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STATE OF CONNECTICUT *v.* ORANE C.*
(AC 44410)

Alvord, Cradle and Suarez, Js.

Syllabus

Convicted, after a jury trial, of three counts of sexual assault in the first degree in connection with the sexual abuse of S, his stepdaughter, the defendant appealed to this court. In 2018, the defendant was arrested pursuant to a warrant, which contained an affidavit that detailed allegations of sexual assault against S, including three specific incidents that occurred in 2014, 2016, and 2017. A long form information was then filed, charging the defendant with, inter alia, a single count of aggravated sexual assault that occurred in 2017. Thereafter, in 2020, a substitute long form information was filed, charging the defendant with one additional count of aggravated sexual assault in the first degree for conduct that occurred in 2014, and one additional count of sexual assault in the first degree for conduct that occurred in 2016. During trial, the defendant moved to dismiss the second count of the substitute information alleging the 2014 aggravated sexual assault, on the ground that the count was time barred by the statute of limitations ((Rev. to 2019) § 54-193 (b)), because it charged the defendant with conduct that was not charged in an information until more than five years after it occurred. The trial court, after considering the factors set forth in *State* v. *Golodner* (305 Conn. 330), denied the motion, finding that the defendant had notice of the alleged 2014 assault via the arrest warrant affidavit. Prior to trial, the defendant moved to suppress a recording of a conversation during a phone call with R, in which the defendant admitted to repeatedly engaging in sexual intercourse with S since she was fourteen years old, arguing that the recording was inadmissible under the statute (§ 52-184a) pertaining to the admission of evidence obtained illegally by the use of an electronic device, as it was made by R without the defendant's knowledge or consent in violation of statute (§ 52-570d). The trial court denied the motion and admitted the recording as a full exhibit. *Held*:

1. The trial court properly denied the defendant's motion to dismiss the second count of the substitute information charging aggravated sexual assault in the first degree: the affidavit that accompanied the arrest warrant described, in detail, the factual predicate of the 2014 assault and, therefore, the defendant had notice that he would have to defend against allegations of that charge, the elements thereof, and the evidence on which the charges were predicated; moreover, an analysis of the 2020 substitute information pursuant to the *Golodner* factors, revealed that the factual allegations underlying the 2020 substitute information were substantially similar to the facts underlying the first long form information filed in 2018, as it alleged violations of the same statute, containing the same elements, as the 2018 information, the additional charge relied on the same evidence on which the 2018 information was predicated, and, even though the defendant was exposed to a potentially greater sentence if convicted of count two, the increase in exposure was not, under these circumstances, dispositive, as the 2020 information did not broaden or substantially amend the charges made in the 2018 information.
2. The defendant could not prevail on his claim that he was deprived of a fair trial when the trial court admitted into evidence an allegedly illegal recording of his phone conversation with R, in violation of §§ 52-570d and 52-184a: even if the admission of the recording was in error, such error was harmless because the record was replete with evidence, independent of the alleged illegal recording, of the defendant's prior admissions of guilt, which diminished his credibility, specifically, his statements made via Facebook that contained similar admissions of guilt as to those in the recording and were similarly deleterious to his credibility, R's testimony regarding his other phone conversations with the defendant during which the defendant made similar admissions of guilt, and the defendant's confused and inconsistent testimony about his prior admissions to other witnesses; moreover, had the recording not been

admitted into evidence, R could have testified as to the substance of the call, thus introducing the same admission to the jury, and S provided compelling and detailed testimony as to the allegations, which was corroborated by S's sister, who testified as to her firsthand observations that led her to believe that the defendant was sexually assaulting S; accordingly, in light of the record, this court had a fair assurance that the recording did not substantially affect the verdict.

3. The defendant could not prevail on his unpreserved claim that the trial court's limitation of defense counsel's closing argument, which sought to raise the issue of S's credibility by drawing inferences from the fact that S had not become pregnant despite the numerous alleged sexual assaults committed by the defendant, violated his constitutional rights to summation and the effective assistance of counsel:

a. The defendant failed to prove the existence of a constitutional violation that deprived him of his right to summation: defense counsel's statements during closing argument that S was less credible because there was no evidence that she ever became pregnant invited conjecture, not only of the circumstances of the sexual assaults that could have led to pregnancy, a fact not reasonably inferable from the record, but also that S never truly became pregnant, and having failed to demonstrate that the issue of the lack of pregnancy was reasonably inferable from the facts in evidence, the defendant also failed to prove that the court abridged his right to present closing argument.

b. The defendant could not prevail on his claim that the trial court's limitation of defense counsel's closing argument violated his right to the assistance of counsel, amounting to structural error: the court did not preclude defense counsel from arguing the issue of S's credibility to the jury during closing argument as defense counsel argued several grounds on which the jury could have questioned S's credibility, the defendant acknowledged in his appellate brief that the precluded argument regarding S having never become pregnant was only one of several factors pertaining to her credibility and, although the defendant stressed the importance of this particular factor to his overarching argument challenging S's credibility, the defendant was not necessarily entitled to present his theory of defense any way he chose, and the trial court, within its authority, may limit summation.

Argued November 9, 2022—officially released April 11, 2023

Procedural History

Substitute information charging the defendant with three counts of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Calistro*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Calistro*, *J.*; subsequently, the court denied the defendant's motion to dismiss; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Joseph T. Corrandino*, state's attorney, *Ann P. Lawlor*, supervisory assistant state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Orane C., appeals from the judgment of conviction, rendered after a jury trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1).[1] The defendant claims that the trial court erred by (1) denying his motion to dismiss the second count of the relevant information on statute of limitations grounds, (2) admitting an allegedly illegal recording of a phone conversation, and (3) restricting the scope of defense counsel's closing arguments. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The complainant, S, was born in 1996. The defendant, S's stepfather, married S's mother, M, before S turned six.[2] Because M often worked long hours, the defendant would stay home to watch the children while M was working.[3] When S was six years old, the defendant began sexually abusing her by forcing her to have sexual intercourse with him.[4] Following the abuse, the defendant would tell S that he would kill M if S ever said anything about what the defendant was doing to her. The defendant would also frequently hit or choke S if she resisted. The defendant continued to force S to have sexual intercourse with him, repeatedly from the time she was six years old until she was twenty, on multiple occasions threatening her with a knife when she fought back. After a confrontation between S and the defendant in June, 2017, when S was twenty years old, M asked to meet with S at a motel to talk about what was going on between S and the defendant. S told M, for the first time, that the defendant had been sexually assaulting her since childhood. S subsequently told her work supervisor who convinced S to report what happened to the police. In July, 2017, S reported to the police that the defendant repeatedly sexually assaulted her from the time she was six years old until she was twenty.[5] Thereafter, the defendant was arrested in February, 2018, pursuant to a warrant alleging one count of aggravated sexual assault in the first degree, threatening in the first degree, and unlawful restraint in the first degree. The operative substitute information charged the defendant with three counts of sexual assault in the first degree for three separate incidents occurring on different dates. After a jury trial, the defendant was convicted of all three counts of sexual assault in the first degree. The trial court, *Calistro*, *J.*, imposed three sentences to run consecutively to one another for a total effective sentence of sixty years of incarceration, execution suspended after thirty years, with thirty years of probation.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly

denied his motion to dismiss a count of the state's substitute information because it was time barred by the statute of limitations. Specifically, the defendant argues that count two of the February 7, 2020 substitute information charged the defendant with conduct not alleged in the original information more than five years after the offense allegedly occurred, in violation of General Statutes (Rev. to 2019) § 54-193 (b).[7] We disagree.

The following additional facts and procedural history are relevant to the resolution of this claim. On February 15, 2018, a Superior Court judge, *Devlin*, *J.*, issued an arrest warrant charging the defendant with aggravated sexual assault in the first degree, threatening in the first degree, and unlawful restraint in the first degree, for conduct alleged to have occurred on or about May 22, 2017. The affidavit attached to the arrest warrant contained detailed allegations of numerous, specific, and frequently recurring instances of sexual assault against S by the defendant when S was age six until she was age twenty.[8] Three such incidents—described in the affidavit as having taken place, approximately, in 2014, 2016, and on May 22, 2017[9]—detailed how the defendant used force, and threats of force, to compel S to engage in sexual intercourse with him. The defendant was served with the arrest warrant and a prosecution commenced. On March 12, 2018, the state filed a long form information (first long form information) charging the defendant with one count of aggravated sexual assault in the first degree, threatening in the second degree, and unlawful restraint in the first degree, for conduct alleged to have occurred on or about July 22, 2017.[10]

On February 7, 2020, the state filed a substitute information, which is the subject of the defendant's first claim on appeal, charging the defendant with two counts of aggravated sexual assault in the first degree, and one count of sexual assault in the first degree,[11] identifying counts one, two, and three as occurring, respectively, on or about May 22, 2017, on or about January 1, 2014, and on or about January 1, 2016. Trial began on March 3, 2020. On March 5, 2020, following the close of the state's case-in-chief, the defendant moved to dismiss count two of the February 7, 2020 substitute information—concerning the alleged 2014 conduct—on the basis that it was time barred by the statute of limitations because it charged the defendant with conduct that was not charged in an information until more than five years after it occurred.[12]

The court, *Calistro*, *J.*, heard arguments on the motion to dismiss the following day. In an oral ruling on the motion, the court made the following remarks: "[T]here are the four factors the court looks to. Factors to assist in determination of whether the amended information substantially broadens or amends timely charges are one: whether the additional pleadings alleged violations of a different statute. Counts one

and two are the same. Two: [do the charges] contain different elements. It's again counts one and two, [which] are the same in terms of the statutory charge of § 53a-70a (a) (1). [Three]: [do the charges] rely on different evidence. During the course of this trial, there's been essentially the same evidence and again I understand . . . that it's still going to be left up to the jury whether they decide whether the state has proven [its case] . . . . And the fourth . . . is whether [the new charge] exposes the defendant to a potentially greater sentence. In this case it would, because if the count were to remain, it would be an additional B felony, exposure of twenty years. [A]nd if it were dismissed, it would only leave counts one and [three]. So, in that sense it would add. However . . . [notice is] the touchstone of the analysis in determining whether an amended or substitute information substantially broadens the timely charges.

"There's a statute of limitations claim. Again, by the dates that were indicated on the record, the court's position is that it tolled. It is tolled by the signing of the warrant which was signed by Judge Devlin. And paragraph fifteen [of the warrant affidavit] . . . spells it out, 2013 to 2014. It was the subject of the uncharged misconduct hearing that we had. . . . [T]here's notice—the case is replete with notice to the defense from the very beginning when this warrant was served up to the time that [the defendant] retained counsel. He had notice that the alleged [incident] occurred [at a specified residence] . . . . [I]t was still investigated and it's contained within the warrant that was generated by the [police department] and for those reasons, [there was] notice to the defense, the motion to dismiss is denied."

On appeal, the defendant claims that the court improperly denied his motion to dismiss. Specifically, the defendant argues that the February 7, 2020 substitute information "substantially broadened the original charges because count two was based on entirely different facts that were not the basis for the original charges." Further, the defendant contends that count two of the February 7, 2020 substitute information charged the defendant "under the same statute [and] increased his exposure and therefore the charge was time barred." In response, the state argues that "[t]he allegations in the arrest warrant affidavit, as a continuing course of the same kind of criminal conduct, with 2014 conduct in the preceding five years,[13] gave the defendant notice that he might have to defend against this charge." (Footnote added.) For the reasons set forth below, we conclude that the court properly denied the defendant's motion to dismiss count two of the February 7, 2020 substitute information.

We begin our analysis by setting forth the standard of review and relevant legal principles. It is well estab-

lished that review of a court's legal conclusions and resulting denial of a motion to dismiss is plenary. *State* v. *Golodner*, 305 Conn. 330, 357, 46 A.3d 71 (2012).

"[A] prosecutor has broad authority to file an amended or substitute information before trial." *State* v. *Jennings*, 101 Conn. App. 810, 817, 928 A.2d 541 (2007); see also Practice Book § 36-17 (prior to commencement of trial, "the prosecuting authority may amend the information, or add additional counts, or file a substitute information"). "We are cognizant, however, that the broad authority of a prosecutor to amend an information prior to trial is tempered by the applicable statute of limitations. . . . A statute of limitations protects a defendant from stale prosecutions . . . and [ensures] that a defendant receives notice, within a prescribed time, of the acts with which he is charged, so that he and his lawyers can assemble the relevant evidence [to prepare a defense] before documents are lost [and] memor[ies] fade . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Jennings*, supra, 817–18.

When an arrest warrant is timely issued, but not served until beyond the statute of limitations, the arrest warrant "[tolls] the statute of limitations" if the warrant is "executed without unreasonable delay" and "with due diligence." *State* v. *Ali*, 233 Conn. 403, 415–16, 660 A.2d 337 (1995); see also *State* v. *Crawford*, 202 Conn. 443, 445, 451–52, 521 A.2d 1034 (1987). However, "[w]hen the state files an amended or substitute information after the limitations period has passed . . . a timely information will toll the statute of limitations only if the amended or substitute information does not broaden or substantially amend the charges made in the timely information." *State* v. *Golodner*, supra, 305 Conn. 357. Although the arrest warrant was executed with due diligence and without unreasonable delay,[14] and the arrest warrant affidavit contained allegations of the subsequently charged 2014 conduct, the first long form information did not charge the defendant with a crime for said conduct. As stated herein, the defendant was not charged for that conduct until February 7, 2020, beyond the five year statute of limitations. Therefore, to determine whether the statute of limitations was tolled in the present case, we must decide whether the February 7, 2020 substitute information substantially broadened the charges, which requires an analysis guided by the factors set forth in *Golodner*.

"Although notice is the touchstone of the analysis in determining whether an amended or substitute information substantially broadens or amends the timely charges . . . factors to assist in this determination are whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence." (Citations omitted; internal

quotation marks omitted.) Id., 357–58. The *Golodner* factors are adopted from the test set forth in *United States* v. *Salmonese*, 352 F.3d 608 (2d Cir. 2003), which provides: "a superseding indictment that supplants a pending timely indictment relates back to the original pleading and inherits its timeliness as long as the later indictment does not materially broaden or substantially amend the original charges." (Internal quotation marks omitted.) Id., 622. In *Salmonese*, the court stated that, "[i]n determining whether a superseding indictment materially broadens or amends the original charges, we will consider whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence. . . . *No single factor is determinative*; rather, the touchstone of our analysis is notice, i.e., whether the original indictment fairly alerted the defendant to the subsequent charges against him and the time period at issue."[15] Id. (Citation omitted; emphasis added; internal quotation marks omitted.)

We begin our discussion by examining the first two factors under *Golodner*. The first factor under *Golodner* calls for an analysis of whether the February 7, 2020 substitute information alleged violations of a different statute, while the second examines whether the new charge contains different elements. *State* v. *Golodner*, supra, 305 Conn. 358. Here, with regard to the 2014 conduct, both the first long form information and the February 7, 2020 substitute information charge the defendant under § 53a-70a (a) (1), with "[compelling] another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense" was armed with and threatened the use of "a deadly weapon, to wit: a knife . . . ." Therefore, because the subsequent information alleged violations of the same statute, containing the same elements, as the first long form information, the first and second factors are satisfied. See *State* v. *Saraceno*, 15 Conn. App. 222, 240, 545 A.2d 1116 (finding that additional charge of sexual assault in second degree contained same definitive elements as original charge of sexual assault in first degree even though additional charge alleged conduct taking place on different date from original charge), cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988).

The third factor under *Golodner* addresses whether the additional charge relies on different evidence. *State* v. *Golodner*, supra, 305 Conn. 358. This court has previously considered facts alleged in an arrest warrant affidavit in determining the evidence on which the state predicated the original charges. See *State* v. *Mosback*, 159 Conn. App. 137, 158, 121 A.3d 759 (2015) (including witness statements contained in warrant in analysis of whether "[t]he factual allegations underlying the

amended information . . . were substantially similar to the facts underlying the original information" (internal quotation marks omitted)).[16] In the present case, the state, in the arrest warrant affidavit, specifically alleged numerous instances of sexual assault spanning fifteen years, including the 2014 incident, on which count two of the February 7, 2020 substitute information is based. The state, in the arrest warrant affidavit, relying on S's statements to the police, alleged that when S was in the twelfth grade "she moved to Bridgeport, Connecticut [around] 2013-2014. . . . [T]hey lived in [three residences in Bridgeport, including one on] North Bishop Avenue. She recalls [the defendant] raping her at those residences. While she lived at North Bishop Avenue, she recalls [the defendant] would make up excuses to be alone with her and would get her into his room. [The defendant] would tell her at knife point to be quiet to [ensure] her sisters wouldn't hear them. [The defendant] would hold her down on the bedroom floor and would rape her. She recalls one time trying to fight [the defendant] off and pushing him and he attempted to stab her with a knife." In light of this timely allegation, which the state could have relied on as uncharged conduct, the defendant knew, from the inception of the original charges, that he would have to be prepared to defend against evidence of the 2014 incident occurring at the residence on North Bishop Avenue. See *State* v. *Saraceno*, supra, 15 Conn. App. 238–40 (concluding that defendant had sufficient notice of charges associated with 1980 conduct, filed after expiration of statute of limitations, where arrest warrant alleged course of sexual assaults beginning in 1981). Therefore, pursuant to the third *Golodner* factor, we conclude that the additional charge relied on the same evidence on which the first long form information was predicated.

The defendant, however, attempts to construe the present case as a corollary to *Golodner*, in arguing that the February 7, 2020 substitute information introduced charges predicated on new evidence. The defendant argues that, "[j]ust as in *Golodner*, the [substitute] information substantially broadened the original charges because count two was based on entirely different facts that were not the basis for the original charges." In *Golodner*, the defendant was charged on-site with reckless endangerment in the second degree after he intentionally drove his van at a field surveyor and a law enforcement officer. *State* v. *Golodner*, supra, 305 Conn. 336, 355. The state, in the first long form information, charged the defendant with only one count of reckless endangerment in the second degree in connection with his actions against the officer, but a later substitute information, filed after the relevant statute of limitations had already run, added a second count of the same offense for his action as it concerned the field surveyor. Id., 355. Our Supreme Court concluded that

the state, by means of the additional charge in the substitute information, substantially broadened the charges from the first long form information—and therefore the first long form information did not toll the statute of limitations—because it named a new victim. Id., 358–59. Our Supreme Court noted that "the defendant had no notice that he was accused of any criminal conduct related to the new victim, [the field surveyor]." Id., 359. In the present case, the warrant affidavit included detailed allegations concerning the alleged 2014 conduct, but the first long form information did not charge the defendant with sexual assault in connection to those allegations. Conversely, the defendant in *Golodner* was arrested on-site, without a warrant. Id., 337. Therefore, *Golodner* is distinguishable from the present case insofar as the defendant in *Golodner* did not have notice of the factual predicate underlying one of the charges contained in the first long form information.

The defendant also cites *Jennings* as support for his argument that, because the first long form information charged the defendant in connection with allegations of conduct occurring in 2017, and not 2014, the February 7, 2020 substitute information relies on different evidence. In *Jennings*, the defendant was arrested pursuant to an arrest warrant, and an information was timely filed charging him with stalking in the second degree. *State* v. *Jennings*, supra, 101 Conn. App. 812. An untimely substitute information added a second count of stalking in the second degree for conduct occurring on a different day—a charge not alleged in the first long form information or discussed in the arrest warrant affidavit. Id., 813. The court concluded that the addition of a second stalking charge impermissibly broadened the charges made against the defendant because the first long form information only referenced a single instance of stalking occurring on a particular day, and an additional charge would expose the defendant to a potentially greater sentence. Id., 820. However, in *Jennings*, unlike the present case, the warrant did not allege any conduct other than the conduct charged in the first long form information, making it distinguishable from the present case. Id., 812–13.

The fourth factor under *Golodner* concerns whether the additional charge exposed the defendant to a potentially greater sentence. *State* v. *Golodner*, supra, 305 Conn. 358. The defendant argues that "count two [of the substitute information] substantially broadened the charges by increasing the sentence that the defendant could receive by [twenty] years. Indeed, the trial court [sentenced the defendant to a term of twenty years of incarceration to run] consecutive to his other sentences."[17] However, even though the defendant was exposed to a greater sentence, the increase in exposure is not, under these circumstances, dispositive. See *State* v. *Mosback*, supra, 159 Conn. App. 154 (concluding that

new charge, although increasing exposure, did not violate statute of limitations because defendant had notice of charge from original indictment and warrant).

We reemphasize that "notice is the touchstone of the analysis in determining whether an amended or substitute information substantially broadens or amends the timely charges." (Internal quotation marks omitted.) *State* v. *Golodner*, supra, 305 Conn. 357–58. Here, the defendant had notice that he would have to defend against allegations of sexual assault in the first degree, the elements thereof, and the evidence on which the charges were predicated. The arrest warrant affidavit described, in detail, the factual predicate of the 2014 assault. Although the additional charges exposed the defendant to a potentially greater sentence, we conclude that, on balance, the factual allegations underlying the substitute information were "substantially similar to the facts underlying" the first long form information; *State* v. *Almeda*, 211 Conn. 441, 446, 560 A.2d 389 (1989); and the substitute information did not "broaden or substantially amend the charges made in the first information." *State* v. *Jennings*, supra, 101 Conn. App. 818. Therefore, the court properly denied the defendant's motion to dismiss count two of the February 7, 2020 substitute information.

II

The defendant next claims that the court erred in admitting an allegedly illegal recording of a phone conversation to which the defendant was a party. Specifically, the defendant argues that the recording was obtained in violation of General Statutes § 52-570d,[18] rendering it inadmissible under General Statutes § 52-184a.[19] We need not decide whether the court properly admitted the recording into evidence because we conclude that, even if the court erred in admitting the recording, its admission was harmless.

The following facts and procedural history are relevant to the resolution of this claim. On February 10, 2020, the defendant filed a motion to suppress a recording of a phone call between himself and Daniel Ribacoff that occurred on July 25, 2017. The defendant's motion to suppress stated that "the defendant engaged the services of Daniel Ribacoff and his company . . . to administer to the defendant a polygraph examination relevant to the allegations in this case." Further, "[o]n July 21, 2017, the defendant was administered a polygraph examination by Ribacoff at his office in New York." After the defendant returned to Connecticut, he spoke with Ribacoff over the phone multiple times. On July 25, 2017, Ribacoff recorded a phone call between himself and the defendant without the defendant's knowledge or consent. During the recorded conversation, the defendant admitted to repeatedly engaging in sexual intercourse with S from the time she was fourteen years old.[20] Ribacoff sent this recording containing

the defendant's admissions to law enforcement.

The court held a hearing on the motion to suppress on March 2 and 5, 2020, at which Ribacoff and the officer to whom he sent the recording testified to the facts alleged in the motion to suppress. The officer also testified that, although he knew that Ribacoff planned to make the recording, he did not instruct him to do so. Defense counsel argued that §§ 52-570d and 52-184a required that the recording be suppressed because § 52-570d prohibited recording private phone conversations unless all parties consented, and, pursuant to § 52-184a, illegally recorded electronic evidence is inadmissible.[21] At the conclusion of arguments on the motion, the court issued an oral ruling: "I think that it's clear from what the court cited as the legislative history . . . that both § 52-570d and § 52-184a are almost exclusively appl[ied] in civil matters. They're civil statutes. There's a civil remedy and therefore the court is finding that they do not apply in this instance, at least in terms for the suppression." On the basis of the foregoing, the court denied the defendant's motion to suppress the recording. The recording was admitted as a full exhibit during trial and played for the jury.

On appeal, the defendant argues that he "was deprived of a fair trial when the court admitted into evidence a recording of a highly incriminating telephone conversation that was obtained illegally." We disagree.

For the purpose of resolving this claim, we will assume, without deciding, that the court improperly admitted the recording. We conclude that the admission of the recording into evidence was harmless error. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful.[22] . . . We have concluded that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . We previously have considered a number of factors in determining whether a defendant has been harmed by the admission or exclusion of particular evidence. Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Considering these various factors, we have declared that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Footnote added; internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 403, 245 A.3d 866, cert. denied, 336 Conn. 920, 246

A.3d 3 (2021).

At trial, the state presented evidence of admissions of guilt the defendant made to two individuals. In addition to the evidence of the July 25, 2017 recording between the defendant and Ribacoff, the jury heard testimony from Ribacoff that the defendant had admitted to him during a different phone call that he sexually assaulted S. Furthermore, the state introduced a chain of Facebook messages the defendant sent a family friend, Jackson, stating that he had "go[ne] wrong" with S from the time she was fourteen years old to the time she was twenty.[23] The defendant's Facebook messages further stated that "it's not a nice thing to go to God and say Lord I molested my daughter."

The defendant argues that, due to the lack of physical evidence, this case hinged on the credibility of his testimony, which was undermined by the recording. He states that "[a] defendant's confession is probably the most probative and damaging evidence that can be admitted against him. . . . The improper admission of the recording undoubtedly convinced the jurors to convict." (Citation omitted; internal quotation marks omitted.)

Here, the record is replete with evidence, independent of the recording, which reflect the defendant's prior admissions of guilt and diminished his credibility. Particularly, the defendant's statements to Jackson via Facebook contained similar admissions of guilt to those in the recording and were similarly deleterious to the defendant's credibility. Additionally, Ribacoff testified as to his other phone conversations with the defendant during which the defendant made similar admissions of guilt. Moreover, the defendant's confused and inconsistent testimony about his prior admissions to Ribacoff and Jackson inevitably called his credibility into question. See *State* v. *Sinclair*, 332 Conn. 204, 234–36, 210 A.3d 509 (2019) (evidentiary error harmless where, inter alia, defendant's testimony was manifestly not credible). As the state points out, had the recording not been admitted into evidence, Ribacoff could have testified as to the substance of the call, thus introducing the same admission to the jury. Also, S provided compelling and detailed testimony as to the allegations, which was corroborated by S's sister, who testified as to her firsthand observations, which led her to believe that the defendant was sexually assaulting S.[24] Under these circumstances, we have a fair assurance that the recording did not substantially affect the verdict.

III

The defendant's final claims on appeal are based on the assertion that the trial court improperly restricted the scope of defense counsel's closing arguments. Specifically, the defendant argues that the his "constitutional rights to the . . . assistance of counsel, [and] to

present summation to the jury . . . were violated when the court limited him from making an argument" that "the fact S never got pregnant created a reasonable doubt."[25] We disagree.

The following facts and procedural history are relevant to the resolution of this claim. S testified at trial that the defendant never used a condom when he sexually assaulted her, that she was not using any form of contraception at the time of the sexual assaults, and that, to her knowledge, she never became pregnant. However, S also testified as to a "pregnancy scare" that occurred after she began menstruating. S testified that the defendant told her to use a pregnancy test, and later began pressing down on S's stomach until "it hurt like crazy." S never saw the result of the test.

During closing argument, defense counsel made the following statement: "I would also ask you to consider what are the odds that [the defendant] could have had unprotected sex with [S] three to four times a month as he indicated on that call with Mr. Ribacoff, over a number of years but never got [S] pregnant? You heard testimony she wasn't on birth control." At that point, the state objected, stating that the argument asked the jurors "to speculate about pregnancies" that were not in evidence. Defense counsel responded that the argument was "based on the lack of evidence." The court sustained the objection. On appeal, the defendant claims that the court's limitation of his defense counsel's closing arguments violated his constitutional rights to summation and the effective assistance of counsel. This claim was not properly preserved and is therefore subject to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[26] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40; see also *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *McKinney*, 209 Conn. App. 363, 389, 268 A.3d 134 (2021), cert. denied, 341 Conn. 903, 268 A.3d 77 (2022).

In the present case, we consider the merits of the defendant's claim, under *Golding*, because the record

is adequate for our review, and the claim is of constitutional magnitude. See, e.g., id. (claim that "the court violated his sixth amendment right to the effective assistance of counsel by precluding defense counsel's remarks" during closing arguments was "of constitutional magnitude"); *State* v. *Cunningham*, 168 Conn. App. 519, 530–32, 146 A.3d 1029 (same), cert. denied, 323 Conn. 938, 151 A.3d 385 (2016).

Although we conclude that the defendant's claims are reviewable, we conclude that the court did not violate the defendant's right to present a closing argument, or his right to the effective assistance of counsel and, therefore, the defendant's claims fail under the third prong of *Golding*.

A

First, we address the defendant's claim that the court violated his right to summation.

"The sixth amendment guarantee in the federal constitution of the right to assistance of counsel has been held to include the right to present closing arguments. . . . As the United States Supreme Court has explained, [t]here can be no doubt that closing argument for the defense is a basic element of the adversary [fact-finding] process in a criminal trial. Accordingly, it has universally been held that [defense counsel] has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. . . .

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . [Although] we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue. . . . Although defense counsel may not make speculative arguments to the jury, we have explained that counsel may comment [on] facts properly in evidence and [on] reasonable inferences drawn therefrom. . . .

"[T]he right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue *that is reasonably inferable from the facts in evidence*." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Robert R.*, 340 Conn. 69, 79–81, 262 A.3d 810

(2021).

In the present case, the defendant argues that the court violated his right to present summation because the court denied him an opportunity to raise a significant issue, namely, to invite the jury to draw inferences from the fact that S had not become pregnant. He argues that "it was reasonable to infer that a woman having unprotected sex several times a week over the course of several years had a high likelihood of getting pregnant." The defendant therefore concludes that the lack of evidence of a pregnancy, despite fifteen years of sexual abuse, calls S's credibility into question. The state counters that "[t]here was no evidence of whether the defendant ejaculated, his or the victim's fertility, or the likelihood that these sexual assaults would have led to pregnancy." We agree with the state that, for these reasons, the relevant factual predicate for the defendant's argument was not established at trial. Therefore, the defendant's argument that S was less credible because there was no evidence that she ever became pregnant invites conjecture, not only that the circumstances of the sexual assaults *could have* led to pregnancy—a fact that is not reasonably inferable from this record—but also that S truly never became pregnant.

The defendant has failed to demonstrate that the issue he sought to raise during closing argument was reasonably inferable from the facts in evidence. Thus, the defendant has failed to prove that the court abridged his right to present closing argument. Accordingly, the defendant has not proven, under *Golding*'s third prong, that a constitutional violation existed that deprived him of his right to summation.

B

The defendant also claims that the court's limitation of his defense counsel's closing argument violated his right to the assistance of counsel, amounting to structural error.[27] Specifically, the defendant argues that the court violated his right to the effective assistance of counsel by proscribing, during summation, defense counsel's argument that the lack of evidence that S became pregnant diminished her credibility. The defendant argues that this case "turned on issues of credibility," and that "the state was allowed to poke holes in the defendant's version [of the story] and argue S had no reason to lie, [while] the defendant was not given the same opportunity to point out a major flaw in the state's case." We disagree.

It is well established that "[t]he right to the assistance of counsel ensures an opportunity to participate fully and fairly in the adversary [fact-finding] process. . . . It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all

the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . . In a criminal trial, which is in the end basically a [fact-finding] process, no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment. . . .

"Our appellate courts have previously found reversible error when the trial court precluded defense counsel from discussing certain issues during closing argument, particularly when an issue was significant and [bore] directly on the defendant's theory of the defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Robert R.*, supra, 340 Conn. 85–86.

Here, the defendant was not precluded from arguing the issue of S's credibility. Moreover, the argument that S never became pregnant was not the only means of challenging her credibility. Indeed, defense counsel argued several grounds on which the jury could have questioned S's credibility.[28] The defendant acknowledges in his brief that the precluded argument that S never became pregnant was a "*factor* that pertained to S's credibility." (Emphasis added.) Although the defendant stresses the importance of this particular factor to his overarching argument as to S's credibility, the defendant is not necessarily entitled to present his theory of the defense any way he chooses, and the court may limit summation within its authority to do so. See *State* v. *Gonzalez*, 338 Conn. 108, 132, 257 A.3d 283 (2021) (holding that sixth amendment rights do not encompass right to present closing argument in exact manner in which state presents evidence).

Therefore, we conclude that the court did not preclude defense counsel from presenting to the jury, during closing argument, a significant issue bearing on the defendant's theory of the case. Thus, the court did not violate the defendant's right to the assistance of counsel. Accordingly, the defendant's claim fails under the third prong of *Golding* because the alleged constitutional violation does not exist.

The judgment is affirmed.

In this opinion the other judges concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection

order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

[1] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ."

[2] S could not recall exactly what age she was when the defendant married M but testified that it was sometime before she turned six.

[3] Other than S, who is not the defendant's biological daughter, the defendant and M have three daughters together.

[4] The defendant testified at trial that he never sexually assaulted S. However, there was evidence presented to the jury that the defendant sexually assaulted S when she was between the ages of six to twenty.

[5] Although the state introduced evidence at trial that the defendant sexually assaulted S numerous times from age six to age twenty, the defendant was ultimately charged—in the operative information, filed March 9, 2020—with only three counts of sexual assault in the first degree arising from allegations concerning assaults that occurred when S was between the ages of seventeen and twenty years old.

[6] Each individual sentence was for twenty years of incarceration, execution suspended after ten years, followed by thirty years of probation.

[7] General Statutes (Rev. to 2019) § 54-193 provides in relevant part: "(a) There shall be no limitation of time within which a person may be prosecuted for (1) a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, a class A felony or a violation of section 53a-54d or 53a-169, (2) a violation of section 53a-165aa or 53a-166 in which such person renders criminal assistance to another person who has committed an offense set forth in subdivision (1) of this subsection, (3) a violation of section 53a-156 committed during a proceeding that results in the conviction of another person subsequently determined to be actually innocent of the offense or offenses of which such other person was convicted, or (4) a motor vehicle violation or offense that resulted in the death of another person and involved a violation of subsection (a) of section 14-224.

"(b) No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, *except within five years next after the offense has been committed.* . . ." (Emphasis added.)

The charge of aggravated sexual assault in the first degree that is at issue in this claim is not encompassed by subsection (a) of § 54-193, therefore the five year statute of limitations set forth in subsection (b) applies in the present case.

Subsequent amendments to § 54-193 have increased the statute of limitations for sexual assault offenses occurring on or after October 1, 2019, but are not applicable to the present case. See Public Acts 2019, No. 19-16, § 17.

[8] The warrant affidavit alleged multiple discrete instances in which the defendant sexually assaulted her and alluded to several more. Five of these enumerated alleged instances occurred when S was in high school and college.

[9] The identified events are described in the affidavit as taking place during S's senior year of high school, sophomore year of college, and on May 22, 2017.

[10] Count one, charging the defendant with aggravated sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, the [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense he displayed a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count two, charging the defendant with unlawful restraint in the first degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, the [the defendant] did restrain another person under circumstances which exposed the such other person to a substantial risk of physical injury, in violation of [§] 53d-95 (a) of the General Statutes."

Count three, charging the defendant with threatening in the second degree, "charges that in the [c]ounty of Fairfield, at the [c]ity of Bridgeport, on or

about the 22nd day of July, 2017, at approximately 7:00 a.m., at or near [a street in Bridgeport], within said [c]ity, [the defendant] did by physical threat, intentionally placed or attempted to place another person in fear of imminent, serious physical injury, in violation of [§] 53a-62 (a) (1) of the General Statutes."

[11] Count one, charging the defendant with aggravated sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, in the [c]ity of Bridgeport, on or about the 22nd day of May, 2017, at or near . . . [a street in Bridgeport], within said [c]ity, [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense was armed with and threatened the use of a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count two, charging the defendant with aggravated sexual assault in the first degree, "charges that on or about January 1, 2014 at . . . North Bishop Avenue within said [c]ity, [the defendant] compelled another person to engage in sexual intercourse by the use of force against such other person, and in the commission of such offense was armed with and threatened the use of a deadly weapon, to wit: a knife, in violation of [§] 53a-70a (a) (1) of the General Statutes."

Count three, charging the defendant with sexual assault in the first degree, "charges that in the [c]ounty of Fairfield, at the [t]own of Fairfield, on or about January 1, 2016, in the area of [a street in Fairfield] within said [t]own, [the defendant] did compel another person to engage in sexual intercourse by the use of force against such other person which reasonabl[y] caused such other person to fear physical injury in violation of [§] 53a-70 (a) (1)."

[12] On March 9, 2020, the state filed another substitute long form information—the operative charging document on which the defendant's conviction was based—charging the defendant with three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1). The March 9, 2020 information is based on the same incidents alleged in the February 7, 2020 information, which were alleged to have occurred on or about May 22, 2017, January 1, 2016, and January 1, 2014. However, the defendant's motion to dismiss, the court's ruling thereon, and his claim on appeal that the court's ruling was erroneous, are based on the February 7, 2020 substitute information. Thus, the parties agree that the subject of our review is count two of the February 7, 2020 substitute information.

[13] The defendant does not challenge the state's assertion that the warrant affidavit contained a description of the 2014 conduct that is the subject of count two of the February 7, 2020 substitute information.

[14] Neither party disputes this fact.

[15] Although our Supreme Court, in *Golodner*, did not include the language from *Salmonese* disclaiming the determinative effect of any one factor, it did state that all the factors were intended "to assist" in the determination of the tolling effect of the timely filed information. *State* v. *Golodner*, supra, 305 Conn. 358. We interpret *Golodner* as setting forth factors for analyzing the tolling effect, under specific facts, none of which are necessarily dispositive of the issue on their own. See *State* v. *Mosback*, 159 Conn. App. 137, 154, 121 A.3d 759 (2015) (concluding that substitute information did not substantially broaden charges even though one of *Golodner* factors weighed in favor of defendant).

[16] We note that, in *Mosback*, the state, in an untimely substitute information, charged the defendant under a subdivision of the statute cited in the original, timely information. *State* v. *Mosback*, supra, 159 Conn. App. 156–57. This court noted in *Mosback* that, "when the state had filed the original information, it was possible that the state would elect to prosecute the defendant for violating" the specific subdivision on which the state relied in the substitute information. Id., 156. Nonetheless, in its analysis of the similarity of the factual predicate of the timely and untimely charges in *Mosback*, the court considered facts that only appeared in the arrest warrant affidavit, and not in the original information, to arrive at its determination that the factual allegations underlying the amended information were substantially similar to those underlying the original information. Id., 158–59.

[17] The defendant cites to *Jennings* in support of his contention that because the additional charge led to a longer sentence, the statute of limitations was not tolled. However, we once again note that *Jennings* is distinguishable from the present case. In *Jennings*, the warrant did not contain allegations that supported the untimely charge added by the substitute information, as the warrant here did. *State* v. *Jennings*, supra, 101 Conn. App. 812–13.

[18] General Statutes § 52-570d provides in relevant part: "(a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use. . . ."

[19] General Statutes § 52-184a provides: "No evidence obtained illegally by the use of any electronic device is admissible in any court of this state."

[20] The defendant stated in the call that he did not remember having ever engaged in sexual intercourse with S when she was six years old.

[21] The defendant also noted that the law enforcement exception—set forth in § 52-570d (b) (1)—to the two party consent requirement for recordings did not apply here because Ribacoff was acting of his own accord, and not at the direction of law enforcement.

Moreover, the defendant advanced a due process argument at the suppression hearing, which the court rejected. This argument was not advanced on appeal; therefore, we deem it abandoned. See *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 35 n.15, 257 A.3d 360 ("arguments [that] have not been advanced on appeal . . . are deemed abandoned"), cert. denied, 338 Conn. 913, 259 A.3d 653 (2021).

[22] The defendant raised a constitutional argument under the fourth amendment to the United States constitution before the trial court that he expressly abandons on appeal.

[23] The defendant testified that Jackson was a "friend of the family" but later stated that, "I know her but not know her" before stating that he did know her. The defendant further testified that he could not remember sending the messages to Jackson because he was distressed. Subsequently, the defendant testified that he sent the messages to Jackson because he thought it would lead to a reconciliation between him and his family.]

[24] The defendant also suggests that S's credibility was a central facet of the case. The defendant posits that S had motive to fabricate the allegations because she wanted to be free to see her boyfriend, and the defendant was strictly against her dating outside of their church.

[25] The defendant also claims that his right to present a defense was violated. However, this claim is not briefed beyond a bare assertion, and, accordingly, is inadequately briefed. See *In re A'vion A.*, 217 Conn. App. 330, 356–57, 288 A.3d 231 (2023) ("[C]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). We therefore decline to review the defendant's claim that the trial court violated his right to present a defense.

[26] The defendant argues that he is entitled to relief under *Golding* insofar as his claims are unpreserved.

[27] Although the defendant does not cite to any authority to support his assertion that there was structural error, we acknowledge that our Supreme Court has held that "[o]nce a violation of the sixth amendment right to the assistance of counsel has been established, we need not inquire as to whether the error resulted in prejudice to the defendant. [A] per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." (Internal quotation marks omitted.) *State* v. *Robert R.*, supra, 340 Conn. 89.

[28] Much of defense counsel's statement at closing argument was concerned with casting doubt on S's credibility, and, with the exception of the previously referenced comments regarding lack of evidence of pregnancy, these statements were not limited by the court. Such statements included: "this was a strict household"; "we know [S] had a boyfriend . . . [and that] [the defendant] wasn't happy about [the boyfriend] being in a relationship with [S]"; "[i]t's only after this blowup with [the defendant] and the argument about [her boyfriend] . . . that [S] runs off [and] tells her mother that [the defendant] has been sexually assaulting her"; "[S's] explanation of why she finally reported [these] alleged assaults to the police, is that she just had enough and she needed it to stop so that she can live her life or words to

that effect"; "with the exception of the purported black eye from May of 2017, there's been no evidence presented that a single person noticed any sort of injury on [S] despite her claims of being repeatedly, violently sexually assaulted for more than fourteen years"; "[n]ot only does [S] not disclose anything during the fourteen plus years she's claiming this is going on, but when confronted by her mother and [sister] . . . she denied [being sexually assaulted]"; "[h]ow is it that [S] could not tell you whether [the defendant's] penis was circumcised or uncircumcised?"