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BISHOP, J., concurring and dissenting. I agree with the majority that the evidence was sufficient to sustain the trial court's judgment of conviction. I disagree, however, with my colleagues' conclusion that the court incorrectly excluded from evidence a tape of messages left on the answering machine of the defendant, Edan F. Calabrese, and that the exclusion of this evidence likely affected the jury's verdict as to the charges of assault of an elderly person in the third degree in violation of General Statutes § 53a-61a (a) (1) and burglary in the second degree in violation of General Statutes § 53a-102 (a) (1). Accordingly, I would affirm the judgment of the trial court as to the conviction on those charges, as well as the judgment of conviction on the charge of interfering with an officer.

In the case at hand, the pro se defendant attempted to introduce a tape of telephone messages left on his answering machine in October, 2002, by his mother, the victim. The defendant claimed that the messages bore on the victim's credibility because they demonstrated her motive and inclination to fabricate statements and her inability to perceive events accurately when she is intoxicated. The defendant claimed that the victim was intoxicated when she left the messages on his answering machine and, therefore, he argued, the taped messages supported his contention that the statement she made to the police on the evening of the incident was fabricated and the consequence of her intoxication. The court excluded the messages from evidence on the basis of the state's claim that they were not relevant.

In assessing the correctness of the court's ruling, we engage in a three tiered review. Our first question is whether the proffered evidence was relevant. Relevant evidence is evidence "having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. The materiality component requires that the proffered evidence be "material to the determination of the proceeding . . . ." *State v. Bonner*, 290 Conn. 468, 496–97, 964 A. 2d 73 (2008). Additionally, "[r]elevance depends on the issues that must be resolved at trial, not on the particular crime charged." (Internal quotation marks omitted.) *State v. DeJesus*, 270 Conn. 826, 837, 856 A.2d 345 (2004). As noted in the commentary to § 4-1, "[t]he materiality of evidence turns upon what is at issue in the case . . . ." Conn. Code Evid. § 4-1, commentary. Second, if we determine that the proffered evidence was relevant, we must assess whether the court abused its discretion in excluding it. In this step, a reviewing court must be mindful that

“[i]t is the obligation of the party offering the evidence to establish its relevance, and [e]very reasonable presumption should be made in favor of the correctness of the court’s ruling in determining whether there has been an abuse of discretion.” *State v. Johnson*, 107 Conn. App. 188, 194, 944 A.2d 416, cert. denied, 288 Conn. 905, 953 A.2d 650 (2008). Finally, if a reviewing court concludes that evidence was improperly excluded, the court must then engage in an analysis of whether the exclusion was harmful so as to cause reversal. The majority concludes that the court’s evidentiary ruling was improper and harmful. I believe that the court’s evidentiary ruling was within its discretion. Additionally, even if it could be said that the court improperly excluded the proffer, I do not believe that there is a reasonable basis for concluding that the jury’s verdict was “substantially swayed” by the court’s evidentiary ruling.

I begin my analysis with the noncontroversial proposition that the determination of “whether evidence is relevant and material to critical issues in a case is an inherently fact bound inquiry.” (Internal quotation marks omitted.) *State v. Rodriguez*, 107 Conn. App. 685, 710, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008). Rather than conduct such an inquiry on the basis of the facts at hand, the majority appears to rely on the earlier opinion of our Supreme Court in *State v. Calabrese*, 279 Conn. 393, 902 A.2d 1044 (1996), and the state’s concession that the holding of *Calabrese* is binding on the case at hand. The majority’s reliance on the state’s concession that the holding of *Calabrese* renders the evidence relevant in this action is misplaced in light of our jurisprudence that a reviewing court is “not bound by [the] ill advised concessions of any party . . . .” (Citation omitted.) *State v. Reddick*, 224 Conn. 445, 463 n.19, 619 A.2d 453 (1993). As the court in *Reddick* opined, even where the state has made a concession, “[j]ustice does not require that we turn a blind eye to the trial record in adjudicating claims on appeal.” *Id.* Thus, I do not believe that this court is relieved of its independent responsibility of review simply because of the state’s errant concession. In this instance, our responsibility is to consider the appeal on its merits despite the state’s concession that the trial court abused its discretion. See *State v. Avery*, 199 Conn. 377, 379 n.2, 507 A.2d 464 (1986).

Respectfully, I disagree that the outcome of this issue in the present case is determined by *Calabrese*. On the basis of its conclusion that the ruling of the Supreme Court in *Calabrese* binds this court on review, the majority has not engaged in any analysis of the trial court’s ruling; clearly it accorded it no presumption of correctness. If, of course, this action were merely a retrial of the factual issues presented in *Calabrese*, this court, on review, would be in a different position, but, even though *Calabrese* involved the same victim and

defendant and the same telephone messages as in this appeal, it encompassed its own unique predicate facts. I believe that the significantly different factual circumstances confronted by the court in *Calabrese* and those we face render the court's determination of relevance in *Calabrese* unhelpful to our present inquiry.

In *Calabrese*, our Supreme Court noted in its review of the record that neither the complainant nor the defendant testified at trial.<sup>1</sup> The court noted evidence that police were called to the then sixty-nine year old complainant's home on the evening of January 4, 2002, where they found the home in a state of disarray and the disheveled and upset complainant lying on the floor with dried blood on her nightgown and surrounded by blood soaked paper towels.<sup>2</sup> When interviewed, the complainant claimed that she had been injured at approximately 10 a.m. that morning when attempting to block a vase that had been thrown at her. That evening she refused transport to a hospital. On the next day, however, the complainant's son, William Calabrese, Jr., took her to the hospital where she was diagnosed with a fractured elbow. The treating surgeon was permitted to testify, over the defendant's objections, that the complainant told him that her injury was caused by a vase thrown by her son, and he stated that her injury was consistent with that allegation. The physician testified, as well, that he was unaware that the complainant had told a nurse that she had injured herself when she had fallen in the bathroom. The court, in *Calabrese*, also permitted a police officer to testify that he arrested the defendant on the basis of the complainant's statement to him.<sup>3</sup> At trial, the defendant had offered as evidence a tape recording of messages from the complainant left on his answering machine in which she uses invective and threatening language aimed, purportedly, at manipulating the defendant into complying with certain demands. The court excluded the tape from evidence.

On appeal, our Supreme Court determined that the court had abused its discretion in excluding the tape and that the exclusion likely swayed the jury to find the defendant guilty of the assault charge. The court concluded that the tape messages were "admissible nonhearsay evidence under § 6-5 of the Connecticut Code of Evidence, under which [t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely." (Internal quotation marks omitted.) *State v. Calabrese*, supra, 279 Conn. 410. The court concluded: "We can think of no better evidence of animus that might show a motive for making false allegations than the threats of seeking the arrest of the defendant if he did not comply with her wishes, and other invectives, contained in the messages that the trial court improperly excluded from the jury's consideration." *Id.* The court also commented in a footnote that, in regard to the state's claim that the messages

had not been time-stamped, “the lack of a time reference does not render the messages irrelevant as evidence of the complainant’s ill feelings about the defendant.” *Id.*, 411 n.19.<sup>4</sup>

Having decided that the court abused its discretion in excluding the messages, the *Calabrese* court then analyzed whether the trial court’s ruling was harmful by examining whether the jury’s verdict was “substantially swayed by the error” and concluded that the court can only find a nonconstitutional evidentiary error to be harmless when the court, on review, “has a fair assurance that the error did not substantially affect the verdict.” (Internal quotation marks omitted.) *Id.*, 411–12. To apply this analytical paradigm to the facts then at hand, the court opined that a reviewing court should “consider a number of factors, namely, the overall strength of the state’s case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered.” *Id.*, 412. The *Calabrese* court concluded from its search of the trial record that the only evidence regarding the assault charge consisted of hearsay statements by the complainant, including one improperly admitted, and, accordingly, the court opined, the complainant’s credibility was “central to the state’s case.” *Id.* The court concluded that “the recorded messages provide an untainted source for the jury to understand the animus between the complainant and the defendant, and the resulting bias that might have attached to her statements that were admitted as hearsay evidence.” *Id.*, 412–13. Accordingly, the court reversed the defendant’s assault conviction.

The present case is not a reprise of *Calabrese*. A searching review of the trial record of the case at hand reveals several significant factual differences, which, I believe, negate the relevance of these 2002 messages. Unlike *Calabrese*, here, the state’s case did not rely on statements made by the victim. Unlike *Calabrese*, there was independent evidence of the defendant’s guilt of burglary and assault. Indeed, much of the inculpatory evidence on both charges came directly from the defendant’s testimony. Because our review is fact bound, I believe that close scrutiny of the record is key to a reasoned analysis.

As to the burglary conviction, the practical effect of the testimony of both the defendant and the victim is that the defendant entered the victim’s home without license or permission. Although the victim claimed that the doors were locked and the defendant must have entered by a window and the defendant claimed that he entered through the unlocked kitchen door, these factual differences regarding the precise manner of entry are not relevant to the burglary conviction

because the defendant admitted that he entered the victim's home without her permission. The defendant testified that he called the victim three times from his home to tell her that he wanted to come to her house to get some of his money, that she hung up on him the second time and that the telephone was off the hook on his third call. He then walked toward her home. He stated that as he approached the house he noticed that the rear part, including the kitchen and dining room, was dark but that there was a light in the living room in the front of the house. He knocked on the window, and "when [the victim] appeared and she knew what [he] was there for . . . she didn't really say anything but she indicated no by shaking her head that she wasn't going to let [the defendant] in and that she was not going to give [him] money." The defendant indicated that after a few more minutes, he went to the still-darkened back of the house where he knocked on the dining room window to no avail. He then turned the knob on the back door and, finding it unlocked, walked through the door into the house. The defendant testified: "I'll be frank with you, she looked surprised to see me. I think that she—that she unlocked the back door unwittingly and that's how I was able to walk through, and she looked surprised."

On cross-examination, the prosecutor asked about entry into the house, stating: "Okay. And you testified today that your mother wouldn't let you in the house; correct?" to which the defendant responded, "I guess so, yes, I did." The defendant's testimony, alone, satisfies the first prong of the burglary statute, which makes it a criminal violation to enter or to remain in a premise when "the actor is not otherwise licensed or privileged to do so." General Statutes § 53a-100 (b).<sup>5</sup>

The second prong of the burglary statute requiring proof that the actor either entered or remained on the premises with the intent to commit a crime is satisfied by evidence that the defendant did, in fact, assault the victim once he gained access to her home. Evidence sufficient to convict the defendant of assault came from him, from police officers and from the victim's *Whelan* statement.<sup>6</sup>

As to the assault conviction, it is noteworthy that unlike the facts of *Calabrese*, the defendant was present with the victim when the police arrived at her home.<sup>7</sup> Thus, there was no doubt as to the identity of the individual with whom the victim had an encounter. It also is significant that the defendant acknowledged that he had taken hold of the victim's arm after she had gone into the bathroom to avoid him once she realized that he had gained access to the house. Here, the defendant's testimony, coupled with the observations of the police officer, provides more corroboration than rebuttal to the victim's statement to the police. Although the victim claimed that the defendant had grabbed her arm and

dragged her from the bathroom, the defendant, on the other hand, minimized his action, claiming that he simply placed his hand on her arm to lead her from the bathroom to answer the telephone. He acknowledged, however, that when he placed his hand on the victim's arm, she may have lost her balance and fallen against him causing her hair to become disheveled. Even though this testimony was offered in response to the victim's *Whelan* statement that the defendant had dragged her by the hair, the fact that the defendant claimed that the victim may have lost her balance and fallen against him when he allegedly placed his hand on her arm to get her to answer the telephone is supportive of her statement that he grabbed her and inconsistent with his claim that he merely placed his hand on her arm so as to lead her to the telephone.<sup>8</sup>

Additionally, Branford police Officer Jomo Crawford was a first responder to the victim's 911 call. He testified that when he arrived at the victim's home, he saw the victim walking toward his cruiser, that her hair seemed to be out of place and that "[s]he was holding her left arm as if she was in pain and she was walking at a rapid pace." This independent testimony corroborates the victim's *Whelan* statement regarding the defendant's assaultive behavior causing pain to her arm.

Finally, I note that unlike *Calabrese*, in which the complainant did not testify and the state's case was built entirely on her hearsay statements, here, she testified before the jury and, because that testimony was inconsistent with her earlier statement to the police, her statement was admitted for substantive purposes. Thus, in the case at hand, the jury not only had the opportunity to assess the victim's testimony, but it was given the opportunity to assess her credibility by the display of inconsistencies between her testimony and earlier *Whelan* statement.

In sum, a review of the undisputed facts of the case at hand reveals several differences between the circumstances we face and those of *Calabrese*. Perhaps most noteworthy, the complainant's credibility was central to the state's case in *Calabrese* due to the absence of corroborating evidence; it was not pivotal to the jury's determination of the issues in the case at hand because there was ample corroboration of the state's claims. Therefore, what the court found to be relevant in *Calabrese* does not bind our review, and it is not an aid to our analysis.

If, however, it could reasonably be said that the victim's credibility was a material factor to a disputed issue before the jury, our next point of inquiry must be whether the court's exclusion of the tape was an abuse of discretion. "The credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely." Conn. Code Evid.

§ 6-5. “The range of matters potentially giving rise to bias, prejudice or interest is virtually endless . . . . Because evidence tending to show a witness’ bias, prejudice or interest is never collateral . . . impeachment of a witness on these matters may be accomplished through the introduction of extrinsic evidence, in addition to examining the witness directly. . . . The scope and extent of proof through the use of extrinsic evidence is subject to the court’s discretion, however . . . and whether extrinsic evidence may be admitted to show bias, prejudice or interest without a foundation is also within the court’s discretion. . . .

“The offering party must establish the relevancy of impeachment evidence by laying a proper foundation . . . which may be established in one of three ways: (1) by making an offer of proof; (2) the record independently may establish the relevance of the proffered evidence; or (3) stating a good faith belief that there is an adequate factual basis for [the] inquiry. . . . However, otherwise [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” (Citations omitted; internal quotation marks omitted.) *State v. Brown*, 273 Conn. 330, 341–42, 869 A.2d 1224 (2005). “It is a reasonable exercise of judicial discretion to exclude . . . evidence the relevancy of which appears to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case.” (Internal quotation marks omitted.)” *State v. Sanchez*, 75 Conn. App. 223, 251, 815 A.2d 242, cert. denied, 263 Conn. 914, 821 A.2d 769 (2003). Additionally, when such testimony is offered, our courts have held that “[t]he proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant.” (Internal quotation marks omitted.) *State v. Pratt*, 235 Conn. 595, 605, 669 A.2d 562 (1995). Accordingly, when the defendant attempted to introduce the telephone messages, the court had to exercise discretion whether to permit impeachment by the use of extrinsic evidence.

Applying the appropriate law to the facts at hand, I do not believe that the court abused its discretion in excluding the telephone messages even if they contained minimally relevant information. I look first to the defendant’s tender. At the outset, I note that the defendant did not attempt to utilize the taped messages to impeach the victim’s testimony. It was during his direct testimony, after the victim had already testified on his behalf, that the defendant offered the messages into evidence. The basis of his claim was that the messages bore directly on her credibility. Thus, at this juncture in the trial, after the victim had already testified and during the defendant’s testimony one day later,



the court was confronted with an offer regarding the victim's credibility, leaving the state no opportunity for redirect examination of the victim if the messages had been admitted. In sum, the defendant chose not to examine the victim in regard to her *Whelan* statement to demonstrate any potential bias, prejudice or interest.

The basis of the defendant's claim of relevance was that the victim was intoxicated when she left the subject messages and during the events leading to the charges at issue. In support of his proffer, the defendant claimed that the victim goes "haywire" and that she is prone to manipulation and to fabrication when she is intoxicated. He claimed that the messages evinced the victim's intoxication and animosity toward him, reflecting bias and interest. The defendant's proffer, however, is premised on the notion that the victim was intoxicated during the evening in question. Other than the defendant's self-serving claim that the victim had been intoxicated, however, the record is bereft of any such evidence. To the contrary, none of the police officers or the paramedic who interacted with the victim at her home that evening testified that she appeared intoxicated. When asked directly by the defendant whether he had noticed any signs of intoxication with respect to the victim, the paramedic who came to the scene in response to a police call for assistance answered in the negative. This evidence provides a stark contrast to the defendant's admission on cross-examination that he had consumed six to seven beers between 4 p.m. and 11:30 p.m. on the day in question. The defendant's admission of drinking casts doubt on the accuracy of his recollection of the events as well as his observations of the victim's condition. Under these circumstances, and because the defendant's claim of relevance was premised on the notion that the victim was intoxicated both when leaving the telephone messages and during the evening of his arrest, I believe the court was well within its discretion in excluding the tape.

Finally, even if it could be said that the court abused its discretion in excluding the taped messages, I do not believe that we can reasonably conclude, on review, that the exclusion substantially swayed the jury's verdict. This analysis requires us to consider the effect of the court's ruling on the jury's decision, and, as noted in *Calabrese*, in making this assessment, "we consider a number of factors, namely, the overall strength of the state's case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered." *State v. Calabrese*, supra, 279 Conn. 412. Performing this analysis in *Calabrese*, the court observed: "The only evidence in the record on the assault charge consisted of hearsay statements by the complainant made to the police, paramedics and medical personnel at Yale-New Haven Hos-

pital, at least one of which the state concedes was improperly admitted. . . . Thus, the jury's perception of the complainant's credibility was central to the state's case." (Citation omitted.) Id. Unlike *Calabrese* and as noted herein, the victim's credibility was not central to the state's case in the matter at hand, and, accordingly, the exclusion of the tape cannot reasonably be said to have swayed the jury.

Also, unlike *Calabrese*, the victim in the case at hand testified and was available for cross-examination. In fact, the victim generally testified favorably for the defendant creating contradictions between her testimony and her *Whelan* statement. As a consequence, her credibility and lack of consistency was on vivid display for the jury. As to the relative strength of the cases, although it is evident that the assault conviction in *Calabrese* hung on the slender reed of the complainant's uncorroborated hearsay statements, the jury's finding of guilt in the present case finds support not merely in the victim's statements, but also in the observations of police officers and a paramedic and, significantly, the defendant's inculpatory testimony. Finally, the jury was presented with documentary evidence in the form of a letter written by the defendant to the victim discouraging her from attending and testifying at his trial, evidence the court properly charged the jury as consciousness of guilt.

For the reasons stated, I would affirm the court's judgment of conviction. Accordingly, I respectfully concur in the court's affirmance of the defendant's conviction of interfering with an officer and dissent from the court's reversal of the judgment of conviction of assault of an elderly person in the third degree and burglary in the second degree.

<sup>1</sup> Indeed, because the victim did not testify in *Calabrese*, the defendant urged the trial court to admit the telephone messages as the only route available to him to contest her credibility.

<sup>2</sup> *Calabrese* involved charges stemming from two incidents between the victim and the defendant. The first occurred on January 4, 2002, and gave rise to the assault conviction then under appeal. In conjunction with his arrest for the January incident, the defendant had been made subject to a family violence protective order. The second incident took place in September, 2002, and gave rise to the defendant's conviction of violation of the protective order. On appeal, the *Calabrese* court affirmed the conviction of violation of a protective order and reversed the assault conviction. The tape found on appeal to have been improperly excluded from evidence in *Calabrese* is the same tape that was excluded by the trial court in the case at hand. Its contents are set forth in the majority opinion.

<sup>3</sup> On review, the *Calabrese* court opined that the improperly admission of this statement was one of the reasons for reversal.

<sup>4</sup> The majority apparently believes that this footnote dictates the admissibility of the tape for all time. I cannot conclude that the Supreme Court intended its comment to have an eternal effect. Rather, I read the footnote as suggesting that the lack of a precise time date on the tape does not render it inadmissible where it is plain from the record that the messages were left on the defendant's answering machine on an uncertain date or dates in October, 2002. To conclude otherwise, as apparently the majority does, ignores the basic tenet that the determination of relevance is a fact bound inquiry.

<sup>5</sup> The defendant claims that he was licensed to enter the house by operation of law because the victim was holding his money which he was entitled to

enter the house to retrieve. The majority rejects that claim as legally unfounded. I agree.

<sup>6</sup> See *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

<sup>7</sup> In *Calabrese*, the record revealed that the police arrived at the victim's home several hours after the alleged assault. The victim was at home with her husband. On the next day, the police spoke with the victim's son William Calabrese, who gave a statement regarding the defendant to the police. Interestingly, the *Calabrese* opinion contains a footnote that states that when the police went to the victim's home several months after the alleged assault in conjunction with another related charge, the officer noted that the "complainant had a verbal dispute with William [Calabrese] and seemed angry to see him when he arrived from Stratford." *State v. Calabrese*, supra, 279 Conn. 398 n.9. It appears that the court on review may have found it noteworthy that at some point prior to trial, the complainant evinced animus toward another son.

<sup>8</sup> It is undisputed that the defendant was trying to get the victim to answer the telephone as he believed that it was the police calling in response to the emergency 911 call she had made before going into the bathroom. His desire was for her to tell the police not to come.

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