SCHALLER, J., dissenting. Although I agree with the majority that the trial court did not abuse its discretion in admitting evidence of prior misconduct by the defendant, Cristobal Millan, Jr., I respectfully dissent because I conclude that the evidence was insufficient to support the defendant's conviction of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (1). Accordingly, I would reverse the judgment of conviction as to that offense.

I agree with the majority's statement of the applicable law and the appropriate standard of review for this issue. In addition, I agree for the most part with the majority's statement of the pertinent facts regarding what the jury reasonably could have found. The majority's rendition of the evidence, however, is incomplete, in my view, and its construct of reasonable and logical inferences does not find support in the evidence. Without those unsupportable inferences, the evidence is insufficient to support the defendant's conviction.[1]

At the outset, it is crucial to keep in mind that the conspiracy charge is predicated on an agreement to commit an assault with a dangerous instrument against *Lamarr Sands*, *rather than Jeffrey Smith*.[2] To this end, the majority selects portions of the evidence that it uses to build the body of inferences that it argues the jury could have drawn "[o]n the basis of this testimony . . . ." In order to establish this prearranged plan to assault Sands with a dangerous instrument, the majority relies on two key inferences: (1) that Darren Madison had an unspecified reason to believe that Smith would still be at the motel with Sands, and that, therefore, "greater force than fists would be necessary";[3] and (2) that Madison had an extra shirt in his car and aided the defendant in disposing of the defendant's box cutter (hereinafter knife). Both of these inferences are nothing more than speculation and cannot be used to support the conviction.

First, the fact that Madison sought additional manpower in the form of assistance from three other males, rather than weapons, belies the notion that "greater force than fists would be necessary." In fact, there is not a shred of evidence that anyone, other than the defendant, was aware of the fact that the defendant possessed a knife until the defendant actually displayed that weapon after his initial altercation with *Smith*. Second, there was no evidence that Madison acquired the spare shirt before he picked up the defendant. The only reasonable inference, therefore, is that Madison already possessed the spare shirt *before* he had his *chance encounter* with Sands. In addition, there was no evidence that Madison had aided the defendant in disposing of the knife. The defendant testified that he

and Madison had stopped at a gas station after the incident so that the defendant could buy some water to wash off his face. Although the defendant testified that he had disposed of the knife at the gas station, no evidence was presented that Madison, who exercised his fifth amendment right not to testify, was aware that the defendant did so. Moreover, because there was no evidence that Madison was aware that the defendant originally had possessed the knife, the subsequent events at the gas station shed no light on whether there was a *prearranged* plan.

The majority further overlooks other evidence vital to drawing reasonable inferences. As the state conceded in its closing argument at trial, the defendant did not pull out his knife until, in the words of the prosecutor: "[The fight] was over. And [Smith] told you he extended his hand, and instead, there was a second male nearby who made a remark about the defendant's face. He happened to look up. . . . And there is a mirror right there. . . . The defendant looks right up, sees what's happened to his face and just flies into a rage. And . . . Smith tells you [the defendant] pulls out a knife when he catches his image in the mirror and goes to town on [Smith]."

What emerges from this undisputed evidence is that the sudden and unexpected use of the knife at that late, unanticipated stage of the fight was a unilateral action on the part of the defendant, exclusively for purposes of what had now become a personal dispute with *Smith* merely because someone called to the defendant's attention that Smith had bloodied the defendant's face.

Although I agree that evidence regarding this latter, unanticipated event suggests evidence of a conspiracy to commit assault in the first degree, the evidence suggests a conspiracy directed at *Smith*—not *Sands*. As the majority recounts, after the initial altercation between the defendant and Smith, "Smith offered the defendant his hand, saying that this was not 'their fight . . . .' At that point . . . [another male] who was in the motel room remarked to the defendant that Smith 'had messed [the defendant] up pretty bad.' . . . [T]he defendant [then] yelled to the other male to hit Smith with a desk chair . . . ." The other male "attempted to immobilize Smith by hitting him with the chair to facilitate the defendant's [knife] attack and encouraged the defendant to use the knife in a lethal manner." It may well be, therefore, that after the defendant realized that his face had been bloodied, there was evidence to show that the defendant had formed a conspiracy with the other male to assault *Smith* with a dangerous instrument, namely, the knife. See *State* v. *Green*, 261 Conn. 653, 671, 804 A.2d 810 (2002) ("[a] conspiracy can be formed in a very short time period"). Because the charge to the jury required it to determine whether there was a conspiracy to commit an assault in the first degree directed against *Sands*, and not against Smith,

whatever occurred after the initial dispute between the defendant and *Smith* has no bearing whatsoever on the original agreement to assault Sands.[4]

When the full evidentiary picture is taken into account, as it must be, the majority's construct of inferences cannot withstand close scrutiny. There was no evidence that anyone other than the defendant knew that the defendant possessed the knife until he displayed the knife *after* the initial fight was over. *State* v. *Smith*, 36 Conn. App. 483, 487–88, 651 A.2d 744 (1994) (conspiracy conviction overturned because no evidence that anyone was aware that group member happened to possess gun), cert. denied, 233 Conn. 910, 659 A.2d 184 (1995). Moreover, although the defendant had the opportunity to do so, he did not use the knife during the initial fight between Madison and Sands or when he initially attacked Smith, or even when Smith initially released the defendant after holding him in a headlock. In *State* v. *Asberry*, 81 Conn. App. 44, 51–52, 837 A.2d 885, cert. denied, 268 Conn. 904, 845 A.2d 408 (2004), the Appellate Court concluded, on the basis of inferences, that the spontaneous finding and use of a brick to assault a victim could support a conviction for conspiracy to commit assault in the first degree. That case, however, turned on the "*immediacy* with which the brick was found and used" in the course of the assault. (Emphasis added.) Id. In the present case, the defendant passed up *three opportunities* to use the knife and, instead, pulled the knife only after a chance remark following cessation of the initial fighting.

It bears emphasizing that Madison and the defendant specifically choose to assemble additional manpower to accompany them in their expedition to the motel, rather than bringing weapons. In the absence of evidence or reasonable inferences with regard to weapons, the majority relies on several cases, applied out of context in view of the relevant facts, allowing the use of inferences generally in determining conspiratorial intent. No cases, however, support the use of speculation on the basis of intervening, unplanned and spontaneous events that occur during the course of a confrontation like the one in this case. The initial fight, which took an unexpected turn after it appeared to be finished, was clearly an assault but, just as clearly, was not an assault with a dangerous instrument. Although the defendant should stand convicted of the charged lesser offense of assault in the third degree in violation of General Statutes § 53a-61 (a) (1); see footnote 4 of the majority opinion; his conviction for conspiracy to commit assault in the first degree should be reversed. For the foregoing reasons, I respectfully dissent.

[1] The majority does not reach the state's novel claim, accepted in some jurisdictions, that body parts, namely, multiple fists, can be a dangerous instrument under some circumstances. Because the trial court gave no instructions to the jury concerning such a claim, I do not reach that issue.

[2] With respect to the conspiracy count, the trial court charged the jury that "the object of this assault [and] subject of the conspiracy is . . . Sands

and not . . . Smith."

[3] During the evening of March 21, 2005, Sands and Madison encountered each other at the motel in which they were both staying. Smith, who was visiting Sands, observed the argument. Later that evening, Madison returned to the motel with the defendant and several other individuals.

[4] In *State* v. *Crosswell*, 223 Conn. 243, 256, 612 A.2d 1174 (1992), we upheld the conviction of a defendant for conspiracy to commit robbery in the first degree because we concluded that the defendant, by standing silently by while another coconspirator brandished a gun during the course of the robbery, acquiesced in what had then become an "enlarged criminal enterprise." In the present case, the state did not assert that brandishing the knife constituted evidence of a then enlarged criminal conspiracy directed at Sands, but, rather, that it had been the group's plan all along to use the knife to assault Sands. *Crosswell*, therefore, would support a conviction only if the conspiracy to commit assault was predicated against *Smith*, not Sands.