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ROGERS, J, dissenting. I respectfully dissent from the majority's conclusion that there was insufficient evidence to support the verdict because the state did not prove that the defendant, Paul Ovechka, used a dangerous instrument. When construing the evidence in the light most favorable to sustaining the verdict, I believe that there was sufficient evidence from which the jury reasonably could have concluded that the substance with which the defendant sprayed the victim, Michael Rynich, was, under the circumstances in which it was used, a dangerous instrument capable of causing serious physical injuries. The jury reasonably could have concluded that the dangerous instrumentality requirement was fulfilled because there was sufficient evidence from which it could find that Rynich did, in fact, suffer serious physical injuries.¹

A “dangerous instrument” is defined as “any instrument, article or substance which, under the circumstances in which it is used . . . is capable of causing death or serious physical injury” General Statutes § 53a-3 (7). “Serious physical injury” is defined as “physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or *serious loss or impairment of the function of any bodily organ*” (Emphasis added.) General Statutes § 53a-3 (4). “[T]he language of § 53a-3 (7) indicates that the actual use of an item in a manner capable of causing serious physical injury renders the item a dangerous instrument.” *State v. Ramos*, 271 Conn. 785, 794, 860 A.2d 249 (2004). “[E]ach case must be individually examined to determine whether, under the circumstances in which the object is used or threatened to be used, it has the potential for causing serious physical injury.” (Internal quotation marks omitted.) *State v. McColl*, 74 Conn. App. 545, 554, 813 A.2d 107 (feet and footwear can be dangerous instruments in some circumstances), cert. denied, 262 Conn. 953, 818 A.2d 782 (2003).

The first spray blinded Rynich, causing him to fall to the ground. Once Rynich returned to his feet, the defendant sprayed him in his eyes again, blinding him for a second time. Rynich testified that he had burns on his face, neck and chest, and no matter how much he washed, “it wasn’t going away.” Sergeant Melody Pribesh of the Bridgeport police department saw Rynich in a hospital emergency room and observed that he was “fiery red, burnt . . . from the waist up in his face, and his eyes were very irritated, red and swollen and tearing.” After treating Rynich in the emergency room, Jeffrey Pellenberg, a physician, diagnosed Rynich with chemical conjunctivitis and chemical dermatitis. Pellenberg testified that “clearly, he was sprayed with

some type of substance that was clearly irritative to his eyes and skin.” The burning sensation on Rynich’s neck lasted two or three days, and he had blurred vision for the remainder of the day in which he was sprayed.

The jury reasonably could have found that the injuries suffered by Rynich, particularly those with respect to his eyes, constituted a serious physical injury. The jury reasonably could have found that a loss of vision in both his eyes, albeit temporarily, constituted a loss or serious impairment of the function of any bodily organ. General Statutes § 53a-3 (4) does not require that the impairment of an organ be permanent. *State v. Aponte*, 50 Conn. App. 114, 121, 718 A.2d 36 (1998), rev’d in part on other grounds, 249 Conn. 735, 738 A.2d 117 (1999); *State v. Rumore*, 28 Conn. App. 402, 415, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992).

Despite the difficulty of drawing a precise line as to where “physical injury” leaves off and “serious physical injury” begins, in light of the evidence concerning the extent of the injuries sustained by Rynich, I cannot say as a matter of law that the jury could not reasonably have found that he suffered “serious physical injury.” See *State v. Miller*, 202 Conn. 463, 489, 522 A.2d 249 (1987). I would conclude that there was sufficient evidence for the jury to find that the dangerous instrument element was satisfied and, consequently, would affirm the judgment as to that claim. I would have, therefore, proceeded to address the other issues raised by the defendant in this appeal.² See, e.g., *Connecticut National Bank v. Giacomi*, 233 Conn. 304, 351, 659 A.2d 1166 (1995) (*Borden, J.*, dissenting); *State v. Martin*, 98 Conn. App. 458, 474, 909 A.2d 547 (2006) (*Schaller, J.*, dissenting), cert. granted on other grounds, 281 Conn. 901, A.2d (2007).

For the foregoing reasons, I dissent, respectfully.

¹ See footnote 6 in the majority opinion.

² On appeal, the defendant also claims that (1) the court’s instructions on assault in the second degree in violation of General Statutes § 53a-60 (a) (2) were inadequate, (2) he was deprived of his constitutional right to present a defense because no instructions were given on defense of property, defense of premises or defense of dwelling, (3) the court’s instructions on self-defense failed to ensure that the state was required to disprove the defense beyond a reasonable doubt, (4) the evidence was insufficient to show that the state had disproved all available justification defenses beyond a reasonable doubt, (5) the court improperly excluded certain evidence from the jury room and (6) he was deprived of a fair trial by prosecutorial misconduct.
