STATE OF CONNECTICUT *v.* ARNOLD DEVALDA
(SC 18278)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.*

Argued February 7—officially released September 25, 2012

Neal Cone, senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Arnold Devalda, appeals[1] from the judgment of the trial court, rendered after a jury trial, convicting him of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1),[2] kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A),[3] and, after a trial to the court, convicting him of violation of probation in violation of General Statutes § 53a-32. On appeal, the defendant claims, inter alia, that the trial court improperly: (1) omitted limiting language in instructing the jury that the phrase " 'without consent,' " as defined by General Statutes § 53a-91 (1),[4] includes "any means whatsoever, including acquiescence of the victim," for purposes of the restraint element of § 53a-92 (a) (2); and (2) precluded the defendant from questioning the victim about certain comments that she had made in the self-description portion of her MySpace social networking website. We agree with the defendant's instructional claim with respect to his kidnapping conviction, and accordingly, reverse the judgment of the trial court in part.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On October 22, 2006, the twenty-three year old victim[5] attended a party at the Park Place Café (nightclub) in Stamford with her sister, L, and two other friends, in order to see an appearance by the rapper known as Jadakiss. Prior to arriving at the nightclub at approximately 11:45 p.m., the victim and L shared a quart of Hennessy cognac. Due to crowded conditions in the nightclub, there was a very long line outside and they could not get inside until after midnight. Once inside the nightclub, the victim had a few more alcoholic drinks, including Hennessy taken both straight and mixed with Hypnotiq, which is another liquor. By the time the party ended at 2 a.m., the victim was intoxicated,[6] unsteady on her feet and had difficulty speaking.

After the party ended, a disturbance broke out when members of the crowd started pushing and shoving each other while exiting the nightclub. The defendant approached the victim in the crowd and tried to start a conversation with her about whom she was with and where she was going after the party. By this time, however, the victim was "too drunk to talk" to the defendant, whom she had never met before. The defendant nevertheless tried to persuade the victim, L, and their friends to join him for something to eat.

Once outside the nightclub, one of the victim's friends left with her boyfriend, but L and others remained there with the victim, who by that time had to lean against a wall in order to stay upright. At that point, another major disturbance broke out, and police officers attempted to quell the melee by restraining and pepper

spraying members of the postparty crowd. During the tumult, the defendant put his arm around the victim and guided her into his car, separating her from L and her friends. The defendant then refused the victim's request to be let out of the car in order to meet L, who was calling the victim on her cell phone. Instead, the defendant drove through local streets in Stamford, punched the victim when she tried to open the door to exit the car, and increased his speed as he entered Interstate 95 heading northbound.

The victim, who was drifting in and out of consciousness during the car ride, awoke to see that she was heading northbound on Interstate 95 between exits 17 and 18. The victim then asked the defendant to take her back to Stamford, but he refused and told her to "shut up" when she started crying. The defendant then hit the victim several times in the face whenever she cried or screamed, causing her to sustain numerous facial bruises. The defendant exited the highway and stopped the car by the entrance to Sherwood Island State Park (park), where they spent the remainder of the night in the car. While in the car outside the park, the defendant climbed on top of the victim, forced her legs apart, and sexually assaulted her vaginally, ignoring her pleas to take her home.[7]

After sunrise, the defendant exited the car, pulled up his pants, returned the victim's underwear to her, and drove back through Westport onto Interstate 95 heading southbound. The defendant also returned the victim's cell phone, which he had taken from her, so she could try to locate L. The defendant then drove back toward Stamford on Interstate 95, at one point pulling over at a highway rest stop in order to assist the victim in finding an earring that she had lost in his car. Although the victim, upon reaching L by telephone, asked the defendant to bring her to meet L at the Super 8 Motel in Stamford, he refused to bring her there directly, instead dropping her off at a Shell gas station nearby. Before the victim exited the defendant's car, the defendant asked for her telephone number, which she refused to provide.

Although the victim was still distraught, she obtained the license plate number from the defendant's car.[8] She then met L and M, L's boyfriend, at the hotel. The police, who had been summoned by the hotel clerk, arrived shortly thereafter. An ambulance then took the victim, who remained distraught and had difficulty speaking to the police, to Stamford Hospital, where she was treated for cuts and bruises and underwent a sexual assault medical examination.[9] After the state police arrested the defendant, the victim identified him as her assailant.

The state subsequently charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), kidnapping in the first degree in violation

of § 53a-92 (a) (2) (A), and violation of probation by engaging in criminal conduct in violation of § 53a-32 (a). The sexual assault and kidnapping charges were tried to a jury, which returned a verdict finding him guilty of kidnapping on those charges.[10] The trial court, *Pavia*, *J.*, then found, following a court trial, that the defendant had violated his probation. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced him to a total effective sentence of twenty-nine years imprisonment, execution suspended after seventeen years, and twenty-five years of probation.[11] This appeal followed.

On appeal, the defendant contends that we should vacate the kidnapping conviction as a result of two problems with the jury instruction on that count, namely, that the trial court: (1) failed to instruct the jury, in accordance with *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008); and (2) improperly defined the phrase "without consent" as including "[by] any means [whatsoever], including [the] acquiescence of the victim," without including relevant limiting language set forth in § 53a-91 (1). The defendant also contends, with respect to both the underlying criminal charges and the violation of probation charge, that the trial court violated his constitutional right of confrontation when it improperly restricted his cross-examination as to the victim's credibility by precluding him from questioning her about her self-description on her MySpace page, namely, "I do whatever it takes to get what I want or need on my own." (Internal quotation marks omitted.) We address each claim in turn, setting forth additional facts and procedural history where necessary.

I

We begin with the defendant's instructional claims. In his dispositive instructional claim, the defendant argues that, in defining the term "restrain," the trial court improperly instructed the jury that, under § 53a-91 (1), "without consent means but is not limited to deception and any means whatsoever *including acquiescence of the victim*." (Emphasis added.) Seeking review of this unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), the defendant contends that the trial court improperly omitted statutory language limiting the applicability of restraint via "acquiescence of the victim" only to those victims who are "child[ren] less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement." General Statutes § 53a-91 (1) (B). In response, the state concedes that this omission was a misstatement of the law, but contends that it was harmless error not requiring a new trial because the challenged instruction was superfluous to the issues in this case, inasmuch as there

was no claim that the victim had acquiesced to remaining in the defendant's car. We agree with the defendant and conclude that it is reasonably possible that the improper instruction misled the jury, thus requiring a new trial on the kidnapping charge.[12]

The record reveals the following additional relevant facts and procedural history. After giving preliminary instructions and reading the substitute information to the jury, the trial court charged in relevant part: "The defendant is charged with the crime of kidnapping in the first degree in violation of [§ 53a-92 (a) (2) (A)] of the Penal Code [which] provides as follows:

"A person is guilty of kidnapping in the first degree when he abducts another person and he restrains the person abducted with intent to inflict physical injury upon such person or violate or abuse that person sexually.

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: That the defendant abducted the complaining witness; the defendant unlawfully restrained that person he abducted; and that he did so with the intent to inflict physical injury on the complaining witness or abuse that person sexually.

"So, (1) that the defendant abducted a particular person . . . (2) that the defendant unlawfully restrained the person he abducted and (3) that he did so with the intent to inflict physical injury on that person or violate or abuse that person sexually.

"The term abduct means to restrain a person with intent to prevent his or her liberation by either secreting or holding that person in a place where he/she is not likely to be found, or by (b) using or threatening to use physical force or intimidation.

"If the abduction is established by proof of hiding or secreting, there need be no specific proof of the use of force, but merely proof that the defendant effectively secreted the . . . victim or left that person in a place that he or she was not likely to be found.

"Abduction need not be proven by establishing the use of force, if the proof establishes that the defendant threatened its use in such manner that the victim reasonably believed force would be applied to him or her if he sought to escape or to thwart the abductor's intention.

"The term restrain means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his or her liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place in which he or she has been moved, without consent.

"As used herein, without consent means but is not

limited to (1) deception and (2) any means whatsoever, *including acquiescence of the victim.*

"Physical injury means impairment of physical condition or pain.

"To violate or abuse the victim sexually has no technical meaning, and you are to attach to these terms an ordinary common meaning. . . .

"You are to attach [to] these terms an ordinary, common meaning. It is not necessary that actual physical injury, sexual violation or abuse be proven, as long as you determine that the defendant intended to inflict the same, and abducted and restrained the victim with such intent."[13] (Emphasis added.) The defendant did not preserve his instructional claims through the use of a request to charge or a postinstruction exception.[14]

"It is undisputed that this claim is unpreserved for appellate review and, therefore, unreviewable unless the defendant is entitled to review under the plain error doctrine or the rule set forth in *State* v. *Golding*, [supra, 213 Conn. 239–40]. . . . A party is obligated . . . affirmatively to request review under these doctrines. . . . Under *Golding*, however, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 595–96, 10 A.3d 1005, cert. denied, U.S. , 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). In the present case, the state does not dispute that the record is adequate for review, that the instructional claim is of constitutional magnitude or that the instruction was improper. Instead, the state argues only that the improper instruction was harmless error.[15]

"We begin with the well established standard of review governing the defendant's challenge to the trial court's jury instruction. Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored,

a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 454–55, 10 A.3d 942 (2011). "[T]he test for determining whether a constitutional [impropriety] is harmless . . . is whether it appears beyond a reasonable doubt that the [impropriety] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 463, 978 A.2d 1089 (2009), quoting *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

We conclude that it is reasonably possible that the trial court's concededly improper instruction misled the jury, thus requiring a new trial on the kidnapping charge. Legal improprieties in jury instructions, even those that pertain to elements of offenses, may well be harmless error if they do not pertain to "critical factual issues" in the case as demonstrated by the evidence and highlighted by the parties' closing arguments, thereby indicating beyond a reasonable doubt that the jury was not misled. See *State* v. *Ebron*, 292 Conn. 656, 689–91, 975 A.2d 17 (2009) (concluding that improper instruction on retreat doctrine vis-à-vis third persons was harmless error when "critical factual issue in the . . . case focused on the reasonableness of the defendant's perception of a threat from the victim" and "[r]etreat was not a significant factual issue in this case, and any instructional omission thereon did not operate to mislead the jury"), overruled on other grounds by *State* v. *Kitchens*, supra, 299 Conn. 447, 472–73; see also, e.g., *State* v. *Campbell*, 225 Conn. 650, 660–61, 626 A.2d 287 (1993) (trial court's improper instruction directing jurors to determine whether defendant was drug-dependent was harmless error because there was no evidence of drug dependency). The nature of the impropriety in the instruction, however, coupled with the fact that the defense theory was that the victim's allegations were fabrications occasioned by regret over having been unfaithful to her boyfriend in order to have an entirely consensual sexual encounter with the defendant, require the reversal of the defendant's kidnapping conviction because we cannot find beyond a reasonable doubt that the jury was not misled by the improper instruction.

Specifically, the trial court charged the jury that it could find the essential element of restraint proven if it found that the victim "acquiesced" to being moved or confined by the defendant, but that court omitted the clear language of § 53a-91 (1) (B), which permits restraint to occur by acquiescence of a victim *only* when that victim "is a child less than sixteen years old or an incompetent person"—categories that it is undisputed are *not* applicable to the victim in the present case. See *State* v. *Benjamin*, 86 Conn. App. 344, 354–55, 861 A.2d 524 (2004) (concluding in unlawful restraint case that " 'any means whatsoever' language contained in § 53a-91 (1) (B) was [intended] to protect young children and incompetent persons from being kidnapped when the victim agrees to go with the kidnapper because of promises of favors or gifts" and "should not be given in an instruction when . . . the victim is a competent adult"); see also id., 355 ("[a] competent adult's actual consent to the restraint would negate lack of consent if not induced by deception, force, fear or shock; in other words, with no compulsion or deception"). Given that the theme of the defense was that the encounter was consensual and the allegations fabricated[16]—a defense advanced by attacking the victim's credibility through a lengthy and vigorous cross-examination; see footnotes 28 and 29 of this opinion and the accompanying text—the incomplete and improper introduction of the concept of acquiescence could only serve to confuse the jury, particularly because the term acquiescence was otherwise undefined by the trial court, and commonly is understood[17] to be a *form of consent* typified by passivity or lack of protest, rather than active agreement. See, e.g., Merriam-Webster Collegiate Dictionary (10th Ed. 2001) (defining "acquiesce" as "to accept, comply or submit tacitly or passively"); see also *State* v. *Benjamin*, supra, 354–55. Put differently, the linguistic similarity between consent and acquiescence magnifies the instructional impropriety, because, as the defendant points out, a successful consent defense correlatively would have the effect of proving restraint by acquiescence.

Viewed in the particular factual context of this case, the trial court's instruction improperly permitted the jury to find the restraint element satisfied and convict the defendant of kidnapping, contrary to the requirements of the kidnapping statutes, if it found that the victim accompanied him in his vehicle passively or silently—a condition that the jury readily could have found satisfied given the ample evidence of the victim's heavily intoxicated state that night. Furthermore, the jury reasonably might have inferred that the victim simply had acquiesced to being with the defendant prior to the sexual assault from evidence showing that, following the sexual assault, she had several opportunities, such as at the highway rest stop, to escape or to seek assistance from third parties, but nevertheless chose

to remain with him in the car for the remainder of the ride back to Stamford. Indeed, the harm from the improperly included and incomplete acquiescence instruction is illustrated by defense counsel's summation, when, in emphasizing this fact in support of his argument that the encounter was consensual, asking rhetorically, "[a]re you going to strap yourself in with your captor," he essentially was forced into the untenable position of conceding restraint by acquiescence, while trying to advance his consent defense.[18] Cf. *State* v. *Benjamin*, supra, 86 Conn. App. 355–56 (improper inclusion of "any means whatsoever" language in jury charge was harmless error under fourth prong of *Golding* when "[e]vidence of the victims' lack of consent to restraint was overwhelming and undisputed" and defendant did *not* claim consent, "but instead argued that he was not the perpetrator of these crimes").

Consistent with the parties' arguments and the evidence introduced at trial, the jury recognized consent, and various permutations thereof, as being a significant issue in a close case. "We have recognized that a request by a jury may be a significant indicator of their concern about evidence and issues important to their resolution of the case." *State* v. *Carter*, 232 Conn. 537, 549, 656 A.2d 657 (1995); see also, e.g., *State* v. *Miguel C.*, 305 Conn. 562, 577–78, A.3d (2012). Thus, it is significant that, after deliberating for some time, the jury sent a note to the trial court asking whether it could have "a copy of the laws and definitions," a request which that court denied. Thereafter, the jury asked the court to "reread the definitions of the laws" of sexual assault and kidnapping, a request that the trial court honored by repeating the instruction, including the improper omissions, verbatim. Finally, with respect to the factual issues in the case, the trial court subsequently granted the jury's request for playback of the victim's testimony "describing the period of time when she left the club until she describes seeing exit 17 [off Interstate 95 north]." These requests that indicate that the jury deemed critical the factual issues and governing legal standards with respect to the crucial period, for purposes of the kidnapping charge, of the earliest portions of the encounter between the victim and the defendant. Accordingly, we conclude that it is reasonably possible that the trial court's improper instruction had the effect of misleading the jury, and that a new trial is, therefore, required on the kidnapping charge.

II

We next address the defendant's claim that the trial court improperly precluded him from questioning the victim about her self-description on the profile portion of her MySpace social networking web page,[19] namely, that "I do whatever it takes to get what I want or need on my own" (MySpace statement). The defendant contends that this evidentiary ruling: (1) violated his federal

and state constitutional rights to confrontation[20] by preventing him from cross-examining the victim regarding her self-assessment of her own reputation for truthfulness; and (2) improperly failed to consider the MySpace statement as opinion evidence of the victim's character for truthfulness admissible under § 6-6 (a) of the Connecticut Code of Evidence.[21] In response, the state contends that the defendant's confrontation rights were not violated because the defendant had ample opportunity to expose the jury to facts, besides the MySpace statement, from which it could assess the victim's credibility, including her motive to cooperate with the state in this case in light of pending criminal charges against her that exposed her both to incarceration and the losses of her subsidized home and custody of her child. The state also contends that the defendant's character evidence claim is unpreserved and unreviewable, and that the trial court properly excluded the victim's MySpace statement because it was vague, lacked a connection to this case and reasonably could have been viewed as a statement of independence, rather than untruthfulness. We agree with the state and conclude that the defendant's evidentiary claims are unpreserved and that the trial court did not violate his confrontation clause rights by precluding him from questioning the victim concerning the MySpace statement.

The record reveals the following additional relevant facts and procedural history. During an offer of proof outside the presence of the jury, the defendant cross-examined the victim about her response to the trauma of having been sexually assaulted, and her assertion on direct examination that, as a result, she had changed her behavior of getting intoxicated in bars and nightclubs, and had not gone out to clubs for one year after the assault. The victim then qualified her testimony, acknowledging that she had gone out to nightclubs on New Year's Eve and on January 20, 2007, approximately three months after the assault, to celebrate her birthday. The victim admitted that photographs of her dressed and posed provocatively had been taken on those nights and publicized on her MySpace page, in addition to some from the evening that she was sexually assaulted. Because the cross-examination started at the end of the trial day and was to continue into the next day, the trial court ordered the victim not to alter or change, or permit anyone else to alter or change, the contents of her MySpace page.

The next day of trial, the trial court considered the admissibility of photographs from the victim's MySpace page, including photographs taken of her drinking alcohol at the nightclub on the night of the assault and on her birthday several months later.[22] The defendant then stated his intention to question the victim about the MySpace statement, namely, "I do whatever it takes to get what I want or need on my own." The defendant posited that this statement was relevant to the benefits

that the victim was receiving by cooperating with the state in this case, due to the fact that she faced criminal charges that could result in incarceration, losing her subsidized housing benefits, and the placement of her child with the department of children and families (department), observing that "those are all important factors as to why she wanted to be cooperative with the state so she'll do what she wants to get what she wants and needs on her own." In response, the prosecutor argued that the evidence from the victim's MySpace page was more "unfairly prejudicial" than probative of her credibility because there was no evidence that the conduct captured in the photographs was inconsistent with having been sexually assaulted.

The trial court then ruled that the defendant could question the victim on cross-examination about whether she has a MySpace page and whether she attempted to preserve therein images from the night of the sexual assault, as well as about the content of those images.[23] The court also concluded, however, that the victim's statement about "do[ing] whatever it takes" was not probative with respect to the details of the case and, further, was speculative with respect to the victim's honesty, and therefore, that the defendant could not question her about it.[24] See also footnote 25 of this opinion.

"We begin by setting forth the following legal principles that guide our analysis of the defendant's claims. The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

"Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest; proof of the main facts is a matter of right, but the extent of the proof of details lies in the court's discretion. . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitu-

tional requirements [of the confrontation clause] of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"[T]he confrontation clause does not [however] suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Rather, [a] defendant is . . . bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the [federal] constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . To the contrary, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right to confrontation is not affected, and the evidence was properly excluded." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 8–10, 1 A.3d 76 (2010); see also, e.g., *State* v. *Franko*, 199 Conn. 481, 488, 508 A.2d 22 (1986) ("[s]ince the defendant failed to establish that the testimony he sought to elicit was relevant to a material issue in the case, he cannot complain that his constitutional rights were violated when that testimony was excluded").

Moreover, "[w]e first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . ." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011).

We begin by noting that we agree with the state that the nonconstitutional basis for the defendant's claim on appeal, namely, that the MySpace statement is admissible under § 6-6 (a) of the Connecticut Code of Evidence as the victim's opinion of her own veracity, is unpreserved. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to

apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Johnson*, 289 Conn. 437, 460–61, 958 A.2d 713 (2008), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012).

Although the admissibility of the MySpace statement was argued before the trial court, the defendant never claimed that the MySpace statement was character opinion testimony admissible under § 6-6 (a) of the Connecticut Code of Evidence. Rather, the defendant contended that the MySpace statement evinced the victim's bias and motivation to lie on the stand in this case in order to curry favor with state prosecutors in the criminal charges she had pending against her, and the trial court's ruling was confined to whether the statement was indicative of that motivation, not once addressing whether it was in substance opinion testimony.[25] Thus, we conclude that this particular evidentiary claim is unpreserved and decline to review it on appeal. See, e.g., *State* v. *Johnson*, supra, 289 Conn. 461–62 (declining to review defendant's appellate claim that expert testimony "encompassed an ultimate issue of fact and that it, therefore, was inadmissible under § 7-3 of the Connecticut Code of Evidence" because, although admissibility of testimony was raised in trial court, that ground was not); *State* v. *Simpson*, 286 Conn. 634, 647, 945 A.2d 449 (2008) (declining to review under claim made pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 [1986], concerning reliability of victim's statements because "defendant's objections at trial, while well argued, were confined solely to whether [her] trial testimony was inconsistent with her videotaped statement").

Accordingly, we now turn to the defendant's more generalized confrontation clause challenge to the trial court's restriction on the scope of his cross-examination of the victim, which the state concedes was preserved by the defendant's arguments before the trial court. Even if we assume, without deciding,[26] that the MySpace statement was relevant and not speculative[27] with respect to the victim's credibility and veracity, the trial court's ruling did not deprive the defendant of his right to conduct a thorough and effective cross-examination of the victim. Specifically, the defendant's lengthy cross-

examination of the victim comprehensively explored topics including: (1) perception issues created in part by the victim's drug use and intoxication;[28] (2) inconsistencies between her trial testimony and statements to the police, particularly with respect to the location of the sexual assault; (3) the veracity of the victim's statement that she was so traumatized by her sexual assault that she did not go out for one year afterward, confronting her with the existence of photographs taken at a nightclub on her birthday several months afterward, as well as the fact that she published photographs from the night of the assault on her MySpace page; and (4) the victim's motivation to lie in this trial in order to curry favor with the state on her pending criminal charges, which exposed her to incarceration and the losses of her subsidized public housing[29] and the custody of her child.

Thus, "defense counsel [was] permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness," and "the defendant [was] afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony."[30] (Internal quotation marks omitted.) *State* v. *Erickson*, 297 Conn. 164, 189, 997 A.2d 480 (2010); see also, e.g., *State* v. *Osimanti*, 299 Conn. 1, 15–17, 6 A.3d 790 (2010) (exclusion of homicide victim's conviction of violating protective order and limitation on cross-examination of victim's girlfriend did not violate defendant's "constitutional right to present his claim of self-defense and, specifically, to support it with evidence of the victim's violent character, as the defendant was able to introduce evidence to that effect in the form of the victim's lengthy criminal record and gang affiliations"); *State* v. *Erickson*, supra, 190–91 (defendant not deprived of meaningful opportunity to cross-examine state marshal by preclusion of questioning about misappropriation complaints and whether marshal "had a financial stake in the outcome of the case" because "the court subsequently allowed the defense to cross-examine [the marshal] as to whether he was considering a civil action against the defendant [and had received legal advice to that effect], which provided the jury with more than sufficient information on which to conclude that [the marshal] had a motive to testify falsely in the criminal trial"); cf. *State* v. *Franko*, supra, 199 Conn. 487 (observing contention that "trial court unduly restricted [the defendant's] overall cross-examination of the victim" would be rendered "untenable" by "the length and scope of the defendant's actual cross-examination"). We therefore conclude that the trial court's ruling precluding the defendant from questioning the victim regarding the MySpace statement did not deprive him of his constitutional right to confrontation.[31]

The judgment is reversed only as to the defendant's

conviction on the kidnapping charge and the case is remanded for a new trial on that charge; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

* The listing of the justices reflects their seniority status on this court as of the date of oral argument.

[1] The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3).

[2] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ."

[3] General Statutes § 53a-92 (a) provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually . . . ."

[4] General Statutes § 53a-91 (1) provides: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. As used herein 'without consent' means, but is not limited to, (A) deception and (B) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement."

[5] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[6] The victim testified that she did not take any other recreational drugs that evening, but had smoked phencyclidine, commonly referred to as PCP, four days before because she was feeling stressed about a pending criminal court appearance for marijuana possession.

[7] DNA analysis performed by the state forensic science laboratory on samples obtained from the victim's underwear and body, indicated that the victim and the defendant were contributors to the DNA profiles obtained from those mixtures. Carl Ladd, the supervisor of the laboratory, acknowledged on cross-examination, however, that these samples could have been the product of consensual sexual activity.

[8] The victim subsequently gave the police a license plate number that was assigned to a Toyota Avalon kept in Norwalk, and registered to the defendant's girlfriend. Although the victim had described the car as having a round shape like a Nissan Murano, the car that was located was a Toyota Avalon that was otherwise consistent with the description provided by the victim, having large wheel rims and a bronze exterior with a gray leather interior.

[9] Specifically, the victim sustained bruises to her right eye, face, arm, neck and right inner thigh adjacent to her vagina. The physical and sexual assault examinations did not reveal signs inconsistent with consensual sexual intercourse. Stephanie Fletcher, a sexual assault nurse examiner, testified, however, that the lack of physical injury is not inconsistent with sexual assault because many victims do not sustain injuries. The victim also tested positive for PCP; see footnote 6 of this opinion; but did not appear at the time of the examination to be under the influence of that drug.

[10] At the conclusion of the state's case, the trial court denied the defendant's motion for a judgment of acquittal based on insufficient evidence of jurisdiction within the state, and also insufficient evidence as to the counts charged.

[11] The trial court sentenced the defendant to twenty years of imprisonment, execution suspended after thirteen years, with twenty-five years of probation on count one charging sexual assault, and twenty-five years of imprisonment, execution suspended after thirteen years, with five years of probation on count two charging kidnapping, to run concurrently with count one, and four years imprisonment on the violation of probation count, to run consecutively to the sentences ordered on the first two counts. As special conditions of probation, the trial court ordered: (1) lifetime sexual offender registration; (2) no contact with the victim; (3) drug evaluation and treatment; (4) sexual

offender evaluation, testing and treatment; (5) psychological evaluation, testing and treatment; and (6) a standing criminal restraining order.

[12] Because we do not deem it likely to arise on retrial, we need not reach the defendant's first instructional claim, namely, that the trial court improperly failed to instruct the jury in accordance with *State* v. *Salamon*, supra, 287 Conn. 509, because the jury reasonably could have found that the alleged restraint of the victim was inherent in or incidental to the sexual assault, and that the evidence did not permit a finding that the kidnapping had occurred after the completion of the sexual assault.

[13] This instruction subsequently was reread to the jury upon its request during deliberations. Following that reading, the defendant did not object to any of the trial court's explanations of the law, but expressed his concern with the trial court's use of the word "victim" in parts rather than "complainant." The defendant declined, however, the trial court's offer of a curative instruction on that point.

[14] The trial court held a charging conference with counsel in chambers and put the content thereof on the record prior to the parties' summations, noting that the state had filed two formal requests to charge pertaining to the victim's credibility and the defendant's consciousness of guilt, and the defendant had not filed any formal requests. At that time, the defendant expressed no objections to the trial court's proposed charge relevant to this appeal.

[15] In a supplemental authorities letter; see Practice Book § 67-10; and at oral argument before this court, the state relies on *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and contends that the defendant cannot prevail with respect to this unpreserved claim under the third prong of *State* v. *Golding*, supra, 213 Conn. 239–40, because he waived it at trial. In *Kitchens*, which was released after the state filed its brief in this appeal, we concluded that, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." *State* v. *Kitchens*, supra, 482–83. Because the record in the present case surrounding the discussion of the charging conference does not indicate when or whether the defendant received a written copy of the proposed jury instructions, we decline to conclude that this instructional claim was implicitly waived at trial under *Kitchens*. See *State* v. *Collins*, supra, 299 Conn. 597–98 (This court declined to find a claim waived under *Kitchens* when "there is no indication on the record that the trial court provided the defendant with an advance copy of the proposed jury charge. Thus, although the trial court's summary of the conference indicates that one of the topics discussed—namely, closing arguments about the quality of the police investigation—related to the topic of the instructions now challenged on appeal, we cannot say with certainty whether the defendant had a meaningful opportunity to review the written instruction itself and to challenge any objectionable language therein."); cf. *State* v. *Akande*, 299 Conn. 551, 561–62, 11 A.3d 140 (2011) (claim waived under *Kitchens* when "trial court provided defense counsel with a verbatim copy of the proposed supplemental instruction that the defendant now challenges, and a chance to review that copy overnight").

[16] Indeed, consent of the victim was the only plausible defense to the charges against the defendant, who conceded that DNA evidence proved that he had engaged in sexual intercourse with the victim.

[17] "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . ." General Statutes § 1-1 (a).

[18] Thus, we disagree with the state's contention that the improper instruction was harmless error not requiring a new trial because the challenged instruction was superfluous to the issues in this case, inasmuch as there was no claim that the victim had acquiesced to remaining in the defendant's car, and the jury simply "was called upon to decide whether or not to believe the victim's testimony that the defendant restrained her forcibly and without her consent." This argument does not address the subtle linguistic relationship between consent and acquiescence that very likely could have been confusing for the jury, particularly given the fact that evidence of restraint by force was not overwhelming, given: (1) the relatively minor nature of

the victim's injuries; (2) the proffering of the melee outside the club as an alternate cause for those injuries; (3) the lack of witnesses to the kidnapping and assault; and (4) the victim's extreme intoxication, including PCP use, which contributed to numerous lapses in her memory and potentially caused hallucinations. Cf. *State* v. *Tucker*, 226 Conn. 618, 624–25, 629 A.2d 1067 (1993) (An assumed instructional error with respect to the consent element was harmless beyond a reasonable doubt because consent was not part of the defense at trial and "[e]vidence of the victim's lack of consent to the abduction was overwhelming and undisputed. The jury heard testimony that: (1) the perpetrator was not known to the victim; (2) the victim had cried out 'blood curdling' screams of 'Help me,' 'Don't do it to me' and 'Why are you doing it to me'; (3) the victim had attempted to escape from the perpetrator by kicking, fighting and screaming; (4) the perpetrator had severely beaten the victim; and (5) [a police officer] saw the perpetrator standing over the traumatized, injured victim, thereby limiting the victim's liberty to move."); *State* v. *Benjamin*, supra, 86 Conn. App. 355–56 (describing evidence of lack of consent as "overwhelming and undisputed" when it included drag marks, victims strangled into unconsciousness and other serious injuries during sexual assault).

Further, we note that the state did not argue at trial, and properly does not contend on appeal, that the jury's finding that the defendant restrained the victim while sexually assaulting her, which is implicit in the defendant's conviction for sexual assault in the first degree, by itself can provide an independent factual basis for a kidnapping conviction. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 546–48.

[19] "MySpace is a social networking website where members can create profiles and interact with other members. Anyone with Internet access can go onto the MySpace website and view content which is open to the general public such as a music area, video section, and members' profiles which are not set as private. However, to create a profile, upload and display photographs, communicate with persons on the site, write blogs, and/or utilize other services or applications on the MySpace website, one must be a member. Anyone can become a member of MySpace at no charge so long as they meet a minimum age requirement and register." (Internal quotation marks omitted.) *Griffin* v. *State*, 419 Md. 343, 346 n.2, 19 A.3d 415 (2011). "To establish a 'profile,' a user needs only a valid email account. . . . Generally, a user creates a profile by filling out a series of virtual forms eliciting a broad range of personal data, culminating in a multimedia collage that serves as one's digital 'face' in cyberspace." (Citation omitted.) Id., 346 n.3.

[20] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Our analysis is confined to the "the defendant's claim under the federal constitution. Although the defendant also attempts to claim that his rights to confrontation and to present a defense were violated under the state constitution; see Conn. Const., art. I, § 8; he has not adequately briefed this claim, instead relying almost solely on federal precedent or Connecticut precedent analyzing the federal constitutional rights. We will not review inadequately briefed state constitutional claims and, therefore, decline to address this aspect of the defendant's claim." *State* v. *Crespo*, 303 Conn. 589, 610 n.16, 35 A.3d 243 (2012).

[21] Section 6-6 (a) of the Connecticut Code of Evidence provides: "Opinion and reputation evidence of character. The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached."

[22] The defendant claimed that these photographs from the MySpace page were relevant to the victim's credibility with respect to the veracity of her testimony concerning the degree of mental trauma that she had suffered from the assault, relying in particular on her self-description as "sexy."

[23] Thereafter, the victim testified on cross-examination before the jury that the police, who had taken the memory card from her camera for investigative purposes, returned the memory card to her and had uploaded the images from that evening to her personal computer, which she then posted on MySpace as a slideshow. The victim then testified that the photographs depicted her getting ready to go out that evening, posing with friends and consuming alcoholic beverages.

[24] Noting technical difficulties in accessing the MySpace website in the courtroom and concerns about preserving the photographic content of the

victim's MySpace page, the trial court directed defense counsel to print the relevant portions of the page or burn them to a DVD in order to permit the court to rule on the admissibility of the page and the images thereon. The photographs culled from the victim's MySpace page subsequently were marked for identification as court exhibits, but not themselves admitted into evidence, with the parties agreeing instead to the admission of a stipulation that "the [web address of the victim's MySpace website] relates to [the victim's] website, which was the subject of her testimony, and it is in essence a public site."

[25] Specifically, the defendant argued: "There was a statement on her website . . . . I do whatever it takes to get what I want or need on my own.

"The Court: Okay.

"[Defense Counsel]: And that is relating to she's in a situation where she's getting benefits from the state, she's got to take care of her child, part of the trauma treatment she went through it was indicated here in court that she had financial stresses, that her baby's father had gone to jail.

"These are some stresses that she had to deal with and she is getting a benefit now that her pending cases that she got arrested on afterwards she's going to get a walk, probation and she [is] going to get community service and the case will be dismissed on a case where the top count is mandatory five [years] minimum.

"She also has [department] involvement, risk of injury [to] a child as a charge. I am not saying the state assisted with the [department] but she does have that concern and her child is a strong concern for her. Her housing, not being in jail, not to have [the department] take her child away, those are all important factors as to why she wanted to be cooperative with the state so she'll do what she wants to get what she wants and needs on her own."

In response, the state argued that the MySpace statement was not "probative" or "informative [at] all as to her credibility whatsoever or her bias or her motive." Characterizing the MySpace statement as "highly prejudicial and not probative of anything," the state emphasized that there was no evidence that the victim had to be "coaxed or forced to cooperate" in the prosecution of the defendant.

After additional argument as to whether the defendant could question the victim about the photographs on her MySpace page, the trial court ruled that the MySpace statement was inadmissible as "really speculative to say that that somehow then leads to the fact that she's now lying and is willing to do—unless you can show that it somehow relates to something in this case—the court's ruling is that that's not probative." The court further described the MySpace statement as "without more . . . not probative of anything that is occurring here. It is too speculative to assume that [the MySpace] statement relates to . . . the fact that she is going to lie on the stand which is basically the argument that counsel is making."

[26] The defendant does not claim in his principal brief that the trial court abused its discretion in determining that the MySpace statement was "without more . . . not probative," and its relation to the victim's veracity "too speculative." See, e.g., *State* v. *Pena*, 301 Conn. 669, 675–76, 22 A.3d 611 (2011) (abuse of discretion standard of review applied to trial court's rulings as to relevancy of evidence and whether evidence, if relevant, has unduly prejudicial effect exceeding its probative value). To the extent that he raises this claim in his reply brief, we decline to review it because it is well settled that claims that are not raised in parties' main briefs, but instead are raised for the first time in reply briefs, ordinarily are considered abandoned. See, e.g., *State* v. *Richardson*, 291 Conn. 426, 431, 969 A.2d 166 (2009).

[27] The cases that the defendant cites in support of the proposition that the MySpace statement indicates a predilection to lie are completely inapposite. First, unlike the present case, none of the cases cited by the defendant include the qualifier of "on my own," which renders the MySpace statement more indicative of the victim's perseverant and independent nature than an indication of her inclination to lie. Second, in contrast to this case, which supplies no context for the MySpace statement at issue, the cases cited by the defendant suggest that the "whatever it takes" statements at issue therein were uttered in a specific factual context directly suggestive of the witness' inclination to act dishonestly. See *United States* v. *Green*, 964 F.2d 365, 370 (5th Cir. 1992) (considering testimony of bank principal that "he would do 'whatever it took to fund [the defendant's] campaign' " as supporting finding of sham loan for purpose of money laundering conviction), cert. denied, 506 U.S. 1055, 113 S. Ct. 984, 122 L. Ed. 2d 137 (1993); *United States* v. *Kinsella*, 584 F. Sup. 2d 262, 266 (D. Me. 2008) (felon testifying at defendant's

trial conceded on cross-examination exploring plea agreement with government that "he 'would do anything' to get his regular life back"), aff'd, 622 F.3d 75 (1st Cir. 2010), cert. denied, U.S. , 131 S. Ct. 1027, 178 L. Ed. 2d 849 (2011); *Murray* v. *United States*, 416 F. Sup. 2d 740, 742 (W.D. Mo. 2006) (The court noted that the plaintiff "confesses to be willing to tell tall tales when financially needful. 'Whatever it takes' was his motto for preparing a resume for employment.").

Two cases cited by the defendant are wholly inapposite because the "whatever it takes" statements were made by courts or prosecutors characterizing defendants, rather than by a witness. See *Welch* v. *Burke*, 49 F. Sup. 2d 992, 1005 (E.D. Mich. 1999) (prosecutor claimed in summation that defendant was " 'going to do whatever it takes to make him look as good as possible' " after reciting specific evidence in record indicating that defendant had lied several times about events leading to murder), aff'd, 229 F.3d 1155 (6th Cir. 2000); *In re Warner*, 905 A.2d 233, 235–36 (D.C. 2006) (trial court rejected testimony of criminal contemnor indicating that " 'he will do whatever it takes to do whatever he wants to do' " based on evidence that contemnor had "voluntarily impaired his ability to pay [child support] by voluntary unemployment or underemployment," had history of contempts and had lied on employment applications).

[28] This aspect of the cross-examination was buttressed by the testimony of Elizabeth Spratt, director of toxicology for the Westchester County department of laboratory and research, who testified that the victim's level of intoxication by alcohol and PCP that night was in a range that would cause her to experience "memory impairment, judgment impairment, difficulty walking," sedation and hallucinations.

[29] On this point, the defendant questioned the victim regarding the content of a letter from the prosecutor, on the victim's behalf, sent to the victim's landlord, a public housing authority, which resulted in a delay of her eviction from public housing.

[30] The defendant relies heavily on *United States* v. *Turning Bear*, 357 F.3d 730 (8th Cir. 2004), *United States* v. *Watson*, 669 F.2d 1374 (11th Cir. 1982), and *Saiz* v. *McGoff*, United States District Court, Docket No. 98-D-68 (D. Colo. May 23, 2001), rev'd on other grounds, 296 F.3d 1008 (10th Cir. 2002), in support of the proposition that his inability to question the victim about the MySpace statement deprived him of his confrontation clause rights. Given the multiple meanings that could be attributed to the MySpace statement in this case, we find these cases inapposite because the testimony excluded therein was unmistakably pointed directly at the witnesses' untruthful character. See *United States* v. *Turning Bear*, supra, 733 (testimony of child complainant's foster parent that he was " 'untruthful' " and " 'didn't always tell the truth' "); *United States* v. *Watson*, supra, 1382–83 (testimony of four character witnesses that testifying government informant had reputation for untruthfulness); *Saiz* v. *McGoff*, supra (testimony by two defense attorneys that prosecution's expert witness had poor character and reputation for truthfulness).

[31] Accordingly, we similarly reject the defendant's claim that the confrontation clause violation also amounts to a due process violation that requires us to vacate the trial court's finding that he had violated his probation.