ROGERS, C. J., with whom VERTEFEUILLE, J., joins, dissenting. The majority concludes in part I of its opinion that the trial court improperly consolidated the three cases against the defendant, Sushil Gupta, because "his conduct toward [the victim] M was markedly different, far more egregious and could in no way be mistaken for a proper medical examination." In part II of its opinion, the majority concludes that the trial court did not abuse its discretion when it excluded from evidence excerpts from certain medical treatises, but that it improperly excluded certain videotapes demonstrating the technique for a pulmonary examination. Accordingly, the majority affirms the judgment of the Appellate Court reversing the judgment of conviction. I agree with the majority's conclusion that the trial court properly excluded the excerpts from the medical treatises. I would conclude, however, that the trial court did not abuse its broad discretion in consolidating the three cases and that its exclusion of the videotapes was improper, but harmless. Accordingly, I would reverse the judgment of the Appellate Court.

I first address the majority's conclusion that the Appellate Court properly determined that the trial court improperly consolidated the three cases involving M, and two other victims, J and D. I begin with the standard of review. "General Statutes § 54-57[1] and Practice Book § [41-19][2] authorize a trial court to order a defendant to be tried jointly on charges arising separately. In deciding whether to sever informations joined for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that the denial of severance resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Citations omitted; internal quotation marks omitted.) *State* v. *Herring*, 210 Conn. 78, 94–95, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989).

As the majority recognizes, "'[when] evidence of one incident can be admitted at the trial of the other, separate trials would provide [a] defendant no significant benefit. It is clear that, under such circumstances, [a] defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial." (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, 281 Conn. 486, 520, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007).

As the majority also recognizes, this court recently has recognized an "exception to the prohibition on the admission of uncharged misconduct evidence in *sex crime* cases to prove that the defendant had a propen-

sity to engage in aberrant and compulsive criminal sexual behavior." (Emphasis in original.) *State* v. *DeJesus*, 288 Conn. 418, 470, 953 A.2d 45 (2008). Thus, the evidence in sex crime cases ordinarily will be cross admissible to establish propensity, subject to three important limitations. "First, evidence of uncharged sexual misconduct is admissible only if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged. Relevancy is established by satisfying the liberal standard pursuant to which evidence previously was admitted under the common scheme or plan exception. Accordingly, evidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the prosecuting witness. . . .

"Second, evidence of uncharged misconduct is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission. . . . In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity. . . .

"Lastly, to minimize the risk of undue prejudice to the defendant, the admission of evidence of uncharged sexual misconduct under the limited propensity exception adopted herein must be accompanied by an appropriate cautionary instruction to the jury." (Citations omitted; internal quotation marks omitted.) Id., 473–74.

Evidence of prior sexual misconduct may be excluded as unduly prejudicial "(1) where the facts offered may unduly arouse the jur[ors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it. . . . We note that [a]ll adverse evidence is [by definition] damaging to one's case, but [such evidence] is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . Such undue prejudice is not measured by the significance of the evidence which is relevant but by the impact of that which is extraneous. . . . Thus, evidence is excluded as unduly 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." (Citations omitted; internal quotation marks omitted.) *State* v. *James G.*, 268 Conn. 382, 398–99, 844 A.2d 810 (2004).

Finally, this court has held that the state is not required to prove that an alleged act of prior misconduct occurred before it may be admitted. See *State* v. *Aaron L.*, 272 Conn. 798, 822–23, 865 A.2d 1135 (2005). Rather, "the trial court neither weighs credibility nor makes a finding that the [g]overnment has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether *the jury* could reasonably find the conditional fact . . . by a preponderance of the evidence." (Emphasis in original; internal quotation marks omitted.) Id., 822; see also *State* v. *Cutler*, 293 Conn. 303, 322, 977 A.2d 209 (2009) (trial court properly instructed jury that it could consider evidence of uncharged misconduct if it found that evidence logically and rationally supported issue for which it was admitted and court was not required to instruct jury that state must prove that defendant committed uncharged misconduct by a preponderance of evidence).

Applying these principles to the facts of this case, the majority concludes that, "[a]lthough the defendant improperly touched the breasts of D and J during a purportedly legitimate examination, his conduct toward M was markedly different, far more egregious and could in no way be mistaken for a proper medical examination." I disagree. As a preliminary matter, I would point out that the majority appears to have conflated the question of whether the charged misconduct and the uncharged misconduct are similar, which goes to relevance, with the question of whether the uncharged misconduct was much more egregious than the charged conduct, which goes to prejudice. Specifically, the majority appears to have concluded that the defendant's misconduct toward M was dissimilar to his misconduct toward D and J for purposes showing propensity *because* it was more egregious. It is implicit in *DeJesus*, however, that misconduct evidence may be inadmissible because it is unduly prejudicial even though it is sufficiently similar to be probative on the issue of propensity. See *State* v. *DeJesus*, supra, 288 Conn. 473 ("evidence of uncharged sexual misconduct is admissible . . . if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged"); id. ("evidence of uncharged misconduct is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission" [internal quotation marks omitted]). Accordingly, it is necessary to analyze separately the issue of whether the charged misconduct and uncharged misconduct are sufficiently similar to be probative and the issue of whether the prior misconduct is so much more egregious than the charged mis-

conduct as to be unduly prejudicial. I would conclude that the misconduct toward M was similar to his misconduct toward D and J and that it was not so much more egregious as to be unduly prejudicial.

I first address the question of whether the defendant's conduct toward M was sufficiently similar to his conduct toward D and J to be admissible under *DeJesus*. As I have indicated, this court stated in that case that "evidence of uncharged sexual misconduct is admissible . . . if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged." Id. In my view, a reasonable juror could conclude that a person who engaged in the misconduct toward M had a propensity to touch the breasts of young, female patients for sexual gratification. Moreover, I disagree with the majority's conclusion that the victims were not similar because M was employed by "the defendant's medical group preceding the date of the alleged assault, whereas J and D had no relationship with him other than a physician-patient relationship." Again, under *DeJesus*, the state must establish that the victims are similar in order to raise an inference that the defendant has a propensity to engage in the type of conduct with which he is charged. Conversely, any dissimilarity between the victims is relevant only if it negates that inference. The fact that M, who, like D and J, was a young, female patient of the defendant's, also had a work relationship with the defendant does not negate the inference that the defendant had a propensity to grab the breasts of young, female patients.[3] Accordingly, I would conclude that the facts and circumstances of the case involving M were sufficiently similar to the facts and circumstances of the case involving D and J to be probative under *DeJesus*.

Accordingly, I turn to the question of whether the evidence of the defendant's misconduct toward M was so much more egregious than the evidence of his misconduct toward D and J that it was more prejudicial than probative. The majority appears to suggest that, even if the defendant *improperly* touched D's and J's breasts, that conduct was not nearly as egregious as the defendant's conduct toward M *because* his conduct toward D and J could have been mistaken for a proper medical examination. Contrary to the majority's suggestion, however, it is clear to me that the fact that D and J could have been mistaken or uncertain about the purpose of the defendant's manipulation of their breasts in no way excuses or ameliorates that conduct or renders it less offensive to the victims if it was, in fact, improper. Conversely, the fact that the defendant's conduct toward M could not be mistaken for a proper medical examination does not, in and of itself, make the conduct more egregious; it merely makes the conduct impossible to defend as a bona fide medical procedure.

For example, if the defendant had merely kissed M on the mouth, the fact that such conduct could not be mistaken for a bona fide medical procedure would not render it more egregious than his conduct toward D and J, assuming such conduct was improper. Accordingly, the majority's comment that the defendant's conduct toward M "could in no way be mistaken for a proper medical examination" is entirely irrelevant to a proper analysis of whether the conduct was more egregious.

Turning to the details of the defendant's misconduct toward M, I do not agree that the misconduct, objectively considered, was so much more egregious than the misconduct in the cases involving D or J that it would "unduly arouse the jur[ors'] emotions, hostility or sympathy . . . ." (Internal quotation marks omitted.) *State* v. *James G.*, supra, 268 Conn. 398. I see no qualitative difference between directing a patient to expose her chest and then grabbing her breasts under false pretenses and directing a patient to expose her chest and then grabbing and kissing her breasts under false pretenses, while making inappropriate comments. Rather, I would conclude that the difference in the defendant's conduct toward the three victims was a matter of degree, not of kind, and was not significant. See *State* v. *McKenzie-Adams*, supra, 281 Conn. 531 ("the fact that R.S. suffered less severe sexual misconduct than N.R. and P.L. does not illustrate a behavioral distinction of any significance" [internal quotation marks omitted]);[4] *State* v. *James G.*, supra, 388–89 (common scheme or plan testimony by witness admissible when defendant's early abuse of witness was similar to abuse of victim). I recognize that the admission of the evidence of misconduct toward M was undoubtedly damaging to the defendant in the cases involving D and J. Propensity evidence may be excluded as unduly prejudicial, however, only "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." (Emphasis added; internal quotation marks omitted.) *State* v. *James G.*, supra, 399. Thus, the evidence of the misconduct toward M was not inadmissible merely because it was extremely probative in the cases involving D and J, by tending to negate any uncertainty about the purpose of the defendant's conduct. Accordingly, I would conclude that the trial court did not abuse its broad discretion in consolidating the cases.

In support of its conclusion to the contrary, the majority relies heavily on this court's decision in *State* v. *Ellis*, 270 Conn. 337, 852 A.2d 676 (2004). In that case, the victim was charged with sexual misconduct in three cases involving Sarah S., Julia S. and Kristin C. Id., 339–41. In the cases involving Julia S. and Kristin C., the defendant had grabbed and fondled the victims' breasts. Id., 359–60. In the case involving Sarah S., the defendant had spoken to her about sexual matters;

asked her to have phone sex with him while telling her that he was masturbating; grabbed her breasts over her school uniform and attempted to touch her between the legs; and exposed himself to her, attempted to force her to touch his penis and to perform oral sex on him, and masturbated when she refused. Id., 347–48. At trial, the state introduced evidence of uncharged misconduct involving Sarah S. and a fourth victim, Kaitlyn M. Id., 359. The uncharged misconduct toward Sarah S. involved entering her room and masturbating next to her bed, touching her breasts under her shirt, penetrating her vagina digitally and attempting to climb on top of her in bed. Id., 348–49. The uncharged misconduct involving Kaitlyn M. involved making sexual comments, touching her leg and kissing her. Id., 360. All four victims were between the ages of thirteen and sixteen years old at the time that the defendant first engaged in sexual misconduct with them. See id., 344 (Julia S. was fourteen years old); id., 345 (Kristin C. was thirteen years old); id., 347 (Sarah S. was fourteen years old); id., 350 (Kaitlyn M. was fifteen or sixteen years old).

This court concluded that the trial court improperly had admitted evidence of the defendant's conduct toward Julia S., Kristin C., and Kaitlyn M. in the case involving Sarah S. because "although the defendant's abuse of Julia S., Kristin C. and Kaitlyn M. bore some similarities, it had very little in common with his abuse of Sarah S." Id., 360. In addition, because the defendant's relationship with Sarah S. differed in some respects from his relationship with the other victims, this court concluded that "it cannot be inferred logically that, if the defendant was guilty of the charged and uncharged offenses involving Julia S., Kristin C. and Kaitlyn M., he also must have been guilty of the charged offenses involving Sarah S." Id., 361.

This court then *rejected* the state's claims that "misconduct evidence offered in support of a common plan or scheme need only be similar to the charged misconduct for the logical inference to be made that, if the defendant is guilty of one, he must be guilty of the other"; id.; and that "the charged and uncharged misconduct do not have to be identical acts, but only similar enough to justify the conclusion that [the charged conduct] is at least a reasonable facsimile of the prior incident[s]." (Internal quotation marks omitted.) Id., 361–62. Instead, this court appears to have concluded that there must be "more similarities than dissimilarities between the uncharged misconduct [evidence and the charged conduct evidence]"; id., 362; and that the severity of the uncharged misconduct and the charged misconduct must be "not identical, [but] more or less equivalent." Id., 363.

To the extent that this court in *Ellis* rejected the state's claim that evidence of uncharged misconduct in sex cases is relevant if it raises the logical inference

that, if the defendant was guilty of one offense, he is guilty of the other, I disagree. Both before and after *Ellis*, our cases addressing the admissibility of evidence of uncharged misconduct in sex cases consistently have applied this standard. See *State* v. *DeJesus*, supra, 288 Conn. 473 (evidence of uncharged misconduct in sex cases is relevant if it tends "to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged"); see also *State* v. *Snelgrove*, 288 Conn. 742, 759, 954 A.2d 165 (2008) (same); *State* v. *McKenzie-Adams*, supra, 281 Conn. 522 (evidence of uncharged misconduct is relevant in sex case when "the marks which the uncharged and the charged offenses have in common [are] such that it may be logically inferred that if the defendant is guilty of one he must be guilty of the other" [internal quotation marks omitted]); *State* v. *Kulmac*, 230 Conn. 43, 61, 644 A.2d 887 (1994) (same); *State* v. *Esposito*, 192 Conn. 166, 172, 471 A.2d 949 (1984) (same); *State* v. *Hauck*, 172 Conn. 140, 147, 374 A.2d 150 (1976) (trial court did not abuse its discretion in admitting evidence of uncharged misconduct when evidence of uncharged offense would "justify the indication that the commission of one would tend to directly affect the principal crime" [internal quotation marks omitted]). Indeed, this is the standard that this court applied in *Ellis* before apparently rejecting it.

Moreover, it is entirely unclear to me what principles this court applied in *Ellis* to conclude that the defendant's misconduct toward Sarah S. was not sufficiently similar to his conduct toward the other victims for the evidence in the cases to be cross admissible. This court suggested that there must be "more similarities than dissimilarities"; *State* v. *Ellis*, supra, 270 Conn. 362; between the charged and uncharged misconduct and the severity of all of the alleged misconduct must be "more or less equivalent." Id., 363. This court did not explain, however, why the charged conduct and the uncharged misconduct must share similarities beyond those required to raise a reasonable inference that a person who engaged in the uncharged misconduct would probably engage in the charged misconduct or what standard the trial court should apply in determining whether the similarities are sufficient.[5] As I have indicated, this court consistently had held that the similarities need only be sufficient to raise such an inference, and I believe that standard was met in *Ellis*. In my view, a reasonable juror could conclude that a person who has grabbed the breasts of three teenaged girls while in the vicinity of other persons would have a propensity to engage in escalated sexual misconduct toward teenaged girls when there is a reduced risk of discovery.[6]

I next address this court's determination in *Ellis* that the trial court improperly had consolidated the three

cases involving Sarah S., Julia S. and Kristin C. "because the defendant's abuse of Sarah S. was substantially more egregious than his abuse of the other two girls. Consequently, joinder prevented the jury from an impartial consideration of the charges in the latter two cases." Id., 378. I recognize that the question of whether the defendant's misconduct toward Sarah S. was so much more egregious than his misconduct toward the other victims that joinder of the cases was prejudicial is a closer question than the question of whether the conduct was sufficiently similar to raise a reasonable inference that, because the defendant had engaged in the conduct toward Sarah S., he had engaged in the conduct toward the other victims. Assuming that this court correctly held in *Ellis* that the joinder of the cases was improper because the evidence of the defendant's misconduct toward Sarah S. was unduly prejudicial, however, the disparity between the charged conduct and the uncharged misconduct in the present case is, in my view, not nearly as great as the disparity in *Ellis*. In *Ellis*, "[t]he abuse of Sarah S. resulted in a ten count information that included one count of attempted sexual assault in the first degree. The abuse of Julia S. and Kristin C. resulted in a three count and four count information, respectively, neither of which included a charge of attempted sexual assault in the first degree." Id., 360. In the present matter, the defendant was charged with a single violation of General Statutes § 53a-73a (a) (5) in all three cases.[7] Accordingly, I do not believe that the consolidation of the cases was unduly prejudicial in the cases involving D and J because the misconduct involving M was more egregious.

The majority also suggests that the joinder of the cases was improper because "the jury may have cumulated the evidence from all of the cases to find the defendant guilty in J's and M's cases." (Internal quotation marks omitted.) Again, I disagree. There was nothing about the evidence in the three cases that was inherently confusing or that made it difficult for the jury to distinguish them. Moreover, the trial court instructed the jury that, to convict the defendant under § 53a-73a (a) (5), the state was required to prove beyond a reasonable doubt in each separate case that the defendant had intentionally engaged in sexual contact with the victims and had falsely represented that the sexual contact was for a bona fide medical procedure.[8] It also instructed the jury repeatedly that it was required to consider the merits of each case separately.[9] I believe that these instructions, the language of which the majority ignores, adequately informed the jury that it could not convict the defendant in one case solely on the basis of evidence presented in another case.

In support of its conclusion to the contrary, the majority quotes the portion of the Appellate Court's opinion stating that "[t]he insufficiency of the court's repeated

admonitions against cumulating the cases became obvious during the foreperson's reading of the verdict. When asked if the jury found the defendant guilty in the first case, the foreperson replied, 'guilty.' Next, the court clerk asked whether the jury had found the defendant guilty in the second case, and the foreperson replied, 'I am not sure I understand that. Are we separating the three girls?' " *State* v. *Gupta*, 105 Conn. App. 237, 249–50, 937 A.2d 746 (2008). It is apparent, however, that both the Appellate Court and the majority have misread the record. The court clerk first asked the jury whether it had found the defendant guilty in the case involving J with Docket No. CR-04-33225. The clerk then asked the jury whether, in the case involving D with Docket No. CR-04-34202, it had found the defendant guilty for the crime "for which he stands charged in the second *count*." (Emphasis added.) Because the information involving D had only one count, the foreperson's response, "[a]re we separating the three girls?" indicated that she was confused by the clerk's misstatement suggesting that either the information against D had two counts or that the crime involving D was the second count of the case involving J. The response did not indicate that she believed that the cases were not separate. Accordingly, there is nothing in the record to support the majority's conclusion that the jury was confused or that it ignored the trial courts forceful and repeated instructions that it must consider the three cases separately. I decline simply to assume that the jury ignored or disobeyed the court's instructions.

The majority also suggests that consolidation of the cases was improper because, unlike in the cases involving J and D, the defendant could not claim in the case involving M that the alleged misconduct was a bona fide medical procedure. Rather, the only defense that he was able to raise in the case involving M was that she had lied about his misconduct toward her. The majority has cited no authority, however, for the proposition that cases may not be consolidated for trial if the defendant has raised different defenses in the separate cases. As I have indicated, in determining whether evidence of uncharged misconduct is cross admissible, "the trial court neither weighs credibility nor makes a finding that the [g]overnment has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether *the jury* could reasonably find the conditional fact . . . by a preponderance of the evidence." (Emphasis in original; internal quotation marks omitted.) *State* v. *Aaron L.*, supra, 272 Conn. 822. Thus, if a jury reasonably could find that M had *not* lied, the evidence in that case would be cross admissible in the cases involving D and J. It is clear to me that the jury reasonably could have found that M was telling the truth. Indeed, the majority does not contend to the contrary. Accordingly, I would conclude that the defen-

dant has failed to meet his "heavy burden of showing that the denial of severance resulted in substantial injustice"; (internal quotation marks omitted) *State* v. *Herring*, supra, 210 Conn. 95; and that the trial court did not abuse its broad discretion in consolidating the cases.

Finally, even if I agreed with the majority that the trial court abused its discretion in consolidating the cases, I would conclude that any such error was harmless—an issue that the majority fails to consider. J testified at trial that the defendant was "kneading" and "massaging" her breasts with both hands during his examination of her and that he "always ran his thumbs over the top." She demonstrated his actions on a mannequin. M testified that the defendant was "groping" and "massaging" her breasts with both hands and also demonstrated his actions on the mannequin. The state's expert witness, Thomas Godar, a physician specializing in pulmonary medicine, testified that, in performing a routine pulmonary examination, it might be necessary to touch the patient's breasts with a stethoscope, but placing a hand on the breast would not be necessary. He also testified unequivocally that, if a patient presented with the symptoms and complaints of each of the victims, it would be unnecessary for a physician to manipulate the patient's breasts. He further testified that, after reviewing the medical records of the defendant's treatment of D and J, it was his opinion that neither patient required a breast examination. In addition, he testified that there is no standard medical procedure that requires a physician to massage both of the patient's breasts simultaneously with both hands. During cross-examination of the defendant's expert witness, Francoise Roux, a pulmonologist, the prosecutor demonstrated the massaging technique on the mannequin and, without any objection by the defendant, asked Roux if the technique constituted a normal pulmonary examination or a normal breast examination. Roux testified that it did not.

As the majority acknowledges, the defendant's defense in the case involving J was that she had "misinterpreted the defendant's legitimate examination," not that she had lied. Accordingly, I do not believe that the evidence in the case involving M could have prejudiced the jury in the case involving J. If the jury believed J's testimony—and she had no apparent motive to lie—there is no reasonable possibility that, if the evidence in the case involving M had not been before the jury, the jury would have acquitted the defendant in that case. The defendant's own expert witness admitted that the defendant's conduct, as described by J, did not constitute a bona fide medical procedure. In addition, even if the majority is correct that the evidence of the misconduct in the case involving J was significantly less egregious than the evidence of the misconduct in the case involving M, I cannot perceive how the cross admission of evidence of this similar but *less* serious

misconduct could have been unduly prejudicial in that case. Accordingly, I would conclude that the consolidation of the cases, even if improper, was harmless.

I next turn to the majority's conclusion that the trial court improperly excluded evidence of the videotapes demonstrating the proper technique for a pulmonary examination. I agree that the exclusion of the videotapes was improper, but I would conclude that it was harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the [impropriety] was harmful. . . . [A] nonconstitutional [impropriety] is harmless when an appellate court has a fair assurance that the [impropriety] did not substantially affect the verdict." (Citation omitted; internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 663, 969 A.2d 750 (2009).

As I have indicated, there was extremely strong evidence that the defendant's conduct toward the victims did not constitute a bona fide medical procedure. Indeed, the defendant's own expert witness admitted that the simultaneous massaging of both of a patient's breasts in the manner demonstrated by M and J was not a proper examination technique. Thus, the central issue in the cases involving M and J was the credibility of their testimony, not the credibility of Roux' testimony regarding the proper technique for a pulmonary examination, which the videotapes were intended to bolster.

Second, a thorough review of the videotapes reflects that virtually all of the relevant information in the videotapes was contained in the excerpts from the twelve treatises that were read into the record, which tended to corroborate Roux' testimony. Accordingly, although the videotapes were probative, their probative value was only incrementally significant because the evidence was cumulative. Accordingly, I believe that there is "a fair assurance that [the exclusion of the videotapes] did not substantially affect the verdict." (Internal quotation marks omitted.) Id.

I would conclude that the trial court did not abuse its broad discretion in consolidating the three cases for trial and that any impropriety in excluding the videotapes from evidence was harmless. Accordingly, I would reverse the judgment of the Appellate Court and remand the case to that court with direction to affirm the judgment of conviction.

[1] General Statutes § 54-57 provides: "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise."

[2] Practice Book § 41-19, formerly Practice Book § 829, provides: "The judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together."

[3] Later in this dissenting opinion, I address the majority's argument that M was different from D and J because the defendant claimed that M had a motive to lie about the defendant's conduct.

[4] In *McKenzie-Adams*, the defendant made sexual comments to a victim,

R.S., and hugged her in a sexual manner. See *State* v. *McKenzie-Adams*, supra, 281 Conn. 527–28. The defendant was not charged with this conduct. The defendant also engaged in extensive sexual activity with another victim, N.R., including kissing her, penetrating her vagina digitally and performing oral sex on her; id., 491–93; and with another victim, P.L., including penetrating her vagina digitally and having penile-vaginal sexual intercourse. Id., 493–96. This court concluded that evidence of the defendant's uncharged sexual misconduct with R.S. was admissible in the cases involving N.R. and P.L. to show common scheme and plan. Id., 532–33. In addition, this court concluded that the evidence in the cases involving N.R. and P.L. was cross admissible. See id., 527.

[5] This court in *Ellis*, like the majority in the present case, apparently confused the question of whether the uncharged misconduct and the charged misconduct were sufficiently similar to be probative on the question of propensity with the question of whether the defendant's misconduct with one of the victims was significantly more egregious, which goes to prejudice. As in *Ellis*, the standard adopted by the majority in the present case provides little guidance to our trial courts. The majority first acknowledges that the "similarities shared by the charged and the uncharged crimes need not be so unusual and distinctive as to be like a signature"; (internal quotation marks omitted); and then concludes that they need only "be sufficiently similar." The majority provides no guidance, however, as to how the trial court should determine what degree of similarity is sufficient or for what purpose it must be sufficient.

[6] The abuse of Julia S., Kristin C. and Kaitlyn M. "occurred in the vicinity of other persons"; *State* v. *Ellis*, supra, 270 Conn. 359; while the abuse of Sarah S. "occurred inside her home or in the bedroom of her Florida residence . . . when no other person was present to observe the defendant's behavior." Id.

[7] In the case involving M, the defendant also was charged with sexual assault in the fourth degree under § 53a-73a (a) (2). That charge, however, was a charge in the alternative, in the event that the jury determined that the defendant had not made a false representation that the sexual contact was for a bona fide medical purpose. It was not an additional or more serious charge.

[8] The trial court instructed the jury that the state "must prove each element of the offense charge[d] beyond a reasonable doubt before you return a guilty verdict on a charge. The fact that there are three separate informations here does not mean that the state has a lesser standard or a lesser burden of proof with respect to any of the four charges contained in the three informations."

[9] The trial court instructed the jury that it "must infer nothing from [the consolidation of the cases]. It is essentially for the purpose of judicial efficiency and nothing more. It is of the utmost importance that you keep each alleged incident separate and distinct from one another. You must keep them separate in your evaluation of the facts and separate in your minds, and the determination of your verdict. You must not mix the evidence of one incident with the evidence of another."

The trial court further instructed the jury that "[t]he prosecution's case is not improved or any stronger because there are cases that are tried together in one trial as this one. To judge how good a prosecutor's case is by the number of incidents that are claimed without analyzing each incident separately is not in accord with our system of government.

"This court is mindful of the natural tendency to conclude that a person must be guilty of one or more of the consolidated matters because there are so many. One or more of you think that the total overall effect of each offense may indicate that [the defendant] is guilty as to some or all of the offenses. And if you think this way you have merged the offense[s] and you have fallen prey to exactly what you must not do. You must render a verdict of guilty or not guilty on each of the four counts separately."