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MCDONALD, J., concurring in part and dissenting in part. Although I agree with part I and part III¹ of the majority opinion, I respectfully disagree with part II of the majority opinion. In my opinion, the due process rights of the defendant, Roger Ruffin, were violated when the prosecutor improperly commented, during closing argument, on the defendant's failure to testify and contradict the testimony of the state's principal witness, J. F., while also arguing, improperly, the state's evidence established circumstances to support J. F.'s allegations of sexual abuse as detailed by an expert sexual abuse child interviewer.

J. F. testified that in early January, 2009, the defendant, her mother's former boyfriend, touched the top of her vagina, put his tongue in her mouth and, about a week or two later, forced her to perform oral sex. She testified that both times she was alone with the defendant in his automobile.

The defendant argues that the prosecutor improperly referred to the defendant's failure to testify. He argues correctly that even an indirect remark may violate the prohibition against referring to the defendant's failure to testify. *State v. Rizzo*, 266 Conn. 171, 269–70, 833 A.2d 363 (2003). This court has stated that a “prosecutor is prohibited from asking for explanations that only the defendant can provide because such questions are an indirect comment on the defendant's failure to testify.” *State v. Menzies*, 26 Conn. App. 674, 696, 603 A.2d 419, cert. denied, 221 Conn. 924, 608 A.2d 690 (1992); see also *State v. DeMartino*, 7 Conn. App. 292, 295, 508 A.2d 809 (1986).

In this case, during the prosecutor's initial closing argument, she stated that J. F.'s testimony was “consistent within itself because there's nothing that she said that couldn't have happened the way she reported it, and there's nothing that she said that conflicted with something someone else said about how it happened.”² The prosecutor continued that “[n]o person's testimony here gave you any reason to disbelieve J. F., nor were you given any reason why the facts that she described could not have happened the way she described them.”

The prosecutor argued that no person's testimony conflicted with J. F. or gave the jury any reason to disbelieve J. F.'s testimony about the sexual abuse. The evidence, as the prosecutor pointed out to the jury, was that the only witnesses to the abuse were J. F. and the defendant, as J. F. testified that both incidents of abuse happened when she was alone with the defendant in his automobile. The evidence was that only the defendant could have provided testimony to conflict with J. F.'s testimony. The defendant was the only other person

present during the incidents of abuse to which J. F. testified and that J. F. described to the other prosecution witnesses. The lack of conflicting testimony or testimony giving the jury any reason for disbelief of J. F. was placed upon the defendant's silence at the trial. I would conclude that the state's "no conflicting witness" argument was naturally and necessarily an adverse comment on the defendant's silence that penalized the defendant for exercising his fifth amendment right. It was prosecutorial impropriety. In the words of the United States Court of Appeals for the First Circuit, a "prosecutor does take a risk whenever the 'not contradicted' argument is made." *United States v. Stroman*, 500 F.3d 61, 66 (1st Cir.), cert. denied, 552 U.S. 1050, 128 S. Ct. 674, 169 L. Ed. 2d 528 (2007).

On the trial record I also would conclude that only the defendant alone has information to contradict J. F. as to sexual abuse, a situation which, in itself, establishes a constitutional violation if the "not contradicted" comment is made. As the United States Court of Appeals for the Second Circuit held in *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872, 98 S. Ct. 217, 54 L. Ed. 2d 151 (1977), "[a] constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify. *United States ex rel. Leak v. Follette*, 418 F.2d 1266 (2d Cir. 1969), cert. denied [sub nom. *Leak v. Follette*], 397 U.S. 1050, 90 S. Ct. 1388, 25 L. Ed. 2d 665 [1970])." See also *United States v. Gotchis*, 803 F.2d 74, 81 (2d Cir. 1986); *United States v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), cert. denied, 410 U.S. 927, 93 S. Ct. 1358, 35 L. Ed. 2d 587 (1973).

Our Supreme Court has observed in *State v. Walker*, 206 Conn. 300, 307, 537 A.2d 1021 (1988), referring to *United States ex rel. Leak v. Follette*, supra, 418 F.2d 1269, that the offending language must be naturally and necessarily taken to be a comment on the failure of the accused to testify. The court in *Walker* also noted that in *Leak* remarks concerning lack of contradiction are forbidden in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony. *State v. Walker*, supra, 307-308.

During the no conflicting witness portion of the prosecutor's argument, the prosecutor referred to "important" testimony from Erin Byrne, a child interviewer at the Aetna Foundation Children's Advocacy Center. That center provides evaluation and treatment, as well as protection, for children who have made allegations of sexual abuse. Byrne had been at the advocacy center two and one-half years and interviewed 250 to 300 children. Byrne testified that partial or piecemeal disclosure often happens during the process of interviewing children. She also stated that children often

times go back to the abuser they knew or trusted.

Byrne testified that it was not her role to decide if the child was credible or not credible. Byrne further testified that her role was to conduct diagnostic interviews with children, during which she was to look for things to support the child's disclosure of abuse, such as internal consistency, providing the same information at the beginning, middle and end of the interview, providing contextual details of what happened "in the context" with the abuse, before, during and after abuse; providing sensory details, i.e., how something felt; providing details of conversations during or near the time of the abuse, details of the abuse, directions not to tell of the abuse, and threats if the child told or of force used during abuse.³

She further testified that she recommended that if a child needed counseling and medical services, including a medical examination, following Byrne's diagnostic interview, she would recommend counseling and medical care. In this case, following the personal diagnostic interview, Byrne did recommend that J. F. required counseling and medical care.

In *State v. Favoccia*, 306 Conn. 770, 51 A.3d 1002 (2012), our Supreme Court held that it was improper for the state to introduce evidence from an expert of a direct or indirect imprimatur on a sexual assault victim's allegations. In *Favoccia*, the majority, as well as the two dissenting justices, stated that direct or indirect evidence of a diagnosis of sexual abuse by an interviewing expert would constitute an improper vouching for a sexual assault victim's testimony. Our Supreme Court agreed with authorities that testimony tailored to the specific complainant is not necessary "to dispel myths or mistaken beliefs about how sexual assault victims are 'supposed to act.'" Id., 804. The court also "agree[d] with those authorities observing that more specific testimony yields returns that increase in prejudice to the defendant as they diminish in value with respect to the edification of the jury as to behaviors that might affect the complainant's credibility." Id.

The defendant on appeal argues that evidence concerning Byrne's diagnostic interview of J. F. was improper. I agree because the evidence from the expert interviewer might cause the jury to conclude that the interviewer, in making a diagnosis for treatment at the sexual abuse clinic made an indirect assertion that that child had been sexually abused. See id., 794 n.30.

The recommendation for needed treatment in the opinion of Byrne implied the diagnosis was that J. F. had been sexually abused and that J. F.'s disclosure of abuse was supported. Thus, the jury could rely upon the diagnosis and recommendations in its deliberations because the diagnosis and recommendations were made by an experienced sexual abuse interviewer who

personally interviewed J. F. Moreover, as the prosecutor argued to the jury, J. F.'s testimony contained those which were "all things that Erin Byrne said she looks for to support an allegation." See footnote 2 of this concurring and dissenting opinion. The state's closing did state directly that Byrne would and did find J. F.'s interview allegation was supported. In effect, the expert improperly vouched for J. F.'s testimony with testimony of Byrne's support list.⁴

I would then determine that these improprieties deprived the defendant of his due process right to a fair trial. See *State v. Singh*, 259 Conn. 693, 793 A.2d 226 (2002).

After weighing the factors set forth in *State v. Favoccia*, supra, 306 Conn. 770, *State v. Angel T.*, 292 Conn. 262, 287, 973 A.2d 1207 (2009), and *State v. Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), I believe that prosecutorial impropriety deprived the defendant of his due process right to a fair trial and was not harmless. I do not believe that the trial record would support the jury, unaffected by the improprieties, convicting the defendant without believing J. F.'s allegations where no physical evidence from a medical examination supported those allegations.

I would, therefore, set aside the judgment of the trial court and order a new trial.

¹ As to part III of the majority opinion, I concur because the defendant's trial counsel agreed to the court's observation that partial disclosure did not constitute an inconsistent statement that I view as invited error. *State v. Kitchens*, 299 Conn. 447, 468–69, 10 A.3d 942 (2011); *State v. Gibson*, 270 Conn. 55, 66–67, 850 A.2d 1040 (2004).

² In her initial closing argument, the prosecutor said in relevant part: "J. F.'s testimony about the abuse is consistent within itself because there's nothing that she said that couldn't have happened the way she reported it, and there's nothing that she said that conflicted with something someone else said about how it happened. She told you what the defendant said to her. She reported elements of force and secrecy. She said he forced her head to his penis. She described how he held her—moved her head up and down with his hands or hand. She said he forced his tongue into her mouth. She told you he told her not to tell her mother, and those were all things that Erin Byrne said she looks for to support an allegation. . . ."

"No person's testimony here gave you any reason to disbelieve J. F., nor were you given any reason why the facts that she described could not have happened the way she described them. No person's testimony pointed to any reason why J. F. would be lying or talked about a time when she did lie, or pointed to any motivation at all as to why J. F. would falsely accuse Mr. Ruffin of these crimes."

³ Byrne testified as follows:

"[The Prosecutor]: In your capacity as an interviewer, do you make judgment credibility?

"[Byrne]: It is not my role to decide if a child is credible or not credible.

"[The Prosecutor]: Okay. Do you have more?

"[Byrne]: Yes. There are things I look for in an interview to support a child's disclosure."

"[The Prosecutor]: Okay. What types of things do you look for to support disclosure?

"[Byrne]: Well, it is different for every child, but some of the things that we would look for would be internal consistency where the child is able to provide the same information, the beginning, middle, and end of the interview. Are they able to provide contextual details? So were they able to provide details in regards to what was happening in the context in which abuse may have happened or happened before, during or after the abuse. Sensory detail, are they able to provide information relative to how something felt. Reproduction of conversation. Are they able to provide informa-

tion in regards to the reproduction of two-way conversation that happened during or near the time of the abuse.

“[The Prosecutor]: What about elements of secrecy?

“[Byrne]: Yes. Elements of secrecy is when a child discloses that someone told them to tell or not to tell. For secrecy would be not to tell. Other things we may look for are elements of threats would something happen if you did tell, and elements of force, if they were forced to do something.”

⁴ The definition in Webster’s Dictionary for “vouch” is “to supply supporting evidence” Merriam-Webster’s Collegiate Dictionary (10th Ed. 1999).
