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CONNECTICUT REPORTS

Vol. 340

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DEONTE O. TOMLINSON
(SC 20192)

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

Syllabus

Convicted of the crimes of murder and carrying a pistol without a permit in connection with the shooting death of the victim, the defendant appealed to this court. The state's theory was that the defendant and the victim were members of rival gangs, the "150 gang" and the "Green Hollow Boyz," respectively, and that the defendant shot the victim in retaliation after the victim had been tried for and acquitted of the murder of H, another 150 gang member. At the time the victim was shot, the defendant's acquaintance, M, was in a nearby car driven by her friend, J. M saw the defendant, whom she knew as "DT," cross the street and then heard gunshots. Meanwhile, J was having a phone conversation with her incarcerated boyfriend, D, on a recorded line. Within minutes of the shooting, M spoke to D and identified the defendant as the shooter. The police also executed a search warrant at the defendant's apartment on the night of the shooting. In one of the bedrooms, they found a mirror, on which someone had written "150," "GANG" and "DT." Prior to trial, the defendant sought to preclude evidence of his association with the 150 gang and a rap music video that had been posted on the Internet, which featured the defendant and two other members of the 150 gang, who were handling a gun. The trial court made preliminary rulings denying the defendant's motions. At trial, the state sought to present the expert testimony of A, a gang intelligence sergeant for the Bridgeport Police Department. Defense counsel objected, claiming that A's testimony was inadmissible because it was irrelevant insofar as there was no direct evidence that the defendant belonged to a gang or that the shooting was gang related. He also claimed that A's opinions were based on hearsay and that, as an expert witness, A was not allowed to testify as to hearsay. The trial court overruled the objection, and A testified that his duties included monitoring gang activity in Bridgeport through social media, where he discovered the rap music video, and by talking with community residents, informants and gang members. He stated that he was familiar with the rival gangs, that the defendant and H were members of the 150 gang, and that H's death contributed to a conflict between the two gangs. In conjunction with A's testimony, the state introduced the rap music video, which was played for the jury over defense counsel's renewed objection. Defense counsel also renewed his objection when the state sought to admit photographs of the writing on the mirror, but the trial court concluded that the photographs were

admissible under the hearsay exception for statements of a party opponent. Finally, defense counsel objected on hearsay grounds to the admission of the recording of M's statements to D identifying the defendant as the shooter. The trial court concluded, however, that M's statements were admissible under the hearsay exception for spontaneous utterances, and the recording was played for the jury. From the judgment of conviction, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly admitted A's expert testimony about gangs on the grounds that it was irrelevant and a violation of his constitutional right to confrontation:

a. The defendant abandoned his nonconstitutional, evidentiary claim that A's expert testimony was irrelevant; it was the defendant's burden to establish that the allegedly improper admission of A's testimony was harmful, he failed to brief that issue, and, even if the single sentence in his brief relevant to that issue raised an argument that A's testimony was more prejudicial than probative, that argument did not address whether any alleged error was harmful in light of all of the other evidence adduced at the defendant's trial.

b. The defendant failed to preserve his claim that A's testimony violated his constitutional right to confrontation insofar as it was a conduit for inadmissible, testimonial hearsay from contacts and informants who were not subject to cross-examination; defense counsel never argued before the trial court that the alleged hearsay was testimonial, as counsel challenged A's testimony only on the basis of relevancy, hearsay and prejudice, and, although the parties and the trial court might have been on notice of other constitutional claims relative to other evidence, that did not place them on notice as to this specific claim.

c. Even if A served as a conduit for testimonial hearsay, any constitutional error in the admission of A's testimony regarding gangs was harmless beyond a reasonable doubt in light of the strength of the state's case, evidence of the defendant's motive, and the cumulative nature of the witnesses' testimony: the jury reasonably could have inferred that the defendant shot the victim in retaliation for H's murder and that the shooting was gang related, as there was evidence that the defendant and H had been friends and that the victim had been arrested for the murder of H but was acquitted after a trial, which the defendant attended; moreover, the state linked the defendant to the 150 gang through the reference to 150 on his bedroom mirror and evidence that he used that number as part of his username for his Snapchat account; furthermore, the state's case was strong, as M, who had known the defendant for years, identified the defendant as the shooter within minutes of the shooting, the firearm used to shoot the victim and the sweatshirt that eyewitnesses had seen the shooter wearing were discovered near the location where the police apprehended the defendant, and testing could not eliminate the defendant as a contributor to the DNA that was found on the gun used in the

shooting, which was similar to the gun that appeared in the rap music video.

2. The defendant failed to establish that any error in the admission of the rap music video was constitutional in nature, as he did not demonstrate the materiality of that evidence, especially in light of the other substantial evidence of his guilt that had been adduced at trial; moreover, the defendant's failure to brief the issue of harmless evidentiary error rendered any evidentiary claim with respect to the admission of the video abandoned.

3. The trial court did not abuse its discretion in admitting the photographs of the writing on the mirror, because, even if the writing constituted hearsay, it was admissible under the hearsay exception for statements of a party opponent: the state produced sufficient evidence from which the jury reasonably could have inferred that the defendant authored the writing on the mirror, as there was circumstantial evidence that the defendant was at least an occupant of the bedroom where the mirror was found, including documents found therein with his name and address on them, there was no evidence from which it could be inferred that a person other than the defendant resided in the apartment, and, at the time of the search by the police, the apartment was not open and no one else was present in the apartment; moreover, there was other circumstantial evidence that demonstrated the defendant authored the writings, including his initials on the mirror.

4. The trial court did not abuse its discretion in admitting the recording of M's statements to D under the spontaneous utterance exception to the hearsay rule: contrary to the defendant's assertion that M's statements were inadmissible because she had an opportunity for deliberation or fabrication, the few minutes between the shooting and her statements to D were insufficient to provide M with an opportunity to deliberate or to fabricate, especially in light of her proximity to the crime scene and her emotional state, evidenced by her crying, her rambling, and her distressed voice; moreover, it was of little significance that M's statement identifying the defendant as the shooter was in response to a question from D, as her response was a stream of consciousness that was spoken under emotional circumstances, she answered D's question regarding the shooter's identity without pause, and, although she was rambling and crying, she continued to provide D with additional information, unprompted, about what she had witnessed; furthermore, there was no evidence that J and M discussed the shooting prior to M's conversation with D, nothing J said to D, to the extent it was decipherable from the recording, identified the defendant as the shooter, and there was no evidence that M was influenced by anything she heard from J.

Argued November 18, 2020—officially released September 8, 2021*

* September 8, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pavia*, *J.*, denied the defendant's motions to preclude certain evidence; thereafter, the case was tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Colleen P. Zingaro* and *Michael A. DeJoseph, Jr.*, senior assistant state's attorneys, for the appellee (state).

Opinion

D'AURIA, J. The principal claims in this appeal concern the propriety of the trial court's admission of evidence regarding a criminal defendant's alleged gang affiliation and, specifically, whether the prejudicial nature of this evidence outweighed its relevance. The defendant, Deonte O. Tomlinson, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), for the shooting death of the victim, Kahlil Diaz, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court improperly admitted the following evidence: (1) expert testimony regarding gangs because it was irrelevant and violated his right to confrontation under the federal constitution; (2) a rap music video because its highly prejudicial nature rendered his trial fundamentally unfair; (3) police photographs that depicted writing on a mirror in a bedroom of his apartment—

arguably reflecting gang membership—because the photographs constituted inadmissible hearsay; and (4) portions of a recorded phone conversation that was contemporaneous with the murder because it constituted hearsay and did not fall under the excited utterance exception to the rule against hearsay. Although we recognize that evidence regarding a defendant's gang affiliation may prejudice a jury against a defendant, on the facts of this case, we affirm the judgment of conviction.

Specifically, we conclude that the defendant did not preserve at trial his claim regarding expert testimony on gangs and that, even if the testimony was improperly admitted, it was harmless beyond a reasonable doubt. We also conclude that the defendant has failed to establish that the allegedly erroneous admission of the rap music video was of constitutional magnitude. Finally, we conclude that the trial court did not abuse its discretion in admitting either the photographs of the mirror or the recorded conversation.

Relevant to our review of these claims is the following procedural history, along with the following facts the jury reasonably could have found from the evidence admitted at trial. At approximately noon on May 13, 2016, the day of the shooting, Detectives Theodore Montagna, Edward Martocchio and Albert Palatiello of the Bridgeport Police Department were driving northbound in an unmarked police vehicle on Madison Avenue in Bridgeport. At the intersection of Madison Avenue and Frank Street, Montagna saw a tall, thin, light-skinned black male wearing a black hooded sweatshirt standing in the middle of the street firing a gun with his right hand into a silver-colored vehicle. After firing three gunshots, the shooter turned away and ran eastbound down an alleyway between two residences. Palatiello exited the vehicle and ran northbound on Madison Avenue, where he discovered the victim sitting in a silver-

colored Audi, bleeding from his neck. The victim exited his vehicle and died at the scene from multiple gunshots wounds.

Meanwhile, Montagna drove down Madison Avenue, dropped Martocchio off halfway down the block, and parked on the corner of Grand Street and Madison Avenue, about one block from the crime scene, hoping to flush out the shooter. As Montagna proceeded on foot on Grand Street, he saw a tall, thin, black male, later identified as the defendant, exit an alleyway that ran behind a church and led to the backyard of a residence at Madison Avenue and Grand Street. The defendant was no longer wearing a black sweatshirt. Montagna yelled, "[s]top! Police!" The defendant stopped. Montagna grabbed the defendant, and, unsolicited, the defendant said, "I didn't do nothing." Montagna patted the defendant down, searching for a weapon but did not find one. Although the temperature was 61 degrees Fahrenheit and the defendant was wearing only a T-shirt and jeans, he was sweating and his heart was beating rapidly.

While Montagna detained the defendant, Officer Paul Nikola of the Bridgeport Police Department, who had been dispatched to assist in the investigation, found a knit hat, black hooded sweatshirt, and a silver-colored, semiautomatic handgun under a wooden deck in the backyard of a residence that abutted the alleyway from which the defendant had emerged onto Grand Street.

Two witnesses to the shooting were not police officers: Francisco Rivera and Alexis McIntosh. McIntosh had known the defendant since middle school and identified him as the shooter in a phone conversation recorded within moments of the shooting. Rivera, who had been waiting for a bus on Madison Avenue, witnessed the shooting but did not see the shooter's face

and could describe the shooter only as tall and dressed entirely in black.

The state's theory of the case was that the defendant was a member of the "150 gang" and that the victim was a member of a rival gang known as the "Green Hollow Boyz." The victim recently had been acquitted after a trial of the murder of a member of the defendant's gang, Ryan Hernandez, and the state contended that the defendant murdered the victim in retaliation. Following a jury trial, the defendant was convicted of murder and carrying a pistol without a permit. The trial court imposed a total effective sentence of fifty-three years of incarceration. The defendant now appeals to this court. Additional facts will be set forth as necessary.

I

The defendant claims that the trial court violated the rules of evidence and his sixth amendment right to confrontation by improperly admitting expert testimony from Sergeant Jason Amato of the Bridgeport Police Department regarding local street gangs. As to his evidentiary claim, the defendant argues that, because no direct evidence established that he was a member of a gang, and, thus, no evidence established that the shooting was associated with gang violence, expert testimony regarding gangs was irrelevant. As to his confrontation clause claim, the defendant argues that Amato's testimony was a conduit for inadmissible, testimonial hearsay obtained from contacts in the community and informants who were not subject to cross-examination. The defendant contends that the state cannot demonstrate that this error was harmless beyond a reasonable doubt. The defendant's failure to brief the issue of harmfulness renders it unnecessary for us to review that claim.

As to the defendant's constitutional claim, which he did not preserve at trial, on the record before this court,

we conclude that either a majority of Amato's testimony did not improperly parrot testimonial hearsay statements or the record is inadequate to make that determination. We further conclude that any error by the trial court in permitting Amato to serve as a conduit for testimonial hearsay was harmless beyond a reasonable doubt.

A

The following additional facts and procedural history are necessary to our review of these claims. Prior to trial, the defendant filed a motion in limine to exclude evidence of his association with the 150 gang pursuant to the fifth, sixth and fourteenth amendments to the federal constitution, as well as §§ 4-1, 4-3, 4-5 and 8-2 of the Connecticut Code of Evidence. His supporting memorandum of law, however, contained no constitutional analysis, arguing only that Amato's expert testimony regarding gangs was irrelevant because there was no evidence that the defendant belonged to a gang.

Before the start of evidence, the trial court held a hearing on the defendant's motion in limine. Amato testified that he was the gang intelligence sergeant for the city of Bridgeport. After testifying as to his experience and training, Amato explained that his duties required him to acquire information provided by community members and gang members. When talking to gang members, he would meet with them in an isolated area to obtain pertinent information about gangs, the meaning of signs and symbols that they use, areas of the city that they control, and crimes that had been committed.

Amato also testified that he was familiar with both the 150 gang and the Green Hollow Boyz, as well as with the defendant and Hernandez. He testified that Hernandez had been a member of the 150 gang and that the basis for his opinion included Hernandez' portrayal

of himself in videos and other materials, along with information from sources in the community.[1] The victim and Fabian Francis, who were members of the Green Hollow Boyz, had been arrested and charged with Hernandez' murder but were acquitted after trial. Amato also was familiar with Tajvon Ferris and Kevin Beason through "several contacts," including "[i]nformation provided through people on the street that they were a part of a—they were part of the 150 [gang]. And we had made contacts on the street with them." Amato learned through informants and social media that the defendant was associated with Ferris and Beason, and with the 150 gang.

Amato then testified that, as part of his duties, he monitored social media to keep an eye on the gangs and to learn more about them. This was how he discovered a rap music video depicting the defendant, Ferris, and Beason. Based on what others had told him, Amato was able to interpret the video's lyrics, including that the use of "G" in the video meant the Green Hollow Boyz.

Based on his experience as a gang intelligence sergeant and his investigation of shootings in the city, including that of the victim, Amato opined that, at the time of the victim's death, there was a conflict between the 150 gang and the Green Hollow Boyz, and that Hernandez' homicide and the acquittal of the victim and Francis contributed to this conflict. He stated that his knowledge of which gangs controlled which areas of the city was based not just on what community resi-

[1] Specifically, Amato testified that he had seen videos and other depictions of Hernandez in which Hernandez portrayed himself as being a gang member, being around known gang members, flashing firearms and discussing membership in the 150 gang, and in which gang members referred to themselves as PAB—Park Avenue Boyz—which referred to the neighborhood the 150 gang controlled. Amato testified that he also relied on information gathered from debriefings of people who were under arrest, and from various informants and community members

dents, informants, and gang members had told him, but on his own observations and experiences.

Amato conceded that the defendant never told him that he was involved in a gang. Rather, Amato's opinion that the defendant was "100 percent part of [the] 150 [gang]" was based on "information we receive through sources, videos, [and] photographs, other information through the years," and that other police officers had told him that the defendant had been involved in other gang related crimes. For example, he testified that the rap music video he had discovered evidenced an association between the three men, referred to issues involving another area gang, and exhibited access to a "community weapon," which he described as a weapon hidden by a gang in a certain location that can be accessed and used by any member of that gang who needs a firearm, after which the firearm is to be returned to the same hidden location for use by other members of the gang. He clarified that he learned about community weapons from his debriefing of gang members and through his experience.

Following Amato's testimony at the pretrial hearing, defense counsel argued that this testimony was inadmissible because Amato admitted that he was basing his opinions on hearsay and that, as an expert witness, Amato was not allowed to parrot hearsay. The court made "a finding that . . . in this particular instance . . . the expert's testimony is based on evidence that has been gained through many years of experience, through many courses that have been taken, through sources that are reliable, and, therefore, it's going to be a question of weight, not admissibility." The court made clear, however, that it was making a preliminary ruling and that the parties should raise additional objections at trial based on the evidence that was admitted. For example, the court stated that, if there was no evidence that the defendant was a member of the 150 gang,

Amato's expert testimony could be ruled irrelevant and inadmissible.[2]

Prior to the start of Amato's testimony at trial, defense counsel accepted the court's invitation and again objected to his testimony, arguing that there had been, to that point, no nonhearsay evidence admitted showing that the defendant was a member of the 150 gang. The trial court adhered to its prior ruling and overruled the objection that all expert testimony regarding gangs was irrelevant. The court clarified that Amato could testify that 150 is a known gang but not that the defendant was a member of the 150 gang or what was meant by the "150" in his Snapchat address and on his bedroom mirror. The court stated that the jury could instead infer any link between the defendant and the 150 gang.

Amato's testimony before the jury was considerably shorter than what the state had presented at the pretrial hearing. After describing his training and experience, Amato testified that, as the city's gang intelligence sergeant, he was "responsible for any gang related activity,

[2] The court ruled: "I don't think that there's any surprise on this. The state's theory is, and has always been, that this a gang related retaliation; therefore, the state has a right, there's an abundance of case law dealing with motives and motive evidence of gang retaliation, and I think we've all talked about them . . . . But they deal with the fact that expert testimony is appropriate for the jury, it is a scenario where, once it is relevant to the case itself, then the question becomes whether an expert can provide the [jurors] with information that might be outside their expertise. . . . That doesn't mean that, if the state is going into something, that you shouldn't object; I'm just saying that the issue of expert testimony to explain gangs and gang behavior, particular gangs in the area, is appropriate. What is not appropriate is . . . identifying the defendant as being affiliated with a particular gang, unless there's some specific knowledge of that, which, from—from the offer of proof that was given, was not addressed. So, I'm not finding that this officer can testify to that specific but can testify to a general expertise in terms of gangs, behavior, identification of different gangs in the area, and that [type] of thing." The court emphasized that "these are not [absolute] rulings, and, to the extent that the evidence is going in one way or another and the defense feels that an objection is appropriate, please make that objection because they are not absolute."

shootings, assaults, identifying and tracking gang intelligence . . . . [T]hen we . . . share [it] with other units in the city." He testified that, as part of his duties, he gathered intelligence from many sources, including social media, the Internet, and contacts within the community. Amato explained that gangs in Bridgeport are unique; they are not organized but, instead, are neighborhood based with certain gangs controlling different areas of the city based on where the members are from. Amato repeated that portion of his pretrial testimony in which he indicated that he knew Hernandez through contacts in the community and that Hernandez went by the nickname, or street name, "Ryo." Amato learned through the course of his employment that Hernandez had been fatally shot and that Francis and the victim had been arrested in connection with the shooting but were later acquitted after trial.

The prosecutor then asked Amato if he was aware of the motive behind the murder of Hernandez, to which he responded in the affirmative, leading defense counsel to object on the ground of hearsay. Amato then explained that the basis for his knowledge included community contacts, firsthand knowledge from investigating the defendant's case and his work as a police officer in general, which included a long-term investigation into a rival gang. The trial court overruled defense counsel's objection.[3]

Amato proceeded to testify, as he did at the pretrial hearing, that the motive underlying the homicide of Hernandez was gang related, that Hernandez had been affiliated with the 150 gang, which also was known as

[3] Following the jury's verdict of guilty, defense counsel moved for a new trial, arguing in relevant part that "[t]he trial court erred in permitting [Amato] to testify, where his testimony was based on hearsay, and any probative value of his testimony was outweighed by its prejudicial tendencies . . . ." The trial court denied the motion, stating that it was "stand[ing] by its rulings for the reasons articulated throughout the course of the trial."

the Park Avenue Boyz (PAB), and that Francis and the victim were affiliated with the rival Green Hollow Boyz gang. Amato stated that his testimony was based on his long-term investigation of neighborhood gangs in Bridgeport, each of which controlled its own section of the city. He testified that he had firsthand knowledge that, in 2016, there had been a conflict between the 150 gang and the Green Hollow Boyz, and that, based on information he had gathered at various shooting incidents in Bridgeport, he arrived at his opinion that there was a war between these two gangs. He opined that the murder of Hernandez contributed to this conflict and that, based on information he obtained through "contacts on the street, using confidential informants," "[the conflict] was gonna continue, and it was only gonna get worse."

Based on his training, Amato also testified that an individual seeking to identify his association with the 150 gang would assign himself either a name or a symbol, using the number 150 or PAB. Similarly, someone affiliated with the Green Hollow Boyz would use "G-B" or "G$B."

Amato testified that he knew the defendant, Ferris, and Beason from prior contacts, with Ferris going by the nickname "T Raw," Beason going by "KB," and the defendant going by "DT." He explained that, prior to the shooting at issue, he had discovered a rap music video depicting the defendant, Ferris, and Beason. Defense counsel again objected when the state sought to admit the rap video into evidence, stating simply that he maintained his prior objections.

Before the video was played for the jury, Amato testified that he was familiar with the term "community weapon" through his training and experience, and described it is "a firearm that's passed amongst the gang members or group members from that one area."

Using a screenshot from the rap video, Amato identified the defendant, Ferris, and Beason. The video was subsequently played for the jury. Amato was not permitted to interpret what was said in the video.[4]

In closing arguments to the jury, the prosecutor argued that, as to motive, Hernandez and the defendant were associated with each other and that the victim was shot only a few months after being acquitted of Hernandez' murder. The prosecutor further argued that there was an ongoing feud between the 150 gang and the Green Hollow Boyz. The prosecutor never specifically argued that the defendant was a member of the 150 gang or that the shooting of the victim was gang related. The prosecutor suggested this, however, by relying on the testimony of both McIntosh and Amato to argue that the shooting occurred in an area of the city that was not controlled by the 150 gang but by the Green Hollow Boyz, with which the victim had been associated, and that the defendant's presence in that area was not normal. The prosecutor also noted that the rap music video and the defendant's Snapchat name contained the number 150 but left the jury to draw its own inferences and conclusions from this fact. The prosecutor specifically argued, without objection from the defendant, that the shooting of Hernandez, in which the state had implicated the victim, was part of the feud between the two gangs.

Neither party timely requested that the court give the jury an instruction on motive or any limiting instruction regarding Amato's testimony. The court, however, did

[4] Amato testified only as to his role in downloading the video in March, 2016, and that the first screen before the video begins notes the title of the video as it appeared on YouTube. He also testified that the Bridgeport Police Department did not create the title of the video or the screen at the end of the video showing the symbol used by Snapchat to identify itself and the text, "Hotboy150." The contents of this video are discussed in part I C 2 of this opinion.

instruct the jury, without objection from the parties, regarding expert testimony in general, consistent with the model jury instructions on the Judicial Branch website. See Connecticut Criminal Jury Instructions 2.5-1, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 8, 2021).

B

The defendant first asserts that Amato's expert testimony was inadmissible because it was irrelevant. Specifically, he argues that, because there was no direct evidence that he was a member of the 150 gang, this evidence was not relevant to motive, that is, that he killed the victim, who was a member of a rival gang, in retaliation for the victim's allegedly having murdered Hernandez, who had been the defendant's friend and a fellow gang member. The defendant does not argue, however, that this alleged evidentiary error was harmful.[5] Accordingly, we deem this claim of evidentiary error abandoned and decline to address it.

We have stated that, if the improper admission of expert opinion testimony "is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 419, 963 A.2d 956 (2009). The defendant argues in a single sentence in his principal brief that, by utilizing Amato's allegedly irrelevant testimony, "the state played to the [jurors'] fears and unduly prejudiced the defendant; that is, it raised and perpetuated the specter of the young, violent, inner city African-American male as associating with and engaging in the most negative of stereotypes."

[5] The defendant also does not argue that this alleged error was so prejudicial as to rise to the level of a constitutional violation.

Even if this single sentence sufficed to raise an argument that the testimony was inadmissible because it was more prejudicial than probative, the argument does not address whether any alleged error was harmful in light of all the other evidence. See *State* v. *Toro*, 172 Conn. App. 810, 818–20, 162 A.3d 63 (explaining that, although prejudice and harm may overlap, they are separate and distinct issues requiring separate analysis), cert. denied, 327 Conn. 905, 170 A.3d 2 (2017). Because it was the defendant's burden to establish harm from any evidentiary error; see *State* v. *Beavers*, supra, 419; and because he failed to brief the issue of harmful error, we deem this claim abandoned and decline to address it.[6] See *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003) ("to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse"); *State* v. *Toro*, supra, 818–20 (evidentiary claim was abandoned when defendant did not brief issue of whether admission of evidence constituted harmful error).

C

The defendant also claims that the admission of Amato's expert testimony was improper because it violated his sixth amendment right to confrontation. Specifically, he argues that Amato's testimony was a conduit for inadmissible, testimonial hearsay obtained from contacts and informants who were not subject to cross-examination.

First, we must decide whether the defendant properly preserved this claim. He argues that he raised this claim at trial because, (1) in his motion in limine to exclude

[6] Nevertheless, we note that, although Amato was prohibited from testifying that the defendant was a member of the 150 gang, other evidence admitted at trial linked the defendant to the 150 gang, such as his Snapchat username (Hotboy150) and writing on the mirror discovered in his bedroom. From this, the jury reasonably could have inferred that the defendant was a member of the 150 gang. See part I C 2 of this opinion.

evidence regarding any alleged association with the 150 gang, he stated that he sought to exclude this evidence pursuant to the fifth, sixth, and fourteenth amendments to the federal constitution, (2) he argued at trial that Amato, as an expert witness, could not merely repeat hearsay from witnesses and informants, (3) he raised this claim in his motion for a new trial, and (4) the trial court recognized the constitutional implications of admitting other hearsay reliant testimony, and, thus, the trial court and the state were on notice of his claim. The record does not support the defendant's arguments.

Although, in his motion in limine, the defendant cited to the sixth amendment, he never distinctly claimed that he was raising a confrontation clause claim; nor did he advance any argument that Amato's testimony was a conduit for *testimonial* hearsay. Rather, he argued only that Amato's testimony was irrelevant. Additionally, at trial, his argument regarding the admissibility of this evidence was limited to hearsay and prejudice. Although, as we will discuss subsequently, hearsay is one component of a confrontation clause claim, it is not the equivalent of a confrontation clause claim, which requires the defendant to establish that he did not have an opportunity to cross-examine a declarant regarding a testimonial, hearsay statement. See, e.g., *State* v. *Walker*, 332 Conn. 678, 700–701, 212 A.3d 1244 (2019) (defendant must establish that challenged statement was both hearsay and testimonial in nature). The defendant never argued that the alleged hearsay was testimonial. In his motion for a new trial, the defendant raised only hearsay and prejudice challenges to Amato's testimony. Finally, the fact that the parties and the trial court might have been on notice of other constitutional claims in relation to other evidence offered at trial did not place them on notice of this specific claim. Alerting the trial court and the state to this particular claim at trial is important in creating a

proper record for appellate review. We conclude that the defendant did not preserve this claim at trial and that we may review it only 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).

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 omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. Because this court previously has not had the opportunity to address a confrontation clause claim in relation to expert testimony regarding gangs, we first briefly address how trial courts should treat such testimony. Having reviewed the entire record in the present case, however, we determine that any possible error in admitting Amato's testimony was harmless beyond a reasonable doubt, and, thus, the defendant's claim fails on the fourth prong of *Golding*.

1

Although our recent discussion of testimonial hearsay in *Walker* did not pertain to expert testimony regarding gangs, we stated that "testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. . . . Accordingly, the threshold inquiries in a confrontation clause analysis are whether the statement was hear-

say, and if so, whether the statement was testimonial in nature . . . . These are questions of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Walker*, supra, 332 Conn. 689–90. Testimonial hearsay includes statements made under circumstances that "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." (Internal quotation marks omitted.) Id., 701.

We recognize that "[s]pecial considerations arise under the [c]onfrontation [c]lause in the context of expert testimony." *United States* v. *Garcia*, 793 F.3d 1194, 1212 (10th Cir. 2015), cert. denied, 577 U.S. 1088, 136 S. Ct. 860, 193 L. Ed. 2d 758 (2016). Although an expert may rely on hearsay in reaching an opinion, the expert may not place the underlying hearsay before the jury for its truth. See Conn. Code Evid. § 7-4 (b); see also *State* v. *Lebrick*, 334 Conn. 492, 527, 223 A.3d 333 (2020); *State* v. *Walker*, supra, 332 Conn. 691–93; cf. *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726–27, 80 A.3d 887 (2013) (civil case; no confrontation clause issue), overruled in part on other grounds by *DeMaria* v. *Bridgeport*, 339 Conn. 477, 261 A.3d 696 (2021).

Both our Appellate Court and the United States Courts of Appeals have applied these legal principles to expert testimony regarding gangs and other criminal associations, holding that this testimony does not implicate the confrontation clause, even if the expert relies on hearsay—testimonial or otherwise—in reaching an opinion, as long as certain circumstances are present and precautions are observed. To begin with, it is necessary that the expert apply his or her training and experience to the information to reach an independent judgment and does not merely parrot another individual's out-of-court statement for its truth, thereby serving as a conduit for an otherwise inadmissible hearsay statement. See, e.g., *United States* v. *Garcia*, supra, 793 F.3d 1212–13; see

also *United States* v. *Rios*, 830 F.3d 403, 417–18 (6th Cir. 2016), cert. denied sub nom. *Casillas* v. *United States*, U.S. , 137 S. Ct. 1120, 197 L. Ed. 2d 220 (2017), and cert. denied, U.S. , 138 S. Ct. 2701, 201 L. Ed. 2d 1096 (2018); *United States* v. *Vera*, 770 F.3d 1232, 1239–40 (9th Cir. 2014); *United States* v. *Palacios*, 677 F.3d 234, 243–44 (4th Cir.), cert. denied, 568 U.S. 834, 133 S. Ct. 124, 184 L. Ed. 2d 59 (2012); *United States* v. *Mejia*, 545 F.3d 179, 197 (2d Cir. 2008); *United States* v. *Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003), cert. denied sub nom. *Griffin* v. *United States*, 541 U.S. 1092, 124 S. Ct. 2832, 159 L. Ed. 2d 259 (2004); *United States* v. *LoCascio*, 6 F.3d 924, 937–38 (2d Cir. 1993), cert. denied, 511 U.S. 1070, 114 S. Ct. 1646, 128 L. Ed. 2d 365 (1994), and cert. denied sub nom. *Gotti* v. *United States*, 511 U.S. 1070, 114 S. Ct. 1645, 128 L. Ed. 2d 365 (1994); *State* v. *Crocker*, 83 Conn. App. 615, 634–35, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004); *State* v. *Henry*, 72 Conn. App. 640, 656–58, 805 A.2d 823, cert. denied, 262 Conn. 917, 811 A.2d 1293 (2002). For example, if the expert explicitly refers to or vouches for the accuracy of the underlying hearsay statement, the confrontation clause is implicated, as "expert witnesses cannot be used as conduits for the admission into evidence of the testimonial statements of others." *State* v. *Walker*, supra, 332 Conn. 695. Additionally, the level of specificity contained in the hearsay statement must also be considered. "An important consideration in distinguishing proper testimony from parroting is the generality or specificity of the expert testimony. . . . [W]hen [gang expert] testimony descends to a discussion of specific events recounted by others, the expert is merely adding unmerited credibility to the sources . . . and summarizing evidence in a way that should be reserved for the government's closing argument." (Citation omitted; internal quotation marks omitted.) *United States* v. *Garcia*, supra, 1213;

see also *United States* v. *Mejia*, supra, 194–95.[7] It also is important to ensure that the expert is utilizing the hearsay testimony for the purpose of applying to that testimony his particular area of expertise. See, e.g., *United States* v. *Dukagjini*, supra, 326 F.3d 59 ("[w]henever a court permits a case agent or a fact witness to testify as an expert, there is a significant risk that, if

[7] For example, an expert witness improperly parrots hearsay when testifying that the defendant or another person was a gang member if that knowledge is based solely on an informant's having told the expert that the person is a gang member. See *United States* v. *Garcia*, supra, 793 F.3d 1213–14; see also *United States* v. *Dukagjini*, supra, 326 F.3d 59 (expert's testimony regarding interpretation of certain drug jargon was inadmissible when interpretation was based solely on what other people had told him those terms meant, and, thus, he "was not translating drug jargon, applying expert methodology, or relying on his general experience in law enforcement"). By contrast, an expert may rely on hearsay in forming an opinion regarding the history, organization, rules, and unique terminology or symbols of a gang. See, e.g., *United States* v. *Castelle*, 836 Fed. Appx. 43, 45–46 (2d Cir. 2020); *United States* v. *Rios*, supra, 830 F.3d 415; *United States* v. *Garcia*, supra, 1212–13; *United States* v. *LoCascio*, supra, 6 F.3d 938.

It may at times be difficult to determine whether an expert is merely parroting a hearsay statement or relying on it to support an independent opinion, especially if the expert witness is testifying in a dual capacity as both an expert and as a fact witness. See, e.g., *United States* v. *Cruz*, 363 F.3d 187, 194–95 (2d Cir. 2004). The line between expert testimony and fact testimony also may be difficult to discern given that experts may rely on their own experiences in reaching their opinions. See *State* v. *Walker*, supra, 332 Conn. 691–92. To prevent confusion and prejudice, when an expert witness also serves as a fact witness, at least one court has required the government to present the factual and expert testimony in bifurcated phases. See *United States* v. *Stanley*, Docket No. 3:15-cr-198 (JAM), 2016 WL 7104825, *2 (D. Conn. December 4, 2016); cf. *United States* v. *Rios*, supra, 830 F.3d 414 (noting suggestion by federal appeals court that, to assuage concerns that jury may be confused by witness' dual role as expert witness and fact witness, "the district court and the prosecutor [should] take care to [ensure] that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness" (internal quotation marks omitted)); *United States* v. *Mejia*, supra, 545 F.3d 196 (noting concern that "line between [a police officer's] opinion and fact witness testimony [is] often hard to discern" (internal quotation marks omitted)).

The defendant, however, does not raise any alternative evidentiary claim that Amato improperly mixed factual and expert testimony, and, thus, we do not address this issue.

the witness digresses from his expertise, he will be improperly relying [on] hearsay evidence and may convey hearsay to the jury").[8]

2

Even if we assume that Amato served as a conduit for testimonial hearsay, however, we conclude that this error was harmless beyond a reasonable doubt.[9] Because the defendant's claim is constitutional in nature, the state bears the burden of establishing that this alleged error was harmless beyond a reasonable doubt.[10] See, e.g., *State* v. *Edwards*, 334 Conn. 688, 706–707, 224 A.3d 504 (2020). "That determination must be made in light

[8] Two other caveats are found in the relevant federal case law. First, if the trial court admits the hearsay under these circumstances, it should be accompanied by an appropriate cautionary instruction. See *United States* v. *0.59 Acres of Land*, 109 F.3d 1493, 1496 (9th Cir. 1997) (it was error to admit hearsay offered as basis of expert opinion without limiting instruction to jury); see also *United States* v. *Dukagjini*, supra, 326 F.3d 58 (citing *0.59 Acres of Land*). Second, "even if the testimony is admissible under [Fed. R. Evid.] 702 [the federal analogue to § 7-2 of the Connecticut Code of Evidence], it still must pass muster under [Fed. R. Evid.] 403 [the federal analogue to § 4-3 of the Connecticut Code of Evidence]: Its probative value must not be substantially outweighed by unfair prejudice." *United States* v. *Dukagjini*, supra, 58; cf. Conn. Code Evid. § 4-3 ("probative value [must not be] outweighed by the danger of unfair prejudice").

[9] In addition to being harmless beyond a reasonable doubt, the record in the present case also is inadequate to determine whether (1) Amato served as a conduit for hearsay, and (2) this hearsay was testimonial in nature. Specifically, in reaching his opinions regarding the rivalry between the 150 gang and the Green Hollow Boyz, the activities of these gangs, the gang affiliations of the victim and Hernandez, and the motive for the murder of Hernandez, Amato clearly relied on information he learned from others, but the record is inadequate to determine whether he merely parroted this information or whether he properly applied his experience and training to this information to reach his own opinions. As to his testimony regarding the underlying facts in the Hernandez murder, Amato testified that he learned of the shooting, arrests, and acquittals through the course of his employment. As to these statements, his testimony was clearly a conduit for hearsay. There is no indication in the record, however, that this information was testimonial.

[10] The defendant does not raise any alternative evidentiary claim that Amato improperly served as a conduit for nontestimonial hearsay, and, thus, any evidentiary claim is abandoned.

of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors . . . include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony." (Citation omitted; internal quotation marks omitted.) Id., 707.

The following additional facts are relevant to our harmless error analysis. The state presented the testimony of two eyewitnesses. Rivera, who had been waiting at a bus stop on Madison Avenue just before noon on the day of the shooting, testified that he saw a tall man dressed entirely in black point a gun into a car and then heard gunshots. More incriminating, however, was the testimony of McIntosh, who had known the defendant since middle school, had seen him two to three weeks prior to the shooting, and, also prior to the shooting, had had contact with him on Snapchat where his username was "Hotboy150." She testified that, at approximately noon on the day of the shooting, she was in a vehicle operated by Kadeija Johnson on Madison Avenue. At that time, the two women were discussing whether Johnson had made a wrong turn. McIntosh saw the defendant, whom she knew as "DT," walking across the street with his hands in his pockets and then heard gunshots as she turned her head away from him. She recognized the defendant by his height, skin tone, and facial expression—he was biting his lip—and was surprised to see him in this area of the city because he was not from that side of the city.

After the gunshots, Johnson made a U-turn to return to the scene to see what had happened. McIntosh then saw the victim exit his vehicle, bleeding from the neck. During these events, Johnson had been on the phone with her then boyfriend, Richard Davis. Because Davis was incarcerated, the conversation was recorded by

the correctional facility. Within minutes of the shooting, McIntosh also spoke with Davis and told him that the defendant was the shooter.

At trial, McIntosh testified that she was not certain that the shooter was the defendant because she had not been wearing her glasses in the car. The state refreshed McIntosh's recollection with a statement she had made to the police. In that statement, McIntosh said that she actually saw the defendant pull out a silver-colored gun and shoot the victim while the defendant was standing in the middle of the street and that she was 100 percent certain that the defendant was the shooter. She also told the police that she was able to see this despite not wearing her glasses at the time. At trial, however, she sought to clarify that she did not see the shooting or the defendant with a gun but, rather, saw something silver-colored in his hand and thought it was a cell phone but, after hearing the gunshots, assumed it was a gun. She also testified that she told the police that she was certain that the shooter was the defendant only because she had seen a video on social media about his arrest. She claimed at trial that she was only 60 to 70 percent certain it was he until then, and she did not want to get involved unless she was certain.

The court then admitted into evidence a portion of the recording of McIntosh's conversation with Davis under the spontaneous utterance exception to the rule against hearsay to show that she had been certain of the shooter's identity at the time of the shooting and had in fact witnessed the shooting and seen the gun. The jury reasonably could have concluded that the recording stated:

"[Q]. Hello? Who shot him?

"[A]. No. I seen his face. He was light-skinned. He had on a hoodie. He had on all black.

"[Q]. He tall?

"[A]. Yes. He's tall. He's like a little taller than Kai yo.

"[Q]. DT?

"[A]. I swear to god it looked just like DT because I was looking and I seen his face yo, and I was like I know that's not DT. Pulled out a gun and he fired. I swear to god Pooh Bear, it looked like DT, and I looked right in his face. I looked right in in his face, and I said that looked like DT. I seen him pull out something silver. I can't see far with my glasses."

In the recording, McIntosh was clearly emotional, her words broken up by sobs and crying. After the recording was played for the jury, McIntosh clarified that, when she exclaimed to Davis, "I know that's not DT," she did not mean that she was uncertain as to the identity of the shooter but that she was surprised by his presence in that area of town and shocked by what she had witnessed.

In addition to the testimony of Rivera and McIntosh, the state offered the testimony of the three detectives who had been driving to lunch on Madison Avenue at the time of the shooting, Martocchio, Montagna, and Palatiello. Because they were going for lunch, none of the detectives had their handcuffs or bulletproof vests with them, although they had their service revolvers and police radios. Montagna, who was driving the car, testified that he stopped at a stop sign on Frank Street, which intersected with Madison Avenue. Montagna testified that, although another vehicle was in front of them at the stop sign, he could see clearly up Madison Avenue. While the detectives were stopped, Montagna saw a black male wearing a dark colored, hooded sweatshirt in the middle of the road firing a gun with his right hand into a silver-colored vehicle before running from the scene on Madison Avenue and through

a backyard toward Grand Street. At that time, Palatiello got out of the vehicle[11] and Martocchio announced over the police radio that gunshots had been fired. Montagna drove down the street a little farther, letting Martocchio out midblock before parking and exiting the vehicle at the corner of Madison Avenue and Grand Street (one block away from the shooting) to search the backyards in the hope of flushing out the shooter. This all occurred within twenty to thirty seconds of the shooting.

Montagna then walked down Grand Street with his service revolver drawn, searching for the shooter. He described the shooter over the police radio as a tall, thin, black male. Within two minutes, as Montagna proceeded down Grand Street, the defendant appeared out of an alleyway. Montagna immediately yelled for the defendant to stop and identified himself as a police officer. The defendant, who stopped, looked similar to the shooter but was wearing a T-shirt rather than a sweatshirt. Montagna testified that the defendant said that he did not do anything, although Montagna had not asked a question. Montagna determined that the defendant was unarmed but was sweating and had a rapid heartbeat. Montagna was not certain whether the defendant was the shooter, but the defendant was similar to the shooter in terms of weight, thinness, height, and skin tone (light-skinned black man).

At this time, no one else was in the area, and, because Montagna did not have handcuffs with him, he held onto the back of the defendant's pants and waited for another officer to arrive. Montagna did not want to let go of the defendant to make any announcement on the police radio. He held onto the defendant for about one minute before Sergeant Joel Carly arrived in a police

[11] Palatiello testified that he pursued the shooter on foot but lost sight of him when the shooter ran between two houses. Palatiello then stopped to check on the victim when he heard someone screaming for help.

vehicle. The defendant was then placed in the back of Carly's vehicle. After securing the defendant, Montagna searched for the weapon in a backyard near the area from which the defendant had emerged onto Grand Street. At this time, Nikola, who was assisting in the investigation, also was searching this area. When Montagna did not discover anything in the yard, he walked back to Carly and discussed what steps to take next. Nikola then called Montagna over and said that he had found a gun, a hooded sweatshirt, and a knit hat underneath a deck in the backyard abutting the alleyway from which the defendant had emerged onto Grand Street. The sweatshirt was similar to the one that the shooter had been wearing. Only after Nikola discovered these items, approximately eight minutes after the gunshots were reported, was it announced over the police radio that a suspect had been detained.

As to physical evidence, the state offered DNA evidence showing that the defendant had been eliminated as a contributor to DNA samples that were taken from the cuff, zipper pull, and pocket areas of the hooded sweatshirt. DNA testing on the armpit of the hooded sweatshirt was inconclusive regarding the defendant. He was included, however, as a contributor to a mixed DNA sample on the knit hat. In addition, although an initial laboratory test eliminated the defendant as a contributor to the DNA sample from the firearm, later testing showed that no comparison could be drawn because of the large number of contributors found in the DNA sample from the firearm.

Samples from the hooded sweatshirt also showed that Beason was a contributor to the mixed DNA sample and that Ferris was a major contributor. Ferris also was a major contributor to the DNA sample from the knit hat. To explain this DNA evidence, the state offered evidence that the defendant was associated with Beason and Ferris. Additionally, the state offered testimony

from Latia Steadman, an acquaintance of Beason, that he had borrowed her vehicle on the day of the shooting, and video surveillance evidence showed that this vehicle was near the crime scene at the time of the shooting.

The state also offered testimony from Fung Cso Kwok, a state forensics examiner and an expert in gunshot residue. He testified that gunshot residue is comprised of three elements—lead, antimony, and barium—and that two of these elements (lead and barium) were found in samples taken from the right side of the defendant's pants. Such findings were consistent with gunshot residue. Additionally, lead was found on samples taken from the defendant's left and right palms, and from the back of his right hand. These findings are commonly associated with gunshot residue. Kwok explained that the amount of gunshot residue that lands on a shooter and the presence of all three elements can be affected by wind or by the shooter moving or wiping his hands. The evidence demonstrates that the defendant was outdoors at the time of the shooting, had been running prior to being detained, and had removed his sweatshirt, from which the jury reasonably could have inferred that the gunshot residue may have been removed or affected.

Regarding the firearm specifically, the state offered testimony from Marshal Robinson, a firearms examiner, that the firearm discovered under the deck close to where the police apprehended the defendant was the gun from which the bullets that struck the victim were shot. Additionally, Robinson testified that the gun discovered near the scene was similar to a gun depicted in the rap music video that featured the defendant, Beason, and Ferris. The gun in the video and the gun discovered hidden under the deck both had similar floor plates, finger extensions, and trigger shape. Both guns appeared to be .380 automatics. Although only Beason and Ferris were seen holding the gun in the video, the

prosecutor argued to the jury that some aspects of that gun were similar to the gun used to shoot the victim and that this was evidence that the defendant had access to the gun. Additionally, the DNA evidence showed that numerous people had touched the gun and, thus, no comparison could be drawn. From all of this, the jury reasonably could have inferred that the defendant had access to the gun used to shoot the victim.

As to motive, besides Amato's challenged testimony, the state offered evidence that the defendant and Hernandez had been friends. Additionally, there was unchallenged testimony that the victim had been arrested for the murder of Hernandez but was acquitted after a trial. Maya Oquendo, the mother of the victim's son, testified that the defendant had attended the victim's trial, although she could not recall if he had been present for the verdict.

From this evidence, we conclude that the state has established that any error in admitting the challenged evidence was harmless beyond a reasonable doubt. Multiple witnesses testified about the relationship between the defendant and Hernandez, and the facts underlying Hernandez' death. The jury reasonably could have inferred from the defendant's presence at the victim's trial that he knew that the victim had been acquitted. From this, even without Amato's testimony regarding the motive underlying the Hernandez homicide and gang affiliation, the jury reasonably could have inferred that the defendant shot the victim in retaliation for his friend's death. Although there was no other direct evidence that the Hernandez homicide was gang related, such evidence was not necessary to establish a motive for the shooting at issue, about which Amato did not testify. The jury also reasonably could have inferred from other evidence that the shooting at issue was gang related. Specifically, the state linked the defendant to the 150 gang through circumstantial evidence—the ref-

erence to 150 on his bedroom mirror and in his Snapchat username, as well as McIntosh's testimony that he was not from the part of the city where the shooting occurred. To the extent Amato's testimony bolstered the state's theory regarding motive, or that its exclusion would have diminished that theory, we note that the state is not required to establish motive, which is not an element of either of the offenses with which the defendant was charged. See *State* v. *Wilson*, 308 Conn. 412, 430, 64 A.3d 91 (2013).

Moreover, the state's case against the defendant was strong. Within moments of the shooting, while under the stress and emotional strain of having witnessed the shooting, McIntosh, who had known the defendant for years, identified him as the shooter. See part IV of this opinion. Additionally, although the announcement over the police radio that the defendant had been apprehended was not made until approximately eight minutes after the shooting, the reporting was delayed; the defendant had been detained within minutes of the shooting. Montagna observed while detaining him that the defendant was sweating and that his heart was beating rapidly, as if he had been running. The firearm used to shoot the victim, along with a black hooded sweatshirt, which was consistent with the sweatshirt eyewitnesses had seen the shooter wearing, was discovered hidden under a deck in a backyard near where the defendant was apprehended. Although the DNA evidence was not conclusive, the defendant's DNA could not be excluded from the DNA samples taken from these items. Additionally, the DNA of two of the defendant's associates, Beason and Ferris, was found on these items or could not be excluded from the DNA samples taken from them. There also was evidence that the defendant had access to the gun, which was similar to the gun that appeared in the rap music video. Although there was not a match between the DNA on the gun and that of

the defendant, two of the three elements of gunshot residue were discovered on the defendant's pants.

Nevertheless, the defendant points to the following flaws in the state's case: (1) McIntosh spoke to the police only after seeing a video on social media about the defendant's arrest; (2) analysis of the DNA evidence found on the gun excluded the defendant as a contributor; (3) DNA evidence suggested that Ferris or Beason was the shooter; and (4) the defendant presented evidence that he was left-handed but that the shooter was right-handed. It is true that McIntosh's testimony was equivocal. The state, however, offered strong evidence that, at the moment of the shooting, McIntosh identified the defendant as the shooter before she had time to contemplate what she had seen. See part IV of this opinion. As to the DNA evidence regarding the gun, it is not accurate to say that the defendant was excluded as a contributor. Rather, in the initial test conducted, he was excluded as a contributor to the DNA on the gun, but more modern, recent testing showed that he could not be excluded as a contributor because there were too many contributors to the DNA sample. This evidence, combined with the rap music video depicting Beason and Ferris holding a similar gun, supported the state's argument that the defendant had access to the gun that shot the victim. As for the DNA evidence suggesting that Ferris or Beason was the shooter, the state also offered evidence to explain the presence of their DNA—that they were associates of the defendant, with Beason possibly serving as the getaway driver. The state based this argument on video surveillance evidence from the time of the shooting that showed the vehicle Beason used that day near the crime scene. Last, as to the evidence that the defendant was left-handed, the defendant offered only testimony from Detective Jorge L. Cintron of the Bridgeport Police Department, who stated that he saw the defendant sign a piece of paper

with his left hand but that the writing looked more like a scribble than a signature. Thus, the defendant's evidence in this regard was weak.

Accordingly, in light of the strength of the state's case, the other evidence of motive, and the cumulative nature of the testimony, we conclude that any error in the admission of Amato's testimony was harmless beyond a reasonable doubt.

II

The defendant next claims that the trial court deprived him of a fair trial in violation of his due process rights under the federal constitution by improperly admitting the rap music video in which he was featured along with Ferris and Beason because (1) it contained inadmissible hearsay, (2) lacked any nexus to the charged offenses, and (3) was unduly prejudicial. The defendant argues that the state is not able to show that this error was harmless beyond a reasonable doubt. The state responds that the rap music video (1) was properly admitted as an adoptive admission of a party opponent under § 8-3 (1) (B) of the Connecticut Code of Evidence, (2) was relevant to establishing the defendant's motive, his access to a gun, his association with the 150 gang, and his association with Beason and Ferris, whose DNA was also found on the hooded sweatshirt and hat, and (3) was not more prejudicial than probative. The state thus argues that any error was not of constitutional magnitude and that, to the extent admission of the video was improper, it was the defendant's burden to establish harm.

We agree with the state that the defendant has failed to establish that this alleged error was constitutional in nature. We also agree with the state that it was the defendant's burden to establish harm, and, therefore, even if we assume that the trial court improperly admitted the video, the defendant's failure to brief the issue

of harmless evidentiary error renders any evidentiary claim abandoned. Nevertheless, we acknowledge the potential for the prejudicial use of evidence depicting or describing gratuitous violence or playing on potential juror biases—whether contained in a rap music video or any other type of evidence—and encourage defendants to request, and trial courts to undertake, measures to mitigate any prejudice. Because the defendant did not request these measures in the present case, however, we cannot conclude that any alleged error was constitutional in nature.

The following additional facts and procedural history are relevant to our resolution of this claim. At trial, Amato testified that, as part of his work as a police officer, he monitors social media to collect intelligence on the different gangs in the city. Amato testified that, prior to the shooting at issue, in March, 2016, he discovered a rap music video on the Internet. There are three individuals depicted in the video, whom Amato identified as the defendant, Beason, and Ferris, all of whom he had contact with previously. Amato downloaded the video the same day he discovered it and transferred it to a computer storage device on May 13, 2016. The video is titled "DT the Gawd X Trawobe—Purp Shot @JayYoung56."

The video features the defendant, Beason, and Ferris rapping, surrounded by graffiti, alcohol, and a gun. Because of the quality and clarity of the audio, the lyrics are difficult to decipher at times. The jury reasonably could have concluded, however, that the lyrics included profanity and referenced narcotics, firearms, shootings, robberies, and threats to the police. The jury also reasonably could have concluded that the lyrics referenced "Ryo," which was Hernandez' street name. In the video, both Beason and Ferris hold the gun, but the defendant is never seen holding the gun. Toward the end of the video, the screen displays the Snapchat symbol (the

outline of a ghost inside a yellow square) with the username "Hotboy 150" next to the symbol. There was testimony at trial that Hotboy 150 was the defendant's Snapchat username.

Before trial, the defendant moved in limine to exclude the rap music video in its entirety on the grounds that it violated his due process right to a fair trial and was inadmissible as irrelevant and prejudicial under §§ 4-1 and 4-3 of the Connecticut Code of Evidence. Following an evidentiary hearing, the trial court heard oral argument. The defendant argued that the video was irrelevant because he never held the gun in the video and that, because it was not clear that the gun in the video was real and operable, the video did not show that he had access to a gun and, therefore, the means to shoot the victim. He further argued that the video was not relevant to motive because, to the extent the video referred to the 150 gang, that evidence was inadmissible hearsay. Finally, he argued—without specificity—that the video was more prejudicial than probative. The state argued that the audio of the video was admissible as an adoptive admission because the defendant could be seen singing the words. The state further argued that the video was relevant to show that the defendant had access to a gun that looked similar to the gun used to shoot the victim; see part I C 2 of this opinion; and that the jury could decide for itself whether the gun in the video was real. The state also argued that the video was relevant to establishing motive based on the references in it to "Ryo" and the 150 gang, and to show an association between the defendant, Beason, and Ferris, which was germane to explaining the presence of the DNA of all three men on items found at the crime scene. The state noted that, because the defendant sought to exclude the entire video, it was seeking to have the entire video admitted.

The trial court issued a preliminary ruling, noting that it could change depending on the evidence admitted at trial. The court ruled that the video was relevant to identifying the defendant and to showing his association with the gang, and the relationship between the defendant, Beason and Ferris to the extent this friendship was significant to other evidence. The court also ruled that, although the video did not show the defendant holding the gun, the gun's depiction was relevant to show his proximity to the weapon, its availability to him, and his familiarity with this type of weapon. The trial court did not find the video overly prejudicial because the defendant was not actually holding the gun. Finally, the trial court held that the audio of the video constituted an adoptive admission by the defendant because he had voluntarily participated in the video. Nevertheless, the trial court offered to give a limiting instruction to the jury if the defendant requested one, which he did not at that time.

At trial, the state sought to admit the rap video through Amato. Again, defense counsel objected, stating simply that he was maintaining his prior objections, which the trial court overruled without additional comment. The video was played for the jury. Amato identified the defendant, Ferris, and Benson in the video while admitting that he did not know who had made the video, the video's title, or that portion of the video that showed the Snapchat usernames. The trial court again offered to provide a limiting instruction to the jury regarding the video, but the defendant did not request one.

In its closing argument, the state relied on this video to argue that the defendant had a relationship with Beason and Ferris. This was significant for two reasons: (1) their DNA was discovered on the hooded sweatshirt and hat that was found near the location where the defendant was apprehended, and (2) according to the

state's theory of the case, Beason was near the scene of the crime in a borrowed vehicle and acted as the getaway driver. The state further argued that this video showed the defendant's connection to the 150 gang and that the defendant had access to a gun similar to the gun Nikola found in the backyard abutting the alleyway where the defendant was discovered. The state did caution the jury that it was not using the video "just to show people in a bad light or—or anything like that, or, hey, look, they're in a rap video; we must, you know, they must be guilty of something. It's got nothing to do with that. You know what it has to do with; there's important things about this video that we should consider in light of everything here."

Notably, the defendant does not raise an evidentiary claim but, rather, only a constitutional claim.[12] "Generally, the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved." (Internal quotation marks omitted.) *State* v. *Flanders*, 214 Conn. 493, 500–501, 572 A.2d 983, cert. denied, 498 U.S. 901, 111 S. Ct. 260, 112 L. Ed. 2d 217 (1990). "This is consistent with federal jurisprudence, which recognizes that an evidentiary error may be of constitutional magnitude if the error was so pervasive as to have denied [the defendant] a fundamentally fair trial . . . . [T]he standard . . . [is] whether the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have

[12] Although the defendant claims that the improper admission of the rap music video violated his right to a fair trial in that the video was inadmissible hearsay, irrelevant, and more prejudicial than probative—all of which are normally evidentiary issues—he does not argue, alternatively, that, if this error were not constitutional in nature, these evidentiary errors were harmful.

been crucial, critical, [and] highly significant . . . .'' (Internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 674, 224 A.3d 129 (2020). It is the defendant's burden to establish that an alleged evidentiary error is of constitutional magnitude. See *State* v. *Varszegi*, 236 Conn. 266, 274, 673 A.2d 90 (1996).

The defendant argues that the admission of the rap music video into evidence was so prejudicial as to deprive him of his constitutional right to a fair trial. Even if we assume, however, that the trial court improperly admitted the video, the defendant has failed to establish that this error was of constitutional magnitude because he has failed to demonstrate the materiality of this evidence, especially in light of the other substantial evidence of his guilt that the state offered. In addition, he failed to request any measures to limit the alleged prejudice.

Specifically, other than arguing that the rap video was central to the state's case, the defendant did not argue how the video was ''sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it.'' (Internal quotation marks omitted.) *State* v. *Turner*, supra, 334 Conn. 674. Although the defendant argues that this video was improper character evidence that was offered solely to paint him as a violent person and that it infringed on the presumption of innocence and played on the jurors' biases against and stereotypes about gang members and young black men,[13] he failed

[13] In a motion to strike filed six days prior to oral argument before this court, the state argued that, in his reply brief, for the first time, the defendant cited to two social science articles about rap music and racial prejudice, and improperly asked this court to create a new rule governing the admissibility of rap music video evidence. In the exercise of our discretion, we declined to order that these portions of the defendant's reply brief be stricken because the state's motion was untimely, as it was filed approximately three months after the defendant filed his reply brief and less than one week before oral argument before this court. See Practice Book § 60-2 (''[t]he court may . . . on its own motion or upon motion of any party . . . (3) order improper

to analyze the video in the context of the other evidence presented at trial. As discussed in detail in part I C 2 of this opinion, substantial evidence of the defendant's guilt that was admitted at trial supported the verdict.[14] See, e.g., *United States* v. *Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (Even if evidence of the defendant's rap recordings were inadmissible, "in light of the overwhelming evidence against him, [the defendant] has failed to persuade us that the [rap] recordings affected the outcome of the [trial] court proceedings. . . . We thus conclude that their admission did not affect [the defendant's] substantial rights." (Citation omitted.)). Thus, not only has the defendant failed to argue materiality, but, on the basis of this record and the arguments presented to this court, we cannot say that the video was crucial, critical and highly significant to the jury's verdict. Accordingly, the defendant has failed to establish that the alleged error was constitutional in nature.

Nevertheless, we recognize that the rap music video contained content that had the potential to prejudice the jury against the defendant. The lyrics in the video, to the extent decipherable, reference narcotics, firearms, shootings, robberies, and threats to the police. Even if we assume that portions of the video were relevant for

matter stricken from a brief or appendix"); see also *Ramos* v. *Commissioner of Correction*, 248 Conn. 52, 61, 727 A.2d 213 (1999) (applying abuse of discretion standard to Appellate Court decision to deny motion for permission to file late appeal under what is now Practice Book § 60-2 (5)). Nevertheless, we do not read the defendant's reply brief as raising an argument that this court should adopt a new rule regarding the admissibility of rap music videos but, rather, as merely challenging the relevance of this evidence in the present case.

[14] To the extent the defendant attempts to raise a cumulative error argument to establish that the admission of the rap music video violated his right to a fair trial when viewed in context of the other errors that he alleged, we note that this court does not recognize cumulative error and that the defendant has not urged this court to adopt the federal cumulative error standard. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 94–97, 136 A.3d 596 (2016). Thus, we do not address this argument.

the purposes articulated by the state, the lyrics regarding other, unrelated criminal activity, whether fact or fiction, serve no purpose other than to portray the defendant as violent. These lyrics were irrelevant to the charged offense and did not aid the state in establishing the defendant's relationship to Beason and Ferris, his association with the 150 gang, or his access to the gun.

The defendant argues, for the first time on appeal, that the trial court should have redacted portions of the rap music video or allowed only limited screenshots of the video into evidence. He is correct that screenshots of the video may have minimized any prejudice while adequately illustrating the defendant's relationship to Beason and Ferris, his association with the 150 gang, and his access to the gun. Alternatively, portions of the video or audio could have been redacted to prevent potential prejudice. The defendant, however, did not seek to have portions of the video redacted in any fashion before it was played for the jury. The defendant also could have requested a limiting instruction but did not do so.[15] Defense counsel's relevance objection to the admission of the video did not preserve a request for redaction. See *State* v. *Smith*, 156 Conn. App. 537, 575 n.9, 113 A.3d 103 (holding that, although defendant objected to admission of written statement at trial, objection did not preserve his claim on appeal that, if evidence was not excluded, it should at least be redacted to minimize prejudice), cert. denied, 317 Conn. 910, 115

[15] We note that, when ruling on the defendant's motion in limine to exclude the rap music video, the trial court addressed defense counsel and offered "to give any type of a limiting instruction that [the defense] would like," including an instruction that "there's no suggestion that this is the defendant who is speaking [in the] video," but the defendant did not request at that time that the trial court give any limiting instruction in relation to the video. The trial court made the same offer again when it overruled defense counsel's objection to the video at trial, but, again, the defendant did not request such an instruction.

A.3d 1106 (2015); see also *State* v. *Cecil*, 194 Conn. App. 446, 459 n.2, 221 A.3d 481 (2019) (party seeking redaction of video has duty to identify specific portions for redaction), cert. denied, 334 Conn. 915, 221 A.3d 809 (2020).

As with any evidence that might suggest a propensity for violence or might play on potential juror biases, defendants should request and trial courts should grant measures to minimize any undue prejudice, such as the redaction of irrelevant portions, the muting of all or portions of the audio, the use of screenshots in lieu of video, and limiting instructions to the jury. See, e.g., *State* v. *Franklin*, 162 Conn. App. 78, 99, 129 A.3d 770 (2015) (considering whether defendant sought to limit challenged evidence in determining whether admission of that evidence was unduly prejudicial), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). These measures are especially important when the evidence at issue is misused to show a propensity for violence or gang affiliation, as "we are cognizant that evidence relating to gangs and gang activity may, in certain circumstances, improperly arouse the emotions of the [jurors] . . . ." *State* v. *Crocker*, supra, 83 Conn. App. 640.

The defendant attempts to skirt his failure to request any redactions or a limiting instruction by arguing that the evidence at issue is unique and especially prejudicial because it involves rap music and that rap music triggers jurors' biases against and stereotypes about gang members and young black men. Rap lyrics and rap music videos that reference violent conduct, criminal activity, and gang associations, like any evidence that contains such references, may indeed at times be quite relevant and, therefore, admissible. See, e.g., *United States* v. *Pierce*, 785 F.3d 832, 841 (2d Cir.) (rap video containing lyrics relating to violence was properly admitted when "relevant and [the lyrics'] probative value [was] not substantially outweighed by the danger

of unfair prejudice"), cert. denied, 577 U.S. 877, 136 S. Ct. 172, 193 L. Ed. 2d 139 (2015), and cert. denied sub nom. *Colon* v. *United States*, 577 U.S. 890, 136 S. Ct. 213, 193 L. Ed. 2d 163 (2015), and cert. denied sub nom. *Meregildo* v. *United States*, 577 U.S. 908, 136 S. Ct. 270, 193 L. Ed. 2d 198 (2015); *United States* v. *Belfast*, 611 F.3d 783, 820 (11th Cir. 2010) (rap lyrics referring to violence were admissible when relevant to charged conduct), cert. denied, 562 U.S. 1236, 131 S. Ct. 1511, 179 L. Ed. 2d 334 (2011); *Hannah* v. *State*, 420 Md. 339, 357, 23 A.3d 192 (2011) (violent rap lyrics written by defendant were inadmissible because they were not relevant to motive or intent and served no purpose other than to show defendant's propensity for violence); *State* v. *Skinner*, 218 N.J. 496, 522–23, 95 A.3d 236 (2014) (reviewing cases in which rap lyrics or rap music videos depicting violence were properly admitted as relevant to motive, intent, or identity). There is the potential that prejudice can outweigh probative value, of course. See *State* v. *Skinner*, supra, 523 (noting that sister state jurisdictions rarely admit rap lyrics depicting violence without demonstration of strong nexus between subject matter of lyrics and crime charged); *State* v. *Cheeseboro*, 346 S.C. 526, 550, 552 S.E.2d 300 (2001) (even though they were minimally probative, violent rap lyrics authored by defendant should have been excluded from evidence because they did not specifically refer to crime at issue and general references glorifying violence led to inference that defendant had propensity for violence), cert. denied, 535 U.S. 933, 122 S. Ct. 1310, 152 L. Ed. 2d 219 (2002); see also *United States* v. *Gamory*, 635 F.3d 480, 493 (11th Cir.) ("[t]he lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle"), cert. denied, 565 U.S. 1080, 132 S. Ct. 826, 181 L. Ed. 2d 527 (2011); *Boyd* v. *San*

Francisco, 576 F.3d 938, 949 (9th Cir. 2009) (although admission of portions of rap lyrics written by decedent was not harmful to plaintiffs because it was more probable than not that jury would have found for defendants even without their admission, court's "[f]ailure to exclude these lyrics was error, as they had no probative value regarding [the decedent's] alleged activities [when defendant was stopped by the police], and were unfairly prejudicial in light of their offensive nature"). As with any evidence that potentially suggests that a defendant has a propensity for violence, courts must carefully balance the probative value of the evidence against any potential unfair prejudice.

Because the defendant has failed to establish that the alleged error is constitutional in nature, any error, even if we assume that error occurred, was evidentiary in nature. The defendant, however, has raised only a constitutional claim, which would require the state to prove that the error was harmless beyond a reasonable doubt. He has not briefed the issue of harmful evidentiary error. See *State* v. *Manuel T.*, 337 Conn. 429, 461, 254 A.3d 278 (2020) ("[a] nonconstitutional [evidentiary] error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict" (internal quotation marks omitted)). We therefore deem any claim of evidentiary error abandoned and decline to review it. See part I B of this opinion.

III

The defendant next claims that the trial court improperly admitted photographs of a mirror with "150," "GANG," and his initials (DT) written on it because the writings constituted inadmissible hearsay.[16] We agree

[16] The defendant does not specifically claim that the photographs of the mirror were inadmissible because they were more prejudicial than probative. However, in a concluding paragraph in this section of his principal brief, he argues that "[t]he admission of this evidence over objection was [an] error of constitutional magnitude. The gang evidence, in combination with the rap music video and . . . Amato's testimony about monitoring violence

with the state that, even if we assume that the writing on the mirror amounted to hearsay, it constituted a statement of a party opponent under § 8-3 (1) (A) of the Connecticut Code of Evidence.

The following additional facts and procedural history are relevant to this claim. On the night of the shooting, after the defendant's arrest and while he was in custody, the police executed a search warrant at his apartment. Detective Kimberly Biehn of the Bridgeport Police Department, who participated in the search, testified that the apartment was not open and no one was there when the police arrived, and that the entire residence was photographed prior to the search. Some of these photographs show a mirror in one of the bedrooms with writing on it that included "150," GANG" and "DT." Biehn also testified that the police found in that bedroom various paperwork, including mail with the defendant's name and address on it, from which they inferred that the bedroom belonged to him. She conceded, however, that she did not know who put the writing on the mirror or when it was placed on the mirror. She also admitted that she did not recall if there was any indication that anyone else resided at the apartment. There was another room in the apartment with a mattress, but the officers executing the search warrant did not find any evidence of a specific person living there, such as paperwork identifying another individual.

Prior to trial, the defendant moved to suppress the photographs, arguing that the writing on the mirror was

around the city . . . perpetuated negative stereotypes and played to the worst fears of the jury. The state's evidence injected extraneous and prejudicial issues into the case that rendered a fair trial impossible."

To the extent the defendant is attempting to assert that the admission of the photographs of the mirror was more prejudicial than probative, we deem that claim inadequately briefed and decline to review it. To the extent the defendant is attempting to assert a cumulative error argument, we reject such a claim. See footnote 14 of this opinion.

inadmissible hearsay because there was no evidence as to who wrote on the mirror or when, and, thus, there was insufficient evidence for the writing to be admissible as a statement of a party opponent. The trial court issued a preliminary ruling that a sufficient foundation existed to admit the photographs of the writing as statements of a party opponent because the mirror contained the defendant's initials and was near the paperwork that identified him. The trial court explained that any argument regarding whether the room was in fact the defendant's bedroom or whether he authored the writings went to the weight of the evidence, not its admissibility. At trial, the defendant renewed his objection, which the trial court again overruled, and the defendant cross-examined Biehn about her lack of knowledge regarding who wrote on the mirror and when.

Having reviewed the trial court's decision to admit the photographs for an abuse of discretion; see *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007); we conclude that, even if we assume that the writing on the mirror constitutes a hearsay statement, it "fall[s] within a recognized exception to the hearsay rule." (Internal quotation marks omitted.) *State* v. *Canady*, 297 Conn. 322, 341, 998 A.2d 1135 (2010). Section 8-3 of the Connecticut Code of Evidence provides in relevant part that certain statements are "not excluded by the hearsay rule, even though the declarant is available as a witness," including "(1) . . . [a] statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity . . . ." It is well established that "[s]tatements made out of court by a [party opponent] are universally deemed admissible when offered against him . . . so long as they are relevant and material to issues in the case." (Citation omitted; internal quotation marks omit-

ted.) *State* v. *Woodson*, 227 Conn. 1, 15, 629 A.2d 386 (1993).

To be admissible as a statement of a party opponent, the statement must be "properly authenticated as [a statement] made by the defendant." *State* v. *Berger*, 249 Conn. 218, 232–33, 733 A.2d 156 (1999). Rule 9-1 (a) of the Connecticut Code of Evidence provides: "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." "In general, a writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence. . . . Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity. . . . The only requirement is that there have been substantial evidence from which the jury could infer that the [writing] was authentic." (Citations omitted.) *State* v. *Berger*, supra, 233; see C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 9.2.3 (distinctive characteristics, such as contents, mode of expression, circumstances and context in which unsigned document is found, may authenticate that document); see also Conn. Code Evid. § 1-3 (a), commentary ("courts are not bound by the [c]ode in determining preliminary questions of fact under subsection (a), except with respect to evidentiary privileges"); Conn. Code Evid. § 9-1, commentary (only prima facie showing of authentication required).

This court recently has emphasized that "a prima facie showing of authenticity is a low burden." *State* v. *Manuel T.*, supra, 337 Conn. 454. Additionally, our Appellate Court on several occasions has held that, to authenticate a writing, the party offering the writing into evidence may rely on circumstantial evidence, including otherwise inadmissible evidence, such as information contained in the writing or evidence concerning where and when the writing was discovered. See, e.g., *State* v. *Jackson*, 150 Conn. App. 323, 332–34, 90 A.3d 1031 (holding that there was sufficient circumstantial evidence that defendant wrote letter at issue because it bore his name, listed prison where he was incarcerated, was dated from when he was incarcerated, and included information known by him), cert. denied, 312 Conn. 919, 94 A.3d 641 (2014); *State* v. *John L.*, 85 Conn. App. 291, 302, 856 A.2d 1032 (holding that letters were sufficiently authenticated as having been authored by defendant through circumstantial evidence that linked his presence at his home with time letters were created as well as their contents), cert. denied, 272 Conn. 903, 863 A.2d 695 (2004). Once the party offering the statement establishes a prima facie case of authenticity, any uncertainty regarding authorship goes to the weight of the evidence, and it is for the jury to determine what weight to give to the statement. See, e.g., *State* v. *John L.*, supra, 302.

As with other rules of evidence, this court, on multiple occasions, has looked to federal case law regarding the contours of the authentication requirements of § 9-1 of the Connecticut Code of Evidence. See, e.g., *State* v. *Manuel T.*, supra, 337 Conn. 456–57; *State* v. *Swinton*, 268 Conn. 781, 811–12 and 811 n.28, 847 A.2d 921 (2004); see also *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 407, 880 A.2d 151 (2005) (considering federal case law when construing § 7-1 of Connecticut Code of Evidence). Federal courts have held that writings are suffi-

ciently authenticated as being written by a defendant when they were found in the defendant's residence with other documents identifying the defendant. See, e.g., *United States* v. *Gonzalez-Maldonado*, 115 F.3d 9, 20 (1st Cir. 1997) (holding that notebook was sufficiently authenticated as result of being found in briefcase with defendant's identification card in defendant's room); *United States* v. *Thorne*, 997 F.2d 1504, 1508 (D.C. Cir.) (failure to authenticate ledgers was not plain error when "ledgers were found with documents belonging to the defendants in the bedroom dresser"), cert. denied, 510 U.S. 999, 114 S. Ct. 568, 126 L. Ed. 2d 467 (1993); *United States* v. *Huguez-Ibarra*, 954 F.2d 546, 552–53 (9th Cir. 1992) (holding that documents were circumstantially authenticated because they were found in safes at defendants' home with documents bearing their names).

The defendant contends that, because there was no evidence that he wrote on the mirror or had either exclusive use of the room or had been the last person in the room, there was insufficient evidence that he wrote on the mirror for purposes of admissibility. It is true that some courts have held that a showing that the defendant was the sole occupant of the residence where the writing was found supports authentication of a writing. See, e.g., *United States* v. *Sotelo*, Docket Nos. CR 14-652-6 and CR 14-652-10, 2016 WL 4650617, *10 (E.D. Pa. September 7, 2016) ("[T]here [was] sufficient evidence to enable the jury to determine [that the codefendant] authored or adopted the ledgers, including their discovery on a dresser in the bedroom of his residence at the time of the search. [The codefendant] [did] not argue, and [the court has] no evidence suggesting, [that] any other person residing with [him] created [those] [l]edgers." (Footnote omitted.)), aff'd, 707 Fed. Appx. 77 (3d Cir. 2017).[17]

[17] See *United States* v. *Sotelo*, supra, 2016 WL 4650617, *10 (evidence of authentication included writing found in bedroom of codefendant's residence, and no evidence suggested another person resided there); see also

We are not aware of any case, however, holding that sole occupation is *necessary* to satisfy the prima facie requirement of authentication. Rather, federal courts have determined that a prima facie showing of authentication exists if the location of the writing is connected to the defendant, with any uncertainty of authorship going to the weight of the evidence, rather than its admissibility. See, e.g., *United States* v. *McGlory*, 968 F.2d 309, 329 (3d Cir. 1992) (holding that notes found in trash outside defendant's residences, with other identifying documents, were properly authenticated), cert. denied sub nom. *Hauser* v. *United States*, 506 U.S. 956, 113 S. Ct. 415, 121 L. Ed. 2d 339 (1992), and cert. denied sub nom. *Cotton* v. *United States*, 506 U.S. 956, 113 S. Ct. 415, 121 L. Ed. 2d 339 (1992), and cert. denied sub nom. *Kulkovit* v. *United States*, 506 U.S. 1009, 113 S. Ct. 627, 121 L. Ed. 2d 559 (1992), and cert. denied, 507 U.S. 962, 113 S. Ct. 1388, 122 L. Ed. 2d 763 (1993), *Burgess* v. *Premier Corp.*, 727 F.2d 826, 835 (9th Cir. 1984) (holding that documents found in defendant's warehouse were adequately authenticated simply by having been found there); *United States* v. *Wilson*, 532 F.2d 641, 644–45 (8th Cir.) (there was sufficient authentication of notebooks when they were found in apartment frequented by defendant and contents of notebooks linked them to defendant), cert. denied, 429 U.S. 846, 97 S. Ct. 128, 50 L. Ed. 2d 117 (1976);[18] see

State v. *Reed*, 153 N.C. App. 462, 467, 570 S.E.2d 116 (sufficient authentication to admit business card into evidence when authentication, at least in part, was based on fact that card was found in defendant's residence and there was evidence that he was sole occupant of residence), appeal dismissed, 356 N.C. 622, 575 S.E.2d 521 (2002); *State* v. *Greiner*, Docket No. 106426, 2018 WL 3954312, *1 (Ohio App. August 16, 2018) (evidence of authentication included writing found in bedroom of defendant's apartment when defendant did not have roommates), appeal denied, 154 Ohio St. 3d 1432, 111 N.E.3d 1192 (2018).

[18] State courts with similar authentication rules also have held that circumstantial evidence that a writing was discovered in a defendant's bedroom is sufficient evidence of authentication, even if the defendant was not the sole occupant. See *People* v. *Olguin*, 31 Cal. App. 4th 1355, 1372–73, 37 Cal. Rptr. 2d 596 (1994) (lyrics found in codefendant's bedroom were sufficiently

also *United States* v. *Hassanshahi*, 195 F. Supp. 3d 35, 50 (D.D.C. 2016) ("[although the defendant's] arguments [that he did not author the letter] may provide fodder for urging the jury to discount the letter or to conclude that [he] did not write it, they do not suffice to overcome the [g]overnment's prima facie case and bar the letter's admission in the first instance").

In the present case, although there was not conclusive evidence that only the defendant resided in the apartment or in the bedroom where the mirror was found, there was sufficient circumstantial evidence that he was at least *an* occupant of the bedroom, such as the various documents with his name and address on them. Although there was a mattress found in another small room in the apartment, no evidence was found from which it could be inferred that a specific person resided in the apartment other than the defendant, and, at the time of the search, no one else was present in the apartment, and the apartment was not open. This circumstantial evidence linked the defendant to the bedroom in which the mirror was found, supporting the trial court's ruling that there was sufficient evidence to authenticate the writing on the mirror. There also was circumstantial evidence that the defendant had authored the writings, including his initials on the mirror and that the writing existed at the time of the search, which the police conducted on the same day as the shooting. But cf. *State* v. *Knight*, 34 So. 3d 307, 320–22 (La. App. 2010) (holding that writing found on defendant's bedroom wall was not sufficiently authenticated when writing did not appear on wall in video made during execution of search warrant and, thus, may not have

authenticated based on location and because content of lyrics included codefendant's nickname and reference to his gang), review denied, California Supreme Court, Docket No. S044704 (April 27, 1995); see also *Shurbaji* v. *Commonwealth*, 18 Va. App. 415, 418, 444 S.E.2d 549 (1994) (utility bills found in bedroom were circumstantial evidence that defendant controlled bedroom and that cocaine and paraphernalia found there belonged to him).

existed at time of search and may have been made after defendant was arrested and no longer had access to premises), writ denied, 73 So. 3d 376 (La. 2011).

In light of this evidence and the low burden of proof necessary to establish a prima facie case of authenticity, we conclude that the trial court properly found that the state produced sufficient evidence from which the jury reasonably could have inferred that the defendant authored the writing on the mirror and that any uncertainty about authorship went to the weight of the evidence, which was for the jury to decide. In light of this conclusion, we also conclude that the trial court did not abuse its discretion in admitting the photographs as statements of a party opponent under § 8-3 (1) (A) of the Connecticut Code of Evidence.

IV

The defendant finally claims that the trial court improperly admitted portions of a recording of statements made by McIntosh over the phone to Davis describing the shooter and then identifying the shooter as the defendant. Specifically, he argues that these statements were hearsay and did not satisfy the spontaneous utterance exception to the rule against hearsay because they were made after McIntosh had an opportunity for reflection. We disagree.

The following additional facts and procedural history are relevant to this claim. As noted in part I C 2 of this opinion, McIntosh, who had known the defendant since middle school, was the passenger in a vehicle operated by Johnson on Madison Avenue at approximately noon on the day of the shooting. At trial, Johnson testified that she did not actually see the shooting, never saw the shooter with a gun, and was not certain the shooter was the defendant.

Within moments of the shooting, Johnson received a phone call from her then boyfriend, Davis, who was

incarcerated, and their conversation was recorded by the correctional facility. Johnson remained on the phone with Davis while turning the car around and parking near the crime scene. Johnson informed Davis that someone had shot the victim, whom she identified by his nickname ("Kah"), although the record is unclear how she knew him, but she did not know the shooter's identity. A majority of the recording of this conversation is indecipherable because of Johnson's crying and screaming. This portion of the recording was admitted as a spontaneous utterance and is not challenged on appeal.

McIntosh then spoke to Davis minutes after the shooting. The state offered the recording of this portion of the conversation both as a spontaneous utterance and as a prior inconsistent statement to show that she had seen the defendant with a gun, had actually witnessed the shooting, and had been certain of the shooter's identity at the time of the shooting. Outside the presence of the jury, the state played the recording, in which McIntosh identified the defendant as the shooter in response to Davis when he asked, "DT," after she had described him. See part I C 2 of this opinion. It is clear from the recording that McIntosh was upset, as her responses to these questions were punctuated by her crying and screaming. She was speaking quickly and in a hysterical tone of voice.

Defense counsel objected to the admission of the recording, arguing that McIntosh's statements came in response to questions after the shooting occurred so that she had an opportunity for reflection, although he admitted that it sounded as if McIntosh was processing aloud what she had just seen. The state responded that the statements occurred within minutes of the shooting and that the statements themselves and McIntosh's tone of voice showed that she did not have an opportunity for reflection.

The trial court ruled that this portion of the recording was admissible as a spontaneous utterance, explaining that "it certainly is in response to a startling event. . . . [I]t's a witness who has personal knowledge of that startling event . . . who is in an excited state and . . . responding without an opportunity to reflect . . . ."[19] The court then asked defense counsel if he wanted a limiting instruction to accompany the ruling, which he declined. The recording was played for the jury, with McIntosh then clarifying that what she meant when she said, "I was, like, I know that's not DT," was that she was surprised that the defendant was in the area and shocked that he had shot someone.

As discussed in part III of this opinion, for evidentiary claims, we review the trial court's legal conclusions de novo but review its decision to admit evidence, if based on a correct view of law, for an abuse of discretion. It is undisputed that the evidence at issue constitutes hearsay—McIntosh made her statements on the phone to Davis out of court, and the state offered them for their truth (i.e., the description of the shooter and her identification of the defendant as the shooter). See Conn. Code Evid. § 8-1 (3). The parties dispute whether these statements satisfy the requirements of the spontaneous utterance exception to the rule against hearsay under § 8-3 (2) of the Connecticut Code of Evidence.

Under § 8-3 (2) of the Connecticut Code of Evidence, a spontaneous utterance is an exception to the rule against hearsay and is defined as "[a] statement relating to a startling event or condition made while the declar-

[19] The trial court also determined that McIntosh's prior statement was admissible as a prior consistent statement: "[This evidence] also goes to issues that went to impeachment," such as whether McIntosh was 100 percent certain that the defendant was the shooter at the time of the shooting. On appeal, the defendant also challenges this ground, but we do not address it given our holding that the court properly admitted the statements as spontaneous utterances.

ant was under the stress of excitement caused by the event or condition." "A statement properly is admitted as a spontaneous utterance when (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant." (Internal quotation marks omitted.) *State* v. *Slater*, 285 Conn. 162, 179, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008).

In assessing whether a statement was made spontaneously, no one factor is determinative, and the decision as to whether to admit the statement is left to the trial court's discretion. "The element of time, the circumstances and manner of the accident, the mental and physical condition of the declarant, the shock produced, the nature of the utterance, whether against the interest of the declarant or not, or made in response to question, or involuntary, and any other material facts in the surrounding circumstances, are to be weighed in ascertaining the basic conclusion whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation." (Internal quotation marks omitted.) *Rockhill* v. *White Line Bus Co.*, 109 Conn. 706, 709, 145 A. 504 (1929).

It is undisputed that McIntosh observed the shooting; the shooting took place in broad daylight in the middle of a street; it was a startling occurrence; the statements at issue referred to the shooting; and she made the statements after the shooting occurred. The defendant contends, however, that the statements describing him and identifying him as the shooter fail to satisfy the criteria for the spontaneous exception to the hearsay rule because McIntosh had the "opportunity for deliberation and fabrication" in that (1) several minutes passed

between the time of the shooting and the statements, (2) during that time, McIntosh discussed the shooting with Johnson, (3) she stated explicitly that she had reflected on whether the shooter was in fact the defendant, and (4) her statements were in response to questions from Davis. According to the defendant, these facts show that McIntosh had the opportunity for deliberation and reflection. We disagree.

As to the passage of time between the shooting and the statements, this court repeatedly has explained that the passage of time "does not preclude the admission of statements made after a startling occurrence as long as the statement is made under the stress of that occurrence. . . . While [a] short time between the incident and the statement is important, it is not dispositive. . . . [T]here is no identifiable discrete time interval within which an utterance becomes spontaneous; [e]ach case must be decided on its particular circumstances." (Citations omitted; internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 374–75, 908 A.2d 506 (2006).

The witness' emotional state at the time of the statement plays a key role in determining whether sufficient time has elapsed for the witness to have had the opportunity for deliberation or fabrication. See *State* v. *Slater*, supra, 285 Conn. 179–80 (victim's emotional state at time of statement weighed against opportunity for deliberation or fabrication despite unknown lapse in time); *State* v. *Kelly*, 256 Conn. 23, 41–42, 770 A.2d 908 (2001) (sexual assault victim's statement made to sister while victim was hysterical and in fetal position fifteen minutes after altercation was properly admitted as spontaneous utterance); *State* v. *Arluk*, 75 Conn. App. 181, 188–90, 815 A.2d 694 (2003) (thirty minutes did not constitute excessive amount of time when child declarant was still under stress of having witnessed altercation); see also *State* v. *Vega*, 181 Conn. App. 456, 466–68, 187 A.3d

424 (despite several minutes having passed after shooting and witness' having responded to police officer's questions, witness' statements made while on phone and overheard by officer were spontaneous in light of witness' crying and screaming), cert. denied, 330 Conn. 928, 194 A.3d 777 (2018).

In the present case, only a few minutes passed between the shooting and McIntosh's statement to Davis. The trial court specifically found that McIntosh had been "in an excited state," and the record clearly supports this finding. McIntosh testified at trial that, after witnessing the shooting, she was upset. The trial court admitted into evidence the recording of the phone call, which included McIntosh's crying and distressed voice, for the jury to hear and to assess. Her answer to Davis' question regarding the identity of the shooter was rambling and emotional, and was broken up by her crying. The conversation began almost immediately after the shooting, with Johnson having spoken with Davis first. McIntosh then spoke with Davis within minutes of the shooting. Additionally, McIntosh remained near the crime scene when she made this statement, with Johnson having turned the car around and parked near the crime scene. Given McIntosh's emotional state and the surrounding circumstances, the trial court did not abuse its discretion in concluding that the short passage of time between the shooting and her statements was insufficient to provide an opportunity for McIntosh to deliberate or to fabricate.

The defendant also relies on the fact that McIntosh made her statement identifying him as the shooter in response to a question Davis asked. Although whether a statement is in response to a question is one factor to consider in determining the spontaneous nature of the statement, this court has explained that the fact that "a statement is made in response to a question does not preclude its admission as a spontaneous utterance."

State v. *Kirby*, supra, 280 Conn. 376. Rather, we focus our analysis on "whether the declarant made the statement before he or she had the opportunity to undertake a reasoned reflection of the event described therein," with particular focus on the amount of time that has elapsed and the declarant's emotional state. (Internal quotation marks omitted.) Id.; see also *State* v. *Vega*, supra, 181 Conn. App. 472–74 (fact that statements were made in response to questions was not significant when declarant was emotional or near crime scene and statements occurred within minutes of crime). In the present case, the fact that McIntosh's statements were in response to questions is of little significance. The statements occurred within minutes after the shooting, while both she and Johnson were emotional and still located near the scene of the shooting. It is true that Davis asked her if the man she saw shoot the victim was "DT," but her response can reasonably be described as a stream of consciousness, spoken under emotional circumstances, rather than reflection or fabrication. After Davis' question about whether the shooter was the defendant, without pause, McIntosh stated that the shooter looked just like the defendant. Although she rambled in her statements, she continued to provide additional information about what she had witnessed, which was not relevant to the question Davis asked regarding the identity of the shooter. McIntosh stated that she saw the shooter pull out something silver-colored and that she could not see far without her glasses. Thus, the short lapse of time between the shooting and McIntosh's statement to Davis, her emotional state and proximity to the crime scene, and her having provided additional information without prompting from Davis all supported the trial court's ruling that her statement was spontaneous.

For similar reasons, we are unconvinced by the defendant's reliance on the fact that McIntosh had time to discuss the shooting with Johnson and admitted to hav-

ing reflected on the shooter's identity. First, there was no evidence that Johnson and McIntosh discussed the shooting prior to the conversation with Davis, and nothing Johnson said to Davis, to the extent decipherable, identified the defendant as the shooter. Although the jury reasonably could have inferred that McIntosh overheard Johnson's conversation with Davis, as they were in the same vehicle together, there was no evidence that McIntosh was influenced by anything she heard from Johnson. The conversation between Davis and Johnson was admitted into evidence. Most of the recording is undecipherable, as Johnson was crying and screaming during the conversation. Johnson stated that she did not know the shooter's identity. McIntosh then spoke to Davis. This lack of evidence that McIntosh heard anything substantive from Johnson regarding the shooting, coupled with the short lapse in time while they were still near the crime scene, contradicts the defendant's argument that McIntosh had an opportunity for deliberation or fabrication. Additionally, the fact that McIntosh stated, "that's not DT," was not evidence of an opportunity for reflection or fabrication but, rather, was evidence of her emotional state in light of her testimony that what she meant by this statement was that she was shocked by the defendant's presence and by the shooting. Accordingly, we conclude that the trial court did not abuse its discretion in finding that this statement constituted a spontaneous utterance under § 8-3 (2) of the Connecticut Code of Evidence.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* LEROYA M.*
(SC 20351)

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

Syllabus

Convicted, after a trial to a three judge panel, of two counts of murder in connection with the deaths of her two children, the defendant appealed to this court. The police reported to the defendant's home in response to a phone call from the defendant's friend, who had received an alarming letter from the defendant in the mail. When the defendant exited her home after the police arrived, she had lacerations on her wrists and told the police that she had "saved them." While the defendant was transported to the hospital, the police entered the defendant's residence and found the children's bodies, as well as a suicide note written by the defendant, in which she stated that, "if I burn for eternity at least I'll know why I deserve it." Autopsies revealed that the children died of acute intoxication from an antihistamine with sedative properties. At trial, the defendant did not dispute that she had killed her children but raised the affirmative defense of mental disease or defect, claiming that, at the time of the murders, she lacked the substantial capacity to either appreciate the wrongfulness of her conduct or to control her conduct within the requirements of the law. The defendant's version of events was admitted into evidence largely through the testimony and written report of her expert witness, A, a forensic psychiatrist. According to A, the defendant was suffering from psychosis and, as a result, developed a "religious delusion" that killing her children and herself was "God's plan." In A's opinion, at the time she killed her children, the defendant did not appreciate that what she was doing was wrong and was not able to control her conduct in accordance with the law. A recounted how, on the day in question, the defendant took the children to a store and then to a fast food restaurant, where she conceived of a method to end their lives. Specifically, because the children had not yet been baptized, she decided to drown them to accomplish their death and salvation. According to A, the defendant bought over-the-counter sleep aids, which she gave to the children upon returning home. While they were sedated, she held their heads underwater in the bathtub. The defendant purportedly heard the voice of God tell her that it was time to come home. The state presented the testimony of its own expert, L,

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

a forensic psychiatrist. According to L, there was no evidence that the defendant had suffered from a serious mental disease or defect at the time of the murders but, instead, had killed the children because she was angry about raising them alone. According to L, the manner in which the defendant committed the murders, certain statements the defendant made in her suicide note, and other communications were inconsistent with a religious delusion and affirmatively reflected the defendant's appreciation of the wrongfulness of her actions. The trial court found that the defendant failed to satisfy her burden of proving that, as a result of mental disease or defect, she lacked substantial capacity to appreciate the wrongfulness of her conduct or to control her conduct within the requirements of the law. The court determined that A's testimony was undermined by his failure to investigate or to adequately explain evidence of the defendant's behavior that the court found to be inconsistent with a religious delusion, including the defendant's communications exhibiting an appreciation of the wrongfulness of her conduct in the days leading up to the murders, her Internet research into the methods of poisoning children, and her provision of lethal amounts of medication to her children. On the defendant's appeal to this court, *held* that the trial court reasonably rejected the defendant's defense of mental disease or defect and the opinions of A related thereto, and, accordingly, this court affirmed the judgment of conviction: opinion testimony from mental health experts is central to a determination of the viability of the defense of mental disease or defect, and the credibility of expert witnesses and the weight to be given to their testimony on that issue are determined by the trier of fact, which may discount or reject expert testimony, so long as the discounting or rejection of such testimony is not arbitrary; in the present case, this court concluded that the trial court did not arbitrarily reject A's testimony, especially in light of the directly conflicting expert testimony of L, including testimony that the defendant's narrative of drowning her children while in the grip of a religious delusion was unsupported and contradicted by the defendant's organized and focused behavior during the relevant time period, including her Internet activity, her communications with friends and family, her purchasing and printing of a mailing label to send the letter to her friend, and the statements in her suicide note that she would "burn for eternity" for her actions; moreover, A's testimony was undermined by other evidence adduced at trial, including testimony from the defendant's friends and family that they had communicated with the defendant in the days immediately before or after the murders and did not observe any symptoms of psychosis or religious delusion, the defendant's text messages and Internet search history, and the autopsy reports, which conflicted with defendant's report that her children had died from drowning; furthermore, contrary to the defendant's claim, the fact that L conducted fewer interviews and spent less time with the defendant than A did was of no consequence, as the trial court, which

was responsible for determining the credibility of the expert witnesses and the weight to be given to their testimony, reasonably credited L's testimony.

Argued February 24—officially released September 13, 2021**

Procedural History

Substitute information charging the defendant with two counts of the crime of murder, brought to the Superior Court in the judicial district of New Haven and tried to a three judge court, *Vitale* and *B. Fischer*, *Js.*, and *Hon. Jon C. Blue*, judge trial referee; finding and judgment of guilty, from which the defendant appealed. *Affirmed.*

Naomi T. Fetterman, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, LeRoya M., was charged with two counts of murder in violation General Statutes § 53a-54a (a) for killing her seven year old son, D, and her six year old daughter, A. The defendant elected a trial before a three judge court; see General Statutes § 54-82 (a) and (b); and presented expert testimony in support of an affirmative defense of lack of capacity due to mental disease or defect pursuant to General Statutes § 53a-13,[1] otherwise known as the insanity defense. The state presented expert testimony at trial

** September 13, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

to rebut the defendant's insanity defense. The trial court ultimately did not find the defendant's expert testimony to be reliable or credible and, as a result, concluded that the defendant had "failed to satisfy her burden of proving that, as a result of mental disease or defect, she lacked substantial capacity to appreciate the wrongfulness of her conduct or to control her conduct within the requirements of the law." On appeal, the defendant claims that no rational fact finder reasonably could have rejected her insanity defense on the present factual record. We disagree and affirm the judgment of conviction.

In a thorough memorandum of decision, the court found the following relevant facts, as supplemented by the undisputed evidence adduced at trial. On Tuesday, June 2, 2015, the defendant's best friend of eighteen years, Jazmin Santiago, received a letter and two credit cards from the defendant in the mail. "In the letter, the defendant directed . . . Santiago to use the credit cards to 'take care of the [kids'] tuition as much as you can . . . make sure you take the [money] out and use it for your kids. My mom is my beneficiary for everything. I did what I could for as long as I could.' " The letter was posted via a United States Postal Service "Click-N-Ship" label, which had been produced online and printed by computer on May 28 or 29, 2015. The return address on the label was the defendant's residence in East Haven.

"Santiago, alarmed by the contents of the letter, called the defendant's cell phone at approximately 2:21 p.m. on June 2. The defendant did not answer. . . . Santiago followed up with a text message to the defendant's cell phone and again received no response. . . . Santiago continued to call the defendant's cell phone, and the defendant eventually answered the phone. The defendant told . . . Santiago that 'she was tired.' . . . Santiago asked the defendant if 'she was okay,' and the

defendant responded that she 'was okay.' Not satisfied with the defendant's response . . . Santiago continued to inquire of the defendant and asked the defendant to come to her home. The defendant stated she 'could not come over.' Undeterred, Santiago told the defendant that she would come to the defendant's residence, and the defendant stated that, if Santiago did so, she 'would not open the door.' Nevertheless . . . Santiago drove to the defendant's house and brought the defendant's letter along with her. The defendant lived 'five minutes' from her home.

"The doors and windows of the defendant's house were locked when . . . Santiago arrived. The defendant did not answer the door. Santiago called the defendant's cell phone . . . . The defendant answered and said she was 'okay' and 'resting.' During one of their ensuing cell phone conversations . . . Santiago asked the defendant about [D] and [A]. The defendant told . . . Santiago that '[A] was good' and '[D] was sleeping.' Alarmed [by] the defendant's conduct and statements . . . Santiago next called 911. . . .

"When the police arrived . . . Santiago gave the police at the scene her cell phone. The police told Santiago to call the defendant, but the defendant did not answer the phone. Rather, the defendant opened the second floor exterior door of the residence . . . [and] descended the stairs . . . ." As she descended the stairs, the defendant asked the police, " 'can we just leave,' " and told them that "she had 'saved them.' " The police noticed lacerations on the defendant's wrists, which were treated by members of the East Haven Fire Department. The defendant was transported to Yale-New Haven Hospital and subsequently admitted to the Yale Psychiatric Institute (YPI) for a mental health evaluation.

In the meantime, "[a]s the events on scene unfolded . . . Santiago frantically asked the police to check on

the whereabouts of [D] and [A].'' East Haven police officers entered the defendant's home using the exterior stairway on the second floor to search for the children. Upon entry, ''[t]he police encountered an 'overwhelming' presence of natural gas . . . . The police were forced to exit the home and notified the fire department on the scene. Once the fire department 'shut off' the gas supply, the police reentered the home to search for the children. . . . The children were eventually located on the first floor [in the living room]. It was readily apparent to the police due to the decomposition of the children's bodies and attendant smell that each of them was dead'' and ''had been there 'a long time.' ''

Near the feet of the children's bodies, the police found a letter written by the defendant (suicide note), which provided:

''I'm sure there's an expert somewhere [who] will say the children suffered, but I let them know they were loved very much and they were going to heaven. We said the Lord's Prayer to protect their souls. I know this was meant to end the way it did. I don't know the reason why, but we were meant to die today. After [thirty-five] years, I was convinced for a while I would be okay and I wouldn't ever be this sad again because I had great jobs, good kids and a house and car and I did these things all by myself. I am all by myself still. I'm not meant to be here past this time. It's [okay] and I'm not scared. I'm numb and if I burn for eternity at least I'll know why I deserve it. I don't know what I did to deserve this life and these kids didn't deserve to be brought into it to have sadness and suffering all of the time. I watch them cry and act out because they don't know what they did for their parents to leave them to fend for themselves.

''I was alone and I was meant to be alone. There is no true way to come back from who I am. I am not

looking for pity. I want the opposite. Years from now I will be forgotten but we're all dust. God already knew who I was. I couldn't leave [any more] of my kids to the system. They don't all get a happy ending. I love them all. I love them all so much I only wanted to be better for them but they were missing the [one] thing I couldn't ever give them on my own. They were in pain and now they're in heaven. I prayed and God knows my heart, he made me the way I am and knew we weren't fit for this world past this time.

"There will thankfully be no fighting over anything I have. I will be cremated and the bank will get the house and the car. That's it. I really tried. [Thirty-five] was great, my friends and family were great. We all have our own lives. There's nothing anyone could've done. I asked God to stop me if I was making a mistake. I asked to show me I was wrong and save them. They should not be left to burden anyone because I am the only one who could love them like a mother. Not an institution or a social worker.

"[M],[2] you cut me out then cut me up, you left these children and only started to care when you saw I was seeing someone else. You couldn't even be a man and admit you hit and choked me. You just wanted to hurt and ruin me and now you have. You cut off the nose but you're the face and you'll suffer from your decisions. I told you when I first got pregnant with [D] that I could not be a single parent again. You did that and left these children to mourn for you every night before bed and in school when they should've been happy with friends. You get your child support back, you save all your money and possessions you cared about more than your family. I warned you I couldn't do it alone when we were going to reconcile but you left them again anyway. You can't take care of them any better than I was and

[2] M is the defendant's ex-husband and the father of D and A.

now they'll always be a faint memory. Your daughter [J][3] should be happy about the things she said to them. You should feel better that she was being abusive to them and you did nothing about it. I will not let anyone abuse or take advantage of [any more] of my children. I hope the things [J] did to them will haunt her for the rest of her life. They will be in heaven with people who we lost and loved. They deserve that.

"They got to do all of the things they wanted to do before they died today. They ate their favorite things. They had ice cream and they wanted to paint their nails so we got nail polish and they had fun and really liked how it came out. I saw them truly happy not being shipped off to multiple babysitters and just hanging out with mommy. I always knew I'd be a mom but I just wish I had children within a family with the man who was supposed to care for me and cares for his family the way he should have with me. I would have been a different mother. I would have had happy children and even if I was sad and unable to care for them, he would have been there to care for us all and I would have gotten through it and maybe made it to [thirty-six]. I just couldn't imagine the [second] half of my life being this way. Dragging my kids along for the ride. I made the mistake the first time and didn't end things when I could have . . . before I made it far and had more kids. My older kids escaped the same fate because I was too depressed to move and make it happen. My angel saved me, saved us. Now they are suffering. I won't do this injustice to my other kids. [D.W.][4] is sadly already lost. [N][5] is without a home and a family who

[3] J is M's daughter from a prior relationship.

[4] D.W. is the defendant's son from a prior relationship. D.W. was seventeen years old and living with his father at the time of the murders.

[5] N is the defendant's daughter from a prior relationship. The defendant's parental rights to N were terminated in 2008. N was thirteen years old and in the custody of the Department of Children and Families at the time of the murders.

loves her. [D.J.][6] has survived despite his challenges and I can only hope he's happy and healthy.

"There's no more pain for [D] and [A]. They left this world as innocent as they were when they came into it . . . not scarred and [heartbroken] by people who make promises to love and protect them. They won't have the loss and betrayal of girlfriends and boyfriends who promise to always be there. I wish my parents would have awarded me the same courtesy if the thought ever crossed their minds just once. We're all just dust. I'm [thirty-five] and I did good things at least in the past [eight] years. It wasn't enough to make me or my children happy. None of it mattered. I raised them not to covet 'things' and they didn't, they wanted a happy life with a family. I just couldn't give them that.

"I'm done. There's nothing else to say and no further explanation to give. We love you and be proud of these [two] angels that will watch over and protect you all." (Footnotes added.)

A subsequent autopsy revealed that the cause of D's death was "acute diphenhydramine intoxication and that his manner of death was homicide." Diphenhydramine "is an antihistamine with sedative properties" that is found in many " 'over-the-counter' medications," such as Benadryl. With respect to A, an autopsy revealed that the "cause of [her] death was acute intoxication from the combined effects of diphenhydramine and alcohol, and her manner of death was homicide. Significantly . . . the toxicology examination revealed that the ethanol level present in [A] was .091," which is above the .08 "threshold sufficient for prosecution of an adult for operating a motor vehicle while under the influence."

[6] D.J. is the defendant's son from a prior relationship. The defendant's parental rights to D.J. were terminated in 2008. D.J. was ten years old and had been adopted by his foster family at the time of the murders.

During the search of the defendant's home, the police found a "significant quantity of both 'over-the-counter' and prescription medication," including medications containing the active ingredient diphenhydramine. The police also found a "substantial quantity of alcohol, including tequila, vodka, 'Southern Comfort,' and beer . . . ." The police seized the defendant's cell phone, from which they were able to extract her text messages, e-mails, and Internet search history from " 'around the time frame' of the crimes." This data helped to establish a timeline for the murders and illuminated the defendant's state of mind during the critical time period of May 27, through June 2, 2015.

The defendant's Internet search history revealed that she "began searching for methods to kill her children on Wednesday, May 27, 2015. Fourteen such searches occurred on May 27, and many related generally to 'overdose' deaths. The searches resumed on Thursday, May 28, 2015, and specifically . . . referenced diphenhydramine. The searches related to 'overdose' continue from May 28, through June 1, 2015."

The defendant communicated with her family, friends, coworkers, and daycare provider during this time. For example, on May 28, the defendant texted her daycare provider that "the kids won't be coming [today]." The defendant texted her employer on May 29, that, "I'm sorry I'm not going to make it in today." After D and A failed to arrive at daycare as scheduled on May 29, and June 1, her daycare provider texted and called the defendant repeatedly to inquire about the whereabouts of the children. On the morning of June 2, the defendant texted a response to her daycare provider, stating, "[m]y dad died I'm just trying to cope . . . [w]e're going to be home this week," even though the defendant's father was alive and well.

The defendant also communicated with her oldest son, D.W., after he arrived at her home on the evening

of June 1, to retrieve some belongings. While D.W. was on the defendant's front porch knocking on the door, the defendant texted him that "[m]y car is not working and I'm at [work]. If [you] want to come back [Friday] or Saturday." D.W. noticed the "strong smell of gas" emanating from the defendant's residence but "figured she was at work and everything was fine" and left.

Sometime between May 27, and June 2,[7] the defendant drafted and "deleted a text message to her mother, in which she told her mother, 'I don't want or deserve a service . . . I just want to be cremated,' and another which indicated, 'I love you and I'm sorry. I couldn't leave any burdens for others to [bear].' " The defendant also texted M, her ex-husband and the father of D and A. The trial court characterized the tone of these text messages as "angry and spiteful . . . ." "The tone is similar to the passages in . . . the defendant's admission and purported suicide note . . . ." For example, the defendant wrote "a derisive and spiteful text" message to M that " '[you] got off [scot] free,' and 'I hope you enjoyed the moments you took for granted . . . .' " Additionally, the defendant texted her former boyfriend regarding "their past romantic involvement . . . ."

After the police completed their investigation, the defendant was arrested and charged with two counts of murder. At trial, the defendant did not dispute that she had killed D and A but raised the affirmative defense of insanity, arguing that, "at the time she allegedly committed the proscribed act or acts, she had a mental disease or defect and that, as a result of that mental disease or defect, lacked the substantial capacity to either appreciate the wrongfulness of her conduct or

[7] Many of defendant's text messages during the relevant time period were delayed or deleted, and, as a result, the "date and time on such messages are likely when they were placed in [a temporary file pending future action] and not when they were actually created." (Internal quotation marks omitted.)

control her conduct within the requirements of the law."[8] In support of this defense, the defendant presented the expert testimony of two witnesses: Vinneth Carvalho, her treating psychiatrist at York Correctional Institution (YCI), and Paul Amble, a board certified forensic psychiatrist. Carvalho testified that, when the defendant was admitted to the psychiatric infirmary at YCI on June 10, 2015, she was suffering from auditory hallucinations, persecutory delusions, and paranoia. Specifically, the defendant reported that "she was hearing the voice of God, and she talked about the voice of God telling her to protect her children, and that—that was why she killed her children. She wanted to protect them. She felt—she couldn't understand initially why God had left her, not let her die. As time went on, that morphed into maybe God left me here for a reason, to perhaps memorialize my children. But all her conversations had this theme of this is what God wants me to do." Additionally, the defendant exhibited symptoms of paranoia, believing that a nurse "was a voodoo priestess . . . [who] was going to poison her" and that, "when other patients touched her . . . they were transmitting spirits to her." The defendant's symptoms improved significantly with antipsychotic medication but never "went away completely" because she still believed that "this was how God wanted her to be or [that] this is what God would have wanted . . . ."

Amble interviewed the defendant "a total of ten times" and attempted to corroborate the defendant's

[8] Alternatively, the defendant raised the affirmative defense of extreme emotional disturbance pursuant to General Statutes §§ 53a-54a (a) and 53a-55 (a) (2). The trial court rejected this defense, finding that "the defendant . . . failed to prove by a preponderance of the evidence that she caused the death of her children while under the influence of an extreme emotional disturbance, for which there was a reasonable explanation or excuse measured from the view point of a reasonable person in the defendant's situation under the circumstances as she believed them to be." The defendant does not challenge this finding on appeal.

self-reporting through other sources, such as police reports, medical records, Department of Children and Families (DCF) records, and interviews with the defendant's friends and family. The defendant's version of events, as reported to Amble, was admitted into evidence through Amble's written report and in-court testimony. According to Amble, the defendant "began to specifically plan for the ending of her children's [lives] three days prior to the . . . offense, [but] she had been contemplating her own death for several months. She linked her suicidal intent not only to numerous mounting stressors in her life, but also to a belief that such a plan was ordained by God, and, as new conflicts and stressors arose, this simply gave her confirmation of God's plan.[9]

* * *

"On Thursday, May 28, [the defendant's] children were scheduled to go to school. She had not specifically planned to end her children's lives that day but felt that her fate was likely to arrive soon, so she decided to spend the entire day with them, doing things they enjoyed. She let her children sleep until about 10 [a.m.] She did not contact the school to let them know the children were not going in, having an underlying thought that perhaps this would be their last day alive. When they woke, they were given breakfast and spent the rest of the morning and into the afternoon watching movies . . . . They prepared lunch together and generally had an enjoyable day. She then brought them out

[9] These conflicts and stressors included (1) a physical altercation with M, which led to the defendant's arrest, (2) the arrest of the defendant's oldest son, D.W., (3) the diagnosis of the defendant's youngest son, D, "as a 'special needs child,' " (4) the loss of a babysitter "loved" by D and A, (5) the placement of the defendant's oldest daughter, N, for adoption, (6) the "recent loss of a relationship," and (7) the defendant's upcoming thirty-sixth birthday and her feeling that "she had not had any significant or meaningful accomplishments."

to collect their dinner, which was a take-out meal from McDonald's. . . . They then went to the nearby Wal-Mart in East Haven, where she allowed her kids to buy a treat for dessert . . . and nail polish.

"It was at the McDonald's [restaurant] when [the defendant] conceived of the method to end her children's [lives]. She decided that the children had not yet been baptized and felt that to drown them would accomplish their death and salvation. She did not know how to accomplish this until walking through Wal-Mart, when the idea came to her to purchase sleeping medications in order to sedate them. She went to the pharmacy section and purchased a package of Wal-Mart brand sleep aids, [ZzzQuil], and either Aleve or Advil PM. . . . She said, 'I didn't want the kids to be scared. I wanted them relaxed and sweet.' . . .

"Upon their return [home], the children ate their meals while watching another movie . . . . Following the meal, the children had their treat from Wal-Mart. [The defendant] then took out all the pills from the blister pack of Wal-Mart brand sleeping medication, which contain[ed] [twenty-four] pills, and gave each child [twelve] pills telling them they were simply medication they needed to take. The medication pills were chewable, and the children ate them immediately upon their mother's instruction. . . .

"While the movie was playing, [the defendant] drew a bath for her daughter in the downstairs bathtub. Feeling that enough time had elapsed for her daughter to become drowsy, she called her down to the bathroom. Her daughter came, and they said the Lord's Prayer together. [A] then undressed and got into the tub. [The defendant] told her daughter she loved her and told her to sit back so she could wash her hair. [The defendant] said her daughter was visibly sedated with the medication." (Footnote added.) The defendant told her daugh-

ter "how much [she] loved her" and "held her [head] underwater . . . until she could see a look in her eye that suggested [A] was no longer alive."

"[The defendant] then picked her daughter up from the tub and brought her into her bedroom on the first floor, dried her off and dressed her in her favorite dress. With her daughter lying there, she returned to the bathroom, let out the rest of the water from the tub and drew a new bath for her son. She then called for her son, but he was too sedated to bring himself to the bathroom. She went and assisted him, seeing that he was, 'heavily medicated.' In the same manner, she said the Lord's Prayer with her son" and held his head underwater for "approximately [one] minute" until she "was convinced her son was also dead." She dressed her son and then dragged both children's bodies into the living room, where she positioned them "with their heads near each other, their arms to their side[s], holding hands."

The defendant cleaned up the house and then used a disposable razor to "deeply cut her wrists. . . . With her arms bleeding profusely, she laid down with her head by the children's feet and her feet up by . . . their heads. She draped her arms over her children's legs and passed out."

The next day, the defendant awoke and "realized she had not died." She then wrote the suicide note found at the feet of the children's bodies, as well as the letter to Santiago. The defendant's recollection of "the rest of her time in the house 'was fuzzy,' " but she spent the next few days before she was found on June 2, attempting to kill herself by cutting her wrists, overdosing on medication, and turning on the gas in the home.

Amble testified that, in his expert opinion, the defendant was suffering from a mental disease or defect at the time she killed D and A, specifically, psychosis, which is characterized by "[h]allucinations, delusions,

disorganized thinking, disorganized conduct, [and] flattened affect."[10] Amble opined that, due to her psychosis, the defendant had developed "a 'religious delusion,' " which he defined as a " 'fixed false belief,' " "that killing her children and herself was 'God's plan.' " "Nevertheless . . . Amble stated that this 'religious delusion' did not prevent [the defendant] from being able to engage in deception" or conduct " 'independent from' the psychosis," such as writing a "well organized," "clear," "succinct," and "logical" suicide note. In Amble's opinion, at the time she killed D and A, the defendant "didn't appreciate what she was doing was wrong, and she wasn't able to rationally control her conduct in accordance with the law."

On cross-examination, Amble conceded that, prior to the murders, none of the defendant's friends, family, or coworkers noticed the defendant engaging in any psychotic behavior, exhibiting any religious delusions, or focusing on religious matters, such as quoting the Bible or talking about God. Indeed, at trial, the defendant's sister testified that she spent approximately two hours with the defendant on the afternoon of May 25, 2015, and the defendant appeared "upbeat" and was "jok[ing] and laugh[ing] as usual." Amble also admitted that some of the defendant's communications at or around the time of the murders were not consonant with the existence of a religious delusion. For example, Amble "[did not] know" why the defendant would text

[10] At trial, Amble testified that, in his opinion, the defendant had developed schizoaffective disorder "in the days or so before she took her children's [lives]," which had persisted up to and including the time of trial. In his first written report, however, Amble expressed his opinion that, although he did not disagree with a diagnosis of schizoaffective disorder, the defendant's symptoms at the time of the murders also were "consistent with a [m]ajor [d]epression with [p]sychotic [f]eatures." Amble based "[t]his assessment . . . on the defendant's symptoms at the time of the . . . offense including a depressed mood, anhedonia, hopelessness, insomnia, and persistent suicidal ideation."

her mother that she did not "want or deserve a service," if she was "utterly convinced that this was God's plan." Additionally, Amble acknowledged that, if the defendant truly was suffering from a fixed false belief that she "was carrying out God's plan," then she "wouldn't, at least in her [own] mind" burn for eternity, despite the statement in her suicide note, "if I burn for eternity at least I'll know why I deserve it." Amble observed that the defendant's suicide note reflected "some confusion in her thinking about whether this was the right thing."[11]

Although Amble interviewed the defendant multiple times in 2015 and 2016, she did not inform him until a few months before trial, on October 17, 2018, that she actually "hear[d] the voice of God prior to the [murders] . . . saying, '[i]t's time to come home.' She said the voice was clear and sounded as though someone [was] sitting in the seat next to her." Amble acknowledged that there is a distinction between interpreting the will of God and having auditory hallucinations of God's voice, and that the defendant's failure to inform him previously of this "important . . . psychotic symptom" was a "significant omission . . . ." Nonetheless, Amble continued "to hold the opinion that, at the time of the . . . offense, [the defendant's] actions were the product of her delusional belief that God's will for her was to end her life and the lives of her . . . children," and that she "did not have the rational capacity to prevent her actions [or to] appreciate the wrongfulness of her conduct at the time she ended their lives."

To rebut the defendant's insanity defense, the state proffered the expert testimony of Catherine Lewis, a

[11] Amble explained that, when the defendant woke up following her suicide attempt and realized she had not died, she started "questioning what in the heck is going on here. . . . I have followed God's plan. This is what I was supposed to do, and suddenly she is now not dead, and she can't believe it, that she's not dead, and wonders at some point whether she even heard this message right to begin with."

board certified forensic psychiatrist. Lewis interviewed the defendant for a total of about eleven hours and reviewed various other sources of information, such as police reports, the defendant's medical records, and the defendant's DCF records. "In contrast to . . . Amble . . . Lewis opined that she did not see evidence of a 'serious' mental disease or defect," such as psychosis, "on the part of the defendant at the time of the offenses. . . . Rather . . . Lewis diagnosed the defendant with a mixed personality disorder with antisocial and borderline features.[12] Although borderline features 'can result in transient psychosis' . . . Lewis concluded that there was 'inadequate evidence' that it existed at the time of the offenses."[13] (Footnote added.) Lewis pointed out that the defendant has "a long history of aggressive and violent behavior" and "had been evaluated many times over the years, beginning in childhood, by social workers, psychologists, and psychiatrists." Despite multiple, prior psychological evaluations, the defendant had never previously been diagnosed with a major mental illness, such as psychosis. In Lewis' expert opinion, the defendant killed her children because "she was angry and upset" at having to raise them on her own "and [was] potentially using substances and therefore disin-

[12] In her written report, Lewis defined a "[p]ersonality [d]isorder [as] a pervasive and enduring pattern of behavior that differs markedly from expectations of an individual's culture and includes difficulties in ways of perceiving self/others or events, range/intensity/lability/appropriateness of emotional response; interpersonal functioning, and impulse control. These difficulties occur across a broad range of personal and social situations. There is significant impairment."

[13] In her written report, Lewis stated: "People diagnosed with [m]ixed [p]ersonality [d]isorder with [b]orderline [f]eatures can decompensate under stress and have psychotic symptoms. It is my opinion that, following her arrests, [the defendant] had a several day period [during which] she was shocked and traumatized [by] what had occurred. She exhibited signs of complex bereavement including hearing her child's voice, paranoid ideation, and numbness. She did not have these symptoms before the alleged offense. It is my opinion that symptoms resulted from the trauma of killing her children and the consequences of so doing."

hibited and took action on the available people," namely, D and A. Lewis believed that, at the time she killed her children, the defendant had the "ability to conform her conduct to the requirements of the law or to appreciate the wrongfulness of her conduct at the time of the alleged offenses."

Lewis explained that the defendant's suicide note was inconsistent with psychotic thinking or a religious delusion. The defendant's suicide note was "organized. It's laid out coherently. There's no evidence of a thought disorder such as perseveration. Tangentially, circumstantially, it's not there." There also was no mention of baptism; instead, according to Lewis, the suicide note reflected the defendant's hurt, anger, and appreciation of the wrongfulness of her actions. Lewis asked, "why would somebody burn for eternity for . . . ushering her children into heaven? Why would God burn someone for eternity who saved her children's souls?"

Like Amble, Lewis testified that "a delusion is a fixed, false belief." Although "[p]eople who are truly delusional do strange things," their behavior tends to "[make] sense" within the context of the delusion, and they "don't waver . . . ." With respect to the defendant, Lewis explained that "[y]ou don't just come off a delusion the way it's described in this case. It doesn't come on suddenly . . . it's just not the trajectory." In particular, "the whole baptism angle" did not "make a lot of sense to [Lewis] for a few reasons." First, the defendant herself was not baptized, and, "if you think baptism is necessary to go to heaven, and you kill your children so you can be there with them, how are you gonna be there with them if you're not baptized? It didn't make any sense." Second, "people who have religious delusions will tell [other] people about it," but the defendant's "contemporaneous texts . . . never [mention]" the defendant's religious delusions. Third, "poisoning someone isn't consistent with baptism. It's just . . .

not how delusions work" because "it's not consistent to sedate people to be baptized." Lewis stated: "[I]n plain English, the story doesn't make sense. It just doesn't make sense. The baptism thing is like spurious. The story would make more sense to me if . . . [the defendant] was so overcome and overwhelmed with caring for [her] children . . . was angry . . . [and] thought [they would] all be better off in heaven [that she] killed them with Benadryl. That would make more sense . . . ."

On the basis of the foregoing evidence, the trial court concluded that the defendant had committed the charged offenses by "intentionally formulat[ing] a plan to kill her children, [taking] intentional and deliberate action to carry out that plan, and employ[ing] a methodology consistent with that intent and plan." With respect to the defendant's insanity defense, the court determined that "Amble's opinion that the defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of her conduct or to control her conduct within the requirements of the law was undermined by his failure to investigate, or adequately explain, evidence that is at variance with that opinion," thus "adversely affecting the reliability and credibility of his testimony." The court provided the following examples of evidence and methodological flaws that, in its view, undermined Amble's opinion: (1) the statement in the defendant's suicide note, "if I burn for eternity at least I'll know why I deserve it," which the court said exhibited an "obvious appreciation by the defendant of the wrongfulness of her conduct," (2) Amble's failure to ask the defendant why she wrote the suicide note or for whom it was intended, (3) Amble's failure "to explain adequately, to the satisfaction of the [court]," how the defendant's text messages were "consistent with a psychosis or 'religious delusion,' " (4) the defendant's sui-

cide note contained an "impassioned and remonstrating" "diatribe against [M], the children's father," which the court found to be inconsistent with a " 'religious delusion,' " (5) Amble's failure to ask the defendant if she believed suicide is a sin, why she needed to medicate the children to baptize them, and why there was alcohol in A's system at the time of her death, (6) the belated timing of the defendant's revelation that she heard the voice of God before the murders "adversely impact[ed] its credibility, especially given its proximity to the start of trial," and (7) the inconsistency between Amble's opinion and Santiago's statements to Amble that there were no "apparent signs of a psychosis, hallucinations, 'religious delusions,' or loss of cognitive functioning" prior to the murders.

In light of the other evidence adduced at trial, including, but not limited to, Lewis' expert testimony, the autopsy report, and the evidence of the defendant's demeanor and state of mind around the time of the murders, the trial court was "not convinced the 'baptism' narrative self-reported by the defendant actually occurred." The court was "not persuaded that the children were in fact drowned," and, even if they were, "it is clear that they were given lethal amounts of medication and were poisoned. . . . Poisoning someone is not consistent with 'baptism.' " The court also found the following relevant evidence to be inconsistent with the defendant's baptism narrative and the existence of a religious delusion at the time of the murders: (1) the defendant herself was not baptized, and it was "unclear how [she] would join [her children] in heaven," (2) "[t]he defendant never mentioned baptism, or any remotely 'religious delusion,' in her confession and 'suicide' note, text messages or conversations immediately before or after the crimes," (3) the defendant spent "hours researching how to kill [D and A] with medication" and drafted text messages that exhibited her

"appreciation of the wrongfulness of her conduct," saying that she was " 'sorry' " and did not "deserve a service," (4) the absence of evidence of any hallucinations "at the time of the offense," and (5) "[t]he deception and falsehoods propagated by the defendant in contemporaneous text messages and phone conversations . . . ." Accordingly, the court found that "[t]he defendant . . . failed to satisfy her burden of proving that, as a result of mental disease or defect, she lacked substantial capacity to appreciate the wrongfulness of her conduct or to control her conduct within the requirements of the law."

The defendant filed a motion for a judgment of acquittal; see Practice Book § 42-53 (b); claiming that no rational fact finder reasonably could reject her insanity defense. Alternatively, the defendant asked the court to set aside the verdict and to order a new trial, claiming that its "rejection of the defense of lack of capacity under . . . § 53a-13 is against the weight of the evidence . . . ." The court denied the defendant's motions and sentenced the defendant to consecutive terms of 60 years of incarceration on each count of murder, for a total effective sentence of 120 years' incarceration. This appeal followed.[14]

Our review is governed by the following principles, most recently articulated by this court in *State* v. *Weathers*, 339 Conn. 187, 260 A.3d 440 (2021). Importantly, insanity is an affirmative defense, which means that the defendant bore the burden of proving legal insanity by a preponderance of the evidence. Id., 209. The insanity defense "has both a cognitive and a volitional prong. . . . Under the cognitive prong . . . a person is considered legally insane if, as a result of mental disease or defect, [she] lacks substantial capacity . . . to

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

appreciate the . . . [wrongfulness] of [her] conduct. . . . Under the volitional prong, a person also would be considered legally insane if [she] lacks substantial capacity . . . to conform [her] conduct to the requirements of law." (Citation omitted; internal quotation marks omitted.) *State* v. *Madigosky*, 291 Conn. 28, 39, 966 A.2d 730 (2009). The present case was decided by a three judge court instead of a jury, but, nonetheless, "the burden is on the defendant to prove [her] affirmative defense, the normal rules for appellate review of factual determinations apply and the evidence must be given a construction most favorable to sustaining the court's verdict." (Internal quotation marks omitted.) *State* v. *Weathers*, supra, 209.

"Undoubtedly, [o]pinion testimony from psychiatrists, psychologists, and other [mental health] experts is central to a determination of insanity. . . . Through examinations, interviews, and other sources, these experts gather facts from which they draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior. . . . At trial, they offer opinions about how the defendant's mental condition might have affected [her] behavior at the time in question. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, [mental health] experts can identify the elusive and often deceptive symptoms of insanity and tell the [trier of fact] why their observations are relevant. . . . In short, their goal is to assist [fact finders], who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense." (Internal quotation marks omitted.) Id., 210.

Equally well settled are the rules governing the permissible use of expert testimony at trial. The trier of fact "can disbelieve any or all of the evidence on insanity

and can construe that evidence in a manner different from the parties' assertions. . . . It is the trier of fact's function to consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances." (Citation omitted; internal quotation marks omitted.) Id., 211. The trier of fact "is not bound to accept a defense expert's opinion on insanity," even when the expert testimony adduced at trial is conflicting or "the state has presented no rebuttal expert." Id., 210; see also *State* v. *Quinet*, 253 Conn. 392, 407, 752 A.2d 490 (2000) ("[t]he evaluation of [conflicting testimony] on the issue of legal insanity is the province of the finder of fact" (internal quotation marks omitted)). "The credibility of expert witnesses and the weight to be given to their testimony . . . on the issue of sanity [are] determined by the trier of fact. . . . [I]n its consideration of the testimony of an expert witness, the [trier of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions [that] he drew from them." (Citation omitted; internal quotation marks omitted.) *State* v. *Weathers*, supra, 339 Conn. 210–11.

There are limits, however, on the permissible use of expert testimony. As we explained in *Weathers*, "[t]he trier's freedom to discount or reject expert testimony does not . . . allow it to *arbitrarily* disregard, disbelieve or reject an expert's testimony in the first instance. . . . [When] the [trier] rejects the testimony of [an] . . . expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Emphasis in original; internal quotation marks omitted.) Id., 211–12. That said, "given the myriad bases on which the trier properly

may reject expert testimony and the reviewing court's obligation to construe all of the evidence in the light most favorable to sustaining the trier's verdict, it would be the rare case in which the reviewing court could conclude that the trier's rejection of the expert testimony was arbitrary." Id., 212–13.

In the present case, after carefully reviewing the evidence adduced at trial in the light most favorable to sustaining the court's verdict, we conclude that the court did not arbitrarily reject Amble's expert testimony. Amble's expert opinion directly conflicted with the state's expert's opinion. The psychiatrist called by the state, Lewis, testified that, at the time the defendant committed the murders, she was not suffering from a mental disease or defect, was able to appreciate the wrongfulness of her conduct, and was able to conform her conduct to the requirements of the law. Lewis opined that the defendant's self-reported version of events—that she had drowned D and A while in the grip of a psychotic, religious delusion—was unsupported and contradicted by numerous other facts, including the defendant's prior psychiatric history and her behavior and communications during the critical time period from May 27 to June 2, 2015. Lewis described the defendant's behavior and communications during this time as "organized . . . and focused on the earthly." For example, the defendant's online activity, such as her Internet searches on how to poison her children and her purchasing and printing a "Click-N-Ship" label to mail a letter to Santiago, reflected "organized thought" and "multistep" planning inconsistent with psychotic behavior. Lewis described the defendant's suicide note as "well typed," "organized," "linear," "coherent", "goal directed," and "stunning[ly]" devoid of any "mention of baptism." Similarly, the defendant's text messages to her family, coworkers and friends were not "overtly psychotic" and did not mention God or baptism.

According to Lewis, the manner in which the defendant committed the murders also was inconsistent with her alleged religious delusion. Lewis pointed out that "it's not consistent to sedate people to be baptized" and that, because the defendant herself was not baptized, it was "internally discordant" to baptize D and A in order "to be with [them]" in death. Additionally, in Lewis' view, the defendant's statement in her suicide note, "if I burn for eternity at least I'll know why I deserved it," was inconsistent with a religious delusion because God would not "burn someone for eternity who saved her children's souls . . . ." Lewis also testified that the defendant's text message to her mother, "I love you and I'm sorry," was inconsistent with a fixed religious delusion because, "why would [the defendant] be sorry for having [her] children go to heaven?" Lewis opined that these communications not only were inconsistent with a religious delusion but affirmatively reflected the defendant's "[a]ppreciation of [the] wrongfulness" of her actions.

Given the directly conflicting expert testimony, the trier of fact was free to credit Lewis' expert opinion and to reject Amble's expert opinion. For better or worse, the success of much litigation, in both criminal and civil cases, depends on the credibility and effect of expert testimony on the trier of fact. We repeatedly have observed that, "[w]hen experts' opinions conflict . . . [i]t is the province of the [trier of fact] to weigh the evidence and determine the credibility and the effect of testimony . . . . [T]he [fact finder] is free to accept or reject each expert's opinion in whole or in part." (Internal quotation marks omitted.) *Grondin* v. *Curi*, 262 Conn. 637, 657 n.20, 817 A.2d 61 (2003). In the present case, the expert opinions regarding the defendant's sanity at the time of the commission of the murders were conflicting, and it was up to the court to determine which expert opinion, if either, it credited.

Even if we set the conflicting expert testimony aside, Amble's expert opinion was undermined by the other evidence adduced at trial. The defendant's sister, best friend, oldest son, and daycare provider all testified that they had communicated and/or interacted with the defendant in the days immediately before or after the murders and that the defendant exhibited no symptoms of psychosis or religious delusion. See *State* v. *Weathers*, supra, 339 Conn. 217–18 (recognizing that defendant's "conduct and demeanor shortly before or after the crime are relevant, and no doubt necessary, to making [an insanity] determination" and "may be more indicative of actual mental health at [the] time of the crime than mental exams conducted weeks or months later" (internal quotation marks omitted)). Similarly, the data extracted from the defendant's cell phone, which included her contemporaneous text messages and Internet searches, did not exhibit a preoccupation with or focus on the divine. The autopsy reports and the testimony of the state's medical examiner, which established that the causes of death of D and A were not drowning, as the defendant had reported, but acute drug and/or alcohol intoxication, also were inconsistent with Amble's expert opinion that the defendant had drowned her children while in the midst of a religious delusion.

The trial court also was entitled to find that the state effectively had undermined Amble's testimony on cross-examination. See, e.g., *State* v. *Cobb*, 251 Conn. 285, 490, 743 A.2d 1 (1999) ("the state can weaken the force of the defendant's presentation by cross-examination and by pointing to inconsistencies in the evidence" (internal quotation marks omitted)), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). On cross-examination, Amble could not explain to the court's satisfaction why the defendant would text her mother that she did not "want or deserve a service" if she was

"utterly convinced that this was God's plan." Amble also had significant difficulty explaining the statement in the defendant's suicide note about burning for eternity, admitting that, if the defendant genuinely believed that she "was carrying out God's plan," then she "wouldn't, at least in her [own] mind," burn for eternity. Additionally, Amble admitted that there was no evidence to corroborate the defendant's self-reported symptoms of psychosis prior to the murders and that the trauma of killing her own children and remaining in the home by herself for days with their decomposing bodies could have induced the defendant's subsequent psychosis. See footnote 13 of this opinion.

In a case involving conflicting evidence, "it is the quintessential [fact finder] function to reject or accept certain evidence, and to believe or disbelieve any expert testimony." (Internal quotation marks omitted.) *State* v. *Crespo*, 246 Conn. 665, 679, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). On the present factual record, "[t]he [fact finder] was free to reject, in whole or in part, the expert defense testimony, and to credit the state's [expert testimony] . . . ." *State* v. *Medina*, 228 Conn. 281, 310, 636 A.2d 351 (1994); see also *State* v. *DeJesus*, 236 Conn. 189, 201, 672 A.2d 488 (1996) ("[i]t is well settled that the trier of fact can disbelieve any or all of the evidence proffered concerning the defense of insanity, including expert testimony, and can construe such evidence in a manner different from the parties' assertions"); *State* v. *Gray*, 221 Conn. 713, 720, 607 A.2d 391 ("[i]n finding facts in cases of conflicting expert testimony, a [fact finder] may choose to believe one expert over another"), cert. denied, 506 U.S. 872, 113 S. Ct. 207, 121 L. Ed. 2d 148 (1992). In light of the foregoing evidence, we conclude that the court reasonably rejected the defendant's insanity defense.

The defendant contends that no rational fact finder could have credited Lewis' expert testimony and rejected Amble's expert testimony because Lewis reviewed the same materials as Amble but conducted fewer collateral interviews and spent less time interviewing the defendant.[15] This claim is without merit. It

[15] The defendant also argues that the court arbitrarily rejected Amble's expert testimony, in pertinent part, because (1) it focused "myopically" on a single sentence in the defendant's suicide note, "if I burn for eternity at least I'll know why I deserve it," divorced from "the context of the entire letter," (2) the defendant's statement about burning for eternity reflected her "acknowledgment that her actions are objectively wrought with societal disapproval for a criminal act" but do not reflect her "appreciation for the wrongfulness of her conduct," (3) Amble's expert opinion was supported by the defendant's psychiatric records at YPI and YCI, as well as Carvalho's testimony, (4) Amble "repeatedly and consistently" explained that an individual experiencing a psychotic delusion does not lose " 'cognitive functioning' " and can continue with " 'goal directed behavior toward rational things' " independent of the psychotic delusion, (5) it improperly focused on Amble's failure to investigate unanswered questions, such as why the defendant's children would be afraid of baptism and in need of medication to participate, even though Amble testified that the answers to those questions would not change his expert opinion, and (6) it incorrectly concluded that the timing of the defendant's disclosure to Amble about hearing the voice of God adversely impacted the credibility and reliability of his opinion. We reject each of these arguments for the following, respective reasons: (1) the court's memorandum of decision reflects that the court considered the entirety of the defendant's suicide note, which was devoid of any mention of baptism and included an "impassioned and remonstrating" "diatribe" against M, (2) the defendant's statement about burning for eternity patently refers to God's eternal judgment for a wrongful and immoral act rather than societal disapprobation of criminal conduct, (3) the defendant's psychiatric records at YPI and YCI, as well as Carvalho's testimony, do not address the defendant's psychiatric condition at the time of her commission of the murders, (4) the court was entitled to disbelieve Amble's testimony that the defendant's contemporaneous text messages were independent of her religious delusion and to believe Lewis' expert testimony that they were inconsistent with the existence of a religious delusion, (5) although the answers to the court's questions would not have affected Amble's expert opinion, they were critical to Lewis' expert opinion and, therefore, entitled to be weighed by the court in making its credibility determination, and (6) despite the existence of evidence indicating that the defendant heard the voice of God *after* her commission of the murders, there was no evidence, until October, 2018, on the eve of trial, that she heard the voice of God *prior to* her commission of the murders, which Amble himself admitted was a "significant omission . . . ."

is axiomatic that "[t]he credibility of expert witnesses and the weight to be given to their testimony . . . on the issue of sanity is determined by the trier of fact." (Internal quotation marks omitted.) *State* v. *Medina*, supra, 228 Conn. 309. "We will not . . . substitute our judgment for that of the fact finder with respect to the weight to be given the testimony of the expert . . . witnesses on the issue of the defendant's sanity." *State* v. *Patterson*, 229 Conn. 328, 340, 641 A.2d 123 (1994). As we previously explained, the trier of fact reasonably credited Lewis' expert testimony that, at the time the defendant murdered D and A, she was not suffering from a mental disease or defect, was able to appreciate the wrongfulness of her conduct, and was able to conform her conduct to the requirements of law. Accordingly, we affirm the judgment of conviction.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 209

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* SIGFREDO ROSARIO
(AC 42827)

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

Syllabus

Convicted, following a jury trial, of the crime of larceny in the second degree, the defendant appealed to this court. The defendant, a resident of a condominium complex in Waterbury, became the president of the board of directors of the condominium association. P, the treasurer of the board of directors, became concerned about the association's finances and asked the defendant for financial information, which he failed to provide. P examined the bank records of the association and noticed that checks had been written from the association's bank account to the defendant and deposited in the defendant's personal bank account. The defendant explained that he made withdrawals from his personal bank account for legitimate purchases for the condominium complex,

but admitted that he also used the funds for personal items. The defendant's sentence included probation with special conditions, including the payment of restitution. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court committed plain error when it required him, as a special condition of probation, to pay restitution, which was based on his claim that the court did not first consider the factors enumerated in the applicable statute (§ 53a-28 (c)): the court did consider the factors in § 53a-28 (c) (3), as it stated in its second articulation that the defendant had an earning capacity that would enable him to make restitution, and the court noted that, at sentencing, the defendant stated that he was able to work and that he was financially supported by his mother, and the court also considered the rehabilitative effect on the defendant of paying restitution and the impact on the victims.
2. The trial court did not abuse its discretion in denying the defendant's motion for an extension of time within which to begin making restitution payments: the court granted the defendant an extension of time to begin making restitution payments to six months after the original start date, and, although the defendant claimed that he was not provided with sufficient time to generate income, the court found that the defendant had a responsibility to find alternative ways to earn funds to make the restitution payments.
3. The defendant could not prevail on his unpreserved constitutional claim that the trial court violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses, H and P: the court's questioning of H, a detective, was not inappropriate because the court stated that its questions were intended to clarify H's testimony, and the record appeared consistent with this purpose; moreover, the court properly intervened to clarify the self-represented defendant's testimony, particularly in light of his inclusion of irrelevant material in his testimony and his disruptive conduct, the fact that the court's questions may have drawn attention to the strength of the state's case did not render those questions improper, the court's questions did not suggest anything about the credibility of any witnesses or advocate in favor of a particular verdict, and the court's questions did not prejudice the defendant because the elicited facts were not truly in dispute; furthermore, the court did not act as an advocate for the state when it questioned P regarding the defendant's identity, as the court's questions, viewed in the context of the entire trial, did not prejudice the defendant or improperly influence the outcome of the proceedings.

Argued October 12, 2021—officially released January 4, 2022

Procedural History

Substitute information charging the defendant with the crime of larceny in the second degree, brought to

the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Crawford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph S. Danielowski*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Sigfredo Rosario, appeals from the judgment of conviction, rendered following a jury trial, of larceny in the second degree in violation of General Statutes §§ 53a-119 (1) and 53a-123 (a) (2). On appeal, the defendant claims that the court (1) improperly ordered that he pay restitution without first considering the factors enumerated in General Statutes § 53a-28 (c), (2) abused its discretion in denying his motion for an extension of time within which to begin making restitution payments and (3) violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses.[1] We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant. The defendant resided at the Lincoln Park condominium complex in Waterbury and became the president of the

[1] The defendant also claims that the court abused its discretion in denying his motion for stay of execution of his probation and his motion for stay of the conditions of probation. At oral argument before this court, defense counsel withdrew this claim. We note that this challenge is not reviewable on appeal. See, e.g., Practice Book § 61-14; *Clark* v. *Clark*, 150 Conn. App. 551, 575–76, 91 A.3d 944 (2014) (declining to review claim that trial court improperly lifted appellate stay because it was improperly presented for resolution on appeal, rather than by motion for review).

board of directors of the Lincoln Park condominium association (association) in May, 2013. In November, 2014, Omayra Pizarro, the treasurer of the board of directors of the association, became concerned about the finances of the association and asked the defendant for financial information related to her concerns. When the defendant failed to provide such information, Pizarro examined the bank records of the association and noticed that checks had been written from the association's bank account to the defendant. Pizarro shared her concerns with James Loughlin, the general counsel for the association, and Loughlin asked the defendant for an accounting, which the defendant declined to provide.

Pizarro then contacted Detective Kyle Howles of the Waterbury Police Department and provided him with the association's bank records and bylaws, which state that no member of the board of directors shall receive compensation from the association for acting as such. Howles then contacted the defendant, who provided Howles with his personal bank records. Howles' investigation revealed that thirteen checks, totaling $47,931.60, had been written from the association's bank account to the defendant and had been deposited in the defendant's personal bank account. The defendant made withdrawals from that same personal bank account for legitimate purchases for the condominium complex, as well as for personal items such as gasoline, groceries, fast food, mortgage payments and cell phone bills. The defendant explained to Howles that he had placed the money into his personal bank account because he needed cash to pay for projects around the condominium, to pay day laborers who only accepted cash and to negotiate better prices with contractors; he did concede, however, that there was no accounting, notes, or record of those expenses. Howles did not include in his calculation of personal expenses any withdrawals that possibly were

related to condominium improvements. Howles determined that the defendant had withdrawn "just short of $20,000" from the subject bank account for expenses that the defendant had acknowledged were personal. The defendant testified at trial that he "took thirteen checks for $47,131.60" from the association and that he used $17,515.09 of that amount for personal expenses.

Following a jury trial, the defendant was convicted of larceny in the second degree. The court, *Crawford*, *J.*, sentenced the defendant to five years of imprisonment, execution suspended, and five years of probation with special conditions, including the payment of restitution in the amount of $17,500, to be paid at a rate of $400 per month beginning in February, 2019. This appeal followed.

The defendant filed a motion for stay of execution of his probation, a motion for stay of the conditions of his probation and a motion for extension of time to start making the restitution payments, which motions the trial court denied. The defendant filed a motion for articulation on December 11, 2019, requesting that the court articulate the basis, according to the factors in § 53a-28 (c), for its order of restitution. On January 8, 2020, the court issued an articulation in which it referenced an excerpt of the transcript of a June 17, 2019 hearing on the defendant's postverdict motions for stay of execution of his probation, for stay of the conditions of his probation and for an extension of time to start making the restitution payments. The defendant filed a second motion for articulation on January 23, 2020, requesting a further articulation as to the court's decision to impose restitution pursuant to § 53a-28 (c). The court issued a second articulation on March 4, 2020, explaining the factual and legal basis for its decision to impose restitution. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court committed plain error when it required him, as a special condition of probation, to pay restitution in the amount of $400 per month without first considering the factors enumerated in § 53a-28 (c).[2] He argues that the court had before it no evidence that he had any income, assets or the ability to generate enough income to pay $400 per month in restitution. We are not persuaded.

"Plain error review may be appropriate when a court fails to follow or apply a statute that is clearly relevant to the case. . . . Nevertheless, [r]eview under the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [T]he core of the plain error doctrine . . . concerns whether a defendant can prevail on the merits of a claim, not simply whether the claim can be reviewed. . . . Consequently, [w]here a trial court's action does not result

[2] The defendant also contends that the court's first and second articulations are inconsistent with each other because, at the June 17, 2019 hearing on the defendant's postverdict motions, which was incorporated by reference into the court's first articulation, the court determined that there was no documentation confirming the defendant's income or employment but the court in its second articulation had clarified that the defendant had an earning capacity that would enable him to make the restitution payments. Even if we were to assume that the court's statements at the June 17, 2019 postsentencing hearing—that the defendant had not provided the court with documentation of income or employment—were somehow relevant to the defendant's ability to pay restitution at the time of sentencing, those statements are not inconsistent with the court's statement in its second articulation that the defendant has an *earning capacity*, which relates to an ability to earn money in the future. Accordingly, because the actions that form the basis for the claim of error did not occur, there can be no manifest injustice warranting reversal of the judgment pursuant to the plain error doctrine. See, e.g., *State* v. *Moore*, 85 Conn. App. 7, 11, 855 A.2d 1006 (claim under plain error doctrine does not warrant review when trial court's action does not result in any manifest injustice), cert. denied, 271 Conn. 937, 861 A.2d 510 (2004).

in any manifest injustice, a defendant's claim under the plain error doctrine does not warrant review." (Citations omitted; internal quotation marks omitted.) *State* v. *Moore*, 85 Conn. App. 7, 11, 855 A.2d 1006, cert. denied, 271 Conn. 937, 861 A.2d 510 (2004).

Section 53a-28 (c) (3) provides in relevant part that, "[i]n determining the appropriate terms of financial restitution, the court shall consider: (A) The financial resources of the offender and the burden restitution will place on other obligations of the offender; (B) the offender's ability to pay based on installments or other conditions; (C) the rehabilitative effect on the offender of the payment of restitution and the method of payment; and (D) other circumstances, including the financial burden and impact on the victim, that the court determines make the terms of restitution appropriate. . . . The court shall articulate its findings on the record with respect to each of the factors set forth in subparagraphs (A) to (D), inclusive, of this subsection. . . ."

We conclude that the court's remarks at sentencing, combined with its second articulation, make clear that the court considered the relevant factors in § 53a-28 (c) (3) (A) through (D).[3] In light of our determination that the alleged error did not occur, we need not address the defendant's argument that § 53a-28 (c) (3) mandates that the court articulate its findings on the record with respect to the four factors in subparagraphs (A) through (D).

With respect to the factors enumerated in subparagraphs (A) and (B) of § 53a-28 (c) (3), which concern the defendant's ability to pay restitution and the defendant's financial resources and the burden restitution would place on him, the court, in its second articulation, stated

[3] We do not consider the court's January 8, 2020 articulation, which referenced the June 17, 2019 hearing on postverdict motions at which the defendant testified, in this analysis. We instead confine our review to the evidence before the court at the time of sentencing.

that "[t]he defendant has an earning capacity that would enable him to make . . . restitution." The court further elaborated that the defendant graduated from high school, received a certificate from a Turbo Jet Flight Engineer course, earned credits from two other programs, has experience in real estate, "can be of help in the community in reviving vacant office buildings," has computer skills, can work as a consultant related to computers and has worked as a consultant from 2008 through 2015. The court also noted in that second articulation that, at sentencing, in requesting probation, the defendant stated that he has the ability to work and further noted that the defendant is supported financially by his mother.

The court also considered the rehabilitative effect on the offender of paying restitution and the impact on the victims pursuant to subparagraphs (C) and (D) of § 53a-28 (c) (3). At the sentencing hearing, the court stated to the defendant: "[Y]ou knew you had no access to the funds, and I didn't know at what point you decided that you were entitled to it, but . . . these are hardworking people and I think it's more important that there be restitution." In its second articulation, the court explained that "[t]he victims here are the individual condo unit owners who paid their condo fees to the association so that those funds would be available to pay the expenses connected with common ownership. The defendant said he was really sorry and remorseful. Therefore, the defendant making restitution would make the victims whole, be an acceptance of responsibility for his criminal conduct, and a step towards rehabilitation." For the foregoing reasons and in light of the fact that the court articulated its findings on the record regarding the four factors in § 53a-28 (c) (3) (A) through (D), we conclude that reversal under the plain error doctrine is not warranted.

II

The defendant next claims that the court abused its discretion by denying his motion for an extension of time within which to begin making restitution payments. We are not persuaded.

We employ an abuse of discretion standard to this claim. "When reviewing claims under an abuse of discretion standard . . . great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Francis*, 338 Conn. 671, 679, 258 A.3d 1257, cert. denied, *Francis* v. *Connecticut*, U.S. , 142 S. Ct. 292, 211 L. Ed. 2d 136 (2021); see also See *State* v. *Doriss*, 84 Conn. App. 542, 548–49, 854 A.2d 48 (court has broad discretion in imposing sentence), cert. denied, 271 Conn. 922, 859 A.2d 581 (2004).

As previously stated, the court, at the December 14, 2018 sentencing hearing, ordered the defendant to make restitution payments of $400 per month beginning in February, 2019. On May 1, 2019, the defendant filed a motion for extension of time to begin making restitution payments. At a May 15, 2019 hearing on that motion, the defendant stated that he had not made any payments because the start date of February, 2019, did not provide him with sufficient time and that he has been trying to find ways to generate income in order to make the restitution payments. The court noted that the defendant failed to comply with the terms of probation and that it had stated at the sentencing hearing that if the defendant missed two consecutive payments, then the matter could be referred for a violation of probation. The court stated that further argument on the motion would be heard at the next court date in order to provide

the then self-represented defendant with time to provide appropriate documentation.

At a June 17, 2019 hearing,[4] the court denied the motion for an extension of time but ordered the defendant to start making restitution payments beginning on August 1, 2019. The court noted that, other than pursuing job prospects that were "highly unlikely" to materialize, the defendant did not immediately look for ways to generate income after having been sentenced in December, 2018, and that the defendant had a responsibility to find alternative ways to earn the funds to make the restitution payments. In light of the foregoing, including the extension of time to August 1, 2019, to begin making restitution payments, which date was six months after the original start date of February, 2019, we conclude that the court's denial of the motion for extension of time, was not an abuse of its wide discretion.

III

The defendant claims that the court violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses, Howles and Pizzaro, at trial. The defendant acknowledges that his claim is unpreserved and seeks 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). 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

[4] The defendant was represented by counsel at this hearing.

demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. The record is adequate for review and the claim, which alleges a violation of a fundamental right, is of constitutional magnitude. See, e.g., *State* v. *Swilling*, 180 Conn. App. 624, 633, 639, 184 A.3d 773 (claim that court violated defendant's right to due process by questioning witnesses was of constitutional magnitude), cert. denied, 328 Conn. 937, 184 A.3d 268 (2018).

We begin with the following principles. "Due process requires that a criminal defendant be given a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . . In a criminal trial, the judge is more than a mere moderator of the proceedings. It is [the trial judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . . Consistent with [her] neutral role, the trial judge is free to question witnesses or otherwise intervene in a case in an effort to clarify testimony and assist the jury in understanding the evidence so long as [the trial judge] does not appear partisan in doing so. . . . One of the chief roles of the trial judge is to see that there is no misunderstanding of a [witness'] testimony. . . . A trial judge can do this in a fair and unbiased way . . . [and an] attempt to do so should not be a basis of error. . . . Whether or not the trial judge shall question a witness is within [her] sound discretion . . . [and] [i]ts exercise will not be reviewed unless [s]he has acted unreasonably, or, as it is more often expressed, abused [her] discretion. . . . The trial judge can question witnesses both on direct and cross-examination. . . . [I]t may be necessary to do so to clarify testimony as [the judge] has a duty to comprehend what a witness says . . . [and] to see that the witness communicates with the jury in an intelligible

manner. . . . While no precise theorem can be laid down, we have held that it is proper for a trial court to question a witness in endeavoring, without harm to the parties, to bring the facts out more clearly and to ascertain the truth . . . and [intervene] where the witness is embarrassed, has a language problem or may not understand a question. . . . Whe[n] the testimony is confusing or not altogether clear the alleged jeopardy to one side caused by the clarification of a [witness'] statement is certainly outweighed by the desirability of factual understanding. The trial judge should strive toward verdicts of fact rather than verdicts of confusion." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 651–52, 881 A.2d 1005 (2005). "Any claim that the trial judge crossed the line between impartiality and advocacy is subject to harmless error analysis." *State* v. *Burke*, 51 Conn. App. 328, 335, 723 A.2d 327 (1998), cert. denied, 248 Conn. 901, 732 A.2d 177 (1999).

Mindful of these principles, we first examine the court's questioning of Detective Howles and the defendant. Howles testified to the following on direct examination. He became involved in the matter as a result of Pizarro's November, 2014 complaint concerning the finances of the association. Following that complaint and upon examining the defendant's personal bank records, he discovered that the defendant had deposited into his personal account thirteen checks, totaling $47,931.60, which had been written from the association to the defendant and that the defendant had made withdrawals from that same account for expenses related to the condominium complex as well as for expenses that the defendant had admitted to Howles were personal, such as for gasoline, groceries, fast food, mortgage payments and cell phone bills. Howles also testified that the defendant's personal bank records showed that the only deposits into the defendant's bank account

were from the association, with the exception of approximately $1200 to $1300. He further explained that he only included in his calculation of the defendant's personal expenses those that could not possibly be related to the improvement of the condominium complex. The defendant had no questions for Howles. Thereafter, the court stated that Howles needed to "clarify a couple of things" and proceeded to elicit the following testimony from Howles: a phone call from the treasurer of the association prompted Howles' involvement; Howles did not recall when the defendant became the president of the association; Howles had examined the bank accounts of both the association and the defendant from January until November or December, 2014, during which time frame the defendant was the president of the association; the defendant had written checks from the association to his personal bank account in his role as the president of the association; approximately $1200 to $1300 was deposited into the defendant's personal banking account from sources other than the association; the defendant had written checks from the association to himself, and Howles included in his calculation of personal expenses only the withdrawals that could not be possibly related to expenses for the condominium complex.

We cannot conclude, on the basis of the record, that the court's questioning of Howles was inappropriate. The court stated that its questions were intended to clarify certain points in Howles' testimony, and the record appears consistent with this stated purpose. "Unlike an appellate court, the trial court is able to observe the testimony of witnesses firsthand and, therefore, is better able to assess the relative clarity—or lack thereof—of any particular testimony." *State* v. *Gonzalez*, 272 Conn. 515, 536, 864 A.2d 847 (2005). "[T]he trial judge is free to question witnesses or otherwise intervene in a case in an effort to clarify testimony and

assist the jury in understanding the evidence so long as [s]he does not appear partisan in doing so." (Internal quotation marks omitted.) *State* v. *Brown*, 56 Conn. App. 26, 29, 741 A.2d 321 (1999), cert. denied, 252 Conn. 927, 746 A.2d 790 (2000).

The defendant, who was the sole defense witness, testified that he became the president of the association in order to improve the association, that he used his personal bank account to fund projects for the association and for personal expenses, that he personally did work to improve the grounds of the condominium complex, that the association owed him $4558.09 for damage to his condominium unit that the association had been reimbursed through an insurance claim, that he wrote thirteen checks totaling $47,131.60 from the association to himself in 2014, and that he used $17,515.09 of that amount for personal expenses. Following the defendant's redirect testimony, the court, through its questions, elicited the following responses from the defendant: his bank account was "mixed, business and personal"; he began writing checks to himself from the association's account in February, 2014; the association's bank account was electronic and did not require a signature, but he signed the checks in order to cash them; the entire $47,931.60 that he deposited from the association's account to his personal bank account was spent to benefit the association and that he reimbursed himself $17,515.09 that he believed was owed to him, including $5000 in relation to a lawsuit against the association that he had filed and withdrew concerning an insurance payment to the association.

Relevant to our analysis, we also note that, during the self-represented defendant's narrative testimony on the third day of trial and outside the presence of the jury, the court warned the defendant that he had been told "time and time again" that he could not make comments or give his opinion of the evidence, that

he was including "a lot of irrelevant material" in his testimony and that the court did not see any good faith on his part. The court noted that the defendant had become disruptive in terms of how he chose to conduct himself.[5]

Under these circumstances, we cannot conclude that the court abused its discretion in intervening to clarify the defendant's testimony, particularly in light of his inclusion of irrelevant material in his testimony and his disruptive conduct. "It is appropriate for the trial judge from time to time to intervene in the conduct of a case. Thus, when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts." (Internal quotation marks omitted.) *State* v. *Fernandez*, 198 Conn. 1, 11, 501 A.2d 1195 (1985). The court's questioning of the defendant, whose testimony lacked clarity, reflected a reasonable and impartial attempt to clarify his testimony to assure that the witness communicated to the jury in an intelligible manner. Such an attempt should not be a basis of error. See *State* v. *Gonzalez*, supra, 272 Conn. 535–36. "Whe[n] the testimony is confusing or not altogether clear the alleged jeopardy to one side caused by the clarification of a [witness'] statement is certainly outweighed by the desirability of factual understanding." (Internal quotation marks omitted.) Id., 536.

The defendant argues that the court's questions to him and to Howles related to testimony that was detrimental and central to his case. However, the fact that

[5] At the conclusion of the third day of trial, during which the defendant testified, the court concluded that the defendant had forfeited the right to continue to represent himself. The following day, however, the court vacated its ruling and permitted the defendant to continue to represent himself with standby counsel.

the court's questions may have drawn attention to the strength of the state's case does not render those questions improper. See *State* v. *Smith*, 200 Conn. 544, 550, 512 A.2d 884 (1986) (court's questioning of witness is not necessarily improper merely because it draws attention to strengths or weaknesses of party's case). The court's questions did not suggest anything about the credibility of any witnesses, did not advocate in favor of a particular verdict, or otherwise suggest that it believed or disbelieved any particular version of the events. See *State* v. *Swilling*, supra, 180 Conn. App. 644–45. Rather, the court impartially asked Howles and the defendant to restate certain portions of their testimony. Therefore, the questions served merely to clarify their testimony for the jury. See *State* v. *Gonzalez*, supra, 272 Conn. 537 ("[a court's] comments or questions for the purpose of clarifying . . . testimony are permissible and often necessary" (internal quotation marks omitted)), quoting *State* v. *Mack*, 197 Conn. 629, 641, 500 A.2d 1303 (1985).

Moreover, the court's questions did not prejudice the defendant because the relevant elicited facts were not truly in dispute. The defendant testified before being questioned by the court: "I took the $47,000 from the condominium complex. I deducted the $17,515.09 that I used for personal things, such as my mortgage, cable, and blah, blah, blah, blah, blah, blah. At the end of that, that leaves a balance of $30,416.51, which were used for Lincoln Park condominium basics. Therefore, it clearly illustrates that that account was being used for dual purposes. Even though, now, it's a major mistake, I realize that now." Furthermore, during its charge, the court, *Doyle*, *J.*,[6] issued the following curative instruction to the jury: "You should not be influenced by the

[6] It appears from the record that Judge Doyle charged the jury because Judge Crawford was unavailable. Neither party raises this as an issue on appeal.

court's actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, or in questions to witnesses, or in setting forth the law in these instructions. You are not to take any actions by the court, either Judge Crawford or myself, as . . . any indication of our opinion as to how you should determine the issues of fact." "Our appellate courts have always given great weight to curative instructions in assessing claimed errors . . . especially in assessing a defendant's claim of prejudice." (Citations omitted; internal quotation marks omitted.) *State* v. *Brown*, supra, 56 Conn. App. 29–30.

Finally, the defendant argues that, in the court's questioning of Pizarro regarding the defendant's identity, it acted as an advocate for the state when it asked her to identify the defendant in the courtroom. During the prosecutor's redirect examination of Pizarro, the court engaged in the following colloquy with Pizarro:

"The Court: Okay. I just have a couple of questions . . . what I'm not clear on is: first of all, the person you refer to as the president, Mr. Rosario, the defendant, would you identify him for the record, please—that's not what I wanted to do. . .

"[Pizarro]: Yeah, the person I was identifying as the president is Mr. Rosario.

"The Court: Just a second—no, is that person in the courtroom?

"[Pizarro]: Yes, he is.

"The Court: All right. Would you identify him, please.

"[Pizarro]: Mr. Rosario, the defendant.

"The Court: I need—and you need to just describe something that he's wearing for the record.

"[Pizarro]: He's wearing a black suit with a burgundy tie.

"The Court: Okay. All right.

"[Pizarro]: It looks black.

"The Court: Thank you. Okay."

This exchange is somewhat troubling. Although Pizarro had testified on direct examination about her concerns regarding "Mr. Rosario's" actions involving the association's finances, she did not, either in response to questioning by the prosecutor or the defendant, make an in-court identification of the defendant as the person she knew to be "Mr. Rosario." Thus, this was not a situation in which the court was clarifying a witness' prior ambiguous in-court identification of the defendant. See, e.g., *State* v. *Swilling*, supra, 180 Conn. App. 641–42 (no due process violation when court questioned victim as to whether "the person she had identified as the perpetrator of the crimes, and who was present in the courtroom, was the person she had previously identified as 'Mr. Swilling' " because court was clarifying victim's prior ambiguous in-court identification of defendant). The court's questions in the present case, however, when viewed in context of the entire trial, did not prejudice the defendant.[7]

A review of the record reveals that, during the defendant's questioning of the state's witnesses, he identified himself as the person whose conduct was at issue. During the defendant's cross-examination of Pizarro, which preceded the court's questioning of her, he asked: "On November 18, you called the police department to say

[7] The record does not reflect whether the court's questioning in this instance played a role in the defendant's decision to testify. Nevertheless, as we discuss, the record reflects that the defendant's identity was not in dispute at this point.

that I misappropriated $52,931.60." During his cross-examination of Loughlin, who also testified prior to Pizarro, the defendant inquired as to how Loughlin became the counsel for the association, and Loughlin explained, "[i]t was before I met you and it was [Pizarro], I think, called me and asked if I was interested. It was a call out of the—was it you who called?" The defendant responded, "[i]t was me." When the defendant further inquired as to whether Loughlin had any financial records of the association, Loughlin explained, "I do have that, that you generated as a summary of—" at which point the defendant interjected, "[t]hat I generated. But [what] I'm asking is something [independent] of me. . . ." During the defendant's recross-examination of Pizarro, the defendant identified himself as the individual who allegedly wrote checks in his own name from the association's bank account. He asked: "When was the first check that I wrote to myself?" Pizarro explained that it was sometime in 2014, and that she had provided the relevant information to the Waterbury Police Department. Tremaine Williams, a resident of the condominium complex, testified on direct examination that, in 2014, he had performed work in relation to the condominium complex and that his relationship with "Mr. Rosario" was positive until he received letters from Pizarro that the accounts of the association were not balanced. On cross-examination and in response to a question from the defendant regarding the status of their friendship prior to 2015, Williams responded: "[W]e were friends. I'm the one [who] voted you . . . wanted [you] to be president." The defendant then asked whether Williams worked for him in 2014, and Williams responded in the affirmative. In light of questions and responses such as these, we do not see how the judge's questioning of Pizarro regarding the defendant's identity could have improperly influenced the outcome of the proceedings.

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that a constitutional violation exists that deprived him of a fair trial. Accordingly, his claim fails under *Golding*'s third prong.

The judgment is affirmed.

In this opinion the other judges concurred.

HOUSING AUTHORITY OF THE CITY OF NEW LONDON *v.* BRUCE STEVENS (AC 43471)

Alvord, Clark and Norcott, Js.

Syllabus

The plaintiff housing authority sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The plaintiff served on the defendant a notice to quit possession of the premises alleging that the defendant's conduct constituted a serious nuisance under the applicable statute (§ 47a-15 (B) and (C)). Thereafter, the plaintiff commenced this summary process action by serving on the defendant a summons and complaint. The defendant filed an answer and special defenses alleging, among other things, that he was entitled to an accommodation because of his psychiatric disability. Subsequently, the defendant filed a motion to dismiss for lack of subject matter jurisdiction because the plaintiff had not issued a pretermination notice. The trial court rendered judgment of possession in favor of the plaintiff on the basis of the defendant's violation of § 47a-15 (C) and denied the defendant's motion to dismiss, from which the defendant appealed to this court. *Held*:

1. The trial court had subject matter jurisdiction over this summary process action: the notice to quit issued by the plaintiff, which complied with statutory requirements (§ 47a-23), provided the court with jurisdiction over the plaintiff's claims; moreover, given that the plaintiff alleged that the defendant's conduct constituted a serious nuisance, the plain and unambiguous language of § 47a-15 made clear that the plaintiff was not required to serve a pretermination notice on the defendant, and, therefore, the lack thereof did not deprive the court of subject matter jurisdiction; furthermore, the court did not need to reach the merits of whether the defendant's conduct did, in fact, constitute a serious nuisance in order to exercise jurisdiction over this action.
2. The defendant could not prevail on his claim that the court improperly rendered judgment for the plaintiff because his acts or omissions did

not constitute a serious nuisance within the meaning of § 47a-15 (C): although the defendant claimed that the court's decision relied on a subordinate, erroneous finding that the defendant had harassed another resident, the court did not make that finding and, instead, made clear that its decision in favor of the plaintiff was based on the condition of the defendant's apartment; moreover, the record supported the court's conclusion that the condition of the defendant's apartment constituted a serious nuisance because it presented an immediate and serious danger to the safety of the other tenants.

3. The defendant's claims that the trial court made clearly erroneous factual findings regarding whether the plaintiff reasonably accommodated him and that the court's findings were the result of implicit bias were not reviewable, the defendant having failed to brief the claims adequately: the defendant's briefs before this court were completely devoid of any legal analysis, as his argument mostly restated portions of the record, without providing any context or explanation of how those facts supported or related to his legal claims; moreover, the defendant failed to explain why either of the two authorities that he cited, an Iowa criminal case and an American Bar Association publication, were instructive in light of the facts of this case, or how the specific findings he challenged were relevant to the court's judgment.

Argued September 21, 2021—officially released January 4, 2022

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New London, Housing Session at Norwich, and tried to the court, *Hon. Francis J. Foley*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

John L. Giulietti, for the appellant (defendant).

Lloyd L. Langhammer, for the appellee (plaintiff).

Opinion

CLARK, J. In this summary process action, the defendant, Bruce Stevens, appeals from the trial court's judgment of possession rendered in favor of the plaintiff, the Housing Authority of the City of New London. The defendant claims that the court (1) lacked subject matter jurisdiction because the plaintiff failed to deliver to

the defendant a pretermination, or *Kapa*,[1] notice prior to commencing its summary process action against him, (2) improperly found that his conduct constituted a serious nuisance within the meaning of General Statutes § 47a-15 (C), and (3) made certain factual findings that are not supported by the evidentiary record. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history that are relevant to our resolution of the defendant's appeal. In 2013, the defendant entered into a written lease with the plaintiff for an apartment in a public housing complex for persons with disabilities and the elderly. In 2019, the defendant, an individual with psychiatric disabilities, was hospitalized on several occasions. On March 26, 2019, the police escorted the defendant from his apartment to an ambulance that took him to the Pond House, which is a behavioral health unit located within the Lawrence and Memorial Hospital. An officer involved in that incident subsequently informed Avalon LeBlanc, the plaintiff's property manager, that, given what the officer had observed while escorting the defendant from the apartment, the apartment should be condemned. Later that day, LeBlanc and a maintenance worker entered the defendant's apartment. LeBlanc took photographs of the hallway adjacent to the defendant's apartment door and the interior of his apartment.

The next day, March 27, 2019, the plaintiff served on the defendant a notice to quit possession. The notice to quit indicated, among other things, that the defendant wilfully caused substantial destruction to his dwelling unit by ripping up tiles from the floor, rendering appliances inoperable, clogging the sink and toilet, and filling the apartment with trash and other debris that had left the unit uninhabitable, constituting a serious nuisance

[1] *Kapa Associates* v. *Flores*, 35 Conn. Supp. 274, 408 A.2d 22 (1979).

in violation of § 47a-15 (B). The notice to quit also alleged that the defendant's conduct presented an immediate and serious danger to the safety of other tenants, constituting a serious nuisance in violation of § 47a-15 (C), because the defendant had harassed another resident and dragged bags of trash down the stairs and through common areas, leaving behind a trail of food and other refuse.[2]

On April 17, 2019, the plaintiff commenced this summary process action by serving on the defendant a summons and complaint. The complaint alleged two claims sounding in serious nuisance, which were identical to the allegations in the notice to quit.[3] Thereafter, the defendant filed an answer and special defenses and a motion to dismiss. The motion to dismiss asserted, inter alia, that the acts alleged in the notice to quit did not constitute a serious nuisance and that the trial court consequently lacked subject matter jurisdiction because the plaintiff had failed to issue the pretermination notice required in summary process actions when an eviction is based upon grounds other than serious nuisance or another exception set forth in § 47a-15. The plaintiff filed a memorandum in opposition to the

[2] General Statutes § 47a-15 provides in relevant part: "Prior to the commencement of a summary process action, *except* in the case in which the landlord elects to proceed under sections 47a-23 to 47a-23b, inclusive, to evict based . . . on conduct by the tenant which constitutes a serious nuisance . . . the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. If such breach can be remedied by repair by the tenant or payment of damages by the tenant to the landlord, and such breach is not so remedied within such fifteen-day period, the rental agreement shall terminate . . . . For the purposes of this section, 'serious nuisance' means . . . (B) substantial and wilful destruction of part of the dwelling unit or premises [or] (C) conduct which presents an immediate and serious danger to the safety of other tenants or the landlord . . . ." (Emphasis added.)

[3] The complaint also alleged five counts for breach of the lease agreement. On the morning of trial, however, the plaintiff withdrew those counts.

defendant's motion to dismiss. All matters, including the defendant's motion to dismiss challenging the court's subject matter jurisdiction, were consolidated for trial, which commenced on October 1, 2019.

At trial, Virginia Watrous, a resident in the building and the head of the tenants association, testified that she was sitting in her apartment at approximately 8 o'clock one evening when she heard an "ungodly noise by [her] door." When she got up to investigate the noise, she noticed that someone had slipped a floor tile under her apartment door. About forty-five minutes later, she observed that another tile was being pushed under her door. When she opened the door, she saw the defendant standing against the wall across from her apartment. She subsequently filed with the property manager a written complaint in which she claimed that the defendant had scared her during that incident.

LeBlanc, the plaintiff's property manager, testified about what she observed when she inspected the defendant's apartment. She also described thirteen photographs of the defendant's apartment, which were entered into evidence. LeBlanc stated that the defendant had thrown garbage in the hallway outside of his apartment. The trash was strewn about, the floor was wet, and bags of garbage impeded an exit, which presented a safety concern. According to LeBlanc, the interior of the apartment was filthy and had a very bad odor; something had been smeared all over the walls; dishes containing spoiled food were scattered throughout the apartment; there were piles of soggy bags of trash; rotting food and grease covered the oven, stove and kitchen walls, which presented a fire hazard; the kitchen sink was clogged and full of greasy, dirty water and dishes; the toilet was unusable because multiple household items had been stuffed into the bowl; and there was standing water on the bathroom floor. LeBlanc further testified that she had to step over bags

of garbage and there was no clear pathway through the apartment. The defendant's personal belongings were in disarray and were stacked four feet high in some places, "similar to . . . a hoarding situation." Additionally, the smoke alarms were inoperable because the batteries had been removed, floor tiles had been ripped up from the entryway to the kitchen, and the refrigerator was not working because the circuit breaker had been tripped. LeBlanc also testified that the defendant never submitted maintenance requests to report any of these issues.

The defendant testified at length about his physical and mental health issues. He claimed that he had picked up tiles that had come loose from his floor because he is diabetic and did not want to cut his feet. He only placed the tiles under Watrous' door to make a maintenance complaint.

On October 4, 2019, following the close of evidence, the court issued its memorandum of decision. With respect to count one of the plaintiff's complaint alleging a serious nuisance in violation of § 47a-15 (B), the court found that the plaintiff failed to prove that the defendant substantially or wilfully had destroyed part of his apartment and rendered judgment in favor of the defendant. With respect to the second count alleging a serious nuisance in violation of § 47a-15 (C), the court found that the condition of the apartment presented "an immediate and serious danger to the safety of other tenants of the building." Accordingly, the court rendered judgment of possession in favor of the plaintiff. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that, because his conduct did not constitute a serious nuisance within the meaning of § 47a-15 (C), the plaintiff's failure to serve

him with a pretermination notice deprived the court of subject matter jurisdiction. The plaintiff counters that no pretermination notice was required because the plaintiff had alleged that the defendant had created a serious nuisance within the meaning of § 47a-15 (C).[4] We agree with the plaintiff.

We begin by setting forth our standard of review and a brief overview of the statutory scheme that governs summary process actions. "[S]ummary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 388, 973 A.2d 1229 (2009).

"Pursuant to § 47a-15, before a landlord may proceed with a summary process action, *except in those situations specifically excluded*, the landlord must first deliver a [pretermination] notice to the tenant specifying the alleged violations . . . ." (Emphasis added; internal quotation marks omitted.) *Josephine Towers, L.P.* v. *Kelly*, 199 Conn. App. 829, 836, 238 A.3d 732, cert. denied, 335 Conn. 966, 240 A.3d 281 (2020). A pretermination notice provides the tenant with an opportunity to remedy the violations and avoid a summary eviction. *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 734–35, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011). When a "landlord elects to proceed under sections 47a-23 to

[4] The plaintiff did not cross appeal the court's judgment against it on count one of its complaint alleging a serious nuisance under § 47a-15 (B).

47a-23b, inclusive, to evict based on . . . conduct by the tenant which constitutes a serious nuisance"; General Statutes § 47a-15; however, a pretermination notice is not required.. Section 47a-15 defines " 'serious nuisance' " in relevant part as "(B) substantial and wilful destruction of part of the dwelling unit or premises [or] (C) conduct which presents an immediate and serious danger to the safety of other tenants . . . ."

In the present case, the notice to quit alleged that the plaintiff was terminating the defendant's tenancy because his conduct constituted a serious nuisance under § 47a-15 (B) and (C). The plain and unambiguous language of § 47a-15 makes clear that the plaintiff was therefore not required to issue the defendant a pretermination notice. It unequivocally provides that a pretermination notice is not required when the landlord seeks to evict, pursuant to §§ 47a-23 to 47a-23b, inclusive, based on circumstances constituting a serious nuisance. See *Cardinal Realty Investors, LLC* v. *Bernasconi*, 287 Conn. 136, 138 n.3, 946 A.2d 1242 (2008) ("[b]ecause the plaintiff alleged that the conditions in the defendant's room constituted a serious nuisance, the provisions of § 47a-15 requiring . . . a [pretermination] notice . . . did not apply"). When a landlord seeks to recover possession of leased property on the basis of a serious nuisance, "[a] landlord may simply serve a notice to quit alleging serious nuisance and, if appropriate, move to the next step." (Footnote omitted.) *Josephine Towers, L.P.* v. *Kelly*, supra, 199 Conn. App. 837.

Notwithstanding the plain language of § 47a-15, the defendant claims that, under the specific facts of this case, he was entitled to a pretermination notice and the lack thereof deprived the court of subject matter jurisdiction. His claim is premised entirely upon his contention that his conduct did not constitute a serious nuisance within the meaning of § 47a-15. The defendant,

however, mistakenly conflates the court's subject matter jurisdiction with the merits of the plaintiff's summary process claim.

"[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Housing Authority* v. *Rodriguez*, 178 Conn. App. 120, 126, 174 A.3d 844 (2017). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Hlinka* v. *Michaels*, 204 Conn. App. 537, 540–41, 254 A.3d 361 (2021).

"There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction. . . . The jurisdiction of the Superior Court in summary process actions, however, is subject to [certain] condition[s] precedent." (Citation omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 56, 209 A.3d 616 (2019). "Our Supreme Court has stated that [a]s a condition precedent to a summary process action, proper notice to quit is a jurisdictional necessity. . . . Simply put, before a landlord may pursue its statutory remedy of summary process, the landlord must prove compliance with all of the applicable preconditions set by state and federal law for the termination of the lease." (Internal quotation marks omitted.) *Housing Authority* v. *Brown*, 129 Conn. App. 313, 317, 19 A.3d 252 (2011).

In general, the conditions that must be met prior to the commencement of a summary process action are

set forth in § 47a-23.[5] To invoke the court's subject matter jurisdiction over a summary process action, a landlord must therefore, at a minimum, prove compliance with § 47a-23, which requires a landlord seeking to terminate a lease or rental agreement for serious nuisance to deliver to the occupant or lessee a notice to quit possession. In contrast to a pretermination notice, which provides the tenant with an opportunity to remedy violations and does not terminate a tenancy, "service of a notice to quit possession pursuant to § 47a-23 is typically an unequivocal act terminating a lease agreement with a tenant." *St. Paul's Flax Hill Co-op* v. *Johnson*, supra, 124 Conn. App. 735. The notice to quit must be in writing, notify the tenant that the tenant must quit possession or occupancy of the premises on a specified date, include the address of the property, and state "the reason or reasons for the notice to quit possession or occupancy using the statutory language or words of similar import." General Statutes § 47a-23 (b).

[5] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor . . . desires to obtain possession or occupancy of any land or building, [or] any apartment in any building . . . and (1) when a rental agreement or lease of such property, whether in writing or by parol, terminates for any of the following reasons . . . (G) nuisance, as defined in section 47a-32, or serious nuisance, as defined in section 47a-15 . . . such owner or lessor . . . shall give notice to each lessee or occupant to quit possession or occupancy of such land, building, [or] apartment . . . at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

Section 47a-23 (b) prescribes the form of the notice to quit. It provides in relevant part that the notice shall be in a writing that substantially follows this template: "I (or we) hereby give you notice that you are to quit possession or occupancy of the (land, building, apartment . . .), now occupied by you at (here insert the address, including apartment number . . . as applicable), on or before the (here insert the date) for the following reason (here insert the reason or reasons for the notice to quit possession or occupancy using the statutory language or words of similar import, also the date and place of signing notice). . . ." (Internal quotation marks omitted.) General Statutes § 47a-23 (b).

It follows that, for purposes of determining whether it had subject matter jurisdiction over the plaintiff's summary process action, the court in the present case needed to determine only whether the notice to quit issued by the plaintiff complied with § 47a-23. The court did not need to reach the merits of whether the defendant's conduct did, in fact, constitute a serious nuisance in order to exercise jurisdiction over this action.

"[T]o establish subject matter jurisdiction, the court must determine that it has the power to hear the general class [of cases] to which the proceedings in question belong." (Internal quotation marks omitted.) *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d (1989). Although, in certain cases, "it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear"; id.; see, e.g., id., 730 (whether notice was proper required inquiry into defendant's status as resident of mobile home park to determine which summary process provision controlled); *Colonial Investors, LLC* v. *Furbush*, 175 Conn. App. 154, 165, 167 A.3d 987 (whether court lacked jurisdiction because notice to quit was defective for failure to state properly total rent owed required examination of facts), cert. denied, 327 Conn. 968, 173 A.3d 953 (2017); this is not such a case. The plaintiff commenced this summary process action on the grounds that the defendant's conduct constituted a serious nuisance within the meaning of § 47a-15 (B) and (C). Its notice to quit included the requisite language set forth in § 47a-23 (b), and the defendant did not claim that the notice to quit was otherwise defective in form or delivery. Accordingly, the plaintiff's undisputed compliance with the requirements of § 47a-23 provided the court with subject matter jurisdiction over the plaintiff's claims.

II

The defendant also claims that the court improperly rendered judgment for the plaintiff because his acts or omissions did not constitute a serious nuisance within the meaning of § 47a-15 (C). We disagree.

"[T]he existence of a nuisance generally is a question of fact, for which we invoke a clearly erroneous standard of review . . . ." (Internal quotation marks omitted.) *Sproviero* v. *J.M. Scott Associates, Inc.*, 108 Conn. App. 454, 467, 948 A.2d 379, cert. denied, 289 Conn. 906, 957 A.2d 873 (2008). "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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 118 Conn. App. 163, 169, 983 A.2d 35 (2009), aff'd, 305 Conn. 488, 45 A.3d 627 (2012).

Additionally, the trial court, "as the sole arbiter of credibility, is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Housing Authority* v. *Brown*, supra, 129 Conn. App. 316. It is "the court's exclusive province to weigh the conflicting evidence [and] determine the credibility of witnesses . . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed. . . . The function of the appellate court is to review,

and not retry, the proceedings of the trial court." (Internal quotation marks omitted.) *Sullivan* v. *Lazzari*, 135 Conn. App. 831, 846, 43 A.3d 750, cert. denied, 305 Conn. 925, 47 A.3d 884 (2012).

The second count in the plaintiff's complaint alleged in relevant part that the defendant was "in violation of . . . § 47a-15 (C), which defines 'serious nuisance' as 'conduct which presents an immediate and serious danger to the safety of other tenants . . . .' Specifically . . . the defendant harassed another resident; this includes the defendant repeatedly placing a floor tile under [Watrous'] door and then confronting her when she questioned him about it. The defendant also dragged bags of trash from his apartment down two flights of stairs to the exterior of the building, trailing food and other refuse the entire way. These actions displayed by the defendant threaten the safety of other tenants . . . ."

The defendant claims that the court improperly found that his conduct was "an immediate and serious danger to the safety of the other tenants" because that finding relied upon a subordinate, erroneous finding that the defendant had harassed Watrous. The court never made any findings about whether the defendant harassed Watrous, however. Rather, in its memorandum of decision, the court merely summarized Watrous' testimony about the defendant placing tiles under her door. The court did not conclude that the defendant, in fact, harassed Watrous or that this conduct was essential to its finding that the defendant's conduct amounted to a serious nuisance under § 47a-15 (C). On the contrary, the court's decision makes clear that its finding in favor of the plaintiff on count two was based on the condition of the defendant's apartment, not the defendant's conduct toward Watrous.

The record supports the court's conclusion that the condition of the apartment constituted a serious nuisance because it presented an immediate and serious danger to the safety of the other tenants. In addition to the thirteen photographs of the defendant's apartment that were entered into evidence, the court heard from LeBlanc, who testified that there were piles of garbage and dishes with rotten food scattered throughout the apartment, both the sink and toilet were inoperable because they were clogged, and the oven and stove were covered in grease, which presented a fire hazard. There was ample evidence, therefore, to support the court's conclusion that the condition of the apartment was "squalid, unsanitary, and a public health threat to the other tenants," which presented an immediate and serious danger to the safety of the other tenants. Consequently, the court's finding that the defendant's conduct constituted a serious nuisance pursuant to § 47a-15 (C) was not clearly erroneous.

III

Although difficult to discern from his brief, the defendant also appears to challenge certain factual findings as clearly erroneous and claims, without support, that two of the court's findings indicate that the court was implicitly biased against him. We decline to review these claims because he did not adequately brief them.

The following additional procedural background provides the necessary context for consideration of the defendant's claims. After filing this appeal, the defendant filed a motion for articulation of the court's decision. Specifically, he sought articulation of the court's finding that the plaintiff had reasonably accommodated the defendant during the months of January through May, 2019. The court's finding in this respect apparently related to the defendant's special defense alleging that,

because of his disability, he was entitled to an accommodation by way of additional time to prepare for a reinspection of his apartment.[6] After the trial court denied the motion for articulation, the defendant sought review in this court. We granted review and ordered the court to articulate the factual and legal basis for its determination that the defendant was reasonably accommodated. The court issued its articulation on February 6, 2020, explaining that, although there was no evidence in the record that the defendant ever had requested a reasonable accommodation, the plaintiff nonetheless had attempted to accommodate the defendant.

On appeal, the defendant has not raised a claim under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2018), or any other state or federal law or regulation affording protections to an individual with disabilities. Instead, he challenges as erroneous the court's finding that he was reasonably accommodated and claims that the court engaged in implicit bias against him as a person with disabilities. His briefs before this court, however, are completely devoid of any legal analysis. The defendant's argument mostly restates portions of the record, without providing any context or explanation of how those facts support or relate to his legal claims. The only authorities he cites are an Iowa criminal case discussing a defendant's request for an implicit bias jury instruction and an American Bar Association publication about implicit biases and disabilities. The defendant has failed to explain why either authority is instructive in light of the facts of this case or how the specific findings he challenges are relevant to the court's judgment.

[6] On April 2, 2019, six days after it served the defendant with the notice to quit, the plaintiff apparently attempted to deliver to the defendant a letter notifying the defendant that he had failed his apartment inspection on March 26, 2019, and that his apartment was scheduled for a reinspection on April 18, 2019.

Our appellate courts consistently have held that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021); see also *Kelib* v. *Connecticut Housing Finance Authority*, 100 Conn. App. 351, 353, 918 A.2d 288 (2007). Where a party cites no law and provides no analysis in support of a claim, we decline to review it. *State* v. *Holmes*, 176 Conn. App. 156, 185, 169 A.3d 264 (2017), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). We therefore do not address the defendant's claims concerning whether he was reasonably accommodated or that the court's findings were the result of implicit bias.

The judgment is affirmed.

In this opinion the other judges concurred.

KLEBER GONZALO LOJA LASSO, ADMINISTRATOR (ESTATE OF LUIS ALBARO ORTEGA ORTEGA), ET AL. *v.* VALLEY TREE AND LANDSCAPING, LLC, ET AL.
(AC 43813)

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

Syllabus

The plaintiffs, the administrator of the estate of the decedent, O, and O's wife, C, sought to recover damages from the defendant G Co., a construction manager, for the wrongful death of O and for loss of consortium on behalf of C, in connection with the death of O as he was using an excavator to remove trees from certain premises. G Co. had been awarded a contract with the borough of Naugatuck for a project to renovate a high school. Subsequently, the building committee for the borough determined that additional borough funds could be used to remove trees near an upper parking lot that were adjacent to, but not a part of, the grounds where the high school renovation project was taking place. At the request of the building committee, G Co.'s project director solicited bids from two companies and went to the site to point

out trees that were flagged for removal by the building committee. The building committee then voted to award the tree removal work to the defendant V Co. O was an employee of V Co. The trial court granted G Co.'s motion for summary judgment as to the plaintiffs' claims, finding that there was no genuine issue of material fact that G Co. was not contractually obligated to have the control or responsibility for the supplemental work of overseeing any separate contractors, including V Co., and that there was no genuine issue of material fact that G Co. did not owe a duty to V Co. or its employees for the safety issues alleged in the complaint, and thus, did not owe a duty of care to O. *Held* that the trial court's determination that the provisions of the contract between G Co. and the borough did not give rise to a duty owed by G Co. to V Co. and its employees was legally and logically correct and supported by the language of the contract: the contract language was clear and unambiguous in the description of the project area, the extent of the project, and the work for which G Co. had the duty to perform, the court correctly determined that the plaintiffs, in their opposition to the motion for summary judgment, did not submit any admissible evidence demonstrating that G Co.'s responsibilities under the contract extended to the tree removal work, the plaintiffs' reliance on the representations made by G Co. in its bid, which was incorporated into the contract, was misplaced, as those representations related to G Co.'s responsibilities for work done within the area included for the renovation project, the tree removal work occurred in an area that was not within the scope of the project covered by the contract and the contractual language did not designate the tree removal work as part of G Co.'s management duties; moreover, the plaintiffs could not prevail on their alternative claim that G Co., through its actions, assumed a voluntary duty of care to O, and that its actions gave rise to a common-law duty to ensure safe workplace practices, as the plaintiffs failed to present any evidence of conduct on the part of G Co. demonstrating that it was in charge of the project to remove the trees or in any way directed the activities of the employees of V Co.; furthermore, C's loss of consortium claim necessarily failed because it was derivative of the negligence claim on which the court properly rendered summary judgment.

Argued October 4, 2021—officially released January 4, 2022

Procedural History

Action to recover damages for the wrongful death of the named plaintiff's decedent as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the motion for summary judgment filed by the

defendant O & G Industries, Inc., from which the plaintiffs appealed to this court. *Affirmed.*

Jeffrey I. Carton, for the appellants (plaintiffs).

Michael S. Lynch, with whom, on the brief, was *Nicole A. Carnemolla*, for the appellee (defendant O & G Industries, Inc.).

Opinion

HARPER, J. The plaintiffs, Kleber Gonzalo Loja Lasso, as administrator of the estate of the decedent, Luis Albaro Ortega Ortega (Ortega), and Marcia Del Lourdes Gualan Coronel (Coronel), appeal from the judgment of the trial court granting the motion of the defendant O & G Industries, Inc. (O & G), for summary judgment as to counts four and five of the revised complaint, which alleged claims against O & G for the wrongful death of Ortega pursuant to General Statutes § 52-555 and for loss of consortium on behalf of Coronel, who was married to Ortega at the time of his death.[1] On appeal, the plaintiffs claim that the court improperly granted the motion for summary judgment filed by O & G because (1) issues of material fact existed concerning O & G's responsibility for ensuring safe workplace practices with respect to certain tree removal work performed by the defendant Valley Tree and Landscaping, LLC (Valley Tree), and (2) the court erred in failing to find, pursuant to a construction contract between O & G and the borough of Naugatuck (borough), that O & G owed a duty of care to Valley Tree and, hence, to Ortega. The plaintiffs also claim that the court improperly rendered summary judgment as to Coronel's loss of consortium claim against O & G, which was derivative

[1] In the original complaint, Coronel also alleged claims as parent and natural guardian of her three minor children with Ortega for loss of parental consortium. After motions to strike those counts were filed, the plaintiffs did not object and agreed to withdraw the claims.

of the negligence claim against O & G. We disagree and affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiffs, reveals the following relevant facts and procedural history. In 2011, O & G was awarded a contract with the borough to act as construction manager for a project to renovate Naugatuck High School in 2012 (renovation project). In 2015, the building committee for the borough determined that additional borough funds could be used to remove trees near an upper parking lot for aesthetic purposes and to improve the viewing of fields for sporting events. The parking lot and trees to be removed were adjacent to, but not a part of, Naugatuck High School grounds where the renovation project was taking place. Two members of the building committee viewed the site to determine which trees to remove, and those trees were flagged by the building committee members. At the request of the building committee, Joseph Vetro, O & G's project director, solicited bids from two companies and went to the site with representatives from those companies in order to point out the trees that were flagged for removal by the building committee. After the bids were submitted, the building committee voted to award the tree removal work to Valley Tree, issued a purchase order to Valley Tree for the tree removal work and sent an e-mail to the owner of Valley Tree accepting its bid. On December 16, 2015, Ortega was working for Valley Tree operating a mini excavator to remove trees from the upper parking lot area. The mini excavator had no door and there was no glass in the front and right-hand side windows. While performing that work, Ortega stood up to remove some branches near the right side window when the boom arm of the mini excavator suddenly came down, crushing him. He died as a result of the significant internal injuries he sustained in the accident.

In their revised complaint, the plaintiffs alleged in count four that "[t]he mini excavator operated by Ortega was in a dangerous and defective condition in that it was missing several protective window enclosures that were designed not to open, thereby preventing its operator, including Ortega, from accessing any area where the operator may come into contact with the boom arms of the mini excavator." The revised complaint further alleged that the protective window enclosures had been missing from the mini excavator for approximately one month prior to Ortega's accident and that, as a result, it was operated by Valley Tree in a hazardous condition. The revised complaint also alleged that O & G, in its role as construction manager, "oversaw the entire renovation project," and that, "[b]ecause of its role as construction manager, O & G had numerous duties, which include[d], but [were] not . . . limited to, the following: managing the construction; coordinating the construction; conducting daily or other periodic inspections of the renovation site to monitor conditions at the site; ensuring that the construction at the site was performed in a safe and proper manner; ensuring that contractors at the site performed their work in compliance with federal and/or Connecticut workplace safety standards and regulations; obtaining satisfactory performance from contractors at the site; notifying the owner of the property of any hazardous or dangerous conditions; assisting the owner of the property in arranging for contractors to actually perform the construction work; ensuring that contractors at the site are coordinated; monitoring the field activities of each contractor at the site; and recommending courses of action to the owner of the property with respect to failures in the performance of the contractors at the site."

According to the allegations of count four of the revised complaint, O & G was negligent, inter alia, in

failing (1) "to prevent Ortega from operating the mini excavator that was in a hazardous condition," (2) "to observe and detect that Valley Tree was performing its work in an unsafe and hazardous manner" and to stop Valley Tree from doing so, (3) to monitor the construction site and to secure a safe workplace, and (4) to exercise reasonable care in fulfilling its duties as the construction manager for the project. In count five of the revised complaint, Coronel, based on the same allegations in count four, alleged a claim against O & G for loss of consortium.

On October 2, 2018, following the completion of discovery, O & G filed a motion for summary judgment as to counts four and five of the revised complaint, claiming that "[a] wrongful death claim based on negligence against O & G . . . [could not] be maintained as a matter of law since . . . O & G owed no duty to the plaintiffs," and that no genuine issues of material fact existed. Specifically, in its memorandum of law in support of its motion for summary judgment, O & G claimed that "[t]he scope of [its] duties and obligations as construction manager for the work performed on the [renovation] project [was] limited to those [duties and obligations] set forth in its contract with the borough," and that it had no independent duty or obligation to perform tasks or services for the project apart from the duties and obligations set forth in the contract, which was devoid of any reference to the tree removal work performed by Valley Tree in the upper parking lot adjacent to the high school grounds. Moreover, O & G asserted that "there [was] no change order or other amendment [to its contract with the borough] that ever brought such work within [its] contractual scope of work."

In further support of its claim that it owed no legal duty to Ortega, O & G argued that (1) "[i]t [was] undisputed that the borough directly hired Valley Tree to

perform tree removal work in an area outside the contract limit line established in O & G's contract," (2) "O & G never exercised any dominion, rights or control over that area, nor did it ever contractually agree to oversee, direct, manage or supervise any of Valley Tree's work," and (3) "Valley Tree worked independently, utilizing its own equipment, machinery, manpower, and means and methods to perform the work contracted by the borough, completely outside O & G's scope of work." Finally, given its claim that the negligence count was insufficient as a matter of law, O & G argued that the loss of consortium claim, which was a derivative claim and not a separate cause of action, necessarily failed as well.

On December 17, 2018, the court, *Brazzel-Massaro*, *J.*, heard arguments on the motion for summary judgment. On January 9, 2020, the court issued a comprehensive memorandum of decision granting O & G's motion for summary judgment. In its decision, the court explained that "[t]he sole issue raised in opposition to the [motion for] summary judgment is whether the argument that the deposition testimony of various [borough] officials, the construction manager and the owner of Valley Tree, as well as the contract documents support a duty owed by O & G." In granting the motion for summary judgment, the court analyzed the contractual provisions, the actions of O & G in working on the renovation project, the deposition "testimony of the various officials of the [borough], the construction manager and the owner of Valley Tree . . . as to the implementation of the contractual provisions and the operation of the project by O & G," and "the circumstances surrounding the hiring of Valley Tree for removal of the trees, including the bidding, the award of the bid, and the actions thereafter in accordance with the contract."

The court ultimately concluded that "the plaintiffs have [presented] no evidence or testimony that would create a duty as to O & G or any of its employees because the facts demonstrate that there is no genuine issue of fact that (1) the area of the work by Valley Tree was not a part of the construction limit line defined for the contractual obligations of O & G; (2) the contract clearly defines and establishes the duties and responsibilities of O & G as the construction management group for the [renovation project]; (3) the tree removal work was not work included in the contract [to renovate] . . . Naugatuck High School; (4) O & G was not responsible to oversee the work of trade contractors who were not hired by them or for whom they did not enter into a change order with the borough or board of education and their representatives in accordance with the contract documents; (5) there were no change orders for any tree removal work or responsibilities entered into by O & G as part of the contract; (6) O & G did not amend the contract by its actions of following the request by the building committee and assisting them in walking the property with Valley Tree but [was] coordinating in accordance with the contract provisions; (7) the only coordination by O & G was the timing of the work by Valley Tree to fit within the timeline for completing the work and not interfering with the contractors doing work with O & G; and (8) the funding for the tree removal was not part of the budget under O & G's control that had been approved for the [renovation project]. The funds for the tree removal were from a separate account for supplemental work.

"Based upon the foregoing, there is no genuine issue of fact that O & G was not contractually obligated to have the control or responsibility for the supplemental work of overseeing any separate contractors, including Valley Tree, by change order or otherwise. Thus, there is no genuine issue of fact that . . . O & G has a duty

to Valley Tree or [its] employees for the safety issues alleged in the complaint." From the summary judgment rendered in favor of O & G, the plaintiffs appealed. Additional facts and procedural history will be set forth as necessary.

Before we address the plaintiffs' claims on appeal, we set forth the relevant legal principles and our well settled standard of review of a court's ruling on a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material [fact] which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Augustine* v. *CNAPS, LLC*, 199 Conn. App. 725, 728–29, 237 A.3d 60 (2020).

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) Id., 733. "Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 178 Conn. App. 647, 655, 176 A.3d 586 (2017),

cert. denied, 328 Conn. 906, 177 A.3d 1159 (2018). "When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 124, 261 A.3d 1 (2021).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty. . . . The issue of whether a duty exists is a question of law . . . which is subject to plenary review. . . .

"Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. . . . Nevertheless, [t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Citation omitted; internal quotation marks omitted.) *Goody* v. *Bedard*, 200 Conn. App. 621, 631, 241 A.3d 163 (2020). Moreover, "[a] duty to use care may arise from a contract . . . ." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, 199 Conn. App. 252, 262, 235 A.3d 626 (2020).

In the present case, the court, in granting O & G's motion for summary judgment, examined the contractual provisions contained in the contract between O & G and the borough, and determined, on the basis of those provisions, that O & G did not owe a duty of care to Ortega. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 403, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). To the extent that the plaintiffs' claims on appeal are directed at the court's interpretation of the contract between O & G and the borough, "our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) Id.

We first address the plaintiffs' claim that the court improperly determined that the contract between O & G and the borough did not give rise to a legal duty owed by O & G to Valley Tree and its employees. According to the plaintiffs, the contract "created an obligation for O & G to supervise and control Valley Tree's work," and its express terms compelled "the conclusion that O & G owed Valley Tree and its employees a duty of care." We are not persuaded.

In its thorough and well reasoned decision, the court first examined in great detail the contractual provisions at issue in determining the duties of O & G under its contract with the borough. Its findings in connection therewith can be summarized as follows. There were

two contractual documents that specified the parameters of the contract and the duties of O & G, which also contained provisions relating to safety, insurance and performance with respect to the renovation project. To determine the site for the work that was within the scope of the renovation project, the court also examined the site plan, which provided the footprint of the work for the renovation, as well as an outline of the property included within the project. The court explained that O & G "contends that the scope of the project which they were contracted to oversee as the construction management company did not include the area" where the tree removal was to be performed, which O & G claimed was "outside of the construction limits." The plaintiffs, on the other hand, relied on a proposal[2] that was submitted by O & G in its bid for the renovation project as defining the duties of the construction manager. The court, however, concluded that "contrary to the plaintiffs' contentions [the proposal] not change the duties set forth in the contract."

As the court explained: "The testimony and evidence clearly demonstrate that the area included in the . . . project for which O & G was the construction manager is restricted to the area in the site drawings," which does not include the area near the upper parking lot where the tree removal was performed. Although the

[2] In the proposal, O & G made the following representations: O & G's field "team will coordinate the efforts of all of the trade contractors and maintain a safe and secure worksite that does not disrupt the educational process of the Naugatuck High School"; "[i]t is our intent to deliver this project assuring a safe environment for all and with minimal disturbance to the educational function of the building"; "[w]e expect zero accidents and injuries on all of our projects [and] [a]ll of our safety planning is based upon this goal, and we actively encourage all workers on the site to participate and follow the safety guidelines"; "[e]veryone involved with O & G is responsible for preserving health and safety [and] [t]he success of this safety program depends on the full participation of every employee, subcontractor, manager and vendor"; and the project manager for O & G will "[c]oordinate and monitor safety and security programs as conditions dictate."

area where the trees were removed is owned by the borough, it was never considered part of the high school grounds, and, thus, "the tree removal work was scheduled for an area never within the project area noted by O & G and the borough. . . . The site plan does . . . outline the area to be renovated as part of the work that is managed by O & G. Nowhere on the plan is there a notation which includes the area for this tree removal as part of the work or project. Additionally, the contractual language, contrary to the plaintiffs' assertions, does not designate this work as part of the management duties of O & G."

With respect to the plaintiffs' claim that O & G, as the construction manager, was responsible for the safety of *all* contractors and subcontractors, the court found that the contract documents provide otherwise in that they "[reserve] the right [for the owner] to perform construction [and] operations related to the project with the owner's own forces, and to award separate contracts in connection with other portions of the project or other construction or operations on the site . . . ." (Internal quotation marks omitted.) On the basis of the contractual provisions, the court found that the parties "intended that there would be subcontractors outside of the work supervised by the construction manager and that would not be within the responsibility of O & G, but which may need to be 'coordinated' with the work that O & G did supervise. This interpretation is exactly the situation existing with the bid acceptance for the supplemental tree removal work by Valley Tree. Not only is this work not included within the scope of work defined in sections E and F of the [renovation] project, but the process of awarding the work to Valley Tree supports the position of O & G." The court, thus, found that "the borough could hire separate contractors as it did in this situation, and it would be responsible for supervising and directing the work, including jobsite

safety." That determination was supported by the deposition testimony of the business manager for the borough, who controlled the expenditures, that "the removal of the trees was not tied into the work by O & G," that it "wasn't part of the original scope of the project," that it "was added as an item to be part of the scope of the Naugatuck High School renovation project," and that it "was under the borough's project." (Internal quotation marks omitted.) The court found that the testimony of the business manager for the borough "confirmed that Valley Tree was hired directly by the borough." (Internal quotation marks omitted.) The court also relied on the deposition testimony of the owner of Valley Tree that he had received an e-mail or letter from the borough stating that the borough was hiring Valley Tree to remove the trees, that he understood that he was working for the borough, and that he did not receive any written approvals or directives from O & G.

Finally, in rejecting the plaintiffs' claim that O & G had a duty by virtue of its obligation to provide a safe work environment under the contract, the court stated: "Although the contract provides a clear duty for certain aspects of safety during the term of the [high school renovation] project and within the scope of the project and the site, this duty is defined by the contract and the site plan drawings. . . . The plaintiffs have expanded th[e] safety aspects of the work to include work outside of the physical boundaries of the proposed project and oversight which is not clearly set forth in the contract language." (Citation omitted.) The court, thus, found that the plaintiffs "espouse[d] an incorrect interpretation of [the deposition] testimony and the safety responsibilities of O & G." Ultimately, the court concluded that there was nothing in the contract that required O & G to "inspect the equipment or procedures

for contractors that were hired by the building committee to do work outside of the site, contract and [certain safety] proposals [submitted by O & G in its bid for the work]."

We conclude that the court's determination that the contract between O & G and the borough did not give rise to a duty owed by O & G to Valley Tree and its employees was legally and logically correct and supported by the language of the contract. After thoroughly examining the provisions of the contract, we agree with the court that they are "clear and unambiguous in the description, the extent of the project, and the work for which O & G [had] the duty to perform." Consequently, the court correctly determined that they simply did not support the plaintiffs' claims or suggested interpretation.

Because O & G, as the party moving for summary judgment, met its burden of proving the absence of any genuine issue of material fact as to the issue of whether the contract created a duty owed by O & G to Ortega, it was incumbent on the plaintiffs to present evidence demonstrating the existence of a disputed issue of material fact. See *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 124. The court, however, found that the plaintiffs, in their opposition to the motion for summary judgment, did not submit any admissible evidence demonstrating that O & G's responsibilities under the contract extended to the tree removal work. We agree with the court's determination. The plaintiffs' reliance on the representations made by O & G in its bid, which was incorporated into the contract, to create a duty by O & G for the tree removal work is misplaced, as those representations related to O & G's responsibilities for work done within the area included in the renovation project, and the tree removal work occurred in an area that was not within the scope of the project covered

by the contract, nor does the contractual language designate the tree removal work as part of O & G's management duties.

The plaintiffs alternatively argue that O & G, through its actions, assumed a voluntary duty of care to Ortega. Specifically, the plaintiffs argue that O & G's actions gave rise to a common-law duty to ensure safe workplace practices and that the court erred in failing to address the existence of such a common-law duty. According to the plaintiffs, "O & G took upon itself to control and direct Valley Tree's work, and as a consequence thereof, owed a duty to Ortega."[3] Moreover, the plaintiffs claim that the court, in finding no duty, improperly decided issues of disputed fact. Specifically, they argue that because questions of fact existed as to the extent of O & G's control over Valley Tree, the motion for summary judgment should have been denied. We disagree.

In its memorandum of decision, the court found that, "[a]t the request of the building committee . . . Vetro . . . [O & G's] project director, contacted the two tree

[3] Specifically, the plaintiffs claim that "O & G directed Valley Tree's work in the following ways: [1] O & G told Valley Tree it was in charge of the overall high school project, as well as Valley Tree's piece of that project . . . [and] never disclaimed supervision; [2] O & G contacted Valley Tree to submit a bid and communicated with Valley Tree's principal during the bidding process; [3] O & G directed when Valley Tree should start its work and when the tree removal work had to be completed; [4] O & G directed Valley Tree as to which trees were to be removed and which trees were to remain; [5] O & G instructed Valley Tree how to dispose of the trees—by chipping them—and then to leave the chips in the surrounding woods; [and] [6] Vetro visited the upper parking lot on at least one occasion to compliment Valley Tree's work." According to the plaintiffs, those facts were consistent with a statement made by O & G in its proposal that it would "coordinate the efforts of all of the trade contractors and maintain a safe and secure worksite." (Internal quotation marks omitted.) The plaintiffs' claim, however, ignores the fact that the representation made by O & G in its proposal related solely to the work and area within the scope of the renovation project.

removal companies that were designated by the building committee as possible contractors for the proposals." As the court explained, when Vetro "walked the site with the contractors, Vetro simply showed the trees that had been flagged by the [two members of the building committee] . . . ." The court, therefore, rejected the plaintiffs' claim that "Vetro's actions of contacting the two companies for the tree removal bids, walking the site with the contractors and board members to designate the trees flagged for removal, and taking the bid documents back to the building committee extended the contractual work to be completed and the project area to include the tree removal within its responsibilities pursuant to the contract." Specifically, the court found that the plaintiffs' claim "ignore[d] the provisions in the contract [that] allow changes to work and responsibility," which outline a method for change to the original work set forth in the contract documents. Without any change orders or amendments to the contract, the court found that "[t]here [was] no evidence that the minor assistance provided by the construction manager was significant to change the terms of the contract," and that the plaintiffs were attempting to create a duty where none existed.

Although the court did not expressly reference whether a common-law duty existed, the court did address the substance of the plaintiffs' claim, namely, whether O & G exercised control over the work performed by Valley Tree and its employees sufficient to give rise to a duty of care owed to Valley Tree. The court explained that, the fact that Valley Tree was to coordinate its work with Vetro "did not involve O & G dictating to Valley Tree how, when, or where to do their work, but it was a simple coordination with O & G so the work would be completed before the fencing was installed by O & G. . . . O & G was still the overall general contractor and any work being done would

have to be coordinated with them." (Citations omitted.) In rejecting the plaintiffs' claim that, because Valley Tree interacted with Vetro only to schedule the work, O & G was responsible to inspect and oversee that work, the court stated: "O & G never relayed to Valley Tree that O & G was to be the final authority and controller for the work to be done by Valley Tree. The plaintiffs . . . in their opposition to the motion . . . [do] not include any admissible evidence placing O & G in charge of the tree removal project. . . . In fact, in performing the work it was clear that Valley Tree decided the location for its equipment, the work decisions for the brush to be cut, the trees that would get cut, how big the logs would be, what the order of tree removal would be, and the pulling back of brush to locate machinery. . . . None of these decisions were made by O & G and none were conveyed to Valley Tree by the construction manager. . . . Coordination of the various subcontractors does not create a responsibility for O & G to check the equipment for safety issues or to provide other safety amenities to the workers at Valley Tree. There is no contractual provision requiring that O & G coordinate or control the work of a contractor hired outside the parameters of the original contract.[4] The interpretation of the construction site limits

[4] The plaintiffs argue on appeal that their claim should not be limited to the geographic reach or precise terms of the contract because there is evidence that O & G did work outside the area of the renovation project and, at times, did work without requesting a change order. Specifically, they argue that O & G worked outside the construction limit line to install fencing and curbing near the upper parking lot area and, thereby, voluntarily assumed a duty of care over Valley Tree and its employees. We are not persuaded. The plaintiffs have presented no evidence demonstrating how O & G's work installing the fencing and curbing gave rise to a duty of care to Valley Tree and its employees for the work they performed in the upper parking lot. The fact that O & G did some work outside of the scope of the work set forth in the contract does not raise a genuine issue of material fact that it thereby voluntarily assumed a duty to Valley Tree or Ortega, especially in the absence of evidence that O & G exercised control over the work of Valley Tree and its employees, and that the outside work performed by O & G did not occur in the upper parking lot and was unrelated to the

and the work responsibilities of O & G does not support the plaintiffs' expansive interpretation of the contract." (Citations omitted; footnote added; footnote omitted.)

We agree with the court's analysis of this argument, which is supported by the record viewed in a light most favorable to the plaintiffs. On the basis of our review of the record, we conclude that the trial court properly determined that, in opposing the motion for summary judgment, the plaintiffs failed to present any evidence of conduct on the part of O & G demonstrating that O & G was in charge of the project to remove the trees or in any way directed the activities of the employees of Valley Tree. The plaintiffs, therefore, failed to meet their burden of demonstrating the existence of a genuine issue of material fact as to whether O & G controlled the work of Valley Tree and its employees, thereby giving rise to a duty of care owed to Ortega.[5] See *Shukis*

tree removal work for which Valley Tree was hired directly by the borough. Thus, even if, as claimed by the plaintiffs, O & G's responsibilities were not solely limited to those outlined in the contract, it was still incumbent on the plaintiffs to present some evidence demonstrating how the work performed by O & G outside of the contract gave rise to a duty of care to Valley Tree and its employees. Our review of the record simply does not support the plaintiffs' contention that there is a genuine issue of material fact that O & G assumed a duty to Valley Tree and its employees for the tree removal work in the upper parking lot.

[5] The plaintiffs' reliance on *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 825 A.2d 72 (2003), and *Van Nesse* v. *Tomaszewski*, 265 Conn. 627, 829 A.2d 836 (2003), is misplaced, as those cases are distinguishable from the present case. In *Pelletier*, our Supreme Court held that, although, as a general rule, "a general contractor is not liable for the torts of its independent subcontractors"; *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 518; there are exceptions to that general rule, including when the general contractor "in the progress of the work assume[s] control or interfere[s] with the work" of the subcontractor. Id. Control means the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." Black's Law Dictionary (6th Ed. 1990) p. 329. *Pelletier* and *Van Nesse* both involved actions by an injured employee of a subcontractor against the general contractor. *Van Nesse* v. *Tomaszewski*, supra, 628; *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 512–13. In *Pelletier*, our Supreme Court rejected the plaintiff's claim that the contract between the general contractor and the owner of the building under con-

v. *Board of Education*, 122 Conn. App. 555, 566, 1 A.3d 137 (2010) ("[a] party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue" (internal quotation marks omitted)).

On the basis of our thorough review of the record, we conclude that the court's determination, as a matter of law, that O & G did not owe a duty to Ortega concerning the safety issues raised in count four of the revised complaint was legally and logically correct. Accordingly, because the existence of a duty is an essential element of a negligence cause of action; see *Goody* v. *Bedard*, supra, 200 Conn. App. 631; the court properly granted O & G's motion for summary judgment as to count four of the revised complaint.

Finally, the plaintiffs claim that the court improperly rendered summary judgment in favor of O & G with respect to the loss of consortium claim alleged in count five of the revised complaint. Because the loss of consortium claim in count five is derivative of the negligence claim alleged in count four, on which the court properly rendered summary judgment in favor of O & G, the loss of consortium claim in count five necessarily must fail. Therefore, the court properly granted O & G's motion for summary judgment as to count five of the revised complaint as well.

The judgment is affirmed.

In this opinion the other judges concurred.

struction, which charged the general contractor with certain safety and inspection responsibilities, created a duty owed by the general contractor to the plaintiff, concluding that the plaintiff was not a party to that agreement. *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 530–31. In the present case, a general contractor-subcontractor relationship did not exist between O & G and Valley Tree, as the record demonstrated that Valley Tree was hired directly by the borough to do tree removal work, which was outside the scope and area covered by the contract between O & G and the borough for the high school renovation project, nor was Valley Tree a party to that

CAROL WALZER *v.* ROY WALZER
(AC 44313)

Alvord, Prescott and Clark, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for contempt and ordering the sale of certain real property, namely, the former marital home. The parties' separation agreement, which was incorporated into the judgment of dissolution, provided, inter alia, that the defendant would pay to the plaintiff a property settlement of $2,580,000, in installments, to be secured with a mortgage deed in favor of the plaintiff against the former marital home. The plaintiff alleged that the defendant had failed to make certain of the installment payments. *Held*:

1. The trial court did not abuse its discretion in finding the defendant in contempt; the defendant conceded that he had defaulted on the payment obligations set forth in the separation agreement, stipulated to the amount owed, offered no evidence to support a finding that he was unable to comply with his payment obligations, and submitted a financial affidavit showing significant real and personal property assets that could be liquidated or financed to satisfy his payment obligations, thus, the court properly found that the defendant's failure to pay was wilful.
2. The defendant could not prevail on his claim that the trial court improperly ordered the sale of the former marital home: the court did not lack jurisdiction to enter the order as it did not alter the terms of the judgment of dissolution but, instead, fashioned a remedy appropriate to protect the integrity of the original judgment, as the separation agreement unambiguously tied the plaintiff's interest in the former marital home to the defendant's payment obligations; moreover, during the hearing on the plaintiff's motion for contempt, the defendant's counsel did not object to the plaintiff's request that the former marital home be sold; furthermore, the court's remedial orders setting the terms of the sale, including that the defendant sell the home with the assistance of a real estate broker, were justified and appropriately tailored to the defendant's violations and did not violate his right to due process, as the defendant had previously taken two years to attempt to sell the property, opposed selling it with a licensed real estate broker and listed it for a sale price that was significantly higher than its fair market value.

Argued November 17, 2021—officially released January 4, 2022

contract. Moreover, the plaintiffs did not present any evidence in opposition to the motion for summary judgment showing that O & G had the authority to control, or interfered with, the work of Valley Tree.

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Shaban*, *J.*, granted the plaintiff's motion for contempt and entered a remedial order, and the defendant appealed to this court. *Affirmed*.

Roy S. Walzer, self-represented, the appellant (defendant).

Stephanie M. Weaver, for the appellee (plaintiff).

Opinion

ALVORD, J. In this marital dissolution action, the self-represented defendant,[1] Roy Walzer, appeals from the trial court's postdissolution judgment in favor of the plaintiff, Carol Walzer, finding the defendant in contempt. On appeal, the defendant claims that the court improperly (1) found that his admitted failure to make property settlement payments to the plaintiff in accordance with the dissolution judgment was wilful, and (2) ordered the sale of the former marital home.[2] We affirm the judgment of the court.

The following facts, as found by the court or as stipulated by the parties, and procedural history are relevant to this appeal. The marriage of the parties was dissolved by the court, *Danaher*, *J.*, on February 19, 2014. The parties' separation agreement (agreement), executed on the same date, was incorporated into the judgment

[1] Although the defendant is self-represented on appeal, he was represented by counsel at the time of the contempt hearing before the trial court.

[2] In his principal appellate brief, the defendant asserts four separate claims of error. For ease of discussion, we address certain claims together and in a different order than they appear in the defendant's appellate brief.

of dissolution. Article II of the agreement provides in part that the defendant would retain title to the real property located at 141 5 1/2 Mile Road in Goshen. Article IV of the agreement, titled "Cash to the [Plaintiff]," provides: "4. The [defendant] shall pay to the [plaintiff] as additional property settlement, Two Million, Five-Hundred Eighty Thousand ($2,580,000) Dollars, in installments as follows:

"4.1 One million dollars ($1,000,000) during calendar year 2014 as follows:

"1.) One hundred fifty thousand dollars ($150,000) on or before March 1, 2014;

"2.) Two hundred fifty thousand dollars ($250,000) on or before June 1, 2014;

"3.) Three hundred thousand dollars ($300,000) on or before September 30, 2014;

"4.) Three hundred thousand dollars ($300,000) on or before December 31, 2014;

"4.2 One Million, Five-Hundred and Eighty Thousand ($1,580,000) Dollars payable in quarterly installments over ten years beginning in 2015 as follows: On or before February 15, 2015, and every quarter of a year thereafter (on May 15, August 15, and November 15) for calendar years 2015, 2016, 2017, and 2018 the [defendant] shall pay to the [plaintiff] quarterly installments of forty two thousand five hundred dollars ($42,500) totaling $170,000 each year to the [plaintiff]. On or before February 15 and every quarter of a year thereafter (on May 15, August 15, and November 15) for calendar years 2019, 2020, 2021, 2022, 2023 and 2024, the [defendant] shall pay to the [plaintiff] quarterly installments of thirty seven thousand five hundred dollars ($37,500) totaling $150,000 each year to the [plaintiff].

"4.3 Said two million five hundred eighty thousand dollars ($2,580,000) shall be secured with a mortgage deed in the amount of two million five hundred eighty thousand dollars as provided in paragraph 4.1 above in favor of the [plaintiff] against the [defendant's] real property located at 141 5 1/2 Mile Road, Goshen, Connecticut [former marital home]. Said amount owed by the [defendant] to the [plaintiff] shall bear no interest. The [defendant] shall provide the [plaintiff] with legally sufficient evidence that he has title to said real property located at 141 5 1/2 Mile Road, Goshen, and that said real property bears no encumbrances other than the presently existing first mortgage in the amount of three million dollars owed to Hudson City Savings Bank. The [plaintiff] shall provide the [defendant] a yearly release for the amount that has been paid off by the [defendant]. If the [defendant] sells said real property at 141 5 1/2 Mile Road, Goshen, or otherwise wishes to substitute security to the [plaintiff] for his obligation herein, he shall provide sufficient substitute security to the [plaintiff] for any unpaid balance at that time."

On January 21, 2020, the plaintiff filed a motion for contempt. On August 19, 2020, the plaintiff filed a supplemental motion for contempt,[3] alleging that the defendant had failed to make property settlement payments as set forth in article IV of the agreement. Specifically, the plaintiff alleged that the defendant owed an arrearage of $10,000 at the time of her January 21, 2020 motion for contempt and that the defendant had not made any of the quarterly payments due on February 15, May 15, and August 15, 2020. With respect to the former marital home, the plaintiff alleged that it was the subject of two foreclosure actions. The plaintiff represented that

[3] In its memorandum of decision, the trial court noted that "[t]he second motion was necessary due to the coronavirus pandemic that closed the court in March, 2020, before the matter could be heard. The courts remained closed to normal operations for several months thereafter."

the defendant's counsel had indicated that the former marital home would be placed on the market for sale but that it was off the market. The plaintiff maintained that the defendant had overpriced the home when listing it in the past.

The plaintiff requested that the court find the defendant in contempt, order the defendant to pay all arrearages and current amounts owing, and order the former marital home be placed on the market for sale with a licensed broker and with a "realistic" listing price commensurate with other listings in the area. She further requested that, in the event an agreement establishing the listing price could not be reached, the listing broker mutually selected should set the price. The plaintiff requested sufficient substitute security for the amounts owed her under the dissolution judgment and sought attorney's fees.

On September 1, 2020, the court, *Shaban*, *J.*, held a hearing at which the parties were both represented by counsel. The defendant submitted a financial affidavit dated September 1, 2020. On September 28, 2020, the court issued its memorandum of decision. The court first found, in accordance with the parties' stipulation offered at the hearing, that the defendant owed an arrearage of $112,000.[4] The court then recited the following additional facts, to which the parties had stipulated. "The property distribution payments due the plaintiff were secured by a lien on the parties' marital home . . . . The fair market value of the property is

[4] In their appellate briefs, both parties represent that the defendant owed the plaintiff $112,500 at the time of the contempt hearing. Specifically, the defendant states: "As of August 19, 2020, the date upon which plaintiff filed the motion for contempt which is the subject of the instant appeal, the defendant owed to plaintiff $112,500, under the payment schedule contained in the agreement." The plaintiff states: "At the time of the hearing, three payments in 2020 for $37,500 were due, for a total of $112,500." Neither party, however, challenges on appeal the court's finding that the parties had stipulated to an amount owed of $112,000.

estimated to be $11,000,000. At the time of the agreement, there was a mortgage encumbering the property that now has a balance due of approximately $3,000,000. Following the mortgage is the plaintiff's lien securing the property settlement payments. The balance of the lien is presently $740,000. Subsequent to the filing of the plaintiff's lien, the defendant secured a second mortgage on the premises for approximately $3,000,000. Both mortgages are now under foreclosure. From 2018 to February, 2020, the defendant marketed the property for sale through a broker. The property had been listed at a price of $13,900,000. The defendant is now attempting to sell the property himself."

The court noted that, during the hearing, the defendant requested permission to market the property without professional assistance through November 1, 2020, and that, if he were unable to find a buyer, requested that he then be permitted to choose a broker and a " 'reasonable' " selling price. With respect to the listing price, the court referenced the defendant's position that "the unique premium nature of the property is such that a comparative analysis could not realistically be done by a broker." (Internal quotation marks omitted.) The court also noted the defendant's representation that there remained sufficient equity in the property to secure the payments due to the plaintiff and his offer to pay interest on any amount in arrearage.

The court found by clear and convincing evidence that the defendant had wilfully failed to make the payments due. It further found that the order was clear and unambiguous. Thus, the court found the defendant in contempt.

The court reviewed the defendant's financial affidavit, which revealed that the defendant had "significant real and personal property assets that could be used to make payment of the amounts due either through

financing or liquidation." Specifically, the court identified the defendant's full ownership in Litchfield Equities, Ltd., which owns two properties valued at $600,000 and $550,000 with no encumbrances. The court further noted that the defendant had identified on his financial affidavit personal property assets valued at $468,775, including an art collection, Oriental rugs, antiques, a wine cellar, furniture, tools, equipment, and miscellaneous items.

On the basis of the foregoing, the court ordered the defendant to bring current all payments due on or before November 15, 2020. The court ordered the former marital home "be immediately listed for sale through a mutually agreed upon licensed real estate broker. In the event the parties cannot agree on a broker, each shall select a broker of their choosing and the two brokers shall choose a third broker who shall market the property. The selection of the broker and the execution of a listing agreement shall be done within ten days of this order. The list price shall be set by the broker and the parties shall thereafter abide by the recommendations of the broker as to the frequency and amount of any alterations in the list price for the property. Any offer for purchase within 5 percent . . . of the list price shall be accepted by the parties."[5] This appeal followed.

I

We first address the defendant's claim that the trial court improperly granted the plaintiff's motion for contempt. Specifically, he contends that no evidence was presented that his failure to make property settlement payments in accordance with the dissolution judgment was wilful. The plaintiff responds that the record before

[5] The court also awarded the plaintiff attorney's fees and costs in the amount of $1009.30, and ordered the defendant to pay such amount on or before November 15, 2020.

the court, including the defendant's financial affidavit, which showed significant assets at his disposal and available to satisfy the judgment, was sufficient for the court to find that his nonpayment was wilful. We agree with the plaintiff.

The applicable principles of law and standard of review are well settled. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . Our review of a trial court's judgment of civil contempt involves a two part inquiry. [W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . [T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Citation omitted; internal quotation marks omitted.) *Giordano* v. *Giordano*, 203 Conn. App. 652, 656–57, 249 A.3d 363 (2021).

On appeal, the defendant does not challenge the court's conclusion that the order was clear and unambiguous, but he claims that the court improperly determined that his noncompliance with that order was wilful. Specifically, he argues that "[i]t is clear upon the facts of [his] financial affidavit that he had neither the income nor the liquid funds at the present time to pay the plaintiff the cash installments in accordance with the terms contained in the judgment," and that "[n]o evidence was presented that [his] failure to pay was wilful nor was wilfulness stipulated." He contends that his assets are illiquid and that "[n]o reasonable inference can be drawn or assumption made, therefore, on the issue of wilfulness or [his] prior and continuing efforts to assemble the funds to comply with the payment schedule in the agreement." We are not persuaded.

"To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . [I]nability to pay is a defense to a contempt motion. However, the burden of proving inability to pay rests upon the obligor." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 187 Conn. App. 375, 393, 202 A.3d 458 (2019). "Whether [a party has] established his inability to pay the order by credible evidence is a question of fact. Questions of fact are subject to the clearly erroneous standard of review. . . . 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. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, 294 Conn. 384, 397–98, 985 A.2d 319 (2009).

In the present case, the defendant conceded that he had defaulted on the payment obligations set forth in article IV of the agreement, and he stipulated to the amount of the arrearage owed. The defendant offered no evidence at the hearing to support a finding that he was unable to comply with his payment obligations. To the contrary, as the trial court found, the defendant submitted a financial affidavit showing "significant real and personal property assets that could be used to make payment of the amounts due either through financing or liquidation." These assets included ownership of two properties valued at $600,000 and $550,000 with no encumbrances, and $468,775 in personal property including an art collection, Oriental rugs, antiques, a wine cellar, furniture, tools, equipment, and miscellaneous items.[6] In sum, the defendant's financial affidavit, which showed ample assets that could be liquidated or financed to satisfy his payment obligations, provided a basis for the court reasonably to infer that his failure to pay was wilful. His failure to utilize those assets to meet his court-ordered dissolution obligations does not insulate him from a finding of contempt.[7] Accordingly,

[6] We also note that the defendant's financial affidavit, filed on the date of the contempt hearing, reported a net weekly income of $2348.80. During oral argument before this court, the defendant was questioned regarding whether he was receiving income of approximately $2400 weekly at the time of the contempt hearing, and he responded that he was.

[7] In his reply brief, the defendant argues: "Had plaintiff . . . made any effort whatsoever to support her claim of willfulness, by means of inquiry or evidence, or had the court below made any inquiry, there would be a record below. For example, gross income does not equal available funds to service defendant's . . . payment schedule and assets do not equal the ability to finance, which requires sufficient income to carry the debt. No such record exists. Without such record, there is no clear and convincing evidence upon which to base a finding of willfulness." Our Supreme Court previously has rejected arguments that the trial court was obligated to comb through the financial situation of the nonpaying party as being in conflict with "the well settled law of this state requiring the contemnor to demonstrate his or her inability to comply with a payment order." *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 398.

we conclude that the court properly found that the defendant's failure to pay was wilful and, consequently, did not abuse its discretion in finding the plaintiff in contempt.[8]

II

We next address the defendant's claim that the court improperly ordered the sale of the former marital home. He offers several arguments related to this claim. First, he argues that the court lacked jurisdiction to enter an order relating to the sale of the former marital home, on the basis that the order constituted an improper modification of the final property division. Second, he maintains that the court abused its discretion in issuing orders related to the sale of the former marital home. Specifically, he contends that "[t]he trial court had the discretion to order the defendant to pay the arrearage by a date certain which the trial court did order. But the court went far beyond that by ordering, in addition, that the defendant sell his residence through a real estate broker, inserting the plaintiff into the real estate broker selection process [and] the listing price determination process and ordering that a mathematically determined offer be accepted irrespective of the terms of the offer beyond price." Third, he argues that the terms of the sale ordered by the court violate his right to due process. We disagree.

[8] During oral argument before this court, the defendant represented that he neither had complied with the court's contempt remedial order that he bring current his payments by November 15, 2020, nor had filed a motion for a stay of that order. The defendant additionally represented that, although he had listed the former marital home for sale following the court's issuance of its memorandum of decision, the selection of the broker and the list price were both his decision. Although the defendant's actions subsequent to the court's issuance of its memorandum of decision on the plaintiff's motion for contempt are not before us in this appeal, we note that the defendant's admitted and continued failure to comply with the court's order may subject him to further remedial orders should the plaintiff elect to file a subsequent motion for contempt with the trial court.

We first set forth relevant principles of law and our standard of review. It is well settled that "[t]he court's authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81. . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final. . . .

"Although the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [I]t is . . . within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This court has explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith. . . .

"If a party's motion can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation. . . . Similarly, when determining whether the new order is a modification, we examine the practical effect of the ruling on the original order. . . . In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order. [T]he construction of [an

order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 482–85, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

Relatedly, "[f]aced with a party in contempt of court, it is within the court's province to fashion appropriate remedial orders. Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, 154 Conn. App. 780, 793–94, 107 A.3d 1004 (2015).

The defendant argues that because "[t]here is no provision in the judgment requiring [him] to sell his residence and the associated real property" but, rather, a payment schedule and "descending security provision," the court's order requiring the sale of the property and setting the terms of the sale are "not the mere technical implementation of the judgment." We conclude that the court's decision on the plaintiff's motion for contempt did not alter the terms of the judgment of dissolution but rather fashioned a remedy appropriate to protect the integrity of its original judgment.

The agreement incorporated into the judgment of dissolution provides that the amount owed the plaintiff under articles 4.1 and 4.2 of the agreement shall be "secured with a mortgage deed in the amount of two million five hundred eighty thousand dollars as provided in paragraph 4.1 above in favor of the [plaintiff] against the [defendant's] real property located at 141 5 1/2 Mile Road, Goshen, Connecticut." The parties, in agreeing to the provision, unambiguously tied the plaintiff's interest in the property to the defendant's payment obligations. The effect of this provision is to ensure that the plaintiff receives the installment payments owed to her under the terms of the dissolution judgment. In the event of the defendant's default in his installment payment obligation, the sale of the property is exactly what the agreement contemplated, in that the defendant's obligation could be satisfied either through foreclosure of the mortgage or through the court's contempt power.

Despite the first motion for contempt having been filed in January, 2020, the defendant remained in complete default on his quarterly installment payments more than eight months later at the time of the hearing in September, 2020. Thus, the defendant's continued default rendered strict adherence to the terms of the agreement impossible; see *Santoro* v. *Santoro*, 70 Conn. App. 212, 218, 797 A.2d 592 (2002) ("noncompliance on the part of the parties made strict adherence to the terms of the [decree] impossible" (internal quotation marks omitted)); and the court appropriately fashioned the remedy of sale to protect the integrity of the court-ordered dissolution agreement.

Moreover, we note that the defendant's counsel did not object, during the hearing on the motion for contempt, to the plaintiff's request that the former marital home be sold. To the contrary, he requested only that the court allow additional time for the defendant to

continue to market the property himself. Specifically, the defendant's counsel proposed: "[The defendant] just . . . wants eight more weeks to try to market this. And, then, he would like to be able to choose the broker and choose a reasonable selling price because, after all, [the plaintiff] is gonna get the cash that she gets in the settlement agreement, but he's trying to manage what he was left after the divorce. And, Your Honor, if—we will report to [the plaintiff] on November 1, who the broker is and the . . . listing price. And if [the plaintiff is] not in agreement with it we can . . . say we're gonna come back to court and argue the listing price and the broker." Thus, the defendant cannot now be heard to complain that the court erred in ordering the former marital home sold. See *Scalora* v. *Scalora*, 189 Conn. App. 703, 732–33, 209 A.3d 1 (2019) (declining to review claim that court erred in crafting arrearage payment schedule without obtaining evidence of ability to pay where parties had effectively invited court to focus on merits of motions without reference to current finances, as parties had not filed financial affidavits nor objected at time of orders that court had not considered their financial conditions).

As to setting the terms of the sale, we conclude that the court's remedial orders were justified and appropriately tailored to the violations and did not violate the defendant's right to due process. The record before the court included stipulations demonstrating the defendant's two year long undertaking to sell the property, his opposition to listing it with a licensed broker, and his listing of the property for sale at a price significantly higher than its fair market value, all of which provided a sufficient basis for the court to conclude that its remedial order needed to address the terms of the sale to ensure that the plaintiff would receive the sums owed to her. See *Behrns* v. *Behrns*, 124 Conn. App. 794, 821, 6 A.3d 184 (2010) (court's order prohibiting defendant

from encumbering assets without approval of court was not abuse of discretion where it was clear court believed order was necessary to secure defendant's debt to plaintiff); see also *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 793 (rejecting claim that remedial orders deprived plaintiff of due process where orders were justified and appropriately tailored to violations). Accordingly, we conclude that the court did not improperly order the sale of the former marital home, abuse its discretion, or violate the defendant's right to due process.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGHAM ZAKKO *v.* LAITH KASIR
(AC 44440)

Alvord, Alexander and Harper, Js.

Syllabus

The defendant appealed to this court from the trial court's order awarding, inter alia, $15,000 in attorney's fees to the plaintiff. Following the dissolution of the parties' marriage, the trial court granted the plaintiff's motion to open the judgment of dissolution as to financial matters only on the ground of mutual mistake in connection with the defendant's failure to disclose information related to a certain disability policy. Thereafter, the plaintiff filed a motion for pendente lite alimony and attorney's fees. During the hearing on the motion, the plaintiff submitted a financial affidavit that listed liabilities totaling $91,094, including $47,105 in outstanding loans from family members. In addition, evidence was presented as to whether the funds given to the plaintiff by her family members were loans or gifts and as to the plaintiff's access to nearly $30,000 in a bank account jointly held with her son. The trial court concluded that an award of $15,000 in attorney's fees to the plaintiff was warranted because, in light of her claimed debts, the plaintiff lacked ample liquid funds to pay for an attorney. In reaching its decision, the court raised, but did not resolve, the question of whether the funds from the plaintiff's family members constituted loans or gifts. *Held*:

1. The trial court abused its discretion in awarding the plaintiff attorney's fees; given the evidence before it, it was not reasonable for that court to conclude that the plaintiff lacked ample liquid funds to pay for her

attorney's fees after it expressly declined to determine whether the funds that the plaintiff received from family members were, in fact, loans.

2. The trial court, in making its award of attorney's fees, expressly relied on the clearly erroneous factual finding that the plaintiff had access to only $3000 in bank accounts, which undermined this court's confidence in that court's fact-finding process and, therefore, could not be deemed harmless error; although the plaintiff testified that she did not wish to withdraw funds from the account that she held jointly with her son, that did not negate the fact that she expressly testified that she had access to the nearly $30,000 in that account.

Argued November 15, 2021—officially released January 4, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court granted the plaintiff's motion to open the judgment; subsequently, the court, *Abery-Wetstone, J.*, granted the plaintiff's motion for pendente lite alimony and attorney's fees and issued a certain order, and the defendant appealed to this court. *Reversed in part*; *judgment directed.*

David A. McGrath, for the appellant (defendant).

Opinion

ALVORD, J. In this domestic relations matter, the defendant, Laith Kasir, appeals from the trial court's order awarding, inter alia, $15,000 in attorney's fees to the plaintiff, Angham Zakko. The defendant claims that, in ordering him to pay attorney's fees, the trial court made a clearly erroneous factual finding and abused its discretion. We agree with the defendant and, therefore, reverse in part the judgment of the trial court.[1]

[1] The plaintiff did not file a brief in this appeal. On May 14, 2021, this court issued an order providing that this appeal would be considered solely on the basis of the defendant's brief and appendix, the record, and oral argument.

The following facts and procedural history are relevant to our resolution of this appeal. On April 5, 2016, the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the parties' marriage. The parties' separation agreement (agreement) was incorporated into the judgment of dissolution. The agreement divided the marital property and provided that the defendant would pay the plaintiff alimony.[2] On March 22, 2019, the plaintiff filed a motion to open the judgment, alleging that "the judgment was secured by fraud on the part of the defendant," or, in the alternative, "the judgment was obtained by the mutual mistake of the parties regarding the defendant's income and assets." In her memorandum of law in support of her motion, the plaintiff asserted that the defendant had failed to disclose information related to a MassMutual disability policy. After a hearing, the court issued an order opening the judgment of dissolution with respect to financial orders only on the basis of mutual mistake.[3]

On December 4, 2019, the plaintiff, acting in a self-represented capacity, moved "pursuant to Connecticut General Statutes after consideration of the parties' respective financial abilities and the criteria set forth in the General Statutes [for] a reasonable amount of attorney's fees to be determined by the court and to be able to supplement the request if additional legal work is required to reach a just and fair outcome as the [p]laintiff has been through unjust financial hardship with no fault of hers." On March 5, 2020, the court

[2] The agreement provided that the defendant would pay the plaintiff alimony of "30% of his gross earned income from work until such time as [the defendant] attains the age of 65. This is currently $1,142 a week. If, prior to attaining the age of 65, [the defendant] commences receiving Veteran's Disability Income, then [the defendant's] alimony obligation shall be reduced to 30% of his gross Veteran's Disability Income plus 30% of additional earned income, if any, he may have in addition to his Veteran's Disability."

[3] The defendant subsequently filed an appeal regarding the granting of the motion to open, which was dismissed for lack of a final judgment on July 22, 2020.

granted the motion, ordering the defendant to pay the "[p]laintiff $10,000 for attorney's fees within 30 days."

On September 8, 2020, the plaintiff filed a motion seeking pendente lite alimony and additional attorney's fees.[4] With respect to her request for attorney's fees, the plaintiff stated: "The [p]laintiff . . . hereby respectfully moves this respectful [c]ourt to award her . . . reasonable [a]ttorney's [f]ees pendente [l]ite to have the assistance of an attorney for the legal process to receive her rightful share of funds and to repair the inequitable unjust status."

Over the course of three days in October and December, 2020, the court, *Abery-Wetstone*, *J.*, held a remote hearing on the plaintiff's motion. On the first two days of the hearing, the plaintiff represented herself,[5] and, on the third day, she was represented by an attorney. During the hearing, evidence was presented as to, inter alia, the plaintiff's access to bank account funds jointly held with her son and whether funds given to the plaintiff by her family were loans or gifts.

Throughout the first two days of the hearing, the plaintiff was admonished repeatedly for interrupting the court and the defendant's attorney.[6] On the second day of the hearing, the court explained to the plaintiff that "the next time you . . . interrupt [the defendant's attorney] or . . . me, I'm going to fine you $25." At one point, the court stated: "[N]o—you're interrupting

[4] At the hearing on this motion for additional attorney's fees, the plaintiff asserted that the earlier award of $10,000 was for the purpose of defending the appeal of the court's order opening the judgment, which was dismissed before the plaintiff filed a brief. See footnote 3 of this opinion. The plaintiff testified that she had $4000 remaining from the $10,000 award.

[5] At the start of the first day of the hearing, the plaintiff was represented by an attorney, who had filed a motion to withdraw. After a brief discussion on the motion, the court granted it.

[6] The court patiently reminded the plaintiff of the proper procedure and endured many interruptions before imposing any fines.

me again. Do you want more fines? Close your mouth please, and listen to what I'm saying. You really need to get a lawyer, because you are not able to control yourself in this court. You are not able to ask a question. You are not able to refrain yourself from testifying when you're supposed to be doing something else. You constantly interrupt both the Court and opposing counsel." The court continued: "I don't know what else to do to stop you from doing this. This behavior . . . is not acceptable in a court of law. You are in court, even though you're on video. You're expected to be respectful. You have been horribly disrespectful to [the defendant's attorney]. You have interrupted him time and time and time again. . . . This is not a conversation. This is a court of law. . . . There is no back and forth. And you keep interrupting me." By the end of the second day of the hearing, the plaintiff had incurred $325 in fines for interrupting.

On the third and final day of the hearing, during which only closing arguments were presented, the plaintiff was represented by an attorney. In his closing remarks, the plaintiff's newly appearing attorney orally requested $25,000 in attorney's fees.[7]

At the conclusion of the hearing, the court stated: "In [their] affidavits the husband reports $150,000 from [securities] and stock as opposed to the wife's $11,000. He has over $140,000 in bank accounts whereas the wife has barely $3000 in bank accounts. I'm not including retirement assets as liquid assets because she's only 55 and she would suffer significant penalty by withdrawing that. *She's also $91,000 in debt depending on who you believe—whether the loans from family are gifts or et cetera*. There's a great discrepancy in what they're

[7] Specifically, he stated: "I don't believe a specific request for [attorney's] fees was made by my client, but I would like to be clear on the record that I believe that a $25,000 award of [attorney's] fees is appropriate under the circumstances." There was no written motion filed by the attorney.

currently earning. Given the fact that the wife has been out of the work market for a significant period of time and given her age and perhaps staleness of her skills as an architect or draftsman, I'm finding that it's—her earning capacity has not been proven. She simply lacks the assets to pay an attorney. So what I'm going to do is order $15,000 in attorney's fees and pendente lite alimony in the amount of $470 per week. That's certainly not going to pay all of her expenses, but it should go in some way to assist her. And the $15,000 should be paid directly to counsel." (Emphasis added.) The court subsequently issued a written order reflecting the oral ruling.[8] This appeal followed.

On appeal, the defendant claims that the court improperly granted the plaintiff's motion for attorney's fees. He argues, inter alia, that the court abused its discretion in awarding attorney's fees because it "indicated that it was possible that those [funds from family members] were in fact gifts, without expressly making a finding either way" and, further, erred in relying on a clearly erroneous factual finding. We agree with the defendant.

We begin with the foundational understanding that "[i]t is well entrenched in our jurisprudence that Connecticut adheres to the American rule. . . . Under the American rule, a party cannot recover [attorney's] fees in the absence of statutory authority or a contractual provision. . . . On the basis of our decisional law, we believe that the theory and thrust of the American rule pertains to the assignment of fees and costs in the family law context as well. In that context . . . [t]he court may order either party to pay [attorney's fees] . . . pursuant to General Statutes § 46b-62, and how such

[8] The written order also provided that "[the defendant] shall pay [the plaintiff] $475/week in alimony" despite the fact that, during the hearing, the court ordered "pendente lite alimony in the amount of $470 per week." The minor discrepancy in the alimony award is not at issue in this appeal.

expenses will be paid is within the court's discretion. . . . We look, then, to the parameters of § 46b-62 to determine if the statute authorizes an award of fees to one party from the other on the basis that a party seeks judicial intervention after having failed to reach an agreement. In this inquiry, because the provisions of § 46b-62 are an exception to the common-law American rule, our teaching is that the statutory provisions must be narrowly construed." (Citations omitted; internal quotation marks omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 680, 220 A.3d 194 (2019).

"In dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either [spouse] to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in [General Statutes] § 46b-82, the alimony statute." *Leonova* v. *Leonov*, 201 Conn. App. 285, 326, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). That statute provides in relevant part that the court "shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . ." General Statutes § 46b-82. "Section 46b-62 (a) applies to postdissolution proceedings because the jurisdiction of the court to enforce or to modify its decree is a continuing one and the court has the power, whether inherent or statutory, to make allowance for fees." *Leonova* v. *Leonov*, supra, 327.

Our Supreme Court has articulated "three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay

their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified." *Turgeon* v. *Turgeon*, 190 Conn. 269, 280, 460 A.2d 1260 (1983).

"[A]n award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." *Ramin* v. *Ramin*, 281 Conn. 324, 352, 915 A.2d 790 (2007). In the present case, the court relied on the first basis in making its award, stating that the plaintiff "simply lacks the assets to pay an attorney."

The defendant contends that the court abused its discretion in awarding the plaintiff attorney's fees in light of its equivocal reference to the plaintiff's claimed debts without determining if the significant funds provided to the plaintiff by various family members constituted loans or regularly recurring gifts. We agree with the defendant.

At the outset, we set forth the applicable standard of review. "Whether to allow [attorney's] fees [pursuant to § 46b-62], and if so, in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Pena* v. *Gladstone*, 168 Conn. App. 175, 186, 146 A.3d 51 (2016).

On her financial affidavit dated October 3, 2020, and submitted to the court on the first day of the hearing, the plaintiff listed liabilities totaling $91,094. Approximately one third of this amount, $35,763, was labeled credit

card debt. The plaintiff also listed, under "Other Consumer Debt," $47,105 in loan balances. Specifically, she included eight entries, each described as "[l]oan from family member" or "[l]oan from family members," and reported dates between 2016 and 2020 as when the funds were received. During the hearing, the defendant's attorney inquired as to which family members the funds came from. First, the defendant's attorney inquired regarding the "[l]oan from family member" dated 2016 in the amount of $27,000. The plaintiff testified that the funds came "from [her] brothers," but she was "not sure" which brother. The defendant's attorney also inquired about the "[l]oan from family members" dated 2018 in the amount of $13,000. The plaintiff recalled that her brother who lived in Florida wrote that check. As to the remaining funds, each approximately $1000, the plaintiff posited that they were provided by her son to help her pay her credit card debts. She testified that the only record she had of these monetary transactions with her family members was the checks themselves—there were no "promissory note[s]."[9] In addition, she testified that she had never made a payment on any of the purported loans, there were no repayment terms for any of the claimed loans, and, "at some point, this is going to be something I have to return."

During his closing remarks, the plaintiff's attorney argued that whether the funds from family members were loans or gifts was not relevant to the court's decision, stating: "I know there was some questioning about certainly the debt on her financial affidavit—whether those familial loans were indeed gifts. I don't think there's adequate proof before the Court on either count, but certainly I would say she's disclosed it under oath

[9] Aside from listing the funds as debts on her financial affidavit and testifying that they were loans, the plaintiff presented no evidence as to the nature of these funds.

as a debt, but she clearly has at least $45,000 in credit card debt." He further stated: "But the truth is . . . that you look at her debt and she's got $90,000, and whether it was a gift or a loan by the way from her family doesn't matter, she still needed it. She didn't use this to buy a new—a new car. She has a car from 2009. She didn't use it to buy new furniture, buy anything special for herself, or even to go, as she said to you a few times in testimony, to the eye doctor. Right?"

In response, the defendant's attorney argued that the funds provided by the plaintiff's family members were not loans but were, in fact, gifts because the plaintiff would not be asked to repay them. Further, he posited that "[i]t absolutely matters if they're gifts or loans. If they are loans then they belong on her financial affidavit in the debt section. And [the plaintiff's attorney] just told us we should really focus on this debt. And if they're gifts, not only do they not belong in the financial affidavit debt section, that's a misrepresentation, but they belong as regularly recurring gifts which should be considered as a source of income."

After the attorneys' closing arguments, the court stated, with respect to the plaintiff's financial resources to pay attorney's fees: "She's also $91,000 in debt depending on who you believe—whether the loans from family are gifts or et cetera."

"A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made." (Internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016). This requires consideration of "the total financial resources of the parties in light of the statutory criteria." (Internal quotation marks omitted.) *Miller* v. *Miller*, 16 Conn. App. 412, 418, 547 A.2d 922, cert. denied, 209 Conn. 823, 552 A.2d 430 (1988). Such an examination naturally

includes an examination of the debts and liabilities of the parties as an individual's assets are impacted by their debts. Indeed, when a party has some savings but many liabilities with payments due, the "ampleness" of their funds is impeded. Review of a party's liabilities is proper when determining whether a party has ample liquid funds for the purposes of § 46b-62 (a). See *Fitzgerald* v. *Fitzgerald*, 190 Conn. 26, 35, 459 A.2d 498 (1983) (comparing net liquid assets with liabilities to determine if there were ample liquid funds); see also *Weiman* v. *Weiman*, 188 Conn. 232, 237, 449 A.2d 151 (1982) (concluding that trial court did not abuse its discretion in awarding attorney's fees when party's liquid assets were needed to meet future needs and were, therefore, not ample); *Pena* v. *Gladstone*, 168 Conn. App. 141, 154, 144 A.3d 1085 (2016) (considering party's liabilities in determining whether party had ample liquid funds); *Kunajukr* v. *Kunajukr*, 83 Conn. App. 478, 488–89, 850 A.2d 227 (concluding that trial court did not abuse its discretion in awarding attorney's fees when plaintiff "was $43,000 in debt with only $5000 in her checking account, with her sole income being alimony in the amount of $640 per week"), cert. denied, 271 Conn. 903, 859 A.2d 562 (2004).

In the present case, we conclude that the court abused its discretion in awarding the plaintiff attorney's fees. Specifically, it was not reasonable for the court to conclude that the plaintiff lacked ample liquid funds after it expressly declined to determine whether the funds the plaintiff received from family members were, in fact, loans. The court, in reaching its decision, raised, without resolving, the material question of whether the $47,105—more than one half of the plaintiff's total claimed debt—constituted loans or gifts from family members. Indeed, although the plaintiff claimed that they were loans, she testified that she had never made a payment on any of the loans, including those dating

back to 2016, that there was no repayment schedule, and that she did not know to which of her family members she owed the money. Given the evidence before it, the court, having failed to determine the validity of the plaintiff's claimed debts while also referring to the plaintiff's debt as supporting its finding that she lacked ample liquid funds, abused its discretion in awarding the plaintiff attorney's fees.

We next address the defendant's contention that the trial court relied on a clearly erroneous factual finding in awarding the plaintiff attorney's fees. "The trial court's findings are binding on this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record 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.) *Buehler* v. *Buehler*, 117 Conn. App. 304, 317–18, 978 A.2d 1141 (2009). "Where . . . some of the facts found [by the court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's fact finding process, a new hearing is required." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 179, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

In § IV C of her financial affidavit, titled "Bank Accounts," the plaintiff reported a Bank of America account with a current balance of $29,447. She identified the account as belonging to her son; she testified, however, that she had access to the funds in the account because it was a joint account.

Thus, the court's finding that the plaintiff had access to only $3000 in bank accounts is clearly erroneous. Although the plaintiff also testified that she did not wish to withdraw funds from the account she held jointly with her son, that does not negate the fact that she expressly testified that she had access to the nearly $30,000 in that account. The court's clearly erroneous finding as to the paucity of the plaintiff's liquid assets was important and material to its decision to award her attorney's fees. See *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 179. This clearly erroneous finding, which the court expressly relied on in making its award of attorney fees, undermines our confidence in the court's fact-finding process and cannot be deemed to be harmless error. See id. Therefore, the court relied on a clearly erroneous factual finding in addition to abusing its discretion in awarding the plaintiff attorney's fees.

The judgment is reversed with respect to the award of attorney's fees to the plaintiff and the case is remanded with direction to deny in part the plaintiff's motion for pendente lite alimony and attorney's fees as to attorney's fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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NOTICE OF CONNECTICUT STATE AGENCIES

NOTICE OF INTENT TO APPLY FOR A STATE CERTIFICATE OF AFFORDABLE HOUSING COMPLETION:

LEGAL NOTICE

NOTICE IS HEREBY GIVEN that the Town of Brookfield intends to file an application for Certification of Affordable Housing Completion (moratorium on applicability of Section 8-30g) with the State Department of Economic and Community Development (''DECD''), pursuant to Section 8-30g(1)(4)(b) of the Connecticut General Statutes.

The proposed application, including all supporting documentation, is available for public inspection and comment in the Land Use Office and the Town Clerk's Office at the Brookfield Town Hall, 100 Pocono Road, Brookfield, CT from 8 a.m. to 4 p.m. weekdays. Written comments may be submitted to Alice Dew, Land Use Director, at the Brookfield Land Use Office (address above) within 20 days of the publication of this notice in the Danbury News Times and the Connecticut Law Journal. A copy of all written comments received and all responses prepared by the municipality will be included as part of the application to the DECD.

Dated in Brookfield, CT this January 4, 2022
Tara Carr, First Selectman, Town of Brookfield

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2021-3 (Amended) December 16, 2021

Questions Presented: **The petitioner asks whether the Code bars him ''from both (1) continuing to hold [his] appointed state position as a Deputy Commissioner at [the Department of Administrative Services (*f*DAS'')] and serving as Interim Director of School Construction, and (2) concurrently serving [his] community as a volunteer in an elective position on the Guilford Board of Education§; and whether his ''participation on the Board of Education prohibit[s] [him] from taking any official actions in [his] role as Interim Director of the Office of School Construction[.]''**

Brief Answers: **We conclude, first, that § 5-266a-1 of the regulations—which bars certain state employees from holding elective municipal office—does not apply to the petitioner in his capacity as Deputy Commissioner; second, that his unpaid service on the Board of Education would not constitute ''employment'' and thus would not violate the Code's outside-employment rules; and third, that the Code's conflict provisions would not, by virtue of his unpaid service on the Board of Education, bar him from taking any official actions as interim Director of the Office of School Construction.**

At its December 16, 2021 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an amended advisory opinion submitted by Noel Petra, Deputy Commissioner of Real Estate & Construction Services at DAS. The Board now issues this amended advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

In his petition, Mr. Petra provides the following facts for our consideration (the emphasis being his):

> My name is Noel Petra, I live at 44 Old Quarry Rd, Guilford, CT, and I am the Deputy Commissioner for Real Estate and Construction Services at the Department of Administrative Services (''DAS''). I am planning to run for the Board of Education in my hometown, Guilford, Connecticut. This is an uncompensated, elective position.
>
> *On September 23, 2021, the Citizen's Ethics Advisory Board issued Advisory Opinion No. 2021-3, which concluded that (1) Section 5-266a-1 of the regulations – which bars certain state employees from holding elective municipal office – does not apply to me in my capacity as Deputy Commissioner at*

DAS; (2) my uncompensated service on the Guilford Board of Education would not constitute ''employment'' and thus would not violate the Code's outside-employment rules, and (3) the Code's conflict provisions would not, by virtue of my uncompensated service on the Guilford Board of Education, bar me from taking any official actions as Deputy Commissioner at DAS.

Last week, the current Director of the Office of School Construction resigned, and I have been asked to fill that position on an interim basis while the agency seeks a permanent replacement. Based on this change of circumstances, I would like to request an amended opinion . . . .

Analysis

We start (as always) with the issue of jurisdiction. Persons generally subject to the Code are described in it as either ''Public officials'' or ''State employees.'' The Code defines the former to include (among others) ''any person appointed to any office of the . . . executive branch of state government by the Governor or an appointee of the Governor . . . . '' General Statutes § 1-79 (11). As a Deputy Commissioner at DAS, Mr. Petra was appointed to a state executive-branch office by the Commissioner of Administrative Services, a gubernatorial appointee. See General Statutes §§ 4-4 through 4-8. He is, therefore, a ''Public official'' and, as such, is subject to the Code, including its outside-employment and conflict provisions, about which he specifically inquires.

Before addressing those provisions, we stress, as did our predecessor, the former State Ethics Commission, that when it comes to political activity, our ''jurisdiction . . . is limited.'' Declaratory Ruling 97-A; see also Informal Request for Advisory Opinion No. 3062 (2002) (''[t]he Ethics Commission has very limited jurisdiction regarding the political activity of state employees''); Informal Request for Advisory Opinion No. 1783 (1997) (''[t]he Commission's jurisdiction regarding political activity is limited'').

Indeed, we have ''jurisdiction over only one aspect of state employee political activity.'' Informal Request for Advisory Opinion No. 3168 (2002). Our jurisdiction stems from General Statutes § 5-266a (b), which mandates that ''[t]he Citizen's Ethics Advisory Board shall establish by regulation definitions of conflict of interest which shall preclude persons in the *classified state service or in the Judicial Department* from holding elective office.'' (Emphasis added.) That regulation—§ 5-266a-1 of the Regulations of Connecticut State Agencies—provides that ''[t]here is a conflict of interests which precludes a person in State service from holding or continuing to hold elective municipal office'' in one of two instances. The first is when ''[t]he Constitution or a provision of the General Statutes prohibits a *classified State employee or a person employed in the Judicial Department* from seeking or holding the municipal office.'' (Emphasis added.) Regs., Conn. State Agencies § 5-266a-1 (a) (1). The second is when ''[t]he *classified State employee* has an office or position which has discretionary power to'' do as follows:

(A) Remove the incumbent of the municipal office;

(B) Approve the accounts or actions of the municipal office;

(C) Institute or recommend actions for penalties against the incumbent of the municipal office incident to the incumbent's election or performance of the duties of said office;

> (D) Regulate the emoluments of the municipal office;
>
> (E) Affect any grants or subsidies, administered by the State, for which the municipality in which the municipal office would be held is eligible.

(Emphasis added.) Regs., Conn. State Agencies § 5-266a-1 (a) (2).

As is clear from the italicized language above, § 5-266a-1 applies to just two groups of persons—namely, ''classified State employee[s]'' and ''person[s] employed by the Judicial Department''—and Mr. Petra fits within neither group. That is, as a Deputy Commissioner at DAS, he is employed by the executive, not judicial, branch of state government; see General Statutes § 4-38c; and as an appointed official under General Statutes § 4-8, he is not a ''classified state employee.''[1] Accordingly, the prohibition in § 5-266a-1 does not apply to Mr. Petra in his capacity as a Deputy Commissioner at DAS. See Advisory Opinion No. 95-5 (concluding that the Deputy Commissioner of the Department of Veterans Affairs ''is an appointed official rather than a classified state employee,'' and that the ''restriction [in '' 5-266a-1 therefore] does not apply to him'').

Moving on to the Code's outside-employment and conflict provisions, Mr. Petra asks, concerning the former, whether ''the outside employment provisions of the Code of State Ethics, specifically C.G.S. Secs. 1-84(b) and 1-84(c), prohibit me from participating as a member of the Guilford Board of Education[.]'' Subsections (b) and (c) of § 1-84 house the Code's primary outside employment rules, which provide, in relevant part, as follows:

> (b) No public official . . . shall accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.
>
> (c) No public official . . . shall use his public office . . . or any confidential information received through his holding such public office . . . to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated.
>
> These provisions, according to the regulations, ''are violated when the public official . . . accepts outside employment with an individual or entity which can benefit from the state servant's official actions (e.g., the individual in his or her state capacity has specific regulatory, contractual, or supervisory authority over the private person).'' Regs., Conn. State Agencies § 1-81-17.
>
> In this case, it appears that the town of Guilford and its Board of Education, on which Mr. Petra wants to serve, could benefit from his position as Deputy Commissioner at DAS due to his role as interim Director of the Office of School Construction. Even so, his service on the Board of Education would not

[1] The job description for Deputy Commissioner of Construction Services at DAS states, under ''Job Class Designation,'' that the position is ''Unclassified.'' https://www.jobapscloud.com/CT/specs/classspecdisplay.asp?ClassNumber=0692EX&LinkSpec=RecruitNum2&R1=&R3=.

> trigger the Code's outside-employment prohibitions, given that his *uncompensated* service would not constitute ''employment,'' about which the regulations have this to say:
>
> [T]he term employment shall be construed to include any work or endeavor, whatever its form, undertaken in order to obtain *financial gain* (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.). *The term shall not, however, include any endeavor undertaken* only as a hobby or *solely for* charitable, educational, or *public service purposes, when no compensation or other financial gain for the individual*, his or her immediate family or a business with which the individual is associated *is involved.*

(Emphasis added.) Regs., Conn. State Agencies § 1-81-14. Given that Mr. Petra's ''endeavor'' (i.e., service on the Board of Education) would be undertaken solely for public service purposes, and that there would be no compensation or other financial gain for him (or, presumably, for his immediate family or any ''business with which he [may be] associated''), his service would not constitute ''employment'' and thus would not violate the Code's outside-employment provisions. See Advisory Opinion No. 81-9 (concluding that uncompensated service on a local board of education ''is not, as subsection l-84(b) requires, 'employment' '').

Turning to the Code's conflict provisions, General Statutes §§ 1-85 and 1-86 (a), Mr. Petra asks three questions: (1) whether ''there are any substantial or potential conflicts with me participating on my local board of education''; (2) whether ''my participation on the Board of Education [would] prohibit me from taking any official actions in my role as Interim Director of the Office of School Construction''; and (3) whether ''there [are] any matters in which I would be required by the Code . . . to abstain from taking official action[.]''

Sections 1-85 and 1-86 (a)—which define and proscribe substantial and potential conflicts of interests for Code purposes—apply to Mr. Petra's conduct only in his state capacity (and not in his capacity as a member of the Board of Education). Under § 1-85, Mr. Petra generally has a substantial conflict (and may not take official action on a matter) if he has ''reason to believe or expect that he, his spouse, a dependent child, or a *business with which he is associated* will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. . . .''[2] (Emphasis added.) And under § 1-86 (a), he generally has a potential conflict (and likewise may not take official action on a matter) if he ''would be required to take an action that would affect . . . [his] financial interest . . . [or that of his] spouse, parent, brother, sister, child or the spouse of a child or a *business with which [he] . . . is associated . . . .*''[3] (Emphasis added.)

To answer Mr. Petra's questions concerning those provisions, we must first answer whether the Board of Education is a ''business with which he is associated,'' which (with an exception not pertinent here) is defined, in General Statutes § 1-79 (2), as follows:

[2] There is an exception in § 1-85 to the general rule: An individual does not have a substantial conflict, ''if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group.''

[3] No potential conflict exists if the financial impact is de minimis (i.e., less than $100 per person per year) or indistinct from that of a substantial segment of the general public (e.g., all homeowners). General Statutes § 1-86 (a); Regs. Conn. State Agencies § 1-81-30.

> [A]ny sole proprietorship, partnership, firm, corporation, trust or other entity through which business for profit or not for profit is conducted in which the public official or state employee or member of his or her immediate family is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class. . . .''Officer'' refers only to the president, executive or senior vice president or treasurer of such business.

That definition was the subject of Advisory Opinion No. 90-29, titled ''Application of 'Business With Which Associated' to Governmental Entities.'' One of the questions there was ''whether governmental entities are excluded from the . . . Code's definition of 'Business with which . . . associated' . . . . '' The answer, in the former State Ethics Commission's opinion (with which we agree), was yes: ''The Commission declines . . . to . . . rule that the term . . . includes municipalities and other governmental entities,'' for ''[n]othing in the legislative history supports such a construction,'' and ''no Connecticut case has held that the terms 'business' and 'government' are in any way synonymous.''

Here, then, the Board of Education would not be a ''business with which [Mr. Petra] is associated'' because it is not a business, but rather a governmental entity. See *Cheney* v. *Strasburger*, 168 Conn. 135, 141 (1975) (noting that ''a town board of education is an agent of the state when carrying out the educational interests of the state,'' and that its ''members . . . are . . . officers of the town''). And because it would not be a ''business with which he is associated,'' his mere uncompensated service on the Board of Education would not create any conflicts under §§ 1-85 and 1-86 (a), meaning those provisions would not (in answer to his questions) prohibit him from taking any official actions as Deputy Commissioner at DAS, including actions in his role as interim Director of the Office of School Construction.[4]

Before concluding, we stress that this opinion interprets the Code only, and that it does not address appearance issues, which are beyond the Code's scope. See Advisory Opinion No. 2009-7 (''[t]he Codes . . . not speak of appearances of conflict, only actualities,'' so in ''interpreting and enforcing the Code . . . are] limited, by statute, from addressing appearances or perceptions of conflict of interest'' [internal quotation marks omitted]).

Conclusion

We conclude that (1) the prohibitions in § 5-266a-1 do not apply to Mr. Petra in his capacity as a DAS Deputy Commissioner; (2) his unpaid service on the Guilford Board of Education would not constitute ''employment'' and thus would not violate the Code's outside-employment rules; and (3) §§ 1-85 and 1-86 (a) would not, by virtue of his unpaid service on the Guilford Board of Education, bar him from taking any official actions in his role as interim Director of the Office of School Construction.

By order of the Board,

Dated 12/16/21

/s/ Dena Castricone
Chairperson

[4]This assumes, of course, that neither Mr. Petra himself nor any of the family members listed in §§ 1-85 and 1-86 (a) would be impacted financially by virtue of such official action.

NOTICES

The New Online Ordering Transcript System

Effective January 3, 2022, the procedure for ordering court transcripts will change. All attorneys will be required to order transcripts utilizing a new online ordering system located within E-Services at https://sso.eservices.jud.ct.gov/TranscriptReq. Please note, this link will not be operational until January 3, 2022. In addition, if you are not an attorney, but are enrolled in E-Services, you may also use the online transcript ordering system. Those individuals who are not attorneys or not registered with E-Services will still be able to order transcripts utilizing the current paper format.

The online ordering system is an easy-to-use process created to mirror the paper form. An instructional quick card will be created and posted on the Judicial Branch's website.

If you have any questions, please contact Court Transcript Services at 860-706-5310 or CourtTranscriptServices@jud.ct.gov.

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book § 2-54, notice is hereby given that on December 1, 2021, in Docket Number HHD-CV20-6125900-S, Robert O Wynne, Juris No. 404770, is suspended from the practice of law for a period of one (1) year, commencing on January 27, 2022; the intention of the order being that the suspension run concurrently with the suspensions imposed in Docket No. HHD-CV17-6084248-S.

Attorney Cody N. Guarnieri, Juris No. 434005, of Hartford, Connecticut, shall continue as Trustee pursuant to his previous appointment in Docket No. HHD-CV17-6084248-S. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.

The Respondent shall participate in the Connecticut Bar Association's Resolution of Legal Fee Disputes Program and shall comply with all rules and orders pursuant thereto.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Any application for reinstatement shall be made pursuant to the provision of § 2-53 of the Connecticut Practice Book.

Susan Quinn Cobb
Presiding Judge