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STATE OF CONNECTICUT *v.* AARON KIRBY
(AC 34862)

Lavine, Beach and Pellegrino, Js.

Argued November 12, 2014—officially released April 14, 2015

(Appeal from Superior Court, judicial district of Hartford, geographical area number twelve, Fuger, J.)

Richard S. Cramer, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony Spinella*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Aaron Kirby, appeals from the judgment of conviction, rendered after a jury trial, of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), disorderly conduct in violation of General Statutes § 53a-182 (a) (2), and possession of child pornography in the third degree in violation of General Statutes § 53a-196f. On appeal, the defendant claims that (1) there was insufficient evidence to convict him of knowing possession of child pornography in the third degree,[1] and (2) the state engaged in prosecutorial impropriety in its summation to the jury. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The victim[2] became sixteen years old in October, 2009. She was a fifteen year old high school student in the spring, summer, and early fall of 2009. In 2009, the defendant was a high school teacher, soccer coach, and assistant track coach at the high school that the victim attended, and the victim was on the indoor and outdoor track teams. Although the victim never had the defendant as a teacher, she interacted with the defendant often at track practice.

The victim kept photographs of herself naked, that she had taken, on her cell phone. One day during track practice in the spring of 2009, the victim lent a teammate her cell phone and told her to leave it on a table. When the victim came back to the table, the defendant had her cell phone in his hand and, as he handed it back to her, remarked, "Oh, by the way, nice pictures." The defendant also told her it could be their "little secret."

In the summer of 2009, the victim, wearing tight spandex pants, was working out in the school's weight room. The defendant approached her and told her the pants were "see-through . . . ." He "grabbed the back of them and opened them," that is, he pulled them away from her body.

In October or November, 2009, after the victim had become sixteen years old, she talked with the defendant about her plans to make a sexual video with her boyfriend. The defendant offered to lend her his video camera and to show her how the night vision feature worked. The defendant and the victim went into a closet in the defendant's classroom and he asked her to remove her pants. The victim refused. The defendant then asked the victim to let him "see up top." The victim acquiesced and lifted up her shirt and bra. The defendant flipped the screen of the camera toward the victim so that she was able to see her breasts on the screen and to see that the camera was recording.

In the same time frame, the victim got a new cell phone. The defendant offered to transfer all the information from her old cell phone to her new cell phone. The victim gave both her old and new cell phones to

the defendant. After several minutes, the defendant returned the new cell phone to the victim.[3]

The victim later told three of her friends about the defendant's conduct. In November, 2009, the police became involved. Detective James Moore of the Manchester Police Department contacted the defendant, who voluntarily accompanied him to the police station and made statements. The police conducted a search of the defendant's home and found a laptop computer. Through the use of computer forensics, police located twenty-four photographs in the thumbcache[4] that depicted the victim naked.

The defendant was found guilty by a jury of risk of injury to a child in violation of § 53-21 (a) (1), relating to the incident in the weight room; disorderly conduct in violation of § 53a-182 (a) (2), relating to the incident in the closet; and the lesser included offense of possession of child pornography in the third degree in violation of § 53a-196f, arising from possession of digital images.[5] The defendant received an effective sentence of fifteen years and three months incarceration, execution suspended after three years and three months, and ten years probation. This appeal followed. Additional facts will be provided as needed.

I

SUFFICIENCY OF THE EVIDENCE

The defendant claims that there was insufficient evidence to support the conviction of knowing possession of child pornography in the third degree.[6] We disagree.

"In reviewing a sufficiency of the evidence claim, 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 [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved 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 the elements of the crime charged beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reason-

able hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 593–94, 72 A.3d 379 (2013).

Section 53a-196f (a)[7] provides in relevant part: "A person is guilty of possessing child pornography in the third degree when such person *knowingly* possesses (1) fewer than twenty visual depictions of child pornography . . . ." (Emphasis added.)[8] The defendant claims that there was no evidence that he knew about the photographs in the thumbcache on his computer and therefore did not possess the requisite mental state to commit the crime.

Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that there is sufficient evidence to support a finding that the defendant knowingly possessed fewer than twenty visual depictions of child pornography. The victim testified that there were photographs of herself naked on her cell phone, and that, in the spring of 2009, the defendant saw the photographs of her naked on her cell phone and made a comment to her about them. The victim testified that she gave her cell phone to the defendant to transfer information to her new cell phone, and that she had seen the defendant's laptop in his classroom. The state's witness who performed the computer forensics investigation, Officer Scott Driscoll of the Glastonbury Police Department, testified that he found such photographs on the defendant's laptop in the thumbcache. Driscoll testified that the twenty-four photographs the state put into evidence were found on the defendant's computer, though they were actually copies of only two images.

The victim confirmed that the twenty-four photographs were of her, taken when she was fifteen years old, and that they were photographs the defendant had transferred from her old cell phone to her new cell phone. The victim noted that in one of the twenty-four photographs, her face had been blurred out. The victim further testified that there was no way she could have manipulated the photograph to accomplish that on her old cell phone. The state's rebuttal witness, Sergeant Rich McKeon of the Glastonbury Police Department, who supervises its computer forensics unit, testified that some of these photograph of the victim had been rotated, and that the rotation could have been accomplished only by operating the defendant's computer. From this testimony, the jury reasonably could have inferred that the defendant copied the photographs onto his computer when he transferred the information from the victim's old cell phone to the new one, and that he knew that they were on his computer because he rotated them and altered the victim's face in one photograph. Therefore, the evidence in this case was suffi-

cient to sustain the jury's verdict of guilty.[9]

II

PROSECUTORIAL IMPROPRIETY

The defendant claims that the prosecutor engaged in impropriety during closing argument and rebuttal. We disagree and will address each claim in turn.

We turn first to the standard of review and applicable law. "At the outset, we note that the defendant's trial counsel did not object to the remarks at issue in this appeal. Although these claims are unpreserved, we have recently stated that a defendant who fails to preserve claims of prosecutorial misconduct need not seek to prevail under the specific requirements of *State* v. *Golding*, [213 Conn. 233, 239–40, 567 A.2d 823 (1989)], and, similarly, it is unnecessary for a reviewing court to apply the four-prong *Golding* test. . . . The reason for this is that the defendant in a claim of prosecutorial misconduct must establish that the prosecutorial misconduct was so serious as to amount to a denial of due process . . . . In evaluating whether the misconduct rose to this level, we consider the factors enumerated by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). . . . The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test. . . .

"Furthermore, the application of the *Golding* test to unchallenged incidents of misconduct tends to encourage analysis of each incident in isolation from one another. Because the inquiry must involve the entire trial, all incidents of misconduct must be viewed in relation to one another and within the context of the entire trial. The object of inquiry before a reviewing court in [due process] claims involving prosecutorial misconduct, therefore, is . . . only the fairness of the entire trial, and not the specific incidents of misconduct themselves. Application of the *Williams* factors provides for such an analysis . . . . Accordingly, we apply only the *Williams* factors to unpreserved claims of prosecutorial misconduct.

"This does not mean, however, that the absence of an objection at trial does not play a significant role in the application of the *Williams* factors. To the contrary, the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When 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 seriously jeopardize the defendant's right to a fair trial. . . . [Thus], the fact that defense counsel did not object to one or more incidents of misconduct must be considered in determining whether and to what extent the

misconduct contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted. . . .

"[I]n analyzing claims of prosecutorial misconduct, we engage in a two step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his due process right to a fair trial. Put differently, misconduct is misconduct, regardless of its ultimate effect on the fairness of the trial; whether that misconduct 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 . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 426–28, 902 A.2d 636 (2006).

A

Closing Argument

The defendant alleges six instances of prosecutorial impropriety in the closing argument. "We have long recognized the special role played by the state's attorney in a criminal trial. He is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. In discharging his most important duties, he deserves and receives in peculiar degree the support of the court and the respect of the citizens of the county. By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. If the accused be guilty, he should nonetheless be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider. . . .

"Or to put it another way while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. . . . A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows. . . . In examining the prosecutor's argument we must distinguish between those

comments whose effects may be removed by appropriate instructions . . . and those which are flagrant and therefore deny the accused a fair trial. . . . In determining whether the defendant was denied a fair trial we must view the prosecutor's comments in the context of the entire trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams*, supra, 204 Conn. 537–38.

1

The defendant argues that the prosecutor improperly mentioned to the jury that the defendant's alleged behavior underlying the disorderly conduct charge would have constituted risk of injury to a child had the victim not turned sixteen years old. The defendant argues that this remark was a gratuitous attempt to make the disorderly conduct charge appear to be less serious than the charge of risk of injury only because of the fortuitous intervention of a birthday. The state argues that the prosecutor merely was explaining the charge to the members of the jury because the conduct underlying the two charges was similar.

The disorderly conduct charge arose from the incident in the closet, where the defendant asked the victim to take off her shirt and recorded her on his video camera. The full statement made by the prosecutor explained the charge in context: "Now, you may be asking yourself, why isn't that risk of injury. Well, the answer is because *she had turned sixteen. That's the only reason it's not a risk of injury.* It's a disorderly conduct charge because now she's obtained the age of sixteen years old." (Emphasis added.) The prosecutor made this statement while explaining the different elements of the various charges and the state's argument in regard to each one. The prosecutor tried to stress the impropriety of the defendant's conduct. The statement was not unfairly inflammatory or misleading, nor did it assume information not in evidence. We do not conclude that the prosecutor engaged in impropriety in this instance.

2

The defendant claims that the prosecutor made two improper comments that misled the jury concerning the burden of proof. The first claim is that the prosecutor improperly speculated that the defendant's closing argument would attack the credibility of the victim.[10] The defendant argues that this comment improperly attempted to shift the burden of proof from the state to him. The state argues that this remark was merely an attempt to "blunt the impact of the defendant's closing argument." The second claim is that the prosecutor improperly said "that the [defendant's] testimony is not corroborated by anything."[11] The defendant argues that this comment implied that he had a burden to present evidence. The state argues that the prosecutor simply

pointed out weaknesses in the defense case.

Having examined these comments in context, we conclude that they were not improper. As to the first comment, the state merely described the defendant's apparent trial strategy and tried to distinguish the state's position. See, e.g., *State* v. *Dumas*, 54 Conn. App. 780, 787–89, 739 A.2d 1251, cert. denied, 252 Conn. 903, 743 A.2d 616 (1999). As to the second comment, the state properly pointed out perceived weaknesses in the evidence that the defendant presented. "Our decisional law on prosecutorial misconduct makes clear that, as the state's advocate, a prosecutor may comment on the evidence adduced at trial and argue inferences that the jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *D'Haity*, 99 Conn. App. 375, 387, 914 A.2d 570, cert. denied, 282 Conn. 912, 924 A.2d 137 (2007). Further, the court instructed the jury as to the burden of proof, and "we presume, absent a fair indication to the contrary, that the jury followed the instruction of the court as to the law . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *H. P. T.*, 100 Conn. App. 183, 188, 917 A.2d 586, cert. denied, 282 Conn. 917, 925 A.2d 1100 (2007).

3

The defendant argues that the prosecutor made two comments that inaccurately characterized the evidence and were therefore improper. The first comment was that Moore's testimony "completely corroborate[d]" the victim's testimony. The second comment was that the three friends of the victim also "completely corroborated" her testimony.[12] The defendant argues that these assertions were inaccurate representations of the testimony, that is, that the testimony of the witnesses, in reality, was not *completely* corroborative.[13] The state argues that the prosecutor acted within the bounds of zealous representation by arguing to the jury that the testimony of its witnesses was consistent and supported the overall theory of the defendant's guilt.

The state invited the jury to draw a conclusion that the state's case was consistent. Defense counsel later argued in his summation that the testimony of the state's witnesses was inconsistent.[14] "That the evidence was susceptible to different interpretations, however, does not render the argument improper." *State* v. *Jones*, 135 Conn. App. 788, 803, 44 A.3d 848, cert. denied, 305 Conn. 925, 47 A.3d 885 (2012).

Perhaps more tellingly, the state's argument that testimony of different witnesses was "completely" corroborative cannot literally be true in any event. It probably would have been more semantically accurate to argue that the witnesses were "completely consistent" with each other, and that many pieces of evidence were mutually corroborative. In the circumstances, we do not see how the jury was misled, especially in light of

the fact that the jury heard all of the evidence referenced by the prosecutor. The state also told the jury in the beginning of its closing argument that the collective memory of the jury controlled.[15] The state's argument that the testimony of its witnesses was "completely corroborated" was not improper in context.

4

Finally, the defendant claims that the prosecutor improperly suggested he had personal knowledge outside the evidence introduced at trial by saying, "we now know that that's not the case at all," referring to the effect of rebuttal evidence that the state had offered concerning the closet. The state argues that the prosecutor was asserting that the evidence of the defense witnesses was untrue, and that the use of "we" was not a suggestion of any secret knowledge possessed by the prosecutor.

Some additional facts are necessary for the resolution of this claim. There was a dispute at trial about whether the closet in the defendant's classroom was big enough to accommodate the defendant and the victim during the incident with the video camera. The defendant presented testimony of former students at the high school. They testified that they were familiar with the defendant's classroom, and that one could not stand in the closet because it was too small and some shelves took up space. In rebuttal, the state presented the testimony of the maintenance supervisor of the high school. A work order demonstrating that the shelves had been installed after the incident was entered into evidence, as was a photograph of two police officers standing inside the closet, notwithstanding the presence of shelves. The prosecutor said: "Well, yesterday you heard these two witnesses, these two schoolchildren got up and said this is how the classroom looked in October of 2009, and *we now know that that's not the case at all*. That's not how the closet looked in October of 2009." (Emphasis added.)

In this case, rather than suggesting any knowledge outside the evidence, the state quite clearly was referring to evidence before the jury, namely, the work order, the photograph, and testimony of the maintenance supervisor. "It is not improper for the prosecutor to comment upon 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. The state's attorney should not be put in the rhetorical straitjacket 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,' or the like." (Citation omitted; internal quotation marks

omitted.) *State* v. *Thompson*, 266 Conn. 440, 465–66, 832 A.2d 626 (2003). In context, the state clearly was relying on the rebuttal evidence as the basis for what "we now know . . . ." The comment was not improper.

B

Rebuttal

The defendant claims that the prosecutor made improper statements to the jury in the course of the rebuttal argument. We disagree.

1

The defendant claims that the state improperly advised the jury to use its knowledge and experience, rather than the evidence presented, in two instances during its rebuttal. The defendant claims that the prosecutor posed an improper rhetorical question to the jury: "When's the last time you had a teacher or heard of a teacher pulling the clothes away from a young girl in the gym?"[16] The defendant argues that this remark asked the jury to decide "what the nature of a proper standard of a high school teacher should be." The state argues that the prosecutor was "simply ask[ing] the jury to use its common sense to infer why the defendant directed his inappropriate behavior toward the victim . . . ."

The defendant also claims that the prosecutor made an improper comment concerning the computer experts. The prosecutor, in his rebuttal, asked jurors to use their common sense in evaluating the evidence concerning the computer and the expert testimony regarding the images.[17] The defendant argues that this amounted to telling the jury to disregard the testimony of the experts and, instead, to substitute their common sense. The state argues that it was appropriate to exercise common sense and that the jurors, as fact finders, were free to accept or reject any expert testimony.

Both comments were essentially appeals to the common sense of the jurors. The rhetorical question asked them to reflect on whether the defendant's testimony made sense in their life experience, and the second comment explicitly asked the jury to put aside the expert testimony and rely instead on their common sense. "In deciding cases . . . [j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to a jury's common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *Ceballos*, 266 Conn. 364, 402, 832 A.2d 14 (2003). Neither of these remarks by the prosecutor in rebuttal was improper.

2

Finally, the defendant claims that the state improperly tried to inflame the prejudices and emotions of the

jury with two comments. The defendant argues that the prosecutor improperly speculated that the defendant was sexually aroused by the photographs of the victim when he said: "He's got an adult nude picture in his basement. This is what his thing is. Every once in a while he checks up on her phone. *Maybe he gets off by it. I don't know*." (Emphasis added.)

The state argues that this comment was a response to the attack on the victim that the defendant's trial counsel made during his closing argument and that it was a reasonable inference that the jury could have drawn on its own. The state refers to various comments by the defendant's trial counsel during his closing argument: "[The victim] is the one making this stuff. She's taking pictures of herself. She's sending them out to the world. . . . And we knew, we knew from [Moore] she has a history of doing this. She sends these out. The school knew; the parents knew; the police knew. . . . This is who the [victim] is."

"And what's [the victim] doing [in the photograph]? She's looking in the mirror and she's sticking her tongue out. High school girls do funny things. I don't know. Maybe she meant something by that; maybe not."

"Impairing the morals of a minor: likely to impair the morals of any such child, not any child, that child, the child. With all due respect to the people in this audience, this is a girl who took pictures of herself, sent them out to the world, was promiscuous. None of [the defendant's] actions would have impaired her morals, and I say that with respect, but that charge is just ridiculous."

The defendant also argues that the prosecutor made an improper appeal to the sympathy of the jury when he said, "we have to protect [the victim] . . . [t]hat's what the law is for." The full context of the prosecutor's comment was: "I think we would all recommend to young girls, probably, don't go in the closet with your adult teacher if you're fifteen years old. But, you know, *we have to protect her*. She's fifteen years old. *That's what the law is for*. He has to use the better judgment. We can't just blame her for all these things. She's fifteen years old. She's a child." The state argues that this was a proper statement of the law and was made in response to the defendant's closing argument.

"A prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . [S]uch appeals should be avoided because they have the effect of diverting the jury's attention from their duty to decide the case on the evidence. . . . No trial—civil or criminal—should be decided upon the basis of the jurors' emotions." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams*, supra, 204 Conn. 545–46. However, "[w]hen a prosecutor's allegedly improper argument is in direct response to matters raised by defense counsel, the defendant has no grounds for com-

plaint." (Internal quotation marks omitted.) *State* v. *Brown*, 256 Conn. 291, 309, 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S. Ct. 670, 151 L. Ed. 2d 584 (2001).

In this case, both comments of the prosecutor were in direct response to defense counsel's closing argument. As noted previously, defense counsel made several remarks alleging that it was the victim who had taken the photographs of herself naked that are at issue and that she was promiscuous. The prosecution has some leeway on rebuttal in suggesting inferences from the evidence concerning the defendant's possible motives, other than unsuspecting innocence, as well as in urging the jury not to "blame the victim." The comments by the prosecutor in rebuttal were not improper. Because we hold that none of the comments complained of were improper, we do not reach the second step, evaluation of the *Williams* factors to decide whether the defendant was denied a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] In addition to the defendant's claim that there was insufficient evidence to support his conviction, he also claims that the court erred in denying his motion for a judgment of acquittal on the ground of insufficient evidence. We review the defendant's claim of insufficient evidence to support his conviction and do not review his insufficiency claim through the lens of the denial of his motion for a judgment of acquittal. "It is the propriety of the jury's verdict of guilty, not the propriety of the court's denial of a judgment of acquittal after the state's case-in-chief has been concluded, that we review." *State* v. *Roth*, 104 Conn. App. 248, 254, 932 A.2d 1071 (2007).

[2] In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[3] In addition to the events described previously, the state alleged other incidents: the defendant showed the victim a photograph on his cell phone of a naked woman bending over and suggested that the victim take a similar photograph; he looked through photographs on her cell phone and asked if she had any new photographs; he gave her a camera to use to take photographs of herself; and he showed the victim a risqué photograph that was taken at a track banquet. Before the homecoming parade in October, 2009, after she had become sixteen years old, he allegedly grabbed her buttocks while she was wearing leggings, then texted her an apology and asked her to keep the incident to herself.

[4] Officer Scott Driscoll of the Glastonbury Police Department, who performed the computer forensics investigation in this case, defined "thumbcache" to the jury: "Thumbcache is a small, a small copy of the picture. What happens is, when things are brought into the computer there are thumbcache versions of them. They're smaller versions of them. . . . There's different ways [pictures in the thumbcache] can be viewed. The way I viewed them was because of the forensic tool. There are ways you can go onto Google and you can download a thumbcache viewer."

[5] The defendant was charged in seven counts: counts one through three alleged risk of injury to a child in violation of § 53-21 (a) (1); count four, disorderly conduct in violation of § 53a-182 (a) (2); count five, sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (6); count six, attempt to commit sexual assault in the fourth degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-73a (a) (6); and count seven, possession of child pornography in the second degree in violation of General Statutes § 53a-196e (a).

After the state rested, the court granted the defendant's motion for a judgment of acquittal in regard to counts one and six. The jury found the defendant guilty as to counts three and four, and not guilty as to counts two, five, and seven. On count seven, however, the jury found the defendant guilty of the lesser included crime of possession of child pornography in

the third degree, in violation of § 53a-196f.

[6] The defendant alternatively argues that there is insufficient evidence to support his conviction of possession of child pornography in the third degree because the state abandoned the argument in support of the computer evidence in its rebuttal argument to the jury, and instead relied only on the evidence that the defendant had briefly possessed the victim's cell phone.

The transcript of the oral argument does not support the defendant's claim. The state argued, "Forget the experts. Just use common sense. Right? You think somebody's going to run a forensic exam on your computers and find evidence that you saw pictures of the complaining witness naked? How would that be possible? . . . Maybe he didn't look at it on his computer. Maybe he didn't. It sounds like he didn't, but it shows that he had it at some point, right, cause it left some trail on his computer. It left a trail of, hey, I had these pictures at one point. . . . At the very least he had knowledge the second he put that phone in his pocket. And the computer evidence, his actual laptop computer, it merely corroborates the fact that he had these pictures and he had access to these pictures."

Although the state argued that the "computer evidence" was not in itself necessary to prove guilt, the evidence was still before the jury, and nothing prevented the jury from considering the evidence. The prosecutor's argument to the jury has no direct bearing on our evaluation of whether the evidence was sufficient to sustain the verdict in this case. See *State* v. *Best*, 56 Conn. App. 742, 752, 745 A.2d 223 ("the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"), cert. denied, 253 Conn. 902, 753 A.2d 937 (2000).

[7] Although § 53a-196f (a) was amended by our legislature since the time the crime here was committed; see Public Acts 2014, No. 14-192, § 3; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of that statute.

[8] General Statutes § 53a-193 (13) defines child pornography as "any visual depiction including any photograph, film, videotape, picture or computer-generated image or picture, whether made or produced by electronic, digital, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct . . . ."

Although § 53a-193 (13) was amended by our legislature since the time the crime here was committed; see Public Acts 2014, No. 14-192, § 5; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of that statute.

[9] We note that there was evidence upon which a jury could reasonably have based its conclusion that the possession in this case was neither unknowing nor overwhelmingly fleeting, in that the defendant could have been found to have knowingly possessed the photographs on the victim's cell phone for significant periods of time and that there was evidence of manipulation of the photographs.

The statute itself criminalizes only knowing possession, and an affirmative defense is available in circumstances of inadvertent viewing.

General Statutes § 53a-196g provides: "In any prosecution for a violation of section 53a-196d, 53a-196e, 53a-196f or 53a-196h it shall be an affirmative defense that (1) the defendant (A) possessed fewer than three visual depictions, other than a series of images in electronic, digital or other format, which is intended to be displayed continuously, or a film or videotape, of child pornography, (B) did not knowingly purchase, procure, solicit or request such visual depictions or knowingly take any other action to cause such visual depictions to come into the defendant's possession, and (C) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof, took reasonable steps to destroy each such visual depiction or reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction."

Although § 53a-196g was amended by our legislature since the time the crime here was committed; see Public Acts 2010, No. 191, § 5; Public Acts 2014, No. 14-192, § 4; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of that statute.

[10] The prosecutor stated: "I don't think you'll hear from the defense that if these happened as the complaining witness said they did, and if these things happened as the defendant himself admitted to, that this is not a disorderly conduct cause these are not risk of injury charges. I think that

you'll find that *the bulk of the defense's argument will center around the credibility of the complaining witness*. So, when you look at the evidence, just keep all these things in mind." (Emphasis added.)

[11] In context, the prosecutor's remark was: "So, I'm not sure what value at all those two experts had. But I think you'll find that *the defense's testimony is not corroborated by anything*. So, we have individual statements but nothing to back those statements up." (Emphasis added.)

[12] The remarks were: "[T]he state put on a case that was completely corroborative of each other. What do I mean by that? Well, the [victim] testified to certain things, right, and Detective Moore, *you heard him testify as to certain things that the defendant told him which completely corroborate with what the* [*victim*] *says*. You heard from the [victim's] three friends. *They completely corroborated what the* [*victim*] *said and what the defendant himself said to Detective Moore*. The state's case is the only thing that is corroborative of each other. The defense case is not corroborative with anything." (Emphasis added.)

[13] The prosecutor used the phrase "completely corroborate" two more times in his closing argument in very similar contexts, but the defendant does not claim that those comments were improper.

[14] In defense counsel's closing, he argued: "Just cause he says so doesn't make it so. He can tell you, well, we know this happened, and it's corroborated, and you use big words and paint with a broad brush: well, it's been corroborated. Well, ladies and gentlemen, let's get down to specifics cause it hasn't been corroborated, and what we've got here is all manner [of] inconsistent stories."

[15] The prosecutor said: "The two things I want you to keep in mind is that if I say anything about the law that's different from what the judge says, you have to defer to the judge, and if I say anything different about the facts [than what] you remember about the facts, you have to defer to your collective memories of what the facts are, not what my memory of the facts are."

[16] In addition to the arguments we discuss, the defendant also argues that the prosecution's use of "pulling away" rather than "tugged" to describe his statement, presented through Moore's testimony, was inaccurate. We agree with the state that the language was either a synonym or a fair inference to be drawn from Moore's testimony. Furthermore, we note that trial counsel for the defendant used the word "pull" in his closing argument.

[17] The exact wording was: "I don't know if all you guys have computers. I think most of you said you did when we questioned you. Okay. *Then you know that stuff doesn't just get on your computer if you didn't have it at some point*. Right? I mean, you're not going to go home today and check your computers and have some remnants of the complaining witness on your computer unless you brought something into contact with that computer. *Forget the experts. Just use common sense*." (Emphasis added.)