STATE OF CONNECTICUT *v.* KENNETH WEBSTER
(SC 18787)

Rogers, C. J., and Norcott, Zarella, Beach and Robinson, Js.

Argued November 1, 2012—officially released February 26, 2013

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Devin T. Stilson*, supervisory assistant state's attorney, for the appellant (state).

Richard S. Cramer, for the appellee (defendant).

Opinion

NORCOTT, J. The principal issue in this certified appeal is whether criminal liability under General Statutes § 21a-278a (b),[1] which prohibits, inter alia, the sale of narcotics within 1500 feet of a school, attaches when a drug transaction begins within 1500 feet of a school, but culminates elsewhere. The state appeals, following our grant of certification,[2] from the judgment of the Appellate Court reversing the conviction of the defendant, Kenneth Webster, of sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b). *State* v. *Webster*, 127 Conn. App. 264, 267, 13 A.3d 696 (2011). On appeal, the state claims that: (1) the Appellate Court construed the statutory definition of sale of a controlled substance under General Statutes § 21a-240 (50)[3] too narrowly when it concluded that the state had failed to present sufficient evidence to support the defendant's conviction; and (2) if this court determines, under a broader definition of a sale of narcotics, that there was sufficient evidence to support the defendant's conviction for the sale of narcotics within 1500 feet of a school, the defendant has waived his claim that the trial court improperly instructed the jury regarding the intent element of that offense. We agree with the state in both respects and, therefore, reverse the judgment of the Appellate Court.

The record and the Appellate Court opinion reveal the following facts, which the jury reasonably could have found, and procedural history. On June 1, 2007, Jeanne Pereira telephoned the defendant seeking to purchase $80 worth of crack cocaine. Id., 267. Pereira had purchased illegal drugs from the defendant on a number of occasions in the past and, in accordance with the defendant's preferred transaction process, arranged to meet him that evening on Prospect Street in Torrington, behind St. Francis School,[4] to complete the transaction. Id., 272 n.3. The defendant drove his vehicle to meet Pereira at the agreed upon location at approximately 8 p.m. Id., 267. When he arrived, Pereira approached the defendant's vehicle and saw that he had a quantity of crack cocaine in his hand. Id., 272 n.3. The defendant invited Pereira into his vehicle and then drove around the block with her, following a route that, for a brief time, took the vehicle beyond 1500 feet of the school. Id., 267, 273. At some point while the defendant was driving, he gave Pereira two small bags and several loose pieces of crack cocaine in exchange for the $80 that she had brought with her. Id., 267. Thereafter, the defendant returned to the original location behind the school, Pereira exited the vehicle and the defendant drove away. Id.

Shortly after Pereira exited the defendant's vehicle, she was stopped by Steve Rousseau and Thomas Rouleau, both sergeants with the Torrington police department, who, while conducting surveillance in the area,

had observed some of Pereira's activities with the defendant. Id., 268. After she exited the defendant's vehicle, the officers approached Pereira, at which time she dropped the two small bags and the several loose pieces of crack cocaine and voluntarily admitted to the officers that she had obtained the drugs from the defendant. Id. The officers then arrested Pereira and recovered the crack cocaine.[5] Id. Thereafter, Rousseau and Rouleau proceeded to the defendant's residence, where, after a brief foot chase, they arrested him. Id. The officers recovered several bags of crack cocaine with a street value of approximately $450, which were packaged in a manner similar to the drugs recovered from Pereira and were dropped or discarded by the defendant during the foot chase, and $407, which the defendant had in his possession at the time of his arrest. Id.

On the basis of the foregoing evidence, a jury found the defendant guilty of, inter alia,[6] sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b). Id., 266. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of twenty-three years imprisonment, suspended after nine years, followed by five years of probation and noted that there was a five year mandatory minimum sentence.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, inter alia,[7] that: (1) the evidence did not support his conviction for sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b) because a portion of the route that he had traveled while driving with Pereira was beyond 1500 feet of the school and the state had conceded that it could not prove exactly where the actual, physical transfer of drugs had occurred; and (2) the trial court improperly instructed the jury as to the intent element of the crime of sale of narcotics within 1500 feet of a school. Id., 266–67. The Appellate Court agreed that the evidence was insufficient to support the defendant's conviction for the sale of narcotics within 1500 feet of a school because the statute required the state to prove that the defendant had effected a delivery—an actual, constructive or attempted transfer—of crack cocaine to Pereira within 1500 feet of St. Francis School, and the state had failed to prove that the physical transfer occurred within that 1500 foot zone. Id., 276. Accordingly, the Appellate Court reversed the judgment of conviction rendered by the trial court as to the count of sale of narcotics within 1500 feet of a school.[8] Id., 293. This certified appeal followed. See footnote 2 of this opinion. Additional facts will be set forth as necessary.

I

The state first claims that the Appellate Court construed the definition of a sale too narrowly when it

concluded that the state had failed to present sufficient evidence to support the defendant's conviction for sale of narcotics within 1500 feet of a school. Specifically, the state argues that, consistent with the legislature's intent to keep drug dealers—along with the danger and violence that pervades their activities—away from children, the statutory definition of sale within the context of drug transactions is much broader than its common definition, and includes even mere offers and attempts to transfer drugs. Thus, the state argues that it was not required to prove that the actual transfer occurred within 1500 feet of the school. In response, the defendant argues that the Appellate Court properly determined that the unambiguous language of the relevant statutes limits criminal liability to an actual delivery or exchange within the 1500 foot zone, and does not impose liability for conduct at locations associated with a continuous course of conduct that begins within 1500 feet of a school but culminates in a physical transfer of drugs outside the 1500 foot zone. The defendant further argues that the state improperly raised its argument that an offer to sell constitutes a prohibited sale for the first time on appeal to the Appellate Court and that, even if this court were to consider the state's argument, there is insufficient evidence to establish that he, in fact, made an offer to sell narcotics within the meaning of the statute. We agree with the state, and conclude that the plain language of the relevant statutes does not limit criminal liability to an actual, physical transfer of narcotics within 1500 feet of a school, but rather, also imposes criminal liability for offers and attempts to sell narcotics within the 1500 foot zone.

Generally, "[i]n reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Ward*, 306 Conn. 698, 714–15, 52 A.3d 591 (2012). When, as in the present case, the claim of insufficient evidence turns on the appropriate interpretation of a statute, however, our review is plenary. See, e.g., *Ugrin* v. *Cheshire*, 307 Conn. 364, 379, 54 A.3d 532 (2012) ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" [internal quotation marks omitted]).

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking

to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Internal quotation marks omitted.) *State* v. *Leak*, 297 Conn. 524, 532–33, 998 A.2d 1182 (2010).

In the present case, the precise question we must answer is whether, as the state claims, it is sufficient to prove that the defendant arrived at an agreed upon location located within 1500 feet of a school and offered narcotics for sale at that location, or whether, as the defendant claims, the statutes require the state to prove that the actual, physical transfer of narcotics occurred within 1500 feet of a school. We begin with a review of the relevant statutory language. Section 21a-278a (b) provides in relevant part: "Any person who violates section 21a-277 or 21a-278 by . . . selling . . . any controlled substance in or on, or within one thousand five hundred feet of, the real property comprising a public or private elementary or secondary school . . . shall be imprisoned for a term of three years, which shall not be suspended and shall be in addition and consecutive to any term of imprisonment imposed for violation of section 21a-277 or 21a-278. . . ." We previously have described "the plain meaning of § 21a-278a (b) to be clear. The first sentence provides that if any person who is not drug-dependent violates [General Statutes] § 21a-277 or § 21a-278 in one of the ways set forth therein, and does so within [1500] feet of a school, that person will receive an additional three year term of imprisonment." *State* v. *Denby*, 235 Conn. 477, 481, 668 A.2d 682 (1995); see also *State* v. *Myers*, 101 Conn. App. 167, 176 n.6, 921 A.2d 640 (2007) ("The purpose of § 21a-278a [b] is present on its face and in its legislative history. This statute was designed to protect children and schools from the danger that accompanies illegal drugs and their purveyors. . . . [T]he language of § 21a-278a [b] manifests a clear legislative intent to provide an enhanced punishment for violating . . . §§ 21a-277 or 21a-278 within 1500 feet of a school." [Citation omitted; internal quotation marks omitted.]), rev'd in part on other grounds, 290 Conn. 278, 963 A.2d 11 (2009).

Given that the question before us is whether the

state's burden to prove a violation of § 21a-278a (b) may be satisfied by proving a mere offer to sell narcotics within the proscribed zone, we look to § 21a-240 (50), which defines sale, as applicable to § 21a-278a (b), as "any form of delivery which includes barter, exchange or gift, *or offer therefor*, and each such transaction made by any person . . . ." (Emphasis added.) Consequently, in order to fully understand the meaning of the word sale as it is used in § 21a-278a (b), we must also review the definition of the terms delivery and offer. First, delivery is statutorily defined as "the actual, constructive *or attempted transfer* from one person to another of a controlled substance . . . ." (Emphasis added.) General Statutes § 21a-240 (11). Next, we note that the term offer is not defined within the statutory scheme. We thus "look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *State* v. *Spillane*, 255 Conn. 746, 755, 770 A.2d 898 (2001). Offer has been defined as, "to present for acceptance or rejection," "to declare one's readiness or willingness" or "to make available . . . esp[ecially]: to place (merchandise) on sale . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Accordingly, when we consider these terms together, § 21a-278a (b) imposes liability for a sale of narcotics when a defendant engages in any form of actual, constructive or attempted transfer from one person to another of a controlled substance which includes barter, exchange or gift, or the presentation of a controlled substance for acceptance or rejection, and each such transaction made by any person in, on or within 1500 feet of the property comprising a public or private elementary school.

We note that, under the statutory definition, "[t]he concept of a sale of an illicit drug is not confined to an exchange for value . . . ." *State* v. *Parent*, 8 Conn. App. 469, 474, 513 A.2d 725 (1986); see also *State* v. *Jurgensen*, 42 Conn. App. 751, 761–62, 681 A.2d 981 (sale not limited to transfer of narcotics for money), cert. denied, 239 Conn. 931, 683 A.2d 398 (1996). Indeed, "[i]n common parlance, a sale is the exchange of an object for value. The statutory definition of sale as applied to illegal drug transactions, however, is *much broader* and includes *any* form of delivery . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Arbelo*, 37 Conn. App. 156, 159–60, 655 A.2d 263 (1995); see also *State* v. *Wassil*, 233 Conn. 174, 193–94, 658 A.2d 548 (1995) ("sale was not originally defined narrowly to mean *only* barter, exchange or gift [or offer therefor] . . . but rather was defined broadly as *including* barter, exchange or gift [or offer therefor]" [emphasis in original; internal quotation marks omitted]). Thus, "the statutory definition of the term 'sale' is *substantially broader* in scope than the common dictionary definition . . . ." (Emphasis added.) *State* v. *Sargent*, 87 Conn. App. 24, 44, 864 A.2d 20, cert.

denied, 273 Conn. 912, 870 A.2d 1082 (2005); see also *State* v. *Avila*, 166 Conn. 569, 580 n.1, 353 A.2d 776 (1974) (definition of sale encompasses conduct that is "quite broad").

Thus, we conclude that the plain meaning of the term sale within the context of narcotics transactions includes, as the state argues, mere offers to sell and attempts to transfer narcotics. Furthermore, given that § 21a-240 (50) encompasses "each such transaction" set forth therein, the statute plainly indicates that there is no requirement that any single drug transaction be *completed* before liability may be imposed. Indeed, according to the statutory language, a defendant may be convicted of a sale of narcotics once he engages in *any* of the conduct set forth in § 21a-240 (50), including offering to sell narcotics. Accordingly, we conclude that, pursuant to § 21a-278a (b), the state was not required to prove that the actual, physical transfer of narcotics occurred within 1500 feet of the school. On the contrary, it was sufficient for the state to prove that the defendant engaged in conduct that constituted an offer to sell narcotics at a location within 1500 feet of a school.[9] See also *Tellado* v. *United States*, 799 F. Sup. 2d 156, 161 (D. Conn. 2011) ("'a "sale" under Connecticut law includes a mere offer to sell drugs' ").

Nevertheless, the defendant argues that the plain language of the statute reveals that a sale is a *delivery* and, although a delivery may be made through "barter, exchange or gift" pursuant to § 21a-240 (50), it is still the act of delivery that constitutes a sale. The defendant's argument, however, ignores the words that immediately follow "barter, exchange or gift" in § 21a-240 (50), namely: "*or offer therefor*, *and each such transaction made* by any person . . . ." (Emphasis added.) Therefore, we conclude that the plain meaning of the statute encompasses every instance in which a defendant offers to, or does in fact, "barter, exchange or gift" narcotics to another.[10]

With this definition of sale in mind, we further conclude that the state presented ample evidence that the defendant offered crack cocaine for sale to Pereira within 1500 feet of St. Francis School. On the basis of the evidence presented, the jury reasonably could have found that the defendant traveled to meet Pereira behind St. Francis School, a location that all parties agree was well within 1500 feet of the school. Thereafter, the defendant arrived at that location and showed Pereira the prepackaged quantities of crack cocaine that he had in his hand. The defendant then invited Pereira into his vehicle to complete the previously arranged transaction, which was the only way the defendant "does business . . . ." See footnote 5 of this opinion. From such conduct, the jury reasonably could have found that the defendant had presented the crack cocaine in his hand for Pereira's acceptance, or at least

indicated that it was available for sale to Pereira, when he met her at the agreed upon location and invited her into his car to complete the transaction.

Finally, our determination that there was sufficient evidence that the defendant offered to sell crack cocaine to Pereira within 1500 feet of St. Francis School is not altered by the defendant's rather cursorily briefed claim that the state failed to argue that the defendant's offer constituted a prohibited sale to the jury during the trial. See, e.g., *State* v. *Fourtin*, 307 Conn. 186, 210, 52 A.3d 674 (2012) ("[t]he state, having chosen to pursue [a particular] path at trial, cannot . . . proceed [on appeal] on the basis of theories that it opted not to pursue"). This claim is belied by the prosecutor's closing argument, wherein he posited that, "even though we have no one saying the actual hand-to-hand transaction took place within this red circle that denotes 1500 feet, the whole course of conduct is included in this charge. He picked her up right at the steps of St. Francis School, he dropped her off at the steps of St. Francis School. When he first picked her up, he had the cocaine in his hand, she saw it. Now, even if the actual physical transfer from his hand to her hand happened outside the 1500 feet . . . North Street and James Street and one of the intersections is outside the 1500 feet, and I'm not arguing that, I agree with that, my position is that even though it's outside the 1500 feet, this whole course of conduct started and ended right [on] the very doorstep of St. Francis School." The prosecutor then continued: "In terms of my asking you to find that the hand-to-hand exchange occurred within the red zone, I'm not asking you to find that. What I'm asking you to find is that the sale and the conduct that constitutes the sale began and ended in the red zone. To me, where the hand-to-hand exchange took place is immaterial. It's all the same course of conduct."

Although the prosecutor used the words "course of conduct," rather than focusing on the terms "offer" or "attempt" in his closing argument, this language did not preclude the jury from considering whether the defendant's conduct leading up to the actual, physical transfer of the crack cocaine constituted an offer for sale and, thus, a sale in violation of § 21a-278a (b). Indeed, the prosecutor expressly stated to the jury that he believed that the location "where the hand-to-hand exchange took place [was] immaterial." It appears, then, that the main purpose of the prosecutor's closing argument in regard to § 21a-278a (b) was simply to highlight that the jury was not required to find that the actual, physical transfer of the crack cocaine took place within 1500 feet of the school, but rather that it could consider the defendant's conduct leading up to the actual, physical transfer of the drugs as well.[11] We, therefore, conclude that the state did not improperly raise this argument for the first time on appeal, and that the Appellate Court improperly concluded that there was

insufficient evidence to support the defendant's conviction of sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b).

II

Having concluded that the state presented sufficient evidence to sustain the defendant's conviction for the sale of narcotics within 1500 feet of a school, we turn to the issue of whether, pursuant to *State* v. *Kitchens*, 299 Conn. 447, 480, 10 A.3d 942 (2011), the defendant waived his claim that the trial court improperly instructed the jury regarding the intent necessary for a conviction on that charge. In his appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court instructed the jury improperly when it provided a broad definition of intent, including explication of both specific and general intent, but improperly failed to provide an instruction regarding the specific level of intent necessary for the crime of sale of narcotics within 1500 feet of a school. Before the Appellate Court, the defendant acknowledged that he had failed to preserve this claim at trial, but requested review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[12] Because the Appellate Court reversed his conviction for sale of narcotics within 1500 feet of a school on other grounds, however, it did not reach this issue.[13] See *State* v. *Webster*, supra, 127 Conn. App. 277.

In the present appeal, the state claims that because defense counsel failed to present this challenge to the trial court even though he was given several meaningful opportunities to review the charge and multiple opportunities to respond, the defendant has waived any instructional claim pursuant to *State* v. *Kitchens*, supra, 299 Conn. 480. The defendant failed to address—either in his brief or at oral argument to this court—the state's *Kitchens* argument, but instead, in response, simply claims that a criminal defendant can never waive a claim that a jury instruction failed to set forth essential elements of the crime charged. In support of his claim, the defendant cites *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (due process requires proof beyond reasonable doubt of every fact necessary to constitute crime with which defendant is charged), and *State* v. *Gabriel*, 192 Conn. 405, 413–14, 473 A.2d 300 (1984) (failure to instruct jury on essential element of crime charged deprives defendant of right to have jury told what crime defendant faces), both of which significantly predate our decision in *Kitchens*.[14] He then reiterates, to this court, the argument that he made before the Appellate Court, namely, that the jury instructions failed adequately to inform the jury of the intent necessary to convict him of sale of narcotics within 1500 feet of a school and again seeks *Golding* review. We agree with the state, and conclude that the defendant has waived his instructional claim.

The following additional facts and procedural history

are relevant to the disposition of this claim. At the conclusion of the presentation of evidence, but prior to closing arguments, the trial court held a charging conference, in chambers, during which it provided each of the attorneys with a written copy of its proposed jury instructions. Thereafter, the trial court noted, on the record, that "[w]e went over every charge that I was going to give. We discussed the eight counts and the language that would be used in the eight counts." The court then asked both attorneys whether they had any objections to the charge as discussed in chambers. At that time, defense counsel raised an objection to the court's intention to charge the jury regarding consciousness of guilt evidence, but did not challenge any of the trial court's proposed instructions regarding the definition of intent or the elements of the crime of sale of narcotics within 1500 feet of a school. After overruling the defendant's objection to the proposed consciousness of guilt charge, the trial court proceeded with closing arguments before the jury and, thereafter, adjourned proceedings for the day.

The following day, prior to charging the jury, the trial court noted that it had held a charging conference the previous day, and there was an issue discussed on the record regarding the proposed consciousness of guilt charge. In response to the trial court's question as to whether the consciousness of guilt charge was the only issue with the proposed instructions, defense counsel stated: "Yes, Your Honor." The trial court then went on to note that it had given both attorneys a copy of the proposed charge and that neither had objected to the jury receiving a copy of the charge during deliberations: Defense counsel responded: "I agree, Your Honor." Thereafter, defense counsel raised a question regarding the instruction related to the depiction of a second school on the map that had been introduced as an exhibit to show the location of the defendant's travels with Pereira in relation to the location of St. Francis School. After resolving that question, the trial court asked whether there were "[a]ny other issues before we bring up the [jury] panel," to which defense counsel responded, "No, Your Honor."

The trial court then proceeded to charge the jury, after which the trial court again asked both attorneys whether they had any exceptions to the charge that the jury heard. At that time, defense counsel raised an objection regarding the trial court's use of the term narcotic substance interchangeably with the term controlled substance and asked the trial court to change the jury charge to use only the term narcotic substance. The trial court noted the defendant's objection, but declined to modify the instructions, and then asked whether there was "[a]nything else," to which defense counsel responded: "No, Your Honor."

Turning to the question of whether the defendant has

waived his instructional claim in the present case, we note that, in *Kitchens*, this court 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, 299 Conn. 482–83.

In the present case, we conclude that the record reveals that defense counsel had several meaningful opportunities to review the jury instructions, including the opportunity to review the instructions overnight. We note that in every post-*Kitchens* case in which defense counsel was given the opportunity to review the proposed jury instructions overnight, we have concluded that defense counsel had received a meaningful opportunity to review the proposed instructions under the *Kitchens* test. See *State* v. *Mungroo*, 299 Conn. 667, 673–76, 11 A.3d 132 (2011); *State* v. *Brown*, 299 Conn. 640, 657–59, 11 A.3d 663 (2011); *State* v. *Akande*, 299 Conn. 551, 561, 11 A.3d 140 (2011). We further conclude that the record reveals that after each opportunity the trial court gave defense counsel to review the jury instructions, the trial court solicited comments from counsel and that defense counsel ultimately affirmatively accepted both the instructions proposed and those given. Thus, in accordance with our holding in *Kitchens*, we conclude that the defendant has waived his claim of instructional error and, therefore, is not entitled to *Golding* review of this claim. See *State* v. *Brown*, supra, 658–59.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion the other justices concurred.

[1] General Statutes § 21a-278a (b) provides in relevant part: "Any person who violates section . . . 21a-278 by . . . selling . . . to another person any controlled substance in or on, or within one thousand five hundred feet of, the real property comprising a public or private elementary or secondary school . . . shall be imprisoned for a term of three years, which shall not be suspended and shall be in addition and consecutive to any term of imprisonment imposed for violation of section . . . 21a-278. . . ."

[2] We granted the state's petition for certification to appeal limited to the following issues: (1) "Did the Appellate Court properly determine that the evidence was insufficient to sustain the defendant's conviction for sale of narcotics within 1500 feet of a school in violation of . . . § 21a-278a (b)?"; and (2) "If the defendant prevails on the first claim, whether the trial court properly instructed the jury on the element of intent for the crime of sale of narcotics within 1500 feet of a school in violation of § 21a-278a (b)?" *State* v. *Webster*, 301 Conn. 905, 17 A.3d 1047 (2011).

[3] General Statutes § 21a-240 provides in relevant part: "(50) 'Sale' is any form of delivery which includes barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor,

agent, servant or employee . . . .”

[4] At all relevant times, St. Francis School was a private school serving students in grades three through eight, and the defendant was not a student enrolled at the school. *State* v. *Webster*, supra, 127 Conn. App. 267.

[5] After her arrest, Pereira provided the police with a written statement concerning her interaction with the defendant, stating: “On [June 1, 2007] just before 8 [p.m.] I called [the defendant] . . . looking for [$80 or $90] worth of rock cocaine. [The defendant] normally meets me on Prospect [S]treet by St. Francis [S]chool. I normally meet him there, get in his white car and drive around the block, or wherever he feels like. I usually buy from him out of his car, it’s the only way he does business, he doesn’t let too many people go to his house. [The defendant] usually keeps his drugs on him, and tonight had it in his hand when he came to pick me up. [The defendant] then dropped me off back at Prospect [S]treet in front of the school after he drove around.”

[6] The jury also found the defendant guilty of sale of narcotics by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b); possession of narcotics within 1500 feet of a school in violation of General Statutes § 21a-279 (d); possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b); interfering with an officer in violation of General Statutes § 53a-167a (a); tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1); and two counts of possession of narcotics in violation of § 21a-279 (a). *State* v. *Webster*, supra, 127 Conn. App. 266. The Appellate Court affirmed the judgment of conviction with respect to all of these counts. Id., 293.

[7] The defendant also claimed that the trial court improperly: (1) instructed the jury regarding the intent necessary to convict him of possession of narcotics with intent to sell; (2) admitted certain testimony from a state’s witness; and (3) limited defense examination of one of the state’s witnesses. *State* v. *Webster*, supra, 127 Conn. App. 266–67. The Appellate Court rejected each of these claims. Id., 267.

[8] In light of its conclusion that the evidence was insufficient to support the defendant’s conviction for sale of narcotics within 1500 feet of a school, the Appellate Court did not reach the defendant’s instructional claim related to that count. *State* v. *Webster*, supra, 127 Conn. App. 277.

[9] Our interpretation of the meaning of sale in this context is further supported by decisions from many jurisdictions that have concluded that the statutory definition of a sale, within the context of drug transactions, is much broader than its common meaning, and have, therefore, concluded that criminal liability may be imposed for mere offers to sell. See, e.g., *State* v. *Strong*, 178 Ariz. 507, 509, 875 P.2d 166 (1994) (state not required to prove that narcotic was produced or that money changed hands); *State* v. *Figueroa*, 153 Ariz. 420, 422, 737 P.2d 396 (App. 1987) (crime of sale of controlled substance “necessarily includes an offer to sell”); *People* v. *Mills*, 192 Colo. 260, 263–64, 557 P.2d 1192 (1976) (“[n]o completed transaction sealed by a transfer of money is required to constitute the ‘offer’ which amounts to a ‘sale’ ” within definition of sale); *Betancourt* v. *State*, 228 So. 2d 124, 126 (Fla. App. 1969) (offer to sell is to sell within meaning of statute and actual purchase is not essential element); *People* v. *Brown*, 116 Ill. App. 2d 228, 232–33, 253 N.E.2d 478 (1969) (definition of sale includes offer of sale); *State* v. *Donaldson*, 279 Kan. 694, 715, 112 P.3d 99 (2005) (sale “need not necessarily include an actual, constructive or attempted transfer of a controlled substance” [internal quotation marks omitted]); *State* v. *Crockett*, 801 S.W.2d 712, 715 (Mo. App. 1990) (proscribed conduct includes offer to transfer controlled substance in addition to sale in “the normal sense”); *People* v. *Mike*, 92 N.Y.2d 996, 998, 706 N.E.2d 1189, 684 N.Y.S.2d 165 (1998) (sale includes offer to sell or exchange drugs); *People* v. *George*, 111 App. Div. 2d 767, 490 N.Y.S.2d 36 (1985) (sale of controlled substance includes not only actual exchange but also offer to sell), aff’d, 67 N.Y.2d 817, 492 N.E.2d 767, 501 N.Y.S.2d 639 (1986); *State* v. *Smith*, 14 Ohio App. 3d 366, 369, 471 N.E.2d 795 (1983) (sale or offer to sell “always constitutes trafficking”); *Knight* v. *State*, 91 S.W.3d 418, 422 (Tex. App. 2002) (sale is “complete when, by words or deed, a person knowingly or intentionally offers to sell . . . a controlled substance” [internal quotation marks omitted]).

[10] We also note that, at oral argument before this court, the defendant conceded that, had Rousseau and Rouleau intervened immediately after Pereira approached the defendant’s vehicle when he arrived behind St. Francis School and caught the defendant with prepackaged quantities of crack cocaine ready for sale, the state could have charged the defendant with an attempt to sell narcotics within 1500 feet of a school. He argued,

however, that because there was a *completed* transfer or delivery of the drugs, which the state had conceded it could not prove occurred within 1500 feet of the school, and the state charged the defendant with a *sale*, rather than an *attempted sale*, within 1500 feet of the school, the statute does not permit the state to impose criminal liability for his conduct leading up to an actual, physical transfer of a controlled substance at a location outside of 1500 feet of a school. This argument, however, likewise fails to acknowledge all of the words included in the relevant statutes. Under § 21a-240 (11), a delivery is an "actual, constructive *or attempted* transfer . . . ." (Emphasis added.) In this context, delivery is not restricted to an actual, physical transfer. Thus, we conclude that if the defendant could have been charged with an attempt to sell narcotics had the officers intervened before the actual, physical transfer of the drugs, the same conduct must also constitute a punishable sale within the plain meaning of the statutes.

[11] We also note that the trial court properly instructed the jury regarding the definition of sale, and indicated that a sale "is any form of delivery which includes barter, exchange or gift, or *offer therefor, and each such transaction made by any person* . . . ." (Emphasis added.) Thus, the defendant's argument that the jury was not presented with the theory that an offer to sell narcotics can constitute a sale in violation of § 21a-278a (b) is unpersuasive. The plain language of the statute defining sale, as read to the jury as part of the jury instructions in the present case, clearly and properly informed the jury that it could find the defendant guilty of sale of narcotics within 1500 feet of a school if it found that the defendant had offered the crack cocaine to Pereira within 1500 feet of St. Francis School. We presume that the jury followed the instructions as given. See, e.g., *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010) ("it is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them" [internal quotation marks omitted]).

[12] Under *State* v. *Golding*, supra, 213 Conn. 239–40, "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."

[13] We certified this issue in the interest of judicial economy to avoid the need to remand this case to the Appellate Court in the event that we held for the state on the first certified question. Cf. *State* v. *James*, 261 Conn. 395, 410, 802 A.2d 820 (2002) (court invoked supervisory authority pursuant to Practice Book § 60-2 to reach argument in interest of judicial economy).

[14] To the extent that the defendant's claim that a criminal defendant can never waive a claim that the jury instructions failed to set forth an essential element of the crime charged can be interpreted as an argument that *Kitchens* is inapplicable to the present case, however, we recently rejected that claim in *State* v. *Darryl W.*, 303 Conn. 353, 367, 33 A.3d 239 (2012), wherein we held that "[a] defendant in a criminal prosecution may waive one or more of his . . . fundamental rights." (Internal quotation marks omitted.) In that case, we specifically noted that a defendant's "claim that the right to proper instruction on the elements of an offense is fundamental and therefore not waivable by counsel is unavailing. It is well settled that counsel has the authority to waive such a right and that the court can rely on counsel's representations regarding the propriety of the instructions at any stage of the proceeding." (Internal quotation marks omitted.) Id., 367 n.15. We, therefore, conclude that a criminal defendant may waive an instructional claim even when the claim is premised on an argument that the instructions failed to set forth an essential element of the crime charged. We further conclude that the *Kitchens* analysis is applicable under these circumstances to determine whether such a waiver has occurred.