SCHALLER, J., concurring. Although I concur in the result reached by the majority, I write separately to emphasize several points with respect to the majority's analysis of the issues presented in parts I and II B.

First, with respect to part I, I agree that the trial court improperly required the defendant, Dowen D. Phillips, to prove actual prejudice in order to prevail on his claim of jury racial bias, and I agree with the remand of the case for a determination of whether the evidence in the record reveals a racial bias against the defendant. I write separately to emphasize that in cases involving claims of jury racial bias, as with claims of ordinary juror misconduct, our concern remains with the defendant's right to a fair trial.

It is well established that in cases of ordinary juror misconduct "[t]he question is whether . . . the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." (Internal quotation marks omitted.) See, e.g., *State* v. *Necaise*, 97 Conn. App. 214, 222, 904 A.2d 245, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006). In *State* v. *Brown*, 235 Conn. 502, 526, 668 A.2d 1288 (1995) (en banc), our Supreme Court held that a trial court must conduct a preliminary inquiry on the record in any criminal case in which jury misconduct is alleged. Id. The court left the form and scope of that inquiry to the trial court's discretion. In *State* v. *Santiago*, 245 Conn. 301, 336–40, 715 A.2d 1 (1998), the court expanded the inquiry that must be conducted in cases in which racial bias is alleged, reasoning that "[a]llegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct, because such conduct is, ipso facto, prejudicial." Id., 336. In a footnote following this sentence, the court explained: "We have recognized that not every incident of juror misconduct requires a new trial. . . . *The question is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial.* . . . The defendant has been prejudiced if the misbehavior is such to make it probable that the juror's mind was influenced by it so as to render him or her an unfair and prejudicial juror." (Emphasis added; internal quotation marks omitted). Id., 336 n.21. The court continued to explain that "[j]uror misconduct involving exposure to extrinsic material such as a dictionary . . . or a newspaper article or involving the deliberation process such as a presubmission discussion among the jurors . . . simply [does] not pose the level of seriousness and likelihood of prejudice to the defendant as a juror who is racially biased." (Citations omitted). Id. Therefore, according to *Santiago*, in cases in which jury racial bias is established, it is presumed that the defendant has been preju-

diced and has not received a fair trial and, therefore, a new trial is automatically warranted.

In light of this precedent, I respectfully disagree with the majority opinion's statement in footnote 7 that "a trial court has the discretion to conclude that certain other manifestations of racial bias, such as racial bias toward another juror, would be ipso facto prejudicial to the defendant." In my view, this statement is too broad. Although a juror's racial bias toward another juror may be ipso facto prejudicial if the defendant's right to a fair trial is affected, the majority's statement could be interpreted to suggest that racial bias among the jury members is enough to warrant a new trial even in cases in which the jury's ability to deliberate fairly and impartially is not impeded. I recognize that there may be situations in which jury deliberations break down as a result of racial bias among jury members, thereby affecting the defendant's right to a fair trial, but this situation is not presented here.

I agree with the majority that the allegations in this case are more elusive than in *Santiago*, as the record does not contain racist statements directly referring to the defendant. I also agree with the majority's conclusion that racial bias demonstrated by one juror toward other jurors of the same race as the defendant could be indicative of that juror's racial bias against the defendant. I would, however, expand on the evidence in the record that is set forth by the majority. Specifically, I would refer to the testimony as to the juror's statement that he had predetermined the defendant's guilt on the basis of his "demeanor." Because of the inherent ambiguity of this statement, which may have a racial connotation, this evidence should also be considered by the trial court in determining whether the juror harbored a racial bias against the defendant. Additionally, I would refer to the testimony of the other jury members that they believed the statements and conduct of the one juror to be racially motivated and to indicate his racial bias against the defendant.

The majority opinion limits the trial court in making its determination to whether a racial bias existed on the "objective facts" in the record and instructs the trial court to distinguish the jurors' testimony as to the statements and conduct of the one juror from their opinions as to the motivation underlying this behavior. The rule of practice and the cases cited by the majority for support address the well established policy against inquiring into a jury's deliberative process in determining a verdict. See Practice Book § 16-34; *Hamill* v. *Neikind*, 171 Conn. 357, 361, 370 A.2d 959 (1976); *Aillon* v. *State*, 168 Conn. 541, 550–52, 363 A.2d 49 (1975). Although I agree with the majority that the trial court improperly inquired into whether the one juror's statements and conduct influenced the verdict of the other jury members, I do not see how consideration by the

trial court of the other jury members' assessments of this behavior would inappropriately touch on the reasoning behind their verdict. Indeed, our Supreme Court, in *Aillon* v. *State*, supra, 541, held that "jurors were competent to testify to the occurrence of incidents during trial or during their deliberations which might have affected the result of the trial, but could not testify as to the impact of such incidents on their verdict." *Hamill* v. *Neikind*, supra, 361. I disagree, therefore, that the trial court should be precluded from taking into account the testimony of the jury members as to their belief that the statements and conduct by the one juror reflected a racial bias on his part against the defendant when such testimony did not reveal the effect of the statements and conduct on the verdict.

I qualify my statements by adding that the opinions of the other jury members that the one juror was racially biased would not alone be enough to warrant a mistrial. As previously stated by our Supreme Court, "[m]ere expression of opinion, as opposed to positive expression of facts, does not warrant a mistrial." (Internal quotation marks omitted). *State* v. *Anderson*, 255 Conn. 425, 438, 773 A.2d 287 (2001). In the present case, the individual jury members concluded that the one juror was racially biased as a result of their interactions with him in the jury room. There was, therefore, a factual basis for their assertions of racial bias. As a result, the trial court should be permitted to consider, not only the statements and conduct in question but also the assessments of the jury members who observed firsthand what transpired in the jury room. This evidence is particularly important in this case, given the ambiguous nature of the allegations.

With respect to part II B, I do not agree with the majority's conclusion that the trial court properly allowed the state to impeach the defendant with evidence that he had used the youthful offender program. As the majority correctly notes, adjudication as a youthful offender is a determination of status rather than a conviction for the underlying offenses or charges. *State* v. *Eric T.*, 8 Conn. App. 607, 615, 513 A.2d 1273 (1986). As such, a youthful offender adjudication is inadmissible for impeachment purposes under General Statutes § 52-145 (b), which provides in relevant part that "*conviction of crime* may be shown for the purpose of affecting [a witness'] credibility." (Emphasis added.); see *State* v. *Keiser*, 196 Conn. 122, 128, 491 A.2d 382 (1985). The majority, however, concludes that the court properly allowed the state to question the defendant on cross-examination as to whether he was familiar with the youthful offender procedure because he "opened the door" to that line of questioning by testifying on direct examination that the courtroom had been closed for a youthful offender proceeding and that he "didn't know what that really was about." I respectfully disagree.

First, given the protected nature of youthful offender proceedings, I do not believe that it was proper for the court to allow any inquiry into the defendant's prior experience with the youthful offender procedure. The youthful offender statutory scheme affords those eligible to be adjudged youthful offenders certain protections and benefits. For instance, all proceedings, except the motion for investigation of eligibility, are private. General Statutes § 54-76c. Statements, admissions or confessions made during youthful offender proceedings are inadmissible as evidence against the youth in subsequent proceedings except with respect to sentencing in certain situations. General Statutes § 54-76f. A youthful offender's records are confidential with the exception of certain permitted disclosures. General Statutes § 54-76*l*. Finally, a youthful offender's records are "automatically erased when such person attains twenty-one years of age, provided such person has not subsequent to being adjudged a youthful offender been convicted of a felony . . . prior to attaining such age. . . ." General Statutes § 54-76o. Section 54-76o further provides in relevant part that "[y]outhful offender status shall not be deemed conviction of a crime," and, "[n]o youth who has been the subject of an erasure order shall be deemed to have been arrested . . . ." General Statutes § 54-76o; see also *State* v. *Matos*, 240 Conn. 743, 750–52, 694 A.2d 775 (1997).

As our Supreme Court has determined, "[t]he youthful offender statutes were intended to protect and possibly rehabilitate those youths who had made a mistake because of their immaturity." *State* v. *Matos*, supra, 240 Conn. 756. One important benefit of the youthful offender process is the avoidance of a record of a criminal conviction and the practical consequences that ensue from that record. In the present case, the court did not inquire into whether the defendant's records had been erased pursuant to the statute. The court, by allowing the state to question the defendant about his prior use of the youthful offender procedure, defeated the central purpose of this statutory scheme because the state was able to suggest to the jury that the defendant had a criminal history dating back to his youth.

Second, I disagree that the defendant invited or "opened the door" to the state's questioning concerning his prior involvement with the youthful offender program. Although, pursuant to the "opening the door" doctrine, "a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject"; (internal quotation marks omitted) *State* v. *Colon*, 272 Conn. 106, 186, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); this doctrine does not allow for unrestricted cross-examination. "The doctrine of opening the door cannot . . . be subverted into a rule for injection of

prejudice. . . . *The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.* . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Emphasis added; internal quotation marks omitted). Id., 187.

The majority concludes that questioning by the state concerning the defendant's prior experience with the youthful offender program was necessary to rebut his testimony suggesting that he had learned of youthful offender procedures only from the marshal while waiting in court on his appointed court date. The majority reasons that the state's questioning established the defendant's independent knowledge of the program, thereby raising the possibility that his testimony about the closed courtroom came, not from being in court on the day in question, but from his prior personal experience. I respectfully disagree that the state's questioning was permissible for this purpose. The trial court allowed the state's questioning for the limited purpose of establishing the defendant's familiarity with the youthful offender program in order to impeach his statement that he did not know what was happening when the court was temporarily closed. Moreover, in my view, the majority unfairly imputes to the defendant knowledge of youthful offender procedures on the basis of his limited prior exposure in concluding as it does.

Applying the balancing test of the "opening the door" doctrine, I conclude that impeachment of the defendant's gratuitous statement that he did not understand what was happening when the courtroom was closed for a youthful offender proceeding was unwarranted. The essence of the defendant's defense was that he appeared in court on the appointed date but that he had missed the calling of his name. As discussed in the majority opinion, the defendant explained on direct examination that he left the courtroom for a short time and, when he attempted to reenter, the courtroom was closed for a youthful offender proceeding. He testified that he reentered the courtroom when the doors were opened but that court later adjourned without his name being called. He continued to testify as to his efforts to remedy the fact that he had missed the calling of his name and stated that he thought he would be sent a bail commissioner's letter and given a new court date. The defendant's passing remark as to his lack of understanding of the youthful offender proceeding was incidental to his explanation as to how he missed the calling of his name; his defense did not turn on his understanding of why the courtroom had been closed or what a youthful offender proceeding involves. Rather, the

question at hand was whether the courtroom was closed to the defendant and whether his later actions were enough to counter the state's proof that his failure to appear was wilful.

Moreover, the state had sufficient latitude in questioning to contradict the defendant's testimony and to establish that his failure to appear was wilful. On cross-examination, the state was able to establish the defendant's familiarity with court procedures and the consequences of failing to appear in court. Specifically, the state established that the defendant had appeared in court on prior occasions and that he knew he was required to appear when he had a scheduled court date. The state was also permitted to question the defendant about his prior convictions and pending charges for failure to appear. Through this questioning, the state elicited that the defendant had been arrested for failure to appear in the past and, on that occasion, did not receive a bail commissioner's letter.

Because the defendant's statement concerning his understanding of youthful offender procedure was not necessary to his defense and because there was sufficient evidence to support the failure to appear charge, I do not believe that the state would have been unfairly prejudiced had it been prevented from questioning the defendant as to his prior experience with the youthful offender procedure. I conclude that the court's decision to permit the questioning constituted an abuse of discretion.

Although I conclude that the court improperly allowed the state to question the defendant as to the youthful offender procedure, this error was harmless. It is well established that this court will not disturb a court's improper evidentiary ruling unless the defendant can demonstrate that he suffered harm as a result of that ruling. See, e.g., *State* v. *Sawyer*, 279 Conn. 331, 352, 904 A.2d 101 (2006). In the present case, the defendant answered, "no," when questioned by the state as to whether he was familiar with the youthful offender procedure and, "I don't recall," when asked whether he had utilized that procedure. The lack of an affirmative response by the defendant renders the court's allowance of this inquiry harmless.

For the foregoing reasons, I respectfully concur in the result.