BISHOP, J., dissenting. Don Quixote cried, "facts are the enemy of truth."[1] In the law, it is a truism that it is improper for a prosecutor to express a personal opinion while arguing to the jury. To the extent that language is determinate, one might believe that expressions by a prosecutor such as "I think" or "I do not think" would be uniformly disapproved as improper expressions of personal opinion, but that is not necessarily so. In the life of the law, we learn that sometimes factual context trumps generalities. I believe this may be such a case.

I agree with my colleagues that the prosecutor's statements in closing argument to the jury appear to be expressions of personal opinion. The teaching of our Supreme Court, however, is that not all statements of personal opinion are what they seem to be, and, even if a prosecutor improperly expresses his or her personal opinion, an isolated impropriety by a prosecutor does not warrant reversal of a judgment of conviction unless the prosecutor's conduct is grossly egregious. Because, in this case, the prosecutor's comments of questionable propriety were not egregious, I cannot conclude, in light of our Supreme Court's recent treatment of claims of prosecutorial impropriety, that the defendant, Gary D. Gibson, was deprived of a fair trial. Accordingly, I respectfully dissent.

The underlying facts are straightforward. The record reveals that the defendant failed to appear in court on an assigned date. At trial, he conceded that he had been notified to be in court on the date in question, but he claimed that his absence was due to a mistake. He contested only the state's claim of wilfulness, an essential element of the offense of failure to appear. In closing argument, the prosecutor stated: "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. He never called the clerk's office, never called his attorney, never called anybody to see if his court date was changed. But he got that court date on April 2, and they told him it was May 5, twice." The defendant claims that these statements by the prosecutor constituted improper expressions of personal opinion that deprived him of a fair trial.

Our analytical pathway is guided by *State* v. *Stevenson*, 269 Conn. 563, 849 A.2d 626 (2004).[2] We assess whether the prosecutor's comments were improper and, if so, whether the defendant was deprived of a fair trial. Id., 572–73. This analysis should take place sequentially. *State* v. *Coney*, 266 Conn. 787, 808, 835 A.2d 977 (2003). "[Impropriety] is [impropriety], regard-

less of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question that may only be resolved in the context of the entire trial . . . .'' Id.

In the case at hand, although I am inclined to agree with the majority that the prosecutor's comments appear to be expressions of personal opinion, our Supreme Court has taught us that such expressions by prosecutors are not always improper, particularly if the trial record contains evidence consistent with the stated opinion. Therefore, what appears to be an opinion may also be viewed as merely a rhetorical device employed to convince the jury to draw an inference from the evidence.

In general, statements of personal opinion by prosecutors are viewed as improper because they are a ''form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Put another way, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . 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. *Fauci*, 282 Conn. 23, 35, 917 A.2d 978 (2007). The *Fauci* court also commented: ''We have held, however, that [i]t is not improper for the prosecutor to comment [on] 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 them 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.'' (Internal quotation marks omitted.) Id., 36. Thus, the fact that there is some evidence regarding the subject of the claimed improper comment suggests that ''I'' statements made by a prosecutor need not always be viewed as the expression of personal opinion but, if drawn from the evidence and not whole cloth, can be seen as a mere rhetorical device used to urge a jury to draw certain inferences from the evidence. This is so even if the prosecutor uses such terms as ''I think'' or ''I believe.'' Even though the Supreme Court has cautioned against the use of such phrases, the court has commented: ''[W]e recognize that the use of the word I is part of our everyday parlance and . . . because of established speech patterns, it cannot always easily be eliminated completely from extemporaneous elocution.'' (Internal quotation marks omitted.) *State v. Luster*, 279 Conn. 414, 436, 902 A.2d 636 (2006). The court continued: ''[T]he state's attorney should not

be put in the rhetorical straightjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows . . . . Therefore, if it is clear that the prosecutor is arguing from the evidence presented at trial, instead of giving improper unsworn testimony with the suggestion of secret knowledge, his or her occasional use of the first person does not constitute [impropriety]." (Internal quotation marks omitted.) Id.

In *State* v. *Ancona*, 270 Conn. 568, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005), a case involving claims of police misconduct, the court did not find the following comments by a prosecutor to be the improper expression of personal opinion regarding witness credibility: "I don't believe for a minute that all these officers were either true to themselves or spoke the whole truth;" (internal quotation marks omitted) id., 607; and, "[a] lot of the officers that were there that night weren't involved in the search for the truth. And when they testified here, they weren't involved in the search for the truth" (Internal quotation marks omitted.) Id., 608. The court's reasoning is instructive. In finding that the prosecutor's comments did not constitute the impermissible expression of personal opinion, the court noted that because there was sufficient circumstantial evidence to support the prosecutor's theory that a number of police officers had engaged in a coverup, the prosecutor's argument urging the jury to credit that theory was not improper, and, although the prosecutor should have couched his argument in terms of the state's theory of the case rather than expressing it in terms of his belief, his comment regarding his belief was isolated and did not carry the suggestion that he possessed information unavailable to the jury. Id. The court continued: "We nevertheless agree with the defendant that the state's attorney should not have expressed his own belief that those officers had testified untruthfully. Rather, he should have couched his argument in terms of the state's theory of the case. . . . Moreover, the state's attorney's use of the first person did not carry the suggestion that he possessed information unavailable to the jury; on the contrary, the state's attorney recited the specific evidentiary predicate for the inference that he was urging the jury to make." Id. It is noteworthy that in *Ancona*, the court found that the prosecutor's comments were not improper even though the court found that the prosecutor had couched his statements in terms of his personal beliefs.

In *State* v. *Luster*, supra, 279 Conn. 414, a case in which there was a significant dispute over whether the defendant had intended to kill or cause physical injury to the decedent, our Supreme Court found that the following comment was merely a rhetorical device and not an expression of personal opinion: "When you bring a pistol to a fistfight, and you cause the death of another

person with a shot to the heart and a shot to the back, that says something about his intent. Was he trying to cause serious physical injury? *I don't think so.*" (Emphasis in original; internal quotation marks omitted.) Id., 437. As in this case, the issue in *Luster* was one of intent.

The lessons of *Ancona* and *Luster* are that not all statements couched as personal opinion are improper or even what they seem to be, and their propriety likely depends on whether there is evidence in the record from which a jury may determine that the prosecutor is simply urging it to draw inferences. In determining that the prosecutor's comment was not an expression of personal opinion, the *Luster* court found, rather, that the statement was a device to suggest an inference that could be drawn from the evidence. Id.

In the case at hand, in which the jury had heard conflicting reasons for the defendant's failure to appear in court on the assigned date, the prosecutor's comments can be seen as merely suggesting an inference that could be drawn from the evidence. Additionally, the prosecutor's comments did not suggest that he had some special knowledge regarding whether the defendant's failure to appear in court on the assigned date was wilful or merely a mistake. Thus, I cannot conclude that the comments likely confused the jury.

Because it is a very close question whether these comments were expressions of personal opinion or a rhetorical device used to argue an inference from the evidence, I consider, as well, whether the comments, if improper, deprived the defendant of a fair trial.[3]

To assess whether prosecutorial impropriety has deprived a defendant 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." (Internal quotation marks omitted). *State* v. *Salamon*, 287 Conn. 509, 551–52, 949 A.2d 1092 (2008). Put another way, the question we must answer is "whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 50. Indeed, our Supreme Court has opined that to establish the denial of a fair trial, a defendant must demonstrate " 'substantial prejudice.' " *State* v. *Coney*, supra, 266 Conn. 806.

In making this assessment, we turn to the six factors enumerated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), namely: "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." (Citations omitted.) In addition, in assessing the question of impropriety, we examine the record to determine whether trial counsel timely objected to the alleged improprieties.

In this instance, the *Williams* factors point in both directions. The prosecutor's comments regarding the defendant's wilfulness were not invited by defense counsel; they concerned the only contested issue in the case; and, as noted by the trial judge, the state's case was not strong. On the other hand, the impropriety, if so, was not severe, egregious or pervasive, and, even though the court gave no curative instruction tailored to the comments, the court's general instructions were on point. Finally, trial counsel did not object to the comments.

In judging the severity of the conduct when defense counsel does not object, our Supreme Court has opined that "only instances of grossly egregious conduct will be severe enough to mandate reversal." *State* v. *Thompson*, 266 Conn. 440, 480, 832 A.2d 626 (2003). Indeed, there appear to be degrees of egregiousness with only the most egregious warranting reversal of the judgment. The court, in *Thompson*, concluded that even though it was " 'inexcusable' "; id.; for the prosecutor to suggest that defense witnesses were facing impending charges, the question it confronted was not whether the prosecutor should be disciplined but, rather, whether the defendant was deprived of a fair trial by the conduct. The court concluded that the remark was not "sufficiently egregious" to warrant reversal. Id.

In assessing the severity of the claimed impropriety, it also appears to be highly relevant that the possible impropriety was isolated. For example, in *State* v. *Heredia*, 253 Conn. 543, 754 A.2d 114 (2000), the court emphasized the absence of a pattern of improper behavior in making its determination that the defendant had not been denied a fair trial. The court commented: "[T]here was no pattern of prosecutorial [impropriety], and . . . the sole, isolated instance of improper argument did not deprive the defendant of a fair trial." Id., 561. Similarly, the court in *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000), opined that a defendant "may not prevail under [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)] or the plain error doctrine [embodied in Practice Book § 60-5] unless the prosecutorial impropriety was so pervasive or egregious as to constitute an infringement of the defendant's right to a fair trial . . . ."[4] (Internal quotation marks omitted.) *State* v. *Floyd*, supra, 749.

Even when an instance of impropriety relates to a

central issue in the case, it is not necessarily fatal to a defendant's conviction. In *State* v. *Warholic*, 278 Conn. 354, 897 A.2d 569 (2006), the Supreme Court affirmed the defendant's conviction despite its finding that the prosecutor had committed numerous acts of impropriety, including one that related to a central issue in the case. There, the court found that the prosecutor committed improprieties by attempting to elicit the jury's sympathy for the victim by gratuitously remarking that at the time of the alleged sexual assaults, the victim was a "cute little kid," by appealing to the jury's emotions in stating that the victim's mother refused to come to the state's attorney's office and that child molesters are "out there" and "among us," and by committing a *Singh* violation[5] during the defendant's cross-examination. (Internal quotation marks omitted.) Id., 374–76. The court concluded, as well, that the state's case was not strong. Id., 397. Nevertheless, and despite finding that the prosecutor's *Singh* violation impacted the victim's credibility, the central issue in the case, the court determined that the prosecutor's improper conduct did not warrant a new trial. The *Warholic* court stated: "In sum, we conclude that, although the state's case was reliant on [the victim's] credibility, the one instance of [impropriety] that was central to the issue of credibility was not severe and was cured by the trial court's general instructions, and that the other instances of [impropriety] were either not severe or were cured by the trial court's prompt curative instructions. We therefore conclude that the defendant was not deprived of his due process right to a fair trial."[6] Id. 404. As in *Warholic*, the court in this matter gave the general instruction that the jury is required to come to its decision on the basis of the evidence and that arguments of counsel do not constitute evidence. Against that jurisprudential backdrop, I cannot conclude that the prosecutor's possibly improper conduct in the case at hand so infected the trial that the defendant was deprived of a fair trial.

Additionally, it is significant that the defendant did not object at trial to the claimed impropriety. In this regard, our Supreme Court has opined: "Although a defendant's failure to object to improprieties does not preclude review of his claims . . . [w]hen defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial. . . . [T]he fact that defense counsel did not object to one or more incidents of [impropriety] must be considered in determining whether and to what extent the [impropriety] contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted." (Citation omitted; internal quotation marks omitted.) *State* v. *Bell*, 283 Conn. 748, 782, 931 A.2d 198 (2007). In *State* v. *Ritrovato*, 280 Conn. 36, 905 A.2d 1079 (2006), the court commented: "We emphasize the responsibility

of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time. . . . Moreover as the Appellate Court has observed, defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument. . . . Accordingly, we emphasize that counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . . Put differently [claims of prosecutorial impropriety are] not intended to provide an avenue for the tactical sandbagging of our trial courts, but rather, to address gross prosecutorial improprieties that . . . have deprived a criminal defendant of his right to a fair trial." (Internal quotation marks omitted.) Id., 68–69.

Finally, in assessing a claim of prosecutorial impropriety, our Supreme Court has not ever suggested that the nature or seriousness of the charged crime is relevant to our assessment on appeal. Indeed, due process has no sliding scale. Thus, it is reasonable to believe that if multiple instances of prosecutorial impropriety, including one bearing on the principal issue in a close case, are insufficient to warrant reversal of a judgment of conviction for a heinous, violent crime, an isolated instance of impropriety relating to a central issue in a close case involving a victimless, nonviolent crime will be similarly inadequate to entitle a defendant to a new trial. This is the lens through which I view the case at hand, as I believe it is only by the consistent application of legal principles that the law garners public trust.

Applying the lessons of our Supreme Court to the present case takes me on a path away from the majority. Because there was trial evidence bearing on the issue of wilfulness, the prosecutor's comments can be seen not as expressions of personal opinion but, rather, as a rhetorical device aimed at an inference the jury could fairly make from the evidence. Additionally, defense counsel did not object to the comments, and even though the remarks under scrutiny bore on a central issue in a close case, they were not severe or egregious, let alone grossly egregious, nor were they pervasive. For the foregoing reasons, I cannot conclude that the defendant was deprived of his due process right to a fair trial, and, therefore, I would affirm the judgment of conviction. Accordingly, I respectfully dissent.

[1] D. Wasserman, Man of La Mancha (Random House Publishing Group, 1966).

[2] If, however, the defendant had claimed that the prosecutor's conduct bore directly on a specific constitutional right, I would be less confident of

our proper analytical route. In 1996, in *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), our Supreme Court appeared to adopt the view that once a defendant has established prosecutorial impropriety bearing on a constitutional right, the state has the burden of demonstrating that its impropriety did not deprive the defendant of a fair trial. Id., 129. In *Cassidy*, the court stated: "Because the state's case rested entirely upon the uncorroborated testimony of the victim; because the relative credibility of the defendant and the victim was critical to the jury's resolution of the case; because there was no independent evidence of the crimes to assist the jury in that determination; and because the trial court failed to give a curative instruction as requested by the defendant, *we are not persuaded beyond a reasonable doubt that the jury was not influenced by the prosecutor's improper closing argument. The state, therefore, has failed to establish that the remarks were harmless.*" (Emphasis added)." Id., 131–32.

Thus, in *Cassidy*, the court imposed the burden of proving harmlessness on the state once it determined that the prosecutor's comments bore on the defendant's constitutional right to be present during the entirety of the trial. Although the court in *State* v. *Alexander*, 254 Conn. 290, 296, 755 A.2d 868 (2000), overturned *Cassidy*'s holding that such comments actually infringe on a defendant's constitutional right to be present during trial, the principle of *Cassidy* appears intact.

When the court in *Stevenson*, however, abandoned the requirement that claims of prosecutorial impropriety be analyzed under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and posited, in its stead, the requirement that a defendant on appeal demonstrate both an impropriety and its harmlessness by utilizing the factors enumerated in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987), the court, sub silentio, may have relieved the state of demonstrating the harmlessness of an impropriety bearing on a constitutionally protected right. Given the chance to clarify this issue in *State* v. *Warholic*, 278 Conn. 354, 897 A.2d 569 (2006), the court declined. There, even though the court found numerous instances of prosecutorial impropriety, none appears to have directly infringed on a constitutional right. The court declined a request by the defendant for the court to establish a bright line rule that once a defendant on appeal establishes prosecutorial impropriety, the burden should shift to the state to prove the harmlessness of the impropriety beyond a reasonable doubt.

Nevertheless, *Cassidy* and *Warholic* can be harmonized on the basis that when the claimed prosecutorial impropriety directly implicates a specific constitutional right, such as, perhaps, the right of confrontation, or to present a defense, or to remain silent, the burden of harmlessness will still shift to the state, but when the claim of impropriety does not directly bear on a specific constitutional right but, rather, implicates due process generally, the defendant retains the burden of demonstrating both the impropriety and the attendant denial of due process.

[3] Although I recognize that the Supreme Court has suggested that the *Stevenson* analysis is a two step process, I note, as well, that the court has looked to the factors enunciated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), when the issue of propriety is a close call. Thus, in *State* v. *Grant*, 286 Conn. 499, 542, 944 A.2d 947, cert. denied, U.S. , 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008), the court noted: "We need not decide whether the prosecutor's comment rose to the level of an impropriety, however, because even if it was improper, we conclude that any impropriety was harmless and did not deprive the defendant of a fair trial."

[4] Although *Floyd* predates *Stevenson*, its wisdom appears to remain pertinent in an appeal in which a defendant raises an unpreserved claim of prosecutorial impropriety.

[5] In *State* v. *Singh*, 259 Conn. 693, 712, 793 A.2d 226 (2002), our Supreme Court held that it is improper to ask a witness to comment on another witness' veracity, in large part because determining the credibility of witnesses is solely within the province of the jury.

[6] Thus, it appears that as to the *Williams* factor concerning curative instructions, when the court has given a general instruction distinguishing argument from evidence and the defendant has both failed to object to a claimed impropriety and failed to seek a curative instruction, the lack of a specific curative instruction is not fatal to maintaining a judgment of conviction. See also *State* v. *Ancona*, supra, 270 Conn. 568, in which the court found some improprieties but concluded, nevertheless, that the defendant was not deprived of a fair trial and noted that "[t]he jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary. . . . In light of the brevity and isolated nature of the improprieties, the trial court's general instructions likely minimized any harm that may

have resulted from the improprieties." (Citation omitted; internal quotation marks omitted.) Id., 616–17.