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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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DRANGINIS, J., dissenting. Although I agree with the majority that the defendant, Ralston E. Samuels, was not denied his constitutional right to confrontation, I otherwise respectfully dissent from the majority opinion.

This case is not about a violent sexual assault. It is about a ''consensual'' sexual relationship between a thirteen year old girl and a twenty-four year old man. Such crimes are commonly referred to as statutory rape, a situation in which the minor consents to the sexual act, but the consent is ineffective due to the minor's age and immaturity. See *United National Ins. Co.* v. *Waterfront New York Realty Corp.*, 994 F.2d 105, 109 (2d Cir. 1993). Here, the victim never *complained* to anyone about her sexual relationship with the defendant. In fact, outside of bragging to her cousins that the defendant was her boyfriend, the victim never told anyone voluntarily or wanted anyone to know about the relationship.[1] This is an instance in which the victim's family and the state had to intercede to protect the victim from a man who took advantage of her. After the victim was specifically questioned by her uncle, she admitted that she and the defendant had had sexual intercourse. When her mother learned of the fact, she sought medical care for the victim and was told to inform the police, which she did.

The majority cites the policy and history of the hue and cry, the fresh complaint rule and the constancy of accusation doctrine, as they apply to violent, nonconsensual sexual assault. In my opinion, that policy and history are inapplicable in a case of statutory rape where there is ''consensual'' sexual intercourse between an adolescent who is younger than sixteen and an adult. In this case, the burden was on the state to prove the elements of General Statutes § 53a-71 (a) (1) beyond a reasonable doubt. That is, the state had to prove that the defendant was more than two years older than the victim, that the victim was thirteen but not older than sixteen, and that the two had engaged in sexual intercourse. In proving its case against the defendant, the state had to overcome the inconsistencies between the victim's written statement and her various oral statements, and to contend with the defendant's defense that the victim had fabricated the sexual assault claim in response to the controversy between the defendant and the victim's grandmother. This court has ''held that [u]nder [*State* v. *Troupe*, 237 Conn. 284, 677 A.2d 917 (1996) (en banc)], the state is allowed to introduce any constancy of accusation testimony found necessary to associate the victim's complaint with the pending charges.'' (Internal quotation marks omitted.) *State* v. *Vumback*, 68 Conn. App. 313, 324, 791 A.2d 569,

cert. granted on other grounds, 259 Conn. 933, 793 A.2d 1086 (2002), quoting *State* v. *Williams*, 65 Conn. App. 449, 464–65, 783 A.2d 53, cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001).

I also take exception to the majority's position that the trial court improperly admitted evidence. Our case law is replete with teaching that appellate courts cannot discern the mood of the courtroom, the interaction between counsel and witnesses, and jury reaction from the cold, nonhuman pages of a transcript. See *Adams* v. *State*, 259 Conn. 831, 844, 792 A.2d 809 (2002); *Hill* v. *Hill*, 35 Conn. App. 160, 165, 644 A.2d 951, ("[w]e were not there and the flavor of the court's remarks cannot be appreciated from reading the cold black and white lines of a transcript. The nuances of voice inflection, gestures and body English are invisible on the pages of a printed transcript"), cert. denied, 231 Conn. 914, 648 A.2d 153, cert. denied, 513 U.S. 1059, 115 S. Ct. 669, 130 L. Ed. 2d 603 (1994). For those reasons, trial judges are afforded broad discretion with respect to the admission of evidence. See *State* v. *Sullivan*, 244 Conn. 640, 653, 712 A.2d 919 (1998) ("'trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion' "); see also *State* v. *Young*, 56 Conn. App. 831, 840, 746 A.2d 795 ("'trial court, which has a firsthand impression of the jury, is in the best position to evaluate the critical question of whether the juror's or jurors' exposure has prejudiced a defendant' "), cert. denied, 253 Conn. 904, 753 A.2d 939 (2000). Consequently, I am troubled by what I perceive as the majority's micromanaging the flow of evidence in the trial of this case.

Before I address the defendant's claims, I want to make clear the context in which the charges were brought against the defendant. The defendant was charged, in part, with four counts of sexual assault in violation of § 53a-71 (a) (1). Section 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 . . . ."

Statutory rape is a crime with a long history. See *State* v. *Sebastian*, 81 Conn. 1, 69 A. 1054 (1908). In *Sebastian*, the defendant was a music teacher convicted of carnally knowing and abusing one of his students, a fifteen year old girl. Id., 2. "While the offense of which the accused stood charged was not rape, it was a crime essentially similar in character. It is not necessary to prove a want of consent on the part of the female; but this is simply because the law declares her incapable

of consenting. Being thus incapable, there must always be a want of consent. Her tender years both render her peculiarly susceptible to the influence of others, and make it imperative that she should be protected against herself. Whether she yield to the solicitations of a seducer, or be the one to propose the guilty act, the law, therefore, declares to be immaterial.'' Id., 6–7.

The statutory rape law, now § 53a-71 (a) (1), has been amended by our legislature, as recently as 1993. The legislative history of that amendment is instructive and has been relied on by this court and our Supreme Court since its enactment. ''The general purpose of § 53a-71 (a) (1) is to protect victims who are thirteen, fourteen or fifteen years of age, and thus may not have the full measure of maturity to make an intelligent choice regarding sexual intercourse, from being taken advantage of by someone who, because he or she is significantly older, may be able to persuade the victim to engage in physically consensual sexual intercourse.'' *State* v. *Jason B.*, 248 Conn. 543, 553–54, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999). ''There are many considerations that support the conclusion that the state has a compelling interest in restricting teenage sexual activity, some of which were mentioned by the legislators who approved the statute. The prevention of pregnancy, reduction of sexually transmitted diseases, and limitation of the opportunity of more sexually experienced persons to take advantage of those substantially younger are concerns of significant importance to society.'' *State* v. *Jason B.*, 47 Conn. App. 68, 80–81, 702 A.2d 895 (1997), aff'd, 248 Conn. 543, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999).

To demonstrate the manner in which this case falls within the ambit of the state's compelling interest in protecting the sexually vulnerable youth of our society, a fuller recitation of the facts reasonably found by the jury is required. The victim's grandmother owned a three-family residence, where she lived on the first floor. The defendant, a friend of the victim's uncle, rented the basement apartment beginning in December, 1997. The grandmother suffered extremely poor eyesight, and the defendant assisted her by providing transportation when she needed to shop. The defendant was treated as a member of the grandmother's family.

Due to her grandmother's poor vision, the victim went to live with her in September, 1998, to provide assistance. The victim was thirteen and the defendant was twenty-four at the time. The victim developed a romantic interest in the defendant and sent him letters. The victim and the defendant frequently spoke on the telephone. The defendant often visited the grandmother's apartment to visit with the victim. While he was there, at times, he gave hand signals to the victim for her to telephone him or for her to lift up her blouse.

On occasion, the defendant telephoned the victim, asking her to come to his apartment to get something. The defendant, however, never had anything for her to retrieve. Instead, he took the victim to his bedroom where he removed her clothing. The defendant then instructed the victim to lie on his bed.[2] The defendant leaned over the victim and inserted his penis into her vagina. The defendant withdrew and ejaculated onto the victim's thigh. The defendant then instructed the victim to go to the bathroom and clean herself. The defendant also instructed the victim not to tell her mother or grandmother about their sexual relationship.

Intercourse was sometimes painful for the victim. Once after she had had intercourse with the defendant, the victim noticed that she was bleeding. At one time, the victim was afraid that she was pregnant. The victim discussed her fear with the defendant, who told her that everything would be all right. He gave her two white pills that he had obtained from a clinic, and the victim got her menstrual period two days later.

The defendant first had sexual intercourse with the victim prior to Christmas, 1998. Initially, the victim reported that she had intercourse with the defendant four times during December, 1998, and January, 1999. At trial, the victim testified that she had sexual relations with the defendant ten to twenty times between December, 1998, and June, 1999. The two always had sexual intercourse on a Saturday morning in the defendant's apartment while the grandmother was out shopping. The victim previously had provided inconsistent statements as to whether the two always had intercourse in the defendant's apartment or whether they had intercourse there twice and twice in the grandmother's apartment. The victim and the defendant told one another that they liked one another. The victim thought the defendant cared for her.

On or about Valentine's Day, 1999, the victim told her second cousins, C and T, that the defendant and she were boyfriend and girlfriend. Until her uncle confronted her, the victim had no intention of telling any member of her family about her sexual relationship with the defendant.

By June, 1999, the defendant's relationship with the grandmother had deteriorated. The grandmother brought a small claims action against the defendant to recover moneys she had lent to him. The grandmother paid the utility bill and complained to the defendant about his failure to turn off lights and water. There was an altercation between the grandmother and the defendant, and the victim consequently telephoned 911 for police assistance. Thereafter, the defendant was asked to move out of the basement apartment.

The day the defendant moved out of the apartment, Jane Ruiz, a former girlfriend of the defendant,

approached the grandmother and told her to be careful because the victim had written letters to the defendant. The defendant had told Ruiz that in one letter, the victim wrote that she wanted him "to be her first . . . ." The grandmother asked the victim's uncle to talk to the victim about what was going on between her and the defendant. When the uncle asked her specific questions, the victim told him of the sexual relationship she had had with the defendant. After the uncle told the victim's mother and grandmother, the victim told her family and explained why she had not told them about the sexual relationship.

The victim's mother sought advice from her pediatrician, who advised her to take the victim to Saint Francis Hospital and Medical Center. The victim's mother reported the incident to the police on July 2, 1999. The victim spoke with a male police officer, Michael Kot, and, subsequently, a female detective, Naomi Cagianello, observed the victim give a video statement to Linda Murphy, a member of the diagnostic and investigative team at the Aetna Foundation Children's Center at Saint Francis Hospital and Medical Center. Thereafter, the victim discussed the sexual assault with a therapist at the Institute of Living, and two of her schoolteachers. At the request of her mother and grandmother, the victim prepared a written statement on July 28, 1999. In her written and video statements, the victim alleged that she had sexual relations with the defendant four times. The victim's various statements were inconsistent about where the sexual acts had occurred.

The victim was examined by Elaine Yorden, a physician board certified in pediatrics and adolescent medicine. Yorden's physical examination of the victim revealed that her hymen had been transected at the six o'clock position, which is consistent with sexual penetration. The victim also had a vaginal infection commonly seen in teenagers who are sexually active.

The defendant testified. He maintained that he had a family like relationship with the grandmother's family and thought of the victim as a niece. He denied that he had a sexual relationship with the victim; the jury clearly did not believe him.

I

I first address the claims on which the majority decided the defendant's appeal. In his brief, the defendant claims that the court improperly admitted hearsay testimony in violation of the rules of evidence, our case law and the state and federal constitutions. The defendant claims that the court improperly (1) admitted testimony from constancy of accusation witnesses whom the victim did not identify, in violation of *State* v. *Troupe*, supra, 237 Conn. 284, thus violating his right to confrontation, (2) permitted witnesses to testify, under the guise of constancy of accusation testimony,

about statements concerning sexual assault, which the victim made to them after she had complained to the police,[3] (3) balanced the probative value of the testimony with its prejudice to him and (4) violated his right to a fair trial by admitting the testimony of too many constancy of accusation witnesses. The defendant had raised his constitutional claims pursuant to the fourteenth amendment to the United States constitution and article first, § 8, of the constitution of Connecticut, and his constitutional right to confrontation pursuant to the sixth amendment to the United States constitution. I disagree with all aspects of the defendant's claims and with portions of the majority opinion.

At trial, the victim testified that she told the following individuals about her relationship with the defendant: her cousins, C and T, her uncle, her mother, her grandmother, Kot, Cagianello, Murphy, her therapist, Yorden, and one of her schoolteachers. Each of those individuals, except C, plus a second teacher testified at trial that the victim had told him or her about her sexual relationship with the defendant. On appeal, the defendant claims that the court should not have permitted her cousin, T, her therapist and the two teachers to testify as constancy witnesses.

The defendant claims that the court improperly admitted the testimony of T, the therapist and her two teachers as constancy of accusation testimony. The defendant relies exclusively on *State* v. *Troupe*, supra, 237 Conn. 284, for his claims.[4] I am of the opinion that the defendant, and the majority, have misapplied *Troupe*.

"[A] person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator. In all other respects, our current rules remain in effect. 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. In determining whether to permit such testimony, the trial court must balance the probative value of the evidence against any prejudice to the defendant." Id., 304–305. "Of course, *the rule that we adopt today does not affect those cases in which the details of a sexual assault complaint are otherwise admissible*, as, for example, in the case of a spontaneous utterance or in the case of a prior consistent statement admitted to rebut a claim of recent fabrication." (Emphasis added.) Id., 304 n.19.

Although I believe that the court properly admitted the challenged testimony under the constancy of accusation doctrine, the testimony also was admissible pursuant to other exceptions to the hearsay rule. ''Although [our Supreme Court's] decision in *Troupe* restricted the constancy of accusation doctrine, [our Supreme Court] also held that *Troupe* 'does not affect those cases in which the details of a sexual assault complaint are otherwise admissible . . . .' '' *State* v. *Kelly*, 256 Conn. 23, 40–41, 770 A.2d 908 (2001). Even if the court improperly admitted the evidence as constancy of accusation testimony, ''[w]e can sustain a right decision although it may have been placed on a wrong ground.'' *Stapleton* v. *Lombardo*, 151 Conn. 414, 417, 198 A.2d 697 (1964).

A

The defendant first claims that the court improperly admitted the testimony of T because the victim did not testify that she had told T that she and the defendant had engaged in sexual intercourse.[5] The defendant argues that the victim testified that she had told T only that she and the defendant were boyfriend and girlfriend. When asked by the prosecutor whether she had told T that she and the defendant were having sex, the victim denied having said so, but admitted that she may have been mistaken about whether she told T more than she admitted. On cross-examination, the victim testified that she did not get into any details about the assault with T.[6] T, however, testified that the victim had told her that she was having sex with the defendant.[7]

The defendant's specific argument is that the victim's having told T that she was the defendant's girlfriend is not the same as reporting a sexual assault. The defendant overlooks his leading cross-examination about who the victim had told first about ''this incident.'' See footnote 6. In response, the victim replied that she had told C and T, but that she did not get into details. We have no way of knowing what defense counsel or the victim meant by ''incident'' or ''details,'' as there were no follow up questions. Furthermore, the defendant never asked the victim what being boyfriend and girlfriend meant to her.

T's testimony is quite consistent with the victim's testimony. T reported that the victim had said that she was the defendant's girlfriend and that they had had sex. ''[T]hat was it.'' See footnote 7. Again, defense counsel did not pursue his cross-examination to ask T what it meant to be boyfriend and girlfriend. If there was ambiguity about the relationship between the victim and the defendant, defense counsel made no effort to clarify that ambiguity. There is nothing in our case law, as the majority notes, regarding the testimonial talisman of reporting a sexual assault. See *State* v. *Lisevick*, 65 Conn. App. 493, 508, 783 A.2d 73, cert. denied, 258 Conn. 933, 785 A.2d 230 (2001); *State* v.

*Orhan*, 52 Conn. App. 231, 243, 726 A.2d 629 (1999). A jury, however, may draw reasonable inferences from the facts presented at trial. *State* v. *Ford*, 230 Conn. 686, 692, 646 A.2d 147 (1994). In *State* v. *Dziob*, 133 Conn. 167, 170–71, 48 A.2d 377 (1946), the court stated that ''[t]he state thereafter offered the testimony of the mother of a talk with the daughter some months before she was taken to the doctor, but the defendant claims that this did not constitute an accusation of the crime. While the daughter did not expressly state to the mother that sexual intercourse had occurred, the conversation was such that the mother could reasonably infer that it had, as she evidently did. The fact that some months intervened between this conversation and the talk with the doctor would not necessarily require the trial court to conclude that there was not a constancy of accusation, particularly when considered in the light of testimony of other witnesses as to accusations made by the daughter to them.''

Regardless of the ambiguity, T's testimony was admissible for purposes other than constancy of accusation. T's testimony was admitted properly under the prior consistent statement exception to the hearsay rule. See *State* v. *William C.*, 71 Conn. App. 47, 71, 801 A.2d 823, cert. granted on other grounds, 262 Conn. 907, 810 A.2d 277 (2002). ''The general rule is that a party cannot strengthen the testimony of his own witness by showing that he made previous statements to the same effect as his testimony . . . .'' Id. ''If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment.'' Conn. Code Evid. § 6-11 (b).

Here, the court properly may have admitted T's testimony as a prior consistent statement for any of those three reasons. During his cross-examination of the victim, the defendant noted inconsistencies in her statements. He suggested that she had contrived the claim of sexual assault against him due to the conflict between him and the grandmother. The legal difficulties between the grandmother and the defendant occurred subsequent to the victim's telling T of her relationship with the defendant. For those reasons, T's testimony also was admissible as a prior consistent statement.

B

The defendant claims that the therapist's testimony was not admissible as constancy of accusation testimony because the victim disclosed to the therapist the defendant's sexual abuse subsequent to the time she had informed the police.[8] Although I do not think that *Troupe* or any case stands for the proposition that only

complaints made prior to telling the authorities are permissible constancy of accusation testimony, the therapist's testimony[9] is admissible under the residual exception to the hearsay rule; Conn. Code Evid. § 8-9;[10] and under *State* v. *Kelly*, supra, 256 Conn. 45.

The victim testified that as a consequence of her sexual relationship with the defendant, she was receiving therapy. We do not know whether the therapist is a psychiatrist, psychologist or some other member of the mental health care profession. In *Kelly*, our Supreme Court held that a treating physician may testify as to the identity of the perpetrator and the details of a sexual assault as it is relevant ''to facilitate the treatment of *psychological* and physical injuries.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 45, quoting *State* v. *DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994).[11] Although *Kelly* and *DePastino* address the physician-patient exception to the hearsay rule, I see no reason not to permit any other qualified, mental health professional from testifying about allegations of sexual abuse made by a patient. ''[I]n cases of sexual abuse . . . hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible.'' (Internal quotation marks omitted.) *State* v. *DePastino*, supra, 565.

For those reasons, the therapist's testimony was admissible.

C

The defendant also claims that the court improperly admitted testimony from two of the victim's schoolteachers as constancy of accusation witnesses and compounded the prejudice against him by failing to include their names in the list of constancy of accusation witnesses it read to the jury during its charge on constancy of accusation. I disagree.

During her testimony, the victim did not identify her teachers as individuals to whom she had reported the defendant's sexual abuse.[12] She testified in response to a question from the prosecutor, however, that she had a discussion with a teacher that led the teacher to believe that she had been sexually abused. One of the victim's teachers was teaching a civics class in which the students were watching a film concerning a girl who had been kidnapped and raped. The victim asked to leave the classroom. The other teacher saw the victim standing in the hall, crying. She approached the victim, who explained why she was not in class.[13] One week or so later, the victim told her civics teacher why she had asked to leave the class.[14] The testimony of both teachers was admissible to show the victim's state of mind at the time she was asked why she was crying and why she had left class. State of mind is an exception to the hearsay rule, referred to in our code of evidence

as then existing mental condition. See Conn. Code Evid. § 8-3 (4).[15] ''[A]n out-of court statement that is offered to establish the truth of the matter asserted is inadmissible hearsay unless the statement falls within a recognized exception to the hearsay rule. . . . An out-of-court statement is not hearsay, however, if it is offered to illustrate circumstantially the declarant's then present state of mind, rather than to prove the truth of the matter asserted. . . . Of course, for any such out-of court statement to be admissible, it must be relevant to an issue in the case.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Wargo*, 255 Conn. 113, 137–38, 763 A.2d 1 (2000).

Here, the statements the victim made to her teachers were not offered to prove the truth of the matter asserted, but to explain to each of the teachers the reason for her distress.[16] For those reasons, the testimony of the teachers was not admitted improperly.

The testimony of the victim's teachers also was proper constancy of accusation testimony. ''This court . . . has reviewed numerous trial court decisions in light of *Troupe*. In *State* v. *Orhan*, [supra, 52 Conn. App. 243], we held that [t]he controlling language from *Troupe* does not limit the identifying information that may be provided. It limits only the extent of the information provided. Our Supreme Court merely gave examples of how a sexual assault might be identified; it did not hold that that was the only testimony that could be provided.'' (Internal quotation marks omitted.) *State* v. *Vumback*, supra, 68 Conn. App. 323.

D

Regardless of whether the challenged testimony was admitted under the constancy of accusation doctrine or another exception to the hearsay rule, I agree with the majority that the testimony of each of them alone does not rise to the level of substantial prejudice or injustice to the defendant. See *State* v. *Beliveau*, 237 Conn. 576, 592, 678 A.2d 924 (1996). I also conclude that the testimony of those individuals together did not substantially prejudice the defendant. If anything, the testimony was cumulative, but not harmfully so.

''Although the defendant frames the appellate issue as one of a constitutional violation, [the] ultimate conclusion turns on evidentiary grounds.'' *State* v. *Eagles*, 74 Conn. App. 332, 335, 812 A.2d 124 (2002); see also footnote 4. ''It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him. . . . The relevant inquiry is whether the claimed error of the trial court is likely to have affected the outcome of the trial.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 39.

Here, the victim herself testified that the defendant had abused her. Murphy testified in detail about her interview with the victim, and Yorden gave compelling testimony about the evidence of sexual abuse that she found during her physical examination of the victim, including a transected hymen and a sexually transmitted disease.

For all of those reasons, I conclude that the court did not abuse its discretion in admitting the testimonial evidence of T, the victim's therapist or her teachers.

II

I now turn to the defendant's constitutional claims. The defendant claims that his federal constitutional right to confrontation was denied by the admission of the constancy of accusation testimony that was discussed in part I. The defendant also claims that the plethora of constancy of accusation testimony violated his right to a fair trial. I disagree with both of those claims.

A

As previously discussed, I concur with the majority that the defendant's constitutional right to confrontation was not violated by the admission of constancy of accusation testimony.[17] ''In Connecticut, it is well established that the constancy of accusation doctrine does not violate a defendant's sixth amendment right to confrontation. *State* v. *Romero*, 59 Conn. App. 469, 480, 757 A.2d 643, cert. denied, 255 Conn. 919, 763 A.2d 1043 (2000). Our Supreme Court has ruled that this is a fundamental tenet of confrontation clause jurisprudence, namely, that the clause is not violated by admitting a declarant's out-of-court statements, *as long as the declarant is testifying as a witness and subject to full and effective cross-examination*. . . . [*State* v. *Troupe*, supra, 237 Conn. 292].'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Thompson*, 71 Conn. App. 8, 13, 799 A.2d 1126 (2002). ''The defendant attempts to 'put a constitutional tag on a nonconstitutional evidentiary ruling.' '' Id.

The victim, the state's first witness, identified everyone to whom she had told of her relationship with the defendant. The defendant had an opportunity to cross-examine the victim and each of the witnesses who testified that the victim had told them about her relationship with him. Although the defendant cross-examined the victim to some extent and cross-examined some of the witnesses, he failed to cross-examine other witnesses.[18] What is more, the defendant had the option of asking the court's permission to recall the victim during his case to elicit further testimony from her regarding her revelations to others regarding her relationship with him, which he did not do. See *State* v. *William C.*, supra, 71 Conn. App. 58.

''[T]he decision whether to cross-examine a witness is almost always a purely tactical one. . . . When a party chooses not to cross-examine a witness in order to avoid the possibility of eliciting harmful testimony, his right to confront and cross-examine that witness as guaranteed by the sixth and fourteenth amendments of the United States constitution is in no way abridged.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 642, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

''The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'' (Internal quotation marks omitted.) *State* v. *Abernathy*, 72 Conn. App. 831, 836, 806 A.2d 1139, cert. denied, 262 Conn. 924, 814 A.2d 379 (2002).

Our appellate courts frequently have stated that a party ''may not pursue one course of action at trial for tactical reasons and later on appeal argue that the path he rejected should now be open to him.'' (Internal quotation marks omitted.) *State* v. *Barber*, 64 Conn. App. 659, 670, 781 A.2d 464, cert. denied, 258 Conn. 925, 783 A.2d 1030 (2001). A ''defendant cannot now complain that he was deprived of his constitutional rights because his trial tactic failed.'' *State* v. *Fisher*, 52 Conn. App. 825, 830, 729 A.2d 229, cert. denied, 249 Conn. 912, 733 A.2d 232 (1999).

B

I now turn to the defendant's claim that the court deprived him of his right to a fair trial by (1) permitting three witnesses to testify about statements the victim had made after she reported the crime to the police and (2) improperly weighed the probative value of the testimony against its prejudicial effect on him. I do not agree.

The majority concluded, and I agree, that the testimony of the constancy of accusation witnesses individually did not harm the defendant. I part company with the majority, however, where it concludes that the cumulative effect of the constancy of accusation witnesses was harmful. Our Supreme Court repeatedly has ''declined the invitation to create a new constitutional claim in which the totality of the alleged constitutional error is greater than the sum of its parts; *State* v. *Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 112 S. Ct. 3000, 120 L. Ed. 2d 876 (1992); *State* v. *Robinson*, 227 Conn. 711, 746–47, 631

A.2d 288 (1993) . . . .'' (Internal quotation marks omitted.) *State* v. *Cassidy*, 236 Conn. 112, 146, 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).

''Because constancy of accusation testimony is evidentiary in nature, a trial court's admission of such testimony will be reversed on appeal only where there has been an abuse of discretion and a showing by the defendant that such abuse has caused him substantial prejudice or injustice.'' *State* v. *Vumback*, supra, 68 Conn. App. 321–22. ''In a case involving an evidentiary ruling, it is the defendant's burden to show that it is more probable than not that the court's action affected the result.'' (Internal quotation marks omitted.) *State* v. *Faria*, 47 Conn. App. 159, 175, 703 A.2d 1149 (1997), cert. denied, 243 Conn. 965, 707 A.2d 1266 (1998).

The defendant claims that the court improperly permitted the victim's therapist and two of her teachers to testify because the victim had discussed with them her relationship with the defendant after she reported it to the police. He also claims that because the witnesses were a therapist and two teachers, the jury was more likely to believe them. He also argues that permitting testimony from those witnesses constituted ''piling on,'' which deprived him of a fair trial.

''In *Troupe*, our Supreme Court limited the common-law rule, holding that a person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator. In all other respects, our current rules remain in effect. Thus, such evidence is admissible only to corroborate the victim's testimony and not for substantive purposes.'' (Internal quotation marks omitted.) *State* v. *Vumback*, supra, 68 Conn. App. 322. The defendant does not claim, and the record does not demonstrate, that the testimony from the victim's therapist and the teachers failed to conform to the *Troupe* rule.

''[T]he complaint need not have been made promptly after the commission of the alleged offense; any delay in reporting [was] to be considered by the fact finder in evaluating the weight of the constancy of accusation testimony. . . . [W]hatever delay took place between the time of the attack and the time the victim first told witnesses of it does not affect the admissibility of the evidence, but merely presents a question of fact for the trier as to the weight to be given it . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Marshall*, 246 Conn. 799, 809, 717 A.2d 1224 (1998).

''Prior to our [Supreme Court's] decision in *Troupe*, in *State* v. *Parris*, 219 Conn. 283, 293–94, 592 A.2d 943 (1991), [our Supreme Court] held that the trial court properly admitted testimony of four constancy of accusation witnesses and that such testimony was not cumulative. While such evidence was overlapping in the sense that it related to the same incident, [it] pertained to a different statement that the victim made to a different person at a different point in time . . . [and demonstrated that the victim] previously had reported the incident . . . in a constant and consistent fashion. . . . The Appellate Court also has upheld trial court decisions to admit as many as eight constancy of accusation witnesses.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Kelly*, supra, 256 Conn. 38.

In *Kelly*, two sets of two witnesses, the victim's parents and the investigating police officers, were permitted to testify about the statements the victim had made to each set of witnesses. Our Supreme Court concluded that the *Kelly* defendant had failed to show that the testimony of both of the police officers and both of the victim's parents was likely to have affected the outcome of the trial. Id., 39. The testimony was corroborative and merely cumulative, and was therefore harmless. Id., 39–40. The same conclusion applies to the testimony of the therapist and the teachers.

''[I]n determining whether to permit [constancy of accusation] testimony, the trial court must balance the probative value of the evidence against any prejudice to the defendant.'' (Internal quotation marks omitted.) *State* v. *Vumback*, supra, 68 Conn. App. 323. ''[T]he controlling language from *Troupe* does not limit the identifying information that may be provided. It limits only the extent of the information provided. Our Supreme Court merely gave examples of how a sexual assault might be identified; it did not hold that that was the only testimony that could be provided.'' (Internal quotation marks omitted.) Id.

For those reasons, I would not reverse the judgment on the grounds reached by the majority and would address the defendant's remaining claims.[19]

[1] The victim testified in relevant part as follows on direct examination by the prosecutor:

''[Prosecutor]: How did it come up that you told your uncle about what had happened?

''[The Witness]: He—my grandmother told him to ask me some questions because she—she thought that something was going on. So, my uncle asked me if anything was going on. And I told him.

''[Prosecutor]: Did you want to tell him?

''[The Witness]: No.

''[Prosecutor]: Were you planning on telling—

''[The Witness]: No.

''[Prosecutor]:—your family—

''[The Witness]: No.

''[Prosecutor]: —about what had happened?''

[2] The victim lay at the foot of the bed with her feet on the floor.

[3] The defendant also claims that the court improperly instructed the jury with respect to constancy of accusation testimony because the court failed

to include the teachers in the list of constancy of accusation witnesses.

[4] With respect to each of his claims, the defendant asserts that they were preserved at trial and, to the extent that they were not, that he be afforded *Golding* review. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The defendant objected to the constancy evidence at trial. I want to make clear, however, that claims concerning the admission of specific constancy of accusation testimony is evidentiary in nature and that *Golding* review does not apply because evidentiary claims are not constitutional in nature. *State* v. *Vumback*, supra, 68 Conn. App. 321.

[5] On direct examination by the prosecutor, the victim testified in relevant part as follows:

"[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."

[6] The victim testified on cross-examination by defense counsel in relevant part as follows:

"[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."

[7] T testified in relevant part as follows in response to questions from the prosecutor:

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

"[The Witness]: Yes, she did.

"[Prosecutor]: What did she tell you?

"[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?

"[The Witness]: When [the victim's grandmother] was not there."

Defense counsel did not cross-examine T.

[8] In response to the prosecutor's questions, the victim testified in relevant part as follows:

"[Prosecutor]: Did you go to counseling?

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

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

"[The Witness]: The Institute of Living.

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

"[The Witness]: Yes."

[9] On direct examination by the state, the therapist testified in relevant part as follows:

"[Prosecutor]: . . . Did [the victim] come to you for counseling in August of 1999?

"[The Witness]: That's—correct. Yes, she did.

"[Prosecutor]: During the course of that counseling, did she disclose to you an incident that had occurred?

"[The Witness]: Yes, she did.

"[Prosecutor]: What was the nature of the disclosure that she made to you, in very general terms?

"[The Witness]: That she was sexually abused.

"[Prosecutor]: Did she identify the person that had sexually abused her?

"[The Witness]: Yes, she did.

"[Prosecutor]: And who did she identify?

"[The Witness]: She identified [the defendant].

"[Prosecutor]: Did she indicate when the abuse had occurred?

"[The Witness]: In December of 1998 and January of 1999.

"[Prosecutor]: Did she indicate how many times it had occurred?

"[The Witness]: As best I recall, I think she said four times."

The defendant did not cross-examine the therapist.

[10] Connecticut Code of Evidence § 8-9 provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

[11] *Kelly* extended the *DePastino* rule of the admissibility of a physician's testimony from in-home child abuse to sexual abuse cases of adults. *State* v. *Kelly*, supra, 256 Conn. 45.

[12] The victim testified in relevant part as follows on direct examination:

"[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."

[13] One teacher testified in relevant part as follows on direct examination by the prosecutor:

"[Prosecutor]: During the course of the past year, was there a time when you saw [the victim] in the hallway outside of a history class?

"[The Witness]: Yes. She—do you want me to—

"[Prosecutor]: Yes, please.

"[The Witness]: Oh, okay. I was engaging in one of my classes, and I happened to—you know, if I see students walking in the hall, I'll go out and make sure they have their pass or, you know, what have you. And I happened to see her out in the hall. And she was crying. So, I went over to her, being one of my volleyball players also, and kind of engaged in a conversation with her to find out what was going on. And she happened to disclose to me—do you want me to go into what she—

"[Prosecutor]: Without going into the—too much detail about the nature.

"[The Witness]: Right. She had just come in, and 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 had happened to her. . . .

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

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

The defendant did not cross-examine that teacher.

[14] The civics teacher testified in relevant part as follows on direct examination by the prosecutor:

"[Prosecutor]: Was [the victim] a student of yours this past year?

"[The Witness]: Yes, she was. She was in my civics class the first semester, the first half of the year.

"[Prosecutor]: Was there a time during the course of the year that she made a disclosure to you?

"[The Witness]: . . . And in the beginning [of the civics class], we explain to the students what they're about to see. And not that they showed anything, but it was implied. And there was a little girl who was kidnapped and raped by two men.

"[Prosecutor]: Yes.

"[The Witness]: Okay. When she saw the scene, she got up and she said, you know, 'Can I leave?' I mean it was dark and she seemed upset. And I said, 'Yeah. Please step out in the hallway.' And she went out in the hallway. And I pursued her about a minute later just to make sure that class is all set. And [S] was out there talking to her already. So, she was all set. A week later she—you know, I went through the lobby and I spoke to her—

"[Prosecutor]: And without going into any detail whatsoever, did she make any kind of 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."

The defendant did not cross-examine the civics teacher.

[15] Connecticut Code of Evidence § 8-3 (4) provides: A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed."

[16] Because the court properly admitted the teachers' testimony, I need not reach the defendant's claim of harm resulting from an allegedly improper jury instruction. The failure of the court to give a limiting instruction as to constancy of accusation testimony is not a matter of constitutional magnitude. *State* v. *Wild*, 43 Conn. App. 458, 467, 684 A.2d 720, cert. denied, 239 Conn. 954, 688 A.2d 326 (1996).

[17] The defendant failed to brief his state constitutional claim, and that claim is deemed abandoned. See *Cummings* v. *Twin Tool Mfg. Co.*, 40 Conn. App. 36, 45, 668 A.2d 1346 (1996).

[18] My review of the trial transcript discloses that the defendant failed to cross-examine T, Officer Cagianello, the therapist or either of the two teachers.

[19] On appeal, the defendant also claimed that the court improperly (1) replaced a member of the jury panel with the first alternate juror, rather than by replacing the juror by lot, in violation of General Statutes § 54-82h (c) and (2) permitted the state to file an amended long form information before the start of evidence. I will not address the defendant's other claims because my opinion is in the minority, and those claims are not likely to arise during a retrial, if any. See *State* v. *Norwood*, 47 Conn. App. 586, 590, 707 A.2d 31 (1998).