SCHALLER, J., concurring. I agree with the result in this case. The majority, however, *assumes* "*without deciding* that the defendant [Luis Galarza] was denied the right to cross-examine the witness"; (emphasis added); presumably because Edwin Bonilla's testimony about the out-of-court statement by one of the victims, Magdiel Rivera, Jr., in which Rivera had repeated what Jose Arciniega had said to him, was inadmissible. I write separately for the sole purpose of stating my view that Bonilla's testimony repeating Rivera's statement clearly should not have been admitted under the Connecticut Code of Evidence.

The state initially offered Bonilla's testimony concerning Rivera's statement as a declaration against Arciniega's penal interest. The state argued that the statement showed that Rivera and the defendant were involved in a territorial dispute and that the defendant had a motive to kill Rivera. The state then abandoned that rationale and adopted the spontaneous utterance exception suggested by the trial court as a ground for admitting the statement. The state argued curiously that the statement was not offered to prove its truth but to prove the victim's state of mind. The defendant objected on the ground that the statement was double hearsay and did not fall within any hearsay exception, including spontaneous utterance. The court admitted the statement into evidence as a spontaneous utterance in order to prove Rivera's state of mind. During Bonilla's testimony, the court informed the jury that the statement was not being offered as proof of the truth of the statement but as proof of the victim's mental condition and state of mind when he made the statement. In the course of instructing the jury, the court explained further that the statement was admitted as a spontaneous utterance. The court noted: "This is an exception to the hearsay rule. It was not offered for its truth but for the witness' then existing state of mind."

The defendant correctly points out that both the state's offer and the court's ruling and instructions contain contradictions. Under our rules of evidence, spontaneous utterances are admitted for the truth of the matter asserted and need not be limited to proving state of mind. See Conn. Code Evid. § 8-3 (2); *State* v. *Arluk*, 75 Conn. App. 181, 187, 815 A.2d 694 (2003) (under the spontaneous utterance exception, "[h]earsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein" [internal quotation marks omitted]). Conversely, a statement offered for a nonhearsay purpose, such as proving a person's state of mind, need not be designated as a spontaneous utterance. A nonhearsay purpose for an offer does not rely on an exception to

the hearsay rule. See C. Tait, Connecticut Evidence § 8.7 (3d Ed. 2001) ("Any statement that is not offered to prove the matter asserted is not hearsay. . . . If the statement is not offered to prove its contents, the offeror must satisfy the court that the statement itself is relevant for some other purpose."); *State* v. *Rivera*, 40 Conn. App. 318, 324–25, 671 A.2d 371 (1996) ("An out-of-court statement is not hearsay . . . 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. . . . [S]uch an out-of-court statement by a declarant would only be admissible to show his state of mind where his mental state is relevant." [Citations omitted; internal quotation marks omitted.]). Notwithstanding the confusion in the trial court, I suggest that Bonilla's testimony as to Rivera's statement was not properly admissible as a spontaneous utterance or, for that matter, to prove Rivera's state of mind, which was irrelevant to the issues in the case.[1]

I note, at the outset, that Bonilla's testimony regarding Rivera's out-of-court statement, in which Rivera repeated what Arciniega had said to him, constituted hearsay within hearsay. As such, Bonilla's testimony was "admissible only if each part of the combined statements [were] independently admissible under a hearsay exception." Conn. Code Evid. § 8-7; see also *State* v. *Lewis*, 245 Conn. 779, 802, 717 A.2d 1140 (1998) ("[w]hen a statement is offered that contains hearsay within hearsay, each level of hearsay must itself be supported by an exception to the hearsay rule in order for that level of hearsay to be admissible"). In my view, these statements are inadmissible.

It is axiomatic that "[a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies . . . ." (Internal quotation marks omitted.) *State* v. *Gregory C.*, 94 Conn. App. 759, 770, 893 A.2d 912 (2006). Pursuant to Connecticut Code of Evidence § 8-3 (2), a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" constitutes a spontaneous utterance and is an exception to the general hearsay rule. The spontaneous utterance exception is well established and dictates that "[h]earsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein when (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant. . . .

"Whether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact

to be decided by the trial judge. . . . The trial court has broad discretion in making that factual determination, which will not be disturbed on appeal absent an unreasonable exercise of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Gregory C.*, supra, 94 Conn. App. 770–71.

In the present case, the circumstances of Rivera's repeating what Arciniega had told him did not fall within the traditional spontaneous utterance rule, which requires that the utterance be "spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation." (Internal quotation marks omitted.) *State* v. *Kelly*, 256 Conn. 23, 60, 770 A.2d 908 (2001). Rivera, immediately after his conversation with Arciniega in the rest room, left the rest room and recounted to Bonilla what he had been told. According to Bonilla, however, "[Rivera] didn't want to talk. I had to push [it] out of him." Although Rivera was "acting funny" and may have been upset by Arciniega's information, the episode did not involve circumstances that give rise to the exception for spontaneous utterances. In fact, as Bonilla implicitly acknowledged, there was nothing spontaneous about the statement; rather, he had to encourage Rivera to speak. Moreover, the admission of the details of the information that Arciniega had told Rivera was not needed to prove Rivera's state of mind, which was that he was fearful, if, indeed, his state of mind was relevant at all in this case. Rather, it is apparent that the only plausible purpose of the offer was to implicate the defendant by establishing that he had hired Arciniega to kill Rivera, not simply to prove Rivera's state of mind.

In conclusion, the offered statement was, indeed, hearsay upon hearsay, and was not admissible under our rules of evidence. I agree with the majority's analysis that admission of the statement was harmless beyond a reasonable doubt.

For the foregoing reasons, I respectfully concur.

[1] On the basis of the nature of the statements offered, § 8-3 (4) of the Connecticut Code of Evidence is not implicated.