STATE OF CONNECTICUT *v.* RICHARD R. QUINT
(AC 24389)

Schaller, Bishop and Dupont, Js.

Argued February 23—officially released August 15, 2006

(Appeal from Superior Court, judicial district of Ansonia-Milford, geographical area number twenty-two, Cremins, J.)

April E. Brodeur, special public defender, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *Mary M. Galvin*, state's attorney, and *L. Mark Hurley*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Richard R. Quint, appeals from the judgments of conviction, rendered after a jury trial, of three counts of criminal violation of a protective order, pursuant to General Statutes § 53a-223 (a), and three counts of criminal trespass in the first degree, in violation of General Statutes § 53a-107 (a) (2). On appeal, the defendant claims that (1) his convictions violated his constitutional protection against double jeopardy, and (2) he was denied his right to a fair trial as a result of prosecutorial misconduct during trial and closing arguments.[1] We disagree and affirm the judgments of the trial court.

The jury reasonably could have found the following facts. In February, 2002, the defendant began dating and living with the victim, Francine Casey, in Milford. On July 9, 2002, following a domestic dispute, the defendant called the Milford police to the couple's residence, and both the defendant and the victim were arrested. After the arrest, the victim requested that a full no contact protective order be issued against the defendant. The court granted the request, and a full no contact protective order was issued,[2] which provided in relevant part: "That the defendant refrain from threatening [the victim] . . . entering her dwelling or the dwelling occupied by the victim. That he may return one time with a police escort to retrieve his personal belongings. That he refrain from having any contact in any manner with the victim. That he refrain from coming within one hundred yards from the victim . . . ."

At approximately 9:55 p.m. on July 22, 2002, Officer Andrew Dunaj of the Milford police department was dispatched to the residence of the victim after the Milford police received a call from the victim's brother alleging that the defendant had violated the protective order. When Dunaj arrived, the victim informed him that the defendant had violated the protective order two times that day. The victim reported that at approximately 3 a.m., the defendant entered her residence intoxicated, instigated a verbal exchange, stole her purse and threatened her with bodily injury if she contacted the police. She stated that she did not report the violation of the protective order because she feared the defendant would retaliate against her. She also stated that at approximately 6:44 p.m., on the same day, the defendant attempted to enter the residence through a window, which was blocked by an air conditioner. The victim told Dunaj that the defendant had returned to the residence to give her back her purse but left once he heard the police were en route to the residence. She told Dunaj that although she did not want the defendant arrested, she did want to create a record of his violations of the protective order "in case anything happened."

On July 27, 2002, Dunaj contacted the defendant to

inquire about the incident on July 22. According to Dunaj, the defendant admitted that he had entered the victim's residence early in the morning on July 22, but he insisted that he was invited to the residence by the victim. The defendant, however, denied threatening the victim or returning to the residence later that day. Dunaj recalled reminding the defendant of the conditions of the protective order and informing him that when he entered the residence of the victim on July 22, he violated the protective order.

Then, on August 20, 2002, Dunaj again was dispatched to the residence of the victim. When Dunaj arrived, the victim informed him that, on that day, the defendant had returned to her residence without a police escort, this time seeking to retrieve his personal belongings. She stated that the defendant did not enter the residence, but rather was in her driveway and attempted to enter the dwelling through a window. The victim's brother, who was at the residence during the relevant time period, opined that the defendant tried to enter the dwelling through a window. The victim also claimed that the defendant had instigated a verbal argument with her and left only when she informed him that she had called the police.

Later that day, Dunaj located and arrested the defendant. The defendant was charged with one count of threatening in the second degree in violation of General Statutes § 53a-62 (a) (1) in connection with the incident that occurred at 3 a.m. on July 22, 2002, as well as three counts of criminal trespass in the first degree and three counts of criminal violation of a protective order for the incidents that occurred on July 22 and August 20, 2002. Following a jury trial, the defendant was acquitted of the threatening charge but convicted of three counts of criminal trespass in the first degree and three counts of criminal violation of a protective order. Additional facts will be set forth where necessary.

I

First, the defendant claims that his prosecution and convictions under both § 53a-223 (a) and § 53a-107 (a) (2)[3] violated his constitutional protection against double jeopardy under the fifth amendment to the United States constitution and article first, § 9, of the constitution of Connecticut. We disagree.

The defendant concedes that he failed to preserve his claim that his convictions violated the principles of double jeopardy and seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). We will review the defendant's claim because the record is adequate for our review, and the claim is of a constitutional nature. The defendant cannot prevail, however, because the alleged constitutional violation clearly did not exist, and he clearly was not deprived of a fair trial. See id.

"The double jeopardy clause of the fifth amendment to the United States constitution provides: '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Citations omitted.) *State* v. *Greco*, 216 Conn. 282, 289–90, 579 A.2d 84 (1990). One may, however, when the legislature authorizes, be convicted of multiple offenses even though the offenses arise from the same conduct. *Missouri* v. *Hunter*, 459 U.S. 359, 367–68, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

Here, the defendant claims that he was punished multiple times for the same offense. That is to say, he alleges that his prosecutions and convictions under § 53a-223 (a) for the crime of violating a protective order and under § 53a-107 (a) (2) for the crime of criminal trespass in the first degree constituted double jeopardy because the statutes criminalize the same conduct. "In this context, double jeopardy protection is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." (Internal quotation marks omitted.) *State* v. *Smart*, 37 Conn. App. 360, 365, 656 A.2d 677, cert. denied, 233 Conn. 914, 659 A.2d 187 (1995).

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Greco*, supra, 216 Conn. 290–91. While the first prong requires a review of the bill of particulars, the second prong requires the application of the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), "to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy [and] the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Lopez*, 93 Conn. App. 257, 272, 889 A.2d 254, cert. granted on other grounds, 277 Conn. 919, 895 A.2d 791 (2006).

As the *Blockburger* test is only a rule of statutory construction and "serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." (Internal quotation marks omit-

ted.) Id.; *State* v. *Greco*, supra, 216 Conn. 292.

Thus, the *Blockburger* test, as a rule of statutory construction, simply creates a rebuttable "presumption as to the actual legislative intent, [and] it is not a blind presumption that may be applied without regard to other relevant evidence of true intent. It would be absurd indeed to apply *Blockburger*, which was meant to help determine legislative intent, in a way that actually defeats what reason and logic dictate to be the intent." (Internal quotation marks omitted.) *State* v. *Delgado*, 19 Conn. App. 245, 252, 562 A.2d 539 (1989). The United States Supreme Court and our Supreme Court have made clear that the *Blockburger* "rule should not be controlling where, for example, there is a clear indication of contrary legislative intent [and] [t]he language, structure and legislative history of a statute can provide evidence of this intent." (Citations omitted; internal quotation marks omitted.) *State* v. *Greco*, supra, 216 Conn. 293. "Statutory construction is a matter of law over which we exercise plenary review." (Internal quotation marks omitted.) *State* v. *Lopez*, supra, 93 Conn. App. 272.

In the present case, the parties do not dispute that the charged offenses of criminal trespass in the first degree and violation of a protective order arose from the same acts.[4] Furthermore, the state concedes, as it must, that criminal trespass in the first degree in violation of § 53a-107 (a) (2) and violation of a protective order pursuant to § 53a-223 (a) constitute the same offense under the *Blockburger* test.[5] Thus, the determinative question is whether there is any clear indication of legislative intent to the contrary. We answer that question in the affirmative.

On the basis of our examination of the language, structure and legislative history of §§ 53a-107 (a) (2) and 53a-223 (a), we conclude that the legislature intended multiple punishments for the offense of trespassing in violation of a protective order. In reaching this conclusion, we first look to the explicit language of §§ 53a-107 (a) (2) and 53a-223 (a) and note that neither statute contains language barring multiple punishments for the same offense. We have held that because "the legislature has shown that it knows how to bar multiple punishments expressly when it does not intend such punishment . . . the absence of similar language in those statutes provides evidence that the legislature intended cumulative punishments."[6] (Citation omitted; internal quotation marks omitted.) *State* v. *Servello*, 80 Conn. App. 313, 323, 835 A.2d 102 (2003), cert. denied, 267 Conn. 914, 841 A.2d 220 (2004).

Indeed, § 53a-223 was created by Public Acts 1991, No. 91-381, "An Act Concerning Family Violence," the same act that amended § 53a-107 by expanding § 53a-107 (a) (2) to provide a criminal penalty for those who trespass in violation of a protective order issued pursu-

ant to General Statutes § 46b-15 or General Statutes § 46b-38c. In addition, both § 53a-223 and § 53a-107 were subsequently amended by Public Acts 1995, No. 95-214, "An Act Concerning Stalking,"[7] and Public Acts 1999, No. 99-240, "An Act Concerning Witness Protection, Cash Bail, Bail Enforcement Agents and Health Insurance for Survivors of Police Officers and Constables."[8] Thus, it is clear that the legislature was aware of these two criminal statutes and, while having the opportunity to bar multiple punishments under these statutes, did not add language to these statutes evincing such an intent.

Additional evidence of the legislature's intent to provide for cumulative punishments is that the statutes set forth separate penalties "rather than using a multiplier of a penalty established for another offense." *State* v. *Delgado*, supra, 19 Conn. App. 255. In *Delgado*, we found evidence of legislative intent to provide cumulative punishments when the statutes in question did not make reference to each other and instead set forth their own penalty. Id. Similarly, in this instance, neither § 53a-107 (a) (2) nor § 53a-223 (a) make reference to each other, and while a violation of § 53a-107 (a) (2) is a class A misdemeanor, a violation of § 53a-223 (a) is a class D felony.

Finally, our conclusion that the legislature intended cumulative punishments is based on the fact that the interests protected by the statutes are distinguishable. As our Supreme Court noted in *State* v. *Greco*, supra, 216 Conn. 282, "[t]he United States Supreme Court found support for its conclusion that Congress intended multiple punishment for violations of two conspiracy statutes in the fact that the statutes were directed to separate evils presented by drug trafficking, namely importation and distribution." (Internal quotation marks omitted.) Id., 295; see *State* v. *Braswell*, 42 Conn. App. 264, 270, 679 A.2d 407 (1996), appeal dismissed, 243 Conn. 248, 701 A.2d 1057 (1997). Here, the obvious purpose of § 53a-223 (a) is to aid the enforcement of protective orders and to protect victims from injury or intimidation. See Public Acts 1991, No. 91-381; Office of Legislative Research Bill Analysis for Public Acts 1991, No. 91-381. Conversely, § 53a-107 (a) (2) was enacted to protect landowners or occupiers "from intrusions by unwanted persons." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 19 Conn. App. 254.[9]

As the defendant's prosecutions and convictions pursuant to § 53a-107 (a) (2) and § 53a-223 (a) were consistent with the legislature's intent to provide cumulative punishments for the single act of trespass in violation of a protective order, we hold that the defendant has not established that a constitutional violation clearly exists and clearly deprived him of a fair trial. Thus, his claim must fail under the third prong of *Golding*.

II

Finally, the defendant claims that he was denied his right to a fair trial as a result of prosecutorial misconduct during trial and closing arguments. Specifically, the defendant claims that the prosecutor improperly (1) asked the defendant to comment on the veracity of other witnesses, and (2) vouched for the credibility of the state's witnesses and expressed his personal opinion.[10] We disagree.

We begin by setting forth the applicable standard of review. Although, the defendant did not object to any of the alleged misconduct challenged on appeal, he maintains that he is entitled to a new trial on the ground that the alleged misconduct deprived him of a fair trial. "We review unpreserved claims of prosecutorial misconduct by applying the factors set out in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). . . . [I]n analyzing claims of prosecutorial misconduct, we engage in a two step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his due process right to a fair trial. Put differently, misconduct is misconduct, regardless of its ultimate effect on the fairness of the trial; whether that misconduct caused or contributed to a due process violation is a separate and distinct question . . . .

"Only if we conclude that prosecutorial misconduct has occurred do we then determine whether the defendant was deprived of his due process right to a fair trial. In doing so, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial misconduct, therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This inquiry is guided by an examination of the following *Williams* factors: the extent to which the misconduct was invited by defense conduct or argument. . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *McCleese*, 94 Conn. App. 510, 516–17, 892 A.2d 343, cert. denied, 278 Conn. 908, 899 A.2d 36 (2006).

"[I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . We are mindful throughout this inquiry, however, of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of

the State, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his [or her] office, [the prosecutor] usually exercises great influence upon jurors. [The prosecutor's] conduct and language in the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. If the accused be guilty, he [or she] should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe." (Internal quotation marks omitted.) *State* v. *Boyd*, 89 Conn. App. 1, 29, 872 A.2d 477, cert. denied, 275 Conn. 921, 883 A.2d 1247 (2005).

As it relates to prosecutorial misconduct during closing arguments, we have held that "[i]n determining whether such misconduct has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. . . .

"In examining the prosecutor's argument we must distinguish between those comments whose effects may be removed by appropriate instructions . . . and those which are flagrant and therefore deny the accused a fair trial. . . . Last, we note that [w]e do not scrutinize each individual comment in a vacuum, but rather we must review the comments complained of in the context of the entire trial. . . . It is in that context that the burden [falls] on the defendant to demonstrate that the remarks were so prejudicial that he was deprived of a fair trial and the entire proceedings were tainted." (Citations omitted; internal quotation marks omitted.) Id., 29–30. With those basic tenets in mind, we now turn to the defendant's claims on appeal.

A

First, the defendant claims that the prosecutor improperly asked the defendant to comment on the veracity of other witnesses and that the prosecutor continued this improper conduct by emphasizing the defendant's testimony during closing arguments. We are not persuaded.

The following additional facts are necessary for the resolution of that issue. It will suffice to say that the evidence at trial distilled to a credibility contest between the defendant and the state's witnesses due to the nature of the charged offenses and the conflicting testimony of the witnesses. In this regard, the state's key witness was the victim, who testified that the defendant violated the protective order and trespassed twice on July 22 and once on August 20, 2002. Although the victim and the victim's brother were both present when the defendant violated the protective order on August 20, only the victim was present when the defendant committed two violations of the protective order on July 22. Indeed, as to the July 22 incidents, the testimony of Dunaj and the victim's brother was based on representations made to them and not on their personal observations.

During the defendant's case-in-chief, defense counsel asked the defendant if on July 22 he violated the protective order by either entering the victim's dwelling, having any contact with the victim or threatening, harassing, assaulting, molesting or sexually assaulting the victim. When the defendant replied, "No I did not," the following exchange occurred:

"Q. You are telling this jury and the court that [the victim] is lying?

"A. Yes, I am."

On cross-examination of the defendant, the prosecutor adopted this line of questioning, begun by defense counsel, and delved into the subject of the veracity of all of the state's witnesses. The defendant was asked the following:

"Q. Do you believe [the victim's] testimony is fabricated?

"A. Yes, I do.

"Q. And we are to believe you that you weren't there?

"A. Yes.

"Q. Did you hear Officer Dunaj testify that he had a phone conversation with you . . . [and] that you admitted going on the property . . . ?

"A. As I already said.

"Q. So, he's lying, too.

"A. That's not what I told him.

"Q. So, is it your testimony that [the victim] and Mr.—Officer Dunaj are both lying to this jury?

"A. Well, Mr. Dunaj must be, and [the victim] definitely is.

"Q. Okay. But you're not; you are telling the truth—

"A. Yes, I am."[11]

During closing argument, the prosecutor remarked on the defendant's testimony that the state's witnesses were "fabricat[ing]" their testimony and resolved that in fact, the only person with a motive to lie was the defendant.[12]

The defendant claims that even if the prosecutor's questions asking the defendant to comment on the veracity of the victim were invited by defense counsel's question, it was improper for the prosecutor to ask the defendant to comment on the veracity of all of the state's witnesses and then to highlight the defendant's testimony concerning the veracity of the state's witnesses in his closing arguments.

"It is a well established evidentiary rule that it is improper to ask a witness to comment on another witness' veracity. . . . That is so because such questions not only invade the province of the jury, in that determinations of credibility are for the jury to decide, but those questions also have no probative value because they are not helpful to the jury in assessing a witness' credibility. . . .

Nevertheless, "[a]s a general rule . . . if a party delves into a particular subject during examination, he is said to have opened the door for further examination regarding that subject. . . . Once that door was opened, the prosecutor had the right to inquire into the defendant's statement and ask whether all the witnesses in the case were lying." (Citation omitted; internal quotation marks omitted.) *State* v. *Sells*, 82 Conn. App. 332, 338, 844 A.2d 235, cert. denied, 270 Conn. 911, 853 A.2d 529 (2004).

Indeed, we have reached the same conclusion on facts analogous to those in this case. In *Sells*, we held that when defense counsel, on direct examination, asked the defendant to comment on the veracity of the state's witnesses, thus opening the door on the subject of the credibility of the state's witnesses, the prosecutor "had a right to inquire into the defendant's statements and ask whether all the witnesses in the case were lying." Id. Thus, the prosecutor, in this case, did not commit misconduct in cross-examining the defendant on the issue of the credibility of all of the state's witnesses, and it was not improper for the prosecutor to emphasize the defendant's testimony in closing argument.[13]

B

Next, the defendant claims that the prosecutor, during the trial and in closing argument, improperly vouched for the credibility of the state's witnesses and expressed his personal opinion, consequently depriving the defendant of a fair trial.

1

We first address the defendant's claim that the prose-

cutor improperly expressed his personal opinion during the trial. In particular, the defendant points out that on cross-examination, the prosecutor repeatedly asked the defendant if he was telling the truth, if he was perjuring himself and if he understood the penalty for perjury. Although defense counsel raised no objection to this line of questioning at trial, the defendant claims on appeal that these questions constituted impermissible statements of personal opinion. The state argues in response that the prosecutor's questions were not improper cross-examination because "[o]nce the defendant decided to testify, he opened himself up to legitimate probing questions testing his credibility." We agree with the state.

It is axiomatic that when a defendant chooses to testify, he puts his credibility at issue, and the state is free to "challenge the defendant's version of the facts and to argue that the defendant had tailored his testimony to fit the state's case, provided that such an argument [is] linked solely to the evidence and not, either directly or indirectly, to the defendant's presence at trial [i.e., his exercise of a constitutional right]." (Internal quotation marks omitted.) *State* v. *Alexander*, 50 Conn. App. 242, 250, 718 A.2d 66 (1998), rev'd in part on other grounds, 254 Conn. 290, 755 A.2d 868 (2000). Thus, we conclude, the prosecutor's questions during cross-examination were not an expression of his personal opinion and, thus, did not constitute misconduct.

2

Next, the defendant argues that during closing arguments, the prosecutor improperly expressed his personal opinion. The record reveals that during summation, the prosecutor stressed that the defendant's testimony was inconsistent with the testimony of all of the state's witnesses, and that the state's witnesses were telling the truth and that only the defendant had a reason to fabricate his testimony.[14] Defense counsel did not object to the prosecutor's comments during closing argument. Instead, defense counsel adopted the same method of argument and offered his personal opinion as to the credibility of the witnesses.[15]

Although the state concedes that the prosecutor, during closing argument, improperly expressed his personal opinion, the state maintains that the misconduct did not deprive the defendant of a fair trial. We agree with the state.

Even if we assume arguendo that the prosecutor's remarks were an improper expression of his personal opinion, we next must determine whether the defendant was deprived of his due process right to a fair trial. "As we have stated, our inquiry into whether the defendant has been prejudiced by prosecutorial misconduct is guided by an examination of the *Williams* factors: the extent to which the misconduct was invited by defense

conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *McCleese*, supra, 94 Conn. App. 520–21.

The state concedes that the prosecutor's comments on the credibility of the witnesses were not invited by defense counsel's conduct or argument. The state also acknowledges that credibility was a critical issue in this case and that there was no incriminating physical evidence. As our Supreme Court has stated, cases that are lacking conclusive physical evidence and hinge on the jury's determination of the credibility of the victim are not particularly strong cases. *State* v. Ceballos, 266 Conn. 364, 416–17, 832 A.2d 14 (2003); *State* v. Singh, 259 Conn. 693, 724–25, 793 A.2d 226 (2002); see State v. *Singleton*, 95 Conn. App. 492, 503, 897 A.2d 636 (2006).

The misconduct in this case, however, was neither frequent nor severe because it was confined to only a portion of the closing argument. See *State* v. *Pouncey*, 40 Conn. App. 624, 636, 673 A.2d 547 (1996), aff'd, 241 Conn. 802, 699 A.2d 901 (1997). Although the court did not issue any specific curative instruction, its preliminary and final instructions to the jury likely cured the misconduct, as it reminded the jury that it "alone determine[s] the weight, the effect, the value of the evidence, as well as the credibility and believability of the witnesses."[16] Although "a general instruction does not have the same curative effect as a charge directed at a specific impropriety, particularly when the misconduct has been more than an isolated occurrence . . . [where] [t]he defendant fail[s] . . . to object to this comment . . . to bring [the improper comment] to the attention of the trial court, [the defendant] bears much of the responsibility for the fact that [this] claimed impropriet[y] went uncured." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 401–402, 897 A.2d 569 (2006). Indeed, we have repeatedly stated that "defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel [may not have] believe[d] that it was unfair in light of the record of the case at the time." (Internal quotation marks omitted.) Id., 402. Additionally, of note is the fact that the jury found the defendant not guilty of the threatening charge, which indicates that the jury's deliberations were not overborne by the prosecutor's improper opinions as to the credibility of witnesses. See *State* v. *Doriss*, 84 Conn. App. 542, 548, 854 A.2d 48, cert. denied, 271 Conn. 922, 859 A.2d 581 (2004).

Thus, even if we were to conclude that the prosecutor's comments during closing arguments were improper, the defendant was not prejudiced by the misconduct and was not deprived of his right to a fair trial.

See *State* v. *Warholic*, supra, 278 Conn. 400–404.

The judgments are affirmed.

In this opinion DUPONT, J., concurred.

[1] The defendant also claims that the prosecutor referred to facts that were not in evidence. Specifically, the defendant claims that during closing arguments, in regard to the charge that the defendant threatened the victim, the prosecutor stated that the defendant "threatened [the victim] with bodily harm, to have one of his—her fate would be worse than death after he contacted his motorcycle gang." The state concedes that because this fact was never introduced at trial, it was improper for the prosecutor to refer to it in his closing argument. The defendant, however, was not prejudiced by this statement because he was acquitted of the charge of threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). Additionally, we find no support for the defendant's assertion that but for this remark, the jury would have found the defendant not guilty of the remaining counts.

[2] The protective order was issued on July 9, 2002, the same day that the victim and the defendant were arrested.

[3] General Statutes § 53a-223 (a) provides in relevant part that a "person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, or section 54-1k or 54-82r has been issued against such person, and such person violates such order." In this instance, the protective order prohibited the defendant from, among other things, (1) entering the dwelling of the victim, (2) returning to the dwelling without a police escort, (3) having any contact in any manner with the victim, (4) coming within 100 yards of the victim and (5) stalking the victim.

General Statutes § 53a-107(a) (2), criminal trespass in the first degree, makes it a crime when a person "enters or remains in a building or any other premises in violation of a restraining order issued pursuant to section 46b-15 or a protective order issued pursuant to sections 46b-38c, 54-1k or 54-82r by the Superior Court . . . ."

[4] We note that, as the state has pointed out, in theory, there would be no double jeopardy issue if the charging instrument had provided that the defendant was charged with criminal trespass in the first degree pursuant to General Statutes § 53a-223 (a) for entering the victim's dwelling in violation of the protective order and under General Statutes § 53a-107 (a) (2) for his violation of the protective order by coming within 100 yards of the victim, returning to the victim's dwelling without a police escort and having contact with the victim. In such a case, the charges and the subsequent conviction would not be for the same offense. Nonetheless, the charging instrument, in this case, did not specify the particular acts for which the defendant was charged, and therefore "we resolve the ambiguity in the defendant's favor"; *State* v. *Mincewicz*, 64 Conn. App. 687, 693, 781 A.2d 455, cert. denied, 258 Conn. 924, 783 A.2d 1028 (2001); for double jeopardy purposes and assume that the charged offenses arose out of the same act. See id.

[5] This is because, on the facts of this case, it is clear that it was not possible for the defendant to commit the offense of criminal trespass in the first degree without having first committed the crime of criminal violation of a protective order. See *State* v. S*immons*, 86 Conn. App. 381, 391–92, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, U.S. , 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005).

[6] See General Statutes §§ 53a-56a (a), 53a-59a (b), 53a-60a (a), 53a-60b (b), 53a-60c (b), 53a-61a (b), 53a-70a (a), 53a-72b (a), 53a-92a (a), 53a-94a (a), 53a-102a (a) and 53a-103a (a).

[7] Both statutes were amended by Public Acts 1995, No. 95-214, to include protective orders pursuant to General Statutes § 54-1k.

[8] Public Acts 1999, No. 99-240, amended both statutes to include, among other things, a protective order issued pursuant to General Statutes § 54-82r.

[9] In *State* v. *Delgado*, supra, 19 Conn. App. 254, we held that, subsection (a) (1) of General Statutes § 53a-107, which "prohibits conduct involving the unlawful occupation of a premises where the actor is personally ordered by the owner or other authorized person to leave and the actor refuses to do so in direct contravention of that order," was enacted for the purpose of protecting "any possessor of land, whether titleholder or not, from intrusions by unwanted persons." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 254. These two provisions, while not identical, are similar and were enacted at the same time. As such, we conclude that the legislative purpose of § 53a-107 (a) (1) enunciated in *Delgado* is directly applicable to

§ 53a-107 (a) (2).

[10] The defendant also claims that the prosecutor "scoffed at the defendant's testimony," implying that he was not telling the truth, and "allied himself with the jurors . . . ." We note that we read transcripts in monotone, and we decline the defendant's invitation to impute misconduct where such misconduct could be revealed only by the tone of the speaker and not on the face of the printed record. *State* v. *Vazquez*, 79 Conn. App. 219, 228–29, 830 A.2d 261, cert. denied, 266 Conn. 918, 833 A.2d 468 (2003).

[11] Defense counsel only once objected to this line of questioning, on the ground that a question had been asked and answered.

[12] The prosecutor stated: "But we are dealing with July 22 and August 20 here. What happened then? Who claims all the other witnesses are lying? Who has the motive to fabricate his testimony? Did anyone expect that he was going to get on the [witness] stand and say, 'Yes, I violated this order. Yes, I trespassed'? Of course not, he is going to deny it. . . . Who has the most interest in the outcome of the trial? Of the five witnesses in this case, only one is charged with seven violations of the Connecticut General Statutes. [The defendant] has the motive to fabricate. [The defendant] is the answer to all these questions. [The defendant] testified under cross-examination when I asked him why the other witnesses would lie, and he said, well, the officer would lie because he needs, he wants to get the conviction. The police officer's involvement in a criminal case ends with the arrest. . . So, he has no interest in the outcome of the case. I'm not paid for convictions or losses at trial. I am paid to present evidence as it is presented to me through the police officers for you . . . . [The victim] testified [that] she just wanted him to stay away. She initially didn't even want him arrested. . . . So, her interest is to terminate this relationship . . . . [The defendant] is the one on trial. He has the most to lose. Thus, it's our contention [that] his testimony was completely fabricated. And remember, his testimony was in direct controversy with the other people."

[13] We believe, however, that a word of caution regarding the "opening the door" doctrine is appropriate. As we have stated, "[t]he doctrine of opening the door cannot, of course, 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." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 187, 864 A.2d 666 (2004), cert. denied, U.S. , 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

[14] The prosecutor stated: "Why, ladies and gentlemen, would the officer fabricate testimony, fabricate information that's presented to the state's attorney's office and to a judge? There is no reason because the officer is telling the truth based on his investigation. Why would [the victim] make up this whole story and subject herself to perjury for the charge of issuing a false statement? She's not. She is here in court. She is telling an honest story with respect to what happened on those occasions. Why would John Casey [the victim's brother] fabricate a story and submit himself to [charges of] issuing a false statement or perjury? Because what he told you is true. He is living with his sister, [the defendant] showed up on August 20, 2002, attempted to enter the dwelling and left before the police were there, and Mr. John Casey called the police.

"These witnesses are all sworn in. They all understand the obligation of an oath.

"The other witness we heard from is [the defendant]. [The defendant] is the one charged with these crimes. [The defendant] is the one who denied ever going on the property. Ladies and gentlemen, if you believe the testimony that he never went there, then your deliberations should then deliver a verdict of not guilty.

"But consider. Why would these other witnesses fabricate their testimony when they have nothing to gain or lose depending on the outcome of this trial? They are merely here to tell the truth.

"[The defendant], however, is the person that is charged with the crime and, as the judge will instruct you, it is your decision based on the evidence presented whether or not [the defendant] violated any of these state statutes and, you know, we are dealing with three charges of violation of a protective order, and three charges of criminal trespass [in the first degree] and one count of threatening. . . .

"So, ladies and gentlemen, when you really add up all the testimony, the state feels it's fairly clear beyond a reasonable doubt what happened here.

What happened here is that [the defendant] should be found guilty for his actions on July 22, 2002, and August 20, 2002.

"During your deliberation process, I'm going to ask you to carefully consider each of the witnesses' testimony from this chair and think about the things we talked about. If you feel that [the defendant] was the one telling the truth, then it's a not guilty [verdict], but I think clear and careful consideration of the evidence will show you that the four other witnesses, who have no interest in the outcome of the case, are the ones telling the truth and [that the defendant] has fabricated testimony for you to find him not guilty.

"The other thing to consider, the only person other than myself, [defense counsel], the clerk, the court reporter and the judge, who sat through the entire trial, in addition to the jurors, was [the defendant]. The other witnesses were kept out of the courtroom, and they were called in individually. So, they didn't hear each other's testimony. [The defendant] heard the whole trial, the whole state's case. So, he had a perfect opportunity to fill in the blanks, to get up there and deny everything they said as all lies.

"He heard all the testimony; the other witnesses didn't. The other witnesses came in independently and testified to you ladies and gentlemen truthfully."

During rebuttal, the prosecutor stated: "So, this is a play on words that [defense counsel] wants you to believe that [the victim] is lying. She wasn't lying. . . . If you believe it's not a violation, you'd have to totally discount all of [the victim's] testimony, and why would you do that? She is telling the truth as she recollects it. She told the officer on the very day [that the defendant] came over twice, clearly in violation of the order. She was there August 20, she was in the yard, she was not in the residence. When John Casey testified [that] she was out, she was out of the house, she wasn't out of the area. Again, if she was out of the area, she couldn't have talked to the police officer who arrived shortly after the call came in. [The victim] is not lying. John Casey is not lying. Officer Dunaj is not lying. There is only one person that's lying, and that's the person who has the interest in the outcome of the case."

[15] Defense counsel stated: "The state asked you who is lying? Why would [the victim] lie? I don't know. Could it be that she wanted an easy way to get [the defendant] out of the house, an easy way to end this relationship? Possibly. Could it be because she wanted the goods that were at her home? I don't know. I don't know why she is lying, but I do submit to you that she is.

"[The defendant] testified to it. I don't know whether you believed [him] or not. I did. I really did. When I saw [him] testify and he looked at you and he told you he was not at the property, I believed him. He didn't have to say that. The state didn't prove its case beyond a reasonable doubt, even if he was there. . . .

"He told you, in spite of that, that he wasn't there. [The victim] told you that he was. [The victim] also told you that she was. We know now, after this morning, that [that] isn't true. [The victim] was not present on at least one of the occasions in question, August 20 at seven o'clock. So, who is lying? I submit that it is [the victim] who is lying. Why? I can't tell you why; I can only speculate."

[16] The court stated in relevant part: "Your function, the function of the jury is to determine the facts. You are the sole and exclusive judges of the facts. You alone determine the weight, the effect, the value of the evidence, as well as the credibility and believability of the witnesses. . . .

"You must consider and weigh the testimony of all the witnesses who appear before you. You alone are to determine whether to believe any witness to the extent to which any witness should be believed. . . .

"It is your responsibility to resolve any conflicts in testimony which may arise during the course of the trial and to determine where the truth lies."

The court also stated at the conclusion of closing arguments: "You alone are responsible for determining the facts. It is your exclusive province to deal with the evidence and determine what the facts are, and to reach the final conclusion as to whether the accused is guilty or not guilty. . . .

"By applying the law as I give it to you to the facts as you find them to be, you will arrive at your verdict. You are the sole judges of facts.

"It is your duty to find the facts. You are to recollect and weigh the evidence and form your own conclusions as to what the ultimate facts are. You may not go outside the evidence introduced in court to find the facts. . . .

"Also, your verdict must be based absolutely and solely upon the evidence given to you in the trial of the case. . . .

"You should keep in mind that the arguments, the statements by the attorneys in final argument or during the course of the case, are not evidence. You should not consider as evidence their recollection of the facts, nor their personal beliefs as to any facts or as to the credibility of any witness. Nor

any facts which any attorney may have presented to you in an argument which that attorney's knowledge was not present—was not presented to you as evidence during the course of the trial.

"Furthermore, I emphasize to you that if there is any difference between what any attorney recalls as the evidence and what you recall as the evidence, it is your recollection that controls. Follow your recollection, not anyone else's."