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LAVERY, J., dissenting in part. Practice Book § 42–40 provides in relevant part that “[a]fter the close of the prosecution’s case in chief . . . upon motion of the defendant . . . the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty. . . .” In this case, after the state rested, the defendant, Noel Mendoza, immediately moved for a judgment of acquittal, stating that the state had not presented “evidence sufficient to support [the case] going to the jurors.” Because the state failed to offer any evidence in its case-in-chief regarding the defendant’s convicted felon status, an essential element of the crime charged, and because the defendant complied with applicable rules of practice, the trial court abused its discretion in granting the state’s motion to reopen its case. Accordingly, I respectfully dissent from part I of the majority opinion.

Our Supreme Court has held that prejudice warranting the reversal of a trial court’s decision to grant the state’s motion to reopen has occurred “when the state was allowed to introduce further testimony in order to cure its failure to introduce, during its case-in-chief, any evidence upon an essential element of the crime charged, a deficiency called to its attention by the defendant’s motion for a directed judgment of acquittal.” *Wood v. Bridgeport*, 216 Conn. 604, 606–607, 583 A.2d 124 (1990), citing *State v. Allen*, 205 Conn. 370, 533 A.2d 559 (1987). On the basis of this premise, and for the following reasons, I believe the court abused its discretion in granting the state’s motion to reopen immediately following the defendant’s motion for a judgment of acquittal.

In determining whether, in these circumstances, the court abused its discretion in allowing the state to reopen its case-in-chief, it is important to consider that the “state, which has the burden to prove every element of the crimes charged beyond a reasonable doubt, is required to present enough evidence so that a jury could reasonably find the defendant guilty; failing such an evidentiary showing, it risks a successful motion for judgment of acquittal. . . . In *United States v. Hinderman*, [625 F.2d 994, 996 (10th Cir. 1980)] the court warned that the ‘government’s case-in-chief should not be treated as an experiment that can be cured after the defendant has, by motion, identified the failures.’ The California Supreme Court has recognized that ‘to require a defendant to state specific grounds in support of the motion for acquittal would place the burden upon him to point out to the prosecutor, as well as to the court, the gaps in the prosecution’s case.’¹ Such a

requirement would come perilously close to compelling a defendant to aid in his own prosecution and would lessen the prosecutor's burden to prove each and every element of the case beyond a reasonable doubt.' *People v. Belton*, 23 Cal. 3d 516, 522, 591 P.2d 485, 153 Cal. Rptr. 195 (1979)." (Citation omitted.) *State v. Allen*, supra, 205 Conn. 379–80.

In this case, the state in its case-in-chief offered the testimony of police officers, witnesses and a forensic firearm examiner, as well as two dozen exhibits into evidence. At no time during its case-in-chief, however, did the state offer any evidence regarding the defendant's convicted felon status. Only after the defendant filed a motion for a judgment of acquittal, and the court subsequently granted the state's motion to reopen, did the state then offer the new testimony of a deputy clerk of the Superior Court as evidence that the defendant had been convicted of a prior felony.

In *State v. Allen*, supra, 205 Conn. 383, the state failed to offer any evidence on the length of the barrel of the pistol at issue, an essential element of the crime charged, and the defendant moved for a judgment of acquittal at the close of the state's case, claiming that the evidence was insufficient on that element. Subsequently, the state moved to reopen its case to present evidence on the length of the barrel of the firearm. After the court granted the state's motion to reopen, the state offered new evidence and did not merely offer cumulative evidence or clarify previous testimony. Those facts strengthened our Supreme Court's conclusion that "allowing the state to reopen its case-in-chief after the defendant has identified its shortcomings was fundamentally unfair to the defendant and an abuse of the trial court's discretion." *Id.*, 383–84.

Although, as the majority points out, the holding in *Allen* is narrow—the court concluded that the trial court abused its discretion in permitting the state to reopen its case to supply missing evidence because the defendant had *specifically* identified the evidentiary gap in his motion for a judgment of acquittal—the law does not require such a specific evidentiary identification when a defendant moves for a judgment of acquittal. *Id.*, 385. Thus, I believe the state's offering of new evidence after the state rested and failed to make out a prima facie case, and after the defendant pointed out that the state had not presented "evidence sufficient to support [the case] going to the jurors," constitutes a fundamental unfairness to the defendant. Because I believe the defendant was substantially prejudiced by the court's granting of the state's motion to reopen, I find that the court abused its discretion.

The state had the burden to prove every element of the crime charged beyond a reasonable doubt and failed to do so. In fact, the state concedes that it failed to make out a prima facie case because it offered no evidence of

the felony conviction element of the charged offense. Additionally, no stipulation was entered into regarding this evidentiary gap. In turn, after the state rested, the defendant followed the rules of practice and appropriately moved for a judgment of acquittal due to insufficient evidence.

Furthermore, had the defendant remained silent until after the verdict had been returned, the omission of this evidence would have required, under the constitution, a judgment of acquittal either in the trial court or on appeal. See *id.*, 377. Having brought to the attention of the state the fact that insufficient evidence existed, the defendant effectively was victimized by his own diligence, as the state used the reopening of its case to supply the missing element of the crime, thus assuring the defendant's conviction. See *id.*, 378.

After reviewing the relevant motion to reopen case law, the only case factually similar to the present matter is *Allen*. The facts in *Allen* are analogous except that in this case, after the state failed to establish a prima facie case, the defendant called the deficiency to the state's attention by stating that insufficient evidence exists to support the case going to the jury. Although the defendant did not specifically notify the state as to what essential element of the crime the state had failed to prove, such specificity, as mentioned previously, is not required. In my opinion, allowing the state to reopen its case-in-chief, after the defendant has identified its shortcomings and complied with the rules of practice and the law, fundamentally is unfair to the defendant. See *id.*, 383–84. The majority is permitting the defendant to be effectively victimized, as the state used the reopening of its case to supply evidence of an essential missing element of the crime. See *id.*, 378. Consequently, I believe the trial court abused its discretion in granting the state's motion to reopen.

Accordingly, I respectfully dissent from part I of the majority opinion, and I would reverse the judgment of conviction with respect to the charge of criminal possession of a firearm and remand the case to the trial court with direction to render judgment of acquittal as to that charge. I concur in the remainder of the opinion.

¹ It also is clear that the plain language of Practice Book § 42–40 does not require such specificity when the defendant makes a motion for a judgment of acquittal.