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STATE OF CONNECTICUT *v.* RALSTON E. SAMUELS
(AC 21681)

Dranginis, Flynn and Bishop, Js.

Argued October 23, 2002—officially released March 25, 2003

(Appeal from Superior Court, judicial district of Hartford, Crawford, J.)

Jeanne M. Zulick, deputy assistant public defender, with whom was *G. Douglas Nash*, public defender, for the appellant (defendant).

Melissa L. Streeto, deputy assistant state's attorney, with whom, on the brief, were *James E. Thomas*, state's attorney, and *Kimberley N. Perrelli*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Ralston E. Samuels, appeals from the judgment of conviction, rendered after a jury trial, of four counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1)[1] and four counts of risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (2).[2] He claims that the trial court improperly replaced a juror with an alternate by using a nonstatutorily sanctioned selection method, that it abused its discretion by allowing the

state to amend its long form information after the jury had been impaneled and that the court improperly allowed the state to call multiple constancy of accusation witnesses. We reverse the judgment of the trial court.

The jury reasonably could have found the following facts. During the 1998-1999 school year, the victim,[3] who was then thirteen years old, lived with her grandmother. In the basement apartment of the grandmother's house lived the defendant, who was twenty-four years old at the time. The victim met the defendant shortly after she moved into her grandmother's house in September, 1998. The defendant would frequently spend time with the grandmother, who was partially blind, and the victim, and occasionally would drive them to go shopping.

In the summer of 1999, a dispute arose between the defendant and the grandmother, ostensibly over an unpaid loan to the defendant by the grandmother. The defendant was asked to move out of the basement apartment, which he did in late June, 1999. Soon after, the grandmother asked the victim's uncle, a friend of the defendant, to ask the victim if anything "was going on between [the defendant] and [the victim]." When the uncle asked the victim about her relationship with the defendant, she alleged that on four separate occasions, she had had sexual intercourse with the defendant.[4] The police were notified shortly thereafter, and a report was filed on July 2, 1999.

At the trial, which took place from July 17 through 20, 2000, the state called fourteen witnesses, seven of whom were constancy of accusation witnesses.[5] The defense called the defendant as its sole witness. The jury found the defendant guilty on all counts. On September 29, 2000, he was sentenced to thirty years incarceration, execution suspended after fifteen years, with twenty-seven months as a mandatory minimum sentence. Additional facts will be supplied as necessary.

On appeal, the defendant advances the following claims. When a juror needed to be replaced by an alternate, the court did not select the new juror by lot, as was prescribed by statute.[6] Further, the defendant claims that the state amended its long form information at such a late date in the trial as to violate his constitutional right to due process. Last, the defendant claims that four of the constancy of accusation witnesses improperly were allowed to give testimony and that the admission of their impermissible hearsay testimony denied him a fair trial. Because we agree with the defendant as to the last claim, we need not reach the first two claims.

I

The constancy of accusation doctrine has a long history in Connecticut, but its underlying rationale, ques-

tionable from the outset, has come under increased scrutiny in recent years.[7] *State* v. *Troupe*, 237 Conn. 284, 294, 677 A.2d 917 (1996) (en banc). The rationale stems from the ancient belief that a victim of a violent crime would naturally cry out immediately after an assault and that, by implication, if such a victim did cry out, her complaint was more likely true. Id., 295. That belief led to the corresponding supposition that a jury would treat with skepticism one who did not cry out soon after she was attacked. Id., 294. So profound was the belief in that sociological phenomenon, and so entrenched was the distrust in a victim's delayed complaint, that proof of ''hue and cry'' became a formal prerequisite for the prosecution of any rape case.[8] Id., 294–96.

With the advent of the hearsay rule in the early 1800s, an exception was carved out for those fresh complaints, partially as a means to dispel the jury's inclination to distrust the victim if there were a delay in reporting. Id., 296. ''Its use thereby forestalled the inference that the victim's silence was inconsistent with her present formal complaint of rape.'' (Internal quotation marks omitted.) Id. In effect, the fresh complaint rule allowed a victim to testify that she had told others about an alleged sexual assault as anticipatory rebuttal against an attack on her credibility, either by the defendant or by the unspoken bias of jurors who, it was presumed, would tend to discredit a victim's claims unless she offered testimony that she had complained soon after the assault.

The fresh complaint rule, in turn, spawned our current constancy of accusation doctrine.[9] Accordingly, those to whom a victim purportedly made a complaint are permitted to testify that such a complaint was, in fact, made to them. That testimony is permitted to corroborate the victim's testimony that she made such a complaint. Unlike courts in the majority of states, Connecticut courts had, historically, allowed constancy testimony for both the fact that a victim reported an assault and the details of what was said by the victim to the witness. Id., 297–99. Thus, the witness to whom the victim purportedly complained was permitted to testify as to the details of the victim's complaint to corroborate the victim's testimony that she did, in fact, complain as stated. Recently, however, our courts' attitude to such testimony has become more circumspect, and, although the central element of the doctrine has been maintained, the scope of it has been consciously restricted.

In *Troupe*, our Supreme Court expressly modified the doctrine to allow constancy of accusation testimony for the limited purpose of showing only that a complaint was made. Id., 304. Testimony is to be restricted to such facts as the identity of the alleged perpetrator and the timing of the victim's complaint, details to be

"limited to those necessary to associate the victim's complaint with the pending charge . . . . Thus, such evidence is admissible only to corroborate the victim's testimony and not for substantive purposes. Before the evidence may be admitted, therefore, the victim must first have testified concerning the facts of the sexual assault and the identity of the person or persons *to whom the incident was reported*." (Emphasis added.) Id., 304–305. The court's modification of the constancy of accusation rule was codified in § 6-11 (c) of the Connecticut Code of Evidence.[10]

In *Troupe*, our Supreme Court held that "[a]lthough we agree that the assumptions underlying the constancy of accusation doctrine are unfounded, we are also cognizant of the fact that those misconceptions are not uncommon. . . . Hence, we hesitate to discard the benefit of this rule to a woman who does complain without a clearer understanding of the burdens the rule may impose on the woman who does not complain." (Internal quotation marks omitted.) Id., 301–302.

II

Through that prism of history, we now review the defendant's claims. The defendant claims, for two different reasons, that the court improperly allowed the testimony of four different constancy of accusation witnesses and requests that we review those claims. To the extent that the defendant raises claims not raised at trial, he requests review under the guidelines set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, additionally, he requests plain error review. See Practice Book § 60-5.

The first reason, the defendant argues, is that the victim did not testify that she actually had complained of the incident(s) to the witnesses and, therefore, the witnesses' testimony was not corroborative of the victim's testimony. The second reason offered by the defendant is that the alleged complaints to three of the witnesses occurred after the formal report to the police and that this should preclude the witnesses from being called under the constancy of accusation doctrine. Over the defendant's objection, all of those witnesses were, nevertheless, called on by the state as constancy of accusation witnesses and all testified. We will examine the testimony of the victim and the witnesses in regard to each of those claims.

We note at this point that evidentiary claims are reviewed pursuant to an abuse of discretion standard. *State* v. *Pereira*, 72 Conn. App. 107, 117, 806 A.2d 51 (2002), cert. denied, 262 Conn. 931, A.2d (2003). Moreover, "[e]videntiary rulings will be overturned on appeal only where there was an abuse of discretion *and* a showing by the defendant of substantial prejudice or injustice." (Emphasis added; internal quotation marks omitted.) *State* v. *Alvarez*, 216 Conn. 301, 306,

579 A.2d 515 (1990).

A

Constancy Witness T

The victim testified that while at a Valentine's Day party in February, 1999, she spoke about the defendant to two friends, one of whom, T, later was called as a constancy of accusation witness. The following colloquy took place between the prosecutor and the victim:

"[Prosecutor]: Did you tell anyone during the time that he was having sex with you? Did you tell anybody about him?

"[The Witness]: I told two people that—how he said that he considers me as his girlfriend.

"[Prosecutor]: Did you tell them anything else?

"[The Witness]: No.

"[Prosecutor]: Are you sure?

"[The Witness]: Yes.

"[Prosecutor]: Could you be mistaken?

"[The Witness]: I might be.

"[Prosecutor]: Who did you—who did you talk to?

* * *

"[The Witness]: [A relative, C] and the other girl was [T].

* * *

"[Prosecutor]: Other than [C] and [T], while you thought the defendant was your boyfriend, did you tell anyone else?

"[The Witness]: No.

"[Prosecutor]: Actually, did you tell someone else what had happened?

"[The Witness]: Yes.

"[Prosecutor]: Who did you tell?

"[The Witness]: My uncle."

At several other points in the trial, the victim largely reiterated that same testimony,[11] i.e., that she had told T and C that she and the defendant had a boyfriend-girlfriend relationship.

As the court held in *Troupe*, the prerequisites for the admission of constancy of accusation testimony are (1) that the victim testify that an assault took place and (2) that she testify as to the identity of the person to whom she reported the assault. Although it is uncontroverted that the victim testified that an assault took place, her testimony shows that she did not ever claim that she reported it to her friends, T and C. The premise of admitting constancy of accusation witnesses is to

show a reciprocity between a victim's testimony concerning a complaint made to a witness and the witness's testimony concerning the complaint made by the victim. For there to be a comparison, the victim must testify that she actually complained of the incident to the witness. That the victim said the defendant considered her to be his girlfriend—whatever meaning may be attached to that statement—plainly falls short of a report of an incident (or incidents) of sexual assault.[12]

Although we agree that testimony that qualifies as ''a report of the incident'' need not contain magic words, or, even necessarily be a precise statement,[13] it should, minimally, be a statement that a reasonable person would find to be relating an incident of sexual assault. The victim's testimony regarding her conversation with T, we believe, cannot accurately be characterized as a complaint or a ''report of the incident'' as required by *Troupe* and § 6-11 (c) of the Connecticut Code of Evidence.

Although we determine that the victim testified that she had not reported the incident to T, T nevertheless was called as a constancy of accusation witness, and, when called, testified that the victim had, in fact, reported that she had intercourse with the defendant:

''[Prosecutor]: Did [the victim] talk to you about anything about [the defendant] the night of the party? . . .

''[The Witness]: She told me that [the defendant] was her boyfriend and that she had sex with him. And that was it.

''[Prosecutor]: Did she say when she would have sex with him?

''[The Witness]: No, she did not.

''[Prosecutor]: Did she say where she would have sex with him?

''[The Witness]: At his house.

''[Prosecutor]: And did she say when she would go down there?

''A. When [her grandmother]'s not home . . . .''

The defendant specifically objected to the testimony of T on the ground that the testimony of the victim did not indicate that she had reported the incident to T. That objection was timely made and was adequate to perfect the matter for review. As such, we agree with the defendant that the testimony of T as a constancy of accusation witness was improperly admitted.

B

The Constancy Witness Teachers

We turn next to the testimony of the victim regarding her interaction with two of her schoolteachers who were permitted to testify as constancy of accusation

witnesses. At trial, the defendant objected to the testimony of the two teachers on the ground that the alleged complaint to them occurred after the victim had filed her official police report, and, thus, was outside the ambit of the constancy of accusation doctrine. On appeal, the defendant additionally objects to the teachers' testimony on the ground that the victim did not testify that she had complained of the incident to either of those witnesses and that she had, in fact, never actually complained of the incident to the witnesses.[14] The defendant requests *Golding* review of his additional ground. Because we agree with the first claim, we need not reach the second.[15]

Specifically, the defendant claims that complaints made after the official charge do not fall under the constancy of accusation doctrine, and, as those complaints were made after that had occurred,[16] they are not proper subjects of constancy testimony. In light of the stated purpose of the constancy exception, we agree that the objection has merit.

Returning to the roots of the doctrine, the point of allowing the testimony of witnesses, whose sole function is to corroborate the testimony of the victim that a complaint was made, is to act preemptively to rebut a jury's potential residual prejudice against the failure of a victim to complain promptly. *State* v. *Troupe*, supra, 237 Conn. 296. The constancy of accusation doctrine was originally meant, and has continued to serve, as a method of counterbalancing a supposed societal bias against late complaining assault victims: Practically speaking, it provided a means to verify complaints made between the time of the assault and the time of the official complaint.[17] Once the complaint has been formally and officially lodged, the defense argues, any subsequent complaints cannot reasonably be the subject of an inquiry regarding their timeliness.[18]

We review that newly framed claim in light of the reasoning of *Troupe*. *Troupe* had the effect of narrowing the scope of the constancy of accusation doctrine as used in Connecticut. Most notably, it restricted the use of constancy testimony, allowing it for the sole purpose of corroborating the victim's testimony that a complaint had been made. Id., 304. The court also narrowed the reasoning behind the doctrine, rationalizing that it now serves only to counteract a lingering, false assumption. "[T]he scope of our current doctrine is broader than necessary to protect against the unwarranted, but nonetheless persistent, view that a sexual assault victim who does not report the crime cannot be trusted to testify truthfully about the incident." Id., 303. If the purpose of the doctrine is to combat stereotypes held by jurors regarding nonreporting victims, once a victim has officially reported the crime to the police, we do not believe any reasonable function can be further served by the admission of postcharge constancy testimony.

As the defense argues, once the formal complaint has been lodged, according to the doctrine's rationale, there should be no more constancy of accusation witnesses. Not only does the admission of that postofficial complaint constancy testimony *not* contribute to the rebuttal of any sexist bias, but it provides an unwarranted opportunity for the accumulation of redundant testimony prejudicial to the defendant. The defendant argues that the court improperly admitted the testimony of the two teachers because the alleged complaints that were made to them by the victim occurred after the official complaint was lodged and that the timing of such complaints places them outside the scope of permissible constancy of accusation testimony. We agree with the defendant.

At first glance, *State* v. *Romero*, 59 Conn. App. 469, 757 A.2d 643, cert. denied, 255 Conn. 919, 763 A.2d 1043 (2000), appears to control. We believe that it does not and that this case is distinguishable. The defendant in *Romero* claimed that the trial court improperly allowed the testimony of a constancy of accusation witness to whom the victim had made statements long after the crime and after the defendant had been charged with the offense. Id., 471. This court concluded that the timing of a complaint does not affect the admissibility of the evidence, but merely affects the weight to be given to that evidence. Id., 475. We remain true to that view. ''The delay . . . in the victim's statements to [a friend] does not make [the friend's] testimony inadmissible, but rather, is a factor to be considered by the trier of fact.'' Id. The defendant in *Romero* did not make the claim, as does the defendant here, that the admission of postcharge constancy of accusation testimony itself is contrary to the underlying doctrine, and the court's holding in *Romero* did not reach that question.[19]

We believe that the testimony of the teachers, as constancy of accusation witnesses, was admitted improperly. Both teachers, in turn, testified, substantially, that the victim had reported the incident(s) of sexual assault to them.[20]

C

The Constancy Witness Therapist

The last constancy of accusation witness to which the defendant objects was the victim's therapist.[21] The defendant argues, and timely objected at trial, that the testimony of the therapist was likewise inadmissible because any alleged report of the incident to the therapist would have come after the formal charge had been made.[22] The defendant argues, in the alternative, on appeal, that the victim never testified that she had reported the incident to the therapist.[23] Because that objection was not raised at trial, we do not reach the issue here.

For the same reasons discussed in part II B, we

believe that the therapist's testimony also was admitted improperly. The therapist subsequently testified that the victim had told her that she was sexually abused by the defendant.

D

Returning to the standard by which this court reviews evidentiary claims, we believe that the admission of the previously discussed testimony; see part II A, B and C; represents an abuse of discretion. We do not believe, however, that the defendant has shown that the admission of any one constancy of accusation witness, alone, constitutes harmful error, given that seven constancy of accusation witnesses were presented, all of whom testified, improperly or not, to the same effect. Though that undoubtedly was prejudicial to the defendant, we do not believe that he has shown that the admission of the testimony of any individual witness rises to the level of substantial prejudice or injustice, the requisite standard for reversal on purely evidentiary claims of error.

The defendant makes the claim on appeal that the cumulative effect of all the improperly admitted constancy of accusation testimony rose to the level of a constitutional violation by depriving him of a fair trial. We agree. As that claim was not raised at trial, the defendant requests that we review the matter pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40.[24]

"[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly 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.) Id.

We conclude that the record is adequate to review the claim of error. See part II A, B and C. The defendant raises constitutional claims under the fourteenth amendment to the United States constitution, as well as article first, § 8, of the constitution of Connecticut.[25] In particular, the defendant claims that the admission of the witnesses' testimony deprived him of a fair trial, and that his right to confront the witnesses against him and to subject them to a full and complete cross-examination was violated.

Although we do not believe that the defendant was deprived of his right to confront the witnesses against him,[26] we do believe that the improper admission of the testimony of the four constancy of accusation witnesses nevertheless deprived him of a fair trial. The improper admission of the testimony of each constancy of accusa-

tion witness, we conclude, was harmless and did not, alone, create such substantial prejudice to the defendant as to warrant a reversal of the judgment. As noted previously, however, the testimony is part of a mosaic of improperly admitted evidence that, in the aggregate, served to deny the defendant a fair trial. ''[T]he trial court as well as the court of review must insist that fairness in the trial and in the argument shall be observed. Otherwise justice cannot be done.'' (Internal quotation marks omitted.) *State* v. *Floyd*, 10 Conn. App. 361, 390, 523 A.2d 1323 (*Bieluch, J.*, dissenting), cert. denied, 203 Conn. 809, 525 A.2d 523, cert. denied, 484 U.S. 859, 108 S. Ct. 172, 98 L. Ed. 2d 126 (1987).

''It is well settled that a violation of constitutional magnitude may be established even though there has not been a complete abridgement or deprivation of the right. A constitutional violation may result, therefore, when a constitutional right has been impermissibly burdened or impaired by virtue of state action that unnecessarily chills or penalizes the free exercise of the right. . . . Thus, [w]hatever might be said of [the state's] objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is incidental rather than intentional; the question is whether that effect is unnecessary and therefore excessive.'' (Internal quotation marks omitted.) *State* v. *Alexander*, 50 Conn. App. 242, 249, 718 A.2d 66 (1998), rev'd in part on other grounds, 254 Conn. 290, 755 A.2d 868 (2000).

The right to a fair trial can be implicated in numerous ways.[27] ''The concept of fairness embraces many concrete notions, ranging from such fundamental matters as the right of the defendant to know the charges against him, to such lesser interests as his right to have each count of the indictment charge him with no more than one criminal violation . . . or the right to have access to reports by informant witnesses to law enforcement officials . . . or the right to present information in mitigation of punishment before being sentenced after conviction . . . .'' (Citations omitted.) *Daye* v. *Attorney General of State of New York*, 696 F.2d 186, 193 (2d Cir. 1982).

Prosecutorial misconduct is probably the most notable reason for the deprivation of a defendant's right to a fair trial. See *State* v. *Santiago*, 73 Conn. App. 205, 807 A.2d 1048 (2002), cert. granted on other grounds, 262 Conn. 939, A.2d , cert. denied, 262 Conn. 939, A.2d (2003); *State* v. *Alexander*, supra, 50 Conn. App. 242; *State* v. *Floyd*, supra, 10 Conn. App. 361. ''[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.'' (Internal quotation marks omitted.) *State* v. *Floyd*, supra, 383 (*Bieluch J.*, dissenting). That misconduct can range

from failure to provide exculpatory evidence to the defense; *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); to improper comments by the prosecutor made in closing arguments. *State* v. *Cassidy*, 236 Conn. 112, 115, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part on other grounds, *State* v. *Alexander*, 254 Conn. 290, 296, 755 A.2d 868 (2000). The right to a fair trial has, additionally, been found to have been abridged by improper jury instructions; *State* v. *Davis*, 261 Conn. 553, 562, 804 A.2d 781 (2002); and by failure to allow evidence of a victim's prior sexual abuse. *State* v. *Rolon*, 257 Conn. 156, 160, 777 A.2d 604 (2001).

The common thread in those situations is the prejudicial impact on the parties' due process rights, generally implicating the parties' right to be tried before an impartial fact finder. See *State* v. *Harvey*, 27 Conn. App. 171, 177, 605 A.2d 563, cert. denied, 222 Conn. 907, 608 A.2d 693 (1992). ''The appearance and existence of impartiality are both essential elements of a fair trial.'' *State* v. *Santangelo*, 205 Conn. 578, 602, 534 A.2d 1175 (1987). Whether the claim of a denial of a fair trial is of constitutional dimension is guided by whether the claim rests on a factual matrix that is within the mainstream of due process adjudication. *Daye* v. *Attorney General of State of New York*, supra, 696 F.2d 193.

We cannot overlook the fact that the improper admission of the testimony of the multiple constancy witnesses constituted a significant amount of prejudicial hearsay. Although any one of the hearsay statements, alone, would not have substantially prejudiced the defendant's right to a fair trial, the cumulative effect of the witnesses' testimony, we believe, escalated the harm to a constitutional level. The aggregation of missteps at trial has frequently led to such results. See *Floyd* v. *Meachum*, 907 F.2d 347 (2d Cir. 1990) (cumulative effect of prosecutor's comments denied defendant fundamentally fair trial); *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002); (cumulative effect of four instances of improper conduct by prosecutor deprived defendant of fair trial); *State* v. *Santiago*, supra, 73 Conn. App. 228–29 (numerous acts of misconduct so infected proceedings as to deprive defendant of fair trial). Again, the gauge of the constitutional violation is the overall fairness of the trial.

As a result, we find that the defendant has made a claim of constitutional magnitude alleging the violation of his fundamental right to a fair trial. Thus, the second prong of *Golding* has been satisfied. ''The first two requirements [of *Golding*] involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail.'' *State* v. *Woods*, 250 Conn. 807, 815, 740 A.2d 371 (1999). We find that the third and fourth prongs of *Golding* are satisfied as well. For rea-

sons we will discuss, we believe that the alleged constitutional violation clearly exists and that the state has not shown the error to be harmless beyond a reasonable doubt. In short, the improper admission of multiple constancy of accusation witnesses deprived the defendant of a fair trial before an impartial jury.

Here, the four of the seven constancy of accusation witnesses whose testimony improperly was admitted included a friend of the victim, the victim's therapist and two schoolteachers. Without the umbrage of the constancy doctrine, their testimony is simple hearsay, the unreliability of which is manifest by a significant discrepancy in the testimony of the victim and three of the witnesses. Although the court in *Troupe* held that all other evidentiary rules remain in effect; *State* v. *Troupe*, supra, 237 Conn. 304; here, the state explicitly relied on the constancy of accusation doctrine for the admission of that testimony. The testimony in question was a significant part of the state's evidentiary presentation argued to the jury. The state relied prominently on the improperly admitted testimony of the victim's friend, T, in closing argument,[28] and referred to the therapist's and the teachers' testimony as well. The potential damage caused by the testimony of the teachers was increased by the fact that no constancy of accusation limiting instruction was given to the jury regarding their testimony.

Although it is established that if erroneously admitted evidence merely is cumulative of other evidence, that alone does not constitute reversible error; *Swenson* v. *Sawoska*, 215 Conn. 148, 155, 575 A.2d 206 (1990); it is clear that repeatedly allowing such testimony ''leave[s] the jury with the impression that the State has gathered a greater number of witnesses than the defense . . . .'' (Internal quotation marks omitted.) *State* v. *Troupe*, supra, 237 Conn. 320 (*Berdon, J.*, concurring). ''Later multiple accusations . . . [can serve] no purpose but to 'pile on' statement upon statement to impress the jury that if repeated often enough it must be true.'' C. Tait, Connecticut Evidence (3d Ed. Sup. 2002) § 6.37.5, p. 17.

Given the weight and volume of the improperly admitted testimony and its relative importance to the state's case, we believe that the defendant's right to a fair trial before an impartial jury clearly and impermissibly was burdened, that the admission of the testimony of those four witnesses was substantially prejudicial to the defendant and that the state has not shown the cumulative effect of the improperly admitted testimony to be harmless beyond a reasonable doubt. To conclude otherwise would provide prosecutors and trial courts no governance on the admission of the testimony of constancy of accusation witnesses, thereby allowing the state to accumulate witnesses with impunity, a result pernicious to justice.

This case highlights the mischief that unfettered application of the constancy of accusation doctrine can generate. The doctrine is hanging by a thread, and the strand of reasoning opposed to it is not new.[29] We conclude, given the guidance of our Supreme Court in *Troupe* coupled with the surviving theory underlying the doctrine, that allowing the testimony of the four constancy of accusation witnesses would amount to an expansion of an already troubled body of law.[30] We do not so much constrict the doctrine as to construe it strictly.

The judgment is reversed and the case is remanded for a new trial.

In this opinion FLYNN, J., concurred.

[1] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person . . . ."

[2] General Statutes (Rev. to 1997) § 53-21 (2) provides that person is guilty of risk of injury to a child if that person "has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ."

[3] In keeping with our policy to protect the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom her identity may be revealed. See General Statutes § 54-86e.

[4] In her initial report to the police, the victim alleged that the incidents took place between December, 1998, and February, 1999. Later statements by the victim alleged that the incidents took place ten to twenty times between December, 1998, and June, 1999; the amended long information included the new dates, but not the additional alleged incidents.

[5] The constancy of accusation witnesses included (in order of encounter with the victim) the victim's friend, T, the victim's uncle, two police officers, the victim's therapist and two schoolteachers.

[6] See General Statutes § 54-82 h (c). Although there was error in the trial court's alternate juror selection method, we need not reach the question of whether it was reversible error because we dispose of the appeal on other grounds.

[7] For an excellent survey of the evolving doctrine, see R. Block, "The New Face of Connecticut's Constancy of Accusation Doctrine: *State* v. *Troupe*," 29 Conn. L. Rev. 1713 (1997).

[8] In fact, until 1974 when the legislature repealed General Statutes (Rev. to 1972) § 53a-68; see Public Acts 1974, No. 74-131; a defendant could not be convicted of sexual assault based on the uncorroborated testimony of the victim alone. See *In re Robert K.*, 12 Conn. App. 585, 589 n.1, 532 A.2d 1319 (1987).

[9] See *State* v. *Kinney*, 44 Conn. 153 (1876).

[10] Connecticut Code of Evidence § 6-11 (c) provides in relevant part: "A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. . . . The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes."

[11] The victim testified in relevant part as follows:

"[Defense Counsel]: Okay. Now, you testified you gave five to eight statements, we'll call them, right, about this incident? Can you—can you bring us back to the very first statement you made, to one?

"[The Witness]: I spoke to my uncle about the whole situation.

"[Defense Counsel]: Okay. That was—when was that?

"[The Witness]: In June of 1999.

* * *

"[Defense Counsel]: Okay. Now, on direct examination you testified that

you told two—are these classmates of yours, about [the defendant]. Is that correct?

"[The Witness]: That I can remember.

"[Defense Counsel]: Who did you first tell about this incident?

"[The Witness]: The—I—are you talk—the only people I told was [C] and [T].

"[Defense Counsel]: And you told them that you and he were boy-friend-girlfriend?

"[The Witness]: Yes.

"[Defense Counsel]: You didn't get into any details.

"[The Witness]: No.

"[Defense Counsel]: And after [T] and [C]—and that, you said, was in February of 1999?

"[The Witness]: Yes.

"[Defense Counsel]: Who was the next person you talked to about this?

"[The Witness]: My uncle.

* * *

"[Defense Counsel]: . . . And that was before you told anybody about this allegation that brings us to court?

"[The Witness]: Not that I know of.

"[Defense Counsel]: In other words, on June 24, 1999, you hadn't told anybody—your uncle, your mother, your grandmother, the police—about what brings us here today before that date. Is that right?

"[The Witness]: Yes.

* * *

"[Prosecutor]: . . . [W]hen you were talking about disclosing to your uncle and the police and so forth, that all occurred after the defendant moved out. Right?

"[The Witness]: Yes.

* * *

"[Prosecutor]: Do you recall your earlier testimony that you did talk to your two cousins, your friend [T] and [C] in February of 1999?

"[The Witness]: Yes.

"[Prosecutor]: Is that right?

"[The Witness]: Yes.

"[Prosecutor]: So, you had told someone about your relationship with him prior to the police being called in June and then finally the complaint being made after you finally disclosed to your uncle. Is that right?

"[The Witness]: Yes."

[12] Defense counsel did not object to the testimony of the victim. Although, as the record shows, her testimony did not comport with the edicts of *Troupe* as constancy of accusation, whether that testimony itself was impermissible is not at issue before us.

[13] In fact, we have held that circumstantial evidence can be used to help lay the foundation that a complaint was made. See *State* v. *Orhan*, 52 Conn. App. 231, 240–42, 726 A.2d 629 (1999).

[14] The victim's testimony in relevant part was as follows:

"[Prosecutor]: Did you ever tell anyone at school?

"[The Witness]: I didn't tell nobody at school. I just asked one of my teachers a question. So, I guess he considered it that I was talking about myself.

"[Prosecutor]: Oh, okay.

"[The Witness]: Because we were watching a movie that had to do with the same thing.

* * *

"[Defense Counsel]: Who was the next person you talked to about this?

"[The Witness]: My uncle. And I had talked to one of my teachers in school this year about—about an incident that we were watching a movie of. And I didn't mention myself.

* * *

"[Defense Counsel]: You testified earlier that you had seen a movie at school that triggered a question that you had for the teachers. Is that right?

"[The Witness]: Yes."

[15] We conclude that the testimony improperly was admitted on the former ground rather than on the latter because "[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Falcon*, 68 Conn. App. 884, 886, 793 A.2d 274, cert. denied, 260 Conn. 924, 797 A.2d 521 (2002). It is, nevertheless, patent that the victim did not testify that she complained of or related any incident to either teacher. Cf.

State v. *Troupe*, supra, 237 Conn. 284.

[16] The incident was reported to the police on July 2, 1999. The victim's interaction with the teachers took place in the 1999-2000 school year, at least two months after the police report was filed.

[17] One commentator, representing the Women's Rights Litigation Clinic of Rutgers-Newark Law School, testifying before the New Jersey Supreme Court Joint Subcommittees Regarding the Fresh Complaint Rule in Rape Prosecutions on Criminal Practice and Rules of Evidence, suggested the following rationale: ''[J]ust in presenting its case, the State will inevitably disclose when the complaint was made [to the police] in relation to the event complained of. The jury . . . will assume that that was her first complaint of any kind and, if it was delayed, will further assume that no rape occurred. Rather than allowing such an inference or giving the accused control over the decision whether to raise this issue . . . the state [should] be allowed to take the initiative by introducing evidence of her first complaint.'' (Internal quotation marks omitted.) R. Coombs, ''Reforming New Jersey Evidence Law on Fresh Complaint of Rape,'' 25 Rutgers L.J. 699, 707 (1994); see also C. Tait, Connecticut Evidence (3d Ed. Sup. 2002) § 6.37.5, p. 17 (''constancy of accusation rule is fully satisfied by a victim's initial complaints'').

Our Supreme Court in *Troupe* found itself in accord with the views of the Supreme Court of New Jersey; see *State* v. *Hill*, 121 N.J. 150, 578 A.2d 370 (1990); in balancing the competing interests at stake. *State* v. *Troupe*, supra, 237 Conn. 301–302. The bias against victims of rape should be weighed against the defendant's burden of refuting ''supporting evidence, which . . . generally is not admissible in the trial of crimes other than sexual assault. Concerns about such evidence are magnified if the victim has reported the alleged offense to a number of persons, all of whom are permitted to testify about the details of the complaint.'' Id., 302–303.

[18] It has been contended that the probative value of a complaint had a terminable shelf life. ''While the 'freshness' of the complaint remains a matter for the jury . . . at some point in time an accusation is so 'stale' that the rule should be deemed inapplicable as a matter of law.'' (Citation omitted.) C. Tait, Connecticut Evidence (3d Ed. 2001) § 6.37.3, p. 496. We believe that a complaint should have no shelf life and that the weight given to it should remain a matter for the jury. See *State* v. *Romero*, 59 Conn. App. 469, 475, 757 A.2d 643, cert. denied, 255 Conn. 919, 763 A.2d 1043 (2000). In the present case, we only apply common sense to the rule's application in relation to the timing of the formal complaint.

[19] Moreover, the cases relied on by the court in *Romero* supported only the claim that a complaint does not lose its viability, for constancy purposes, by a break in the constancy chain or by lapse of time. See *State* v. *Parris*, 219 Conn. 283, 291, 592 A.2d 943 (1991); *State* v. *Brigandi*, 186 Conn. 521, 526–29, 442 A.2d 927 (1982).

[20] One teacher testified that she found the victim in the hall crying and that she approached her. The teacher testified in relevant part as follows:

''[The Witness]: Right. She . . . said that there was a scene in the movie that made her very uncomfortable and she had to leave. And she went into detail about what the scene was and made reference that it was very personal to her.

''[Prosecutor]: Okay. And did she say anything else to you at that time?

''[The Witness]: She told me what happened to her. Do—

''[Prosecutor]: Okay. Did she identify with whom it had happened?

''[The Witness]: She said a family friend.''

* * *

The other teacher testified that he confronted the victim after she had left the classroom after watching a film in which two men kidnapped and raped a young girl.

''[Prosecutor]: And without going into any detail whatsoever, did she make any kind of a disclosure?

''[The Witness]: About why she was upset? Yes, she did.

''[Prosecutor]: Without any detail, what was the nature of the disclosure that she made?

''[The Witness]: She said that something similar—something similar happened to her that made her remember that. And she was upset because this person that did this to her was about to receive bail or about to get out or something like that.''

[21] The state called the therapist as a constancy of accusation witness only, stating that ''because [she] is a therapist and the majority of her information is privileged, she's strictly a constancy of accusation witness.''

[22] The incident was reported to the police on July 2, 1999. The victim was referred to the therapist for counseling in August, 1999.

[23] The victim testified in relevant part as follows about her communication with her therapist:

"[Prosecutor]: Thank you. Did you go to counseling?

"[The Witness]: Yes. I'm still in therapy now.

"[Prosecutor]: Where did you—where do you go?

"[The Witness]: The Institute of Living.

"[Prosecutor]: . . . Did you ever tell [your therapist] what happened with the defendant?

"[The Witness]: Yes."

That testimony is not, unassailably, legitimate constancy evidence because "what happened" is exactly what the victim needs to have reported to the witness so that the witness could give constancy of accusation testimony. In contrast to the victim's conversations with T and the two teachers, however, here, at least, she affirmatively testified that she had told the witness "what happened." We conclude that insofar as that inquiry goes, that testimony suffices to trigger the witness' availability as a constancy of accusation witness.

[24] The defendant additionally requests that we review the matter for plain error. See Practice Book § 60-5. Because we believe that it was the aggregation of evidentiary missteps that led to the deprivation of the defendant's right to a fair trial, we do not believe that plain error analysis is appropriate. Plain error review "is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Falcon*, supra, 68 Conn. App. 887 (judge's failure to recuse himself in trial after participating in pretrial plea negotiations was plain error).

[25] "[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney* v. *California*, 274 U.S. 357, 373 [47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)]." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 846–47, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

The fifth amendment to the United States constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

Article first, § 8, of the constitution of Connecticut provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

[26] In *Troupe*, the court acknowledged that the admission of constancy of accusation testimony does not violate the confrontation clause of the sixth amendment. *State* v. *Troupe*, supra, 237 Conn. 293. The reasoning is that the clause is not violated by admitting declarant's out-of-court statements "as long as the declarant is testifying as a witness and subject to full and effective cross-examination." (Internal quotation marks omitted.) Id., 292. "Because constancy of accusation evidence is not admissible unless the victim has testified, and is subject to cross-examination, concerning the crime and the identity of the person or persons to whom the victim has reported the crime . . . ."; (citations omitted); id., 293; there is no constitutional violation. Id.

The facts here are different from those in *Troupe*. Here, the issue is not whether the defense was allowed adequate cross-examination of the victim on the identity of the person(s) to whom she had reported the crime, but whether the defense was allowed to cross-examine the victim fully and effectively on the identity of witnesses who *later claimed* that she had reported the crime to them. Here, in contrast to *Troupe*, it would appear that three of the four constancy of accusation witnesses in question should not have testified at all, given that the victim had not identified them as people to whom she had reported the incident and, thus, their testimony, which contradicted the victim's own testimony, provided a crucial basis on which the defense would have reason to cross-examine the victim, but could

not. Once those witnesses had testified, and the defense was on notice as to the nature of their statements, the defendant argues, the opportunity to cross-examine the victim had passed.

We are mindful that whenever hearsay is admitted and is safeguarded properly by the presence of the declarant, our courts, generally, have not found any constitutional violation. See *State* v. *Troupe*, supra, 237 Conn. 292–93; see also *California* v. *Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). In the instances in which we have found such a violation, it was because the court impermissibly restricted the defendant's lines of inquiry when cross-examining the declarant. See, e.g., *State* v. *Santiago*, 224 Conn. 325, 331–32, 618 A.2d 32 (1992). Here, the declarant was available, and no line of questioning was restricted. We therefore do not find that this situation satisfactorily implicates the defendant's constitutional right to confront his accuser. It does, however, implicate the defendant's right to a fair trial.

[27] "The defendant's right to a fair trial is implicated by the fourteenth amendment to the United States constitution and by article first, § 8, of the Connecticut constitution." *State* v. *Floyd*, supra, 10 Conn. App. 387 (*Bieluch J.*, dissenting).

[28] In the closing argument rebuttal, the prosecutor stated in relevant part: "I would submit to you that it's a sophisticated expectation that a child of thirteen would be able to maintain what had happened . . . that she would indicate it was of a consensual nature, tell friends back in February that she was having sex with this guy who she believed to be her boyfriend . . . she just happens to mention that she had sex with him and was going down whenever her grandmother [wasn't home] . . . ."

[29] Objection to the reasoning of the doctrine came early. "We are told that the outrage is so great that there is a natural presumption that a virtuous woman would disclose it at the first suitable opportunity. I confess that I should think that this was about the last crime in which such a presumption could be made, and that it was far more likely that a man who had had his pocket picked or who had been the victim of an attempt to murder would speak of it, than that a sensitive woman would disclose such a horror." O. Holmes, "Law in Science and Science in Law," 12 Harv. L. Rev. 443, 453 (1899).

Holmes' comments may have proven prescient, as, increasingly, physicians and therapists have been called to testify as to the natural inclination of rape victims, especially young ones, to delay disclosure. See *State* v. *Williams*, 65 Conn. App. 449, 453, 783 A.2d 53 (physician testifying that "delayed disclosure of sexual abuse by child victims was so common that it constituted the norm rather than the exception"), cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001); see also *State* v. *Rolon*, supra, 257 Conn. 156; *State* v. *Christiano*, 29 Conn. App. 642, 617 A.2d 470 (1992), aff'd, 228 Conn. 456, 637 A.2d 382 (1994).

"Indisputably, one of the historic premises of the doctrine—that it is natural for the victim of a sexual assault to complain promptly following the assault—has been discredited substantially in contemporary times. The overwhelming body of current empirical studies, data, and other information establishes that it is not inherently 'natural' for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted." *People* v. *Brown*, 8 Cal. 4th 746, 758, 883 P.2d 949, 35 Cal. Rptr. 2d 407 (1994).

If a fresh complaint is, as experts are now testifying, the exception, rather than the norm, what benefit is left for maintaining the constancy of accusation doctrine? As one commentator asked: "Is the value of what is left of the rule for credibility purposes outweighed by the rule's potential to prejudice the accused, when further viewed in the context of the legal complexities and niceties it generates for trials and appeals?" C. Tait, supra, (Sup. 2002) § 6.37.2, p. 16.

[30] Contrary to the dissent's assertion, we believe that *State* v. *Kelly*, 256 Conn. 23, 770 A.2d 908 (2001), is not controlling authority for the issues in this case. In *Kelly*, the defendant did not complain that the individual testimony of any of the constancy witnesses was inadmissible. Rather, he complained that the state was permitted to "pile on" by offering cumulative testimony from eight constancy witnesses. While acknowledging that, to some extent, the constancy testimony was cumulative, the Supreme Court declined to adopt a rule prohibiting multiple constancy witnesses whose individual testimony fits the parameters set by *Troupe*. Unlike the situation in *Kelly*, in the present case, the defendant has argued, and we agree, that the individual testimony of four of the witnesses offered for constancy of accusation was,

in each case, improperly admitted for differing reasons and that the prejudice caused by the aggregation of these evidentiary missteps denied the defendant a fair trial. In sum, contrary to my dissenting colleague's assertion, this appeal is not about the "piling on" of otherwise admissible testimony, but rather the prejudicial result of the aggregation of improperly admitted evidence. *Kelly* is inapposite.