STATE OF CONNECTICUT *v.* JOSE G.[1]
(AC 24785)

Flynn, C. J., and Schaller and McLachlan, Js.

Argued October 11, 2006—officially released July 31, 2007

(Appeal from Superior Court, judicial district of Stamford-Norwalk, geographical area number one, Hon. Martin L. Nigro, judge trial referee.)

Daniel J. Krisch, special public defender, with whom were *Michael S. Taylor* and, on the brief, *Clarisse N. Thomas*, legal intern, for the appellant (defendant).

Proloy K. Das, assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Michael A. Colombo, Jr.*, former deputy assistant state's attorney, for the appellee (state).

Opinion

McLACHLAN, J. The defendant, Jose G., appeals from the judgment of conviction, following a jury trial, of kidnapping in the second degree in violation of General Statutes § 53a-94, attempt to commit sexual assault in the first degree in violation of General Statutes § 53a-49 and § 53a-70 (a) (1), intimidating a witness in violation of General Statutes § 53a-151a and assault in the third degree in violation of General Statutes § 53a-61 (a) (1) in connection with a domestic incident involving his then girlfriend, who was more than four months pregnant at the time.[2] On appeal, the defendant claims that (1) the trial court improperly admitted into evidence certain testimony from two witnesses regarding alleged incidents of uncharged sexual abuse he perpetrated against the victim and (2) the state engaged in a pattern of prosecutorial impropriety,[3] which denied him a fair trial. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims on appeal. In the very early morning hours of March 6, 2002, police officers on patrol noticed a commotion occurring in the front seat of the defendant's van at an intersection. As the van turned in front of the officers, the passenger, who was the victim, opened the door, and it appeared that she was trying to jump out of the van and flag down the officers, but she was being held back by the defendant, who was driving the van. The police pulled over the van, and the victim stated that the defendant had assaulted her. The victim was brought to the police station where she signed a voluntary, sworn statement that contained allegations that the defendant had forced her into the van and had proceeded to kiss her very hard and put his hand down her pants, digitally penetrating her vagina with his finger against her will, while instructing her not to yell. According to the statement, the defendant also struck the victim in the face approximately three times and threatened to kill her. The statement contained accusations that the defendant had hit the victim on two prior occasions and had physically, mentally and sexually abused her previously. After completing the statement, the victim was taken to Stamford Hospital, where she was examined.

At trial, the victim recanted the sworn statements she had made to the police on March 6, 2002, testifying, inter alia, that on the night of the incident, the defendant had not threatened her, restrained her or digitally penetrated her, and she denied that he had abused her in the past. When confronted with her prior sworn statement, the victim indicated that she disagreed with some of its contents. The prior statement was admitted into evidence substantively at trial pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986),[4] and a redacted version was read into evidence by the court

clerk during the victim's testimony.

I

The defendant first claims that the court improperly admitted certain testimony from two witnesses regarding alleged incidents of uncharged sexual abuse he perpetrated against the victim. These two state's witnesses were J, a friend of the victim who picked her up from the police station on the night of the incident, and Stamford police Officer Sandra Conetta, who had contact with the victim on the night of the incident. J testified that the victim told her about two prior incidents when the defendant had sex with the victim against her will; the first occurred in October or November, 2001, and the second occurred approximately two weeks prior to the March 6, 2002 incident. Conetta testified that on the way back from the hospital on March 6, 2002, the victim told her about the second incident, stating that the defendant had broken into her house and forced himself on her sexually on that occasion.

In his main appellate brief, the defendant claims that the court improperly admitted the testimony of J and Conetta as constancy of accusation testimony.[5] In the state's brief, it argues that this claim is not reviewable because the record is clear that the court admitted the testimony for impeachment and not as constancy of accusation testimony. In his reply brief, the defendant concedes that the court admitted the testimony for impeachment purposes, but he argues, nonetheless, that it still was admitted improperly because it constituted extrinsic evidence on a collateral issue and was more prejudicial than probative.

On the issue of reviewability, the defendant argues that he did not have the opportunity to respond to the issue of impeachment until the court issued an articulation in January, 2006, after his main appellate brief was filed. The state argues that the defendant did not preserve the issue at trial and that his attempts to raise this issue for the first time in his reply brief are improper, and, as such, we should not review his claim.

During the state's direct examination of J, the defendant objected, solely on the ground that the question was leading, when the state sought to elicit testimony regarding statements the victim had made to her about prior sexual abuse. The state argued that the evidence was admissible as constancy of accusation testimony. After a voir dire examination of J, the court allowed the testimony.[6]

On May 9, 2005, the defendant filed a motion for articulation, requesting that the court articulate the basis for admitting the challenged testimony, as well as other evidence including expert testimony related to battered woman's syndrome, which the state had proffered at trial.[7] The court denied that motion, and, on June 2, 2005, the defendant filed a motion for review

with this court. On July 19, 2005, we granted the motion for review as to the ruling admitting expert testimony but denied it as to the other requests.

On September 22, 2005, the defendant filed a request pursuant to Practice Book § 64-1, seeking a signed transcript or memorandum of decision from the trial court with respect, inter alia, to the court's ruling to admit evidence related to claims of uncharged misconduct against him. The defendant submitted his main appellate brief to this court on November 21, 2005. On January 3, 2006, the trial court issued a memorandum of decision on the admission of evidence related to claims of uncharged misconduct against the defendant. In that decision, the court indicated that the evidence was admitted as impeachment evidence of the victim's trial testimony.[8] The state filed its appellate brief on May 10, 2006.

At oral argument before this court, the state argued that the reasoning for the trial court's ruling was not ambiguous and that the defendant should have briefed the impeachment issue in his main appellate brief. Without abandoning its position that the claim is not reviewable, the state requested permission to present a full written brief on the substantive merits of the issue. On January 16, 2007, we granted the state's request to file a supplemental brief, which the state filed on January 31, 2007.

"It is a well established principle that arguments cannot be raised for the first time in a reply brief. . . . Claims of error by an appellant must be raised in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Internal quotation marks omitted.) *State* v. *Howard F.*, 86 Conn. App. 702, 708, 862 A.2d 331 (2004), cert. denied, 273 Conn. 924, 871 A.2d 1032 (2005).

Moreover, "[t]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while

there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 408 n.18, 902 A.2d 1044 (2006).

Here, the defendant's argument in his reply brief presents an entirely new claim of error, which the trial court had no opportunity to address at trial. Moreover, the defendant's general objections at trial were inadequate to preserve the issue properly for appellate review.[9] Furthermore, in seeking our review of his claim, the defendant failed to request review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or the plain error doctrine. See Practice Book § 60-5. "[W]here a defendant fails to seek review of an unpreserved claim under either *Golding* or the plain error doctrine, this court will not examine such a claim." (Internal quotation marks omitted.) *State* v. *Spillane*, 69 Conn. App. 336, 342, 793 A.2d 1228 (2002). Accordingly, we decline to review this claim on appeal.[10]

II

The defendant next claims that the prosecutor engaged in a pattern of severe impropriety that deprived him of a fair trial by "improper[ly] appeal[ing] to jury sympathy, vouching for the credibility of witnesses, and deliberately violating orders of the trial court . . . ." The defendant also argues that the state improperly asked the jury to consider the negative effects of a not guilty verdict on the victim and on society in general. The state concedes that the prosecutor made an improper statement concerning what the jury felt comfortable with.[11] It is not necessary, therefore, for us to determine whether, in fact, this conduct was improper. See *State* v. *Stevenson*, 269 Conn. 563, 582, 849 A.2d 626 (2004). We must examine the remaining remarks, however, to determine whether they were improper, and, if so, whether the totality of the impropriety deprived the defendant of a fair trial. Although we agree that the prosecutor did engage in instances of impropriety, we conclude that the defendant was not deprived of a fair trial.

"In examining claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reason-

able likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citation omitted; internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 604, 910 A.2d 931 (2006), cert. denied, U.S. , 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

A

The defendant argues that "the state repeatedly made two sets of arguments designed to appeal to the emotions and sympathy of the jury. First, the state referred on numerous occasions to the fact that the defendant and [the victim] had two children together and the effect of the defendant's alleged actions on those children . . . . Second, the state referred repeatedly to the fear allegedly experienced by [the victim], her subservient position with respect to the defendant and the 'cycle of violence' between them . . . ." (Citations omitted.) We are not persuaded that this amounted to impropriety.

"A prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . [Our Supreme Court has] stated that such appeals should be avoided because they have the effect of diverting the jury's attention from [its] duty to decide the case on the evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal. . . . No trial—civil or criminal—should be decided upon the basis of the jurors' emotions." (Citations omitted; internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 255, 833 A.2d 363 (2003). Nevertheless, "as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Peeler*, 267 Conn. 611, 641, 841 A.2d 181 (2004).

In this case, the victim recanted portions of her statement to the police, and the state presented expert testimony on the issue of battered woman's syndrome to explain the reasons that victims recant in situations in which they are battered. As our Supreme Court has explained: "[E]xpert testimony concerning battered woman's syndrome has been accepted by many courts when the testimony was offered by a criminal defendant to bolster a claim of self-defense. . . . Such expert testimony has also been accepted if offered by the prosecution to explain the recantation of the complaining witness . . . and if offered to explain the victim's delay in reporting the abuse and remaining with the defendant after the abuse. (Citations omitted.) *State* v. *Borrelli*, 227 Conn. 153, 170, 629 A.2d 1105 (1993). Although the defendant argues that these issues were not relevant to the case against him, we conclude that they were

relevant to help explain why the victim had recanted portions of her statement, as explained in the testimony by physician Evan Stark, the state's violence against women expert. Our review of the record reveals that the comments by the prosecutor regarding the victim's fear and the cycle of violence were supported by the evidence, as were the statements regarding the children.

B

The defendant also claims that the state improperly vouched for the credibility of witnesses. Specifically, he argues that the state vouched for "[J] [and] Officers [Aaron] Trew and Michael DiBella by ridiculing any claim that their testimony was either mistaken or fabricated." The state argues that it never vouched for the credibility of these witnesses, but rather that it merely noted that the evidence did not support an inference that these witnesses had any motive to testify falsely. We agree with the state.

"[A] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . However, [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The state's attorney should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Citation omitted; internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583–84.

The defendant refers to two statements made by the state during closing argument to support his claim that the prosecutor improperly vouched for the credibility of witnesses: "What motive did [they] have to come in here and make that up?" and, "What possible bias or motive did the police have for fabricating this?" We conclude that these remarks were not improper.

Our Supreme Court has explained that "[i]t is not improper for a prosecutor to remark on the motives that a witness may have to lie, or not to lie, as the case may be." (Internal quotation marks omitted.) *State* v.

Stevenson, supra, 269 Conn. 585; see also *State* v. *Warholic*, 278 Conn. 354, 365, 897 A.2d 569 (2006) ("the state may argue that a witness has no motive to lie"). The prosecutor's questions to the jury in this case, asking the jury to consider what motive these witnesses had for lying, were not improper. Rather, the questions properly called on the jury to use its common sense and experience to determine whether these witnesses were testifying truthfully. See *State* v. *Warholic*, supra, 365; *State* v. *Stevenson*, supra, 584–85.

C

The defendant next claims that the prosecutor deliberately and improperly defied the orders of the court by seeking to elicit testimony concerning the intrusiveness of using a Sirchie rape kit, which elicitation repeatedly had been barred by the court because no rape kit was used in this case. Specifically, the defendant argues that "on a half-dozen occasions, the state sought to question witnesses about the details of a Sirchie rape kit, in contravention of the trial court's clear and express ruling barring such questions," and that this was improper. We agree that the prosecutor's repeated attempts to elicit such testimony were improper in light of the court's ruling that additional testimony on this issue would not be allowed.

During the direct testimony of Domenico A. Leuci, the gynecologist who had examined the victim at Stamford Hospital after the assault, the following colloquy took place without objection by the defendant:

"[The Prosecutor]: Okay. Did you do what's called a Sirchie kit?

"[The Witness]: I didn't.

"[The Prosecutor]: Do you know what that is?

"[The Witness]: Of course.

"[The Prosecutor]: Could you explain to the ladies and gentlemen of the jury what a Sirchie kit is?

"[The Witness]: It's essentially a state issued forensic kit in terms usually when there's a question of sexual abuse or a claim of sexual abuse.

"[The Prosecutor]: All right, and does that look for hairs, fibers, semen?

"[The Witness]: Correct, body fluids, hair.

"[The Prosecutor]: All right. And that wouldn't necessarily be left by a finger?

"[The Witness]: Not usually."

On cross-examination by defense counsel, the following colloquy related to a Sirchie kit occurred:

"[Defense Counsel]: The kit done in cases of sexual abuse—is that mandated by the state as to when it should be done or is it a physician's decision?

"[The Witness]: Basically—I can tell you when I would do the kit. I would do the kit if I was told definitively by a woman that there was, you know, a rape or sexual assault. I would do it if a police officer asked me. I would do it if one of my supervisors asked me to do it. At the time—

"[Defense Counsel]: But it's your decision?

"[The Witness]: I think it's my decision as well as others.

"[Defense Counsel]: But there's no state law saying you've got to do it?

"[The Witness]: Not that I'm aware of.

"[Defense Counsel]: Oh. And again, none was done in this case, correct?

"[The Witness]: Correct.

"[Defense Counsel]: Why not?

"[The Witness]: Well, as I said, in my judgment, you know, I didn't see any trauma or evidence that she had been penetrated. Her story to me was not consistent with the fact that she had definitively been penetrated. And, likewise, I wasn't asked by anyone else to do it. . . .

"[Defense Counsel]: Okay. Did the police officer . . . ask you to do any specific test on [the victim]?

"[The Witness]: Not that I remember."

On redirect examination, the prosecutor sought to elicit further information on the intrusiveness of a Sirchie kit and how it is performed. Defense counsel objected, and the court sustained the objection, stating that it did not make a difference because such a kit was not performed in this case.

During the next day of trial, the prosecutor sought to elicit testimony from Trew on the use of a Sirchie kit, but defense counsel objected, and the court sustained the objection, stating that such testimony was "not relevant here because there is no testimony that a Sirchie kit was ever utilized in this case." This was the second time defense counsel objected to testimony concerning a Sirchie kit. The prosecutor attempted to explain the relevance of such testimony by arguing that the jury needed to know why a Sirchie kit was not requested in this case, but the court stated that it already had ruled.[12] The prosecutor then attempted to ask another question of Trew regarding when a Sirchie kit is done, and defense counsel offered his third objection to such testimony. The court ordered the testimony stricken and told the prosecutor to take an exception to the ruling.

Shortly thereafter, the prosecutor asked Trew if "the determination of whether or not bodily fluid was trans-

ferred [has] any influence on what you tell a doctor in terms of treatment?" Trew responded: "Yes. . . . Because . . . bodily fluid is the reason why we would do a Sirchie kit." Defense counsel offered his fourth objection to such testimony, which the court, again, sustained.

Later that day, Conetta testified, and during direct examination, the prosecutor asked if "there was any mention to do any type of a rape kit" at the hospital. Defense counsel offered the fifth objection to such testimony, which the court sustained and instructed the prosecutor to "get it through [his] head" that such testimony would not be allowed.

The final instance of the prosecutor seeking to elicit testimony on a Sirchie kit was during the direct testimony of DiBella. The prosecutor asked DiBella if he had made any assessment as to what should be done when the victim got to the hospital, and he responded that he had not. The prosecutor continued by asking if he gave the victim any type of a Sirchie kit at that time, to which defense counsel offered a sixth objection to such questioning, which the court sustained.

The defendant argues that it is obvious that the prosecutor's repeated efforts to discuss a Sirchie kit were a deliberate attempt to "exaggerate the seriousness of the defendant's alleged conduct in the minds of the jurors." Although we think it is just as likely that the prosecutor, as he attempted to explain to the trial court, wanted the officers to explain why, in this case, they had not requested that Leuci perform a Sirchie kit on the victim, we nonetheless agree that counsel's repeated attempts to elicit such testimony were improper in light of the court's ruling that it would not be allowed.

D

Having concluded that the prosecutor committed impropriety when he: (1) told the jury that it was within its province to let the defendant "walk out the door" if it felt "comfortable" doing so and (2) attempted to elicit additional testimony on the use of a Sirchie kit, despite the court's ruling that such additional testimony would not be allowed, we now turn to the ultimate question, which is "whether the trial as a whole was fundamentally unfair and [whether] the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396.

To determine whether the defendant was deprived of his due process right to a fair trial, we must determine "whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's

verdict would have been different absent the sum total of the improprieties. . . . This inquiry is guided by an examination of the following factors [set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)]: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396.

1

The first factor we look to is whether the impropriety was invited by defense counsel. We conclude that the remarks of the prosecutor related to whether the jury felt comfortable letting the defendant "walk out the door" were not invited by defense counsel. Additionally, we conclude that although defense counsel extensively questioned Leuci about the use of a Sirchie kit during cross-examination, the repeated attempts by the prosecutor to elicit additional testimony from other witnesses, despite the court's repeated rulings that further testimony would not be allowed, were not invited by defense counsel.

2

We next consider whether the impropriety was frequent or severe. Although the prosecutor repeatedly questioned witnesses regard the use of a Sirchie kit, we do not consider this improper questioning either frequent or severe. Questioning regarding the use of a Sirchie kit was allowed, without objection, during the direct examination and the cross-examination of Leuci. It was on redirect examination that defense counsel first objected to further questioning in this area, which objection the court sustained without further inquiry. When Trew testified, and the prosecutor initially asked him about the use of a Sirchie kit, the court sustained defense counsel's objection, but the prosecutor made two additional attempts to elicit such testimony from Trew, both of which also were not allowed. The prosecutor's final two attempts to elicit such testimony occurred during the testimony of Conetta, and they, too, faced objection by defense counsel. Both the prosecutor and defense counsel extensively questioned Leuci about the use of a Sirchie kit, on both direct and on cross-examination, without objection. The prosecutor's first attempt to elicit further information from Trew cannot be seen to be improper in light of the admission of the prior testimony. Nevertheless, following the court's sustaining of the defendant's first objection during Trew's direct examination, the remaining four attempts to elicit further testimony on this issue may have been improper, but we conclude that they were not frequent.

In terms of severity, we cannot say that the repeated attempts to elicit additional testimony on the use of a Sirchie kit were severe because Leuci already had testified on the use of this kit during both direct and cross-examination without objection. The jury had been told what a Sirchie kit was, when it should be used and that a kit was not used in this case because the physician did not think it was necessary and the police had not requested that one be used. The improper attempts to elicit further information on the use of a Sirchie kit cannot be said to have been severe.

As to the prosecutor improperly telling the jury that it was within its province to let the defendant "walk out the door" if it felt "comfortable" doing so, we conclude that this line of argument also was neither frequent nor severe. The prosecutor's implication that the jury would be responsible for letting the defendant "walk out the door" clearly was an improper argument in that it asked jurors to consider extraneous matters when deliberating the defendant's guilt. See *State* v. *Whipper*, 258 Conn. 229, 271–72, 780 A.2d 53 (2001), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004). Nevertheless, this was an isolated argument, which quickly was the subject of an objection and a commendable curative instruction by the court.

3

Our next consideration is the centrality of the impropriety to the critical issues in the case and the strength of the state's case. The critical issue in this case was whether the defendant had committed the charged crimes, and this issue came down to a credibility contest, as is argued by the defendant. Because there were no eyewitnesses in this case, other than the victim and the defendant, the jury had to decide whether to believe the victim's statement to the police or her contrary trial testimony. The impropriety in this case, however, did not involve an attempt to enhance the credibility of the victim. Thus, despite the improper nature of the prosecutor's remarks and his repeated attempts to elicit testimony on the use of a Sirchie kit after the court had ruled that such additional testimony would not be admitted, we conclude that the impropriety did not relate directly to the ultimate issue in this case.

4

Finally, we examine the sufficiency of the curative measures taken by the court. "[W]e have previously recognized that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant." (Internal quotation marks omitted.) *State* v. *Satchwell*, 244 Conn. 547, 569, 710 A.2d 1348 (1998). Additionally, "[i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's]

curative instructions." (Internal quotation marks omitted.) *State* v. *Whipper*, supra, 258 Conn. 258. We do recognize, however, that "a general instruction does not have the same curative effect as a charge directed at a specific impropriety, particularly when the [impropriety] has been more than an isolated occurrence." *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003).

At the end of the prosecutor's closing argument, almost immediately after he had argued improperly to the jury that it was within its province to let the defendant "walk out the door" if it felt "comfortable" doing so, the court instructed: "I want to admonish the jury at this time that it's not your function to feel comfortable or uncomfortable with regard to your decision. It's not your function to determine the possible consequences either with regard to the defendant or with regard to the victim or to the defendant's family or to the victim's family as to the decision you make. That is not your function. Your function is [to act as] fact finders. You're not here as crusaders. You're not here as admonishers. You're there to determine what the facts are. Now, I will indicate that the last remarks of counsel by the state were not appropriate, and just ignore [them]." We conclude that the commendable and very direct admonishment of the prosecutor by the court cured any prejudicial effect that this improper argument may have had.

As to the prosecutor's improper attempts to elicit further testimony on the use of a Sirchie kit, although the court did not give a specific curative instruction with each improper question, it did sustain each objection made by the defendant. Additionally, in its final instructions to the jury, the court admonished the jury not to consider sympathy when determining the facts, to consider only the testimony and exhibits as evidence, not to consider excluded or stricken evidence and not to consider the arguments or comments of the attorneys as evidence. Finally, the court explained the presumption of innocence, the state's burden of proof and the fact that this burden must be met beyond a reasonable doubt.

As our Supreme Court often has directed, "[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we [must] presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 762, 850 A.2d 199 (2004). In this case, there is no suggestion that the jury did not follow the court's general instructions.

After our application of the six *Williams* factors, we conclude that the instances of prosecutorial impropriety in this case did not deprive the defendant of his due process right to a fair trial.

E

The defendant also asserts that this court should

invoke its supervisory authority over the administration of justice to require a new trial because of the prosecutor's repeated attempts to elicit additional testimony concerning the use of a Sirchie kit, which the defendant argues, were in direct and flagrant violation of the clear orders of the trial court. The defendant requests that we apply a different standard of review to this claim because it involves the deliberate attempt by the prosecutor to circumvent clear rulings of the trial court. He requests that we employ our supervisory powers to vacate the judgment of conviction and order a new trial, which, he claims, would serve to deter this type of impropriety in the future. We decline the defendant's request.

"[W]e may invoke our inherent supervisory authority in cases in which prosecutorial [impropriety] is not so egregious as to implicate the defendant's . . . right to a fair trial . . . when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper. . . . We have cautioned, however, that [s]uch a sanction generally is appropriate . . . only when the [prosecutor's] conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 405.

After carefully examining the instances in which the prosecutor improperly sought to elicit further testimony on the use of a Sirchie kit, we cannot say that this repeated attempt to elicit such testimony was so unduly offensive to the maintenance of a sound judicial process that reversal of the defendant's conviction is necessary. See *State* v. *Whipper*, supra, 258 Conn. 269. We are unable to conclude that the instances of impropriety in the present case were "so offensive to the sound administration of justice that only a new trial [could] effectively prevent such assaults on the integrity of the tribunal." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 266 Conn. 251. Furthermore, it is undisputed that the particular prosecutor who tried this case is no longer engaged in the prosecution of criminal cases in Connecticut. Consequently, no exercise of supervisory authority to reverse the defendant's conviction could have any salutary effect on the manner in which this prosecutor might conduct future prosecutions. Therefore, we conclude that this case does not present an appropriate circumstance justifying the invocation of our supervisory authority.

The judgment is affirmed.

In this opinion FLYNN, C. J., concurred.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[2] The defendant received a total effective sentence of fifteen years imprisonment, execution suspended after seven years, with ten years probation. He was found not guilty of tampering with a witness in violation of General

Statutes § 53a-151.

[3] Subsequent to oral argument in this court, our Supreme Court rendered its decision in *State* v. *Fauci*, 282 Conn. 23, 917 A.2d 978 (2007), in which it determined that the term "prosecutorial impropriety" is more appropriate than the traditional term "prosecutorial misconduct." Id., 26 n.2. Although the parties briefed and argued the defendant's claim under the more traditional nomenclature, we have adopted the term prosecutorial impropriety in our analysis of the defendant's claim.

[4] In *Whelan*, our Supreme Court adopted "a rule allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." *State* v. *Whelan*, supra, 200 Conn. 753.

[5] The defendant argues that the admission of constancy of accusation testimony is limited to allegations related to the charged offenses and that allegations of prior uncharged misconduct do not fall within the ambit of the rule. See Conn. Code Evid. § 6-11 (c); *State* v. *Ouellette*, 190 Conn. 84, 100, 459 A.2d 1005 (1983) ("the [constancy of accusation] exception applies only to testimony of witnesses to whom the victim complains *concerning the act charged*" [emphasis added]).

[6] After the objection and brief argument, the jury was excused, and the following occurred:

"The Court: All right, voir dire. Constancy of accusation.

"[The Prosecutor]: Yes.

"The Court: As you know as a prosecutor . . . after a victim testifies concerning a specific act of . . . sexual assault, other people to whom she had complained about the sexual assault are allowed to testify. They're allowed to testify as to what she said about who attacked her and when the attack occurred.

"[The Prosecutor]: Yes.

"The Court: But that's it.

"[The Prosecutor]: Okay.

"The Court: Not a description of the occurrence.

"[The Prosecutor]: All right.

"The Court: And the reason I'm allowing it is because the last police officer stated in his testimony that the victim had complained to him about a sexual assault and that he referred it to the Norwalk police department.

"[The Prosecutor]: Right.

"[Defense Counsel]: Actually, Judge, that was the same incident. That's not a different incident.

"[The Prosecutor]: I'm not sure if it's the same incident or not. If I could voir dire with the witness, we'll find out.

"The Court: Pardon me, let's find out.

"[The Prosecutor]: Okay.

"The Court: Yes, that's why I'm going to have a voir dire.

"[The Prosecutor]: Thank you, Judge.

"[Defense Counsel]: But the relationship—

"The Court: The jury is not present.

"[Defense Counsel]: Okay."

At this point, a voir dire examination of J ensued. At the end of the voir dire but prior to the return of the jury, the following occurred:

"The Court: All right, but she cannot go into any specific indications, just that he forced her to have sex; that's what she told [J] on the two occasions.

"[The Prosecutor]: On the two occasions.

"The Court: One was in 2001, and one was three weeks or so before the Stamford Hospital visit?

"[The Prosecutor]: Yes.

"The Court: All right. Your objection is noted, if you wish.

"[Defense Counsel]: Yes, please. Thank you.

"The Court: All right. Invite the jury in, please. *The reason I'm allowing this in is because of this claim that the testimony she gave here in court ought to be disbelieved because of the statement she made earlier.*

"[The Prosecutor]: Yes, Your Honor." (Emphasis added.)

[7] The state presented testimony of an expert on violence against women, Evan Stark, who testified, inter alia, that it is quite common where battering is involved that victims of abuse will recant statements that they had made in the excitation of the moment of abuse.

[8] As the court stated, "[b]ecause the trial testimony and the *Whelan* statement were in such total conflict, and because the jury had to decide which version or portions of which version to credit, the state was permitted to

introduce additional evidence of out-of-court statements allegedly made by the victim in order to impeach her trial testimony."

[9] When the state first sought to elicit testimony from J as to whether the victim had confided in J regarding prior sexual abuse, defense counsel objected as "totally leading." Despite the defendant's argument on appeal, the defendant never claimed that the evidence related to a collateral matter or was inadmissible as overly prejudicial.

[10] We disagree with the dissent's conclusion that the circumstances in the present case warrant a departure from the well established rule in our appellate courts limiting review of purely evidentiary claims to the grounds on which they were raised before the trial court. In reviewing the claim, the dissent seeks to carve out an exception to this well established rule. Moreover, the dissent's conclusion that at trial, the court "admitted the challenged testimony into evidence as constancy of accusation" fails to consider the whole record. During J's voir dire testimony, the court indicated: "Counsel, *if* this is for constancy of accusation, there is a limit set by the Supreme Court." (Emphasis added.) This appears to indicate skepticism on the part of the court as to the applicability of the proffered grounds. The notion that the court admitted the evidence only for impeachment is bolstered by the court's concluding remarks in which the court indicated: "And the reason I'm allowing it is because the last police officer stated in his testimony that the victim had complained to him about a sexual assault and that he referred it to the Norwalk police department."

In concluding that the court admitted the challenged evidence as constancy of accusation testimony, the dissent cites the court's ruling that the witness "cannot go into any specific indications, just that he forced her to have sex; that's what she told [J] on two occasions." That the court limited the impeachment testimony by precluding the witnesses from providing the victim's detailed description of the occurrence, however, was proper in the context of impeachment, as the court always may limit impeachment testimony in light of prejudice concerns. See, e.g., *State* v. *Vitale*, 76 Conn. App. 1, 9, 818 A.2d 134 ("Where the defendant admits to prior convictions on direct examination, the customary impeachment inquiry on cross-examination is limited to the name of the crime and the date of conviction . . . . The facts underlying the prior conviction are generally inadmissible . . . because they must be excluded where their prejudicial tendency outweighs their probative value." [Internal quotation marks omitted.]), cert. denied, 264 Conn. 906, 826 A.2d 178 (2003). Thus, the dissent's conclusion that the defendant had no basis to object on impeachment grounds at trial is without merit.

[11] More specifically, the prosecutor told the jury that it was within its province to let the defendant "walk out the door" if it felt "comfortable" doing so.

[12] We offer no opinion on whether the court should have allowed such testimony.