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STATE OF CONNECTICUT *v.* ROBERT A. PEREZ-LOPEZ (AC 44280)

Alvord, Clark and Seeley, Js.

Syllabus

The defendant was convicted, after a jury trial, of assault in the first degree in connection with a physical altercation outside a restaurant during which he stabbed the victim. At trial, the primary evidence against the defendant were eyewitness identifications by the victim and the victim's friend, V, who was with the victim at the time of the assault. After the assault but prior to the administration of a photo lineup to the victim, a third party sent a photograph of the defendant obtained from Facebook to the victim's wife, who forwarded the photograph to the detective in charge of the investigation. The detective used the photograph to learn the defendant's name and to generate a photo lineup, from which the victim identified the defendant as the perpetrator. V, who had previously worked with the defendant for a period of approximately two years, subsequently identified the defendant as the perpetrator in a separate photo lineup. On appeal, the defendant claimed that the trial court violated his state constitutional right to due process by denying his motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth in *State* v. *Harris* (330 Conn. 91), which provides that, in order to obtain a pretrial hearing, the defendant has the initial burden of offering some evidence that a system variable, a factor within the control of the criminal justice system, undermined the reliability of the eyewitness identification and, if the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables, factors outside of the control of the criminal justice system that generally arise from the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime. If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification and, if the defendant meets that burden of proof, the identification must be suppressed. The defendant also claimed that the trial court abused its discretion in denying his motion in limine to preclude the victim's identification of him following the administration of the photo lineup and abused its discretion and violated his right to present a defense by denying his specific request to charge the jury on eyewitness identification. *Held*:

1. This court concluded that, although the trial court failed to apply the proper burden shifting analysis set forth in *Harris*, any error in the trial court's analysis was harmless beyond a reasonable doubt:

   a. The trial court improperly failed to apply the framework adopted in *Harris* in connection with the defendant's state constitutional due process claim: the court applied the initial step of the *Harris* framework by conducting a hearing and making a statement suggesting that the state, by agreeing to the hearing, had conceded that the defendant had produced sufficient evidence of a system variable undermining the reliability of the identification, and, although the court cited to *Harris* when setting forth the federal framework in its memorandum of decision, it failed to identify the state constitutional framework adopted in *Harris* and did not analyze the identification under that standard but, rather, analyzed the identification under the federal framework by concluding that the identification procedures were not unduly suggestive and that they had been conducted in a manner that substantially reduced the risk of misidentification.

   b. Any error in the trial court's analysis of the defendant's constitutional claim was harmless beyond a reasonable doubt because, even if the court had properly applied the *Harris* framework, it was not reasonably possible that it would have reached a different conclusion as to the admissibility of the victim's identification of the defendant: this court reviewed the video recording of the administration of the photo lineup to the victim and concluded that any deviations in conducting the lineup

from the statutorily (§ 54-1p) required procedures were minimal in nature; moreover, the state presented ample evidence of both system and estimator variables that supported a determination that the photo identification by the victim was reliable, including that the area where the assault occurred was well lit, this case did not involve a cross-racial identification, there was no evidence that the victim was aware that the defendant had a weapon, and the victim's description of the assault was substantially similar to that recounted by V, and despite the fact that the defendant appeared to be wearing the same shirt in the lineup photo that he wore in the Facebook photo, the details of the defendant were difficult to discern in the Facebook photo and, therefore, the lineup photo of the defendant did not unduly stand out and the victim was not shown multiple images clearly depicting the defendant during the photo identification process so as to render the victim's identification unconstitutionally unreliable; accordingly, the victim's identification of the defendant did not result in a substantial likelihood of misidentification.

2. The trial court did not abuse its discretion in denying the defendant's motion in limine to preclude the victim's identification of him in the photo lineup because that identification was the product of unduly suggestive conduct by a private actor, namely, the victim's viewing of the Facebook photograph: utilizing the two-pronged inquiry traditionally applied to identifications involving state action to determine the admissibility at trial of an eyewitness' identification, this court determined that the victim's viewing of the Facebook photograph was not unnecessarily suggestive because there is no case law that suggests that a victim's conduct outside of the control of the criminal justice system constitutes unnecessarily suggestive conduct and, based on an examination of the totality of the circumstances, the victim's identification was nonetheless reliable; moreover, even if the trial court had abused its discretion in admitting the victim's out-of-court identification into evidence, any such error would be harmless in light of the other evidence in the present case, particularly the positive identification of the defendant made by V, who already knew the defendant personally.

3. The trial court did not improperly deny the defendant's request to instruct the jury with his proposed language regarding eyewitness identification or deprive him of the right to present a defense by doing so: under Connecticut law, identification instructions are not constitutionally required, and, even if a court's instructions are less informative on the risks of eyewitness misidentification, the issue is at most one of instructional error rather than constitutional error; moreover, a new trial would be warranted only if a defendant could establish that it was reasonably probable that the jury was misled, which the defendant in this case failed to do, as the trial court's instructions to the jury, taken as a whole, fairly and adequately presented the case to the jury in such a way that injustice was not done to the defendant pursuant to the established rules of law; furthermore, the defendant presented expert testimony on the issue of eyewitness identification, including the exact matters that the defendant contended should have been included in the court's instructions, and the expert's testimony fulfilled the purpose of particularized jury instructions, namely, to educate the jury regarding the science related to the fallibility of eyewitness identifications and the specific factors that may affect their reliability.

Argued May 12, 2022—officially released April 11, 2023

Procedural History

Information charging the defendant with the crime of assault in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hernandez*, *J.*, denied the defendant's motion to suppress certain identification evidence; thereafter, the court denied the defendant's motion in limine to preclude certain identification evidence; subsequently, the case was tried to the jury before *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Lisa J. Steele, assigned counsel, for the appellant

(defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Michael A. DeJoseph*, supervisory assistant state's attorney for the appellee (state).

Opinion

SEELEY, J. The defendant, Robert A. Perez-Lopez, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1).[1] On appeal, the defendant claims that the trial court (1) violated his state constitutional right to due process[2] by denying his motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth by our Supreme Court in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018),[3] (2) abused its discretion in denying his motion in limine to preclude the identification of him following the administration of a photo lineup,[4] and (3) abused its discretion and violated his right to present a defense by denying his specific request to charge the jury on eyewitness identification.[5] We affirm the judgment of conviction.

The jury reasonably could have found the following facts. On November 3, 2017, the victim, Alberto Santos, and his friend, Johnny Veloz, went to the home of an individual known as "Alfred." The victim consumed several beers before the three men went to La Sabrosura, a restaurant in Bridgeport, in Veloz' automobile. Veloz parked on the street near the restaurant in the early morning hours of November 4, 2017.

The victim exited the automobile and walked toward the restaurant. A group of three men approached the victim and blocked his entry into the restaurant. The first individual in this group, later identified as the defendant, confronted the victim, which resulted in a physical altercation between the victim and the three men. The victim was struck in the face, and, at some point, the defendant moved behind the victim and stabbed him in the back with a sharp object. Veloz witnessed the stabbing and observed blood on the defendant's hands. After the defendant and his group departed, Veloz drove the victim to the hospital. The victim sustained various injuries and was hospitalized for five days.[6]

Jeremy Kelly, a Bridgeport police detective, went to the hospital to speak with the victim on November 4, 2017. The victim had tubes inserted into his lungs and he appeared weak, so Kelly spoke to him only briefly. At that time, the victim informed Kelly that he did not know who had stabbed him. Kelly provided his contact information, including his email address, to the victim's wife, Jordy Gonzalez.

At some point after November 4, 2017, a third party sent a photograph[7] obtained from Facebook[8] to Gonzalez, who then forwarded it to Kelly on November 7, 2017. Kelly used the Facebook photograph to learn the defendant's name and to generate a photo lineup.[9] Kelly interviewed the victim at the police station on November 13, 2017. A police detective who had no knowledge

of the case administered the photo lineup to the victim while Kelly observed from a separate room. The victim identified the defendant as his assailant[10] and indicated that he was between 70 and 80 percent certain of his identification. After the photo lineup was administered, Kelly showed the Facebook photograph to the victim. The victim indicated that the three people in the Facebook photograph were involved in the altercation at the restaurant.

Kelly interviewed Veloz at the police station on November 20, 2017. A police sergeant who had no knowledge of the case showed Veloz a photo lineup, with Kelly again observing from a separate room. Veloz identified the defendant as the individual who had assaulted the victim and stated that he was 100 percent certain of his identification.[11]

Following a trial, at which the victim and Veloz identified the defendant as the assailant, the jury found the defendant guilty of assault in the first degree in violation of § 53a-59 (a) (1). Thereafter, the court sentenced the defendant to a period of incarceration of ten years, execution suspended after seven years, and three years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court violated his state constitutional right to due process by denying his motion to suppress the victim's out-of-court identification after it failed to apply the burden shifting analysis set forth in *State* v. *Harris*, supra, 330 Conn. 91. Specifically, he contends that the court erred by not requiring the state to establish that the victim's identification was reliable based on certain factors present at the time of the assault and following numerous flaws in the identification procedure. The state counters, inter alia, that any error in the court's analysis was harmless beyond a reasonable doubt. We agree with the defendant that the court improperly failed to apply the burden shifting test announced in *Harris*. We nevertheless conclude that this error was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of the victim's identification had it applied the *Harris* test.

A

The following additional facts and procedural history are necessary for the resolution of this claim. On January 24, 2018, the defendant moved to suppress, inter alia, identifications resulting from any pretrial identification procedures that were unnecessarily suggestive or in any way violated his federal or state constitutional rights. He further sought to suppress any subsequent identifications that had been tainted by such improper procedures. The defendant filed a supplemental motion to suppress, dated November 4, 2019, repeating his

claim that the identifications should be suppressed.[12] Therein, he argued that the victim had not provided a description of his assailant, had stated that he was unsure who assaulted him, had indicated that he was stabbed in the back by someone from behind, had an elevated blood alcohol content, and had been too intoxicated to consent to treatment. The defendant also contended that the police had created a photo lineup that included a picture of the defendant in which he was wearing the same shirt that he had on in the Facebook photograph. On the basis of these facts, the defendant argued that the photo lineup was unnecessarily suggestive and not reliable in violation of his federal and state constitutional rights. He requested that the court suppress the identifications[13] and conduct an evidentiary hearing pursuant to *State* v. *Harris*, supra, 330 Conn. 91.[14]

The court, *Hernandez*, *J.*, conducted an evidentiary hearing on January 8, 2020. At the outset, the court noted that it had received and reviewed a copy of the police reports and the photo lineups, a package of standard discovery materials, and the video recordings of the police interviews where the victim and Veloz had reviewed the photo lineups prepared by the police and identified the defendant. On the morning of the hearing, defense counsel provided the court with excerpts from the victim's medical records.

At the hearing, Kelly testified that he was assigned to investigate the victim's stabbing at the restaurant. He described the area as a "densely populated [commercial] area" that was "adequately lit up . . . not a dark place, it's pretty bright" from overhead streetlights and the ambient lighting from businesses and residences. Kelly further testified that, after he received the Facebook photograph of the defendant, he showed it to another Bridgeport police officer and learned the defendant's name. Kelly then obtained a photograph of the defendant from a police database and used that to create a photo lineup.[15]

On November 13, 2017, Kelly interviewed the victim at the police station. Juan Serrano, another Bridgeport police detective, participated in this interview and also served as a Spanish translator. Serrano had no knowledge of this criminal investigation. Kelly explained that he did not "want a detective that had any prior knowledge of who the suspect might be to taint the photo lineup."[16] The video recording of the interview reveals that Kelly briefly left the room to get the photo lineup. During the time period when Kelly was absent, Serrano read instructions from a form[17] relating to the administration of the photo lineup to the victim but omitted the instruction that the victim should take as much time as he needed to review the photo lineup. As Serrano neared the end of the instructions, Kelly reentered the room holding a manila folder in his right hand and

papers and another manila folder in his left hand. Kelly left one of the manila folders, which contained the photo lineup, with Serrano and, while holding the other folder, stated: "[Serrano] doesn't know anything about the case other than what we talked about. I do know the case, so I have an idea who it is, so I am going to leave the room for a few minutes. Take your time." Kelly then exited the room.

Serrano began the administration of the photo lineup by removing the first photograph from a manila folder and placing it faceup in front of the victim. The victim looked at the photograph and immediately slid it to his left. Serrano inquired, "no?" to which the victim replied, "no." Serrano then turned the first photograph over so that it was facedown. Serrano placed the second photograph faceup in front of the victim. The victim quickly identified the defendant in this photograph and slid it to his right without flipping it over. While the photograph of the defendant remained faceup and to the right of the victim, Serrano placed the third photograph faceup in front of the victim. The victim, while looking directly at the third photograph, stated, "no." As Serrano was turning the third photograph facedown and placing it on top of the facedown first photograph, the victim appeared to glance at the second photograph to his right for a brief instant. At no point did the victim directly compare the two photographs. The victim continued looking down at the table as Serrano placed the fourth photograph in front of him faceup. The victim pushed the fourth photograph away from him and toward the pile that was facedown without saying anything. After placing the fourth photograph facedown on the pile with photographs one and three, Serrano noticed that the second photograph had remained faceup. Without comment or drawing undue attention to what he was doing, Serrano turned over the second photograph so that it was facedown. Serrano continued with the administration of the photo lineup, where each of the remaining photographs was shown individually to the victim and then placed facedown on the pile to the left of the victim. Upon the completion of the administration of the photo lineup, Serrano collected the materials and placed them in the manila folder. Kelly then returned to the room and asked the victim to write the name of the individual depicted in the second photograph. Kelly also requested that the victim indicate "how sure is he that's the guy, is he 100 percent . . . ." The victim responded that he was 70 to 80 percent sure of his identification.

Kelly interviewed Veloz one week later, on November 20, 2017. Sergeant Gilberto Valentin, who had no knowledge of the case, presented a different photo lineup to Veloz. Kelly left the room while Valentin showed that lineup in a sequential manner to Veloz. During the administration of the photo lineup, Veloz identified the defendant as the individual who had assaulted the vic-

tim and stated that he was 100 percent certain of his identification.[18]

After the testimony from Kelly, Serrano, and Valentin, the prosecutor and defense counsel stated that there were no further witnesses. The court indicated its intention to take a recess to review the relevant case law and to afford counsel time to prepare their respective arguments. The prosecutor requested that the court consider two decisions from our Supreme Court, *State* v. *Johnson*, 312 Conn. 687, 94 A.3d 1173 (2014), and *State* v. *Holliman*, 214 Conn. 38, 570 A.2d 680 (1990),[19] while defense counsel suggested that the court review *State* v. *Harris*, supra, 330 Conn. 91.

After the recess, the court resumed the hearing. Defense counsel first highlighted the evidence regarding the victim's intoxication on the night of the stabbing to the court. Next, he challenged the makeup of the photo lineup on the basis that some of the filler[20] photographs depicted individuals with long hair.[21] Defense counsel also restated his concern that the defendant appeared to be wearing the same shirt in both the Facebook photograph and the photo lineup. He then identified *State* v. *Harris*, supra, 330 Conn. 91, as the "controlling case" that discussed "the system variables [those factors within the control of the criminal justice system] that undermine the reliability" of the identification. Defense counsel challenged the manner in which the administering officer, Serrano, permitted the victim to put aside the photograph he chose as the perpetrator while he viewed other photographs in the lineup. Defense counsel then argued that, just prior to the commencement of the administration of the photo lineup, Kelly stated that he had to leave the room because he had "an idea" of who the suspect was. He further argued that Kelly was pointing to or had his hand on the folder containing the photo lineup, implicitly suggesting that Kelly had knowledge of whether the assailant's photograph was included in the lineup. Defense counsel also noted that Serrano had failed to read one of the required instructions to the victim during the administration of the photo lineup; namely, that the victim "should take as much time as needed in making a decision." He also claimed that the victim's confidence statement was not made in his own words. Finally, defense counsel contended that certain estimator variables, those variables outside of the control of the criminal justice system, including the brief duration of this high stress attack, the victim's purported intoxication, the fact that it was night, the victim's exposure to the Facebook photograph, and the fact that the victim was stabbed from behind, all supported the claim that the victim's identification of the defendant was unreliable.

During the prosecutor's argument to the court, he first claimed that defense counsel had not carried his initial burden under *State* v. *Harris*, supra, 330 Conn.

91, to present some evidence that a system variable undermined the reliability of the identification. The prosecutor then stated: "If the court finds that the defendant has put forth some evidence meeting that burden, then the state has to demonstrate that the identification was reliable in light of all the relevant [system] and estimator variables. The court has reviewed the interviews with [the victim], the interview with Veloz, the court has examined the [photo lineups] of both of those witnesses. The state would submit there's nothing unduly suggestive in any of that and there's certainly no police conduct in those interviews which would warrant suppression. So I would submit the state has met its burden on that prong. And then the defendant would have—the defendant must then prove a very substantial likelihood of misidentification which the defendant has not reached."

The court then asked defense counsel to identify the system variables that supported his claim that the victim's identification was unreliable and therefore should be suppressed. Defense counsel responded: "So one would be the array itself, the photo of [the defendant] wearing the same shirt as the Facebook picture. The fact that there was multiple individuals in the array with long hair. That contrary to the intention and instructions to have a sequential identification the individual was allowed to set [the defendant's] picture to the side and for some period of looking at the other photos had [the defendant's] photo to compare it to . . . .[22] I would also indicate that when . . . Kelly . . . says I have to leave the room because I have an idea of who the suspect is [this is a system variable in support of suppression]. And while he's saying that he's either pointing to or touching the folder with the photos[23] [which] suggests that he knows that the suspect is in that group, undermining the goal of the double-blind procedure.

"And then instruction number 7 is I would submit was not given and that the instructions were in English and not in Spanish. And lastly the confidence statement I would indicate was not in the [victim's] own words, largely not in his own words. So those would be the system variables that I would submit would be violated. . . . And then going on to the estimator variables I would indicate it was . . . very fast, according to their words, events. We know that they had to observe multiple parties. I would blame the intoxication, nighttime, dark. The extrinsic evidence of the Facebook photo I would claim the prior nonidentification. A high stress situation and in his words he was stabbed from behind." (Footnotes added.)

The court orally denied the defendant's motion to suppress. The court initially noted that a hearing had been necessary to address the issues raised by the defendant with respect to the identification. The court

then stated: "After a full hearing being submitted to the court, however, the court finds that with respect to both identification procedures the identification procedures employed by . . . Kelly and his fellow officers was not unduly suggestive. The administration of the array was conducted in a manner which substantially reduced the risk of misidentification. The motion to suppress the out-of-court and in-court identifications is denied."

After the defendant was convicted, and in response to his motion for articulation filed on March 18, 2021, the court issued a memorandum of decision on June 30, 2021, explaining its reasoning for denying the motions to suppress. In setting forth the relevant legal principles, the court identified the test for determining whether an identification violated the due process clause of the federal constitution. Although it cited *State* v. *Harris*, supra, 330 Conn. 91, it did not set forth the new framework for determining whether the identification procedures in the present case violated our state constitution. The court described the issue as follows: "The defendant moves to suppress evidence of the out-of-court identification procedures employed by the Bridgeport Police Department as unduly suggestive in the manner in which they were administered to [the victim and Veloz]. He also challenges [the victim's] identification as unduly suggestive because [the victim's wife] had previously emailed a copy of the defendant's photograph to . . . Kelly." The court again referred generally to *Harris* but not to the framework our Supreme Court adopted for determining whether an identification procedure violated the defendant's state constitutional due process right.

The court found that the incident occurred under lighting conditions sufficient to render the identifications reliable. It then summarized Kelly's November 13, 2017 interview with the victim at the police station and the administration of the photo lineup by Serrano. The court found that, although there was evidence that the victim was intoxicated at the time of the crime, under the totality of the circumstances, this did not render the victim's identification unreliable. The court stated: "Rather, the court finds that the fact that [the victim] was able to recall additional details as mundane and unremarkable as the absence of parking spaces in front of the restaurant and where the driver eventually parked the car, and was able to recall those additional details nine days after the assault, constitute persuasive evidence that the victim's recall and, therefore, his ability to make a reliable identification were not substantially impaired."

Next, the court set forth the details of Kelly's November 20, 2017 police station interview with Veloz and the administration of the photo lineup by Valentin. At the conclusion of that discussion, the court specifically found that "[the victim], Veloz and the defendant all

appear to be of Afro-Latino extraction."

In its analysis, the court stated that Veloz previously had worked with the defendant and, on the night of the incident, had provided the police with an accurate description of the defendant's physical appearance. It also indicated that the victim had identified the defendant in the Facebook photograph, and, thus, "by the time the police conducted the identification procedures at issue, the victim and [Veloz] had already taken substantial steps in identifying the defendant." The court then turned to the video recordings of the administration of the photo lineups to the victim and Veloz, concluding: "[I]n both instances the administering officers scrupulously followed the identification procedures in letter and spirit. The administering officers were not familiar with the investigation, they did not know who the primary suspect was, they allowed the pair to view the photographs one at a time and they did not betray any suggestion that the defendant's photograph was that of the primary suspect. Indeed, because they did not know who he was, they could not."

After setting forth the details of the photo lineup administered to the victim, the court found that "the individuals depicted in the [photo lineup] are sufficiently similar to one another so as not to render the procedure unduly suggestive." The court also found that, although Serrano failed to read instruction number 7 to the victim,[24] which provided that "[y]ou should take as much time as needed in making a decision," during the administration of the photo lineup, this omission "[did] not render the overall fairness of the identification procedure suspect from . . . a constitutional due process standpoint . . . ." The court determined that "under the totality of the circumstances, the manner in which the [photo lineup] was conducted was not unduly suggestive. Moreover, the general thrust of instruction number 7—take your time—is conveyed and suggested in other instructions." In addition to the instructions, the court also pointed to the overall demeanors of Serrano, who did not impart an air of urgency, and the victim, who did not appear to be under pressure to hurry.

The defendant's argument that the identification procedure was unduly suggestive due to the Facebook photograph depicting the defendant that had been emailed to the police by the victim's wife also failed to persuade the court. In response to this contention, the court cited our Supreme Court's decision in *State* v. *Johnson*, supra, 312 Conn. 702–705, which rejected the view that unduly suggestive conduct by a private actor automatically implicates due process principles. For these reasons, the court denied the defendant's motions to suppress.

We next set forth the relevant legal principles. It is well established that the admission into evidence of an out-of-court identification that is both unreliable and based on unduly suggestive police procedures violates a defendant's federal right to due process. See *State* v. *Waters*, 214 Conn. App. 294, 315 n.13, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022); see also *Perry* v. *New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). "The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 621–22, 254 A.3d 905 (2020).

Pursuant to this test under the federal constitution, if the trial court determines that no unduly suggestive identification procedure occurred,[25] then no further analysis is required, and the identification is admissible into evidence. *State* v. *Dickson*, 322 Conn. 410, 421, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see also *State* v. *Marquez*, 291 Conn. 122, 141–42, 967 A.2d 56 (summarizing and endorsing two-pronged inquiry), cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009); *State* v. *Outing*, 298 Conn. 34, 55, 3 A.3d 1 (2010) (no need to reach second part of two-pronged inquiry once defendant has failed to meet first prong), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). An identification resulting from an unnecessarily suggestive identification procedure nevertheless will be admissible so long as it is reliable in light of all of the relevant circumstances. See *State* v. *Harris*, supra, 330 Conn. 108. For the purposes of the federal constitution, "we determine whether an identification resulting from an unnecessarily suggestive procedure is reliable under the totality of the circumstances by comparing the corrupting effect of the suggestive identification against factors including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the

[identification], and the time between the crime and the [identification] [hereinafter *Biggers* factors]." (Internal quotation marks omitted.) Id.; see also *State* v. *Outing*, supra, 61–62. Stated differently, "[a]n out-of-court eyewitness identification should be excluded on the basis of the procedure used to elicit that identification . . . if the court is convinced that the procedure was so suggestive and otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 422.

In recent years, our Supreme Court has made substantial changes to our eyewitness identification jurisprudence,[26] including permitting expert testimony on the reliability of eyewitness identification and recognizing that focused and informative jury instructions may be needed to guide the jury with respect to this issue. See *State* v. *Guilbert*, 306 Conn. 218, 220–21, 257–58, 49 A.3d 705 (2012). In *State* v. *Harris*, supra, 330 Conn. 96, our Supreme Court held that the due process clause of article first, § 8, of the Connecticut constitution affords greater protection than the federal due process clause with respect to the admissibility of an eyewitness identification.[27] The court explained that "the *Biggers* framework is insufficiently protective of the defendant's due process rights under the state constitution." Id., 131.

Our Supreme Court then identified the analytical framework required by our state constitution "for evaluating the reliability of an identification that is the result of an unnecessarily suggestive identification procedure." Id. The court stated: "Having reviewed the various approaches used by courts around the country, we conclude that the most appropriate framework is that adopted by the New Jersey Supreme Court in *State* v. *Henderson*, [208 N.J. 208, 288–89, 27 A.3d 872 (2011)]. Pursuant to that framework, to obtain a pretrial hearing, *the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables. . . .*[28] *If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . .* If the defendant meets that burden of proof, the identification must be suppressed. . . . It bears emphasis that this framework does not differ significantly from our current approach . . . ." (Citations omitted; emphasis added; footnote added.) *State* v. *Harris*, supra, 330 Conn. 131; see also *State* v. *White*, 334 Conn. 742, 770, 224 A.3d 855 (2020).

To determine if a defendant has met his or her initial burden of offering "some evidence" that the reliability of an identification has been undermined by a system

variable, we consider *State* v. *Henderson*, supra, 208 N.J. 289–91, which our Supreme Court relied on in *Harris*. In *Henderson*, the New Jersey Supreme Court set forth the following nonexhaustive list of system variables to consider in determining whether evidence of suggestiveness existed: (1) was the procedure performed in a double-blind manner; (2) was the witness provided with neutral pre-identification instructions warning that the suspect may not be present in the array or lineup and that the witness should not feel compelled to make an identification; (3) was the lineup or array constructed so that the suspect did not stand out and contained only one suspect and at least five fillers; (4) was the witness provided any feedback information before, during or after the identification procedure; (5) was the confidence statement of the witness recorded immediately, before the possibility of any confirmatory feedback; (6) was the witness permitted to view the suspect more than once as part of multiple identification procedures without the use of repeat fillers; (7) was a showup conducted more than two hours after an event, and, if so, did the police notify the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification; (8) was the witness asked by law enforcement if he or she spoke with anyone about the identification, and, if so, what was discussed; and (9) was the witness' initial choice the suspect or did he or she make no choice or choose a different suspect or filler. See id., 289–90.

The court in *Henderson* further explained that a hearing was required so long as the defendant offered some evidence of suggestiveness. "If, however, at any time during the hearing the trial court concludes from the testimony that [the] defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the [s]tate to elicit more evidence about estimator variables; that evidence would be reserved for the jury." Id., 290–91.

During the second step of the *Harris* framework, "the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables." *State* v. *Harris*, supra, 330 Conn. 131. A trial court should consider the following variables, which our Supreme Court has noted are neither exclusive nor frozen in time. See id., 132–34. "(1) [T]here is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-

racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54; see also *State* v. *Harris*, supra, 133.

If the state satisfies its burden by producing evidence of reliability in light of the relevant system and estimator variables, then the burden shifts back to the defendant to "prove a very substantial likelihood of misidentification," the third and final step in the analysis. *State* v. *Harris*, supra, 330 Conn. 131. The New Jersey Supreme Court explained that this third step is done by cross-examination of witnesses and police officers and the presentation of witnesses and other relevant evidence linked to both system and estimator variables. *State* v. *Henderson*, supra, 208 N.J. 289. In a subsequent case, the court emphasized that the "threshold for suppression remains high" and that unless "a defendant can show a very substantial likelihood of irreparable misidentification . . . it is for the jury to decide whether to credit a witness' account . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Anthony*, 237 N.J. 213, 239, 204 A.3d 229 (2019).

C

With this background and these legal principles in mind, we turn to the defendant's claim on appeal that the court failed to apply the burden shifting test identified in *State* v. *Harris*, supra, 330 Conn. 91, and instead used the analytical framework applicable to a due process claim made pursuant to the federal constitution. Specifically, he argues that the court "did not put the burden on the state to show that [the victim's] identification was reliable in light of the flaws in the identification procedure. The state offered no evidence about why [the victim's] identification was nonetheless reliable. Having failed its burden of proof, [the victim's] identification should have been suppressed." On the basis of our careful review of the motions to suppress filed by the defendant, the hearing on those motions, the court's oral decision, and the court's memorandum of decision, we conclude that the court did not apply the *Harris* framework.

The first stage in the *Harris* framework provides that, in order to obtain a pretrial hearing, the defendant has the initial burden of offering "some evidence"[29]

that a system variable undermined the reliability of the eyewitness identification. *State* v. *Harris*, supra, 330 Conn. 131. The trial court appears to have, in effect, applied this initial step of the *Harris* framework. Specifically, it conducted a hearing and, during that proceeding, made a statement suggesting that the state, by agreeing to the hearing, had conceded that the defendant had produced sufficient evidence of a system variable undermining the reliability of the identification. Although the state expressly disavowed making any such concession, the court's statement indicated its awareness of the first part of the *Harris* framework. As further support for this observation, we note the court's statement in its oral decision that it was "satisfied that counsel has made a threshold showing that there are issues regarding the identification which would require a hearing."

The court's adherence to *Harris* ended there, however. Instead of applying the second and third steps of the *Harris* framework to evaluate the reliability of the victim's identification, it is evident from the court's memorandum of decision that the court analyzed the identification under the federal framework by concluding that the identification procedures were not unduly suggestive and that they had been conducted in a manner that substantially reduced the risk of misidentification. Although the court cited to *Harris* in setting forth the federal framework, it failed to identify the state constitutional framework adopted in *Harris* and did not analyze the identification under that standard.

Although the court asked questions and engaged with counsel at the motion to suppress hearing regarding various system and estimator variables, there is no indication that it determined whether the state had met its burden of demonstrating reliability. Nor is there any indication that the court considered whether the defendant had proved a very substantial likelihood of misidentification, the final step in the *Harris* analysis. We agree, therefore, with the defendant that the court improperly failed to apply the framework adopted in *State* v. *Harris*, supra, 330 Conn. 123–24, in connection with the defendant's state constitutional due process claim.[30]

D

Although we agree with the defendant that the court improperly failed to apply the *Harris* framework, we nevertheless conclude that the state has established that any error was harmless beyond a reasonable doubt. Initially, we note that our Supreme Court utilized a harmless error analysis in *Harris*. Specifically, it recognized "the defendant's claim that, if the trial court had applied the proper standard in the present case, it would have concluded that [the] identification of him should be excluded as insufficiently reliable." Id., 135. The court considered the facts in light of the new burden

shifting framework, the related principles that the parties may present expert testimony regarding the relevant factors, and that the court should provide appropriate instructions to the jury regarding the fallibility of eyewitness identification. See id., 131–35. Ultimately, the court concluded that "the trial court's application of the *Biggers* framework instead of the reliability standard that we have adopted in the present case was harmless because *it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of* [*the*] *identification under our new framework*. See, e.g., *State* v. *Montgomery*, 254 Conn. 694, 718, 759 A.2d 995 (2000) ('[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt' . . .)." (Emphasis added.) *State* v. *Harris*, supra, 330 Conn. 137–38; see generally *State* v. *Alexander*, 343 Conn. 495, 506, 275 A.3d 199 (2022) (state bears burden of proving that error of constitutional dimension was harmless beyond reasonable doubt). We believe the same to be true in this case. That is, if the court properly had applied the *Harris* framework, it was not reasonably possible that it would have reached a different conclusion as to the admissibility of the victim's identification.

In *Harris*, the defendant argued that, had the trial court applied the proper standard, the court would have been precluded from considering the witness' level of confidence and would have been compelled to consider (1) the tendency of an eyewitness to overestimate the duration and quality of their opportunity to view a perpetrator, (2) the tendency of fear and stress to impair perception and recall, (3) the effect of a two week interval between the crime and the identification, (4) the witness' lack of sleep, (5) the poor lighting conditions, (6) the witness' nonspecific description of the perpetrator's facial features, and (7) the issue of cross-racial identification. See *State* v. *Harris*, supra, 330 Conn. 135. Our Supreme Court determined, however, that the testimony of the expert witness addressed many of these considerations. Id., 135–36. Additionally, the court explained that, although the *Biggers* factors did not specifically identify these topics, they generally directed the court to consider the opportunity of the witness to view the perpetrator at the time of the crime, the degree of attention of the witness, and the witness' level of certainty. See id., 136. It further explained that "[t]hese general factors [from *Biggers*] encompass the more specific reliability factors we have identified in the present case and that were addressed by [the expert witness during her testimony]." Id. The court also noted that there was nothing to suggest that the trial court had failed to consider aspects of the expert's testimony because it considered them irrelevant under the *Biggers* factors. See id., 137. Under these facts and circumstances, the court concluded that the application of the *Biggers* framework was harmless. See id., 137–38.

Our decision in *State* v. *Scott*, 191 Conn. App. 315, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019), also is instructive. In that case, the defendant claimed, inter alia, that the trial court had deprived him of his right to due process under the federal and state constitutions when it denied his motion to suppress out-of-court and in-court identifications. Id., 319. We rejected his claim under the federal constitution, concluding that, even if the out-of-court identification procedure had been unnecessarily suggestive, it nonetheless was reliable under all of the relevant circumstances. Id., 340. With respect to his state constitutional claim, we explained "that the trial court's failure to apply the state constitutional standard set forth in *State* v. *Harris*, supra, 330 Conn. 91 . . . *was harmless because the court reasonably could not have reached a different conclusion under that more demanding standard*." (Emphasis added.) *State* v. *Scott*, supra, 326. Specifically, we considered the defendant's claim regarding the variable of unconscious transference.[31] Id., 343. In addition to noting that the more specific reliability factors served as a means to define the focus of the relevant inquiry more precisely, and that there was no evidence that the court declined to consider any portion of the expert's testimony on the basis that it was not relevant under the *Biggers* factors, we also stated that the defendant had failed to identify any evidence that he was prevented from presenting at the suppression hearing or at trial on the basis that it was not relevant under *Biggers*. Id., 344–45. For these reasons, we concluded that it was not reasonably possible that the court would have reached a different conclusion regarding the admissibility of the identification under the *Harris* framework. See id., 345; see also *State* v. *Anthony*, supra, 237 N.J. 226 (New Jersey Supreme Court observed that it did not create bright-line rules requiring suppression of reliable evidence any time law enforcement makes mistake); *State* v. *Henderson*, supra, 208 N.J. 288 (court noted that new framework permitted trial courts to consider all relevant evidence affecting reliability but also recognized that most identifications will be admitted into evidence).

On the basis of the foregoing, we conclude that the defendant's claim is subject to the harmless error analysis used in both *State* v. *Harris*, supra, 330 Conn. 137–38, and *State* v. *Scott*, supra, 191 Conn. App. 345. After a scrupulous examination of the record; see *State* v. *Harris*, supra, 101–102; we are persuaded that it is not reasonably possible that the court would have reached a different conclusion regarding the admissibility of the challenged identification had it applied the *Harris* framework. We conclude that the state presented evidence establishing the reliability of the identification in light of the applicable system and estimator variables and ultimately met its burden on appeal of demonstrating that it was not reasonably possible that the result

would have been different had the trial court applied the test established in *Harris*.

We first address the system variables and aspects of the administration of the photo lineup challenged by the defendant in his appellate brief. He specifically contends that Kelly and Serrano did not comply with sections of General Statutes § 54-1p.[32] Implicit in his argument is the contention that these deviations from the statutory requirements violated his state constitutional right to due process. We disagree with the defendant. See, e.g., *State* v. *Anthony*, supra, 237 N.J. 239 (not every deviation by law enforcement in administration of photo lineup warrants suppression of identification evidence).

The defendant first asserts that Serrano's failure to read one of the instructions to the victim during the administration of the photo lineup resulted in an unreliable identification. A review of the administration of the photo lineup confirms that Serrano did not read the instruction that provides: "You should take as much time as needed in making a decision . . . ." In addressing this issue, the trial court reasoned: "Serrano's failure to read and translate instruction number 7 . . . does not render the overall fairness of the identification procedure suspect from either a constitutional due process standpoint or from an evidentiary standpoint. Rather, the court finds that under the totality of the circumstances, the manner in which the [photo lineup] was conducted was not unduly suggestive. Moreover, the general thrust of instruction number 7—take your time—is conveyed and suggested in other instructions. For example, number 6, 'You should not feel that you must make an identification,' serves to allay any sense of urgency or pressure which the witness may feel. Likewise, number 9, 'Even if you are able to make an identification you will be asked to finish the procedure by looking at all the photographs . . . until you have completed looking at each one,' imparts the message that the procedure must be undertaken with seriousness, care and deliberation. Finally, the overall demeanor of Serrano and [the victim] during the identification procedure reveals both that Serrano did not impart an air of urgency and [the victim] did not appear to be under pressure to hurry." We agree with the court's analysis. Furthermore, we note that, after Serrano had read the instructions to the victim, Kelly stated that he was going to leave the room and directed the victim to "take his time" in reviewing the photo lineup.

The defendant next contends that Serrano permitted the victim to put aside the photograph he identified as depicting his assailant while he viewed two other photographs in violation of § 54-1p (c) (1), which directs that the photographs in the lineup be viewed one at a time.[33] As previously noted in this opinion, the victim

identified the defendant in the second photograph. While he looked at photographs three and four of the array, photograph two was located off to the victim's right side and remained faceup for approximately seventeen seconds. Although the victim at one point appears to glance briefly at the photograph of the defendant, he did so after saying "no" and as Serrano was turning over the third photograph. The victim then quickly rejected the fourth photograph by pushing it away without comment. Most importantly, the victim never conducted an extensive side-by-side comparison of the photograph of the defendant with photographs three or four during the momentary interval when he had the two photographs in his field of vision. Before showing the victim photograph five of the lineup, Serrano discreetly turned the photograph of the defendant facedown. The victim then completed looking at the remainder of the photographs in a sequential manner. We conclude that this minor deviation, involving a fleeting glance in the direction of the defendant's photograph after the victim already had rejected a different photograph during the administration of the photo lineup, did not render the identification unreliable.

Additionally, the defendant maintains that Kelly returned to the room before the administration of the photo lineup to the victim was completed, looked at the photograph that the victim had selected, and asked the victim to sign it and to write his certainty statement regarding this selection. The defendant argues that "Kelly's presence, and the potential that his reaction to [the victim's] choice subconsciously affected [the victim's] confidence" undermined the reliability of the certainty statement, thereby violating § 54-1p (c) (2) and (14). We disagree with the defendant's contention. The video recording reveals that when Kelly returned to the room, Serrano had completed showing the photographs to the victim. Additionally, the victim already had identified the defendant as the perpetrator. The effect, if any, of Kelly's return to the room on the reliability of the identification process is not clear based on the record before us.

The defendant further claims that Kelly's statement, made prior to the administration of the photo lineup, that he had to leave the room so that another officer could administer the lineup because he knew who the suspect was undermined the intent of § 54-1p (c) (3) (D). That provision of the statute directs that the witness must be instructed that the perpetrator may or may not be included in the array. See General Statutes § 54-1p (c) (3) (D). We disagree that Kelly's statement that he knew the identity of the suspect had any correlation to whether the defendant's photograph was included in the photo lineup. Additionally, we note that Serrano specifically had instructed the victim that "[t]he perpetrator may or may not be among the persons" in the photo lineup.

We carefully have reviewed the video recording of the administration of the photo lineup to the victim and conclude that any deviations from § 54-1p were minimal in nature. Serrano adhered to the spirit of the statutorily mandated identification procedures. Moreover, the defendant fails to support his § 54-1p arguments beyond reference to general principles of law. Instead, he appears to equate any deviation from the requirements of § 54-1p, no matter how slight, as automatically resulting in an unreliable identification. Such a conclusion is not supported by our case law. For example, in *State* v. *Grant*, 154 Conn. App. 293, 312 n.10, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015), we stated: "This court has made clear that it views the procedures in § 54-1p as reflecting 'best practices' that are not constitutionally mandated. . . . It is noteworthy that the statute does not include any remedy for noncompliance, such as imposing a presumption of suggestiveness if the recommended procedures are not followed." (Citation omitted; internal quotation marks omitted.) See also *State* v. *Johnson*, 149 Conn. App. 816, 827 n.9, 89 A.3d 983, cert. denied, 312 Conn. 915, 93 A.3d 597 (2014); see generally *State* v. *Harris*, supra, 330 Conn. 134 n.32 (Supreme Court not persuaded by contention that any material violation of identification procedures required by § 54-1p should render identification inadmissible per se); *State* v. *Henderson*, supra, 208 N.J. 303 ("[t]he framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake").

The defendant also argues that Kelly's use of a photograph of the defendant in the lineup wherein he was wearing the same shirt as the one in the Facebook photograph violated § 54-1p (c) (5), which provides that "[t]he photo lineup . . . shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and . . . so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out . . . ." This argument challenges both a system and an estimator variable. Regarding the former, the defendant contends that Kelly used a photograph of the defendant wearing a shirt with a red collar in the photo lineup that was the same as the one he wore in the Facebook photograph. As to the latter, he claims that the witness viewed multiple photographs of the defendant, i.e., the Facebook photograph and his photograph in the lineup, which was suggestive because that procedure emphasized the defendant, thereby increasing the risk of misidentification.

We are not persuaded by either of these arguments. In the lineup photograph shown to the victim, the defendant is in front of a grey background and wearing a

black shirt with a red collar. Kelly selected this photograph from a database. This image clearly depicts the defendant's facial features, including his eyes, mouth, nose, and facial hair, and ends at the base of his throat. In contrast, the Facebook photograph is dark, and it is difficult to discern the defendant's face and clothing. This image shows the defendant from the top of his head to his knees, and he is partially obscured by the men positioned on either side of him. The red collar is difficult to visualize due to the darkness of the image and the fact that it is partially blocked by a gold chain.[34] For these reasons, we are convinced that § 54-1p (c) (5) was not violated, in that the defendant did not unduly stand out due to his shirt and that the victim was not shown multiple images clearly depicting the defendant during the photo identification process so as to render the victim's identification unconstitutionally unreliable.

As for the other relevant estimator variables, the state presented evidence that the area where the stabbing had occurred was "pretty bright" from the "frequent overhead streetlights" and "ambient lighting from the businesses and residences." See *State* v. *Harris*, supra, 330 Conn. 124 n.25 (circumstances under which eyewitness viewed perpetrator during commission of crime, such as lighting, are considered estimator variables). The court credited and relied on this evidence in its memorandum of decision. The court determined that this case did not involve a cross-racial identification. See id., 124 n.26. There was no evidence that the victim was aware that his attacker had a weapon. See id. Additionally, the victim provided a certainty statement of between 70 and 80 percent. See id.[35] During his November 13, 2017 interview with Kelly, the victim recalled details including where Veloz parked. The court also observed that the victim's description of the stabbing incident was "substantially similar" to that recounted by Veloz. On the basis of these facts, the court found "that to the extent [the victim] may have been intoxicated, it did not render his identification of the defendant unreliable." See *State* v. *Harris*, supra, 124 n.26 (witness characteristics, such as use of alcohol, are *Henderson* estimator variables). The defendant does not challenge these findings on appeal, all of which support the reliability of the victim's identification.

The state presented ample evidence of both system and estimator variables that support a determination that the photo identification by the victim was reliable, as required by *Harris*. Further, on the basis of our review of the record, we are satisfied that the victim's identification of the defendant did not result in a "substantial likelihood of misidentification." Id., 131.[36] We emphasize that, in most cases, a witness identification will be presented to a jury because the threshold for suppression remains high, as a defendant ultimately must demonstrate a "very substantial likelihood of

irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Anthony*, supra, 237 N.J. 226. Accordingly, we conclude that the application of the *Biggers* framework by the trial court was harmless because it is not reasonably possible that the court would have reached a different conclusion as to the admissibility of the identification under the framework required for state constitutional due process claims as set forth in *State* v. *Harris*, supra, 330 Conn. 91.[37]

II

The defendant next claims that the court abused its discretion in denying his motion in limine to preclude his identification in the photo lineup administered to the victim. Specifically, he argues that the court should have precluded the victim's identification[38] pursuant to the rule set forth in *State* v. *Holliman*, supra, 214 Conn. 38, and that the prejudicial impact of this evidence outweighed its probative value. We disagree.

The following additional facts are necessary for the resolution of this claim. As mentioned previously in this opinion, defense counsel filed a motion in limine, dated November 4, 2019, to preclude the in-court and out-of-court identifications of the defendant.[39] See footnote 12 of this opinion. The motion relied on, inter alia, evidentiary principles in accordance with *State* v. *Holliman*, supra, 214 Conn. 46–49. Defense counsel contended that, in *Holliman*, "the court held that as an evidentiary matter when a defendant has claimed an eyewitness identification was the product of unduly suggestive conduct by a private actor, the court must determine first whether that conduct was unnecessarily [suggestive], and second, [if] it is found to be, whether the [identification] is nevertheless reliable based upon examination of the totality [of the] circumstances." Defense counsel further argued that the evidence was neither relevant nor probative and that its prejudicial impact outweighed the probative value. The court orally denied the motion in limine.[40]

In addressing the defendant's evidentiary claim in its June 30, 2021 memorandum of decision, the court stated that there was no risk of misidentification due to cross-racial identification, the lighting conditions were conducive to making an accurate identification, and Veloz was not affected by the presence of a weapon. The court also noted that the victim's description of the attack was substantially similar to that of Veloz, "which renders each of their observations and identifications all the more reliable. In short, under the totality of the circumstances, [the victim] . . . had an opportunity to make an accurate identification of the defendant such that [his] identification testimony is admissible as relevant and probative."[41]

We begin our analysis with a discussion of the relevant case law. In *State* v. *Holliman*, supra, 214 Conn.

39–40, J was sexually assaulted and robbed outside of a convenience store. Earlier that day, A, a friend of J's sister, had multiple unsettling interactions with the defendant, one of which had occurred at the convenience store. Id., 40–41. After learning of J's assault, A suspected the defendant as the perpetrator. Id., 41. Approximately three weeks later, A observed the defendant at the convenience store. Id. A and members of J's family followed the defendant to a supermarket in another town and then decided to return with J. Id. In the supermarket parking lot, A pointed to the defendant and repeatedly asked J if this was the person who had assaulted and robbed her. Id., 41–42. J responded in the affirmative. Id., 42. A then called the police, who arrested the defendant. Id.

The defendant moved to suppress J's pretrial identification of him in the supermarket parking lot. Id. On appeal, the defendant claimed that this identification constituted a violation of his federal right to due process. Id., 42–43. Our Supreme Court explained that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the [d]ue [p]rocess [c]lause." (Internal quotation marks omitted.) Id., 43. In rejecting the defendant's constitutional claim, the court stated: "[I]t is well established that conduct that may fairly be characterized as state action is a necessary predicate to a challenge under the due process clause of the fourteenth amendment to the United States constitution. The defendant has failed to identify any state action in the pretrial confrontation between J and the defendant. Accordingly, the trial court's denial of the defendant's motion to suppress J's identification and the subsequent admission into evidence at trial of that identification did not violate the defendant's right to due process of law." Id., 45–46.

The court in *Holliman* next agreed with the parties that, "even if the defendant's claim has no constitutional underpinning, the criteria established for determining the admissibility of identifications in the due process context are appropriate guidelines by which to determine the admissibility of identifications that result from procedures conducted by civilians. . . . Accordingly, we will engage in the two-pronged inquiry traditionally applied to identifications involving state action to determine the admissibility at trial of J's identification. [F]irst, it must be determined whether the identification procedure was unnecessarily suggestive, and second, if it is found to be so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances." (Footnote omitted; internal quotation marks omitted.) Id., 46; see also *State* v. *Berthiaume*, 171 Conn. App. 436, 453, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017). The court reasoned that the

identification procedure was not unnecessarily suggestive, and, therefore, the trial court properly denied the defendant's motion to suppress. *State* v. *Holliman*, supra, 214 Conn. 49; see also *State* v. *Johnson*, supra, 312 Conn. 700 (admissibility of eyewitness identification that defendant claimed to be result of unduly suggestive conduct by private actor governed by *State* v. *Holliman*, supra, 45–46, and, in such scenario, trial court must apply *Biggers* framework and determine whether conduct by private actor was unnecessarily suggestive and, if so, whether identification was nevertheless reliable based on examination of totality of circumstances in determining whether to admit identification into evidence).[42]

Next, we set forth our standard of review. "When we review an evidentiary claim, our standard of review is clear. Unless an evidentiary ruling involves a clear misconception of the law, the [t]rial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Qayyum*, 344 Conn. 302, 315, 279 A.3d 172 (2022); see also *State* v. *Hazard*, 201 Conn. App. 46, 70–71, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

The state contends that *State* v. *Patterson*, 170 Conn. App. 768, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017), presented a similar situation to the facts of the present case. In *Patterson*, the defendant entered the victim's residence without permission and attempted to steal certain items. Id., 771. The victim, who was in his bedroom at the time of this incursion, recalled having seen the defendant on the local news. Id. The victim checked the website of a television station and saw a photograph of the defendant in an article relating to a recent burglary. Id., 771–72. On appeal, the defendant claimed, inter alia, that the victim's conduct in searching for the photograph on the Internet in order to identify the defendant was unnecessarily suggestive. Id., 781. In rejecting this claim, we stated: "We agree with the court's finding that [the victim's] conduct was not unnecessarily suggestive. The defendant cites to no case law, and we are aware of none, which suggests that searching for an individual's photograph online after observing that individual in person constitutes unnecessarily suggestive conduct." (Internal quotation marks omitted.) Id., 783.

Similarly, we conclude that the court in the present case did not abuse its discretion in determining that the victim's viewing of the Facebook photograph was not *unnecessarily* suggestive. We further conclude, for the reasons previously set forth in this opinion, that the

victim's identification was nonetheless reliable. Finally, even if we were to conclude that the court had abused its discretion in admitting the out-of-court identification into evidence, any such error would be harmless in light of the other evidence, particularly the positive identification of the defendant made by Veloz. For these reasons, this claim fails.

III

The defendant finally claims that the court abused its discretion and violated his constitutional right to present a defense by refusing to instruct the jury in accordance with his request to charge on the subject of eyewitness identification testimony. He argues that the court improperly declined to charge the jury in accordance with his proposed instructions, based on Massachusetts Model Eyewitness Identification Instruction 9.160,[43] and that the charge given by the court, based on Connecticut Criminal Jury Instruction 2.6-4 (revised to November 20, 2017), failed to give proper guidance to the jury. He contends that the court should have instructed the jury specifically on the stages of memory and recall, good faith misidentification, and the effects of high-level stress, disguise, intoxication, and after-acquired information. We conclude that the defendant's claim is not of constitutional magnitude and that the court's instructions were not improper.

The following additional facts are necessary for our discussion. On January 17, 2020, the defendant presented expert testimony from Michael Leippe, a professor and social psychologist, to the jury.[44] Leippe's research focused on areas relating to eyewitness identification and the factors relating to memory. Leippe explained that there are three stages of memory: the encoding or acquisition stage, the retention stage, and the retrieval stage. At the outset, Leippe stated that memory is not static, akin to a video recording, but rather "an organized constructive process so . . . lots of things . . . can happen after a person's already encoded a memory [that] can serve to change their memory to integrate their memory with other memories with other information." He also addressed the various factors that can influence an eyewitness' memory at each of the three stages of memory.

With respect to the encoding or acquisition stage, Leippe testified that some of the factors that could disrupt the accuracy of an eyewitness' recollection of a witnessed event include lighting, distance, duration, stress, fear, injury, alcohol intoxication, a disguise, the number of perpetrators, and the amount of activity during an event. With regard to the retention stage, Leippe stated that memories become integrated with and influenced by other memories. Furthermore, he stated that the longer the time between the witnessing of an event and the memory test, the less accurate the eyewitness

becomes. As to the retrieval stage, Leippe explained that when it is suggested or told to an eyewitness that a suspect is included in a photo lineup, that eyewitness is pressured to select someone who best resembles their memory. Leippe also explained the concept of photo biased identification as something that occurs when, "after the event, but before the identification, people are exposed to . . . a picture of . . . the suspect . . . and it biases their original memory because . . . that picture could be incorporated into their memory for the original event or it could overwrite the original memory." Finally, Leippe described unconscious transference, which occurs when an eyewitness confuses the context of a viewed photograph and transfers the recognition of an individual to the events of criminal activity. The state cross-examined Leippe but did not present its own expert witness.

During the charging conference held on January 15, 2020, defense counsel requested that the court's proposed instructions on the issue of identity be replaced with his request to charge. The prosecutor countered that the defendant's proposed charge was not in accordance with Connecticut law, was not part of this state's model jury instructions, and the court's charge, considered as a whole, covered the issues contained in the language suggested by defense counsel. The court agreed to review the proposed language submitted by defense counsel.

Two days later, the court and counsel again reviewed the proposed jury charge. Defense counsel noted his objection to the court's rejection of his proposed language with respect to the issue of identity and identification. In response, the court stated: "Yes. Thank you for reminding me of that, Counsel. I did look very carefully at that. I think that the Connecticut standard charge, quite frankly, is easier to understand. No disrespect to my colleagues to the north and to the extent that Connecticut already has an established charge on identity, I—I determine to follow that."

On January 21, 2020, the court charged the jury. It directed the members of the jury to decide what testimony to believe and not believe, based in part on "how well the witness was able to recall and describe those things . . . ." It also instructed the jury that if a witness deliberately testified falsely in some respect, then it should consider carefully whether to rely on any of the testimony from that witness. Furthermore, it stated: "In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether the contradiction has to do with an important fact or with only a small detail."

The court further provided the jury with specific instructions regarding the identity of the defendant as

the perpetrator of the criminal conduct alleged. Specifically, it stated: "[I]n arriving at a determination as to the matter of identification, *you should consider all the facts and circumstances that existed at the time of the observation of the perpetrator by each witness*. In this regard, the reliability of each witness is of paramount importance, since identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later. It is for you to decide how much weight to place upon such testimony.

"Capacity and opportunity of the witness to observe the perpetrator: In assessing the identification of the defendant as the perpetrator by any witness, *you should take into account whether the witness had adequate opportunity and ability to observe the perpetrator on the date in question. This will be affected by such considerations as the length of—length of time available to make the observation; the distance between the witness and the perpetrator; the lighting conditions at the time of the offense; whether the witness had known or seen the person in the past; the history, if any, between them, including any degree of animosity; and whether anything distracted the attention of the witness during the incident. You should also consider the witness' physical and emotional condition at the time of the incident and the witness' powers of observation in general.* . . .

"Circumstances of identification: *Furthermore, you should consider the length of time that elapsed between the occurrence of the crime and the identification of the defendant by the witness. You may also consider the strength of the identification, including the witness' degree of certainty. Certainty, however, does not mean accuracy*. You should also take into account the circumstances under which the witness first viewed and identified the defendant, the suggestibility, if any, of the procedure used in that viewing, any physical descriptions that the witness may have given to the police, and all the other factors which you find relating to reliability or lack of reliability of the identification of the defendant.

"You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness. . . .

"Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator may increase

the probability of a misidentification. . . .

"Credibility of witness: You will subject the testimony of any identification witness to the same standards of credibility that apply to all of the witness[es]. When assessing the credibility of the testimony as it relates to the issue of identification, keep in mind that it is not sufficient that the witness be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find him guilty on any charge.

"*You also heard the testimony of . . . Leippe on research on eyewitness identification.* You should—you should evaluate that testimony as I have instructed you on expert testimony.

"Conclusion: In short, you must consider the totality of the circumstances affecting the identification. Remember, the state has the burden to not only prove every element of the crime but also the identity of the defendant as the perpetrator of the crime. You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime, or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty." (Emphasis added.)

On appeal, the defendant claims that the court erred in denying his request to instruct the jury with his proposed language regarding eyewitness identification, which was based, in part, on language from the Massachusetts Model Eyewitness Identification Instruction. Specifically, he contends that the court's charge failed to address the following factors relevant to the accuracy of the eyewitness identifications: good faith mistaken identification; the common misperception that memory is like a video recording; the stages of memory in an identification; the effect of concealing a portion of the perpetrator's head or features; and the effects that high levels of stress, intoxication, delay between the event and the identification procedure, and information given to the witness by others could have on the accuracy of the identification. The defendant additionally argues that Leippe's expert testimony did not constitute an adequate substitute for proper jury instructions. As a result, the defendant argues that the court's instructions denied him his right to due process, failed to guide the jury properly with respect to the identifications made by the victim and Veloz, and misled the jury. We do not agree.[45]

At the outset, we note that "[i]t is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The primary purpose of the charge to the jury is to assist [it] in applying

the law correctly to the facts which [it] find[s] to be established. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Citation omitted; internal quotation marks omitted.) *State* v. *Hazard*, supra, 201 Conn. App. 77–78.

We must first determine whether this claim is of constitutional magnitude. Specifically, the defendant contends that the court's instructions deprived him of the right to due process to establish a defense of good faith misidentification. This court, however, on numerous occasions has rejected the claim that an improper jury instruction related to the issue of misidentification rises to the level of a constitutional violation. Moreover, "[o]ur Supreme Court has held that identification instructions are not constitutionally required and [e]ven if [a] court's instructions were less informative on the risks of misidentification . . . the issue is at most one of instructional error rather than constitutional error. A new trial would only be warranted, therefore, if the defendant could establish that it was reasonably probable that the jury was misled. . . . The ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present the case to a jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Faust*, 161 Conn. App. 149, 183, 127 A.3d 1028 (2015), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016); see also *State* v. *Cerilli*, 222 Conn. 556, 567, 610 A.2d 1130 (1992); *State* v. *Crosby*, 182 Conn. App. 373, 410, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018); *State* v. *Day*, 171 Conn. App. 784, 831, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018). We conclude, therefore, that the defendant's claim of instructional error in this case is not of constitutional magnitude.

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Crosby*, supra, 182 Conn. App. 410–11; see also *State* v. *Kitchens*,

299 Conn. 447, 455, 10 A.3d 942 (2011); *State* v. *Day*, supra, 171 Conn. App. 831–32.

Our decision in *State* v. *Day*, supra, 171 Conn. App. 784, is particularly instructive to the resolution of this claim. In that case, the defendant was convicted of assault of an elderly person in the first degree, attempt to commit robbery in the first degree, and criminal possession of a firearm. Id., 787. On appeal, the defendant challenged eyewitness identification testimony. Id., 787–88. Specifically, he claimed that his federal and state constitutional due process rights had been violated because the victims' out-of-court identifications were the result of unnecessarily suggestive procedures. Id., 788. The defendant also claimed that the court improperly had precluded certain expert testimony regarding the photo identification procedures and that the court improperly instructed the jury. Id., 788–89.

In addressing the defendant's claim regarding the court's instructions to the jury in *Day*, we initially noted: "[O]ur Supreme Court in *Guilbert* undeniably sought to protect defendants from a specific risk, that of being misidentified as perpetrators by eyewitnesses to criminal activity. . . . Although the defendant in *Guilbert* raised an evidentiary claim, and not a claim of instructional error, the court there recognized not only the importance of expert testimony as to factors affecting the reliability of eyewitness identifications, but also the value of particularized jury instructions as to those factors. [Our Supreme Court] stated: We . . . wish to reiterate that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence . . . would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. We emphasize, however, that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; broad, generalized instructions on eyewitness identifications . . . do not suffice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 832;[46] see also *State* v. *Faust*, supra, 161 Conn. App. 197–98 (*Borden*, *J.*, concurring).

This court then set forth the charge given to the jury regarding eyewitness identification. See *State* v. *Day*, supra, 171 Conn. App. 833–36. We concluded that "[t]he foregoing instructions given by the trial court are precisely the sort of generalized instructions that the court in *Guilbert* described as insufficient, standing alone, to educate a jury about the current state of scientific research concerning the factors affecting the reliability of eyewitness identification testimony." Id., 836. Next, we explained that the existence of expert testimony on the issues relating to the accuracy of eyewitness

identification may serve as a remedy to such generalized instructions: "However, when the court [in *Guilbert*] emphasized the need for particularized instructions . . . it noted that these are the findings and conclusions that a qualified expert would provide to the jury in the absence of the court's focused jury instructions on the eyewitness identification issue or issues presented by the case. . . . In concluding that generalized instructions that merely touch on the subject of eyewitness identification evidence do not suffice as a substitute for expert testimony on the reliability of such evidence . . . the court [in *Guilbert*] implied that such instructions are at least adequate when expert testimony is presented on that subject. Expert testimony, particularly uncontroverted testimony, fulfills the stated purpose of particularized instructions, which is obviously to educate the jury regarding the findings of scientific researchers as to the reliability of eyewitness identifications." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id.

The jury instructions in the present case essentially tracked those given by the trial court in *State* v. *Day*, supra, 171 Conn. App. 833–36. Similar to the facts of *Day*, the defendant here presented expert testimony on the issue of eyewitness identification, including the exact matters that the defendant now contends should have been included in the court's instructions. Specifically, the defendant claims that he "was entitled to a jury instruction that explained concepts like good faith misidentification and the stages of memory and recall. The jury also should have been instructed about high-level stress, disguise, intoxication, and after-acquired information . . . ."

Leippe testified as an expert on the factors that affect the accuracy of an eyewitness identification. He discussed the three stages of memory: encoding or acquisition, retention, and retrieval. Leippe stated that stress and fear have a "deleterious effect on memory." He indicated that one of the effects of alcohol intoxication is that it "debilitates the memory system both at the encoding stage and at the retrieval stage." Leippe agreed that if "somebody's face is covered that's going to make it more difficult for them to be identified." Leippe also discussed the effect that after-acquired information can have on a memory, specifically that the new information will be incorporated into and potentially alter the memory of the person or event. Finally, Leippe addressed the issue of a good faith misidentification.[47]

We conclude, therefore, as we did in *State* v. *Day*, supra, 171 Conn. App. 836, that Leippe's testimony fulfilled the purpose of particularized jury instructions, namely, to educate the members of the jury regarding the science related to the fallibility of eyewitness identifications and the specific factors that may affect their reliability. See *State* v. *Crosby*, supra, 182 Conn. App.

412 (jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony at informing jury of potential unreliability of said identifications).[48] We further conclude that the court's instructions, taken as a whole, fairly and adequately presented the case to the jury in such a way that injustice was not done to the defendant pursuant to the established rules of law. Accordingly, the court's instructions were not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 53a-59 provides in relevant part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

[2] Article first, § 8, of the Connecticut constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . . ."

[3] As we set forth in greater detail later in this opinion, pursuant to *Harris*, "the defendant has the initial burden of offering some evidence that a system variable [a factor within the control of the criminal justice system] undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables [factors outside of the control of the criminal justice system that generally arise from the circumstances under which the eyewitness viewed the perpetrator during the commission of the crime]. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) *State* v. *Harris*, supra, 330 Conn. 131.

[4] General Statutes § 54-1p (a) (2) provides: " 'Photo lineup' means a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, is presented to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator . . . ." Although interchangeable, we will use the term found in § 54a-1p (a) (2), "photo lineup," rather than the terms "photographic lineup" or "photographic array."

[5] For clarity and ease of analysis, we address the defendant's claims in a different order than they are presented in his principal brief.

[6] Francisco Garrido, a physician who treated the victim in the emergency department at Bridgeport Hospital on November 4, 2017, testified that the victim had been stabbed in the back with a sharp weapon. Garrido further opined that, as a result of the stabbing, the victim suffered a collapsed lung, which created a substantial risk of death, a serious impairment of health, and impairment of the function of a bodily organ.

[7] The photograph depicts two men, each holding a bottle of beer, leaning against a chain-link fence with the side of a house and an awning shaded window in the background. A third individual, the defendant, is positioned in the middle of, and slightly behind, the other two men. The defendant appears to be wearing a black T-shirt with a red collar and a gold chain. The image of the defendant is very dark, and it is difficult to ascertain his features, such as his eyes, his mouth, his ears, and the presence or absence of any facial hair, and the details of his clothing.

[8] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on a password protected profile. . . . To create a Facebook profile, a person chooses a name under which the profile will be listed, enters his or her birth date and e-mail address, and selects a password. . . . Thereafter, the profile may be accessed on any computer or mobile device by logging into Facebook's website using the same e-mail address and password combination. . . .

"Users post content to their profiles, which may include written com-

ments, photographs, digital images, videos, and content from other websites. To create a . . . post, users upload data from their computers or mobile devices directly to the Facebook website." (Citations omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 692 n.2, 138 A.3d 868 (2016).

[9] Kelly described a photo lineup as follows: "[A] series of photos, we use eight in Bridgeport, with like—you know, there's a certain parameter, the computer generates it, they're of the same age demographic, and then they don't have markings on them. So, they'll be folded up—not folded up but organized in a fashion where if someone looks at them one at a time and to see if the suspect's in there or not."

[10] The photograph in the lineup shown to the victim depicts the defendant from the top of his head to the bottom of his throat and wearing a black shirt with a red collar.

[11] Veloz had worked with the defendant in 2011 or 2012 for a period of one year and eight months. Veloz saw the defendant four days per week during that time period. At the trial, the defendant's expert witness acknowledged on cross-examination that an eyewitness would be more likely to correctly identify someone with whom he had worked for a period of two years than a stranger.

[12] The defendant also filed a motion in limine, dated November 4, 2019, to preclude both the out-of-court and in-court identifications made by the victim and Veloz. We address this motion in part II of this opinion.

[13] In the trial court, the defendant challenged the identifications made by both the victim and Veloz. On appeal, the defendant limits his state constitutional due process claim to the identification made by the victim.

[14] Our Supreme Court released its opinion in *State* v. *Harris*, supra, 330 Conn. 91, on September 4, 2018, approximately fourteen months before the defendant filed his supplemental motion to suppress.

[15] Kelly testified that, "[f]or the photo array in 2017 using the mugshot which is exclusively of the suspect there's a—a way to do a search for like images. And the computer generates I don't know if it's hundreds, maybe 150 possible pictures that look similar to the . . . height and weight, skin tone and facial hair. And then from there as they pop up I'd go through and eliminate any pictures that look like they were super old, where there might be a difference in the backdrop or whatnot, so the people look similar."

[16] Although he did not use the term in his testimony, Kelly described a double-blind administration of the photo lineup. See *State* v. *Outing*, 298 Conn. 34, 42, 3 A.3d 1 (2010) (double-blind identification procedure described as one in which person administering identification procedure does not know identity of suspect), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011); see also General Statutes § 54-1p (c) (2) (mandating adoption of procedures that require double-blind identification procedure or, if not practicable, specified alternative procedure); *State* v. *Johnson*, 149 Conn. App. 816, 825, 89 A.3d 983 (administering officer was aware that defendant was suspect, and, therefore, photo lineup was not double-blind), cert. denied, 312 Conn. 915, 93 A.3d 597 (2014).

In *State* v. *Day*, 171 Conn. App. 784, 814, 158 A.3d 323 (2017), cert. denied, 330 Conn. 924, 194 A.3d 776 (2018), we explained why law enforcement should utilize this type of procedure: "The photographic identification procedures used in [*Day*], moreover, were not double blind, because both of the detectives who administered them were aware that the defendant was their chief suspect and knew which photographs in the arrays they showed the victims were of him. Such a procedure is unnecessarily suggestive because it makes possible both the conscious or unconscious cueing of witnesses as to which photograph they should select from an array and, even in the absence of such cueing, the giving of confirmatory postidentification feedback to any witness who selects the chief suspect's photograph. The potential consequences of giving a witness such confirmatory postidentification feedback are to substitute the witness' memory of the person in the selected photograph for his memory of the perpetrator and to bolster his confidence in that and future identifications of the defendant as the true perpetrator of the charged offenses, making it difficult to expose the strength or weakness of the identification on cross-examination." See also *State* v. *Guilbert*, 306 Conn. 218, 238, 49 A.3d 705 (2012) (identifications are likely to be less reliable in absence of double-blind, sequential identification procedure).

[17] Serrano used a form that contained the following instructions:

"1. Please listen carefully as these instructions are read aloud to you. Each one of the instructions is equally important. You have been given a copy of these instructions to read along with the officer if you wish.

"2. You will be asked to view an array of photographs or a group of persons, and each photograph or person will be presented one at a time;

"3. It is just as important to exclude innocent persons as it is to identify the perpetrator;

"4. The person in the photographic lineup or live lineup may not look exactly as they did on the date of the offense because features like facial or head hair can change;

"5. The perpetrator may or may not be among the persons in the photographic lineup or live lineup;

"6. You should not feel that you must make an identification;

"*7. You should take as much time as needed in making a decision*;

"8. If you are able to make an identification of someone, you will be asked to describe in your own words how certain you are of that identification;

"9. Even if you are able to make an identification; you will be asked to finish the procedure by looking at all the photographs or all of the individuals until you have completed looking at each one;

"10. If there are other witnesses, you must not indicate to them that you have or have not made an identification of a person;

"11. The officer administering this procedure either does not know whether any of the people in the photographic array or in the lineup were involved in the crime or does no[t] know the order in which you are viewing the photographs;

"12. If you do select someone, the officer will not be able to provide you any information about the person you have selected;

"13. If you select a person or photograph you will be asked to provide a statement about this process and the results. If you don't recognize anyone in the lineup, please say so;

"14. Whether or not you select someone, the police will continue to conduct an appropriate investigation into this matter." (Emphasis added.)

As discussed elsewhere in this opinion, Serrano failed to read instruction number 7 from the form. See generally General Statutes § 54-1p (requiring development and promulgation of uniform mandatory policies and appropriate guidelines for conducting eyewitness identification procedures based on best practices).

[18] The defendant has not raised any challenge to the manner in which the photo lineup was administered to Veloz.

[19] As detailed in part II of this opinion, the two cases cited by the prosecutor focused on suggestive conduct by a private actor.

[20] "Filler means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure. General Statutes § 54-1p (a) (5)." (Internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 396 n.12, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018).

[21] In both the Facebook photograph and the photo lineup, the defendant had short hair.

[22] As we set forth previously, a review of the video recording of the administration of the photo lineup reveals that the victim did not directly or extensively compare the photograph of the defendant to photographs three and four. Furthermore, Serrano turned the photograph of the defendant facedown before the victim looked at photographs five, six, seven and eight of the photo lineup.

[23] The video recording depicts one manila folder, which contained the photo lineup, on the table and Kelly holding the other manila folder in his left hand. Kelly never pointed to the manila folder that contained the photo lineup as he explained to the victim why he was going to leave the room. While telling the victim that he had an "idea who it is," Kelly briefly placed his right hand on the folder on the table containing the photo lineup.

[24] See footnote 17 of this opinion.

[25] Under the federal test, two factors are used to determine whether an identification procedure was too suggestive and necessitated proceeding to the reliability prong. *State* v. *Outing*, 298 Conn. 34, 49, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). "The first factor concerns the composition of the photographic array itself. In this regard, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect." *State* v. *Marquez*, 291 Conn. 122, 142–43, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). The second factor, related to but conceptually broader than the first, requires the court to consider the actions of law enforcement to determine whether the attention of the witness was directed to a suspect,

through either the construction of the photographic array or verbal or physical cues. See id., 143–44; see also *State* v. *Moore*, 169 Conn. App. 470, 495, 151 A.3d 412 (2016), appeal dismissed, 334 Conn. 275, 221 A.3d 40 (2019). Thus, "[t]he suggestiveness prong should be less stringent and more focused on the mechanics of the [photo lineup] itself as well as the behavior of the administering officers." *State* v. *Marquez*, supra, 145.

[26] "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure. . . . This reinforces the idea that the appellate courts of this state must remain vigilant to developments in this field of inquiry by engaging in careful study of the scientific literature." (Citation omitted; internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 213 (*Schaller*, *J.*, concurring); see also *Watkins* v. *Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (*Brennan*, *J.*, dissenting) ("[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime. . . . All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says That's the one!" (Emphasis omitted; footnote omitted; internal quotation marks omitted.)).

[27] "It is well settled that the federal constitution sets the floor, not the ceiling, on individual rights." *State* v. *Purcell*, 331 Conn. 318, 341, 203 A.3d 542 (2019); see also *State* v. *Geisler*, 222 Conn. 672, 684, 610 A.2d 1225 (1992).

[28] System variables are those factors that are within the control of the criminal justice system, such as lineup procedures, whereas estimator variables are factors that stem from conditions outside of the control of the criminal justice system, such as distance, lighting, or the presence of a weapon. See *State* v. *Harris*, supra, 330 Conn. 124 nn.24 and 25; *State* v. *Guilbert*, supra, 306 Conn. 236 n.11.

[29] In *Harris*, the court specifically noted: "[W]e recognize that the requirement that the defendant provide 'some evidence' of suggestiveness may necessitate somewhat less evidence to trigger the admissibility inquiry than is required under the *Biggers* framework." *State* v. *Harris*, supra, 330 Conn. 132. Additionally, the court recognized that "this lower threshold is appropriate both because it will provide more meaningful deterrence and because more extensive hearings will address reliability with greater care and better reflect how memory works." (Internal quotation marks omitted.) Id.

[30] The state argues that the test announced in *Harris* applies only after the defendant had established that the identification procedure was unduly suggestive. Specifically, it contends that "trial courts must still determine, in the first instance, under the traditional analyses . . . whether an identification was the result of an unnecessarily suggestive procedure before turning, if at all, to the question of whether, despite the unduly suggestive identification procedure, the identification was nevertheless reliable enough to be admitted under the new framework set forth in *Harris*." It further points out that, in the present case, the trial court properly determined that the identification procedures were not unduly suggestive, and, therefore, there was no need for the court to continue to a *Harris* analysis. The defendant, in his appellate brief, challenged the court's determination that the identification procedures were not unduly suggestive. In his reply brief, the defendant disagreed with the state's claim that the unduly suggestive prong remains under the *Harris* analysis.

We acknowledge that some of the language in *Harris* supports the state's contention that there must be an initial determination that the identification procedure was unduly suggestive before applying the analytical framework. For example, the court stated: "Accordingly, as we explain in part II B of this opinion, we endorse the factors for determining the reliability of an identification that we identified as a matter of state evidentiary law in *State* v. *Guilbert*, supra, 306 Conn. 253, and we adopt the burden shifting framework embraced by the New Jersey Supreme Court in *Henderson for purposes of allocating the burden of proof with respect to the admissibility of an identification that was the product of an unnecessarily suggestive procedure.*" (Emphasis added.) *State* v. *Harris*, supra, 330 Conn. 115; see also id., 124 (*Henderson* identified twelve nonexclusive and nonstatic estimator

variables that courts should consider *in determining reliability of identification that resulted from unnecessarily suggestive procedure*); id., 131 ("[i]n light of the foregoing conclusion, we next must determine the proper framework, for state constitutional purposes, *for evaluating the reliability of an identification that is the result of an unnecessarily suggestive procedure*" (emphasis added)). Finally, we recognize that in both *State* v. *Harris*, supra, 108, and *State* v. *Scott*, 191 Conn. App. 315, 330, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019), the reviewing court either determined that the identification procedure had been unduly suggestive or assumed that to be the case.

After carefully reviewing *Harris*, and informed by the opinion of the New Jersey Supreme Court in *Henderson*, we conclude that an initial determination of undue suggestiveness is not required for a claim that an identification procedure violated a defendant's due process right under our state constitution. Under the *Henderson* framework, which our Supreme Court adopted in *Harris*, there is no mention of a threshold requirement, or opportunity, for the defendant to establish an unduly suggestive procedure. The court in *Harris* recognized that "the requirement that the defendant provide 'some evidence' of suggestiveness may necessitate somewhat less evidence to trigger the admissibility inquiry than is required under the *Biggers* framework. *State* v. *Henderson*, supra, 208 N.J. 288; see id., 293 ('estimator variables [will] no longer be ignored in the court's analysis until it [finds] that an identification procedure was impermissibly suggestive'). We agree with the court in *Henderson* that this lower threshold is appropriate both because it 'will provide more meaningful deterrence' and because 'more extensive hearings will address reliability with greater care and better reflect how memory works.' " *State* v. *Harris*, supra, 330 Conn. 132. Additionally, it explained that "*Henderson* . . . required a new framework that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both [to] understand and evaluate the effects that various factors have on memory . . . ." (Internal quotation marks omitted.) Id., 123. Further, our Supreme Court noted that only in the absence of *evidence* of suggestiveness, rather than a determination by the trial court, would evidence of the identification procedure affect the weight and not the admissibility of the identification. Id., 132; see also *State* v. *White*, supra, 334 Conn. 770 (where there is *evidence* of suggestive procedure, trial court should consider eight *Guilbert* estimator variables in determining whether identification is reliable). For these reasons, we are not persuaded that the defendant must establish that an identification procedure was unduly suggestive as a prerequisite to the burden shifting test set forth in *State* v. *Harris*, supra, 91.

[31] The defendant's expert witness in *Scott* described unconscious transference as "a phenomenon where people can lose track of the context in which they had seen a face and mistakenly [identify] a face that they'd seen in one context as a face they've seen in another context . . . ." (Internal quotation marks omitted.) *State* v. *Scott*, supra, 191 Conn. App. 338.

[32] General Statutes § 54-1p (c) provides in relevant part: "(1) Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup . . . shall be presented sequentially so that the eyewitness views one photograph . . . at a time in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(2) The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup . . . is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure;

"(3) The eyewitness shall be instructed prior to the identification procedure: (A) That the eyewitness will be asked to view an array of photographs . . . and that each photograph . . . will be presented one at a time; (B) That it is as important to exclude innocent persons as it is to identify the perpetrator; (C) That the persons in a photo lineup . . . may not look exactly as they did on the date of the offense because features like facial

or head hair can change; (D) That the perpetrator may or may not be among the persons in the photo lineup . . . (E) That the eyewitness should not feel compelled to make an identification; (F) That the eyewitness should take as much time as needed in making a decision; and (G) That the police will continue to investigate the offense regardless of whether the eyewitness makes an identification;

"(4) In addition to the instructions required by subdivision (3) of this subsection, the eyewitness shall be given such instructions as may be developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

"(5) The photo lineup . . . shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and . . . so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out;

"(6) If the eyewitness has previously viewed a photo lineup . . . in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which . . . the photograph of the person suspected as the perpetrator is included shall be different from the fillers used in any prior lineups;

"(7) At least five fillers shall be included in the photo lineup . . . in addition to the person suspected as the perpetrator;

"(8) In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness . . .

"(11) The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure;

"(12) Nothing shall be said to the eyewitness regarding the position in the photo lineup . . . of the person suspected as the perpetrator;

"(13) Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator;

"(14) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior to obtaining the eyewitness's statement regarding how certain he or she is of the selection . . . ."

[33] "A sequential photographic identification procedure involve[s] showing the witness the suspect and other fillers on the identification procedure one at a time, rather than the [outdated] practice of simultaneous presentation." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 772 n.2, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017).

[34] At trial, the victim stated that the defendant "could be" wearing the same shirt in the two photographs.

[35] We acknowledge that other estimator variables weigh in favor of the defendant. For example, the victim likely experienced stress during the sudden and brief physical altercation. See *State* v. *Harris*, supra, 330 Conn. 124 n.26.

[36] At the suppression hearing, the defendant cross-examined the state's witnesses, Kelly, Serrano and Valentin, but chose not to present any additional witnesses or present other relevant evidence regarding system and estimator variables. As recognized in *Harris*, "both the defendant and the state may adduce expert testimony regarding recent scientific developments that cast light on particular factors, or that establish the existence of additional relevant factors . . . ." *State* v. *Harris*, supra, 330 Conn. 134.

[37] We also note that Veloz' identification supports the conviction of the defendant in the present case and would support an appellate conclusion of harmless error. "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (Internal quotation marks omitted.) *State* v. *Ayala*, 324 Conn. 571, 591, 153 A.3d 588 (2017); see also *State* v. *Braswell*, 318 Conn. 815, 837, 123 A.3d 835 (2015).

In *State* v. *Artis*, 314 Conn. 131, 145–56, 101 A.3d 915 (2014), our Supreme Court reconsidered its prior holding in *State* v. *Gordon*, 185 Conn. 402, 441 A.2d 119 (1981), and concluded that harmless error review applies to the admission of unreliable eyewitness identifications that are the product of unnecessarily suggestive procedures. It emphasized that, "because of the constitutional magnitude of the error, the burden falls on the state to prove that the admission of the tainted identification was harmless beyond a

reasonable doubt." *State* v. *Artis*, supra, 154.

In the present case, Veloz provided the police with a "highly detailed and specific description" of the defendant on the night of the incident. Veloz was not aware of a weapon during the incident. Veloz had provided a detailed description of the defendant, both his physical appearance and his clothing, to the police shortly after the stabbing. Veloz also knew the defendant due to their shared employment history. Veloz did not see the Facebook photograph of the defendant. Finally, the defendant does not challenge the manner in which the photo lineup was administered to Veloz. For these reasons, even if we were to conclude that the court improperly permitted the identifications of the defendant by the victim, we would determine that any such error was harmless as a result of the identifications made by Veloz.

[38] Although the motion in limine addressed the identifications made by the victim and Veloz, on appeal the defendant challenges only the identification made by the victim.

[39] The defendant argued in his motion, inter alia, that "as an evidentiary matter said [out-of-court] identification is not relevant or the probative value of said evidence is outweighed by the prejudice" and, therefore, it should be excluded. In support of this argument, the defendant cited to *State* v. *Johnson*, supra, 312 Conn. 687; *State* v. *Holliman*, supra, 214 Conn. 46; and §§ 4-1 and 4-3 of the Connecticut Code of Evidence.

[40] Specifically, the court stated: "Well, this morning before coming out on the bench, I was reviewing my draft of the jury charge, particularly the charge with respect to identification. I think that all of the factors . . . that you address in your motion in limine are addressed in my draft charge and will be addressed in the final charge to the jury such that [a] reasonable trier of fact will be in a position to assess all of these factors that you're raising. The witnesses will be subject to cross-examination and I . . . do not believe that the . . . nonstate action was so unduly . . . suggestive that it should preclude the state from offering identification testimony . . . at trial. Accordingly, the motion in limine to preclude in- and out-of-court identification of the defendant is denied."

[41] We disagree with the defendant's assertion that the court failed to balance the probative value of the victim's identification with its prejudicial impact. The court stated in its oral denial of the defendant's motion that the private actor's actions were not "so unduly . . . suggestive" so as to preclude the prosecutor from presenting this evidence at trial. Furthermore, in its memorandum of decision, the court described the victim's identification as being "admissible as relevant and probative." Given the record in this case, we agree with the following statement from the state's brief: "Our courts do not . . . require a trial court to use some talismanic phraseology in order to satisfy this balancing process. Rather . . . in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling. *State* v. *James G.*, 268 Conn. 382, 395 [844 A.2d 810] (2004). Because the court held a full evidentiary hearing and issued a twenty-one page memorandum of decision addressing the defendant's constitutional and evidentiary arguments, at the end of which it specifically found the identification to be reliable, relevant and probative, this court may infer that the trial court conducted the requisite balancing test." (Emphasis omitted; internal quotation marks omitted.)

[42] Former Chief Justice Rogers authored a concurring opinion to express her "disagreement with the necessity for the special evidentiary rule of *Holliman* and to suggest that, when the issue squarely presents itself in a future appeal, this court abandon that rule and instead hold, as did the United States Supreme Court in *Perry* v. *New Hampshire*, [supra, 565 U.S. 228], that potentially unreliable eyewitness identifications resulting from suggestive procedures undertaken by private actors should be evaluated like any other potentially unreliable evidence—namely, by a fully informed, properly instructed jury within the confines of a trial employing the usual array of constitutional safeguards." *State* v. *Johnson*, supra, 312 Conn. 706–707 (*Rogers*, *C. J.*, concurring); see generally *State* v. *Patterson*, 170 Conn. App. 768, 783 n.15, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017). Stated differently, in her view, "no rule of admissibility should apply other than §§ 4-2 and 4-3 of the Connecticut Code of Evidence, which together provide, in short, that relevant evidence presumptively is admissible, unless the potential harm resulting from its admission outweighs its probative value." *State* v. *Johnson*, supra, 707 (*Rogers*, *C. J.*, concurring). The majority in *Johnson* also questioned the need for the *Holliman* rule, given that the rationale for excluding an unreliable identification involving

suggestive conduct by a state actor is to punish and deter such improper government action, and that rationale is absent in cases involving a private actor. See *State* v. *Johnson*, supra, 704 n.18.

Although recognizing that, as an intermediate appellate court, we cannot alter or deviate from the binding precedent from our Supreme Court, the state nonetheless argues in its brief that the rule of *Holliman* should be abandoned. See, e.g., *State* v. *Siler*, 204 Conn. App. 171, 178, 253 A.3d 995, cert. denied, 343 Conn. 912, 273 A.3d 694 (2021); *State* v. *Madera*, 160 Conn. App. 851, 862, 125 A.3d 1071 (2015). The sole purpose of the state's inclusion of this matter in its brief is to preserve it for further review.

We also are mindful that, because our Supreme Court has determined that the *Biggers* framework has been undermined by recent scientific research and does not sufficiently protect the state constitutional due process rights of the citizens of this state, *Holliman*'s reliance on those factors may be revisited at some point. See, e.g., *State* v. *Johnson*, supra, 312 Conn. 702–703 n.17. In his appellate brief, the defendant mentions, in passing and without extensive discussion or analysis, that the trial court should have applied the *Harris* factors in deciding this evidentiary issue rather than the *Biggers* framework. He failed to raise this claim to the trial court, leaving us with an unpreserved, and thus unreviewable, evidentiary claim. See, e.g., *State* v. *Waters*, supra, 214 Conn. App. 314. Furthermore, the defendant failed to brief this claim adequately. See, e.g., *State* v. *McKinney*, 209 Conn. App. 363, 376 n.18, 268 A.3d 134 (2021), cert. denied, 341 Conn. 903, 268 A.3d 77 (2022). Finally, as previously noted, we are not at liberty to reconsider the holdings of our Supreme Court. For these reasons, we decline to address whether the *Harris* test should replace the *Biggers* framework in the context of the *Holliman* rule.

[43] The defendant's request to charge the jury on the issue of identification testimony stated in relevant part: "Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

"People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

"The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Remembering something require[s] three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect—or even alter—someone's memory of what happened and thereby affect the accuracy of identification testimony. This can happen without the witness being aware of it.

"I am going to list some factors that you should consider in determining whether identification testimony is accurate.

"a. You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, hoodie or sunglasses, it may affect the witness's ability to accurately identify the person.

"b. You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.

"c. You should consider whether, at the time of the observation the witness was under the influence of alcohol or drugs, if so, to what degree.

"d. You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and beings to fade soon thereafter.

"e. You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification, or received after the identification. Such information may include identifications made by other witnesses, physical description given by other witnesses, photographs or media accounts, or any other information

that may affect the independence or accuracy of a witness's identification. Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event. The witness may not realize that his or her memory has been affected by this information.

"An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual. Suggestive conduct need not be intentional and the person doing the 'suggesting' may not realize that he or she is doing anything suggestive."

[44] In *State* v. *Guilbert*, supra, 306 Conn. 220–21, our Supreme Court overruled *State* v. *Kemp*, 199 Conn. 473, 477, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), which had concluded that an average member of the jury knew about the factors that affected the reliability of eyewitness identification and that expert testimony on that issue was disfavored because it invaded the province of the jury to determine what weight to give that evidence. Specifically, our Supreme Court stated: "[There is now] the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This broad based judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification. [T]he scientific evidence . . . is both reliable and useful. . . . Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings. . . . [C]onsensus exists among the experts . . . within the . . . research community. . . . [T]he science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Guilbert*, supra, 234–37; see also *State* v. *Gore*, 342 Conn. 129, 160–61, 269 A.3d 1 (2022); *State* v. *Scott*, supra, 191 Conn. App. 342 n.34; see generally *State* v. *White*, supra, 334 Conn. 771 (even in cases where identification is not preceded by unnecessarily suggestive procedure, defendant is entitled to present expert testimony on reliability of eyewitness testimony).

The court in *Guilbert* also concluded that testimony by a qualified expert witness on the fallibility of eyewitness identification was admissible pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), when that testimony would assist the jury with its evaluation of the identification evidence. *State* v. *Guilbert*, supra, 306 Conn. 221.

[45] Contrary to the state's argument, we note that the defendant preserved his claim regarding the court's jury instructions. The defendant filed a written request to charge and raised this issue with the court at the charging conference. See *State* v. *Salmond*, 179 Conn. App. 605, 625–26, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018); see also *State* v. *Wilson*, 209 Conn. App. 779, 797–98, 267 A.3d 958 (2022).

[46] We note that in *State* v. *Crosby*, supra, 182 Conn. App. 411–12, this court expressly rejected the defendant's claim that the *Guilbert* factors are required in jury instructions. See also *State* v. *Faust*, supra, 161 Conn. App. 185 (following *Guilbert*, trial court retained discretion regarding which instructions regarding reliability of eyewitness identification were warranted given particular facts and circumstances of each case). Furthermore, given that our appellate courts have explained that a trial court must tailor its charge regarding reliability of an eyewitness identification to the evidence presented, we decline the defendant's invitation to recommend replacement language to the model identification instruction on the Judicial Branch website.

[47] The following colloquy between defense counsel and Leippe illustrates his testimony regarding the topic of good faith misidentification:

"Q. In that situation, would it be fair to say the person isn't lying but actually believes what he or she is saying?

"A. Yeah. All of the research and all of the things I'm talking about—talk

about are about sincerely offered memories. Okay. People really believe that's the guy. Okay. I mean, when people make an identification, I mean, most of the time, okay, I mean, we're not talking about lies here, we're talking about things that affect memory without us being aware of—of—of these factors and sincerely believing that, yeah, that's the person."

[48] Assuming arguendo that the court had committed instructional error, the defendant would need to establish harm in order to obtain a new trial. See *State* v. *Faust*, supra, 161 Conn. App. 193. "When a defendant challenges the trial court's failure to provide a requested charge . . . [where] the error is merely of an evidentiary nature . . . the defendant must prove that it was reasonably probable that the jury was misled. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citation omitted; internal quotation marks omitted.) Id.

In the present case, the court specifically referenced Leippe's testimony in its charge on eyewitness identification. Additionally, the issues of the reliability factors relating to the eyewitness identification were before the jury during the proceedings. See *State* v. *Day*, supra, 171 Conn. App. 838. We conclude, therefore, that the defendant has not established that it was reasonably probable that the jury was misled.