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MIHALAKOS, J., dissenting. I respectfully disagree with the majority's conclusion that the trial court properly permitted the prosecutor to inquire into the nature of the civil lawsuit brought by the defendant, Larry Powell, against certain police officers and the city of Stamford. I do not agree that defense counsel ''opened the door'' to the questioning through his cross-examination of the state's witness regarding a deposition taken in the civil lawsuit. I further disagree that the error was not harmful. Accordingly, I respectfully dissent.

Because the issue of the deposition first arose in the cross-examination by defense counsel of Officer Thomas Scanlon of the Stamford police department, a review of the cross-examination and redirect examination of Scanlon is necessary to my analysis of the issue. On cross-examination, the following testimony was elicited by defense counsel:

''[Defense Counsel]: Well, at any point in time during your struggle with [the defendant], did you get your hand behind his head like that (indicating), like sort of a full nelson, half nelson?

''[The Witness]: Did I get his hand around his head?

''[Defense Counsel]: Yeah, when you were on top of him, did you get your hand behind his head, you know, behind his head?

''[The Witness]: No. . . .

''[Defense Counsel]: You testified in another proceeding in this matter regarding this. Do you recall giving a deposition?

''[The Witness]: Yes.

''[Defense Counsel]: Okay. And, you—were you sworn under oath in that deposition?

''[The Prosecutor]: Objection.

''[The Witness]: Yes.

* * *

''[Defense Counsel]: And, during that deposition, do you recall saying that you had [the defendant's] hand tucked behind the back of his neck to keep from being struck by the blows?

''[The Witness]: That's inaccurate.

''[Defense Counsel]: That's inaccurate?

''[The Witness]: My head was tucked behind his neck so that my head wouldn't be hit with his blows, and I already testified to that, I believe.

''[Defense Counsel]: So, is it your testimony, that you didn't—this is not what you said during the deposition?

"[The Witness]: I'd like to read it, actually, Your Honor, that might be—

"The Court: Show it to him.

"[The Witness]: Could you show me where you're talking about? No, that's—that's wrong.

"[Defense Counsel]: So, is it your indication that the court reporter who typed this up on the tape was—is inaccurate?

"[The Witness]: Absolutely."

At that point, defense counsel ended his inquiry into the deposition testimony and moved on to questioning Scanlon on another issue in the case. At the opening of the redirect examination of Scanlon by the state, the following testimony was permitted by the court:

"[The Prosecutor]: Counsel had mentioned something about a deposition. Well, what's that all about?

"[Defense Counsel]: Objection.

"[The Prosecutor]: Well, he brought it up.

"The Court: Well, the question isn't very specific. What's the basis of the objection?

"[Defense Counsel]: Objecting on the grounds of relevance that was very—that the question is very limited.

"The Court: I'll overrule the objection.

"[The Prosecutor]: Thank you.

"[The Witness]: The defendant is suing myself as well as the other officers in the city of Stamford for, I believe, $1 million or in excess of $1 million.

"[The Prosecutor]: And that deposition was something you took?

"[The Witness]: Civil.

"[The Prosecutor]: On the civil end of this?

"[The Witness]: Yes.

"[The Prosecutor]: All right. And that hasn't even come out yet, that case?

"[The Witness]: No.

"[The Prosecutor]: That's still pending, as far as you know?

"[The Witness]: Yes."

After examining the foregoing exchange, I see no basis on which the evidence solicited by the state could have been properly admitted by the court.

Initially, I expand on the majority's recitation of the applicable law regarding the "opening the door" doctrine. Although "[g]enerally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the

witness on the same subject''; (internal quotation marks omitted) *State* v. *Colon*, 272 Conn. 106, 186, 864 A.2d 666 (2004), cert. denied, U.S. , 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); ''[t]he admissibility of [such] evidence . . . is not an automatic right.'' *Tuite* v. *Stop & Shop Cos.*, 45 Conn. App. 305, 312, 696 A.2d 363 (1997). ''The doctrine of opening the door cannot . . . be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it *only to the extent necessary* to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Colon*, supra, 187.

''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. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 527–28, 864 A.2d 847 (2004).

I respectfully disagree that the line of questioning by defense counsel concerning Scanlon's deposition testimony invited or ''opened the door'' to questioning regarding the nature of the lawsuit. Defense counsel's inquiry into the deposition testimony was extremely limited. The questioning was designed only to impeach Scanlon through the use of a prior inconsistent statement he had made regarding the manner in which he had restrained the defendant during his arrest.[1] The deposition itself was never the focus of the cross-examination of Scanlon, and defense counsel's reference to the deposition simply identified the venue where the prior inconsistent statement was made.[2] Defense counsel never inquired into or even mentioned the civil lawsuit during the cross-examination, nor would it be necessary to do so to impeach Scanlon on the basis of the prior inconsistent statement. In this case, defense

counsel's limited questioning into Scanlon's deposition testimony did not open the door to the state's sweeping and generic inquiry: ''Counsel had mentioned something about a deposition. Well, what's that all about?''

Although in the criminal context, the purpose of the ''opening the door'' doctrine is to ''prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context''; (internal quotation marks omitted) *State* v. *Colon*, supra, 272 Conn. 187; this is not a case in which the state would have been at an unfair advantage had the court precluded the rebuttal testimony. The present case is not one in which defense counsel sought to introduce select portions of the deposition testimony and to exclude others not to his advantage. Although a court may, in its discretion, allow otherwise inadmissible evidence on rebuttal when the party initiating inquiry has made *unfair* use of the evidence, defense counsel did not make unfair use of the evidence by mischaracterizing Scanlon's deposition testimony in any way.

Although, undisputedly, the cross-examination into Scanlon's deposition testimony opened the door to certain inquiries by the state that would otherwise be inadmissible, the question that the state asked extended beyond the limits of the opening the door doctrine. The majority refers to the state's right ''to place in context testimony adduced by an opposing party . . . .'' *State* v. *Gonzalez*, supra, 272 Conn. 544. The right to place testimony in its context is not an unqualified one, however, and a party does not have free rein to inquire into any matter that would place the testimony in a more favorable light. See *State* v. *Graham*, 200 Conn. 9, 14, 509 A.2d 493 (1986) (introduction of rebuttal evidence ''was not essential to cure the unfairness, if any, that the state may have suffered by the defense counsel's limited inquiry''). The court always must determine that the value of establishing a particular ''context'' for the testimony outweighs its prejudicial effect on the jury. In my opinion, the question posed by the state was only marginally probative, with its effect being highly prejudicial to the defendant. As such, I believe that the court's decision to permit the questioning constituted an abuse of its discretion.

The question presented by the state on redirect examination was not especially probative of any legitimate issue related to Scanlon's impeachment. Although the state was free to rehabilitate Scanlon, in no way did the elicited testimony demonstrate Scanlon's character for veracity or cast light on the reason for his prior inconsistent testimony. If anything, the state's elicitation of the existence of the defendant's civil action against Scanlon damaged Scanlon's credibility and sug-

gested that he was biased.[3] The state did not attempt to draw any connection between the matter on which Scanlon was impeached and the inquiry into the nature of the civil action. See 2 C. Fishman, Jones on Evidence (7th Ed. 1994) § 11:34, p. 354 (''to be admissible, the evidence [proffered on the basis that a party has opened the door to its admissibility] must truly answer or rebut what has already been offered''). Because the state's inquiry was not designed to rehabilitate its witness in any way, it was not at all probative on any *legitimate* issue in the criminal case.

More importantly, the testimony permitted to be elicited on redirect examination was highly prejudicial to the defendant. ''[T]he court has inherent authority to *prevent* the jury from being influenced by matters that might prejudice its deliberations.'' (Emphasis in original.) *State* v. *Martin*, 77 Conn. App. 818, 829, 827 A.2d 1 (2003). ''Evidence is prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.'' (Internal quotation marks omitted.) Id., 830. In the present case, the jury was permitted to hear testimony that the defendant was suing certain police officers and the city of Stamford for millions of dollars. There is often a stigma attached to those who bring lawsuits against their local governments for millions of dollars; the connotation sometimes is that such individuals are motivated solely by money.[4] That evidence unfairly took the jury's attention away from the facts of the criminal case and emphasized a controversial lawsuit that carried negative connotations about the criminal defendant. The degree of prejudice suffered by the defendant was exacerbated by the repeated reference by the state throughout the remainder of the trial to his ''million dollar lawsuit.'' The court's decision to permit that testimony and, thus, to open the floodgates to further inquiry into that irrelevant matter was clearly an abuse of discretion.

We will not disturb a court's improper evidentiary ruling, however, unless the defendant can demonstrate that he suffered substantial harm as a result of that ruling. See *State* v. *Gonzalez*, supra, 272 Conn. 527–28. I respectfully disagree with the majority that the ruling in this case was not harmful. As stated previously, the evidence of the defendant's civil lawsuit prejudiced the defendant by distracting the jury from the criminal case and appealing to the common prejudice against individuals who sue the government for large sums of money. Our law is clear that ''[a]ny improper evidence that may have a tendency to excite the passions, awaken the sympathy, or influence the judgment, of the jury, cannot be considered as harmless.'' (Internal quotation marks omitted.) *State* v. *Ellis*, 270 Conn. 337, 367–68, 852 A.2d 676 (2004). A review of the record reveals that after Scanlon's testimony regarding the civil lawsuit was admitted, references to the defendant's ''million dollar

lawsuit'' permeated the entire trial from that point onward. Had the court not permitted the initial reference to the nature of the deposition proceedings, it is likely that the repeated references to the ''million dollar lawsuit'' would not have occurred.[5] The most damaging reference to the civil action was made by the state during its rebuttal argument when the prosecutor urged the jury to ''[s]ay no more to his million dollar lawsuit. . . . And the way you say no more to [the defendant], based on all the evidence that was elicited in this case, is to . . . find him guilty of those counts.'' The pervasive reference to the civil action, particularly as part of the state's last words to the jury, raises in my mind the great possibility that the jury was prejudiced by the court's initial evidentiary ruling. The harmfulness of the court's decision was further enhanced by its failure to give any limiting instruction regarding the civil action. The trial became contaminated, and the focus of the jury was distracted from the relevant issues in the case. Because the civil action permeated the entire trial, there is a distinct possibility that the jury was improperly influenced by it.

Although there is no dispute that our law permits an inquiry on redirect examination concerning the subject matter to which reference was made in cross-examination, here, the door was never opened so as to permit any inquiry into the nature of the defendant's civil action. If anything was opened, it was Pandora's box that was opened by the court. The result was that the defendant was substantially prejudiced and the propriety of his trial jeopardized. The evidence should have been confined to that which would have determined the guilt or innocence of the defendant. That was not done. For the reasons stated, I respectfully dissent and would reverse the judgment and remand the case for a new trial.

[1] ''It is fundamental that for the purpose of impeaching the credibility of his testimony, a witness may be cross-examined as to statements made out of court or in other proceedings which contradict those made upon direct examination. . . . This is based on the notion that talking one way on the stand, and another way previously, raises a doubt as to the truthfulness of both statements. . . . The impeaching statement may be oral . . . or written.'' (Citation omitted; internal quotation marks omitted.) *Falls* v. *Loew's Theatres, Inc.*, 46 Conn. App. 610, 612, 700 A.2d 76 (1997).

[2] Although the majority states that defense counsel used the word ''deposition'' five times during that line of questioning, that was only because he was required to rephrase his questions following objections by the state. In fact, that portion of the cross-examination testimony that raises the deposition testimony was brief.

[3] Although if the defendant sought to impeach Scanlon on the ground of potential bias, that would necessarily require an inquiry into the civil lawsuit and, as stated previously, the defendant did *not* seek to impeach Scanlon on that ground and never mentioned the civil action.

[4] In fact, the prosecutor in his rebuttal argument referenced the civil action and stated numerous times that the defendant was motivated solely by money. See part II of the majority opinion.

[5] Although the majority correctly points out that defense counsel also raised the issue of the civil action in subsequent witness examinations, I do not see that as determinative of the issue on appeal. I cannot fault defense counsel for attempting to use evidence of the civil action to his client's advantage after the court improperly permitted the initial testimony on

the issue.