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STATE OF CONNECTICUT *v.* CHRISTOPHER R.*
(AC 45869)

Moll, Suarez and Seeley, Js.

Syllabus

The defendant, who had been convicted, following a jury trial, of the crimes of sexual assault in the first degree, risk of injury to a child and attempt to commit sexual assault in the first degree, appealed to this court. He claimed that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary and by denying his request to open the evidence to allow him to testify. At trial, after the state rested, defense counsel informed the court that he did not plan to call any witnesses. The court thereafter canvassed the defendant on his election not to testify, during which the defendant confirmed repeatedly that no one had forced him or threatened him to waive his right to testify. Subsequently, the court found that the defendant had knowingly and voluntarily waived his right to testify. The following day, the defendant addressed the court and stated that he wanted to testify in his defense and that his attorney had forced him not to testify. The defendant indicated that he wanted to testify so that he could alert the jury that the victim, his stepgrandaughter, was his biological child, allegedly conceived when he sexually assaulted her mother when the mother was a teenager. Defense counsel informed the court that he was not filing a motion to open the evidence, and the court stated, inter alia, that, even if there were a motion, it would be denied, as the defendant would intend it only to effect a delay in the proceedings. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary: the defendant's claim failed under the third prong of *State* v. *Golding* (213 Conn. 233) because the alleged constitutional violation did not exist, as the record indicated that the court had conducted a thorough canvass of the defendant on the issue of whether he had been forced to waive his right to testify, inquiring four times as to whether the waiver was voluntary and asking the defendant whether he understood its questions and whether his answers were voluntary; moreover, the defendant had previously confirmed during the canvass that he understood that the choice of whether to testify was his to make, he made it knowingly and voluntarily, he had sufficient time to discuss the matter with his counsel, who had explained possible consequences of his decision to testify or not, and, when offered the opportunity to ask questions of the court, he did not indicate in any way that his counsel had forced him, pressured him, or otherwise exerted undue influence on him to waive his right to testify; furthermore, the defendant offered only a conclusory assertion and no evidence to support his contention that his counsel forced him not to testify.

2. The defendant could not prevail on his claim that the trial court abused its discretion in denying his request to open the evidence to allow him to testify: because defense counsel elected not to file a motion to open the evidence, and the defendant, represented by counsel, could not file such a motion on his own as Connecticut does not recognize a right to hybrid representation, there was no motion properly before the court upon which to rule; moreover, even if the trial court treated the defendant's comments as a valid motion to open, the defendant's proffered testimony relating to his alleged biological relationship with the victim would have been inadmissible pursuant to the Connecticut Code of Evidence (§§ 4-1 and 4-3), as his contention that the victim was his biological child would not have made any fact material to the determination of whether he sexually assaulted her more or less probable, and such a shocking and inflammatory proclamation posed a high danger of surprising the jury, confusing the issues and wasting time; furthermore, although the court remarked that it believed that the defendant's request to open the evidence was intended to effect a delay, its decision was based on the fact that the defendant had made a valid and voluntary waiver of his right to testify, and the comment, made after the court

had ample opportunity to observe the defendant's behavior throughout the course of the trial, was not improper and did not violate the defendant's constitutional rights; additionally, contrary to the defendant's claim, although the court considered the timely progression of the proceedings, it did not give that factor undue weight or subordinate the defendant's right to testify to its desire to stay on schedule.

Argued September 14—officially released December 12, 2023

Procedural History

Substitute information charging the defendant with two counts of the crime of risk of injury to a child and with one count each of the crimes of sexual assault in the first degree and attempt to commit sexual assault in the first degree, brought to the Superior Court in the judicial district of New Britain, and tried to the jury before *Baldini, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, executive assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *David N. Clifton*, senior assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Christopher R., appeals from the judgment of conviction, rendered following a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1). On appeal, he claims that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary and denying his request to open the evidence to allow him to testify following his assertion that the waiver of his right to testify was involuntary. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In October, 2018, the victim, N, was fifteen years old and lived with her mother and her two younger sisters. At that time, N's grandmother and the defendant, her grandmother's husband, were also residing in the apartment where N lived. On October 3, 2018, N was in the apartment with her two sisters, discussing a concert that she wanted to attend, when the defendant asked her what she would be willing to do for the concert tickets. The defendant proceeded to grab her and kiss her. He then asked her to come talk with him in her mother's bedroom. When her sisters became scared and began to cry, N went into the bedroom with the defendant. Once N was in the bedroom with the defendant, he restrained her by grabbing her arm and locking the door. He proceeded to pin her to the bed and sexually assault her. When she cried, he hit her on the mouth. During the assault, he rubbed his genitals against her, penetrated her digitally, and attempted to penetrate her with his penis. The defendant also told N that if she did not stop screaming, he would "get one of" her sisters. Thereafter, the defendant suddenly stopped the assault, sat on the bed, and, while punching himself in the head, said that the "demons" in him had made him assault N.

After N's grandmother returned to the apartment, N communicated to her, using an application on her phone, that she had been assaulted. N's grandmother called N's mother, K, who returned to the apartment. N disclosed the assault to K, who called the police. N subsequently was taken to a hospital, where a sexual assault kit was administered. The defendant was subsequently arrested and taken into custody.

A trial commenced on May 2, 2022. The state presented evidence from multiple witnesses, including N, K, N's grandmother, multiple police officers, the nurse who performed N's sexual assault kit, and two forensic experts. Defense counsel cross-examined each of the

state's witnesses. On May 3, 2022, after the state rested, defense counsel informed the court that he did not plan to call any witnesses. The court asked defense counsel if that meant that the defendant had elected not to testify. Defense counsel confirmed that that was his understanding. The court then canvassed the defendant to confirm that he was waiving his right to testify. The court first elicited certain information, including that the defendant was fifty-seven years old, that he was not under the influence of any alcohol, drugs, or medication, and that he had completed the eleventh grade. The court then asked the defendant whether he had discussed the matter with his attorney, whether he had had enough time to discuss the matter with his attorney, whether his attorney had properly explained the risks and benefits of not testifying with him, whether he understood those risks and benefits, and whether he understood that the decision not to testify was his and only his to make. The defendant answered in the affirmative to each of the court's questions. The following exchange then took place:

"The Court: And is it your personal decision not to testify on your own behalf?

"The Defendant: Yes.

"The Court: Are you waiving your right to testify?

"The Defendant: Yes.

"The Court: Are you waiving your right to testify knowingly and voluntarily?

"The Defendant: Yes.

"The Court: Has anyone forced or threatened you to waive your right to testify?

"The Defendant: Sorry?

"The Court: Has anyone forced or threatened you to waive your right to testify?

"The Defendant: Do I have to answer that?

"The Court: Yes. Has anyone forced or threatened you to give up your right to testify?

"The Defendant: No.

"The Court: All right. So let me ask you the question again. Has anyone forced or threatened you to waive your right to testify?

"The Defendant: No.

"The Court: And is your response to that question a voluntary one? Have any promises been made to you to waive your right to testify? Have you understood all of my questions . . . ?

"The Defendant: Yes.

"The Court: Do you have any questions of the court?

"The Defendant: No."

After the canvass was complete, the court then stated that it had "evaluated and asked this defendant whether or not there [were] any impediments to his judgment or thought process that would affect this ability to make the decision that he just made to not testify in this case. This court has also asked questions to determine this defendant's age, his level of schooling. This court has advised the defendant that he does have a constitutional right to testify . . . which is his choice alone of whether or not he wishes to testify or not. I have canvassed this defendant and I find that the defendant has knowingly and voluntarily waived his right to testify in this case."

The following day, the defendant addressed the court and stated that he now wanted to testify in his defense, claiming that he had been forced not to testify by his attorney.[1] The defendant stated that, "when you asked me, [were] you forced or threatened, I said I don't want to answer that question because I was . . . it was not voluntary . . . [i]t was forced. I was forced to say yes. I was forced to do this. . . . I think the jury needs to know the truth. They need to know the truth. Okay. If we [are] going to do justice, let's do justice with the truth, not dishonesty, Your Honor."[2]

The court found that the defendant had knowingly and voluntarily waived his right to testify. The court addressed the defendant directly, stating that "you were aware that you had this choice. I canvassed you on it, I asked you specific questions, and then I asked you whether or not anybody threatened or forced you not to testify; you asked, do I have to answer that question and I said yes, and you paused and then you eventually answered no. The follow up question that the court asked after you responded to that was, is your response to that question truthful, and your response was yes. So, in looking at this situation, the court completed a full canvass because I wanted to make sure that I knew that your [waiver of the] constitutional right on whether you wanted to testify or not was knowing and voluntary, and I made findings that it was."

Defense counsel informed the court that he would not be filing a motion to open the evidence. The court acknowledged this, stating that "[t]he defense . . . is not making a motion to open the evidence. So, technically speaking, there is no motion before the court. I will indicate, however, if there was a motion before the court, [your] request would be denied. I believe that it is an obstruction of the proceedings, and it is only intended to effect a delay. I also note that there was a full canvass done of [the defendant] relative to the issue of his decision to testify or not. This issue was raised multiple times. The defendant was advised of his choice early on in this case and during the trial."[3] The court

then had counsel for both parties deliver their closing arguments as scheduled. The defendant was found guilty of all charges and sentenced to a term of incarceration of seventeen years, with ten years being mandatory, and twelve years of special parole.

On appeal, the defendant claims, for the first time, that his "constitutional rights were violated by the trial court's refusing his request to [open] [the] evidence to allow him to testify when he asserted that his prior waiver was involuntary." Specifically, he premises his claim of a constitutional violation on his assertions that (1) the court erroneously concluded that his waiver of his right to testify on May 3, 2022, was voluntary and (2) its decision denying his request to open the evidence on May 4, 2022, to allow him to testify was based on flawed reasoning. The defendant further argues that his unpreserved constitutional claim is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and that the deprivation of his right to testify "constitutes structural error, requiring automatic reversal of [his] conviction and a new trial." We do not agree.

Under *Golding*, a defendant can prevail on an unpreserved claim "only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Morel-Vargas*, 343 Conn. 247, 253, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022). In the present case, although the defendant's claim that he was prevented from exercising his right to testify is one of constitutional magnitude, and the record on appeal is adequate to review the claim, we hold that the claim fails under the third prong *of Golding*, as the defendant has failed to show that the alleged constitutional violation exists.

We first set forth the legal principles that guide our analysis of the defendant's claim. A defendant has a constitutional right to testify in his own defense. See *Rock* v. *Arkansas*, 483 U.S. 44, 51–52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right has been found to have "sources in several provisions of the [federal] [c]onstitution." Id., 51. Our Supreme Court previously has discussed the constitutional roots of the right to testify in one's own defense, holding that "[a] criminal defendant also has a right to testify on his own behalf, secured by the fifth, sixth, and fourteenth amendments to the federal constitution. . . . The right to testify

includes the right to testify fully, without perjury, to matters not precluded by a rule of evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Francis*, 317 Conn. 450, 460, 118 A.3d 529 (2015). "The [United States Supreme Court's] designation of the right to testify in one's own defense as more fundamental than the right to self-representation—which the court deemed a personal constitutional right in *Faretta* v. *California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)—logically implies that the decision of whether to testify is also personal to the defendant. . . . [I]n *Rock*, the [United States] Supreme Court noted that a criminal defendant's right to testify is a necessary corollary to the [f]ifth [a]mendment's guarantee against compelled testimony. . . . Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." (Internal quotation marks omitted.) *State* v. *Morel-Vargas*, supra, 343 Conn. 256–57.

Our Supreme Court recently discussed what constitutes a proper waiver of the right to testify in *Morel-Vargas*, noting that, although it is not required, "an on-the-record canvass of a defendant is the best practice to ensure that the defendant's waiver of his constitutional right to testify is made knowingly, intelligently and voluntarily. Therefore, we exercise our supervisory authority to require, prospectively, that a trial court either canvass the defendant or, in certain circumstances, inquire of defense counsel directly to determine whether counsel properly advised the defendant regarding the waiver of his right to testify." Id., 250. In determining whether the waiver is voluntary, the court stated: "Our task . . . is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to [testify]. . . . Our inquiry is dependent [on] the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the [defendant]. . . . In examining the record, moreover, we will indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . [will] not presume acquiescence in the loss of fundamental rights." (Internal quotation marks omitted.) Id., 260.

In connection with his assertion that the court erroneously concluded that his waiver of his right to testify on May 3, 2022, was voluntary, the defendant argues that the court failed in its obligation to conduct a "probing inquiry to determine the validity" of his waiver of his right to testify. In that respect, he appears to challenge the court's May 3, 2022 canvass, claiming that, because he "plainly manifested hesitation during the canvass," the court was required to inquire further, and if it had done so, "it is reasonable to assume that [he] would have revealed the basis for the next day's revelation that he was 'forced' " to waive his right to testify.[4]

We disagree with the defendant's characterization of

his exchange with the court during the canvass on May 3, 2022. The court, in fact, did inquire further when the defendant showed hesitation, as it asked the defendant four times whether he had been forced to waive his right to testify. At first, the defendant responded, "[s]orry," which prompted the court to repeat the question. After the court asked the question a second time, the defendant asked if he had to answer the question. The court informed the defendant that he did and asked the question for the third time, to which he responded by saying, "[n]o." The court then asked the question for a fourth and final time, and the defendant again reiterated that no one had forced him to waive his right to testify. The court further inquired if the defendant understood its questions and if his answers were voluntary, to which he replied, "[y]es." The defendant's argument that the court did not follow up with him to ensure that his waiver was voluntary is contradicted by the record in this case, which indicates that the court conducted a thorough canvass on the issue of whether the defendant had been forced to waive his right to testify.

Beyond the fact that the court followed up four times to ensure that the defendant had not been forced to waive his right to testify, the defendant already had confirmed on the record that he understood that it was his choice alone to make, that his choice not to testify was his "personal decision," and that he was making that choice "knowingly and voluntarily." The defendant's argument that his waiver was involuntary, and that he had been forced not to testify, is belied by the fact that he told the court, during his canvass on May 3, that he was aware that the choice not to testify belonged solely to him. Furthermore, the defendant confirmed that he had sufficient time to discuss whether to testify with his attorney, that his attorney explained "the pros and cons of not testifying versus testifying on [his] behalf," and that he fully understood them. Most significantly, on the basis of our review of the record on May 3, we conclude that the defendant, despite being offered the opportunity to ask questions of the court, did not indicate in any way that his counsel was pressuring him, forcing him, or otherwise exerting undue influence on him to waive his right to testify.

Moreover, as the state points out in its brief, the defendant offered no evidence to support his contention that he was forced not to testify. Rather, the defendant stated on May 4: "I told [my attorney] that I wanted to take the stand, okay. Yesterday he looked at me, okay, he said God D, all right. Shut—shut up. All right. I mean, yes, and then he—I should [have] had the paper. He wrote in big capital—all capital letters, okay, control yourself, okay. Not to look, not to look at the jury or nothing. Okay. I—I mean, that's—that's what I was going by. I felt like a little kid sitting right next to him. You do what I tell you to do."[5] In the defendant's own words, his attorney had said "all right" when he

expressed a desire to testify. The rest of the exchange suggests the defendant's dissatisfaction with the advice of his counsel about the wisdom of the defendant's potential testimony and counsel's efforts to provide direction on how the defendant should comport himself in the courtroom. Nothing in the defendant's statement suggests that defense counsel had forced the defendant not to testify or that the defendant's waiver was anything other than voluntary. As other courts have held, a mere conclusory assertion after the fact that counsel prevented the defendant from testifying is insufficient to invalidate a waiver. See *Taylor* v. *United States*, 287 F.3d 658, 662 (7th Cir. 2002) (finding no violation of rights in case where defendant's "affidavits show that he discussed [the possibility of testifying] with counsel and decided not to testify after counsel pointed out the risks"); *Underwood* v. *Clark*, 939 F.2d 473, 476 (7th Cir. 1991) ("[A] barebones assertion by a defendant [that his counsel forced him not to testify], albeit made under oath, is insufficient to require a hearing or other action on his claim that his right to testify in his own defense was denied him. It just is too facile a tactic to be allowed to succeed."); *Siciliano* v. *Vose*, 834 F.2d 29, 31 (1st Cir. 1987) (record "suggest[ing] that appellant knew that, legally speaking, he could testify if he chose . . . but [that] he chose not to testify as a matter of trial strategy, perhaps at the strong urging of counsel" is insufficient to "demonstrate that his constitutional right to testify was violated"); see also *State* v. *Crenshaw*, 210 Conn. 304, 311–12, 554 A.2d 1074 (1989) (in case in which defendant sought to withdraw guilty plea, claim that he pleaded guilty because his attorney had instructed him to do so was insufficient ground for withdrawal of plea); *State* v. *Spence*, 29 Conn. App. 359, 364–65, 614 A.2d 864 (1992) (trial court did not abuse its discretion in refusing to allow defendant to withdraw his guilty plea, despite defendant's claim that court had coerced him to enter plea). We conclude, therefore, that the court properly determined that the defendant's waiver on May 3 was voluntary.

We now turn to the defendant's claim that the court's decision not to open the evidence on May 4, 2022, was based on flawed reasoning. The defendant makes a number of arguments[6] in support of this claim, including, inter alia, that (1) the admissibility of the proffered evidence is not relevant to the decision to open the evidence given "the defendant's absolute right to testify," (2) "[t]here was no basis in the record for the court's conclusion that [his] request was 'an obstruction of the proceedings and . . . only intended to effect a delay,' " and (3) the court, in refusing to open the evidence, "subordinated the defendant's constitutional rights to its administrative concerns."[7]

Before we consider the merits of these claims, we must address the proper standard of review applicable to a court's decision not to open the evidence after the

defense has rested. The defendant acknowledges that an abuse of discretion standard typically applies to such a decision but, nonetheless, argues that our standard of review should be plenary, as the court's failure to open the evidence involved its conclusion that the defendant's waiver of his right to testify the previous day was voluntary, which presents a mixed question of law and fact. The state counters that "there was no motion to [open the] evidence properly before the court and, therefore, the trial court correctly declined to rule on any such motion. There is no preserved ruling on a motion to [open the] evidence to review." Specifically, the state argues that the choice to file a motion to open lies solely with trial counsel, not the defendant himself, and that, in this case, there was no motion to open before the court because defense counsel declined to file one. The defendant appears to argue in response that, because the right to testify belongs to the defendant and cannot be waived by trial counsel, the defendant had the authority to file a motion to open the evidence, and that, upon hearing his statement that his previous waiver was involuntary, the court should have treated that statement as a motion to open the evidence. We agree with the state.

Connecticut does not recognize a right to hybrid representation. "[T]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them." (Internal quotation marks omitted.) *State* v. *Despres*, 220 Conn. App. 612, 622 n.8, 300 A.3d 637 (2023). Once a defendant elects to be represented by counsel, the ability to file a motion of this type has been found squarely to belong to counsel. See *State* v. *Joseph*, 174 Conn. App. 260, 275, 165 A.3d 241 (holding that defendant represented by counsel did not have right to file pro se motion to dismiss and for speedy trial), cert. denied, 327 Conn. 912, 170 A.3d 680 (2017); see also *State* v. *Gibbs*, 254 Conn. 578, 611, 758 A.2d 327 (2000) (holding that defendant represented by counsel could not file pro se motion to dismiss).

In the present case, defense counsel specifically stated that he was not making a motion to open the evidence. Furthermore, the defendant did not actually file a motion to open the evidence but, rather, stated that his previous waiver was involuntary and that he now wanted to testify. Because defense counsel elected not to file a motion to open the evidence and the defendant, represented by counsel, could not file such a motion on his own, there was no motion properly before the court on which to rule. The court acknowledged such, stating that, "technically speaking, there is no motion before the court."

We note, however, that the court further stated: "[I]f

there was a motion before the court, [the defendant's] request would be denied. I believe that it is an obstruction of the proceedings, and it is only intended to effect a delay. I also note that there was a full canvass done of [the defendant] relative to the issue of his decision to testify or not. This issue was raised multiple times. The defendant was advised of his choice early on in this case and during the trial."

Even if we construe the defendant's statement as a request or motion to open the evidence, we conclude that the court properly exercised its discretion in denying the request. It is well established in our case law that "[w]e review a trial court's decision to [open] evidence under the abuse of discretion standard." (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, 219 Conn. App. 276, 341, 295 A.3d 973, cert. denied, 348 Conn. 913, A.3d (2023). "The decision to reopen a criminal case to add further testimony lies within the sound discretion of the court, which should be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The purpose . . . is to preserve the fundamental integrity of the trial's truth-finding function." (Internal quotation marks omitted.) *State* v. *Orr*, 199 Conn. App. 427, 469, 237 A.3d 15 (2020). In determining "whether the trial court acted within its broad discretion in rejecting the defendant's request for permission to introduce [evidence] after the defendant had rested his case, we consider the admissibility of the proffered evidence, as well as the specific circumstances of the defendant's request, including the state's interest in an orderly trial process, the potential for jurors to have placed undue emphasis on the evidence had it been admitted, and the nature of the evidence." (Internal quotation marks omitted.) *State* v. *Komisarjevsky*, 338 Conn. 526, 612, 258 A.3d 1166, cert. denied, 303 U.S. 602, 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021).

The defendant's argument that the admissibility of the proffered evidence is irrelevant to the issue of whether the court should have opened the evidence is incorrect. A criminal defendant has a right to testify on his own behalf, but that right "is not without limitation." *Rock* v. *Arkansas*, supra, 483 U.S. 55. In determining whether the trial court acted within its discretion in denying the request to open the evidence made after the defense had rested, this court may consider a number of factors, including the admissibility and nature of the proffered evidence. See *State* v. *Komisarjevsky*, supra, 338 Conn. 612; *State* v. *Carter*, 228 Conn. 412, 425, 636 A.2d 821 (1994). In the present case, the defendant indicated that he wanted to testify to the fact that N, his stepgranddaughter, is actually his daughter, who allegedly was conceived when he sexually assaulted her mother when her mother was a teenager, and that this alleged biological relationship explained the pres-

ence of his DNA in the epithelial sample that was taken from the interior of N's vagina at the hospital after she reported the assault.

The defendant's proffered testimony would have been inadmissible. This proposed testimony, as noted by the state in its brief, "would not explain why the DNA found in a sample generated from the epithelial fraction of the vaginal swab taken from inside N's vagina was consistent with the defendant's DNA profile,"[8] and, therefore, it would not have been admissible under §§ 4-1 and 4-3 of the Connecticut Code of Evidence.

Under § 4-1 of the Connecticut Code of Evidence, " '[r]elevant evidence' means any evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." We conclude that the defendant's proffered testimony would have been inadmissible because his contention that the victim was his daughter would not have made any fact material to the determination of whether he sexually assaulted her more or less probable, including the presence of his DNA in the sample taken from her vagina. Moreover, under § 4-3 of the Connecticut Code of Evidence, "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Even if the potential parental relationship between the defendant and N were relevant to a determination of his guilt, such a shocking and inflammatory proclamation posed a high danger of surprising the jury, confusing the issues, and wasting time, as the prosecution would have had to respond by bringing back an expert to testify about how the defendant's potential paternal connection was unrelated to the DNA obtained from the vaginal swab. Therefore, we conclude that, due to the nature and admissibility of the proffered testimony, and assuming that the court treated the defendant's comments as a valid motion to open and denied the motion, it did not abuse its discretion in electing not to open the evidence.

We now turn to the defendant's final two arguments: that there was no basis in the record for the court's observation that the defendant's request was meant to effect a delay and that the court improperly elevated administrative concerns in its decision not to open the evidence.

We begin by noting that, although the court remarked that it believed the request to open the evidence was "intended to effect a delay," its decision did not rest on that observation but, rather, was based on the fact that the defendant had made a valid and voluntary waiver of his right to testify on May 3, 2022. Moreover, the defendant's contention that there was no basis for

the court's remark about his intent to delay the proceedings is unavailing, as the court had had ample opportunity to observe the defendant's behavior throughout the course of the trial.[9] The defendant and the court had multiple exchanges leading up to the canvass on May 3, 2022, all of which were of such a nature that they support an inference of an interest by the defendant to delay the proceedings. Therefore, we conclude that the court's comment that it believed that the defendant intended to cause a delay in the proceedings was not improper and did not violate the defendant's constitutional rights.

Finally, the record reflects that, although the court considered the timely progression of the proceedings, it did not give that factor undue weight, as claimed by the defendant. The court, in addressing the defendant, stated that "we closed evidence and as you heard, we talked about scheduling and we're already behind at this point, but . . . this is important stuff. So, I want to make sure that we're really clear on it. We specifically scheduled what we were going to do today based upon what happened yesterday. . . . Now you're coming in and saying that you do want to testify after you were canvassed . . . [a]m I correct about that?" The court's brief reference to the schedule and to administrative concerns does not suggest that the court subordinated the defendant's right to testify to its desire to stay on schedule. Rather, in light of its determination that the defendant already had made a valid waiver of his right to testify the previous day, the court considered the other concerns within its purview before issuing its decision denying his request to open the evidence. See *State* v. *Komisarjevsky*, supra, 338 Conn. 612 ("interest in an orderly trial process" is proper consideration in determining whether court abused its discretion in denying request to introduce evidence after defendant had rested his case). Accordingly, even if we were to conclude that the court did, in fact, deny a motion to open, its ruling was not an abuse of its discretion.

We conclude, therefore, that the defendant's unpreserved claim that he was denied his constitutional right to testify fails to meet the third prong of *Golding*, as there was no constitutional violation.[10] The defendant was not deprived of his right to testify but, rather, voluntarily relinquished it on May 3, 2022, which we have determined to be a valid waiver after a thorough canvass. The fact that the defendant did not testify does not mean that he was deprived of a fair trial, especially when he voluntarily waived his right to testify and the substance of his proffered testimony would have been inadmissible.

The judgment is affirmed.

In this opinion the other judges concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline

to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[1] Defense counsel denied on the record that the defendant had been forced not to testify, and the defendant provided no explanation as to how defense counsel had in fact forced him not to testify. The defendant had a history of dissatisfaction with his legal counsel, as the three previous attorneys who represented him in this matter all stated that the attorney-client relationship had broken down such that they were no longer able to work with the defendant.

[2] The "truth" to which the defendant wanted to alert the jury appears to have been that he believes that N, his stepgranddaughter, is also genetically his daughter. He stated: "They [the jury] need to know; my DNA runs through her body." During trial, K testified, outside the presence of the jury, that the defendant had molested her, beginning when she was eight years old, and that, when she was fifteen years old, he sexually assaulted her, which she believed resulted in her pregnancy with N.

[3] At the beginning of the proceedings, the court informed the defendant that, although his attorney had the authority to make many strategic decisions, there were some decisions that were reserved solely for the defendant, including "whether you wish to testify . . . whether or not you wish to plead guilty, and whether or not you want to have a trial before a jury of your peers." There was no further discussion between the court and the defendant of his right to testify until the defendant waived his right on May 3, 2022.

[4] The defendant, citing to *Morel-Vargas*, asserts that, in order for a waiver to be voluntary, the court must determine "at minimum, that (1) defense counsel informed the defendant that the defendant has the right to testify, as well as the right not to testify, and should the defendant choose not to testify, the fact finder may not draw any adverse inferences from the defendant's choice not to testify, (2) defense counsel explained to the defendant that the right to testify belongs to the defendant alone, and no one, including defense counsel, can prevent the defendant from testifying, (3) the defendant has consulted with counsel in making the decision not to testify, and counsel has discussed with the defendant the advantages and disadvantages of testifying, (4) the defendant has had enough time to discuss with counsel the right to testify and the strategic decision not to testify, and the defendant has understood the information counsel has provided, and (5) the defendant has personally waived the right to testify knowingly, intelligently and voluntarily." *State* v. *Morel-Vargas*, supra, 343 Conn. 271. The defendant's claim, however, fails because our Supreme Court decided *Morel-Vargas* after the defendant's trial, creating a prospective rule for how courts must properly canvass a defendant who waives his or her right to testify. Id., 250. The rule does not apply retroactively. Id.

[5] Defense counsel addressed the defendant's claim, telling the court that, "[i]n regards to [the defendant's] claim that I somehow tried to threaten him or intimidate him . . . I did write down on the note—on the notepad that he had to control himself and the context of that was, it's that during a portion of the trial he was getting emotional and what I tried to explain from day one, is that there's a jury who is going to decide your fate and you want to put your best foot forward. You want to make the best representation of yourself that you can. So, if they look over at you and they see you getting angry, if they see you getting emotional, if they see you acting up, it is only going to have a negative impact on the end result. So, one of my jobs at times as defense counsel is to tell people, you better calm down, get control of yourself. . . . That was the extent of it. Nothing else was said beyond that."

[6] The defendant also claims that the court's refusal to open the evidence was based on its erroneous conclusion that his waiver of his right to testify the previous day was voluntary and that the court erred in concluding that there was no motion before it to open the evidence and, thereby, essentially allowed defense counsel to waive the defendant's right to testify. In light of our conclusions that the defendant's waiver of his right to testify was voluntary, that there was no motion to open properly before the court, and that there is no right to hybrid representation, these claims necessarily fail, and we need not address them further.

[7] The defendant has also attempted to create new procedural requirements for a court following a waiver of the right to testify, arguing that, once he told the court the following day that he had been "forced not to testify," the court was required to make both a "thorough inquiry" and to conduct a "thorough evidentiary hearing" into his waiver. This claim fails for the

following reasons. First, the defendant does not provide any authority that is on point to support his claim that a court is required to conduct a "thorough inquiry" or "an evidentiary hearing" upon being informed that a defendant was forced into waiving his right to testify after the court already had completed a successful canvass and made a determination that the waiver was voluntary. Instead, the cases on which the defendant relies require that a court properly canvass a defendant to make sure that his waiver is voluntary, intelligent, and knowing and that the defendant is aware of his rights, which, in this case, the court had done the day before. See, e.g., *State* v. *Cushard*, 328 Conn. 558, 568, 181 A.3d 74 (2018); see also *United States* v. *Calabro*, 467 F.2d 973, 985 (2d Cir. 1972) (holding that waiver of right to counsel must be "knowingly [and] intelligently made" and that defendant must be aware that he has choice and he makes that choice himself), cert. denied, 410 U.S. 926, 93 S. Ct. 1358, 35 L. Ed. 2d (1973), and cert. denied sub nom. *Tortorello* v. *United States*, 410 U.S. 926, 93 S. Ct. 1357, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Conforti* v. *United States*, 410 U.S. 926, 93 S. Ct. 1386, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Conforti* v. *United States*, 410 U.S. 926, 93 S. Ct. 1386, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Picciano* v. *United States*, 410 U.S. 926, 93 S. Ct. 1403, 35 L. Ed. 2d 587 (1973). As previously discussed in this opinion, the court had clarified for the defendant, prior to his waiver on May 3, that his decision not to testify was his alone, and that he was doing so voluntarily and after having ample time to consult with counsel about that decision.

Second, on May 4, upon hearing the defendant's claim that he had been forced not to testify, the court did inquire further. After being informed by defense counsel that the defendant now wanted to testify, the court provided the defendant with an opportunity to explain. The court followed up multiple times with the defendant to let him expand on his contention that his waiver had been involuntary. At no point in response to the court's prompting did the defendant provide a compelling explanation for how defense counsel had "forced" him not to testify. Instead, the defendant proclaimed his general dissatisfaction with counsel's strategic decisions. We conclude that the court adequately assessed the defendant's claims on May 4.

Finally, as to the defendant's argument in his reply brief that the court was required to conduct an evidentiary hearing, such an argument may not be raised for the first time in a reply brief, and, accordingly, we decline to address it. See *State* v. *Richardson*, 291 Conn. 426, 431, 969 A.2d 166 (2009) ("[b]ecause the defendant failed to raise this issue in his main brief, it is abandoned . . . [as] [i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (citation omitted; internal quotation marks omitted)); see also *State* v. *Myers*, 178 Conn. App. 102, 106–107, 174 A.3d 197 (2017) ("Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer." (Citation omitted.)).

[8] Angela Przech, the forensic science examiner with the state laboratory who performed DNA testing on the swabs that had been obtained from the victim at the hospital within hours of the assault, testified regarding the procedures used to test the DNA evidence in this case. During her testimony, the state introduced a laboratory report signed by Przech and another forensic examiner dated October 3, 2019, that describes the results of the DNA testing. The report states that the laboratory tested vaginal, genital, and mouth swabs taken from N, as well as a buccal sample from the defendant for comparison. See *State* v. *Walker*, 332 Conn. 678, 683 n.2, 212 A.3d 1244 (2019) ("[a] buccal swab involves rubbing a Q-tip like instrument along the inside of the cheek to collect epithelial cells"). Przech testified that a genital swab comes from the outer regions of the genital area, while a vaginal swab is "taken internally from the vagina." The report states that the material that was extracted from the swabs was separated "into an epithelial-rich fraction . . . and a sperm-rich fraction." She explained that epithelial cells are those that "people shed . . . like from their body . . . . If you have dry skin, you tend to slough off a lot of your cells and leave them behind . . . . If you rub your hands together over something you may leave [epithelial cells] behind." The report concluded that the epithelial-rich fraction extracted from one of the victim's vaginal swabs was consistent with the defendant (or another member of the same paternal lineage) being the source.

[9] Indeed, in light of the defendant's behavior that followed the court's

denial of the defendant's request, which caused significant delays and disruptions, and eventually necessitated the defendant being moved to two other rooms within the courthouse so that he could not disrupt the proceedings, the court seems to have appropriately estimated the potential risk the defendant posed in disrupting the proceedings.

[10] In light of our determination that there was no error, constitutional or otherwise, the defendant's structural error claim necessarily fails. Structural errors are those which "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. . . . These are structural defects in the constitution of the trial mechanism, which defy analysis by [harmless error] standards. . . . Instead, structural errors require reversal of the defendant's conviction and a new trial. . . . Constitutional violations have been found to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (Internal quotation marks omitted.) *State* v. *Joseph A.*, 336 Conn. 247, 264–65, 245 A.3d 785 (2020). Because we find that there is no error, we need not decide whether the doctrine of structural error applies to the denial of the right to testify.