchased a sundry of materials and goods *from* [*the plaintiff*]." (Emphasis added.) The third count, however, did not incorporate this revised

allegation but, instead, asserted in its opening paragraph that the allegations in the plaintiff's complaint "[arise] out of goods and materials sold and delivered by [Northwest Lumber], not [the plaintiff], to [RMM] . . . and/or the other [defendants]." Count four alleged slander of title resulting from prejudgment remedy liens of attachment, and, as already indicated, count five alleged a CUTPA violation.[11]

On June 24, 2016, the plaintiff filed a motion to strike all but the first count of the counterclaim, arguing that the remaining four counts did "not arise out of the transactions that are the basis of the plaintiff's complaint and, therefore, must be stricken." The plaintiff also filed a memorandum in support of its motion to strike. The defendants filed an objection to the motion to strike, stating as grounds for their objection that the challenged counts "are *legally sufficient* in that they *properly set forth causes of action*." (Emphasis added.) They simultaneously filed a memorandum of law in support of their objection to the motion to strike.

On August 8, 2016, following a hearing, Judge Radcliffe issued an order granting the plaintiff's motion to strike all the challenged counts of the revised counterclaim.[12] On September 22, 2016, the court, pursuant to

[11] Counts four and five of the counterclaim each incorporated by reference the contradictory factual assertions about the identity of the seller that the defendants made in their second and third counts. Although it is permissible under our pleading practices for a party "to plead various alternatives . . . even when those assertions are contradictory"; *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, 133 Conn. App. 1, 24, 33 A.3d 848 (2012); this right to plead in the alternative cannot account for a party's having alleged through incorporation two wholly irreconcilable factual assertions within a single count of a complaint or counterclaim.

[12] The court's ruling on the motion to strike stated in its entirety: "The plaintiff's motion to strike is hereby granted as to counts [two, three, four, and five]. The court finds that these counts do not [arise] out of the claim made during the breach of contract count. These matters are adequately made in count one. Count [three] should be stricken in that it does not set forth a cause of action. It is not a consumer action under CUTPA and it does not fall under the 'cigarette rule'. This is without prejudice to the right

a motion for judgment filed by the plaintiff, rendered judgment in favor of the plaintiff on the four stricken counts of the counterclaim. The plaintiff thereafter filed an answer and special defenses to the defendants' sole remaining count, in which they admitted the allegation contained in the first and only remaining count of the counterclaim that "[the defendants] purchased a sundry of materials and goods from [the plaintiff]."

The matter was assigned for a court trial before Judge Arnold. The court heard evidence over nine days beginning on September 22, 2016, and concluding on January 26, 2017. The court heard testimony from multiple witnesses and received well over 140 exhibits. The parties each filed posttrial briefs and reply briefs. On February 2, 2018, the court issued its memorandum of decision finding in favor of the plaintiff on the complaint and the counterclaim.

In its decision, the court first addressed the defendants' arguments regarding the identity of the seller of the materials for which payment was sought. The court noted that if, as argued by the defendants, Northwest Lumber was the actual seller rather than the plaintiff, "the issue becomes one of standing as it pertains to the [plaintiff's] ability to prosecute this action." The court rejected the defendants' arguments. It found that the plaintiff was the seller of the goods at issue and, accordingly, that it had standing to seek payment from the defendants pursuant to the agreement. The court based its decision on its review of the evidence presented at

of the defendant[s] to reduce or resolve the prejudgment attachment, should it not be supported by probabl[e] cause or should it be excessive."

The court later denied a motion to reargue and an amended motion to reargue filed by the defendants. After this appeal was filed, the defendants sought articulation of, inter alia, the court's ruling on the motion to strike, arguing that Judge Radcliffe's order contained several ambiguities and lacked any legal analysis supporting its conclusions. Judge Radcliffe denied the motion for articulation without comment, and this court, in response to a motion for review filed by the defendants, granted review, but denied relief.

trial, which, on balance, the court concluded, demonstrated that the defendants both knew and acknowledged that the plaintiff was the seller.[13] The court also relied in part on Judge Radcliffe's earlier ruling that the plaintiff was the only counterclaim defendant and that "there is no other party to the counterclaim," concluding that this finding was the law of the case. The court further treated the allegations that the defendants had made in their various withdrawn, amended, or superseded pleadings indicating that the plaintiff was the seller of the building materials at issue as constituting evidentiary admissions that the plaintiff "and no one else" was the seller.

The court next turned to the merits of the parties' competing breach of contract claims. As identified by the court, the plaintiff sought damages of $128,294.75, which consisted of principal and interest owed for the building materials that it provided to the defendants pursuant to the agreement. The defendants, on the other

[13] The court relied on the following evidence as supporting its decision: the plaintiff was the actual owner of the materials provided to the defendants; the invoices given to the defendants indicated that payment should be remitted to the plaintiff; the plaintiff employed all of the persons who worked at its various locations, including at Northwest Lumber's location in Cornwall Bridge; the plaintiff paid for the rent, utilities, and insurance for the Cornwall Bridge location; all funds paid by the defendants were deposited into accounts owned by the plaintiff; the plaintiff collected and paid sales taxes to the state for all materials sold out of the Cornwall Bridge location; and the plaintiff filed "state and federal tax returns for business conducted at all its locations, including the Cornwall [Bridge] location." Further, the court noted that despite the defendants' assertions that Northwest Lumber was the seller, the evidence established that the defendants knowingly made payments for materials to the plaintiff. Specifically, the court mentioned that, despite asserting that payments had been made to Northwest Lumber, Morrill had faxed authorization *to the plaintiff* to charge her credit card. The defendants also issued a check made payable *to the plaintiff*. In response to a letter from the plaintiff, written on the plaintiff's letterhead, demanding payment, Morrill sent a reply letter that referenced the balance claimed by the plaintiff, she made no mention of Northwest Lumber, and raised no concern that the plaintiff was not the actual seller of the goods at issue.

hand, claimed by way of defense and counterclaim that, inter alia, a substantial portion of the building materials at issue were nonconforming or otherwise defective and, therefore, they either had no obligation to pay the plaintiff for the materials or were entitled to consequential damages resulting from the plaintiff's refusal to repair or to replace the defective materials.[14]

In resolving the parties' claims, the court first recognized that the case had been improperly tried and briefed by the parties as a "simple debt collection action based on a simple common-law breach of contract" rather thanas a commercial contract for the sale of goods governed by the provisions of article 2 of the Uniform Commercial Code (UCC), General Statutes § 42a-2-101 et seq. After citing relevant provisions of the UCC and discussing the evidence presented at trial, the court ultimately concluded that the plaintiff had established the allegations in the complaint and that it was owed the balance on the account, plus interest, as alleged. The court also ruled for the plaintiff on the defendants' counterclaim. Although the court found that some of the materials provided by the plaintiff had been nonconforming or defective, it nevertheless concluded: "The court agrees with the plaintiff that the defendants did not plead that the goods had a different value in its counterclaim. They presented no evidence on the difference in value of the materials. They presented no evidence of any actual amounts spent to fix or repair any claimed defective

[14] The defendants claimed that the plaintiff had provided defective windows, doors, trim and siding for the 11 Cornwall Road project. They also claimed that they received defective cedar shakes for a project at 75 Todd Hill Road and a defective door for a project at 79 Todd Hill Road. In addition to their claims of defective materials, the defendants also sought damages based on the plaintiff's having changed a price quote for a railing system intended for a project at 90 Spooner Hill Road. The court determined that the defendants failed to present sufficient evidence needed to quantify its damages with respect to the 11 Cornwall Road and 75 Todd Hill Road projects, and rejected outright its claims of damages related to the 79 Todd Hill Road and 90 Spooner Hill Road projects.

goods that were measurable at the time of trial. Proof was submitted as to the claimed cost to repair, but no award can be based upon that as no defendant any longer owns such property or is under any obligation to make any such repair. The properties in question have either been foreclosed upon or sold. . . .

"The court enters a verdict for the plaintiff on its complaint and finds that the plaintiff has established that the balance on the account due and owing to the plaintiff by the defendants at the time of the complaint was $68,886.58, plus interest on that principal debt. The court enters a verdict for the plaintiff on the defendants' counterclaim, and as such there is no offset to the plaintiff's claim of the balance due and owing by the defendants." (Footnote omitted.) The court further indicated that it would schedule a postverdict hearing to determine "if the court would award attorney's fees and costs to the plaintiff and, if so, what amounts may be reasonable."[15] The court later denied the defendants' motion to reargue, and this appeal followed.

As previously indicated; see footnote 12 of this opinion; after filing this appeal, the defendants filed a motion for articulation. With respect to Judge Arnold's decision on the merits of the complaint and sole remaining count of the counterclaim, the defendants argued that the court had overlooked or failed to decide certain issues properly raised to the court, its decision was ambiguous and in need of clarification, and it failed to set forth sufficient factual or legal bases for its decision. Judge Arnold denied the portion of the motion for articulation pertaining to his decision without comment.

[15] "[A] judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988). On September 4, 2018, following a hearing, the court issued a decision awarding the plaintiff $35,346.87 in attorney's fees as well as postjudgment interest pursuant to General Statutes § 37-3a of 6 percent per annum. The defendants did not amend the present appeal or file a separate appeal challenging this ruling.

In response to a motion for review filed by the defendants, however, this court ordered Judge Arnold "(1) to articulate whether [the court] found that [Morrill and Jones] were guarantors or individual buyers of the materials that are the subject of the plaintiff's complaint and, if it found that they were individual buyers, to provide the factual basis for that finding; and, (2) to articulate whether it found that the trim that the plaintiff delivered to 11 Cornwall Road was defective and whether it found that RMM had revoked its acceptance of that trim, as well as the factual and legal basis for the court's finding."

On May 28, 2019, Judge Arnold filed an articulation in response to this court's order. In that articulation, the court indicated that it found that "Morrill and Jones acted in dual capacities as both buyers and guarantors." Although seeming to acknowledge the ambiguity in its original memorandum of decision, in which the court had indicated that Morrill and Jones had signed the agreement as "personal guarantors *and/or* individual buyers" (emphasis added), the court nonetheless explained that, in the sole remaining count of the counterclaim, the defendants, which necessarily included both Morrill and Jones, had alleged that they collectively had "purchased" goods and materials from the plaintiff, and the court viewed this allegation as a binding judicial admission that Morrill and Jones, although undisputedly guarantors, were also buyers of the goods for purposes of this action. With respect to the trim for the 11 Cornwall Road project, the court noted that it had failed expressly to address in its decision the defendants' claim that trim items were defective. Although the court found that the evidence presented supported a finding that certain trim pieces were defective, it nevertheless indicated that "[e]vidence was lacking as to any monetary amounts expended by the defendants in repairing or replacing the trim while waiting for the matter to be resolved with the plaintiff. This matter was not resolved prior to the defendants' loss of the property

through foreclosure proceedings. Thus, the court could not determine how defective trim in the noted areas of the structure affected the value of the property when the foreclosure took place."[16]

I

We begin with the defendants' claim that the court improperly granted the plaintiff's motion to strike four of their five counts of the revised counterclaim and subsequently rendered judgment on those stricken counts in favor of the plaintiff. Specifically, the defendants claim that, in striking their counts, the court misapplied the "transaction test" as set forth in Practice Book § 10-10. See footnote 2 of this opinion. We are not persuaded.[17]

[16] The defendants filed a second motion for review arguing that the court's articulation failed to address adequately all elements of revocation of acceptance and asking this court for an order requiring the trial court to articulate further its decision. This court granted review, but denied the relief requested in the motion.

[17] As previously noted, because we conclude that the court did not abuse its discretion in striking the four counts of the counterclaim on the ground that they failed to satisfy the transaction test as asserted in the motion to strike, we do not address the defendants additional claims that the court improperly (1) granted the motion to strike in part on grounds not raised by the plaintiff in its motion, (2) determined that the defendants had failed to state properly a cause of action for abuse of process, and (3) concluded that the defendants could not maintain a counterclaim based solely on allegations that the goods at issue were not purchased from the plaintiff but from Northwest Lumber. Even if we reached the merits of these additional claims, however, the defendants would fare no better in obtaining a reversal of the court's ruling on the motion to strike. In ruling on a motion to strike, a court ordinarily should limit itself to the grounds on which the proponent of the motion relies. See *Gazo* v. *Stamford*, 255 Conn. 245, 259, 765 A.2d 505 (2001). The obvious rationale underlying this rule is that it would be unfair for a court to grant a motion on a ground of which the opposing party had no notice and against which it lacked an opportunity to defend. We are not convinced that this rationale is implicated in the present case. Here, the defendants' opposition to the motion to strike the counts of the counterclaim stated that its counts were "legally sufficient in that they properly set forth causes of action," which, reasonably construed, evinces an understanding by the defendants that the plaintiff's motion to strike, in addition to invoking the transaction test, also challenged the legal sufficiency of the counts to state a proper cause of action. Furthermore, the defendants have not directed our attention to anything that undermines

At issue are counts two, three, four, and five of the revised counterclaim filed by the defendants on June 22, 2016. Count two purported to sound in abuse of process arising from the plaintiff's use of prejudgment remedies in the present action. Specifically, the gravamen of count two was that "[the plaintiff's] actions in filing prejudgment remedy attachments on [the defendants'] properties and bank accounts and its actions in filing mechanic's liens on property of customers of the [defendants] constituted an abuse of process in that such attachments and liens were filed with an improper motive and/or for an improper purpose in one or more . . . respects . . . ."

Count three, unlike the other counts at issue, was not labeled by the defendants as to the cause of action it purported to assert. It was comprised of only three paragraphs. The first two paragraphs alleged that the goods at issue in the plaintiff's complaint had been sold by Northwest Lumber and that Northwest Lumber was not a party to the agreement that was the subject of the plaintiff's breach of contract complaint. The final paragraph concluded that the defendants "sustained damages as a result of [the plaintiff] bringing this action against them and filing prejudgment remedy liens and mechanic's liens against them and [their] clients for goods that were sold and delivered by Northwest Lumber and not by the [plaintiff]."

the court's additional determination that a counterclaim that alleges nothing more than that the plaintiff was not the seller of the goods does not state any proper cause of action. Such an allegation properly can be construed only as a denial of the allegations in the complaint or an affirmative defense to breach of contract. Finally, a counterclaim sounding in abuse of process is premature and cannot lie in the very action that allegedly forms the basis for the alleged abuse of process. See *U.S. Bank National Assn.* v. *Bennett*, 195 Conn. App. 96, 107–108, 223 A.3d 381 (2019), citing *Larobina* v. *McDonald*, 274 Conn. 394, 407–408, 876 A.2d 522 (2005). Thus, the court's reliance on these additional bases for granting the motion to strike likely would provide us with proper alternative grounds for affirming the court's judgment in the present case. See *Gazo* v. *Stamford*, supra, 259.

The allegations in count four also pertained to the plaintiff's prejudgment remedies. More specifically, count four purported to assert an action for slander of title alleging, in relevant part, that the plaintiff had "caused prejudgment attachment liens to be placed against real estate owned by the [defendants], as well as against the [defendants'] bank account . . . when the [plaintiff] knew that the facts set forth in such application and affidavit were false and untrue."

Finally, count five incorporated the allegations from the earlier counts regarding the plaintiff's actions in securing prejudgment remedies. It asserted that the plaintiff's actions constituted a CUTPA violation "resulting in ascertainable losses and damages to the [defendants], including [their] inability to operate their businesses and several of such businesses were forced into bankruptcy and/or forced to close."

We now turn to the applicable law. "A counterclaim is a cause of action existing in favor of the defendant against the plaintiff and on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action. . . . A motion to strike tests the legal sufficiency of a cause of action and may properly be used to challenge the sufficiency of a counterclaim." (Emphasis omitted; internal quotation marks omitted.) *Ameriquest Mortgage Co.* v. *Lax*, 113 Conn. App. 646, 649, 969 A.2d 177, cert. denied, 292 Conn. 907, 973 A.2d 103 (2009). A motion to strike is also the proper vehicle to challenge whether a counterclaim has been properly joined with the plaintiff's action pursuant to the transaction test as set forth in Practice Book § 10-10. See *Bank of New York Mellon* v. *Mauro*, 177 Conn. App. 295, 315, 172 A.3d 303, cert. denied, 327 Conn. 986, 175 A.3d 45 (2017).[18] Although our review of a trial court's ruling on a motion to strike challenging the legal sufficiency of

[18] In *Bank of New York Mellon* v. *Mauro*, supra, 177 Conn. App. 295, this court also held "that a litigant may use a motion for summary judgment as a means of testing whether a party's counterclaims [fail to] satisfy the transaction test of [Practice Book] § 10-10." Id., 320.

a pleading is ordinarily plenary, we apply a more deferential abuse of discretion standard when reviewing whether a court properly has granted a motion to strike a counterclaim upon a finding that it does not satisfy the transaction test. See id., 317. "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 428, 35 A.3d 388 (2012), aff'd, 309 Conn. 663, 72 A.3d 1019 (2013).

As previously noted, "Practice Book § 10-10 provides that [i]n any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint. . . . This section is a commonsense rule designed to permit the joinder of closely related claims [if] such joinder is in the best interests of judicial economy. . . . The transaction test is one of practicality, and the trial court's determination as to whether that test has been met ought not be disturbed except for an abuse of discretion." (Internal quotation marks omitted.) *South Windsor Cemetery Assn., Inc.* v. *Lindquist*, 114 Conn. App. 540, 546, 970 A.2d 760, cert. denied, 293 Conn. 932, 981 A.2d 1076 (2009).

"Our Supreme Court has instructed that the [r]elevant considerations in determining whether the transaction test has been met include whether the same issues of fact and law are presented by the complaint and the [counter]claim and whether separate trials on each of the respective claims would involve a substantial duplication of effort by the parties and the courts." (Internal quotation marks omitted.) Id., 547. In other words, proper application of the transaction test requires a trial court to consider "whether a duplication of judicial effort and resources would result if the subject of

the complaint and counterclaim were tried in separate actions." *Ceci Bros., Inc.* v. *Five Twenty-One Corp.*, 81 Conn. App. 419, 423 n.3, 840 A.2d 578, cert. denied, 268 Conn. 922, 846 A.2d 881 (2004).

In ruling on the motion to strike in the present case, the court seemingly agreed with the argument advanced by the plaintiff that the challenged counts of the counterclaim did "not [arise] out of the claim made during the breach of contract count." Although the court's brief order does not contain a precise discussion of the factual or legal basis for its conclusion; see footnote 12 of this opinion; it is entirely reasonable for us to infer, in the absence of any indication to the contrary, that the court predicated its ruling on the legal reasoning offered by the plaintiff as the proponent of the motion to strike and adopted the same. In support of its argument that the transaction test was not met, the plaintiff stated: "In this case, the plaintiff has sued for simple breach of contract. Although tort claims can arise out of the same transaction as a contract claim . . . they only do so when they are so connected to the complaint that [their] consideration is necessary for a full determination of the rights of the parties. . . . Here, whether the [credit] agreement was breached has absolutely nothing to do with the manner in which [the] ex parte [prejudgment remedy (PJR)] was obtained, nor the attachments made pursuant thereto. The consideration of the second, third, fourth and fifth counts of the revised counterclaim—all solely and directly related to the ex parte PJR—is completely unnecessary to determining whether, and to what extent, the [credit] agreement was breached. As a result, the second, third, fourth and fifth counts of the revised counterclaim do not arise out of the same transactions that serve as the basis of the complaint and, therefore, they should be stricken." (Citations omitted; internal quotation marks omitted.)

We conclude on the basis of our careful review of the pleadings that the court did not abuse its discretion

by striking counts two through five of the counterclaim because the court reasonably could have concluded, as argued by the plaintiff, that, at their core, the stricken counts involved a different set of facts and law than were at issue in the breach of contract complaint. The propriety of the plaintiff's prejudgment remedies, their legal effect on the defendants and their customers, and the motivations of the plaintiff in utilizing them in this case present factual and legal issues that are distinct from those necessary to adjudicate whether the defendants breached the credit agreement that was the sole subject matter of the complaint. All the allegations made by the defendants in the stricken counts either involved issues relating to the plaintiff's use of prejudgment remedies, which, at best, are only tangentially related to the breach of contract action, or contained allegations that are simply duplicative of those contained in their response to the complaint, in the asserted special defenses, or in the remaining breach of contract count, which was not a subject of the motion to strike.

This court previously has stated that the "adjudication made by the court on the application for a prejudgment remedy is not part of the proceedings ultimately to decide the validity and merits of the plaintiff's cause of action. It is *independent of and collateral thereto* and primarily designed to forestall any dissipation of assets by the defendant. . . . [P]rejudgment remedy proceedings . . . are not involved with the adjudication of the merits of the action brought by the plaintiff or with the progress or result of that adjudication." (Emphasis added; internal quotation marks omitted.) *Orsini* v. *Tarro*, 80 Conn. App. 268, 272–73, 834 A.2d 776 (2003).

In short, we cannot conclude on the basis of the record before us that the court's decision to disallow joinder of the defendants' counts would thwart the goal of judicial economy at the heart of the transaction test

because their joinder undoubtedly would have expanded the focus of the trial proceedings to additional issues well outside the nexus of the breach of contract action before the court.[19] If the defendants elected to bring a separate action raising claims of abuse of process, slander of title and unfair trade practices flowing from the plaintiff's use of prejudgment remedies, adjudication of those claims would not necessarily "involve a substantial duplication of effort by the parties and the courts." (Internal quotation marks omitted.) *South Windsor Cemetery Assn., Inc.* v. *Lindquist*, supra, 114 Conn. App. 547.

Although we conclude that the court properly granted the motion to strike, the judgment rendered on those stricken counts nonetheless is incorrect as a matter of form. As this court recently explained, if a court determines that counts of a counterclaim are not part of the same transaction that is the subject of the complaint, the appropriate remedy is *not* a final judgment *on the merits* of the stricken counts but, rather, a judgment dismissing the counts of the counterclaim on the ground of improper joinder with the primary action. See *Bank of New York Mellon* v. *Mauro*, supra, 177 Conn. App. 320. Further, unless otherwise barred as a matter of law, such dismissal should be without prejudice to the right to replead any stricken claim in a separate action. Id. Here, rather than having rendered judgment on the stricken counts in favor of the plaintiff, the court should have rendered a judgment dismissing the stricken counts so as to preserve the defendants' right to pursue their claims, if possible, in a separate action. Because the court's judgment rendered in favor of the plaintiff

[19] This opinion should not be misconstrued as holding that, in the face of a similar counterclaim, a court necessarily would abuse its discretion if it denied a motion to strike and allowed the defendants to proceed on such counterclaim. As indicated, proper application of Practice Book § 10-10 involves common sense, practicality, and requires accounting for a myriad of factors that reasonably could lead to different results.

on the four counts of the counterclaim could be misconstrued as a judgment on the merits, we reverse that judgment and remand with direction to render a judgment of dismissal with respect to the counts at issue.

II

The defendants next claim on appeal that the court improperly rendered judgment on the merits of the complaint in favor of the plaintiff. The defendants raise several arguments in support of this claim. Specifically, they argue that the court improperly (1) relied on the allegation in their counterclaim that the plaintiff was the seller of the goods as a judicial admission and also failed to credit overwhelming evidence that the actual seller was the plaintiff's wholly owned subsidiary, Northwest Lumber, (2) found, solely on the basis of a judicial admission, that Jones and Morrill were liable for damages as buyers rather than as guarantors, (3) failed to consider and properly resolve the defendants' defense of revocation of acceptance, (4) rendered judgment for the plaintiff despite finding that the plaintiff had refused to remedy or replace certain materials that the court determined were defective, and (5) incorrectly determined that the plaintiff had proven its damages to a reasonable degree of certainty. For the reasons that follow, we are not persuaded.

A

The defendants first argue that the court improperly found that the plaintiff established that it was the seller of the goods and materials at issue in the complaint such that it was entitled to damages for the defendants' nonpayment. The defendants contend that, in making this finding, the court improperly construed and relied on an allegation in their pleading as a judicial admission by the defendants that the plaintiff was the seller of the goods at issue. Further, the defendants contend that the court failed to credit what they describe as "over-

whelming" evidence that the actual seller was the plaintiff's wholly owned subsidiary, Northwest Lumber. For the following reasons, we reject both contentions.

1

The defendants first argue that the court misconstrued an allegation in the breach of contract count of their revised counterclaim—namely, their allegation that they collectively had "purchased a sundry of material and goods *from* [*the plaintiff*]"—as a judicial admission that the plaintiff was, in fact, the seller of the building supplies at issue in this matter. We disagree.

"Factual allegations contained *in pleadings upon which the cause is tried* are considered judicial admissions and hence irrefutable as long as they remain in the case." (Emphasis added; internal quotation marks omitted.) *Bartlett* v. *Metropolitan District Commission*, 125 Conn. App. 149, 162, 7 A.3d 414 (2010), cert. denied, 300 Conn. 913, 13 A.3d 1101 (2011). "For a factual allegation to be held to be a judicial admission, the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken." *Mamudovski* v. *BIC Corp.*, 78 Conn. App. 715, 728, 829 A.2d 47 (2003), appeal dismissed, 271 Conn. 297, 857 A.2d 328 (2004). "An admission in pleading dispenses with proof, and is equivalent to proof. . . . It is the full equivalent of uncontradicted proof of these facts by credible witnesses . . . and is conclusive on the pleader. . . . A party is bound by a judicial admission unless the court, in the exercise of its discretion, permits the admission to be withdrawn, explained or modified." (Citations omitted; internal quotation marks omitted.) *Days Inn of America, Inc.* v. *161 Hotel Group, Inc.*, 55 Conn. App. 118, 126–27, 739 A.2d 280 (1999). "The distinction between judicial admissions and mere evidentiary admissions is a significant one that should not be blurred by imprecise usage. . . . While both types are admissible, their legal effect is markedly

different; judicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier. . . .

"In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation contained in its pleadings on which the case is tried, [a]n evidential admission is subject to explanation by the party making it so that the trier may properly evaluate it. . . . Thus, an evidential admission, while relevant as proof of the matter stated . . . [is] not conclusive. . . . As a general rule statements in withdrawn or superseded pleadings . . . may be considered as evidential admissions [of] the party making them, just as would any extrajudicial statements of the same import." (Citations omitted; internal quotation marks omitted.) *Nationwide Mutual Ins. Co.* v. *Allen*, 83 Conn. App. 526, 541–42, 850 A.2d 1047, cert. denied, 271 Conn. 907, 859 A.2d 562 (2004). The parties agree that whether the allegation in the defendants' counterclaim that they purchased materials from the plaintiff amounted to a judicial admission that the plaintiff was the seller of the goods involves interpretation of the pleadings and, thus, presents a question of law over which our review is plenary. See *Mamudovski* v. *BIC Corp.*, supra, 78 Conn. App. 727.

In the present case, in answering the question of who the actual seller of the building materials at issue was, the court expressly found that "the 'seller' of the goods and materials in this matter was . . . the named plaintiff, and [the plaintiff] has standing to bring this claim [for breach of contract]." The court noted multiple bases supporting this finding, including agreeing with the plaintiff's argument that the allegations by the defendants in their sole remaining count of their operative revised counterclaim dated June 22, 2016, amounted to a judicial admission that the plaintiff was the seller.[20]

[20] Although the court's recognition of the judicial admission arguably would have been conclusive and required no additional support, the court

Here, the defendants' one remaining breach of contract count in the counterclaim was, along with the complaint, a pleading on which the underlying case was tried. The defendants, who had the burden to establish that the plaintiff had breached the parties' agreement by, inter alia, supplying defective or nonconforming building materials, alleged in their counterclaim that they had "purchased a sundry of materials and goods from [the plaintiff]." The plaintiff admitted this allegation in its answer to the counterclaim. Whether the plaintiff was the party that sold the materials to the defendants unquestionably was a fact that was within the defendants' particular knowledge as the buyer of the materials, and it was a fact about which they were not likely to be mistaken. Although the defendants attempt to explain away the legal import of their admission by arguing that they were entitled to argue in the alternative that Northwest Lumber rather than the plaintiff was the actual seller, and, in fact, had alleged such in other counts of their counterclaim, those alternative allegations were contained in counts that had been stricken and, thus, were no longer a part of the pleadings on which the case was tried. The defendants never sought the court's permission to withdraw or to amend their allegation after the granting of the motion to strike, and, therefore, the court, as the trier of fact, was entitled to rely on the defendants' own factual allegations, made in their operative pleading, as conclusively establishing the fact asserted therein, without any need for additional proof. Simply put, the defendants have failed to provide any basis on which we could conclude that the court committed legal error by recognizing uncontested allegations in the defendants' own pleading as a judicial admission.

nevertheless credited other evidence admitted at trial that supported its finding that the plaintiff was the seller, including noting that the defendants had made a number of allegations in earlier, superseded or stricken pleadings that the court considered as evidentiary admissions by the defendants that the plaintiff was the seller. The defendants do not challenge the court's analysis regarding its reliance on evidentiary admissions.

We turn next to the defendants' related contention that, regardless of their admission, there was other "overwhelming" evidence before the court that Northwest Lumber was the seller. Even if we agreed that the court should not have treated the defendants' pleadings as constituting a judicial admission regarding the identity of the seller, as we have already indicated, that was not the sole basis that the court relied on in finding that the plaintiff was the seller. Contrary to the defendants' assertion, there was more than sufficient evidence in the record to support the court's factual finding that the plaintiff was the seller.

"Our standard of review of a challenge to a court's factual findings is well settled. [W]e will upset a factual determination of the trial court only if it is clearly erroneous. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Palmer*, 88 Conn. App. 330, 336, 869 A.2d 666 (2005). "Weighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role." *Faulkner* v. *Marineland, Inc.*, 18 Conn. App. 1, 4, 555 A.2d 1001 (1989).

The court, as the trier of fact, was not required to credit any of the evidence offered by the defendants to establish that Northwest Lumber, rather than the plaintiff, was the actual seller. See *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017) (trier

of fact may credit some, all, or none of conflicting evidence). The question for this court is not whether there was "overwhelming" evidence to support the position taken by the defendants and rejected by the trier, but whether there was evidence in the record from which the court reasonably could have reached a contrary finding. The following evidence in the record amply supports the court's finding that the plaintiff was the seller.

The agreement itself identifies that the plaintiff was the party extending credit to the defendants for all materials purchased. Dan Sirois, who was the salesperson who provided the credit application to the defendants and who placed their orders for materials, testified that he was employed at all relevant times by the plaintiff and had in fact told the defendants that he worked for the plaintiff.[21] The plaintiff employed all of the persons who worked at its various retail locations, including at Northwest Lumber's location in Cornwall Bridge. Sirois testified that although most materials ordered by the defendants were supplied out of inventory located at the plaintiff's Northwest Lumber/Cornwall Bridge location, the plaintiff was the supplier of all materials provided to the defendants. The plaintiff paid for the rent, utilities, and insurance for the Cornwall Bridge location. The defendants had been provided with invoices for all materials purchased, copies of which were entered as exhibits at trial. The invoices had the plaintiff's name and logo printed on them. The invoices indicated that all payments should be remitted to the plaintiff. The defendants made some payments for materials to the plaintiff. As indicated by the court, despite claiming that

[21] Sirois testified that when Northwest Lumber was purchased by the plaintiff, the plaintiff kept the former Northwest Lumber signage in place, which could be confusing at times to customers. He explained: "I've always made a point to tell clients, you know, Northwest [Lumber] is owned by [the plaintiff] and how we kept the same—it was always Northwest Lumber from the prior owners so they didn't want to change the name because it's kind of hometown atmosphere, so they kept the name of the lumberyard owned by [the plaintiff]."

Northwest Lumber was the seller and that payments had been made to it and not the plaintiff, Morrill had faxed authorization to the plaintiff to charge her credit card. The defendants also issued a payment by check that was made payable to the plaintiff. In response to a letter from the plaintiff demanding payment, which was written on the plaintiff's letterhead, Morrill sent a letter that referred to the balance that the plaintiff claimed it was owed for materials provided to the defendants, and she raised no concern in her letter that Northwest Lumber, rather than the plaintiff, was the actual seller of the goods at issue. Finally, all of the defendants' payments for material were deposited into accounts that were owned by the plaintiff. The plaintiff also collected and paid the sales taxes to the state for all materials that were sold out of its Cornwall Bridge location. The plaintiff was the entity that filed the tax returns for all its businesses, including the former Northwest Lumber location in Cornwall Bridge.

Taken as a whole, there was evidence from which the court reasonably could have found that the plaintiff was the seller of the materials as alleged in both the plaintiff's complaint and the defendants' sole remaining count of the counterclaim. The defendants' arguments to the contrary simply amount to an invitation for this court to retry the issue and, thus, are unavailing.

B

The defendants next argue that the court improperly found that Jones and Morrill were buyers of the goods sold by the plaintiff solely on the basis of a judicial admission in count one of the operative counterclaim. The defendants maintain that, in the absence of this admission relied on by the court, there was no evidentiary basis to support a finding that Jones and Morrill were buyers, and the lack of a separate count in the complaint seeking to impose liability on them as guarantors means that the judgment rendered against them was in error. We are not persuaded.

As we have already indicated, "[c]onstruction of the effect of pleadings is a question of law and, as such, our review is plenary. . . . Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial. . . . Accordingly, [t]he admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader." (Internal quotation marks omitted.) *Brye* v. *State*, 147 Conn. App. 173, 177, 81 A.3d 1198 (2013). It is unnecessary to repeat our discussion of judicial admissions, which we set forth in part II A 1 of this opinion.

In its articulation, the court found that "Morrill and Jones acted in dual capacities as both buyers and guarantors." In making this finding, the court treated the same allegation in the defendants' counterclaim that we determined established that the plaintiff was the seller of the goods as a judicial admission that also established that Jones and Morrill were buyers. Specifically, the defendants alleged in paragraph one of the sole unstricken count of the counterclaim that "Counterclaim Plaintiffs, [RMM], [Todd Hill Properties], [Morrill] and [Jones], hereinafter referred to collectively as 'Counterclaim Plaintiffs,' *purchased* a sundry of materials from [the plaintiff]." (Emphasis added.) There are no allegations in the count that seek to distinguish Morrill and Jones as guarantors only. The plaintiff admitted the entirety of this allegation in its answer to the counterclaim. It was both legally and logically sound to construe that anyone who admittedly purchased goods from the seller is a "buyer" of those goods.[22]

[22] That a party could be found to have dual status as both a buyer of goods and as a personal guarantor of debt incurred cannot be discounted as wholly implausible or illogical. There may be legal advantages for both sides in permitting a party to sign a contract for the sale of goods as both a buyer and as a guarantor. Although it is indisputable that both the buyer

As the court concluded, because this action concerns the sale of goods, relevant provisions of the UCC apply. See General Statutes § 42a-2-102 (indicating that UCC "applies to transactions in goods").[23] Buyer is defined in the UCC as "a person who buys or contracts to buy goods." General Statutes § 42a-2-103 (1) (a). Because the verb "to purchase" is generally synonymous with the verb "to buy," the allegation by the defendants in their counterclaim that they collectively, including Morrill and Jones, purchased materials from the plaintiff properly was construed by the court as an admission by Morrill and Jones that they were buyers under the agreement. The fact that they also may have been guarantors of the debt is immaterial.

The defendants suggest that it should have been "unmistakably clear" from a review of the agreement, which was admitted into evidence, that Jones and Morrill signed the agreement only as guarantors, and thus we should view the court's contrary finding as clear error. The agreement, however, is, at best, ambiguous in establishing whether Jones and Morrill signed the agreement as guarantors, buyers, or both. Jones' signature appears on a line designated for "[p]ersonal [g]uarantor *or* [i]ndividual [b]uyer." (Emphasis added.) Neither designation is crossed out or circled on the form, leaving open to

and the guarantor ultimately could be held responsible to the seller in the event of a failure to pay for goods under the contract, there are significant differences involved, both procedurally and substantively, depending on if the seller seeks to pursue a claim against a buyer or a guarantor. Furthermore, a party that is a buyer has additional duties to the seller and remedies available to it against the seller in the event of a seller's breach that would be unavailable to a guarantor. Accordingly, the court's finding is not facially implausible and, in this case, is supported by the parties' agreement.

[23] " 'Goods' " is defined in General Statutes § 42a-2-105 (1) in relevant part as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale . . . ."

The building materials at issue in this case certainly fall under that broad definition and, therefore, the commercial transactions between the parties fall within the purview of the UCC.

interpretation whether Jones signed as guarantor, buyer, or both. Morrill, the sole member of the two business defendants, signed the agreement in two places—once on a line designated for the "[p]ersonal [g]uarantor (2nd/[s]pouse)" and on a separate line as buyer in her representative capacity for the two business entities. The general terms and conditions section of the agreement, however, contained language indicating that the plaintiff was extending credit to the "[b]uyer or *any member of the business entity* . . . (hereinafter referred to as the 'buyer') . . . ." (Emphasis added.) Contrary to the defendants' assertion, therefore, the agreement is open to more than one possible interpretation as to the intent of the parties with respect to who constituted a buyer. Nevertheless, because a judicial admission is conclusive as to the facts admitted, it was not necessary for the court to look for or to consider any additional evidence or proof regarding the identity of the buyers or to resolve any ambiguity arising from the agreement. Because the court was entitled to rely on the defendants' judicial admission that they collectively purchased goods and materials from the seller and, thus, collectively were all buyers of those goods, a fact that the defendants were in a position to know, the defendants' assertion that the court's finding to that effect was clearly erroneous necessarily fails.

C

The defendants next argue that the court failed to recognize and properly address their defense of revocation of acceptance. The defendants posit that the court's analysis improperly focused on a legal standard applicable only to a claim of breach of warranty rather than addressing each of the elements of the defense of revocation of acceptance. We do not agree.

As we previously stated, this action is governed by relevant provisions of the UCC. The court's application of the UCC to the facts and circumstances in a given case

presents a mixed question of fact and law over which we exercise plenary review. See *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 98 Conn. App. 784, 792, 912 A.2d 513 (2006), cert. denied, 281 Conn. 914, 916 A.2d 55 (2007). Further, to the extent that we must interpret the UCC or determine its applicability, these each present a legal question over which we also exercise plenary review. See *Seven Oaks Enterprises, L.P.* v. *Devito*, 185 Conn. App. 534, 545, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

"Under article 2 [of the UCC], the rights and liabilities of the parties are determined, at least in part, by the extent to which the contract has been executed. The buyer's acceptance of goods, despite their alleged nonconformity, is a watershed. After acceptance, the buyer must pay for the goods at the contract rate . . . and bears the burden of establishing their nonconformity. . . . Acceptance does not, however, constitute a definitive election to waive all claims and defenses with respect to the accepted goods. If the buyer can demonstrate that he has been damaged by the nonconformity of the goods that he has accepted, he is entitled to recover such damages as he can prove. . . . Alternatively, if the buyer can demonstrate that the goods are substantially nonconforming, he is entitled, with some qualifications, to revoke his acceptance and recover the purchase price. . . . Whichever route the buyer elects, he is required to give timely notice to the seller within a reasonable time after he discovers or should have discovered the seller's breach." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Superior Wire & Paper Products, Ltd.* v. *Talcott Tool & Machine, Inc.*, 184 Conn. 10, 13–14, 441 A.2d 43 (1981).

"Under the [UCC], a buyer's revocation of acceptance is a distinct course of action not to be confused with rescission by mutual consent . . . nor is it an alternative remedy for breach of warranty. . . . When a buyer justifiably revokes acceptance, he may cancel and

recover so much of the purchase price as has been paid. . . . On the other hand, the basic measure of damages for breach of warranty is the difference between the value of the goods accepted and the value that they would have had if they had been as warranted. . . .

"Section 42a-2-608 of the General Statutes sets up the following conditions for the buyer who seeks to justify revocation of acceptance:[24] (1) a nonconformity which *substantially impairs the value to the buyer*; (2) acceptance (a) with discovery of the defect, if the acceptance is on the reasonable assumption that the nonconformity will be cured, or (b) without discovery of the defect, when the acceptance is reasonably induced by the difficulty of the discovery or the seller's assurances; (3) revocation within a reasonable time after a nonconformity was discovered or should have

[24] General Statutes § 42a-2-608 provides: "(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

"(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. *It is not effective until the buyer notifies the seller of it.*

"(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." (Emphasis added.)

The defendants have not cited to any evidence in the record demonstrating that they timely notified the plaintiff of their choice to revoke acceptance other than to point at attempts they made to get the plaintiff to remedy the defects they discovered. As stated in the commentary to § 42a-2-608, however, revocation of acceptance "will be generally resorted to only after attempts at adjustment have failed"; Conn. Gen. Stat. Ann. § 42a-2-608 (West 2009), comment (4), p. 237; which can only mean that notifying a seller of perceived defects or nonconformity in goods received and accepted could not itself constitute proper notice of an intent to revoke acceptance of those goods. Because the court did not rely on or discuss a lack of notice as a basis for rejecting the defendants' revocation of acceptance defense, we do not address this issue further other than to note it could provide an alternative ground for rejecting the defendants' argument.

been discovered; and (4) revocation before a substantive change occurs in the condition of the goods not caused by their own defects. *The buyer has the burden* of establishing any breach with respect to the goods accepted. . . . *Revocation of acceptance is possible only* [*if*] *the* [*nonconformity*] *substantially impairs the value of the goods to the buyer.* For this purpose, the test is not what the seller had reason to know at the time of contracting; the question is whether the [nonconformity] is such as will *in fact* cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances." (Citation omitted; emphasis added; footnote added; internal quotation marks omitted.) *Conte* v. *Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 120–21, 374 A.2d 144 (1976).

The defendants argue that, in ruling for the plaintiff, the court stated that, although it had sufficient evidence of the price the defendants had paid for the defective building materials, "there was no evidence as to the value of the windows, doors, and trim in their defective nonconforming condition . . . ." The defendants view this statement as evidence that the court focused on an element relevant only to proof of damages for breach of warranty, which General Statutes § 42a-2-714 (2) provides is calculated by measuring "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have if they had been as warranted." We agree with the defendants that the defense of revocation of acceptance was legally distinct from any assertion of damages for breach of a warranty. We do not agree, however, that the court's focus on the lack of evidence offered by the defendants regarding the value of the defective materials as received demonstrates that the court was applying an incorrect legal standard.

The court determined that the defendants had failed to present evidence that establishes to what extent any

defects in the building materials had impaired the value of the goods delivered to the defendants. A nonconformity that *substantially impaired the value of the goods to the buyer* was a necessary element to justify a revocation of acceptance. Thus, the defendants had the burden to demonstrate not only the existence of a defect in materials provided by the plaintiff, but also needed to provide some evidence from which the court could determine that the defect complained of had caused a substantial impairment in the value of the goods. It is this lack of evidence necessary to quantify the impairment in value that the court identified as the basis for rejecting the revocation of acceptance defense.

As the court properly recognized, the party claiming damages always has the burden of proving them with reasonable certainty, and a trial court "must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." *Bronson & Townsend Co.* v. *Battistoni*, 167 Conn. 321, 326–27, 355 A.2d 299 (1974). The court rejected and found not credible the testimony of the defendants' expert, John Downs, regarding replacement costs for nonconforming windows and doors provided for the defendants' 11 Cornwall Road project. The court concluded, among other things, that Downs' opinion was not based upon personal knowledge, that he had never inspected the windows or doors at issue, he was uncertain even of the number of windows affected, and "could not comment on whether or not settling of the new construction could have had an effect on the installed windows' [purported nonconformity]." (Internal quotation marks omitted.)

The defendants have not directed our attention to anything in the record that contradicts the evidentiary lacuna identified by the court. Instead, the defendants focus on the evidence they presented to the court

regarding the costs that would be necessary to repair the identified defects or to replace the materials. But the court rejected this evidence as failing to demonstrate damages attributable to the defendants. The defendants had never sought to repair the defects when they controlled the properties at issue and could no longer incur the purported replacement or repair costs because, as found by the court and not challenged by the defendants, they had lost title to all relevant properties in foreclosure. Accordingly, any cost associated with repairing defects or obtaining replacement materials, even if proven, did not accurately reflect a recoverable measure of damages.

D

The defendants make a related argument with respect to their breach of contract count of the counterclaim, contending that the court improperly rendered judgment for the plaintiff despite having found that the plaintiff refused to remedy or to replace goods that the court determined were defective. More specifically, the defendants claim that the court misapplied § 42a-2-714 (2). We disagree.

Whether the court properly construed and applied § 42a-2-714 (2) of the UCC presents a question of law over which we exercise plenary review. Section 42a-2-714, which describes the measure of damages available to a buyer for a seller's breach in regard to accepted goods, provides in relevant part: "(1) Where the buyer has accepted goods and given notification as provided in subsection (3) of section 42a-2-607 he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

"(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value

they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

Here, as with their revocation of acceptance defense, the defendants failed to prove any recoverable measure of damages. The court found that the defendants had failed to establish the value of the goods as accepted. Therefore, although the court found that the defendants had shown that some of the goods provided may have been nonconforming, the defendants failed to present evidence from which the court could calculate the value of the goods as they were received to compare with the value of the goods had they been received in proper condition, evidence of which presumably was the purchase price. Stated succinctly, the court's finding that the defendants had proven some of their allegations of nonconforming goods did not alleviate the defendants' burden to provide evidence from which the court could determine whether and to what extent the defendants were harmed by the nonconformities. The defendants' argument that the court misapplied § 42a-2-714 is unavailing.

E

Finally, the defendants argue that the court incorrectly determined that the plaintiff had proven the amount of its damages. According to the defendants, the plaintiff's accounting practices "were so shoddy that [it] could not prove with reasonable certainty that the defendants' owed the plaintiff anything." The plaintiff responds that the defendants have failed to demonstrate that the court's finding as to the amount of the debt owed to the plaintiff is clearly erroneous.[25] We agree with the plaintiff.

[25] The plaintiff also argues that the claim is inadequately briefed because the defendants failed to identify a standard of review. To the contrary, the defendants state in their brief that we should review whether the plaintiff proved damages with reasonable certainty under our clearly erroneous standard of review.

Well established legal principles govern our review of damage awards. In an action for breach of contract, "[t]he plaintiff has the burden of proving the extent of the damages suffered. . . . Although the plaintiff need not provide such proof with [m]athematical exactitude . . . the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 224, 990 A.2d 326 (2010). Our Supreme Court has held that "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012). In other words, we are "constrained to accord substantial deference to the fact finder on the issue of damages." Id. Under the clearly erroneous standard, we will overturn a factual finding only if "there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 225.

In the present case, the court properly stated that it placed the burden of proving damages on the plaintiff and found that that the plaintiff had "established that the [unpaid] balance on the account due and owing to the plaintiff by the defendants at the time of the complaint was $68,886.58 . . . ." Although the court did not identify with any specificity the evidence that it relied on in reaching that conclusion, numerous invoices and

account statements were submitted by the plaintiff as full exhibits. The court also heard extensive testimony about the account from several witnesses.

In particular, plaintiff's exhibit C contained copies of statements that accounted for all charges and payments from the time the defendants opened the credit account through the filing of the underlying action. A consolidated account statement with the closing date of December 31, 2008, showed recent charges of $1021.92, resulting in a total outstanding balance of $69,908.50. Subtracting those current charges for which payment was not then due and owing from the total new balance demonstrates a total overdue amount of $68,886.58, the precise amount awarded by the court as the amount due and owing under the contract when the underlying action was filed. Accordingly, there was evidence before the court from which it could make a fair and reasonable calculation of the amount of damages.

Although the defendants raised a number of challenges to the court related to damages, including claims that (1) they were charged for items that they never ordered or never received, and (2) the plaintiff had failed to credit them for certain payments they made, the court rejected each of these claims, concluding that the defendants had failed to meet their evidentiary burden of proof with respect to each claim. It was the exclusive function of the court as the trier of fact to weigh the evidence and to evaluate the credibility of witnesses presented, and it was free not to credit evidence presented in support of the defendants' claims regarding damages.

Having reviewed the evidentiary record before the court and affording the trial court the broad discretion it is entitled to in calculating damages, we are not convinced that the damages award was clearly erroneous or that a mistake was made. Accordingly, we reject the defendant's claim that the plaintiff failed to meet its

burden of proving damages "with reasonable certainty." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 780.

The form of the judgment with respect to stricken counts two, three, four and five of the counterclaim is improper, the judgment with respect to those counts is reversed and the case is remanded with direction to render judgment of dismissal on counts two, three, four and five of the counterclaim; the judgment on the complaint and on count one of the counterclaim is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DIANE WILLIAMS (AC 40953)

Elgo, Cradle and Devlin, Js.

Syllabus

The defendant, who had been convicted of the crime of larceny in the first degree, appealed to this court, challenging various evidentiary rulings by the trial court and its denial of her request to secure the attendance at trial of several out-of-state witnesses pursuant to statute (§ 54-82i). The defendant had been a finance director for the state chapter of the American Red Cross and was responsible for reporting payroll information to P Co., which produced payroll checks and made direct deposits into American Red Cross employees' bank accounts. The defendant was responsible for using SPIN, an online reporting system, to report employee salaries and benefits to the national chapter of the American Red Cross. After the defendant's employment was terminated following a merger of several American Red Cross chapters, her responsibilities were taken over by L, the chief financial officer for the Connecticut American Red Cross. L compared P Co.'s records to the SPIN reports that the defendant had submitted and discovered that the defendant had paid herself $409,647.47 more than she was entitled to while she was employed by the American Red Cross. Thereafter, the defendant gave state police detectives a written, six page statement in which she admitted that she had embezzled money from the American Red Cross. *Held*:

1. The defendant could not prevail on her claim that the trial court abused its discretion in admitting the SPIN reports into evidence pursuant to the statutory (§ 52-180) business records exception to the rule against

hearsay because nothing in L's testimony indicated that the American Red Cross prepared the SPIN reports in the regular course of business; the record plainly indicated that the three statutory requirements for the admissibility of the SPIN reports under the business records exception to the hearsay rule were satisfied, as L testified that the defendant was responsible for submitting individual payroll information to the national chapter of the American Red Cross, that the national chapter of the American Red Cross would create SPIN reports for pension and insurance purposes, and that the creation of SPIN reports was in the normal course of business for the national chapter of the American Red Cross.

2. The trial court did not abuse its discretion in sustaining various evidentiary objections by the state to certain documents and testimony that the defendant proffered at trial, the defendant having failed to demonstrate that any of the court's rulings were harmful; the state presented overwhelming evidence of the defendant's guilt, most notably her confession, which she read, signed and corrected, and which was sufficiently corroborated by her intimate knowledge of the details of the crime and the testimony of one of the detectives that the defendant reviewed and understood the statement before swearing to its accuracy.

3. The defendant's claim that the trial court abused its discretion by denying her request for certificates to subpoena out-of-state witnesses pursuant to § 54-82i (c) and by considering the timeliness of her request was unavailing:

a. The limited nature of the defendant's proffer at trial failed to demonstrate that the witnesses were material and necessary, as she provided generalized allegations in her written applications as to what they could testify to and what documents they could provide, her appellate counsel's more specific references to offers of proof at oral argument before this court pertained to collateral issues that were immaterial to whether she embezzled funds, and much of the proffered testimony would have been cumulative because similar issues had already been explored during cross-examination; moreover, the defendant made no offer of proof that the testimony of the proposed witness who was the source of the SPIN information would have challenged the reliability or authenticity of the SPIN reports.

b. The trial court's consideration of timeliness and delay as a factor in determining whether to grant the defendant certificates was not an abuse of discretion: contrary to the defendant's claim that whether she would have had the time to secure the witnesses was not relevant, a delay of the trial for an indeterminate amount of time as a result of the issuance of the certificates was not inconsequential, as the court had confirmed the trial schedule with counsel so that it could advise venirepersons of the time commitment expected of them at trial, and considered that the case had been pending for more than five and one-half years and that the defendant could have taken numerous steps to secure the testimony of the witnesses in the fifteen months since the mistrial in this case; moreover, nothing in § 54-82i (c) impaired the court's obligation to oversee the management of the trial and the impact that delays

could have on the availability of jurors, trial dates and the court's docket, and the complicated procedural and logistical consequences that arise from the issuance of certificates pursuant to § 54-82i (c) underscored the defendant's need to make timely and adequately supported applications to the court.

Argued September 10, 2020—officially released January 26, 2021

Procedural History

Substitute information charging the defendant with the crime of larceny in the first degree, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Peter A. McShane*, former state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Diane Williams, appeals from the judgment of conviction, rendered after a jury trial, of larceny in the first degree in violation of General Statutes § 53a-122 (a). On appeal, the defendant challenges the propriety of various evidentiary rulings and the denial of her request to secure the attendance at trial of several out-of-state witnesses. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. The defendant was a finance director for the American Red Cross, Middlesex County chapter (chapter). She was hired by Brenda J. Simmons, who was the executive director of the chapter. The American Red Cross employed both hourly and salaried employees; the defendant's position as finance director was a

salaried position. Unlike hourly employees, American Red Cross employees who were salaried were not entitled to overtime. As finance director, the defendant was responsible for reporting the chapter's finances to Simmons, which included payroll, accounts payable and receivable, as well as assisting Simmons in preparing budgets. From 2006 to 2010, the salary for the finance director position at the American Red Cross ranged from $49,000 to $57,000. The American Red Cross had a "use it or lose it" policy with regard to vacation time, pursuant to which employees would forfeit their unused vacation time if it was not used by March 1 of the following year.

As part of her payroll responsibilities, the defendant was required to fill out payroll information in an online data entry system and then report that information to Paychex, a payroll processing company. Paychex used that information to produce payroll checks and to make direct deposits into employees' bank accounts. The defendant was the only chapter employee responsible for communicating with Paychex. When Paychex delivered the paychecks, the defendant personally received them. Simmons was not responsible for reviewing correspondence from Paychex. Additionally, the defendant was responsible for submitting "SPIN reports." SPIN is an online reporting system utilized by local chapters of the American Red Cross to report employee salaries and benefits to the national chapter of the American Red Cross (national). SPIN reports, thus, were intended to be an accurate reflection of what a person earned as an employee of the American Red Cross.

On June 30, 2010, the defendant's employment was terminated following the merger of several chapters of the American Red Cross, which eliminated the need for her position. At that time, Paula Lajoie, the chief financial officer for the Connecticut American Red Cross, took over the defendant's responsibilities. In 2011, while conducting a closeout audit of the chapter, Lajoie

sought payroll information that had been maintained by the defendant. Despite searching the chapter's entire building, including the defendant's former office, Lajoie was unable to locate payroll records for the chapter's employees. That search raised other concerns for Lajoie, as she was unable to locate any of the payroll records that the defendant had been responsible for archiving. In addition, the defendant's work computer had been "wiped clean," and Lajoie was unable to find any of the defendant's human resource records. The defendant was uncooperative when questioned by Lajoie.

Thereafter, Lajoie obtained records from Paychex to review the defendant's compensation while employed with the American Red Cross. Lajoie discovered that the defendant's actual compensation was significantly greater than the $47,000 to $57,000 typical salary range for the position of finance director and the figures that the defendant had reported to the American Red Cross through internal SPIN reports.[1] The defendant's W-2 tax forms, which were admitted into evidence at trial, confirmed that the Paychex records accurately reflected how much the defendant had been paid by the American Red Cross. A comparison of the Paychex records to the internal SPIN reports submitted by the defendant revealed that the defendant had paid herself $409,647.47 more than she was entitled to.

On September 28, 2011, Detective Anthony Buglione, who was assigned to the state police Central District Major Crime Squad, and his partner, Detective Kevin A. Slonski, interviewed the defendant at her home regarding her inflated earnings. The defendant at that time

[1] For example, according to the SPIN reports submitted by the defendant, the defendant reported her salary to be $49,536.19 in 2006, $47,205.36 in 2007, $56,356.90 in 2008, $56,659.67 in 2009, and $43,411.71 in 2010. However, Paychex records of the defendant's compensation indicated that the actual compensation that she received was $109,202.27 in 2006, $141,715.42 in 2007, $131,989.89 in 2008, $188,809.47 in 2009, and $78,953.44 in 2010. Simmons and Lajoie testified at trial that the maximum salary a person in the defendant's position was permitted to receive from 2006 to 2010, was $57,000 annually.

agreed to provide an oral statement, which was transcribed by Buglione. After the interview was complete, the defendant signed Buglione's transcription of their conversation.[2] In that six page statement, the defendant admitted that she had embezzled money from the American Red Cross from 2006 to 2010. On the basis of that signed confession, the defendant was charged with larceny in the first degree in violation of § 53a-122 (a).[3] Following a jury trial, the defendant was found guilty of larceny in the first degree. The court rendered judgment accordingly, sentencing the defendant to a term of thirteen years of incarceration, execution suspended after eight years, and five years of probation. This appeal followed.

On appeal, the defendant raises sixteen claims of error, divided into three groupings: (1) whether the court improperly admitted her SPIN reports; (2) whether the court improperly sustained various evidentiary objections by the state; and (3) whether the court erred in its denial of her request to secure the attendance of several out-of-state witnesses.[4]

[2] After transcribing the defendant's statement, Buglione gave the defendant an opportunity to review the statement and to cross out any spelling errors or make any revisions. For those instances in which the defendant amended the statement, Buglione had the defendant mark her initials next to the cross outs to verify that she was the one making changes to the statement.

[3] General Statutes § 53a-122 (a) provides in relevant part: "A person is guilty of larceny in the first degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds twenty thousand dollars . . . ."

Larceny in the first degree is a class B felony. See General Statutes § 53a-122 (c).

[4] The defendant initially filed a self-represented brief claiming that the court improperly denied her motion to suppress the signed statement she gave to the detectives and that the evidence was insufficient to sustain her conviction. On July 8, 2019, the defendant's newly appointed appellate counsel filed a motion with this court for permission to file a substitute brief on the ground that the defendant's self-represented brief inadequately set forth the defendant's claims. This court denied that request but, sua sponte, permitted the defendant to file a late reply brief and/or supplemental brief. The court also permitted the state to file a supplemental appellee brief in the event that the defendant filed a supplemental brief. On October 22, 2019, the defendant filed a supplemental brief raising the issues before us. At oral argument before this court, the defendant's appellate counsel withdrew both pro se claims. Accordingly, we need not consider them.

I

The defendant first claims that the court abused its discretion by admitting into evidence state's exhibit 7, a spreadsheet containing the defendant's SPIN reports that summarized her biweekly salary and payroll earnings from 2006 to 2010. We disagree.

"The standard for review of evidentiary rulings is well established." *State* v. *Carpenter*, 275 Conn. 785, 815, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006). "[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. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 542, 864 A.2d 847 (2005).

The following additional facts are relevant to the defendant's evidentiary claim. At trial, the state sought to introduce into evidence the defendant's SPIN reports so that the jury could compare the figures that she had reported to national with her W-2 tax statements. That comparison would demonstrate that the defendant had received hundreds of thousands of dollars more in compensation than what she reported to national. To lay the appropriate foundation for this evidence, the state's attorney questioned Lajoie as follows:

"Q. Okay. . . . [I]s that report kept in the ordinary course of business by the American Red Cross?

"A. Yes, it was.

"Q. And are those SPIN numbers or the numbers reflected there recorded at or about the time that someone receives a paycheck for benefit purposes?

"A. Yes. They were filed each pay period."

When the state attempted to offer the defendant's SPIN report into evidence, the defendant conducted a voir dire of Lajoie, in which Lajoie conceded that she did not know who prepared the SPIN reports. The court asked Lajoie if she prepared the document, and Lajoie confirmed that she did not. The court then sustained the defendant's objection but advised the state that it might be able to admit the report with additional foundation.

Later in its direct examination of Lajoie, the state again attempted to offer the SPIN reports into evidence. The court at that time heard arguments on the admissibility of the SPIN reports. During that exchange, defense counsel argued that "one of the problems is [that the SPIN reports contained in exhibit 7 do not] even have any indicia of reliability. It just . . . doesn't even look like an official document. It has no Red Cross marking." In response, the court engaged in the following colloquy with Lajoie:

"Q. . . . [A]s far as the salary of a Red Cross employee . . . in the regular course of business, if you wanted to find out the salary of a Red Cross employee, you would go to national, and they would, basically, produce a SPIN report on that employee?

"A. Normally, you would go to a human resources file. We went to SPIN because that file was missing.

"Q. All right. But the SPIN accurately reflects the salary of a Red Cross employee?

"A. Yes.

"Q. All right. And you have observed . . . many of these . . . SPIN reports of Red Cross employees?

"A. Yes.

"Q. So, in the regular course of business for [national], they keep, if requested, SPIN reports on employees; correct?

"A. They did. They're not using the system now, so I just want to clarify.

"Q. But, back then?

"A. But, back when they did use that system . . . yes.

"Q. You know, whether someone is a . . . clerical worker or finance director . . . you could find that out; correct?

"A. Yes.

"Q. And is that information provided by the employee to national? In other words, does [the defendant] submit that to national?

"A. It was done through finance. So, in this case, it would have been [the defendant], but in her capacity as a finance person, [not as an employee]—

"Q. All right. Submitting this . . . to [national so a SPIN report could be produced?] . . .

"A. It drove some of the pension and insurance, so it was used in that capacity.

"Q. All right. And that's in the normal course of business for the national; is that correct?

"A. Yes."

In light of that testimony, the trial court admitted the defendant's SPIN report into evidence.

On appeal, the defendant argues that the court abused its discretion in admitting the defendant's SPIN reports because that evidence was hearsay and did not satisfy the requirements of the business records exception to the hearsay rule. The state counters that the SPIN reports fall under the business records exception to the hearsay

rule because testimony established that the records were "kept in the ordinary course of business by the [American Red Cross] . . . ." (Internal quotation marks omitted.)[5] We agree with the state.

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible. . . . If the proffered evidence consists of business records, the court must determine whether the documents satisfy the modest requirements under [General Statutes] § 52-180 to admit them under the business records exception to the hearsay rule." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 655, 137 A.3d 1 (2016). "To be admissible under the business record[s] exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, [1] that the record was made in the regular course of business, [2] that it was the regular course of such business to make such a record, and [3] that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . In applying the business records exception, the statute . . . should be liberally interpreted. . . . In part, this is because the statute recognizes the inherent trustworthiness of documents created for business rather than litigation purposes." (Citation omitted; internal quotation marks omitted.) *Calcano* v. *Calcano*, 257 Conn. 230, 240–41, 777 A.2d 633 (2001). "[Our Supreme Court] repeatedly has held that [i]t is not necessary . . . that the witness have

[5] Alternatively, the state argues that, (1) the defendant's hearsay claim was unreviewable because the defendant's objection at trial pertained to authenticity, not hearsay, and (2) the defendant cannot establish that the admission of the SPIN reports was harmful error due to the admission of the defendant's confession, which explicitly specified how much she stole from her employer. Because we agree with the state that the court properly admitted the defendant's SPIN reports, we need not consider those arguments.

been the entrant himself or in the employ of the business when the entry was made. . . . It is sufficient for a witness to testify that it was the regular business practice to create a document within a reasonable time after the occurrence of the event. This is sufficient to ensure that the document was created at the time when the event was fresh in the author's mind. . . . To require the defendant to produce a witness that could testify from personal knowledge as to the specific time that a particular document was made would unduly constrain the use of the business records exception and directly contradict the liberal interpretation that this court has accorded to § 52-180." (Citations omitted; internal quotation marks omitted.) Id., 241–42.

The defendant concedes that the first and third elements of the business records exception were satisfied by Lajoie's testimony. Nevertheless, she argues that the second requirement for the business records exception was not met at trial because "[n]othing in [Lajoie's] testimony indicates that the Red Cross prepared [the defendant's SPIN report] in the regular course of business." We disagree.

The defendant argues that the present case is analogous to *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 595 A.2d 839 (1991). In *River Dock & Pile, Inc.*, the plaintiff sought to admit a document into evidence pursuant to the business records exception. To do so, the plaintiff offered the testimony of a witness, who stated that the document "was kept in the [business'] files, and . . . was prepared in the ordinary course of business . . . ." Id., 795. The witness nonetheless "did not testify as to whether it was in the regular course of [the business] to make such a record or whether the record was made at or within a reasonable time of the act described in the exhibit." Id., 795–96. On appeal, our Supreme Court agreed with the defendant that the trial court had improperly admitted the document under the business records exception. Id., 797.

As the court explained, the plaintiff had offered "no testimony as to whether it was the regular business to make such a record or whether the record was made at or near the time of the act described in the report. A brief examination of the document indicates that the latter requirement was satisfied by notations in the document itself, but we find nothing in the testimony of [the witness] to indicate that it was in the regular course of business of the [business] to prepare such a record." (Footnote omitted.) Id., 796–97. The court further noted that, "[a]lthough § 52-180 is to be liberally construed, we cannot allow any of the three statutory requirements for the admission of business records to be ignored completely." Id., 797. The court thus concluded that the trial court improperly admitted the document in question under the business records exception. Id.

Unlike in *River Dock & Pile, Inc.*, Lajoie's testimony in the present case established that the American Red Cross generated SPIN reports in the regular course of business for pension and insurance purposes. During the colloquy with Lajoie, the court asked if the defendant, in her capacity as finance director, was responsible for submitting individual payroll information to national. Lajoie responded in the affirmative. The court also asked if the payroll information was submitted to national so that SPIN reports could be produced by the American Red Cross. Lajoie answered that national would create SPIN reports for pension and insurance purposes. Finally, the court asked if creating SPIN reports was "in the normal course of business for [national]." Lajoie again answered in the affirmative. The record thus plainly indicates that the three statutory requirements for the admissibility of business records were satisfied. Contra *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, supra, 219 Conn. 797. For that reason, we conclude that the court did not abuse its discretion in admitting the SPIN reports into evidence pursuant to the business records exception.

II

The defendant's second claim is that the court abused its discretion by sustaining various objections by the state. At trial, the court sustained the state's objections to (1) certain documents that were marked for identification as exhibits J, K, L, P and Q,[6] the defendant's attempt to impeach a witness named Elaine Niland through the testimony of Simmons,[7] (3) testimony by

[6] Exhibit J was a spreadsheet showing the fiscal year 2010 budget for the chapter. The court permitted the state to voir dire the defendant, who acknowledged that, although the spreadsheet showed the total salaries paid out to the entire American Red Cross, it did not show individual salaries. For example, the spreadsheet does not identify how much Simmons was paid. When the voir dire concluded, the state objected to the spreadsheet as irrelevant because "[i]t doesn't go to . . . individual salaries." The court sustained the objection, stating: "It's not relevant to what this jury has to decide . . . ."

Exhibit K was a spreadsheet of the proposed 2010 budget for the chapter, which contained a line item for total salaries for 2009 and total salaries budgeted for 2010. During voir dire, the defendant acknowledged that this spreadsheet included only total salaries, not individual salaries and, thus, would not show the defendant's salary for that year. The state again objected on relevance grounds, and the court sustained the objection, stating: "It's not relevant to what this jury has to decide, the overall gross budget for that chapter."

Exhibit L was a spreadsheet for the 2010 budget for the chapter that was submitted to national. The state objected to the relevance of that spreadsheet because, like exhibits J and K, exhibit L provided only total salaries for the chapter and did not contain individual salaries. The court sustained the objection.

Exhibit P was a consolidated income statement for the twelve month period ending June 30, 2010, that contained a line item for total salaries for the chapter. The state raised a relevance objection, which the court sustained.

Exhibit Q was the June 30, 2010 audit report for the chapter. Like the previous defense exhibits, that document did not contain the defendant's individual salary. The court sustained the state's objection to that audit report.

[7] Niland served on the chapter's board of directors and its finance committee from 1999 until approximately 2005. The defendant called Niland as a witness at trial. She testified on direct examination that, as a member of the finance committee, she maintained a binder of income statements, financial reports, budgets, and any other documents she received from finance committee meetings. According to Niland, she shredded those documents sometime after she was no longer on the finance committee.

Thereafter, the defendant called Simmons as a witness and questioned Simmons about an American Red Cross function in the fall of 2013 (a "Red Cross revisit") that Simmons had attended with Niland. The defendant asked Simmons if Niland had anything in her possession. The state objected to that line of questioning, stating that the defense "seem[ed] to be asking

the defendant that she was instructed not to cooperate with Lajoie's efforts regarding consolidation, (4) the defendant's testimony that Simmons took her personnel file home and that Lajoie did not attempt to locate Simmons' missing personnel file, and (5) the defendant's testimony that Simmons previously was the subject of an investigation. The state argues that the court's evidentiary rulings were correct, and, in the alternative, that any errors were harmless. We agree with the state's latter contention and conclude that any evidentiary error in the present case was harmless.

It is well established that, "[w]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [Our Supreme Court has] concluded that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [The court has] considered a number of factors in determining whether a defendant has been harmed by the admission or exclusion of particular evidence. Whether such error is harmless in a particular case depends [on] a number of factors, such as [1] the importance of the witness' testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case. . . . Considering these various factors, we have declared that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Citations omitted; internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 500–501, 964 A.2d 73 (2009).

questions with regard to [Simmons] to impeach . . . Niland." The state argued that such questioning was improper and immaterial. The court agreed and sustained the state's objection.

Our review of the record convinces us that the defendant has failed to meet her burden of demonstrating that any of the court's evidentiary rulings were harmful. Our conclusion is premised on the "weight of the state's evidence absent the contested [exhibits or] testimony . . . ." (Internal quotation marks omitted.) *State* v. *Johnson*, 171 Conn. App. 328, 339, 157 A.3d 120, cert. denied, 325 Conn. 911, 158 A.3d 322 (2017). At trial, the state presented overwhelming evidence of the defendant's guilt, most notably her six page confession. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("[a] confession is like no other evidence").

Here, the defendant's statement to the detectives was drafted over a period of ninety minutes and was handwritten by Buglione. Buglione testified that the defendant read and signed the confession, and made corrections to the statement. In that statement, the defendant described, in painstaking detail, how she embezzled funds from the American Red Cross. The defendant stated that she began embezzling money after she "figured out" that "there was a button" on the Paychex data entry system that "automatically doubled your paycheck." According to the defendant, starting in 2005, she made approximately $65,000, but she should have earned approximately $53,000 to $55,000 that year. The defendant stated that, in 2006, she "began to really take a lot of money from my payroll" and had paid herself "approximately $110,000" that year, which she acknowledged "was approximately $50,000 more than [she] was entitled to." With respect to 2007, the defendant stated that she was paid approximately $141,000 when her salary "should have been less than $60,000." She also indicated that she "began to add hours and add comp time and cash in vacation time" in 2007. When the defendant ran out of vacation time, she stated, she "began to fictitiously add vacation time that [she] certainly was not entitled to." The defendant further stated that she

paid herself "approximately $132,000" in 2008, and $189,000 in 2009. In January, 2010, after learning that "[her] job was going to be eliminated at some point during the year" due to consolidation among local chapters of the American Red Cross, the defendant admitted that she "continued to take the additional money for as long as [she] could" and paid herself approximately $80,000 for only six months of work. In addition, the defendant explained in her statement why she stole from the American Red Cross. The defendant stated that she began having "financial difficulties" in 2005, stemming in part from mortgage obligations and the cost of her daughter's college tuition. "Based on these bills," the defendant stated, she "began inflating [her] pay from the Red Cross." The defendant also indicated that another reason why she stole from her employer was "just impulse on [her] part," stating that she "knew that it was easy to doctor [her] paycheck because [Simmons] never checked." In that statement, the defendant acknowledged that she was "aware of what she was doing but was unable to stop," and that she was "trapped, financially, and needed a way out."

As our Supreme Court has observed: "[A] confession, if sufficiently corroborated, is the most damaging evidence of guilt . . . and in the usual case will constitute the overwhelming evidence necessary to render harmless any errors at trial." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 645, 881 A.2d 1005 (2005); see also *Milton* v. *Wainwright*, 407 U.S. 371, 372–73, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972). In the present case, the defendant's signed confession is sufficiently corroborated. First, the defendant's "intimate knowledge of the details of this crime . . . provide[s] strong corroboration for [her] confession." *State* v. *Shifflett*, 199 Conn. 718, 752, 508 A.2d 748 (1986). The defendant's statement to the detectives was drafted over a period of ninety minutes. See *State* v. *Stevenson*, 269 Conn. 563, 596, 849 A.2d 626 (2004). The defendant's

confession also was corroborated by Buglione, who testified that the defendant reviewed and understood the statement before swearing to its accuracy. See *State* v. *Iban C.*, supra, 646. Because the evidentiary rulings in question are not constitutional in nature,[8] the defendant bore the burden of demonstrating harmful error. See *State* v. *Bonner*, supra, 290 Conn. 500–501. In light of the signed confession that properly was admitted into evidence and before the jury, we conclude that the defendant has failed to establish the harmfulness of any of the allegedly improper evidentiary rulings by the court.

III

The defendant also claims that the court abused its discretion by denying her request for certificates to subpoena several out-of-state witnesses pursuant to General Statutes § 54-82i (c) and by considering the timeliness of her requests. We do not agree.

The following additional facts are relevant to the defendant's claim. On the first day of trial, May 9, 2017, the defendant filed several applications for certificates to summon the attendance of out-of-state witnesses. The applications requested the attendance of Brian Rhoa,[9]

[8] The defendant asserts that the court's decision to sustain various objections by the state was a violation of her constitutional right to a complete defense. The defendant did not preserve that claim at trial and now requests review 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). Because her claims are evidentiary, and not constitutional, in nature, that request is unavailing. See *State* v. *Golding*, supra, 240–41 ("Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label. . . . For example, once identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed." (Citations omitted.)).

[9] The defendant first challenges the denial of her request to subpoena Rhoa, the chief financial officer for the American Red Cross, who resided in Washington, D.C. According to the application filed by the defendant, Rhoa signed an Internal Revenue Service form 990 for the 2011–2012 tax year on February 13, 2014. In an accompanying schedule O supplemental information form, Rhoa described the circumstances surrounding the defendant's embezzlement. The defendant alleged initially that the Rhoa's testi-

Douglas Brownley,[10] Ann Shearer,[11] Frank R.

mony was material and necessary to establish that the defendant was an employee of the American Red Cross. At trial, defense counsel elaborated that the reason Rhoa's testimony was material and necessary was because he "indicate[d] [in the schedule O] that the chapter removed the executive director and finances are monitored by the division vice president in [national's] headquarters." Thus, because Simmons previously testified that she retired after twenty-nine years, the defendant wanted to offer Rhoa's testimony to establish that Simmons' employment was terminated by the Red Cross and that she did not leave voluntarily. The court denied the request to subpoena Rhoa, finding that the defendant did not meet her burden of showing that the statement was material and necessary. However, the court advised the defendant that its ruling did not preclude her from filing a motion to admit the Internal Revenue Service statement as a business record.

[10] The defendant next claims that the court improperly denied her request to subpoena Brownley, a corporate claim manager in risk management at the American Red Cross. Brownley also resided in Washington, D.C. In her application, the defendant stated that Brownley was a material and necessary witness "because he was . . . the claims manager assigned to the defendant's matter" who could testify as to "[t]he insurance policy in effect at the time of the incident in the information," "[t]he deductible on the [American Red Cross'] insurance policy," "[a]ll amounts paid to the [American Red Cross] by insurance," "[a]ll documents submitted or received by the [American Red Cross] regarding this claim," and "[t]he content of e-mail[s] sent and received in the ordinary course of business by this witness . . . ."

At trial, the court questioned defense counsel concerning the relevance of such testimony:

"The Court: How is that relevant to what this jury has to decide? Whether there's any insurance coverage or not is not relevant, to my understanding. I mean, it might be relevant in terms of, if, per chance, this jury made a guilty finding, as far as a potential disposition with whether a policy paid X amount . . . for restitution purposes. But that's not relevant for a jury to hear unless there's something else you want to add.

"[Defense Counsel]: There is. . . . I understand what the court is saying and anticipated that. But my point was that, in conversations between [Brownley] and the insurance carrier . . . there was discussion about . . . what was the actual loss, does anybody know her salary, can we find her salary, where is it. And, so, it was the same kind of discussion that's already come into evidence in this case a little bit. And . . .

"The Court: . . . You have challenged appropriately in your cross-examination the salary . . . and the jury is going to make a decision on that. So, I don't know what Brownley would add to that discussion . . . that's any different as far as the salary of [the defendant]. I mean, in other words, that that's [not] material and necessary for somebody who resides in [Washington, D.C.] unless there's something else on there that I'm not.

"[Defense Counsel]: No. It would—it would focus on that.

"The Court: I'm going to deny the request for that individual."

[11] The defendant's third subpoena request was for Shearer, vice president of Human Resource Enterprise Services at the American Red Cross. Shearer also resided in Washington, D.C. The defendant claimed that Shearer was a material and necessary witness because she was "Chief Investigator Frank Favilla's superior, who was an integral part of the [American Red Cross'] investigation into the actions" of the defendant. The defendant thus argued that Shearer could testify "[t]hat the [d]efendant was an employee of [the] Red Cross," and that Shearer could provide "[a]ll notes, documents, memorandums, communications, forensic accounting records of the investigation conducted by the [American Red Cross] regarding the defendant, including, but not limited to, all communications with . . . Favilla," and "[t]he content of e-mails sent and received in the ordinary course of the business by [Shearer] . . . ."

Favilla,[12] and Teala Brewer.[13] That same day, after the

From the outset, the court was skeptical of the necessity of Shearer's testimony and the document requests:

"The Court: "You know, my understanding, and based on my involvement in this trial so far, is that [the state] . . . basically, has an open file policy. My understanding is, they've given you all the documents relevant that you've requested. . . . So, is some of this duplicates of what has already been done here?"

Defense counsel then made the following offer of proof as to why she believed Shearer's testimony and the document requests were material and necessary:

"[Defense Counsel]: [M]y understanding from e-mails that I obtained from . . . Favilla last year is that [Shearer] was the source of the SPIN information. She was the one that was responsible for sending it to Rebecca C. Williams, who was an assistant for [Favilla], who then sent it to [Lajoie]. So, [Shearer] would be, my understanding, the source of the SPIN information and be able to say how it was—if that is, in fact, the SPIN information.

"The Court: But, as a practical matter, how—if I agreed with your position that this is material and necessary information for this jury to hear, how are you going to have [Shearer] in a few days—

"[Defense Counsel]: I know.

"The Court: —based on the protection that the statute affords a potential witness? I mean, you know, you tell me. I mean, the statute—

"[Defense Counsel]: I mean, she may—she may agree to come. I mean—

"The Court: I have . . . no problem with that.

"[Defense Counsel]: Right.

"The Court: No problem with that. I mean, you could call her as soon as we adjourn today. I mean, there's no prohibition on that . . . . And, you know, maybe all these people will agree to come. But you're asking me, pursuant to statute, to make a finding that their proposed testimony is material and necessary . . . . I think we're all in agreement with what that entails, going to a circuit court or a superior court down in—most of these are in [Washington, D.C.], some of these are in Virginia, where, you know, a notice is sent, summons is sent for somebody to come a few weeks down the road. Then, that judge has to make an independent finding. You know, we've [reviewed] the dates of this case before. This case is not going to be delayed, and I think you'll agree with that. So, you know, there's nothing wrong with you contacting her in ten minutes; maybe she'll come on up. So, I'm going to—what you've presented to me—I make a finding there's nothing material and necessary that is needed for this particular client."

[12] The fourth application at issue was the request to subpoena Favilla, an investigation officer at the American Red Cross who resided in New York. The defendant argued that Favilla was a material and necessary witness because "he [was] an investigator of the alleged larceny of which the defendant is accused" who could testify that "the defendant was an employee of [the] Red Cross," and the defendant also sought "[a]ll notes, documents, memorandums, communications, forensic accounting records of the investigation conducted by the [American Red Cross] regarding the defendant," "[i]nformation contained in a binder referenced in [an] e-mail dated Tuesday, August 16, 2011, at 2:07 p.m.," and "[a]ll e-mails sent and received by this witness in the course of his duties . . . ." The court disagreed that any of the testimony or records sought were material and necessary, and denied the subpoena request.

[13] The defendant's final subpoena request sought to secure the attendance of Brewer, vice president of the Office of Investigations, Compliance and Ethics at the American Red Cross, who resided in Washington, D.C. The defendant claimed that Brewer was a material and necessary witness because she was Favilla's "superior who was an integral part of the [American Red Cross'] investigation into the actions of [the defendant]." The defendant further argued that Brewer could testify "[t]hat the defendant was

jury was selected, both parties had a preliminary discussion with the court about the defendant's application for out-of-state subpoenas. The prosecutor noted that, on the basis of his experience, applications of this nature "take some time." The court then discussed the procedural history of the case and noted that the defendant's first trial had ended in a mistrial on February 9, 2016, approximately fifteen months before the defendant filed the applications at issue.[14] The court asked defense counsel if, during that fifteen month window, she had taken advantage of Practice Book § 40-44,[15] which allows for the depositions of out-of-state witnesses in criminal cases for discovery purposes. Defense counsel conceded that she had not. In response, the court stated that, although it "might be very inclined to grant [the] requests," the defendant needed to have the witnesses in court when

an employee of [the] Red Cross" and that she could provide "[a]ll notes, documents, memorandums, communications, forensic accounting records of the investigation conducted by the [American Red Cross] regarding the defendant, including, but not limited to, all communications with [Favilla]," "Frank Aiello, senior director, Information Security," and "Rebecca C. Williams, senior director Office of Investigations, Compliance and Ethics . . . ." Finally, the defendant claimed that Brewer could testify as to "[t]he content[s] of e-mail[s] [that Brewer] sent and received in the ordinary course of the business . . . ."

At trial, the court asked defense counsel why obtaining e-mails from Brewer was necessary, and the following colloquy transpired:

"The Court: Now, on these e-mails, you have these e-mails on [Brewer], right, a lot of them? . . .

"[Defense Counsel]: Yeah."

Accordingly, the court denied the application for Brewer's testimony.

[14] The defendant's first trial ended in a mistrial because new information in the form of undisclosed e-mails between American Red Cross employees required a delay in the proceedings. The court made specific findings on the record that the mistrial was through no fault of the state or the defendant.

[15] Practice Book § 40-44 provides: "In any case involving an offense for which the punishment may be imprisonment for more than one year the judicial authority, upon request of any party, may issue a subpoena for the appearance of any person at a designated time and place to give his or her deposition if such person's testimony may be required at trial and it appears to the judicial authority that such person:

"(1) Will, because of physical or mental illness or infirmity, be unable to be present to testify at any trial or hearing; or

"(2) Resides outside of this state, and his or her presence cannot be compelled under the provisions of General Statutes § 54-82i; or

"(3) Will otherwise be unable to be present to testify at any trial or hearing; or

"(4) Is an expert who has examined a defendant pursuant to Sections 40-17 through 40-19 and has failed to file a written report as provided by such sections."

the state rested its case. The court at that time stressed that the case was "going to . . . go forward" and that no further delays would be entertained. The court deferred ruling on the defendant's subpoena requests. No further action was taken by the defendant until May 12, 2017, when, following the conclusion of the second day of evidence, the court heard arguments on why each requested witness was material and necessary. The court thereafter concluded that all five of the out-of-state witnesses were not material or necessary and declined to issue the subpoenas.

A

We first address the defendant's contention that the court improperly denied her request for certificates to subpoena several out-of-state witnesses. Our review of that claim is governed by the abuse of discretion standard. See *State* v. *Bennett*, 324 Conn. 744, 758–59, 155 A.3d 188 (2017).

The defendant's request was filed pursuant to § 54-82i (c), which provides in relevant part: "If a person in any state . . . is a material witness in a prosecution pending in a court of record in this state . . . a judge of such court may issue a certificate under seal of the court, stating such facts and specifying the number of days the witness will be required." "Section 54-82i is Connecticut's adoption of the 1936 revision of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings [Uniform Act]." *Hickey* v. *Commissioner of Correction*, 82 Conn. App. 25, 38, 842 A.2d 606 (2004), appeal dismissed, 274 Conn. 553, 876 A.2d 1195 (2005). "[T]he Uniform Act provides a procedure for summoning a witness in the state of the forum to testify in another state, and a procedure for summoning a witness from another state to testify in proceedings in the forum." 25B Am. Jur. Pleading and Practice Forms, Witnesses § 29 (2020). Pursuant to the provisions of the Uniform Act, an issuing court must

make a predicate finding that the proposed witness is a material witness. Id. The defendant argues that each of the witnesses was material and necessary and that the court improperly considered the timeliness of the request in denying the applications.[16]

[16] A plain reading of the text of § 54-82i (c) indicates that the court must find only that an out-of-state witness is a material witness in order to trigger the processes pursuant to its provisions; it does not require a showing that the witness is necessary. In reliance upon such representations by the defendant, the court may "issue a certificate under seal of the court, stating such facts and specifying the number of days the witness will be required." General Statutes § 54-82i (c). By contrast, the court of the sending state, as a signatory to the Uniform Act, must determine whether a person who is the subject of the certificate is a material *and* necessary witness, relying, in part, on the representations in the certificate of the issuing court as "prima facie evidence . . . ." D.C. Code § 23-1502 (b) (2001). To illustrate, § 54-82i (b), which applies when this state is the sending state under the Uniform Act and is nearly identical to the provisions of the Uniform Act in the jurisdictions that have adopted it, provides in relevant part that "such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at such time and place for such hearing. If, at such hearing, the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution . . . the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending . . . at a time and place specified in the summons. At any such hearing, the certificate shall be prima facie evidence of all the facts stated therein. . . ." General Statutes § 54-82i (b).

In the present case, the defendant has maintained in her applications, in her argument to the court and on appeal to this court that the legal standard is materiality and necessity. This appears to be a fair interpretation of the burden the defendant must ultimately demonstrate because the certificate on which the sending court relies for prima facie evidence in support of its ultimate conclusions is generated by the issuing court. Indeed, the record reflects that, in arguing that each of the proposed witnesses was material and necessary, the defendant submitted applications that specifically cited to this state's provisions of the Uniform Act and the provisions of the respective sending jurisdictions. In addition, the defendant drafted the certificates with a representation that each respective witness was a material and necessary witness in the proceeding to which the court, upon approval, would have to attest under seal of the court.

Therefore, although the trial court, in order to trigger the procedures pursuant to § 54-82i (c), is required to determine only that a witness is material, and then represent the factual basis for its finding in the issuing

We have reviewed each of the defendant's written applications and verbal offers of proof to the court on May 12, 2017, as to why the witnesses were material and necessary. On the basis of that review, we conclude that the defendant failed to demonstrate that Rhoa, Brownley, Shearer, Favilla, and Brewer were material and necessary witnesses. In the written applications, the defendant provided generalized allegations that each witness: (1) could testify that "the defendant is an employee of [the American] Red Cross" (which was never in dispute), and (2) "would be able to provide . . . [a]ll notes, documents, memorandums, communications, [and] forensic accounting records of the investigation conducted by the [American Red Cross] regarding the defendant" (which the defendant had already obtained from prior discovery).; At oral argument before this court, the defendant's appellate counsel gave more specific offers of proof for some of the witnesses. For example, appellate counsel referred to defense counsel's proffer that Rhoa "indicate[d] [in the schedule O] that the chapter removed the executive director and [that] finances are monitored by the division vice president in [national's] headquarters."

certificate conveyed to the sending state, we agree with the defendant that consideration of whether a witness is necessary comes within the ambit of the court's discretion. Because a successful application will ultimately require the court of the sending state to make a finding, inter alia, of necessity as well as materiality, the issuing court's independent inquiry as to whether the witness is necessary is not unreasonable or inappropriate in order to assure itself that (1) the process is not a futile exercise, and (2) any facts supporting the necessity of a given witness be included in the certificate for review by the sending state. Cf. *Davenport* v. *State*, 289 Ga. 399, 406–407, 711 S.E.2d 699 (2011) (Hines, J., dissenting) (In challenging the majority opinion's holding that the issuing court is limited toa finding of materiality, the dissent observed that, "even assuming arguendo that a showing of 'necessity and materiality' is different and a greater burden than that of solely 'materiality,' it defies logic and flies in the face of judicial economy that the [legislature] intended that the threshold showing . . . be lesser than that before the court in the foreign jurisdiction. To find otherwise permits a petitioner to utilize the judicial time and resources of two jurisdictions when the petitioner cannot initially prevail, and allows 'necessity' to be decided solely by a court other than the one faced with the trial of the case.").

Defense counsel proffered that, because Simmons previously testified that she retired voluntarily, Rhoa's testimony would impeach Simmons' testimony as to that issue. Defense counsel also proffered that Brownley had "been involved with the insurance carrier . . . for coverage regarding this case" and that "there [were] discussion[s] about . . . what was the actual salary . . . ." We agree with the state that the court did not abuse its discretion in finding that each of those arguments pertained to collateral issues, were immaterial to the question of whether the defendant embezzled funds from the American Red Cross, and that much of this proffered testimony would be cumulative because similar issues had already been explored during cross-examination.

Even the proffered testimony of Shearer, who, as the defendant asserted in her offer of proof, was the source of the SPIN information, was insufficient to establish that the court abused its discretion. We agree with the defendant that Shearer's testimony could have been relevant, material and necessary *if* defense counsel had proffered that Shearer's testimony would have challenged the reliability or authenticity of the defendant's SPIN reports that were offered by the state and admitted into evidence. However, the defendant did not make such an offer of proof to the court. Instead, the defendant merely proffered that Shearer could testify as to whether the SPIN information was accurate. In light of the limited nature of the proffer submitted by the defendant, we conclude that the court did not abuse its discretion in denying the defendant's subpoena request.

B

The defendant also argues that the court improperly rested its decision on the time constraints because "[w]hether or not [the] defendant would have had the time to secure the witness is not relevant." To the extent that the court considered timeliness and delay as a

factor in determining whether to grant certificates pursuant to § 54-82i, we agree with the state that the court did not abuse its discretion.

As we previously noted, § 54-82i is Connecticut's adoption of the Uniform Act. See *Hickey* v. *Commissioner of Correction*, supra, 82 Conn. App. 38. "Decisions from other states . . . are valuable aids for interpreting the provisions of [the Uniform Act]." Id., 39. In *Commonwealth* v. *Dirring*, 354 Mass. 523, 238 N.E.2d 508 (1968), the Supreme Judicial Court of Massachusetts considered the issue of timeliness in the context of the Uniform Act. In that case, the defendant filed an application on the fifth day of trial requesting the attendance of thirty-two out-of-state witnesses from various states. Id., 529. The trial court denied the application, in part, because the request was filed at a "late stage" in the proceeding. Id. On appeal, the Massachusetts Supreme Judicial Court held that the denial of the untimely applications was proper, stating: "The defendant would have us read the word 'may' as 'shall'. This we decline to do. Some discretion must reside in the trial judge to prevent abuses. . . . This is particularly so in a case where a defendant tardily presents nothing more than a list of names of persons residing in all parts of the United States, and requests their presence without any prima facie showing that their testimony is relevant or competent." (Citation omitted.) Id., 530. The court continued: "It appears that [the defendant] was arraigned on the indictment on June 10, 1963; the trial commenced on April 6, 1964. Thus [the defendant] had approximately ten months in which to prepare for trial. . . . The denial of the motion reveals no abuse of discretion." Id. Other courts likewise have recognized that one of the requirements under the Uniform Act is that "the petition must be made in a timely manner." *People* v. *Williams*, 114 Mich. App. 186, 201, 318 N.W.2d 671 (1982), appeal denied, 422 Mich. 909, 368 N.W.2d 246 (1985).

We reiterate that the plain language of § 54-82i (c) provides in relevant part that, "[i]f a person in any state . . . is a material witness in a prosecution pending in a court of record in this state . . . a judge of such court *may* issue a certificate under seal of the court, stating such facts and specifying the number of days the witness will be required. . . ." (Emphasis added.) The text of § 54-82i (c) thus confers a degree of discretion in ruling on such applications even when a defendant has demonstrated that a witness is material to the case. See *State* v. *Bennett*, supra, 324 Conn. 758–60 (despite materiality of witness, court did not improperly deny certificate when defendant provided insufficient information regarding address of witness). The defendant here would have us read the discretionary language contained in § 54-82i (c) as requiring trial courts to issue subpoenas even when the applications are filed in the middle of trial. We decline to do so.

As this court has observed, "[t]he trial court has the responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice." (Internal quotation marks omitted.) *State* v. *Stevenson*, 53 Conn. App. 551, 562, 733 A.2d 253, cert. denied, 250 Conn. 917, 734 A.2d 990 (1999); id., 563 (affirming denial of continuance to subpoena out-of-state witness when defendant failed to specify probable length of delay and could not assure trial court he would be successful in obtaining witness' attendance). The interpretation of § 54-82i (c) advanced by the defendant would impede those core responsibilities of the trial court.

In the present case, the court reviewed the trial schedule on May 3, 2017, just prior to the beginning of jury voir dire and nearly one week before the defendant filed her applications with the court. At that time, the court confirmed with counsel its understanding from an earlier chambers conference on April 28, 2017, that,

with evidence, deliberation, and additional days, the jury would be advised that the trial will require a commitment of ten days, from May 11 through 24, 2017. When the court asked, "Am I correct with the schedule, counsel?," both counsel for the defendant and the state agreed that they had represented to the court that that should be sufficient time for trial and that the schedule was correct. On May 9, 2017, following jury selection, the defendant filed seven applications for the issuance of certificates for out-of-state witnesses. In its initial review of the applications, the court voiced its concern that the case had been pending more than five and one-half years and that it was "the oldest case in this judicial district." The court also questioned whether the defendant had utilized Practice Book § 40-44 (2), which allows for depositions of out-of-state witnesses in criminal cases for discovery purposes when their "presence cannot be compelled under the provisions of General Statutes § 54-82i . . . ."[17]

Notably, the defendant does not dispute the court's concern that issuance of the certificates would have triggered significant delay, requiring an independent hearing by the courts in each of the respective jurisdictions.[18] At the same time, the defendant concedes that,

[17] The court's inquiry was particularly apt because, as the defendant acknowledged, fifteen months had elapsed since the mistrial in the case due to numerous late disclosed documents and e-mails by the American Red Cross. See footnote 14 of this opinion. Under such circumstances, the usual purpose of a mistrial and continuance is to mitigate the prejudice to the defendant and to allow her the opportunity to prepare for trial, including engaging in additional discovery as necessary. The court's query thus follows naturally from the defendant's applications, which, in our view, are more akin to discovery requests than representations of how each witness is material and necessary to the defense.

[18] The court observed that such hearings require notice and summons for a hearing to be scheduled potentially weeks later, and it also referenced the statutory protections afforded to potential witnesses. Specifically, the provisions of § 54-82i (b) require that the sending court determine that the witness is material and necessary, and also that it will not cause undue hardship to the witness to be compelled to attend and to testify.

if she had sought a continuance, the trial court would not have abused its discretion in denying that request. She asserts, instead, that she is seeking only the right to subpoena witnesses. See *State* v. *Godbolt*, 161 Conn. App. 367, 375–79, 127 A.3d 1139 (2015) (court did not abuse its discretion when it declined to grant defendant continuance after considering timeliness, unspecified length of delay and failure to utilize available procedures to secure testimony of out-of-state witness), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).[19] When, as in the present case, the inevitable effect of issuing a certificate results in delaying the trial for an indeterminate amount of time, that distinction is inconsequential. Nothing in § 54-82i impairs the court's obligation to oversee the management of the trial and the impact that unwarranted and unforeseen delays can have on the availability of jurors, trial dates, and the court's overall docket.[20] In fact, the complicated procedural and logistical consequences arising from the issuance of certificates pursuant to § 54-82i; see footnotes 16 and 18 of this opinion; underscore a defendant's need to make timely as well as adequately supported applications to the court. See *State* v. *Cecil J.*, 99 Conn. App. 274, 292–93, 913 A.2d 505 (2007) (trial court did not abuse its discretion in denying defendant continuance to meet with witness to review documents on morning

[19] See also *State* v. *Rivera*, 268 Conn. 351, 379, 844 A.2d 191 (2004) ("[a]lthough resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the defendant's personal responsibility for the timing of the request" (internal quotation marks omitted)); *State* v. *Bethea*, 167 Conn. 80, 86, 355 A.2d 6 (1974) (trial court did not abuse its discretion in denial of motion for continuance when defendant made no showing of good faith and diligence in attempting to find alibi witnesses during five months between his arrest and trial).

[20] See *State* v. *Godbolt*, supra, 161 Conn. App. 376 ("The trial court has the responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . Once a trial has begun . . . a defendant's

of witness' testimony when defendant had months beforehand to interview potential witnesses and to seek judicial orders to permit him to question witnesses who might otherwise be unable to testify), aff'd, 291 Conn. 813, 970 A.2d 710 (2009). Here, the court had confirmed the trial schedule with counsel so that in the course of jury selection, it could advise the venirepersons of the time commitment expected of them. In addition to evaluating the merits of the application, the court also considered that the case had been pending for five and one-half years, and that, since the mistrial fifteen months before, the defendant could have taken numerous steps to secure the testimony of the witnesses.[21] See footnotes 14 and 17 of this opinion. Without a more substantive showing of materiality and necessity, and given the timing and context of the defendant's request, we conclude that the court did not abuse its discretion in denying the applications.[22]

right to due process . . . [does not entitle] him to a continuance upon demand." (Internal quotation marks omitted.)).

[21] On May 12, 2017, the court stated that, since the mistrial, counsel could have "contacted [the witness] at any time . . . sent [her] investigator . . . [taken] a deposition . . . or [she] could . . . contact him [that] afternoon." Although the court would not delay the trial, the court also repeatedly stated that the defendant was free to contact the witnesses to determine their willingness and availability to testify. See footnote 11 of this opinion.

[22] The defendant also claims that the court violated her constitutional right to present a defense under the sixth amendment to the United States constitution by denying her applications to subpoena out-of-state witnesses. Having failed to preserve that constitutional claim at trial, the defendant requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

Aside from a cursory reference to *Golding*, the defendant has failed to engage in an analysis of the four prongs of *Golding*. Because we conclude that this claim is inadequately briefed, we consider it abandoned. See, e.g., *State* v. *Tierinni*, 144 Conn. App. 232, 238, 71 A.3d 675 ("It is well established that . . . this court will not review claims that were not properly preserved in the trial court. . . . [A] defendant's failure to address the four prongs of

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TYWAN EDWARDS (AC 42327)

Lavine, Alexander and Flynn, Js.*

Syllabus

Convicted, after a jury trial, of the crime of larceny in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from his alleged reception of stolen property in the form of one Rolex watch, taken from the victims, D and S, during a break-in of their home by the defendant's brother. During the break-in, three Rolex watches were stolen, valued by D at $11,000, $5000 and $16,000. Over the defendant's objection, the trial court admitted a portion of a police detective's testimony regarding a surveillance video that showed the defendant, in a business that provided jewelry appraisals, in possession of one of the Rolex watches. The defendant claimed, inter alia, that the evidence was insufficient to support a finding that the value of the watch in his possession was more than $10,000 or that he knew the watch was stolen as required by statute (§ 53a-123). *Held*:

1. The evidence was sufficient to support the defendant's conviction of larceny in the second degree:

   a. There was sufficient evidence that the value of the property was more than $10,000 as required by § 53a-123 (a) (2): although D testified that one of the stolen watches had been worth only $5000, his description of that watch did not include diamonds, and D testified that the watch seen with the defendant in the surveillance video was his diamond Rolex, recognizable by its dial and condition, which he had valued at $16,000, a clerk on the surveillance video examined the watch and confirmed the authenticity of diamonds on it to be genuine, and the jury was entitled to weigh the credibility of conflicting evidence that S had valued all three watches below $10,000, and, thus, the jury could have found that the defendant possessed the $16,000 watch; moreover, the state established that D owned the watch and D's testimony as to the value of his watch was sufficient to put the question of value before the jury, which was entitled to weigh that evidence in finding the value of the property.

Golding amounts to an inadequate briefing of the issue and results in the unpreserved claim being abandoned." (Internal quotation marks omitted.)), cert. denied, 310 Conn. 911, 76 A.3d 627 (2013).

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

b. Sufficient evidence existed for the jury to find that the defendant knew the property was stolen; the jury's decision to find the defendant not guilty of various other crimes with which he had been charged by the state did not preclude the inference that the defendant likely knew the property was stolen, as there was testimony that the watch the defendant possessed days after the break-in was stolen, the defendant made inconsistent statements to the police as to how he had obtained the watch, there was evidence that the defendant's brother had been identified by the victims as a suspect in the break-in, had been connected to the stolen watches and had been found in possession of D's stolen documents, and the defendant made an unsolicited reference to the police regarding identifications of the suspects made through Facebook that suggested the defendant was aware of the circumstances of the break-in.

2. The defendant could not prevail on his claim that the trial court erred in admitting evidence of the police detective's testimony regarding the surveillance video over his objection, even if improper, as he failed to show that the admission caused him harm; the challenged testimony was cumulative of D's testimony in which he identified the Rolex as his from the surveillance video, which the defendant did not challenge.

3. The trial court did not abuse its discretion in excluding certain impeachment evidence by prohibiting the defendant from cross-examining S on the topic of her drug related arrest subsequent to the break-in: S testified that she had a criminal history and had sold drugs from her home but that she stopped selling pills after the break-in, and the court denied defense counsel's request to cross-examine S regarding the underlying facts of her arrest months after the break-in during which she had been found with a large quantity of cash and pills on her person, as she was ultimately convicted of illegal storage, not sale, of narcotics, that conviction did not tend to prove that she had lied about ceasing to sell controlled substances, and impeaching S on this issue would be an overly speculative collateral inquiry requiring impermissible extrinsic evidence; moreover, the court gave the defendant wide latitude to impeach S through other means.

4. The defendant's claim that the trial court committed structural error by using a certain phrase in its jury instruction concerning reasonable doubt was unavailing; our Supreme Court repeatedly has upheld the use of instructions employing the very language challenged by the defendant, and this court, as an intermediate appellate court, was bound by that controlling precedent.

Argued September 21, 2020—officially released January 26, 2021

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, robbery in the first degree, conspiracy to commit larceny in the

first degree, assault in the second degree and larceny in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *B. Fischer*, *J.*; verdict of guilty of larceny in the second degree; thereafter, the court, *B. Fischer*, *J.*, denied the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Jeremiah Donovan, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Karen M. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Tywan Edwards, appeals from the judgment of conviction, rendered after a trial to a jury, of larceny in the second degree in violation of General Statutes § 53a-123 (a) (2). On appeal, the defendant claims that (1) the evidence was insufficient to convict him of larceny in the second degree because the jury could not reasonably have found that (a) he possessed stolen property of a value greater than $10,000 or (b) he knew the property in his possession was stolen, (2) the trial court improperly admitted into evidence the testimony that the victim had identified items in a video exhibit as his, in violation of the rule against hearsay, (3) the trial court improperly prevented the defendant from cross-examining a witness concerning her alleged drug dealing subsequent to the crime with which he was charged, and (4) the trial court erroneously instructed the jury concerning reasonable doubt. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, are relevant to this appeal. Samantha Frank (Samantha)[1] generated income by working from her New Haven home as a psychic and by illegally selling pills for which a prescription was required. One of her customers was Dijon Edwards, the wife of the defendant's brother, Terrance Edwards. On January 20, 2017, Dijon Edwards, accompanied by a man named Marcel, purchased pills from Samantha.[2] Later that night, two men broke into the Franks' home, disturbing Samantha, her husband David Frank (David), and two relatives who were staying with them. One of the men wore a mask covering the lower portion of his face. The intruders threatened them at knifepoint and stabbed David in the arm. The men took Samantha's purse and David's wallet and left. The purse contained car keys, jewelry, and, notably, three expensive watches: a Rolex Daytona watch and two Rolex Datejust watches, which are at the center of this appeal.

The Franks (victims) called the police, and David went to the hospital. The victims later spoke to Detectives Kealyn Nivakoff and her partner, members of the New Haven Police Department. The victims gave statements and identified the defendant and his brother as the intruders.

The police undertook surveillance of Terrance Edwards' residence. On January 23, 2017, Nivakoff interviewed Terrance Edwards and Dijon Edwards. At the conclusion of Terrance Edwards' interview, Nivakoff searched his wallet and found a driver's license and Social Security card belonging to David. The police made contact

[1] Samantha identified herself as "Samantha Rose DeMetro" when she was sworn in to testify, but she subsequently answered to the name "Mrs. Frank" during her testimony. For clarity, we will refer to her in this opinion as Samantha Frank.

[2] Samantha and her husband David Frank both testified that they did not know Marcel's last name.

with the defendant that day, at which time they searched him with his consent and found a business card from the American Diamond Exchange on his person. The police subsequently searched Terrance Edwards' residence and recovered jewelry and a Rolex Daytona. The victims identified the items the police found in the residence as theirs, which they had last seen on the night of the break-in. A search of Dijon Edwards' phone revealed a photograph of a Rolex watch. When David was shown a printout of the photograph from Dijon Edwards' phone, he identified his stolen property, writing "Yes, that's my [Rolex] Daytona watch 5-16-18" on the photograph.

Nivakoff went to the American Diamond Exchange and spoke to a clerk, Kathleen Kirker, who had interacted with the defendant. Nivakoff viewed a surveillance video of the defendant's visit. The video depicted the defendant showing Rolex watches to Kirker and asking about an appraisal to establish the value of one of the watches and to confirm the authenticity of the diamonds on it.

An arrest warrant for the defendant was issued in February, 2017. The defendant was located in Arizona and arrested in November, 2017. He was charged with burglary in the first degree, robbery in the first degree, conspiracy to commit larceny in the first degree, assault in the second degree, and larceny in the second degree.

At trial, the state offered the photograph of the Daytona watch found in Dijon Edwards' phone into evidence. The defendant did not object. David identified the handwriting on the photograph as his own and again identified the Daytona watch in the photograph as his. The Daytona watch itself was admitted into evidence. In his testimony, David also identified one of the watches in the American Diamond Exchange surveillance video

as his Rolex Datejust. Neither of the two stolen Datejust watches was recovered by the police.

On June 19, 2018, the jury found the defendant guilty of larceny in the second degree by receiving stolen property, but found the defendant not guilty of the other charges. The court accepted the jury's verdict and imposed a total effective sentence of eight years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the state presented insufficient evidence to prove beyond a reasonable doubt that the value of the stolen property in his possession exceeded $10,000, or that he knew that one of the watches in his possession had been stolen. We disagree.

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

beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 447, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020).

The following additional facts inform our analysis. On the afternoon before the break-in, Samantha sold Percocet pills to Dijon Edwards. Marcel was present during the transaction. In order to complete the transaction, Samantha retrieved the pills from her purse, and while she did this, the contents of her purse were visible to Dijon Edwards and Marcel. During the break-in that night, the intruders threatened the victims with knives, yelling, "Where's the purse?" The intruders ultimately departed with Samantha's purse. Following the break-in, she told police that her purse contained three Rolex watches valued at $6000, $4000, and $8500.

Samantha suspected one of the intruders was related to Dijon Edwards. Dijon Edwards was a frequent customer of Samantha, and Dijon's husband, Terrance Edwards, had sold Samantha cocaine in the past. The day after the break-in, the victims contacted Marcel in the hope that he could provide more information about the intruders. Marcel shared with the victims several Facebook photographs of individuals whom he believed may have been involved in the break-in. These Facebook photographs depicted the defendant and his brother. Believing the individuals in the Facebook photographs were the intruders, the victims shared their suspicions with Nivakoff on January 22, 2017. The victims went to the police department to give statements, at which time they were shown photographic arrays. Both victims identified the defendant and his brother Terrance Edwards as the intruders from their recollection of the event.

The police detained the defendant near his brother's residence. The police found a business card from American Diamond Exchange on the defendant's person. On

the business card were the words "Rolex Watch Appraisal $250 Call for Apt." Nivakoff interviewed the defendant after the police detained him. The defendant stated to her that he was not on good terms with his brother but planned to meet him for drinks that day. The defendant explained to Nivakoff that he had acquired the American Diamond Exchange card during a visit to the store concerning a Michael Kors watch he was wearing. When speaking to Nivakoff, the defendant also made a vague reference to "people being able to identify people from Facebook," which Nivakoff found odd.[3]

Nivakoff visited American Diamond Exchange and obtained an audiovisual surveillance video depicting the defendant and another man entering the store.[4] The second man handed the defendant two watches, which he handed to the clerk, Kirker. One of the watches had a broken band and was referred to by the defendant as a Rolex. The other watch contained what appeared to be diamonds. The defendant stated to Kirker that his Rolex was broken. Kirker responded that David Schnee, another employee, might be able to look at it when he was in, as he was the "only one who knows about Rolexes." The defendant then asked her if the store had a diamond checker, showing her the second watch. He indicated that he wanted to make sure the diamonds were real, commenting that there were a lot of diamonds on the watch. Kirker took the watch into a back room to look at the diamonds. When she emerged, she and the defendant discussed appraising the watch's value. She asked the defendant if he planned to sell the watch, to which he replied in the negative. He asked her if she had tested all the diamonds, and she assured him that the ones she had looked at were definitely

[3] Nivakoff testified at trial that she "thought it was kind of odd that he would have brought it up."

[4] The defendant concedes in his brief that he is pictured in the video.

real. She gave the defendant a card and stated that the fee for "the Rolex watch appraisal [would be] $250" and he needed to call for an appointment. The police did not recover either of the watches depicted in the video.

Following his November, 2017 arrest in Arizona, the defendant gave a statement to Nivakoff in which he stated that his brother Terrance Edwards had given him a Rolex watch in payment of a debt and that he had taken it to American Diamond Exchange for appraisal. This statement contradicted his previous statement in which he had stated that he had obtained the American Diamond Exchange card with respect to a Michael Kors watch appraisal.

In a long form information, the state charged the defendant with, inter alia, larceny in the second degree and charged that "at the city of New Haven, on or about January 23, 2017, at approximately 3:45 p.m., in the area of 1280 Whalley Avenue [American Diamond Exchange], the said [defendant] received or retained stolen property knowing that it had probably been stolen or believing that it had probably been stolen, and the value of the property exceeded [$10,000], said conduct being in violation of sections 53a-119 (8) and 53a-123 (a) (2) of the Connecticut General Statutes."

At trial, Schnee testified that American Diamond Exchange provided "jewelry appraisals" on Rolex watches to determine valuation. According to Schnee, Rolex watches are a particularly desirable brand of watch, and the presence of gems on a watch increases the value "depending on the quality." He confirmed that the handwriting on the American Diamond Exchange card was Kirker's. David testified that in the video he recognized "one of my watches, the—the diamond Datejust. Or the Datejust, yes, one of the Rolex watches." He recognized it "by the video and knowing that it's—it was mine." When asked if there was anything particular about it that he observed, he referenced the condition and the dial.

David also testified as to the value of the watches. According to him, the watches in Samantha's purse were a Rolex Daytona worth $11,000, a Rolex Datejust worth $5000, and a second Rolex Datejust worth $16,000. He described the first Datejust watch, valued at $5000, as "a black—one had black face, oyster perpetual and oyster band, late 80's model . . . stainless." As for the second Rolex Datejust, it was worth $16,000, but David did not describe it in detail.

The defendant moved for a judgment of acquittal at the close of the state's case-in-chief and following closing arguments. The court denied both motions. After the court charged the jury, the jury returned a verdict of guilty of the charge of larceny in the second degree.

The defendant filed a written motion for a judgment of acquittal on July 9, 2018, in which he argued that there was insufficient evidence to conclude that he "knew that the watches he displayed at [American] Diamond Exchange were stolen or probably had been stolen," and that there was insufficient evidence to conclude either that (a) property meeting the statutory value of $10,000 was identified, or (b) David's testimony concerning value was sufficiently reliable. The court denied the motion.

A

The defendant first claims that there was insufficient evidence as to the value of the watches to support his conviction. Section 53a-123 (a) provides in relevant part: "A person is guilty of larceny in the second degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds ten thousand dollars . . . ." The defendant's first claim of insufficiency of the evidence challenges the second element, that the value of the property exceeded $10,000. He raises two points. First, in charging him with larceny by possession of stolen property

at American Diamond Exchange, the state relied on David's identification of one of the two watches in the surveillance video as one of the stolen watches. He argues that because David identified only a single Datejust, the jury lacked sufficient evidence from which it could have determined that David was referring to the Rolex Datejust watch worth $16,000, as opposed to the Rolex Datejust watch worth only $5000. Consequently, he contends that the jury lacked sufficient evidence to find that he possessed stolen property worth more than $10,000. Second, he argues that, even if the jury concluded David had identified the watch in the video as the $16,000 watch, the jury could not find the value of that watch to be $16,000 solely on the basis of David's testimony. We reject both claims.

1

With respect to the defendant's claim that the jury could not have determined beyond a reasonable doubt which of the two watches David identified in the video, we conclude that there was sufficient evidence from which the jury reasonably could have found that David identified a watch worth more than $10,000.

In his testimony, David identified his diamond Rolex Datejust in the video.[5] He stated that he recognized the watch "by the video and knowing that it's . . . mine," and explained that he had observed the watch's "dial" and "condition" in the video. When describing the items stolen from him, David testified that the $5000 Datejust watch was stainless with a black face and oyster band, but he did not reference diamonds. By contrast, the watch that Kirker looked at in the back room had "a lot of diamonds" on it. The jury thus could have drawn the inference that the "diamond Datejust" David identified

[5] To the extent that the brand of the second watch in the video, which Kirker inspected, is disputed, the jury could have found that it was a Rolex. The defendant contends in his brief that the second watch's brand was unidentified. Kirker, however, referred to the second watch as a Rolex.

was not the $5000 watch with the black face and oyster band, but the more expensive $16,000 watch.[6] Additionally, Schnee testified that diamonds will increase the value of a Rolex watch. The jury had a basis to infer that the watch David identified was the more expensive of the two given that it had "a lot of diamonds," some of which Kirker had examined and confirmed to be genuine, while the other was not described as containing diamonds. "[A] jury may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Rhodes*, Conn , , A.3d (2020).

The defendant points out that Samantha told the police that her purse contained Rolex watches with values of $6000, $4000, and $8500—values below $10,000. This, however, goes to the weight and credibility of the evidence, not its sufficiency. "When there is conflicting evidence . . . it is the exclusive province of the . . . trier of fact, to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case . . . ." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 200 Conn. App. 448. Giving the evidence the most favorable construction toward sustaining the jury's verdict, we conclude that the evidence was sufficient for the jury to find that David identified the $16,000 Rolex watch.

[6] The defendant also contended at oral argument before us that the diamonds were a red herring because when David explained how he knew the watch was his, he referenced the "condition" and the "dial," but did not mention diamonds. This vague description does not preclude a reasonable inference that the watch stolen from David had diamonds on it, particularly given that the jury heard David identify the watch as his "diamond Datejust" immediately prior.

The defendant next contends that, even if the evidence was sufficient to conclude beyond a reasonable doubt that David identified a watch with a value exceeding $10,000, his testimony alone was insufficient for the jury to find the value of the watch. He argues that David's single sentence testimony that the watch was worth $16,000 was insufficient to satisfy the statutory value element because "there was no evidence by an appraiser, by a seller of similar items, by an independent owner or collector of Datejusts . . . no documentary evidence: no catalogues, invoices, Internet searches, price tags. . . . [David] gave no background information concerning his acquisition of the Datejusts . . . . Nor did he provide any basis for his belief as to how much they were 'worth'—or even what he meant by 'worth.' " The defendant reasons that it is not clear that David was referring to the "market value" of the watch at that time.[7] The defendant's claim fails.

"The determination of value is a question for the trier of fact." *State* v. *Collette*, 199 Conn. 308, 314, 507 A.2d 99 (1986). "A reviewing court will not disturb the trier's determination if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Felder*, 95 Conn. App. 248, 261, 897 A.2d 614, cert. denied, 279 Conn. 905, 901 A.2d 1226 (2006).

[7] The defendant also contends that the court's jury instruction on larceny, that "[t]he third element is that the property had a value that exceeded $10,000," was unclear on what "value" actually meant because the court did not define it for the jury. To the extent that this raises an instructional error claim, we agree with the state that such a claim is not reviewable, because the defendant did not object to this part of the instruction at trial. See *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011) (acceptance of jury instructions without objection waives constitutional claim of instructional error on appeal).

"Under the law in Connecticut, it is well settled that an owner may testify as to the value of his or her property." *State* v. *Sherman*, 127 Conn. App. 377, 393, 13 A.3d 1138 (2011), cert. denied, 330 Conn. 936, 195 A.3d 385 (2018). In *Sherman*, this court explained that "[a]n owner may estimate the worth of his or her property, and the jury must consider the weight of the owner's testimony. . . . The state does not need to prove the value of property with exactitude. . . . The state is required only to lay a foundation which will enable the trier [of fact] to make a fair and reasonable estimate. . . . Whether an owner's testimony as to the . . . value provides sufficient information to support a jury verdict depends on the circumstances of each case." (Citations omitted; internal quotation marks omitted.) Id.

The defendant attempts to distinguish *Sherman* by pointing out that in that case the owner testified as to "value," not "worth," and the jury could examine the stolen jewelry itself as an exhibit, while here, the Datejusts were not in evidence.[8] As the state correctly points out, "value" and "worth" are typically synonymous terms in our case law. See *State* v. *Sherman*, supra, 127 Conn. App. 393 (using terms interchangeably). The state is also correct that the owner's testimony is sufficient and the property need not be available for the jury to inspect. In *Sherman*, this court rejected the claim that "any testimony provided by the owner regarding the value of his or her property is incompetent unless the state also provides some sort of factual foundation in support of the testimony." Id.

On the contrary, the owner's testimony on its own may be considered by the trier of fact. Our Supreme

[8] Although the watch itself was not in evidence, the jury was able to see the watches depicted in the surveillance video. The state could not very well offer a watch in evidence that had been stolen and not recovered.

Court has ruled that "the competence of the witness to testify to the value of property may be established by demonstrating that the witness owns the property in question." *State* v. *Baker*, 182 Conn. 52, 60, 437 A.2d 843 (1980); see also *State* v. *Felder*, supra, 95 Conn. App. 262 ("[the victim's] testimony with regard to the value of his vehicle was sufficient to satisfy the statutory element that the value of the motor vehicle was in excess of $10,000, and [the victim] was competent to testify as to the value of his property"). Here, the state established that David owned the watch. His testimony was sufficient to put the question of value before the jury, and the jury was entitled to weigh that evidence accordingly.

B

The defendant next argues that whatever the value of the watches may have been, there was insufficient evidence to establish beyond a reasonable doubt that he actually knew either one of the watches in his possession at American Diamond Exchange was stolen. He argues that the jury's finding of not guilty of four of the counts with which he was charged established that he was not one of the intruders, that there was no evidence that he knew of the break-in, that he could assume his brother had received the watch in exchange for controlled substances consistent with his account to Nivakoff, and that his conduct at American Diamond Exchange was consistent with honest activity. We do not agree.

General Statutes § 53a-119 defines larceny by receiving stolen property in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to . . . (8) Receiving stolen property. A person is guilty of larceny by receiving stolen property if he receives, retains, or disposes of stolen property knowing that it

has probably been stolen or believing that it has probably been stolen, unless the property is received, retained or disposed of with purpose to restore it to the owner. . . .'' The defendant disputes the sufficiency of the evidence to establish the statutory knowledge element.

The jury's decision to find the defendant not guilty of four of the counts, charging burglary in the first degree, robbery in the first degree, conspiracy to commit larceny in the first degree, and assault in the second degree, does not preclude an inference that, even if the defendant had not participated in the January 20, 2017 events at the victims' home, he still *knew* the property was probably stolen. ''[An] inference may be drawn if the circumstances are such that a reasonable man of honest intentions, in the situation of the defendant, would have concluded that the property was stolen.'' (Internal quotation marks omitted.) *State* v. *Nunes*, 58 Conn. App. 296, 301, 752 A.2d 93, cert. denied, 254 Conn. 944, 762 A.2d 906 (2000). ''[P]ossession of recently stolen property raises a permissible inference of criminal connection with the property, and if no explanation is forthcoming, the inference of criminal connection may be as a principal in the theft, or as a receiver under the receiving statute, depending upon the other facts and circumstances which may be proven.'' (Internal quotation marks omitted.) *State* v. *Foster*, 45 Conn. App. 369, 376, 696 A.2d 1003, cert. denied, 243 Conn. 904, 701 A.2d 335 (1997).

The jury heard David testify that the watch the defendant possessed at American Diamond Exchange mere days after the break-in was one of the stolen watches. Our review of the evidence, undertaken in a light most favorable to sustaining the verdict, reveals sufficient evidence on which the jury could have relied in concluding the defendant knew that the watch was stolen.

The defendant told the police initially that he had received the American Diamond Exchange card during a visit that concerned his Michael Kors watch. Kirker's

handwriting on the card referenced a Rolex, however, and the defendant later told Nivakoff that he had received a Rolex watch from his brother in satisfaction of a debt. The defendant argues that the jury lacked a basis to refute his claim that he received the watch from his brother as payment without knowledge that it was stolen. The jury did not have to accept either of the defendant's explanations. Rather, the jury could have found that the defendant was not credible in light of the state's evidence of his inconsistent statements to the police and in light of the other evidence produced at trial.[9] The jury heard evidence that the victims identified Terrance Edwards, that the police connected the stolen watches to Terrance Edwards, and that Terrance Edwards was found in possession of David's documents. The jury could have understood the defendant's unsolicited reference to Nivakoff regarding Facebook identifications as suggesting that he knew the circumstances of the break-in, given how the victims identified the purported suspects through Facebook. On the basis of this evidence, construing all inferences in favor of upholding the verdict, we conclude there was sufficient evidence for the jury to find that the defendant's brother was involved in the break-in, and to thus find that the defendant's explanation to the police for possessing the watch was not truthful.

II

The defendant next claims on appeal that the trial court erred by admitting into evidence a portion of Nivakoff's testimony regarding the surveillance video over his objection, in violation of the rule against hearsay.

[9] The defendant's arguments that his trip to American Diamond Exchange and behavior within the store were "not the kind of secretive activity expected of a purveyor of stolen property" are irrelevant because these arguments go to the weight of the evidence. The jury was free to weigh the state's evidence and the nature of the defendant's activity as described in his statements to the detective in reaching its verdict, and it was not required to infer what the defendant suggests.

This is a close issue, but irrespective of whether the testimony is viewed as impermissible hearsay or not, we conclude that the trial court's admission of the testimony was harmless.

The following additional facts inform our analysis. David testified at trial that he was shown a surveillance video by Nivakoff at the police station. As previously stated in this opinion, he testified that he recognized "one of the watches" in that video—specifically, a diamond Rolex Datejust—as belonging to him. Nivakoff later testified at trial. During Nivakoff's testimony, the surveillance video from American Diamond Exchange was admitted into evidence and played to the jury. The defendant's hearsay claim concerns the state's direct examination of Nivakoff, objection by defense counsel, and the court's ruling, which occurred during the following colloquy:

"[The Prosecutor]: Now, after you viewed this video, did you show it to anybody else?

"[The Witness]: I showed it to David Frank.

"[The Prosecutor]: And when you showed it to David Frank was he able to identify items in that—in that video as his?

"[The Witness]: Ye—

"[Defense Counsel]: Objection. Hearsay.

"The Court: What's your claim on that?

"[Defense Counsel]: Asking—

"The Court: And hearsay, in other words, what David Frank identified.

"[Defense Counsel]: Yeah.

"The Court: Yeah. What's your claim on that?

"[The Prosecutor]: I'm just asking yes or no, did that happen?

"The Court: I'm going—I'll allow yes or no.

"[The Witness]: Yeah.

"The Court: Go ahead.

"[The Witness]: I'm sorry. Yes, he did."

Following Nivakoff's testimony, defense counsel did not object to, or move to strike, the answer.[10]

We see no need to discuss in detail our analysis of the relevant legal principles and applicable standard of review, given our resolution of this issue. "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." (Internal quotation marks omitted.) *State* v. *Michael T.*, 194 Conn. App. 598, 611, 222 A.3d 105 (2019), cert. denied, 335 Conn. 982, A.3d (2020).

The defendant argues that Nivakoff's testimony, answering "[y]es, he did" to the question of whether David had identified items in the video as his, was inadmissible hearsay. He claims that the testimony was offered for its truth, i.e., for the proposition that David asserted items in the video were his. The state argues that it elicited Nivakoff's testimony merely to clarify and to explain the process of Nivakoff's investigation. The state contends that it sought only a yes or no answer and did not attempt to elicit the identity of the items in the video.

[10] The defendant argues that the question elicited hearsay but, because there was no objection or motion to strike the answer, we question whether the issue is properly preserved for review. "It is usually the case that when . . . the answer to [a] question contains inadmissible material, an objection made upon the answer is seasonable . . . . The proper form of such an objection is a motion to strike the answer." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 75 Conn. App. 364, 374, 815 A.2d 1261 (2003), rev'd on other grounds, 272 Conn. 515, 864 A.2d 847 (2005). We need not decide this issue of preservation, however, because we conclude that admission of Nivakoff's testimony was harmless error, if any.

For the purpose of resolving this claim, we will assume, without deciding, that the trial court improperly admitted hearsay through Nivakoff's testimony.[11] We thus turn to the question of whether the admission of Nivakoff's challenged testimony amounted to harmful error. Examining the evidence here, we cannot conclude, with a fair assurance, that the testimony substantially affected the jury's verdict, and we, therefore, determine that any error was harmless.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . We have concluded that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . We previously have considered a number of factors in determining whether a defendant has been harmed by the admission or exclusion of particular evidence. Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' 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. . . . Considering these various factors, we have declared that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Johnson*, 171 Conn. App. 328, 338, 157 A.3d 120 (2017).

[11] We note that the state's offer of David's identification has relevance both to the sequence of events in the investigation and to the truth of the matter asserted. Following the presentation of the video to the jury, the state asked Nivakoff whether David had identified items in the video as his. Of some concern is the fact that in essence, Nivakoff's "yes" response could be construed as testimony that David asserted his ownership of the items

In the present case, the state argues that the hearsay testimony was harmless error because the state had previously elicited the substantive facts at issue from David and did not need Nivakoff's testimony to prove that the items belonged to him. We agree. Nivakoff's testimony, to which the defendant objects, was cumulative of David's testimony in which he identified a Rolex watch in the video as being his. Nivakoff's testimony established only that David had identified items as his, which the jury had heard from David himself. See *State* v. *Kerr*, 120 Conn. App. 203, 215–16, 991 A.2d 605 (defendant not harmed by hearsay statements of two witnesses, where testimony of one was "largely parallel" of other witness' testimony and other was cumulative), cert. denied, 296 Conn. 907, 992 A.2d 1136 (2010).

The defendant argues that the error was harmful because Nivakoff's testimony referenced "items," while David testified only that a single item in the video—a Rolex Datejust watch—belonged to him. He argues that due to uncertainty as to which of the two Datejust watches David's identification applied to, which comprises his first insufficiency of the evidence claim, the state needed to rely on Nivakoff's testimony that David identified "items" in the plural in order to establish that the defendant possessed stolen property exceeding a value of $10,000. Because we conclude in part I of this opinion that the evidence was sufficient for the jury to conclude that David identified a stolen watch with a value exceeding $10,000, we reject the defendant's claim of harm. Thus, because the defendant did not challenge the admissibility of David's testimony on this point, we conclude he was not harmed by Nivakoff's testimony.

III

The defendant next claims that the trial court abused its discretion by prohibiting him from cross-examin-

to her. The state's question could be construed as an attempt to elicit testimony of such an assertion.

ing Samantha about her drug dealing subsequent to the break-in. We do not agree that the court abused its discretion in declining to permit cross-examination on what we view as a collateral matter.

The following additional facts inform our analysis. Before Samantha testified, the court heard argument on the state's motion in limine to preclude certain evidence of her criminal history. She testified that she had felony and misdemeanor convictions. The court limited the defendant's examination regarding these convictions to general terms without specific references to the offenses involved. Several of her convictions concerned illegal storage and possession of narcotics. In her subsequent testimony, she confirmed her criminal history and admitted that she had sold drugs from her home, including to Dijon Edwards and Marcel. She also admitted that she had purchased cocaine from Terrance Edwards and admitted on both direct and cross-examination that she had lied to the police during the investigation regarding her drug dealing. She also testified that she stopped selling pills after the break-in because it was dangerous.

Defense counsel asked the court, outside the presence of the jury, to allow him to cross-examine Samantha concerning her arrest on July 5, 2017, which led to her conviction in November, 2017, of illegal storage of narcotics. Defense counsel argued that because Samantha had been found with a large quantity of pills and cash on her person,[12] it was suggestive of continued drug dealing and cast doubt on the veracity of her previous testimony that she had stopped selling drugs after the break-in. The prosecutor argued in response that this line of inquiry was a collateral issue because the witness had

[12] Samantha testified that she had 148 Alprazolam pills, 40 Risperdal pills, 82 acetaminophen and hydrocodone pills, and 125 TEVA diazepam pills, as well as $1600 in cash.

been convicted only of illegal storage of narcotics, and that litigating it would require bringing in a police officer for an "expert opinion on possession with intent to sell." The court allowed defense counsel to cross-examine Samantha outside the presence of the jury. She testified that the pills with which she had been found in July, 2017, were for her own use. The court ultimately ruled that the defense could not cross-examine her on the underlying facts of the July, 2017 arrest, on the basis of her testimony that she had ceased selling pills and the fact that she had been convicted only of possession.[13] On cross-examination before the jury, Samantha admitted that she sold pills to Marcel the day after she was interviewed by the police concerning the break-in, in order to recoup money that she had lost. She stated that this "must've slipped [her] mind" during her previous testimony, and insisted that this was the last sale she had conducted.

The defendant argues that he should have been permitted to cross-examine Samantha on the facts of her July, 2017 arrest in order to impeach her previous testimony by suggesting that she had lied about ceasing to sell drugs after her sale to Marcel. He contends that the intended cross-examination regarding Samantha's arrest was offered to prove that she had lied under oath, rather than to use the conviction itself, and thus fell outside the ambit of § 4-5 of the Connecticut Code of Evidence.[14] We do not agree.

[13] The court ruled as follows: "She testified, and the jury is going to assess her credibility, counsel, that she hasn't sold pills since January 20, 2017, the date of this incident. She has indicated in this offer of proof that the pills that she purchased . . . were for her own personal use over the course of time . . . and that's her testimony . . . from what's in front of me now . . . I'm not going to allow a challenge to the—your claimed underlying facts of her arrest . . . she has admitted to the felony there, but again it's not a sale, it's a possession case."

[14] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) . . . Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided . . . .

We begin our analysis by setting forth the relevant legal principles and applicable standard of review. "Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Bermudez*, 195 Conn. App. 780, 806, 228 A.3d 96, cert. granted on other grounds, 335 Conn. 908, 227 A.3d 521 (2020). "[I]t is well settled that [a] court . . . [may] exclude . . . evidence [that] has only slight relevance due to . . . its tendency to inject a collateral issue into the trial. . . . An issue is collateral if it is not relevant to a material issue in the case *apart from its tendency to contradict the witness*. . . . This is so even when the evidence involves untruthfulness and could be used to impeach a witness' credibility." (Citations omitted, emphasis in original; internal quotation marks omitted.) *State* v. *Annulli*, 309 Conn. 482, 493, 71 A.3d 530 (2013).

Section 6-7 (b) of the Connecticut Code of Evidence provides in relevant part: "Evidence that a witness has been convicted of a crime may be introduced by . . . (1) examination of the witness as to the conviction . . . ." The underlying facts of the conviction may not be used to impeach the witness. See *State* v. *Denby*, 198 Conn. 23, 30, 501 A.2d 1206 (1985), cert. denied, 475 U.S. 1097, 106 S. Ct. 1497, 89 L. Ed. 2d 898 (1986). "If the crime for which the witness was convicted is admissible on the merits of the case, however, the facts

"(c) . . . Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

surrounding the crime are admissible to the extent they are relevant to a material issue in the case." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.29.8 (a), p. 401, citing *State* v. *Denby*, supra, 30–32.

Here, the crime for which Samantha was convicted, in the court's view, was a matter unrelated to the material issues at trial; rather, it was relevant only to cast doubt on her credibility before the jury. Samantha's drug dealings were not a material issue in the trial. See *State* v. *Annulli*, supra, 309 Conn. 494–95 (evidence sought on cross-examination properly excluded because it was not related to material issue "apart from its tendency to contradict the witness" (emphasis omitted; internal quotation marks omitted)).

Section 6-6 (b) of the Connecticut Code of Evidence provides that a witness may be cross-examined on specific instances of conduct if probative of truthfulness, but extrinsic evidence may not be used to prove those instances. If denied, the examiner must take the witness' answer. See E. Prescott, supra, § 6.28.5, p. 390. The court allowed defense counsel to inquire of Samantha whether she had sold drugs after her sale to Marcel; she denied it. The court was not required to permit further examination. See *State* v. *Annulli*, supra, 309 Conn. 495.

We agree with the state that allowing cross-examination to demonstrate that Samantha lied about her drug dealing would result in a "minitrial of Samantha," which would require further offers of proof to determine whether or not she had continued to sell drugs. Such extrinsic evidence is normally not permitted. "[E]xtrinsic evidence is *not* admissible for impeachment on a collateral matter . . . ." (Emphasis in original.) *State* v. *Annulli*, supra, 309 Conn. 497–98; see id., 498 (stating that "the introduction of such evidence, if permitted, would have expended a disproportionate amount of

time in relation to the issue's probative value"). Samantha's conviction of illegal storage of narcotics did not tend to establish that she lied about ceasing to sell controlled substances. The court acted well within its discretion in determining that the defense had "no evidence" that the witness had continued to sell narcotics and that impeaching her on this point would be an overly speculative collateral inquiry necessitating impermissible extrinsic evidence.

Moreover, the court gave the defendant wide latitude to impeach Samantha through other avenues, such as the fact that she had been convicted of multiple felonies, that she had bought and sold drugs, and that she first testified that she ceased selling drugs after the break-in before subsequently admitting to one additional sale to Marcel following the break-in. As the court stated, the jury was equipped to assess the credibility of Samantha's testimony that the pills she was found with were for personal use and that she had not continued to sell them. The court did not abuse its discretion in limiting the defendant's cross-examination of Samantha.

IV

The defendant's final claim on appeal is that the trial court committed "structural error" in its jury instruction regarding reasonable doubt.[15] The defendant specifically objected to the court's charge, "It is such a doubt as, in the serious affairs that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters

[15] "Structural errors" have been defined as "fundamental defects in the trial mechanism that affect the entire framework within which the trial proceeds, rather than simply an error in the trial process itself." (Internal quotation marks omitted.) *State* v. *Vines*, 71 Conn. App. 751, 758, 804 A.2d 877 (2002), aff'd, 268 Conn. 239, 842 A.2d 1086 (2004). The defendant claims that the jury instruction in this case was deficient and thus constitutes structural error under *Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). See id., 278–82 (holding that constitutionally deficient reasonable doubt instruction requires reversal).

of importance."[16] He claims that the inclusion of the words "upon it" in the court's jury instruction "renders the instruction nonsensical" because it then "means almost the opposite of what it should." The defendant cannot prevail on the merits. As we stated in *State* v. *Holley*, 174 Conn. App. 488, 167 A.3d 1000, cert. denied, 327 Conn. 907, 170 A.3d 3 (2017), cert. denied, U.S. , 138 S. Ct. 1012, 200 L. Ed. 2d 275 (2018), in which the same model jury instruction was used, "our Supreme Court repeatedly has upheld the use of instructions that utilized the very language the defendant challenges. . . . [A]s an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor. Accordingly, since our Supreme Court already has determined that the challenged description of reasonable doubt is not improper, we cannot conclude to the contrary." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 494–95. This court is bound by these precedents.

The judgment is affirmed.

In this opinion the other judges concurred.

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[16] The language in question is taken from the model criminal jury instructions on the Judicial Branch website. See ConnecticutCriminal Jury Instructions 2.2-3 (November 20, 2017), available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 18, 2021).

STATE OF CONNECTICUT *v.* JULIE A. FERRAZZANO-MAZZA
(AC 42481)

Bright, C. J., and Moll and Suarez, Js.

Syllabus

Convicted, after a jury trial, of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs as a third time offender, and, after a court trial, of the infraction of operating a motor vehicle without a license, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that the trial court improperly excluded evidence that she had offered to take a blood test in lieu of a Breathalyzer test and gave the jury a limiting instruction that it could not consider her offer to take a blood test as relevant to any issue in the case:

   a. There was no merit to the defendant's claim that the trial court improperly excluded evidence regarding her purported offer to take a blood test, as the state, during its direct examination of D, the state trooper who arrested and processed the defendant, elicited the very testimony that the defendant asserted was improperly excluded and the defendant, thereafter, did not attempt to question D about this or to offer any other evidence of her purported offer to take a blood test.

   b. Even if this court assumed that the trial court's limiting instruction concerning the relevancy of the defendant's purported offer to take a blood test was improper, there was no reasonable possibility that the jury was misled: although the defendant correctly argued that evidence of an offer to take a blood test instead of a Breathalyzer test may be relevant to rebut the inference of guilt permitted under the applicable statute (§ 14-227a (e)) when a defendant refuses to take the specific chemical test chosen by a police officer, in this case, there was no evidence that the defendant offered to take a blood test, and, therefore, an instruction that the jury could consider the defendant's consent to a blood test would have confused the jury; moreover, the state presented overwhelming evidence of the defendant's guilt, independent of her refusal to take a Breathalyzer test.

2. The defendant's claim that the trial court improperly denied her request to charge the jury on field sobriety acts, which provided that the jurors should use their common experience to evaluate whether she had been impaired and that the words used by the state's witnesses to describe field sobriety tests do not indicate that such tests are scientific, was unavailing; there was no reasonable possibility that the jury was misled by that court's refusal to adopt the defendant's requested instruction, as the court's instruction to the jurors that they must consider all the evidence in light of reason, experience and common sense sufficiently

conveyed the defendant's proposed instruction, and, in this context, the terms used by the state's witnesses were simply descriptive and did not automatically imply that the topic was scientific in nature.

Argued October 19, 2020—officially released January 26, 2021

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and with the infraction of operating a motor vehicle without a license, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the charge of operating a motor vehicle while under the influence of intoxicating liquor or drugs was tried to the jury before *Newson*, *J.*; verdict of guilty; thereafter, the charge of operating a motor vehicle without a license was tried to the court, *Newson*, *J.*; finding of guilty; subsequently, the defendant was presented to the court, *Newson*, *J.*, on a conditional plea of nolo contendere to the second part of the information; judgment of guilty in accordance with the verdict, the finding and the plea, from which the defendant appealed to this court. *Affirmed*.

Vishal K. Garg, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Bonnie R. Bentley* and *Brenda L. Hans*, senior assistant state's attorneys, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Julie A. Ferrazzano-Mazza, appeals from the judgment of conviction of operating a motor vehicle while under the influence

of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a), which was tried to a jury, and operating a motor vehicle without a license in violation of General Statutes § 14-36 (a), which was tried to the court. The defendant also pleaded nolo contendere to being a third time offender in violation of § 14-227a (g) (3). On appeal, the defendant claims that the court improperly (1) excluded evidence that she had offered to take a blood test in lieu of a Breathalyzer test and delivered to the jury a limiting instruction on the use of such evidence, and (2) denied her request to instruct the jury that field sobriety tests are not based on science. We affirm the judgment of the trial court.

The jury reasonably could have found the following relevant facts. On December 22, 2016, after leaving work in Vernon at approximately 7 p.m., a motorist, John LaBossiere, came upon the defendant's pickup truck, a 2014 silver Dodge Ram (truck), stopped in the middle of the road on Route 44 in or near Willington. As LaBossiere approached the truck, it sped off. LaBossiere continued behind the truck, driving through a few towns before reaching Pomfret. He witnessed the truck swerving from side to side, repeatedly going over the yellow line and across the white fog line, seemingly overcompensating for its movements. He also observed that the defendant, who was alone in the truck, was having difficulty maintaining the truck at a consistent speed. LaBossiere became concerned and telephoned 911 as he followed behind the truck. He provided the 911 dispatcher with a description of the truck, including the license plate number, as he followed behind it for several more miles. LaBossiere, thereafter, lost sight of the truck as it sped away.

Shortly thereafter, LaBossiere entered Killingly and, as he came upon the intersection of Route 101 and Maple Street, where the Four G's restaurant is located, he saw the truck in the parking lot of the restaurant,

positioned at an odd angle rather than in a designated parking space. He noticed that the driver's side door of the truck was open, that the defendant was outside of the truck, and that she was staggering. LaBossiere proceeded to turn right onto Maple Street, and he went about his business.

Just after 8 p.m., Bruce Taylor, a sergeant with the state police, who had received a certificate from the police academy for having completed a forty hour course on identifying and addressing driving while intoxicated offenses, observed the defendant's truck, which then was stopped facing the median between Route 6 and South Main Street in Brooklyn, approximately three and one-quarter miles from the Four G's restaurant. The truck was blocking the connector in such a way that no vehicles could get by it, and neither its emergency flashers nor its headlights were illuminated. Initially, Taylor thought that the truck might have been involved in a motor vehicle accident. He activated the emergency lights of his police vehicle, and he approached the driver's side of the truck. The defendant exited the truck, and Taylor thought that she appeared to be unsteady on her feet. When Taylor approached her, he could smell alcohol on her breath, which was more pronounced when she spoke to him. Her "mannerisms . . . [were] sluggish . . . she was very slouched over, she spoke in . . . a thick tongue manner, [and] her eyes were glassy . . . ." She kept rambling and told Taylor that she had run out of gas and that a good Samaritan had gone to get some for her.[1]

Taylor requested the defendant's license, registration, and insurance card, which the defendant was unable to produce at that time,[2] and he removed the keys from

[1] The good Samaritan about whom the defendant spoke did not return to the scene while the police were there.

[2] Although the defendant later provided her Rhode Island operator's license to the state police, it was determined that her license was under suspension.

the ignition of the truck. Taylor then called in the license plate number of the truck. He also requested backup from Trooper Jason Deojay, who, at that time, was working pursuant to a grant investigating driving while intoxicated cases, so that Deojay could perform the necessary testing of the defendant. Trooper Matthew Siart also arrived on the scene. Taylor asked Siart to stand near the truck because he did not want the defendant, who was then seated in the truck, to exit the truck and fall into traffic. When Deojay arrived, Taylor relayed relevant information to him, including his suspicion that the defendant was "under the influence."

Deojay, who was aware of LaBossiere's 911 call, noticed the defendant's truck parked "somewhat diagonal with the driver's side rear tire partially flat, nearly flat, some minor damage to the driver's side, and then the driver's side door was open with a female seated in the driver's seat." When he approached the defendant, he noticed that "she had glassy eyes, slightly . . . slurred speech, and the odor of the alcoholic beverage coming from her breath as she spoke." Deojay acknowledged that these were indicators of an impaired driver. Deojay asked the defendant from where she was coming and to where she was going, and she responded that she was coming from a restaurant and going to a gas station. He asked her if she had consumed any alcoholic beverages, and she said no. Deojay then asked the defendant to step away from the truck in order to perform some field sobriety tests. Deojay administered the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test.

As he administered each test, Deojay asked the defendant whether she had any medical conditions that could interfere with her performance, to which she responded in the negative.[3] When he administered the horizontal

[3] The defendant stated that she had hip displacement but that it would not interfere with her performance.

gaze nystagmus test, Deojay noticed nystagmus, which is an involuntary movement of the eye, at three positions in each eye. Out of the six possible clues that indicate intoxication in this test, the defendant had all six. When administering the walk and turn test, the defendant swayed, did not follow directions, and had to stop in order to steady herself. Out of eight possible clues that indicate intoxication in this test, the defendant had five. Finally, when Deojay administered the one leg stand test, the defendant swayed and raised her arms in an attempt to maintain her balance. She also put down her foot more than three times in fewer than ten seconds. Deojay saw three out of a possible four clues of intoxication during that test. On the basis of the totality of the circumstances, including the defendant's performance on all three tests, her "glassy eyes, the slightly slurred speech, [and] the odor of the alcoholic beverage on her breath," Deojay determined that the defendant was intoxicated, and he placed her under arrest.

After arriving at the state police barracks, Deojay took the defendant to the processing room, where Trooper Donna Bimonte[4] searched her. A silent video recorded the events that took place in the processing room. At 8:40 p.m., Deojay, in the presence of Bimonte, advised the defendant of her rights by reading her a preprinted notice of rights form, which Deojay and the defendant then signed. Deojay then prepared a postarrest interview form, documenting the defendant's responses to various questions. In response to a question asking whether she was ill, the defendant stated that she had undergone surgery three days earlier, but she did not elaborate.[5] She also stated that she was not taking any

[4] At the time of trial, Bimonte was known as Donna Sabourin.

[5] Joseph Lawrence Leclair, the defendant's live-in boyfriend, explained during his testimony that the defendant had undergone spinal injections three days earlier. The defendant elected not to testify.

medication. Deojay also read the implied consent advisory contained on the postarrest interview form and notified the defendant that he would be requesting that she submit to either a blood, Breathalyzer, or urine test, as determined by him, and that, if he requested that she take a blood test, she could refuse to submit to that test and, instead, could opt to take a Breathalyzer or urine test. Deojay afforded the defendant an opportunity to telephone an attorney or a family member, but the defendant did not attempt to contact anyone at that time. Deojay thereafter told the defendant that he wanted her to take a Breathalyzer test. The defendant refused. When he testified before the jury, Deojay had no recollection of whether the defendant had requested to take a blood test, and he stated that he had reviewed the video from the processing room and that the defendant had held up her arms. He was certain, however, that she had refused to take a Breathalyzer test.

Trooper Bimonte had remained in the processing room and was present when the defendant refused to take a Breathalyzer test, and Bimonte acknowledged this refusal on a computerized form. Bimonte also observed that the defendant had a strong smell of alcohol coming from her person as she spoke and that she "was somewhat disheveled with makeup on her face and very fidgety as she sat talking, moved her legs a lot, used her hands a lot, just—and very, very talkative during the whole process . . . [exhibiting a] flight of ideas, rambling on about different subjects." In Bimonte's opinion, after "thirteen years of nursing . . . three years being a state trooper, working at detox programs, [and] working in the prison system," the defendant was "impaired." As Deojay was bringing the defendant to the lockup, the defendant changed her mind about making a telephone call, and Deojay brought her back into the processing room and, as the defendant held the receiver, he "dialed" the telephone numbers

given to him by the defendant, but she was unsuccessful in reaching anyone.

The state charged the defendant with operating a motor vehicle while under the influence of intoxicating liquor or drugs, and the jury found her guilty of that charge. In a part B information, the state charged the defendant with being a third time offender, and the defendant pleaded nolo contendere to that charge. The state also charged the defendant with operating a motor vehicle without a license, and the court, after finding the defendant guilty, granted an unconditional discharge on that charge. The court sentenced the defendant to a term of three years incarceration, execution suspended after twenty-eight months, with three years of probation and 100 hours of community service on the charge of operating a motor vehicle while under the influence of intoxicating liquor as a third time offender. This appeal followed.

I

The defendant first raises an evidentiary claim that the court improperly excluded evidence that she had offered to take a blood test in lieu of a Breathalyzer test and improperly gave a limiting instruction to the jury that it could not consider the defendant's offer to take a blood test as relevant to any issue in the case.[6] The defendant argues that the evidence that she was willing to take a blood test "was relevant to two issues in the proceedings: (1) whether [she] had, in fact, refused to take a Breathalyzer test, and (2) whether [her] refusal to take a Breathalyzer test supported an inference that

[6] As an alternative argument, the defendant states that, if we conclude that she has not preserved this issue properly, then the claim is reviewable under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as a constitutional claim because the court violated her right to present a defense and to confront witnesses against her. We conclude that this evidentiary issue was preserved and, further, that the claim is not of constitutional magnitude.

[she] had operated a motor vehicle while under the influence of alcohol." We conclude that the state, on direct examination of Deojay, elicited the very testimony that the defendant claims the court improperly excluded and that there is no reasonable possibility that the jury was misled by the court's limiting instruction.

The following additional facts inform our review. Prior to her trial, the defendant filed a motion in limine seeking to preclude evidence that she had refused to submit to a Breathalyzer test following her arrest. The defendant argued that the evidence should be excluded because Deojay, before asking her to take the Breathalyzer test, had not afforded her an adequate opportunity to contact an attorney.[7] During Deojay's testimony at the hearing, he was asked to narrate the silent video that had captured what had occurred in the processing room when the defendant was arrested, which he did. He acknowledged that the defendant had made many gestures and movements on the video, but he could not recall what she was saying. Deojay testified that once he told the defendant that he had chosen to administer a Breathalyzer test, she stated that she would not take it. Deojay also stated that the defendant had informed him earlier, while in the police cruiser, that she would not take any test. Deojay also stated that the defendant had not offered to take a blood test.

Defense counsel asked Deojay what procedure he undertook when someone volunteered to take a different test. The state objected to the question on relevance grounds, and the court sustained the objection, noting that the sole issue raised by the defendant in her motion was whether Deojay had afforded her an adequate opportunity to consult with an attorney before she

[7] The defendant has not raised on appeal any claim relating to the alleged deprivation of her opportunity to contact an attorney in connection with Deojay's request that she take a Breathalyzer test.

refused to take the Breathalyzer test. The court subsequently denied the motion in limine.

On the first day of the trial, the state requested that the court preclude defense counsel from asking Deojay whether the defendant had offered to take a blood test. The state argued that, because § 14-227a (e) authorizes a police officer to choose the specific test to administer and gives no choice to an arrestee when the officer chooses a Breathalyzer test, defense counsel should be precluded from asking whether the defendant had offered to take a blood test. Defense counsel argued that she had a right to inquire as to what had happened on the night of the defendant's arrest and that the question of whether the defendant had refused to submit to a test was a question in the case. The court stated that, because the statute does not give the defendant the right to choose which test to take, whether she offered to take a different test likely was irrelevant. Defense counsel argued, among other things, that the issue was relevant. The court, thereafter, ruled that defense counsel could ask Deojay whether the defendant had offered to take any other tests. The court explained that it would not allow "any argument made to the jury to the specifics of if she wasn't drunk, she wouldn't have offered to provide this other test . . . ." Defense counsel responded, "I understand that. I have no plan to make such an argument, Your Honor."

The next morning, the court indicated that it had reconsidered its prior ruling on whether defense counsel could ask Deojay whether he recalled the defendant asking to take a blood test. The court stated that defense counsel could question Deojay on this topic out of the presence of the jury, and, depending on Deojay's answers, the court might permit such questioning before the jury.

Thereafter, during direct examination of Deojay by the state before the jury, and before defense counsel

conducted any questioning of Deojay outside the presence of the jury, the following colloquy occurred:

"Q. Okay. And—and you mentioned, although it's entirely your choice, but there are two other ways that a blood alcohol concentration can be obtained: blood and urine?

"A. Yes.

"Q. Okay. And did the defendant indicate that she would submit to either of those tests?

"A. I don't remember. But since I had an opportunity to review the video, she raised her arms in this motion, so it's possible that [she] might [have] asked for a breath—a blood test, but I don't remember.

"Q. Okay. So you have no—no recollection of her asking for a blood test?

"A. No.

"Q. Okay. And—and have you, in your experience, had people when you've told them you—you are offering them to take a breath test offer to take a blood test instead?

"A. I have.

"Q. And what is your experience with that?

"A. There's a lot of factors that go [into it]. For a blood test to be achieved, I have to transport the person to the hospital where there's a nurse on—or phlebotomist who can draw blood. We are not allowed to.

"Q. Okay.

"A. So it takes a—a lot of time to—to go there, then you gotta have the availability of a nurse; if there's an emergency in the emergency room where they're attending to, then they're not available. And she also has the option at that point, the defendant, to refuse.

And normally it's just a delaying tactic that they use to prevent—cause I—I have a two hour window and—to get the test in, so time is of the essence."

The court then excused the jury and questioned the state as to why it had inquired into an area to which it had objected and on which the court had ruled that such questioning would first be conducted outside the presence of the jury. The state told the court that, subsequent to its ruling, Deojay had informed the state that, after reviewing the silent video, although he was certain that the defendant had refused the Breathalyzer test, he no longer was certain that the defendant had not offered to take a blood test. The state further explained that it had disclosed Deojay's change in recollection to the defense and that the state had decided to pursue the topic on direct examination, rather than wait for the defendant to do so during cross-examination.

The court responded: "I mean, you're into it now, so I—I don't know [how] we can take it back, but it's not really relevant for the jury. I mean, I'm giving [it] an instruction that says, the fact that there's some other test out there in the world is not relevant."

Defense counsel argued that Deojay's testimony was before the jury and that she should be able to argue that the defendant might have offered to take an alternative test. The court reiterated that it was going to instruct the jury that the defendant did not have the option to choose which test to take and that the question before the jury was whether the defendant had refused to take the Breathalyzer test that had been chosen by Deojay. Defense counsel told the court the defendant was not contesting the fact that she had refused to take a Breathalyzer test, and she explained: "I understand that, Your Honor, and I understand that Your Honor [is going to] give that instruction. That's pursuant to the standard criminal jury instructions. The—the point I'm

raising is that there has just been testimony that there may have been an offer to take another test. I do intend to argue that fact to the jury. That it's now in evidence. . . . That's fair argument." The court responded: "We'll deal with it," and then reiterated that the statute does not give the defendant the right to choose the test but that the choice falls to the officer.

The court then recalled the jury and offered the following limiting instruction: "All right. Ladies and gentlemen, before we get started again, the court's [just going to] advise you, you heard some—just heard some testimony about the possibility that there may be some other test available other than the breath test and where and how and when those tests may be conducted. That was provided for background and informational purpose only.

"You will get an instruction at the end of the trial that in an operating under the influence case if there is a claim that there is a refusal to take a test, the jury's only consideration is whether or not the test that was offered by the police officer was refused by the defendant, not whether there was an offer to take some other test or whether there was an availability of some other test.

"So, in considering this evidence to the extent that it's relevant—and, again, the background and information is not—your only consideration will be when I instruct you at the end is whether or not the defendant, if you find, if you find, and that's your job, that there was in fact a refusal, whether or not the defendant refused the test that the officer chose. So, I'll allow you to continue. But I'll reinstruct you at the end of the trial."

Later, still during its direct examination of Deojay, the state presented a copy of the silent video, which Deojay narrated for the jury. During one point in the

video, Deojay stated that he had just advised the defendant of her right to contact an attorney and requested that she take a Breathalyzer test, which she refused. When defense counsel cross-examined Deojay, Deojay again stated that the defendant had refused to take a Breathalyzer test. Defense counsel did not attempt to ask Deojay any questions about whether the defendant had offered to take any other test.

During defense counsel's closing argument, she suggested that the jury should discount the defendant's refusal to take the Breathalyzer test because the jury could find that Deojay had not afforded the defendant a reasonable opportunity to contact an attorney before he asked her to take the test. Specifically, she argued: "Trooper Deojay told you this, he reads the line from the form, I'm now giving you a reasonable opportunity to contact an attorney. And he said there was a phone on the desk. She could have called whoever she wanted to. She could have called 411. 411 from a police station? To me, that's incredible. He never instructed her that she could dial 411; but he did testify that even if she dialed 411, she would have to know the name of the person that she was calling. Is that reasonable? Is that a reasonable opportunity to contact an attorney? Did she have a fair shot at that? That's for you to decide."

She further argued: "And we have the booking video, we have the recording of what actually transpired. . . . All throughout the booking process you see [the defendant] engaging in conversation with both Trooper Bimonte and Trooper Deojay. She's asking questions, she's engaged, she looks like she's gesturing. They can't tell you what she was saying; no one remembers anything, nothing.

"That's the evidence. That's the evidence that the state wants you to draw this conclusion that she must have been drinking. That's what explains her animated

speech. That's what explains her refusal to take a test. There's a perfectly plausible other explanation for her decision not to take this breath test, if you decide that that was actually a legitimate refusal."

Defense counsel then argued: "The situation is she ran outta gas, she then was asked by a bunch of troopers to do a bunch of very awkward tests even though she's telling them the whole time, I just need to get to the gas station. It's just right around the corner. That's—that's it. It just died.

"She tells them, I've had surgery. I haven't had anything to drink. I'm just trying to get to the gas station. No, no, no, no more of that, just get into the instructional position. I'm gonna do this eye test for you. I want you to walk in a straight line back and forth to me. I want you to stand on one leg. I want you to pat your head and rub your stomach. They didn't ask her to do that, but that's the impression that she's left with. So she complies, she does everything they ask.

"They ask her questions, she answers; they ask her to do things, she does [them]. At the end of the day, they arrest her anyway. They take her back to the station. You've seen the video. She's talking to them. She looks like she's pleading with them. They ask her to take another test, no. No. That's fair. Why would she continue to cooperate? Why would she? Where has it gotten her up until that point that night? Where had it gotten her? She had done everything they asked. They're asking one more thing of her. That's it. She's had enough. It's a righteous refusal, if you find that it actually happened that way."

After the parties had concluded their closing arguments, the trial court delivered its final charge to the jury. Regarding the defendant's refusal to take a Breathalyzer test, the court instructed: "In the present case, there was evidence of the defendant's refusal to submit

to specifically a breath test. If you find that the defendant did refuse to submit to such test, you may make any inference that follows from that fact that you find reasonable.

"Under our law, in the circumstances of this case, the defendant is deemed to have given an implied consent to the taking of a breath test, urine test, or other test at the option of the police officer. Again, the selection of the type of test is for the officer to make. Here, there is evidence that the officer selected a breath test. The issue, then, is not whether the defendant refused any and all test[s], but whether she refused the selected test.

"The word 'refuse' is defined as showing or expressing unwillingness to do or comply with. Here, it means to show [or] express an unwillingness to do or comply with the directive of the officer to take a particular . . . test. Now whether the defendant refused the breath test remains a question of fact for you to decide. You also heard evidence about the possibility of other chemical tests being available in addition to the Breathalyzer test or that the defendant may have offered to take another type of test.

"As I have instructed you during the trial, the avail ability of some other test or the defendant's offer to take some other test is irrelevant and you shall not consider it. Your only relevant consideration in determining whether you believe there was a refusal is whether the officer requested the defendant to take a particular chemical test and whether the defendant refused to take that particular test."

A

We begin with the defendant's claim that the court improperly excluded evidence that she had offered to take a blood test in lieu of a Breathalyzer test. We conclude that the state, on direct examination of Deojay,

elicited the testimony, which was equivocal, that the defendant claims the court improperly excluded and that the defendant, thereafter, neither attempted to question Deojay about this, nor offered any other evidence of her purported offer to take a blood test.

"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 Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit [or to exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination." (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).

Before Deojay took the witness stand to testify, the court told defense counsel that she would have to question Deojay out of the presence of the jury about whether the defendant had offered to take a blood test and that the court would rule on the propriety of such questioning at that time. Unbeknownst to the court, the state, having just learned that Deojay no longer was certain that the defendant had not offered to take a blood test, disclosed this information to the defendant, and, during its direct examination of Deojay, questioned him about it. Although the court was not pleased about the manner in which such questioning had taken place in light of its earlier ruling that such questioning initially would have to take place out of the presence of the jury, it did not strike the testimony, but it did offer a limiting instruction to the jury, to which defense counsel offered no objection and specifically stated that such an instruction was part of the standard jury instructions.

After the state had opened the door to this issue, defense counsel, when she cross-examined Deojay, did

not attempt to elicit additional testimony about this issue—either out of the presence of the jury, in accordance with the court's earlier ruling, or in its presence—and there is no indication in the record that the court prohibited her from doing so. As a matter of fact, when defense counsel told the court that she intended to argue this point to the jury, the court responded, "We'll deal with it . . . ." Defense counsel, however, did not raise this issue again, either through witness testimony or during closing argument. On the basis of the foregoing, we conclude that the defendant's claim that the court improperly excluded evidence regarding her purported offer to take a blood test is without merit.

B

We next consider whether the court improperly instructed the jury that it could not consider the possibility that the defendant may have offered to take a blood test as relevant to any issue in the case. The defendant argues that the instruction was improper because "[t]he evidence was relevant to two issues in the proceedings: (1) whether the defendant had, in fact, refused to take a Breathalyzer test, and (2) whether the defendant's refusal to take a Breathalyzer test supported an inference that the defendant had operated a motor vehicle while under the influence of alcohol." We conclude that, even if we were to assume some impropriety in the court's instruction, it is not reasonably possible that the jury was misled.

We begin with the well established standard of review governing the defendant's challenge to the court's jury instruction. "Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled . . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will

not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 716–17, 224 A.3d 504 (2020).

"It is well established that when a challenge to a jury instruction is not of constitutional magnitude . . . the charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Seekins*, 123 Conn. App. 220, 227, 1 A.3d 1089, cert. denied, 298 Conn. 927, 5 A.3d 487 (2010).

Section 14-227a (e) provides: "In any criminal prosecution for a violation of subsection (a) of this section, evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b[8] shall be admissible provided the

[8] General Statutes § 14-227b provides in relevant part: "(a) Any person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine . . . .

"(b) If any such person, having been placed under arrest for a violation of section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such

requirements of subsection (b) of said section have been satisfied. If a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a blood, breath or urine test." (Footnote added.)

It is significant when a defendant refuses to take a Breathalyzer test as chosen by the officer. The trier of fact, "pursuant to § 14-227a (e), [may draw] an inference of guilt from this refusal. . . . Such an inference is statutorily valid and a factor to be considered in tandem with other evidence when deciding the issue of intoxication. See, e.g., *State* v. *Hall*, 110 Conn. App. 41, 56–57, 954 A.2d 213 (2008) (refusal of Breathalyzer test and failure of field sobriety tests amongst other factors sufficient to prove intoxication); *State* v. *Gordon*, [84 Conn. App. 519, 528, 854 A.2d 74] (same) [cert. denied, 271 Conn. 941, 861 A.2d 516 (2004)]." (Citation omitted.) *State* v. *Morelli*, 293 Conn. 147, 163 n.11, 976 A.2d 678 (2009).

The defendant argues that the court's instruction was improper in that the court told the jury that Deojay's testimony that the defendant's offer to take a blood test was to be used only for background and informational

test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test, or if such person submits to such test and the results of such test indicate that such person has an elevated blood alcohol content, and that evidence of any such refusal shall be admissible in accordance with subsection (e) of section 14-227a and may be used against such person in any criminal prosecution, refuses to submit to the designated test, the test shall not be given; provided, if the person refuses or is unable to submit to a blood test, the police officer shall designate the breath or urine test as the test to be taken. The police officer shall make a notation upon the records of the police department that such officer informed the person that such person's license or nonresident operating privilege may be suspended if such person refused to submit to such test or if such person submitted to such test and the results of such test indicated that such person had an elevated blood alcohol content. . . ."

purposes and was not otherwise relevant. She argues that the issue of whether she had offered to take a blood test rather than the Breathalyzer test "was relevant because the jury could have found that the defendant's offer to take another test did *not* amount to a refusal, and that the officer had misinterpreted that offer as a refusal." (Emphasis in original.) Even if we assume that the court's instruction too narrowly confined the jury's use of the defendant's purported consent to a blood test, we conclude that there is no possibility that the jury was misled.

First and foremost, although the defendant repeatedly argues that there was testimony that the defendant offered to take a blood test, Deojay's testimony was that "it's possible that [she] might [have] asked for a breath—a blood test, but I don't remember." Deojay then confirmed that he had "no recollection of [the defendant] asking for a blood test," but he was certain that she had refused to take a Breathalyzer test. Bimonte, who was in the processing room with Deojay and the defendant, also acknowledged the defendant's refusal on a computerized form, and she testified that, although she did not recall the defendant's exact words, the defendant asserted "an adamant refusal" to take a Breathalyzer test. Although the defendant may be correct in arguing that evidence of an offer to take a blood test instead of a Breathalyzer test may be relevant, in some circumstances, to rebut the statutory inference permissible under § 14-227a (e) when a defendant refuses to take the specific chemical test chosen by the officer, the testimony of Deojay in the present case was so equivocal concerning the *possibility* that the defendant *may have* requested to take a blood test that it could not serve such a purpose, even if one were permissible. In this case, there was no evidence that the defendant offered to take a blood test. Consequently, an instruction that the jury could consider the defendant's

consent to a blood test, of which there was no evidence, only would have confused the jury.

Furthermore, evidence of the defendant's guilt, independent of her refusal to take a Breathalyzer test, was overwhelming. The jury had before it the testimony of LaBossiere, who had followed behind the defendant's truck for several miles as the truck weaved in and out of its lane of travel. The jury also had LaBossiere's testimony that he saw the defendant's truck parked in the parking lot of the Four G's restaurant at an odd angle with the defendant standing outside of the truck. Additionally, it had LaBossiere's 911 call. Moreover, the jury had the testimony of the state police troopers who had arrived on the scene when the defendant's truck purportedly had run out of gas and was blocking the roadway. Those troopers testified that the defendant smelled of alcohol. Taylor thought that the defendant had been unsteady on her feet. He testified that her "mannerisms . . . [were] sluggish . . . she was very slouched over, she spoke in . . . a thick tongue manner, [and] her eyes were glassy . . . ." When Taylor requested the defendant's license, registration, and insurance card, the defendant fumbled around in the truck but was unable to produce them. Taylor was so concerned that he removed the keys from the ignition of the truck, and he asked Siart to stand near the truck so that the defendant would not fall into traffic.

The jury also heard Deojay's testimony that the defendant "had glassy eyes, slightly . . . slurred speech, and the odor of the alcoholic beverage coming from her breath as she spoke." Deojay told the jury that he asked the defendant to perform several field sobriety tests, and, on the basis of the defendant's poor performance of those tests and her "glassy eyes, the slightly slurred speech, [and] odor of the alcoholic beverage on her breath," he determined that the defendant was intoxicated. Additionally, the jury heard the testimony of

Bimonte, who, prior to becoming a trooper, had thirteen years of experience in the nursing field, as well as having worked in detoxification programs. Bimonte testified that she believed that the defendant was "impaired" and that she had observed that the defendant smelled of alcohol, that she was disheveled, very fidgety, and exhibited a "flight of ideas."

This was not a close case. There was considerable evidence before the jury that the defendant was operating her truck while under the influence of alcohol. Accordingly, we conclude that, even if the court's instruction on the relevancy of Deojay's equivocal statement that the defendant "might have" indicated that she would be willing to take a blood test had been improper, it is not reasonably possible that the jury was misled.

II

The defendant next claims that the court improperly denied her request to charge the jury on field sobriety acts. She argues that the evidence established that she had been required to perform field sobriety tests but that the court's failure to provide the jury with her requested charge left it without "any guidance as to how to use the tests to assess the defendant's guilt." We are not persuaded.

The defendant filed a request to charge on field sobriety acts, which provided: "In this case there has been testimony that the defendant was asked and did agree to perform certain acts, which are commonly called field sobriety acts. It is up to you to decide if those acts give any reliable indication of whether . . . the defendant's capacity to operate a motor vehicle was impaired to such a degree that the defendant no longer had the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence, under the same or similar circumstances or whether they have any rational connection to operating a motor vehicle

safely. In judging the defendant's performance on those acts, you may consider the circumstances under which they were given, the defendant's physical condition, the defendant's state of mind, and other factors you deem relevant.

"You have heard testimony concerning certain movements known as field sobriety tests. You have also heard terms such as 'clues' in connection with that testimony.

"Words such as these are commonly used by the average person to describe unscientific topics. You should not believe that these terms indicate a sobriety evaluation is based on science. Rather, you should evaluate this evidence based only on your common experience." The court declined to give this instruction. The defendant claims this was reversible error. We are not persuaded.

"The framework used to evaluate a challenge to a jury instruction given by the trial court is well established. Our review of the defendant's claim requires that we examine the court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . [A]n error in instructions in a criminal case is reversible error when it is shown that it is . . . reasonably probable . . . that

the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Kelley*, 95 Conn. App. 423, 434–35, 896 A.2d 129, cert. denied, 279 Conn. 906, 901 A.2d 1227 (2006).

The defendant claims that the court erred in failing to employ her proposed jury instruction, which provided that the jury should use its common experience to evaluate whether the she was impaired and that the words used by the state's witnesses to describe field sobriety tests do not indicate that these tests are scientific in nature.[9]

In reviewing the defendant's claim, we are guided by this court's holdings in *Kelley*, in which nearly identical claims were raised. See id., 432–36. First, in the present case, as in *Kelley*, the defendant had claimed that the trial court had "failed to instruct the jury that it could use its common experiences in determining impairment . . . ." Id., 433. In *Kelley*, this court concluded that the trial court's instruction to the jury that it "must consider all the evidence in light of reason, experience, and common sense" sufficiently met the defendant's proposed instruction. (Internal quotation marks omitted.) Id., 435. In the present case, as in *Kelley*, the trial court also specifically instructed the jury that it "must consider all the evidence in light of reason, experience, and common sense."

Second, in *Kelley*, the defendant claimed, inter alia, that the state or witnesses should not have been permitted to use the words "tests, results, pass, fail and points"

[9] We note that during defense counsel's cross-examination of Taylor, she specifically questioned him about field sobriety tests, including the training he had undergone. One of the questions she asked was: "And it's not just that these are tests that officers just go around doing on their own free will. These are scientifically based measures of whether someone's intoxicated, right?" Taylor responded: "That is correct." Defense counsel made no attempt, with this witness or any other witness, to further explore the scientific or unscientific nature of field sobriety tests, with the exception of the state's expert, Robert Lockwood, a forensic scientist with the state forensic laboratory, whom she questioned about the horizontal gaze nystagmus test, a test the defendant concedes is scientific.

when discussing or testifying about the walk and turn test and the one leg stand test because those "words wrongly [implied] that the matters had scientific validity . . . ." (Internal quotation marks omitted.) *State* v. *Kelley*, supra, 95 Conn. App. 432. This court rejected that claim, holding that, "[a]lthough there may be situations when language imbues unscientific evidence with scientific significance, using testing language to describe field sobriety tests is not one of them. Words like tests, results, pass, fail and points are commonly used by the average person to describe unscientific topics. In this context, the language is nothing more than descriptive and does not automatically imply that the topic is scientific in nature." (Internal quotation marks omitted.) Id., 433. The holdings in *Kelley* are applicable to the present case. Accordingly, we conclude that there is no reasonable possibility that the jury was misled by the court's refusal to adopt the defendant's proposed instruction.

The judgment is affirmed.

In this opinion the other judges concurred.

STEVEN W. ROSE *v.* COMMISSIONER OF CORRECTION (AC 42705)

Cradle, Alexander and Harper, Js.

Syllabus

The petitioner, who had been convicted of felony murder, attempt to commit robbery in the first degree and robbery in the first degree, appealed to this court from the judgment of the habeas court, which dismissed his petition for a writ of habeas corpus pursuant to statute (§ 52-470). The petitioner, who was represented by counsel, filed a habeas petition in 2012, but withdrew it on the date trial was to commence in December, 2016, so that he could obtain different counsel. The petitioner did not refile the petition until February, 2018. The habeas court, at the request of the respondent, the Commissioner of Correction, thereafter issued an order to the petitioner to show cause, pursuant to § 52-470, why the petition should be permitted to proceed in light of the fact that he refiled

it beyond the presumptive deadlines for doing so set forth in § 52-470 (c). After an evidentiary hearing, the court found that the petitioner's counsel had advised the petitioner in 2016 that he could withdraw the 2012 habeas petition but that he should "do it now" and that he would be assigned different counsel. The court further determined that the petitioner's counsel had advised the petitioner in 2016 to refile the habeas petition and that, after the 2016 withdrawal, he could have done so within the time frame permitted by § 52-470 but that he waited more than one year after the withdrawal to do so. The court thus concluded that the petitioner failed to show good cause for the delay in refiling the petition and dismissed it pursuant to § 52-470 (e). On the granting of certification, the petitioner appealed to this court, claiming that he had established good cause for the untimely refiling of his habeas petition because his counsel's failure to inform him of the need to refile it following the 2016 withdrawal, coupled with the court's statements at the 2016 proceeding, resulted in his mistaken belief that the 2012 habeas action remained active. *Held* that the habeas court did not abuse its discretion in dismissing the habeas petition as untimely pursuant to § 52-470 and properly determined that the petitioner failed to establish good cause for the delay in refiling the petition; the court's findings were not clearly erroneous as to the advice the petitioner's counsel had provided about the need to refile the petition and the relevant time limits as it related to refiling, and the record fully supported the court's conclusion that the petitioner failed to establish good cause pursuant to § 52-470, as he offered no reason, impediment or excuse for the delay in refiling the petition.

Argued November 9, 2020—officially released January 26, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Steven W. Rose, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (e). On appeal, the petitioner claims that the habeas court improperly determined that he had not established good cause for the filing of his otherwise untimely petition and, therefore, erred in rendering judgment of dismissal. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our discussion. In *State* v. *Rose*, 132 Conn. App. 563, 565–66, 33 A.3d 765 (2011), cert. denied, 303 Conn. 934, 36 A.3d 692 (2012), this court affirmed the petitioner's conviction of felony murder, attempt to commit robbery in the first degree and robbery in the first degree. The trial court imposed a total effective sentence of forty years of incarceration. Id., 567. Our Supreme Court denied the petitioner's petition for certification to appeal on February 3, 2012. *State* v. *Rose*, 303 Conn. 934, 36 A.3d 692 (2012).

On February 13, 2018, the petitioner commenced the present habeas action. Approximately six months later, the respondent, the Commissioner of Correction, requested that the habeas court order the petitioner to show cause as to why his petition should not be dismissed as untimely pursuant to § 52-470 (c) and (e).[1]

[1] General Statutes § 52-470 provides in relevant part: "(c) Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public

Specifically, the respondent claimed that the petitioner's habeas petition was untimely because it was not filed by October 1, 2017. The court held a hearing on the respondent's request on November 16, 2018.

On January 25, 2019, the habeas court, *Newson*, *J.*, issued a memorandum of decision dismissing the habeas petition. The court concluded that the petition had been filed beyond the presumptive statutory deadlines and that the petitioner had failed to show good cause for the delay in refiling. The habeas court subsequently granted the petitioner's petition for certification to appeal, and this appeal followed.

On appeal, the petitioner does not dispute that his petition for a writ of habeas corpus was presumptively untimely.[2] Instead, he contends that the court improp-

or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section. . . ."

See also *Dull* v. *Commissioner of Correction*, 175 Conn. App. 250, 252, 167 A.3d 466, cert. denied, 327 Conn. 930, 171 A.3d 453 (2017); see generally *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 715–26, 189 A.3d 578 (2018); *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 566–68, 153 A.3d 1233 (2017).

[2] In this case, the judgment of conviction was deemed a final judgment due to the conclusion of appellate review on February 3, 2012, the date our Supreme Court denied the petitioner's petition for certification to appeal from this court's judgment affirming his conviction on direct appeal. See *State* v. *Rose*, supra, 303 Conn. 934. Pursuant to § 52-470 (c), in order to be considered presumptively timely, the petitioner's habeas petition needed to be filed by October 1, 2017. See footnote 1 of this opinion.

erly determined that he failed to show good cause for the delay in filing the petition. As noted in the habeas court's memorandum of decision, the petitioner filed a petition for a writ of habeas corpus in 2012 and was represented by Attorney Anthony Wallace. The petitioner withdrew that action on December 5, 2016. The withdrawal, which occurred on the date that the trial of the 2012 habeas petition was to commence, stemmed from the petitioner's desire to obtain different counsel.[3]

On appeal, the petitioner argues that Wallace advised him only that the 2016 withdrawal would lead to the appointment of new counsel but failed to inform him of the need to refile the habeas petition. The petitioner contends in his appellate brief that he "has shown good cause in two different ways. First, the circumstances surrounding the withdrawal caused the petitioner to reasonably believe that his 2012 habeas corpus case was still ongoing and that new counsel would be appointed. Second, [Wallace] failed to inform him of the time constraints that could preclude him from pursuing a habeas corpus proceeding at the time the petitioner withdrew his petition." The petitioner also claims that Wallace provided ineffective assistance because he failed to inform the petitioner of the time constraints of § 52-470. As a result, the petitioner maintains, he established good cause, and, therefore, the court erred in dismissing the present habeas petition. We are not persuaded.

We begin with our standard of review. The petitioner contends that the plenary standard of review should be utilized in this case. The respondent disagrees and counters that the abuse of discretion standard should be used. Guided by a recent decision from this court, we conclude that the abuse of discretion standard applies in this appeal.

[3] At the December 5, 2016 proceeding, Wallace argued to the court, *Oliver*, *J.*, that the withdrawal would be without prejudice and that new counsel would then be appointed by the Office of the Chief Public Defender.

In *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 35, A.3d (2020), the parties disputed the appropriate appellate standard of review that applies when a challenge is made to a trial court's dismissal of a habeas petition for lack of good cause pursuant to § 52-470. This court engaged in an extensive analysis of § 52-470 and consideration of the appropriate appellate standard of review. See id., 28–31. Ultimately, it concluded that "a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony. As such, the determination invokes the discretion of the habeas court and is reversible only for an abuse of that discretion." Id., 35–36. The court also observed that any factual findings made by the habeas court are subject to the clearly erroneous standard of review. Id., 36 n.12. Accordingly, we employ the abuse of discretion standard when considering the habeas court's determination regarding good cause pursuant to § 52-470, and apply the clearly erroneous standard to any subordinate factual findings on which the court relied when exercising its discretion.

In the present case, the habeas court determined that, after the December 5, 2016 withdrawal, the petitioner could have refiled his petition within the time frame permitted under § 52-470. The court also found that Wallace had advised the petitioner in 2016 that he "could withdraw [the 2012 habeas petition] but [to] do it now and they'll assign you another lawyer." (Emphasis omitted; internal quotation marks omitted.) The court explained further that the petitioner waited for more than one year from the date of the withdrawal to refile his habeas petition.

On appeal, the petitioner claims that Wallace failed to inform him of the need to refile his habeas petition

following the December 5, 2016 withdrawal. He contends that this failure, coupled with the court's statements at the December 5, 2016 proceeding,[4] resulted in his mistaken belief that his 2012 habeas action remained active. The petitioner argues that these facts constitute "good cause" for the purpose of § 52-470. The petitioner further claims that Wallace provided ineffective assistance by failing to advise him "about the time constraints governing habeas corpus petitions." Underlying each of these arguments, however, is the petitioner's claim that the court's findings were clearly erroneous as they relate to the advice Wallace provided to the petitioner at the time of the December 5, 2016 withdrawal, namely, the need to refile the habeas petition and the relevant time limits as they related to refiling the habeas petition.

As we noted in *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 21, "[t]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) Id., 36 n.12; see also *Ervin* v. *Commissioner of Correction*, 195 Conn. App. 663, 672–73, 226 A.3d 708, cert. denied, 335 Conn. 905, 225 A.3d 1225 (2020). "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks omitted.) *Budziszewski* v. *Connecticut Judicial Branch*, 199 Conn. App.

[4] At the conclusion of the December 5, 2016 proceeding, the court stated: "[The petitioner] has that right to withdraw, and the appointment process will be in accordance with the Office of the Chief Public Defender's practices, so the court will accept the withdraw[al]."

518, 523, 237 A.3d 792, cert. denied, 335 Conn. 965, 240 A.3d 283 (2020); see also *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 352, 233 A.3d 1106 (habeas judge, as trier of fact, is sole arbiter of credibility of witnesses and weight to be given to their testimony), cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

At the November 16, 2018 good cause hearing, Wallace testified, and a copy of the transcript from the December 5, 2016 proceeding was admitted into evidence. During Wallace's testimony, he stated that, prior to December 5, 2016, he advised the petitioner to refile his habeas petition. Although he did not provide the petitioner with a specific time frame, Wallace informed the petitioner to "just refile it, and they'll give you another lawyer and they can take another look at it." On redirect examination, Wallace stated that he affirmatively advised the petitioner, near the time of the December 5, 2016 withdrawal, of the need to refile a new habeas petition to be appointed new counsel. Additionally, as reflected in the transcript admitted into evidence, Wallace represented to the court during the December 5, 2016 hearing that, in either November or December, 2016, he advised the petitioner to execute the withdrawal of the habeas action "now . . . ." On the basis of this evidence and our deferential standard of review, we cannot conclude that the habeas court's findings regarding the advice given to the petitioner regarding the need to refile his habeas petition at the time he withdrew the prior habeas action were clearly erroneous.

The remaining question, therefore, is whether the habeas court, in light of its factual findings, abused its discretion in concluding that the petitioner failed to establish good cause for the untimely refiling of the petition for a writ of habeas corpus. We previously explained that, "[f]or the purposes of . . . [§ 52-470 (e)], good cause includes, but is not limited to, the discovery of new evidence which materially affects

the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section." (Internal quotation marks omitted.) *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 532, 197 A.3d 1034 (2018), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020).

In *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 21, we expounded on the good cause standard of § 52-470. "We conclude that to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay. Although it is impossible to provide a comprehensive list of situations that could satisfy this good cause standard, a habeas court properly may elect to consider a number of factors in determining whether a petitioner has met his evidentiary burden of establishing good cause for filing an untimely petition. . . . [F]actors directly related to the good cause determination include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented." Id., 34–35.

Guided by these principles, and coupled with our determination that the habeas court's findings of fact were not clearly erroneous, we conclude that the petitioner has failed to demonstrate that the habeas court

abused its discretion by dismissing his petition for a writ of habeas corpus as untimely pursuant to § 52-470. The habeas court concluded that the petitioner "offered no reason, impediment, or excuse . . . as to why, rather [than] contemporaneously refiling his petition, he waited for over one year after the withdrawal." This conclusion is fully supported by the record.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 202

HSBC BANK USA, NATIONAL ASSOCIATION, TRUSTEE *v.* ERIC HINES ET AL.
(AC 42552)

Alvord, Elgo and Cradle, Js.

Argued January 12—officially released January 26, 2021

Appeal by the named defendant from the Superior Court in the judicial district of Stamford-Norwalk, *Genuario*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

A BETTER WAY WHOLESALE AUTOS, INC. *v.* MICHAEL A. THIBODEAU ET AL.
(AC 42696)

Prescott, Elgo and Cradle, Js.

Argued January 14—officially released January 26, 2021

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

Per Curiam. The judgment is affirmed.

MICHAEL PAUL ROBERTS *v.* COMMISSIONER OF CORRECTION
(AC 42564)

Prescott, Elgo and Cradle, Js.

Argued January 14—officially released January 26, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* $4137 IN UNITED STATES CURRENCY
(AC 43283)

Bright, C. J., and Moll and Alexander, Js.

Submitted on briefs January 14—officially released January 26, 2021

Appeal by Kimar Fraser from the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, *Brillant*, *J.*

Per Curiam. The judgment is affirmed.

LARRY DAVIS *v.* COMMISSIONER OF CORRECTION
(AC 43242)

Bright, C. J., and Alvord and Alexander, Js.

Argued December 3, 2020—officially released January 26, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The judgment is affirmed.

JOHN INGRAM *v.* COMMISSIONER OF CORRECTION
(AC 42960)

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

Argued January 19—officially released January 26, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

DOREEN BELCO *v.* 23 FAIR STREET OPERATIONS, LLC
(AC 44099)

Prescott, Moll and Alexander, Js.

Submitted on briefs January 19—officially released January 26, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Morgan*, *J.*

Per Curiam. The judgment is affirmed.

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RULES OF APPELLATE PROCEDURE

NOTICE

Notice is hereby given that the following amendments to the Rules of Appellate Procedure were adopted on an interim basis to take effect January 26, 2021. The amendments to Section 63-10 were approved on an interim basis by the Appellate Court on December 22, 2020, and by the Supreme Court on January 12, 2021. The courts have waived the provision of Section 86-1 requiring publication of rules sixty days prior to their effective date.

Attest:

Carolyn C. Ziogas
Chief Clerk Appellate

INTRODUCTION

Contained herein are amendments to the Rules of Appellate Procedure. These amendments are indicated by brackets for deletions and underlined text for added language.

This material should be used as a supplement to the Connecticut Practice Book until the 2022 edition of the Practice Book becomes available.

AMENDMENT TO THE RULES OF APPELLATE PROCEDURE

CHAPTER 63
FILING THE APPEAL; WITHDRAWALS

Sec. 63-10. Preargument Conferences

The chief justice or the chief judge or a designee may, in cases deemed appropriate, direct that conferences of the parties be scheduled in advance of oral argument. All civil cases are eligible for preargument conferences except habeas corpus appeals, appeals involving juvenile matters, including child protection appeals as defined in Section 79a-1, summary process appeals, foreclosure appeals, and appeals from the suspension of a motor vehicle license due to operating under the influence of liquor or drugs.

In any exempt case, all parties appearing and participating in the appeal may file a joint request for a preargument conference. In a foreclosure case, the request for a preargument conference is sufficient if jointly submitted by the owner of the equity and the foreclosing party. In any exempt case, however, the chief justice or the chief judge or a designee may, if deemed appropriate, order a preargument conference.

The chief justice may designate a judge of the Superior Court, a senior judge or a judge trial referee **[**or senior judge**]** to preside at a conference. The scheduling of or attendance at a preargument conference shall not affect the duty of the parties to adhere to the times set for the filing of briefs. Failure of counsel of record to attend a preargument conference may result in the imposition of sanctions under Section 85-2. Unless other arrangements have been approved in advance by

the conference judge, parties shall be present at the conference site and available for consultation. When a party against whom a claim is made is insured, an insurance adjuster for such insurance company shall be available by telephone at the time of such preargument conference unless the conference judge, in his or her discretion, requires the attendance of the adjuster at the conference. The conference proceedings shall not be brought to the attention of the court by the presiding officer or any of the parties unless the conference results in a final disposition of the appeal.

The following matters may be considered:

(1) Possibility of settlement;

(2) Simplification of issues;

(3) Amendments to the preliminary statement of issues;

(4) Transfer to the Supreme Court;

(5) Timetable for the filing of briefs;

(6) En banc review; and

(7) Such other matters as the conference judge shall consider appropriate.

All matters scheduled for a preargument conference before a judge trial referee are referred to that official by the chief court administrator pursuant to General Statutes § 52-434a, which vests judge trial referees with the same powers and jurisdiction as Superior Court judges and senior judges, including the power to implement settlements by opening and modifying judgments.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* ANDRE DAWSON, SC 20361
Judicial District of Stamford-Norwalk

Criminal; Whether Evidence Sufficient to Support Defendant's Conviction of Criminal Possession of a Firearm. Police officers were patrolling a housing complex when they entered a courtyard where they saw six individuals, including the defendant. While two officers conversed with the defendant and three others who were seated at a picnic table near a corner formed by the cement walls of a planter, a third officer stepped onto the wall behind the defendant and immediately saw in plain view a gun lying in the corner by the bushes, about four to five feet away from the defendant. Subsequently, a state forensics laboratory examiner was able to generate a partial DNA profile from the "touch DNA" extracted from the gun and ammunition. "Touch DNA" comes from skin cells left behind when someone touches an object directly, through a secondary transfer or through aerosolization. Further testing showed that the defendant was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile. The defendant was subsequently convicted of criminal possession of a firearm. On appeal, he claimed that the evidence was insufficient to support his conviction of criminal possession of a firearm because there was insufficient evidence to establish that he had constructive possession of the gun. In order to establish constructive possession, the state must prove that the defendant had knowledge of the gun and intended to exercise dominion or control over it. The Appellate Court (188 Conn. App. 532) rejected the defendant's claim and affirmed his conviction, ruling that there was sufficient circumstantial evidence by which the jury reasonably could have inferred that the defendant was in possession of the gun when he entered the courtyard, that he put it near the bushes when the police arrived so that it would not be found on his person, and that he intended to retrieve the gun when the police left. The court determined that the state did not rely on DNA evidence alone to prove that the defendant knew of the gun's presence on the wall near the bushes, observing that the defendant was in close proximity to it. Further, although the defendant claimed that the DNA evidence was insufficient due to the questionable reliability of testing a small sample, the court concluded that the size of the DNA sample went to the weight of the evidence and not its admissibility. The court also found that the defendant could not prevail on his claim the state failed

to adduce any evidence of his intent to exercise dominion or control of the gun. The court determined that the jury reasonably could have inferred that the defendant had stashed the gun but remained in close proximity to it, such that he intended to exercise dominion or control over it, where the evidence demonstrated that the gun had been recently placed on the wall near the bushes, that the defendant had been near it, and that it had provided a DNA profile from which only the defendant could not be excluded with respect to those present. The defendant was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the evidence was sufficient to support the defendant's conviction of criminal possession of a firearm.

STATE *v.* JAMAAL COLTHERST, SC 20401
Judicial District of Hartford

Criminal; Juvenile Sentencing; Whether the Appellate Court Correctly Concluded That the Trial Court Had Followed the Statutory Requirements Set Forth in General Statutes § 54-91g in Resentencing the Defendant to Eighty Years of Incarceration. In 2001, the defendant was sentenced to life imprisonment without the possibility of release followed by seventy-one years of imprisonment for several crimes, including capital felony and murder, committed when he was seventeen years old. Subsequently, the legislature enacted P.A. 15-84. Section 1 of P.A. 15-84, codified at General Statues § 54-125a, ensures that all juveniles who are sentenced to more than ten years imprisonment are eligible for parole. Section 2 of P.A. 15-84, codified as amended at General Statutes § 54-91g, requires a sentencing judge to consider a juvenile's age and any youth related mitigating factors before imposing a sentence following a juvenile's conviction of any class A or class B felony. The defendant filed a motion to correct an illegal sentence in light of the passage of § 54-91g, and the trial court granted the motion. After the resentencing hearing, the trial court sentenced the defendant to a total effective sentence of eighty years incarceration, noting that he would be eligible for parole after a meaningful period of time. On appeal, the defendant claimed that § 54-91g created a presumption against imposing a life sentence or its functional equivalent on a juvenile defendant and that the sentencing court was required to overcome this burden by finding that the juvenile defendant was "irreparably corrupt" before imposing such a sentence. Here, because the trial court did not make such a finding, the defendant contended that the trial court erred in imposing a sentence that was the functional

equivalent of a life sentence. The Appellate Court (192 Conn. App. 738), however, concluded that § 54-91g does not create a presumption against the imposition of a life sentence or its functional equivalent on a juvenile defendant, citing *State* v. *Riley*, 190 Conn. App. 1, cert. denied, 333 Conn. 923 (2019). It further concluded that because the defendant was granted parole eligibility in his resentencing, the trial court was not required to make a finding that the defendant was incorrigible, irreparably corrupt, or irretrievably depraved before it properly could sentence him to life imprisonment or its equivalent. Next, the defendant claimed that the trial court improperly failed to account adequately for his youth at the time he committed the underlying crimes in resentencing him, as required by § 54-91g. The Appellate Court rejected the claim, ruling that the trial court's sentence was supported by the record from the resentencing hearing and the court adequately considered the factors set forth in § 54-91g. In so ruling, the court noted that, consistent with § 54-91g, the trial court resentenced the defendant after taking into account his age, environment, criminal history and family and home environment at the time of the crimes, as well as a personality functioning test of the defendant administrated by a clinical neuropsychologist and evidence concerning adolescent brain development. Accordingly, the Appellate Court affirmed the trial court's judgment. The defendant was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the trial court had followed the statutory requirements set forth in § 54-91g in resentencing the defendant to eighty years of incarceration.

SUMMIT SAUGATUCK, LLC *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF WESTPORT, SC 20431

Judicial District of Hartford

Administrative Appeal; Whether Trial Court Improperly Substituted Its Judgment for Defendant Agency's Discretion By Ordering Conditional Approval of Plaintiff's Sewer Extension Application; Whether Defendant May Decline to Approve Proposed Sewer Extension Solely Because Town's Planning and Zoning Commission Issued Negative Report on General Statutes § 8-24 Referral. The plaintiff filed with the defendant water pollution control authority an application for a sewer extension to service its proposed affordable housing development. The plaintiff requested that its application be conditionally approved subject to the completion of the town's project to upgrade and improve its sewer system. The defen-

dant denied the application, noting that there had not been compliance with General Statutes § 8-24—which provides that a sewer extension proposal shall be referred to a town's planning and zoning commission and that, if the commission disapproves the proposal, the proposal shall be adopted by the town only after subsequent approval by two thirds of the representative town meeting—because the town planning and zoning commission had issued a negative report upon statutory referral and the plaintiff had not obtained the subsequent approval of the representative town meeting. The plaintiff appealed to the trial court, which sustained the appeal on the ground that § 8-24 is advisory in nature and not binding on the defendant. The trial court remanded the matter to the defendant for a new hearing. After that hearing, the defendant again denied the application, stating that (1) there was insufficient capacity in the sewer system to accommodate the proposed sewer extension at that time and (2) conditional approvals were not granted as a matter of policy. The trial court sustained the plaintiff's subsequent appeal. It concluded that the defendant's denial was arbitrary and an abuse of discretion where, instead of rendering a decision on the merits of the plaintiff's application, the defendant had decided that the application was premature and that a conditional approval was against established policy. The court remanded the matter to the defendant with direction to conditionally approve the application. The defendant appealed, and the Appellate Court (193 Conn. App. 823) reversed the trial court's judgment, ruling that the decision to grant a conditional approval was properly left to the defendant's discretion and that the trial court had impermissibly substituted its judgment by ordering a conditional approval. It determined that the record did not support a conclusion that the defendant's decision was arbitrary or an abuse of discretion. It also concluded that the defendant was entitled to a presumption of regularity in its decision-making process, given its settled policy of not granting conditional approvals. In light of its disposition, the court concluded that it need not decide the defendant's additional claim regarding § 8-24. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly determined that the trial court had improperly substituted its own judgment for the discretion of the defendant by ordering it to conditionally approve the plaintiff's sewer extension application. The Supreme Court will also decide whether the defendant may decline to approve a proposed sewer extension for the sole reason that the town's planning and zoning commission issued a negative report on a referral under § 8-24 and the applicant did not appeal to the representative town meeting and obtain a reversal.

STATE *v.* WILLIAM HYDE BRADLEY, SC 20450
Judicial District of Middlesex at G.A. 9

Criminal; Standing; Whether Appellate Court Properly Held Caucasian Defendant Convicted under General Statutes § 21a-277 (b) Did Not Have Standing to Bring Due Process Challenge Based on Claim That Statute Was Enacted to Discriminate Against Minority Groups; If Not, Whether § 21a-277 (b) Was Enacted to Discriminate Against African Americans and/or Mexican Americans. The defendant was charged in two separate informations with, inter alia, violation of probation and possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (b) after approximately thirty ounces of marijuana were found in his home during a visit by probation officers. The defendant moved to dismiss the charges on the ground that his prosecution under § 21a-277 (b) was unconstitutional because the statute was enacted to discriminate against persons of African American and Mexican descent in violation of equal protection principles. The trial court ordered the parties to file supplemental memoranda addressing whether the defendant, whom the court had found to be Caucasian, had standing to make his equal protection claim. In its memorandum of decision, the trial court found that the defendant had standing to bring an equal protection challenge to § 21a-277 (b), under which he was charged, because there was a genuine likelihood that he would be convicted under the statute. The trial court nonetheless denied the defendant's motions to dismiss on the merits, concluding that he had failed to prove that the legislature's true purpose in enacting the statute was to discriminate against persons of African American or Mexican descent. The defendant thereafter entered conditional pleas of nolo contendere so that he could appeal the trial court's denials of his motions to dismiss. On appeal, the defendant claimed that the trial court erred in denying his motions to dismiss because state cannabis laws are based on a racially discriminatory purpose in violation of the Equal Protection Clause. The Appellate Court (195 Conn. App. 36) affirmed the trial court, albeit on the alternative ground that the defendant lacked standing to make his equal protection claim. The court distinguished the law on which the trial court relied to find that the defendant had standing and determined that such law provides that parties with individual standing may challenge not only ongoing but also future violations of their constitutional rights that are reasonably likely to occur. The court further determined, however, that the law did not empower the defendant to bring an equal protection challenge in his individual capacity based on alleged violations of the rights of persons of African American or

Mexican descent, groups to which he did not belong. The court also concluded that the defendant had not established classical aggrievement in a representative capacity or third-party standing. It accordingly affirmed the trial court's judgment. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the defendant did not have standing to raise a due process challenge to his prosecution under General Statutes § 21a-277 (b), which he claims was enacted for the purpose of discriminating against minority groups to which he does not belong. If the answer to that question is "no," the court will also decide whether § 21a-277 (b) was enacted for the purpose of discriminating against African Americans and/or Mexican Americans.

ROBERT GOGUEN *v.* COMMISSIONER OF CORRECTION, SC 20482
Judicial District of Tolland

Habeas; Whether Appellate Court Properly Dismissed Self-Represented Petitioner's Appeal Because He Failed to Brief Whether Habeas Court Abused Its Discretion in Denying His Petition for Certification to Appeal. The self-represented petitioner, Robert Goguen, filed a petition for a writ of habeas corpus alleging that he did not voluntarily enter his guilty plea to sexual assault in the second degree and that he received ineffective assistance in connection with the guilty plea. The habeas court declined to issue the writ pursuant to Practice Book § 23-24 on the ground that it lacked jurisdiction because the petitioner was not in the custody of the Commissioner of Correction at the time of the filing. The petitioner filed a petition for certification to appeal from the ruling, which the habeas court denied. The petitioner then filed an appeal in the Appellate Court. The Appellate Court (195 Conn. App. 502) noted that, when faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for a writ of habeas corpus only by satisfying the two-pronged test enunciated by the Supreme Court in *Simms* v. *Warden*, 229 Conn. 178 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608 (1994). First, the petitioner must demonstrate that the denial of his petition for certification constituted an abuse of discretion. Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. To prove an abuse of discretion, the petitioner must show that the resolution of the underlying claims involves issues that are debatable among jurists of reason,

that a court could resolve the issues in a different manner or that the questions are adequate to deserve encouragement to proceed further. Based on its review of the petitioner's appellate briefs, the Appellate Court found he failed to brief the threshold issue of whether the habeas court abused its discretion in denying certification to appeal. The Appellate Court, therefore, dismissed the appeal based on its determination that the petitioner was not entitled to review because he failed to meet the first prong of *Simms* by demonstrating that the denial of his petition for certification to appeal constituted an abuse of discretion by the habeas court. The petitioner sought certification to appeal from the Appellate Court's judgment, which the Supreme Court granted as to the question of whether the Appellate Court properly dismissed the self-represented petitioner's appeal because he failed to brief whether the habeas court had abused its discretion in denying his petition for certification to appeal.

STATE *v.* AUSTIN GRANT HAUGHWOUT, SC 20547
Judicial District of Middlesex

Criminal; Search & Seizure; Whether Conviction for Interfering with, and Disobeying, Officer Violates Fourth Amendment Where Defendant Argues That He Was Unlawfully Detained; Whether New Crime Exception to Exclusionary Rule Applies. The defendant was convicted of disobeying an officer, interfering with an officer and two counts of assault of an officer as a result of two incidents occurring in July, 2015. On July 19th, Clinton police officer Alexieff Adrian Santiago observed the defendant standing in front of a car in a dark corner of the parking lot of the town library, which was closed at the time. As Santiago approached, the defendant got into the car and started to drive away. Santiago activated the lights on his patrol car and signaled for the defendant to pull over. The defendant complied and asked if he was suspected of committing a crime. Santiago asked the defendant what he was doing, and the defendant replied that he was using the public Wi-Fi available at the library. Santiago instructed the defendant to remain where he was, but the defendant drove away. Santiago pulled up behind the defendant's car, which was stopped at a traffic light, and activated the lights on his patrol car. The defendant again drove away. Santiago stopped the defendant a short distance away and asked that he put his car in park and produce his motor vehicle documentation. The defendant refused. Santiago did not arrest the defendant that night but rather subsequently obtained a warrant for his arrest. On July 22nd, the defendant

went to the police station to voluntarily surrender himself. When he arrived, he was carrying a GoPro camera in his hand. An officer notified him that he was under arrest and that could not bring the camera into the secure area. The defendant refused to surrender the camera, became argumentative and attempted to leave the police station. A physical struggle ensued, during which the defendant kicked the officer in the face, neck and arm. Another officer joined in to assist and, after some time, they were able to obtain control of the defendant. The defendant appeals, claiming that his conviction for disobeying an officer and interfering with an officer must be reversed because (1) he was not lawfully detained pursuant to a valid stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968) and, as a result, all evidence derived from the stop should have been suppressed by the trial court; (2) a conviction for failing to comply with a police officer's requests during an illegal seizure violates the fourth amendment; and (3) the "new crime exception" to the fourth amendment's exclusionary rule does not apply under the circumstances here. The defendant also claims that (1) the prosecutor engaged in impropriety during closing argument by vouching for the reasonableness of the police conduct and use of force and by offering a personal opinion that the officers were acting in the performance of their duties; (2) the trial court improperly failed to instruct the jury on the element of assault on an officer that the defendant's conduct must be the proximate cause of the injuries; and (3) the evidence was insufficient to support a conviction on any of the charges.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in December 2020. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Cerrone, Stefanie Ann of Stamford, CT
Goldsmith, Jacob Picard of Fairfield, CT
King, Sheridan Louise of Stamford, CT
Maroules, James Alexander of Hasbrouck Heights, NJ
O'Loughlin, Marissa Ann of Danbury, CT
Sarkissian, Liana of Reading, MA

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in December 2020. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Aloisi, Catherine E. of Waltham, MA
Bassett, Jennifer Genovesi of Greenwich, CT
Bers, Alice of Longmeadow, MA
DeRosa, Michael Philip of Northport, NY
Kirschenbaum, Jennifer A. of Old Westbury, NY
Lutsky, Todd E. of Waltham, MA
Malali, Prem Nagaraj of Cos Cob, CT
Smith, Shelley of Evanston, IL