STATE OF CONNECTICUT *v.* GARY D. GIBSON
(AC 28273)

Bishop, Gruendel and Robinson, Js.

Argued December 1, 2008—officially released May 12, 2009

(Appeal from Superior Court, judicial district of New Britain, geographical area number seventeen, Schuman, J.)

David B. Rozwaski, special public defender, for the appellant (defendant).

Timothy F. Costello, deputy assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Christian M. Watson*, former assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. The defendant, Gary D. Gibson, appeals from the judgment of conviction, rendered after a jury trial, of failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1) and the judgment of the trial court, rendered following a hearing, revoking his probation pursuant to General Statutes § 53a-32 and imposing the remainder of his sentence. On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction of failure to appear in the first degree and (2) the court incorrectly found that he violated his probation. The defendant additionally claims that impropriety by the prosecutor violated his constitutional right to a fair trial. We agree with the defendant's allegation of prosecutorial impropriety and, accordingly, reverse the conviction on the count of failure to appear in the first degree and remand the matter for a new trial. We affirm the judgment of the court in regard to the finding of violation of probation.

A warrant was issued for the defendant's arrest on November 28, 2005, charging him with stalking in the first degree under General Statutes § 53a-181c.[1] The defendant previously had been convicted of stalking in the second degree under General Statutes § 53a-181d on March 19, 2003, and his sentence included imprisonment followed by a two year period of probation.[2] Following his 2005 arrest, bond was set at $25,000 on the warrant, and the defendant was arraigned on December 12, 2005.

The record reveals the following facts underlying the November 28, 2005 stalking charge. The victim, who was the same victim in the case resulting in the defendant's 2003 stalking conviction, had arrived at Stop & Shop in Bristol on the evening of October 23, 2005, when he noticed a blue Jeep Liberty backed into a parking space along Pine Street. When the victim left Stop & Shop a few minutes later, he noticed that the Jeep was behind him, appeared to follow him to a Citgo gasoline station and continued to follow him as he proceeded home. The victim testified that he recognized the driver of the Jeep as the defendant because the defendant was the person who had been convicted of stalking him on a previous occasion. The defendant was found not guilty on the stalking charge. The defendant was found guilty, however, of failure to appear in the first degree. The basis of the failure to appear charge is as follows. As part of the pretrial proceedings associated with the defendant's stalking charge, the defendant was scheduled to appear in court on April 4, 2006. That appearance, before the court, *Dunnell*, *J.*, consisted only of a brief exchange between the attorneys and the court.

"[The Prosecutor]: Twenty, twenty-one, pretrial docket, [the defendant].

"[Defense Counsel]: Good morning, Your Honor. Frank Canace for [the defendant]. I spoke with the state yesterday. I think we're looking for a date for victim's contact?

"[The Prosecutor]: Yes.

"[Defense Counsel]: May I have May 5, if that's convenient with the court?

"The Court: May 5?

"[Defense Counsel]: Yes, ma'am.

"The Court: Yes."

On May 5, 2006, however, the defendant did not appear in court. The defendant's attorney stated: "Your Honor, I have no way of contacting him. He knew today was the court date. I don't know why he wouldn't show up other than the fact that I believe it was going to go on the trial list today." The state requested a rearrest, and the court ordered the defendant rearrested. The bond was called and ordered forfeited by the court, and a new bond of $300,000 was set. After being notified that there was a warrant out for his arrest, the defendant turned himself in to the police on May 11, 2006. He was convicted of failure to appear in the first degree on September 26, 2006, and, after a hearing, was found by the court to be in violation of his probation on October 4, 2006. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support his conviction of failure to appear in the first degree. The defendant specifically claims that the state did not prove that his failure to appear in court on May 5, 2006 was wilful. As we conclude that this is an issue of credibility, we disagree.

The following additional facts are relevant to the defendant's claim. The defendant testified that approximately three weeks after his April 4, 2006 court date, he entered into the calendar on his cellular telephone the date of May 16, 2006, as his next court date. He testified: "I didn't write it down then I left court that day, and, apparently, I just forgot it, and I—for some reason, I thought May 16 was [the] court date [and] about three weeks later, and I entered it in my cell phone. And I thought for sure that was the court date from then on."

We first set forth the standard of review with regard to a sufficiency of the evidence claim. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have

concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proven beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all of the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Jason B.*, 111 Conn. App. 359, 363, 958 A.2d 1266 (2008), cert. denied, 290 Conn. 904, 962 A.2d 794 (2009).

General Statutes § 53a-172 sets forth the elements of the crime of failure to appear in the first degree. "[A] person is guilty of failure to appear in the first degree when (1) while charged with the commission of a felony and while out on bail . . . he wilfully fails to appear when legally called according to the terms of his bail bond . . . ." General Statutes § 53a-172 (a). "[T]he word wilful means doing a forbidden act *purposefully* in violation of the law. It means that the defendant acted *intentionally* in the sense that his conduct was *voluntary* and not inadvertent . . . . Thus, wilful misconduct is *intentional misconduct*, which is *conduct done purposefully* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Outlaw*, 108 Conn. App. 772, 777, 949 A.2d 544, cert. denied, 289 Conn. 915, 957 A.2d 880 (2008). "In order to prove the wilful element of . . . § 53a-172, the state must prove beyond a reasonable doubt either that the defendant received and deliberately ignored a notice to appear or that he intentionally embarked on a course of conduct designed to prevent him from receiving such notice." (Internal quotation marks omitted.) *State* v. *Laws*, 39 Conn. App. 816, 819, 668 A.2d 392 (1995), cert. denied, 236 Conn. 914, 673 A.2d 1143 (1996). "Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Rice*, 105 Conn. App. 103, 108, 936 A.2d 694 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1101 (2008).

Sufficient evidence was presented at trial to sustain the defendant's conviction of failure to appear in the first degree. During its case-in-chief, the state placed in evidence the transcript of the defendant's April 4, 2006 court appearance. The defendant testified that he was present in court on April 4, 2006, when his attorney requested May 5, 2006, as the next court date. The date

of the defendant's next court appearance was stated twice on the record in the defendant's presence, once by his attorney and once by the court. On April 4, 2006, the defendant's attorney stated that the purpose of the defendant's May 5, 2006 court appearance was for "victim contact." The state argued during its rebuttal that the fact that "victim contact" was scheduled for May 5, 2006, gave the defendant a reason to not appear in court intentionally on that date because at that point, the prosecutors would likely choose to move forward with the case, and the defendant was acutely aware of this, given his prior stalking conviction. The defendant did not contact his attorney or the court at any point after April 4 to confirm his May court date.[3]

Under the standard of review applicable to the facts of this case, the jury reasonably could have found, on the basis of the evidence presented and the reasonable inferences to be drawn therefrom, that the defendant's actions were intentional and that he therefore wilfully failed to appear in court on May 5, 2006. Moreover, although the jurors could have accepted the defendant's uncorroborated testimony that he mistakenly believed that his court date was actually May 16, 2006, they did not.

We note that the trial judge acknowledged that this was a very close case. The court went so far as to state during sentencing that "I sat through the trial and heard the testimony. I must say that I did not think the state's case on failure to appear was overwhelming. It was a very close case. It could well have been—a reasonable person could have found the defendant not guilty on that and concluded that the defendant made a mistake about the date. The jury found him guilty, and I must give some deference to [its] determination and decision, which was reached by six people after a day or so of deliberation."

Although this is a very close case, "we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Jason B.*, supra, 111 Conn. App. 363. The jury listened to the defendant's testimony about why he missed his court date and chose to find him not credible; furthermore, the state put forth evidence regarding potential reasons why the defendant would not have wanted to be in court that day, and there was no question that he was present when his next court date was selected and announced. We conclude, therefore, that there was sufficient evidence from which the jury could have found the defendant guilty of failure to appear in the first degree.

The defendant additionally argues that because the transcript does not indicate that he was specifically addressed by the court regarding his next court date, this somehow bears on whether he wilfully failed to

appear in court. The defendant has not provided any analysis of this claim, however, nor does he cite any legal authority that requires the court to address a defendant directly during this type of proceeding. "[W]here the parties cite no law and provide no analysis of their claims, we do not review such claims . . . ." *State* v. *Glenn*, 97 Conn. App. 719, 737 n.17, 906 A.2d 705 (2006), cert. denied, 281 Conn. 913, 916 A.2d 55 (2007).

II

The defendant next claims that the prosecutor's remarks during closing argument amounted to prosecutorial impropriety,[4] and, as such, this court should set aside the conviction of failure to appear in the first degree.[5] We agree.

A

During closing argument, while addressing the charge of failure to appear in the first degree, the prosecutor stated: "[The defendant] admitted to knowing [and] standing in front of the judge and saying, yeah, I knew my court date was May 5. I heard it twice. He knew his court date was May 5, yet on May 5, where was [the defendant]? He wasn't in court. You heard the testimony from the [court] clerk. He was ordered rearrested. His bond was forfeited, and he was ordered rearrested. Why does a rearrest happen, Madam Clerk—when the defendant isn't in court? Did the defendant wilfully fail to appear in court on May 5, 2006? I think he did. Is it safe to assume [that the defendant], sometime after May 5, when he realized that he got rearrested, conveniently came up with the new court date of May 16? I think it's pretty safe to assume that, ladies and gentlemen."

Our Supreme Court "previously [has] recognized that a claim of prosecutorial impropriety, even in the absence of an objection, has constitutional implications and requires a due process analysis under *State* v. *Williams*, 204 Conn. 523, 535–40, 529 A.2d 653 (1987). . . . In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the 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 reasonable 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. *Gould*, 290 Conn. 70, 77–78, 961 A.2d 975 (2009).[6]

The defendant contends that the prosecutor's remarks were improper because a prosecutor is not permitted to inject a personal opinion regarding a defendant's guilt or a witness' credibility into closing argument. The state argues that the statements in question, the two statements beginning with "I think," were isolated instances and were proper rhetorical devices used while marshaling the evidence in the case.

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, 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. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 367–68, 924 A.2d 99, cert. denied, U.S. , 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

"It is not improper for a prosecutor to ask the jury to draw inferences and to exercise common sense. . . . A prosecutor may urge the jury to find for stated reasons that a witness was truthful or untruthful. . . . A prosecutor may also remark on the motives that a witness may have to lie, or not to lie, as the case may be." (Citations omitted; internal quotation marks omitted.) *State* v. *Felix*, 111 Conn. App. 801, 811–12, 961 A.2d 458 (2008). What a prosecutor may not do is express an opinion as to the guilt of the defendant because "[s]uch 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." (Internal quotation marks omitted.) *State* v. *Moody*, 77 Conn. App. 197, 216, 822 A.2d 990, cert. denied, 264 Conn. 918, 827 A.2d 707, cert. denied, 540 U.S. 1058, 124 S. Ct. 831, 157 L. Ed. 2d 714 (2003).

Furthermore, a prosecutor's argument may quickly become improper with the use of the pronoun "I."

"Undoubtedly, using the pronoun I in an argument increases the chances that appropriately structured arguments will deteriorate into expressions of personal opinion." (Internal quotation marks omitted.) Id., 217. Although "[t]he mere use of phrases such as *I would think*, *I would submit*, and *I really don't think*, does not transform a closing [argument] into the improper assertions of personal opinion by the [prosecutor]"; (emphasis added; internal quotation marks omitted) *State* v. *Santiago*, 103 Conn. App. 406, 421, 931 A.2d 298, cert. denied, 284 Conn. 937, 937 A.2d 695 (2007); see also *Jenkins* v. *Commissioner of Correction*, 52 Conn. App. 385, 400, 726 A.2d 657, cert. denied, 249 Conn. 920, 733 A.2d 233 (1999); the prosecutor is not permitted to express an opinion as to the credibility of witnesses. *State* v. *Bermudez*, 274 Conn. 581, 590, 876 A.2d 1162 (2005), after remand, 95 Conn. App. 577, 897 A.2d 661 (2007). If the remarks appropriately relate to the evidence at trial and posit a reasonable conclusion that could have been reached by the jury without the prosecutor's personal knowledge of the case, they are less likely to be improper. See *State* v. *Smith*, 110 Conn. App. 70, 84, 954 A.2d 202, cert. denied, 289 Conn. 954, 961 A.2d 422 (2008); see also *State* v. *Luster*, 279 Conn. 414, 436, 902 A.2d 636 (2006).

Unlike the situation in *State* v. *Moody*, supra, 77 Conn. App. 197, in which the prosecutor's use of the phrases "I believe" and "I feel" to comment on the evidence was held not to constitute improper argument because the comments clearly related to the strength of the evidence and not to the prosecutor's personal belief about the defendant's guilt; id., 217; in this case, the prosecutor used the phrase "I think" more than once to comment on the one element of the crime of failure to appear for which the state had very little evidence. The element of wilfulness, to which the prosecutor's comments were directed, was the only contested element of the crime. Although in *Moody* the court held that "[b]ecause the prosecutor specifically was addressing the strength of the evidence presented at trial, there was no danger that the jury would infer that his comments were based on his personal knowledge of matters not in evidence"; id.; here, the evidence presented at trial relating to the wilfulness of the defendant's conduct was certainly not overwhelming.

This language was more than the use of "proper rhetorical devices," as the state tries to characterize it. Cf. *State* v. *Thompson*, 266 Conn. 440, 283, 832 A.2d 626 (2003) ("[t]he mere fact that the prosecutor employed the rhetorical device of incorporating a literary theme into his closing argument did not render his remarks improper"); *State* v. *Sargent*, 87 Conn. App. 24, 35, 864 A.2d 20, cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005) (after prosecutor commented that defendant did not hand police officer business card identifying himself as crack dealer, court held it was not improper and

noted that "the comment was not expressed as a statement of personal opinion about the defendant, but was merely a rhetorical device used to counter the jury's potential unrealistic expectations regarding the availability of certain evidence"). Taken in context, this was the personal opinion of the prosecutor and was improper. "[W]hen the evidence could lead a jury to infer the factual conclusion about which the prosecutor expresses his personal opinion, we conclude that the challenged remarks fall close enough to the line to also warrant our further review." *State* v. *Dews*, 87 Conn. App. 63, 77, 864 A.2d 59, cert. denied, 274 Conn. 901, 876 A.2d 13 (2005).

B

Having concluded in part II A that the prosecutor's conduct rose to the level of impropriety, we must now determine whether that impropriety was so serious as to amount to a denial of due process. We conclude that it was.

To determine whether the defendant was deprived of his due process right to a fair trial as a result of the impropriety, we must apply the six factors set forth in *State* v. *Williams*, supra, 204 Conn. 540. "These factors include whether (1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak . . . ." (Internal quotation marks omitted.) *State* v. *Gordon*, 104 Conn. App. 69, 74, 931 A.2d 939, cert. denied, 284 Conn. 937, 937 A.2d 695 (2007).

Taking the *Williams* factors in order, there is nothing in the record to indicate that the defendant did anything to invite the impropriety. The second factor looks at the severity of the impropriety, for which "our Supreme Court has set a high bar." *State* v. *Dews*, supra, 87 Conn. App. 77. In *State* v. *Thompson*, supra, 266 Conn. 479–80, our Supreme Court held that the impropriety was not severe when the prosecutor repeatedly attacked the veracity of the defendant's two principal witnesses, appealed to the emotions of the jurors by urging them to give the victim's family justice and urged the jury to use impeachment evidence substantively. See *State* v. *Dews*, supra, 77–78. Using the standard set by the *Thompson* court, we conclude that the prosecutor's conduct in this case was far less egregious and that the defendant has not met the severity prong. In addition, defense counsel failed to object during trial, and "[a] failure to object demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Gordon*, supra, 104 Conn. App. 82.

The third prong measures the frequency of the instances of possible impropriety. Id., 78. Here, there were two isolated statements made during closing argument, which the prosecutor began with the words "I think." This does not rise to the level of being frequent, particularly because the improper comments occurred only during closing argument, where we typically allow some latitude, and they represented a small portion of the prosecutor's argument. See *State* v. *Kelly*, 106 Conn. App. 414, 434, 942 A.2d 440 (2008).

The fourth prong relates to the centrality of the impropriety to the issues of the case. Id. This is a focal point of our analysis. The sole issue to be determined by the jury was whether the defendant wilfully failed to appear in court on May 5, 2006. There was no question that the defendant had a court date on May 5, there was no question that he had been informed of his May 5 court date and there was no question that he did not appear in court on May 5. The jury's only job was to determine whether the defendant's failure to appear was wilful. In his closing argument, the prosecutor clearly expressed his personal opinion as to whether the defendant's conduct was wilful by arguing: "Did the defendant wilfully fail to appear in court on May 5, 2006? I think he did." The prosecutor also expressed his opinion about the guilt of the defendant, stating: "I think it's pretty safe to assume that [the defendant made up an excuse for missing his court date], ladies and gentlemen." The evidence of the defendant's guilt was not strong, yet the prosecutor gave his personal opinion about the one contested element of the crime. "It is a well established principle that the elements of a crime are critical issues in a state's case." *State* v. *Gordon*, supra, 104 Conn. App. 83. The prosecutor's comments were directed squarely at the central issue of the failure to appear charge.

Fifth, we assess the strength of the curative measures adopted by the court. The defendant did not object to the prosecutor's statements or request any curative instructions, and the court did not give any. Although the court did not provide the jury with any curative instructions, in the general jury charge, the judge instructed the jury on the basic guiding principle that "[c]ertain things are not evidence, and you may not consider them in deciding what the facts are. These include . . . arguments and statements by lawyers. The lawyers are not witnesses. What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence." "In the absence of a showing that the jury failed or declined to follow the court's [general] instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Gordon*, supra, 104 Conn. App. 83–84.

The sixth and final factor is the strength of the state's case. We have acknowledged, and the court pointed

out, that the state did not have a particularly strong case with regard to proving the wilfulness of the defendant's conduct. The court stated that it was a very close case but that it must defer to the jury's assessment of the credibility of the witnesses. The only evidence that the state presented on the issue was the transcript of the April 4, 2006 court appearance during which it was mentioned that the defendant's next court date of May 5, 2006, would include victim contact. The state posited in its closing argument that the defendant wanted to avoid victim contact, as it would signify moving forward with the trial, which is why he failed to appear in court on May 5, 2006. The defendant testified and acknowledged that his next court date was stated on the record twice in his presence and that he did not show up in court on May 5, 2006, because he thought his next court date was May 16, 2006. Beyond that, the state presented no evidence tending to prove the wilfulness of the defendant's conduct.

The ultimate question is, in light of the conduct that we have concluded was improper, "whether the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 723, 793 A.2d 226 (2002). We emphasize that this was a one issue case. The prosecutor directed his comments at the only contested issue and expressed his personal opinion as to whether the defendant's conduct was wilful, and thereby, in effect, did the jurors' jobs for them. It cannot be known whether the jury would have concluded that the defendant's conduct was wilful without the prosecutor's giving such a conclusion his personal stamp of approval during closing argument. Such conduct renders the trial fundamentally unfair.

After a review of the record of the entire trial, and taking into account how central the prosecutor's statements were to the sole contested issue in the case, as well as the lack of evidence presented by the state on the issue of the defendant's wilfulness, we conclude that the defendant was deprived of his right to a fair trial. Our conclusion requires the reversal of the defendant's failure to appear conviction.

III

Finally, we address the defendant's claim that the court incorrectly found that he violated his probation. The defendant asserts that because the violation of probation charge was based on the charge of stalking in the first degree, of which he was acquitted, the finding of violation of probation cannot stand. In the alternative, the defendant claims that his original period of probation had expired prior to his arrest on the charge of stalking in the first degree. We disagree with both contentions.

The following facts are relevant to the defendant's claim. As previously noted, prior to the initiation of the current charges against him, the defendant had been convicted of stalking in the second degree and breach of the peace on March 19, 2003. He was sentenced on May 16, 2003, and given a total effective term of eighteen months incarceration, execution suspended after ninety days, and two years probation. The conditions of probation included no contact, direct or indirect, with the stalking victim or the victim's family, including eye contact, and submission to psychological evaluation, counseling and treatment if any was deemed necessary.[7] The defendant received and signed these conditions of probation. The defendant's period of probation began on August 8, 2003, the date that he was released from prison, and was to terminate on August 8, 2005. According to the information, the defendant committed a violation of probation under § 53a-32 on or about October 26, 2004, and the state represented that a warrant was issued for his arrest on October 27, 2004. Prior to February 28, 2005, the defendant admitted the violation of probation on the basis of his failure to comply with the ordered treatment and his failure to report to his probation officer as directed. The court gave the defendant the choice either to earn a suspended sentence or to continue with his probation with all of the original conditions. The defendant chose to continue with his probation, and on February 28, 2005, the court struck his admission to the violation and continued his probation with the original conditions.[8]

On November 28, 2005, the defendant was charged with stalking in the first degree involving the stalking victim of his prior case. A warrant for the defendant's arrest for a violation of probation under § 53a-32 was issued on December 8, 2005, by *Cronan*, *J.*, and the defendant was arrested on December 14, 2005. A violation of probation hearing was held on September 26 and October 4, 2006, immediately following the jury verdict finding the defendant not guilty of stalking in the first degree and guilty of failure to appear in the first degree in connection with the November 28, 2005 charges. The court found after the hearing that a violation of probation had been established. The defendant's probation was revoked, and he was sentenced to serve nine months incarceration, which was the remainder of his suspended sentence.

At the conclusion of the violation of probation hearing on October 4, 2006, the state argued, and the court found, that the defendant's probationary period was tolled during the 2005 violation of probation proceedings, which pushed forward the defendant's probation termination date from August 8 to December 10, 2005. With the new date of termination being December 10, 2005, the court found that the defendant was still on probation at the time of the conduct that led to his

arrest on the charge of stalking in the first degree in the present case. The court stated: "There really is no dispute as to whether [the defendant] was in violation of the conditions of probation, one of which was [that] he have no contact, direct or indirect, with the complaining victim in this case. And I did find, I do find that the defendant did have, at the very minimal, indirect contact by following the [victim] on a motor vehicle trip through Bristol and Plainville."

"[A] probation revocation hearing has two distinct components. . . . The trial court must first conduct an adversarial evidentiary hearing to determine whether the defendant has in fact violated a condition of probation. . . . If the trial court determines that the evidence has established a violation of a condition of probation, then it proceeds to the second component of probation revocation, the determination of whether the defendant's probationary status should be revoked." (Internal quotation marks omitted.) *State* v. *Bouteiller*, 112 Conn. App. 40, 51, 961 A.2d 995 (2009). "As a reviewing court, we may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous." (Internal quotation marks omitted.) *State* v. *Durant*, 94 Conn. App. 219, 224, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007).

A

The defendant first argues that the court incorrectly found him in violation of his probation on the basis of his stalking the victim. The defendant contends that because he was found not guilty by the jury on the underlying charge of stalking in the first degree, the court could not have found him to be in violation of his probation.

The defendant's contention that his acquittal on the underlying stalking charge prohibits a finding of a probation violation is misplaced. "[T]he purpose of a probation revocation hearing is to determine whether a defendant's conduct constituted an act sufficient to support a revocation of probation . . . rather than whether the defendant had, beyond a reasonable doubt, violated a criminal law. The proof of the conduct at the hearing need not be sufficient to sustain a violation of a criminal law." (Internal quotation marks omitted.) Id., 226.

The defendant incorrectly asserts that it was the actual criminal charge of stalking in the first degree that was the basis of his probation violation. The court clearly based its finding on the fact that the defendant violated the conditions of his probation by having indirect contact with the victim. That finding was not clearly erroneous. Defense counsel even acknowledged during the violation of probation hearing the fact that the defendant had contact with the victim and that such

contact was a violation of the defendant's probation.[9] Consequently, we find the defendant's claim to be without merit.

B

The defendant argues in the alternative that the court improperly found a violation of probation because his probationary period had expired by the time he engaged in the conduct that formed the basis of the finding of the violation of probation. The state asserts that the period of probation was tolled beginning with an arrest warrant being issued for the defendant for a violation of probation on October 27, 2004, and, as such, he was still under probation when he engaged in indirect contact with the victim on October 23, 2005, in violation of his probation. We agree with the state.

Under General Statues § 53a-31 (b), "[i]ssuance of a warrant or notice to appear for violation pursuant to section 53a-32 shall interrupt the period of the sentence as of the date of such issuance until a final determination as to the violation has been made by the court. . . ." The case law is clear that once a warrant for a violation of probation is issued, the remainder of the time on the defendant's sentence is to be served at the conclusion of the probation violation proceedings. "The plain language of § 53a-31 (b) provides that the period of the sentence is interrupted by the issuance of a warrant, referring to a tolling of the time remaining on a defendant's sentence. This ensures that if a defendant has a six month suspended sentence, for example, and a violation of probation warrant is issued and the violation hearing is not concluded for one year that the defendant still has six months remaining on the sentence." *State* v. *Johnson*, 75 Conn. App. 643, 657, 817 A.2d 708 (2003); see also *State* v. *Klinger*, 50 Conn. App. 216, 222, 718 A.2d 446 (1998) (issuance of warrant for violation of probation tolled term of defendant's probation, which, had warrant not been issued, would have terminated on original termination date).

There is no dispute that the defendant's probation began on August 8, 2003, the day that he was released from prison, and initially was to terminate on August 8, 2005.[10] Under § 53a-31 (b), his period of probation was tolled beginning on October 27, 2004, when a warrant was issued for a violation of probation, until February 28, 2005, the date that the court struck his admission to the probation violation and concluded the probation violation proceedings. As a result of the tolling, the new date for the termination of the defendant's probation was December 10, 2005. As illustrated previously, he unquestionably violated the terms of his probation by indirectly contacting the victim on October 23, 2005, well within the period of his probation.

The defendant's argument that his period of probation was not tolled because his 2005 violation of proba-

tion hearing ended with the court's striking his admission of a violation on February 23, 2005, and continuing him on his original conditions of probation is without merit. He claims that by striking the violation of probation, the court effectively dismissed the action so that the defendant's probation would continue, and therefore the tolling of § 53a-31 (b) did not apply. The statute clearly states that it is the issuance of the warrant that tolls the period of probation; whether the probationary period is tolled does not depend on the outcome of the violation of probation proceedings. After a careful review of the statute, we find no support for the defendant's contention that if a violation of probation hearing ends in a dismissal, his probationary period is not tolled. The defendant's claim, therefore, fails.

The judgment of conviction of failure to appear in the first degree is reversed and the case is remanded for a new trial on that charge. The judgments are affirmed in all other respects.

In this opinion GRUENDEL, J., concurred.

[1] "A person is guilty of stalking in the first degree when he commits stalking in the second degree as provided in section 53a-181d and (1) he has previously been convicted of this section or section 53a-181d, or (2) such conduct violates a court order in effect at the time of the offense, or (3) the other person is under sixteen years of age. . . . Stalking in the first degree is a class D felony." General Statutes § 53a-181c.

General Statutes § 53a-181d (a) defines stalking in the second degree as occurring "when, with intent to cause another person to fear for his physical safety, [a person] wilfully and repeatedly follows or lies in wait for such other person and causes such other person to reasonably fear for his physical safety."

[2] The defendant was also convicted of breach of the peace in the second degree in violation of General Statutes § 53a-181 on that date.

[3] This case is distinguishable from *State* v. *Khadijah*, 98 Conn. App. 409, 415, 909 A.2d 65 (2006), appeal dismissed, 284 Conn. 429, 934 A.2d 241 (2007), in which this court reversed the defendant's conviction of failure to appear in the first degree where the evidence showed that on the day in question she had asked her boyfriend to wake her up if she fell asleep on the morning of her court date and that once her attorney telephoned her, she immediately went to court.

The court held that "[w]orking late the night before a court appearance, pursuant to a regularly kept work schedule, failing to set an alarm clock or asking a friend to awaken her from a potentially inadvertent doze does not amount to purposefully and intentionally absenting oneself from the courthouse." Id., 418. In the case at hand, unlike in *Khadijah*, the jury was presented with evidence from which it could have determined that the defendant wilfully failed to appear.

[4] Although the defendant uses the term "prosecutorial misconduct" throughout his brief, we note that our Supreme Court has stated that "[t]he use of the term 'prosecutorial impropriety,' when reviewing allegedly improper statements by a prosecutor at trial, is more appropriate than the traditional term of 'prosecutorial misconduct' . . . . Prosecutors make countless discretionary decisions under the stress and pressure of trial. A judgment call that we later determine on appeal to have been made improperly should not be called 'misconduct' simply because it was made by a prosecutor." (Citation omitted.) *State* v. *Fauci*, 282 Conn. 23, 26 n.2, 917 A.2d 978 (2007).

[5] The defendant seeks review of his claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because he did not object to the prosecutor's statements during the trial. As review of a claim of prosecutorial impropriety is required under *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004), a *Golding* analysis is unnecessary.

[6] To the extent that the dissent suggests that *State* v. *Cassidy*, 236 Conn.

112, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part by *State* v. *Alexander*, 254 Conn. 290, 296, 755 A.2d 868 (2000), alters the prosecutorial impropriety analysis, we note that *Cassidy* explicitly was decided under the confrontation clause, rather than the due process basis traditionally employed in cases of prosecutorial impropriety. *State* v. *Cassidy*, supra, 129–32; see also id., 147 n.2 (*Callahan*, *J.*, dissenting) (stating that "[t]he majority does not engage in [a due process prosecutorial impropriety] analysis but rather finds a violation of the defendant's sixth amendment right to confront the witnesses against him").

[7] The original file in this case could not be located by the Superior Court. The deputy chief clerk of the geographical area number seventeen court provided an affidavit and a partial copy of the information and a transcript of the jury's verdict and sentencing.

[8] Additional conditions of probation also were imposed at that time, including (1) continuing counseling, (2) successfully completing all phases of counseling and (3) reporting to a probation officer without confrontation.

[9] "The Court: And you're not challenging at this time any finding that I might make that—putting aside the question of the timeliness of [the] violation—that the defendant, by having, as the very least, indirect contact with the victim was in violation of the conditions of probation?

"[Defense Counsel]: Based upon the evidence, Your Honor, and our failure to admit any evidence to the contrary, I feel that I couldn't be honest to the court if I said no."

[10] "A period of probation or conditional discharge commences on the day it is imposed, except that, where it is preceded by a sentence of imprisonment with execution suspended after a period of imprisonment set by the court, it commences on the day the defendant is released from such imprisonment. . . ." General Statutes § 53a-31 (a).