****

The “officially released” date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the “officially released” date appearing in the opinion. In no event will any such motions be accepted before the “officially released” date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

STATE OF CONNECTICUT *v.* GEORGE A.*
(SC 18729)

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

Argued November 29, 2012—officially released April 23, 2013

Cameron Dorman, special public defender, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, former state's attorney, and *Brian Preleski*, senior assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, George A., appeals[1] from the judgment of the trial court, rendered after a court trial, convicting him in two separate cases of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[2] five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2),[3] and one count of promoting a minor in an obscene performance in violation of General Statutes § 53a-196b (a).[4] On appeal, the defendant claims that the trial court improperly: (1) found sufficient evidence to sustain the defendant's conviction for promoting a minor in an obscene performance under § 53a-196b (a) because the images in the "crush videos"[5] found on his computer featuring the victim did not depict a prohibited sexual act as defined by General Statutes § 53a-193 (3);[6] (2) committed plain error by admitting into evidence expert opinion evidence as to the ultimate issue of fact, namely, that the defendant had physically, psychologically and sexually abused the victim; and (3) permitted the state to present certain evidence of uncharged misconduct. We disagree, and affirm the judgment of the trial court.

The record reveals the following facts, as found by the trial court, and procedural history. The defendant is the father of the victim, who was born in May, 1995. They lived, along with the victim's mother, E, first in an apartment in Meriden, and later a condominium in Southington, where they moved when the victim was in the fourth grade. The first case arises from the defendant's lengthy course of physical, psychological and sexual abuse of the victim between May 24, 2004, when the victim was nine years old, and March 17, 2009, when she was fourteen years old. During that time, the victim spent her days alone with the defendant, because he had withdrawn her from her fourth grade class in the Southington public schools in order to home school her, while E worked outside the home. The victim then spent most of her days cooking for the defendant, giving him back massages, using her computer and playing video games; she was permitted to leave the apartment only occasionally to walk the dog or to take out the garbage.

With respect to the claims of sexual abuse, which formed the basis for the sexual assault charges and the first two risk of injury charges, the defendant digitally penetrated the victim's vagina on two occasions when she was ten and eleven years old in 2005 and 2006. On other occasions, the defendant watched the victim, in accordance with his direction, rub her vagina with a vibrating electric toothbrush, touch her vagina and genital area with mice and rats, crush mice and rats with her toes and buttocks, and penetrate her anus with balloons. The defendant also filmed the victim inserting mice into her vagina, at his direction.

The defendant's abusive behavior was not just sexual in nature. From May 24, 2004 through March 17, 2009, the defendant repeatedly hit the victim with various objects including a clothes hanger, a belt, Kali sticks, which are a martial arts weapon, and a cord from a video game console. The defendant also punished the victim by making her stand in a bathtub filled with water while he held a toaster over it and threatened to drop the toaster. He also beat the victim on one occasion to the point where she lost consciousness, and choked her, causing her to experience difficulty breathing. Finally, during another incident while the victim and the defendant were practicing martial arts,[7] the victim sustained a cut on her head. Rather than seek professional medical attention, the defendant—who had no formal medical training—elected to suture the victim's cut himself at home, without the use of anesthetic.[8]

The second case arises from the events of March 18, 2009, which led to the state's discovery of the defendant's long-standing abuse of the victim. The trial court found that the defendant had become angry at the victim because she was reading a book of which he disapproved. The defendant took the book from her and began to beat her with his hands, then striking her in the face with the book with such force that her orthodontic braces broke and poked out of her lip. He then struck the victim on the back with a treadmill cord. Thereafter, the defendant ordered the victim to write four essays about her wishes to travel, and subsequently interrupted her writing with a request for a back massage. The defendant then fell asleep. Around 3 p.m., the victim packed two bags, lowered them off the condominium balcony with a rope, climbed down from the third floor balcony and ran away, where she called E at work. E then left work, met the victim at a nearby supermarket and, after returning to their home to take the family dog and some clothing while the defendant slept, withdrew money from her bank account and went to the safety of a relative's home.

Thereafter, E and the victim informed the Southington police about the defendant's conduct, and the victim was referred to Nina Livingston, a physician employed by the Aetna Foundation Children's Center at Saint Francis Hospital and Medical Center in Hartford, for an interview and a physical examination.

The state subsequently charged the defendant in the first case, Docket No. HHB CR09-0042176, with two counts of sexual assault in the first degree in violation of § 53a-70 (a) (2), two counts of risk of injury to a child for improper touching in violation of § 53-21 (a) (2), one count of risk of injury to a child for impairment of health in violation of § 53-21 (a) (1), one count of risk of injury to a child for impairment of morals in violation of § 53-21 (a) (1), and one count promoting a minor in an obscene performance in violation of § 53a-

196b (a). The state charged the defendant in the second case, Docket No. HHB CR09-41288, with one count risk of injury to a child for impairment of health in violation of § 53-21 (a) (1). After both cases were joined for a court trial, the trial court found the defendant guilty on all counts in both cases and, accordingly, rendered a judgment of conviction. The trial court subsequently sentenced the defendant to a total effective sentence of sixty years imprisonment, with a ten year mandatory minimum sentence.[9] This direct appeal followed.

On appeal, the defendant contends that: (1) there was insufficient evidence to prove that he promoted a minor in an obscene performance in violation of § 53a-196b (a); (2) the trial court abused its discretion and committed plain error by permitting Livingston to offer her expert opinion as to the ultimate issue of fact; and (3) the trial court improperly permitted the state to present evidence of uncharged misconduct, namely, the testimony of K, a friend of the victim, that the defendant had sexually abused her between the ages of eleven and fourteen years old, and a video featuring E engaged in certain sexual acts with mice at the defendant's direction. We address each claim in turn.

I

We begin with the defendant's claim that the evidence was insufficient to prove beyond a reasonable doubt that he had promoted a minor in an obscene performance in violation of § 53a-196b (a) because the state failed to prove that the "material or performance depicted a 'prohibited sexual act.' " Specifically, the defendant contends that the content of the videos from the defendant's computer admitted into evidence as state's exhibits 6 and 7, in which the victim crushes mice with her toes, show "nothing more than an act of cruelty" and do not depict the victim engaging in a "prohibited sexual act," as defined by § 53a-193 (3). The defendant further posits that there was no proof beyond the victim's vague testimony that he had actually filmed her on video engaging in prohibited sexual acts. The defendant observes that the lack of voice direction contained on the video "strongly suggests that [the victim] made the videos herself," which stands "in direct contrast" to a crush video featuring E wherein the defendant "could be heard directing her actions . . . ."[10] In response, the state acknowledges that exhibits 6 and 7 did not depict the victim engaging in any of the prohibited sexual acts enumerated by § 53a-193 (3), but contends that the evidence nevertheless was sufficient to sustain the defendant's conviction because those exhibits, along with the video of E engaging in such acts with mice, corroborated aspects of the victim's testimony that did in fact satisfy the elements of § 53a-196b (a) beyond a reasonable doubt. We agree with the state, and conclude that there was sufficient evidence to sustain the trial court's finding that the defendant was

guilty of promoting a minor in an obscene performance in violation of § 53a-196b (a).[11]

In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the [fact finder] is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the [fact finder's] function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Fourtin*, 307 Conn. 186, 197–98, 52 A.3d 674 (2012).

Section 53a-196b (a) provides: "A person is guilty of promoting a minor in an obscene performance when he knowingly promotes any material or performance in which a minor is employed, whether or not such minor receives any consideration, and such material or performance is obscene as to minors notwithstanding that such material or performance is intended for an adult audience." "Material or a performance is 'obscene as to minors' if it depicts a prohibited sexual act and, taken as a whole, it is harmful to minors. . . ." General Statutes § 53a-193 (2). A " '[p]rohibited sexual act' means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse." General Statutes § 53a-193 (3).

Having reviewed the record, we note that the defendant correctly observes that exhibits 6 and 7, which depict the victim crushing mice with her bare feet, although repulsive, do not depict a "prohibited sexual act" as defined by § 53a-193 (3).[12] Thus, if these video exhibits were the only evidence in the record, the trial court could not reasonably have found the defendant guilty of promoting a minor in an obscene performance in violation of § 53a-196b (a). The trial court, however, specifically credited the victim's testimony, which established beyond a reasonable doubt that the defendant had violated all of the elements of § 53a-196b (a). Specifically, after describing her knowledge of the defendant's balloon and crushing fetishes in lurid detail, the victim testified that the defendant "had [her] crush and kill baby mice and rats and mice as well," and that he would film her while she was doing such things. After the videos were admitted into evidence, the victim testified further that, between the ages of ten and twelve years old, the defendant would make her "touch [her] private parts with mice," including her labia and geni-

tals, as well as insert a balled-up inflated balloon into her anus. The victim then testified that the defendant filmed these particular activities as well, which took place in their condominium in Southington.[13] Thus, the trial court reasonably could have found beyond a reasonable doubt that the victim's testimony, independent of the videos admitted as exhibits 6 and 7, satisfied the elements of promoting a minor in an obscene performance. As noted by the trial court, the videos merely served as corroboration of some of the activities described in the victim's testimony.[14] Accordingly, we conclude that there was sufficient evidence to sustain the defendant's conviction of promoting a minor in an obscene performance in violation of § 53a-196b (a).

II

The defendant next contends that the trial court improperly permitted Livingston to offer her expert opinion as to an ultimate issue of fact on five occasions, both in her written report admitted into evidence and in her testimony, that the defendant had psychologically, physically and sexually abused the victim. Acknowledging that he did not preserve this claim before the trial court,[15] the defendant nevertheless relies on, inter alia, *State* v. *Iban C.*, 275 Conn. 624, 881 A.2d 1005 (2005), and contends that these five opinions constituted improper bolstering and vouching for the credibility of the victim that is impropriety "so clear and so harmful" that it requires reversal under the plain error doctrine. (Internal quotation marks omitted.) In response, the state contends that we should not review this unpreserved claim because, although portions of Livingston's testimony and report constitute improper opinion testimony, its admission was not plain error requiring reversal because: (1) the case was tried to a judge trained to sift out and not be influenced by improper evidence, rather than a jury; (2) in finding the facts, the judge credited the victim's testimony and did not rely on Livingston's opinions; and (3) the state's case was strong, as the victim's testimony was corroborated by testimony from E and K, a friend of the victim, the video exhibits, evidence of physical injury, and the incriminating notes that the defendant had left for the victim. We agree with the state, and conclude that the admission of the improper opinion evidence was not plain error requiring reversal.

By way of background, we note that after the victim reported the defendant's conduct to the police, Livingston, who is a board certified pediatrician practicing exclusively in the area of child abuse consultation, examined the victim at the Aetna Foundation Children's Center at Saint Francis Hospital and Medical Center in Hartford. Livingston's evaluation of the victim consisted of an interview and a detailed physical examination, which she documented in a written report. In this claim, the defendant challenges much of Livingston's trial tes-

timony describing her diagnoses following her assessment of the victim, namely, that: "*My assessment was that this was a* [*thirteen*] *year old girl who had suffered an extensive history of severe maltreatment by her father*. She disclosed incidents, multiple incidents of *physical abuse* including significant injuries to her head, her face and her eye. She reported multiple incidents of sexual abuse including exposure of pornography, kissing her breasts, abdomen and thighs, fondling her abdomen, her thighs and her genitalia, digital genital penetration, making her put live and dead rodents on her genitalia, making her penetrate her own vagina and anus with objects in a way that caused her pain and tissue injury and videotaping her while sexually abusing her.

"*Additionally, I diagnosed emotional or psychological abuse and there were multiple types of psychological abuse that occurred to this child including: terrorizing, spurning, exploiting and corrupting, rejecting and exposing her to intimate partner violence, and finally I diagnosed multiple types of neglect including educational neglect and medical neglect.*

"I noted that her physical examination demonstrated healing and healed injuries that were consistent with her reports of physical abuse. I noted that her reports that she had genital pain and bleeding suggested that *she suffered significant tissue injury at the time of the sexual abuse and that it's likely that those injuries had healed without residua as expected. I noted that the maltreatment she suffered was life threatening as it led to* [*a*] *suicide attempt and that the maltreatment she suffered deprived her of the opportunities to achieve some of the normal developmental tasks of childhood and early adolescence*. That was my assessment." (Emphasis added.) The defendant further challenges the statement contained in Livingston's written report that: "*The extent and severity of* [*the victim's*] *maltreatment* places her at high risk for acute and chronic mental health problems." (Emphasis added.)

"[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . .

"In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

"[W]e recently clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact commit-

ted an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . We made clear . . . that this inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 371–73, 33 A.3d 239 (2012).

As the state concedes, at least portions of Livingston's testimony, stating, inter alia, that the victim "had suffered an extensive history of severe maltreatment by her father" and had been diagnosed with "emotional or psychological abuse," were phrased in a way that rendered them inadmissible opinion testimony as to the ultimate issue in the case, and could have been stricken by the trial court upon timely objection. See *State* v. *Iban C.*, supra, 275 Conn. 639–40 (trial court improperly admitted testimony and report of expert witness "stating a diagnosis of sexual abuse, [which] effectively offered an expert opinion that this particular victim had in fact suffered sexual abuse"); see also id., 635 ("indirect assertions by an expert witness regarding the ultimate issue in a case can serve inappropriately to validate the truthfulness of a victim's testimony"); *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001) (psychologist's statement that she had treated victim for "the trauma of the abuse that [she] experienced . . . constituted an indirect assertion that validated the truthfulness of [the victim's] testimony" [citation omitted; internal quotation marks omitted]); accord *State* v. *Favoccia*, 306 Conn. 770, 788, 51 A.3d 1002 (2012) (noting "danger of an expert witness, particularly one who has treated or evaluated a complainant, vouching indirectly for that complainant's credibility").

We conclude, however, that this evidentiary impropriety does not satisfy the "relatively high standard" of establishing a "truly extraordinary situation where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Darryl W.*, supra, 303 Conn. 373. First, the fact finder in this case was not a lay jury, but rather, an experienced trial judge whose judgment was not likely to be swayed by inadvertently admitted improper opinion testimony—even in the absence of a formal objection.[16] See *State* v. *Hoskie*, 74 Conn. App. 663, 669, 813 A.2d 136 ("because the case was tried to the court rather than to a jury, the defendant must overcome a greater presumption regarding the likelihood that the fact finder would misuse such evidence in a manner that could unduly prejudice the defendant"), cert.

denied, 263 Conn. 904, 819 A.2d 837 (2003); *State* v. *Robles*, 33 Conn. App. 60, 64, 632 A.2d 1377 (1993) ("Here, the trial was before a court, not a jury, which decreases the likelihood that the trier of fact was misled by the state's allusion to the defendant's invocation of his *Miranda*[17] rights. . . . The collective decision of a jury is more likely to reflect the taint of a *Doyle*[18] violation than the decision of a trial judge trained to sift out and discard evidentiary improprieties." [Citation omitted.]); see also *State* v. *Young*, 81 Conn. App. 710, 717, 841 A.2d 737 ("[t]his was not a trial to the jury, but rather a [probation revocation] hearing before the court where prejudice was unlikely"), cert. denied, 269 Conn. 901, 852 A.2d 733 (2004). Moreover, the defendant elected not to cross-examine Livingston, suggesting that his trial counsel did not view her direct examination testimony as prejudicial to his case.

Finally, unlike those cases wherein we have concluded that improperly admitted opinion evidence was sufficiently prejudicial to the defendant to require a new trial, the other evidence against the defendant in this case was extremely strong.[19] Although the victim's testimony in this case was extremely important, it was heavily corroborated by the testimony of E and K detailing the defendant's prior misconduct with them, as discussed in part III of this opinion, the video exhibits, the documentation in Livingston's report of the physical injuries consistent with physical abuse that the victim had suffered over a sustained period of time, forensic testing of the baseball bat that the victim used to kill mice at the defendant's request, and the incriminating notes that the defendant had left for the victim. This was not a case wherein the defendant was convicted largely on the strength of the complainant's testimony standing by itself—a situation that elevates the risk that inadmissible expert opinion testimony might have the effect of improperly bolstering the complainant's credibility.[20] Cf. *State* v. *Favoccia*, supra, 306 Conn. 811–12 (noting significance of psychologist's testimony because of "import of the complainant's credibility and the defendant's substantial attacks upon it"); *State* v. *Iban C.*, supra, 275 Conn. 641–46 (affirming risk of injury conviction that was corroborated by defendant's confession, but reversing risk of injury conviction that "rested almost entirely on the victim's credibility" and constancy testimony, with no eyewitness testimony or physical or medical evidence of abuse). Accordingly, we conclude that this evidentiary impropriety was not extraordinary or of sufficient magnitude to constitute plain error requiring reversal.

III

The defendant's final claim in this appeal is that the trial court abused its discretion by admitting evidence of uncharged misconduct, namely: (1) the testimony of K, the victim's best friend, that the defendant had

engaged in sexual contact with her, which included the use of mice, from the ages of eleven through fourteen; and (2) exhibit 13, which is a video of E engaged in sexual activities with mice at the direction of the defendant.

Before examining the defendant's claims in detail, we note the following relevant background principles. "We recently have adopted an exception to § 4-5 (a) of the Connecticut Code of Evidence . . . allowing the admission of prior misconduct evidence to establish propensity in sex related cases if certain conditions are met. . . . Specifically, we concluded in [*State* v. *DeJesus*, 288 Conn. 418, 470–74, 953 A.2d 45 (2008)] that evidence of uncharged sexual misconduct is admissible only if it is relevant to prove that [a] defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she [was] charged. Relevancy is established by satisfying the liberal standard pursuant to which [prior sex crimes] evidence previously was admitted under the common scheme or plan exception. Accordingly, evidence of uncharged misconduct [or other crimes] is relevant to prove that [a] defendant had a propensity or a tendency to engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed [against] persons similar to the prosecuting witness. . . .

"[Such] [e]vidence . . . is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission. . . . In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity."[21] (Citations omitted; internal quotation marks omitted.) *State* v. *Gupta*, 297 Conn. 211, 224, 998 A.2d 1085 (2010); see also *State* v. *DeJesus*, supra, 288 Conn. 474 ("to minimize the risk of undue prejudice to the defendant, the admission of evidence of uncharged sexual misconduct under the limited propensity exception adopted herein must be accompanied by an appropriate cautionary instruction to the jury").

"The admission of evidence of . . . uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done. . . . [T]he burden to prove the harmfulness of an improper evidentiary ruling is borne by the defendant . . . [who] must show that it is more probable than not that the erroneous action

of the court affected the result."[22] (Internal quotation marks omitted.) *State* v. *Antonaras*, 137 Conn. App. 703, 713–14, 49 A.3d 783, cert. denied, 307 Conn. 936, 56 A.3d 716 (2012).

A

The defendant first claims that the trial court improperly concluded that the misconduct evidence relating to K was sufficiently similar to be admitted as propensity evidence under *DeJesus*. Specifically, the defendant contends that the passage of four years between his conduct with K and the crimes committed against the victim rendered the misconduct too remote, that K and the victim are not sufficiently similar because the victim is a family member while K is not, and that, in contrast to his actions masturbating while K crushed mice, there is no evidence that the defendant had the victim crush mice for his own sexual gratification. In response, the state contends that the events are adequately proximate in time, that the victims and conduct need not be identical to render the uncharged misconduct admissible, and that the "striking similarities" in the defendant's mice crushing conduct vis-á-vis K and the victim rendered the misconduct evidence admissible as a matter of common sense. We agree with the state, and conclude that the trial court did not abuse its discretion admitting evidence of the defendant's uncharged misconduct with K.

We note that K, who was twenty-three years old at the time of trial, testified that, in the late 1990s, she lived in the same Meriden apartment complex as the defendant, E, E's sister, and the victim. When K was eleven years old, she became acquainted with the defendant through her friendship with E's sister, and often visited the apartment of the defendant's family. Over the defendant's objection,[23] K then testified that the defendant first initiated sexual contact with her in the guise of a game of "truth or dare" when she was eleven or twelve years old. K testified that she then engaged in sexual activity with the defendant several times per week for the next few years until she turned fourteen years old; these activities included, on three or four occasions, at the defendant's request, rubbing mice on her "private areas" and killing mice by sitting on them while he masturbated. K testified that she did not tell anyone about these activities at the time because the defendant had threatened to kill her and her family should she reveal their conduct.

We conclude that the trial court did not abuse its discretion in admitting K's uncharged misconduct testimony, under the applicable liberal standard of admissibility in sex crimes cases. Noting the lack of any argument on appeal that the prejudicial effect of K's testimony exceeded its probative value, we observe that K and the victim were of similar ages during their abuse by the defendant, notwithstanding the fact that K was not related to the defendant. Moreover, contrary to the

defendant's unsupported argument, the four year lapse between the occurrences is well within the acceptable range of remoteness, particularly given the "distinct parallels between the prior misconduct and the charged misconduct." *State* v. *Jacobson*, 283 Conn. 618, 633, 930 A.2d 628 (2007); see also, e.g., id., 632–33 (upholding admission of uncharged misconduct approximately six and ten years before charged offenses); *State* v. *Romero*, 269 Conn. 481, 498–500, 849 A.2d 760 (2004) (nine year gap not too remote); *State* v. *Antonaras*, supra, 137 Conn. App. 716–17 (collecting cases). Further, the similarity of the activities between the victim and K is, in our view, beyond cavil; the defendant's utilization of the victim and K to accommodate his crushing fetish creates a striking similarity between his conduct with K and the victim that renders the trial court's decision well within the bounds of its discretion.[24]

B

The defendant next claims that the trial court improperly admitted the misconduct evidence relating to E, namely a video of her engaging in sexual and crushing activities with mice, because it lacks the required similarity, given the lack of evidence that the "defendant specifically threatened [E] to engage in the activities." In response, the state contends that the trial court did not abuse its discretion in admitting the video of E because: (1) E testified that the defendant had "forced" her to engage in crushing activities; and (2) the crushing activities are so distinctive as to outweigh the fact that E is an adult, while the victim is a child. We agree with the state, and conclude that the trial court did not abuse its discretion in admitting the crush video of E.

By way of background, we note that E testified on direct examination about her relationship with the defendant, including the existence of domestic violence therein. She then testified about the defendant's fetish behavior, including that he "like[d] to crush things, balloons and rats and baby mice. He liked to watch them being crushed." E testified that, although she did not realize that the defendant was making the victim engage in crushing activities as well, he had "forced" E to engage in that conduct, which he sometimes recorded on video. Over the defendant's objection,[25] the trial court admitted into evidence state's exhibit 13, which E identified as a DVD recording that was a fair and accurate representation of the defendant directing her to crush baby mice and use them on herself in a sexual manner.[26]

Despite the obvious dissimilarity in age between E and the victim, we conclude that the trial court did not abuse its discretion in admitting the video of E into evidence. Specifically, the trial court reasonably exercised its discretion based on the fact that the record revealed that both E and the victim were females, residing in the defendant's household, whom he had directed

to engage in crushing activities that are so sexually unique as to constitute a virtual “signature” of his propensity to engage therein.[27] See authorities cited in footnote 24 of this opinion and accompanying text.

The judgment is affirmed.

In this opinion the other justices concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims’ identities may be ascertained. See General Statutes § 54-86e.

** The listing of 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 . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . .”

[3] General Statutes § 53-21 provides in relevant part: “(a) Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of a class C felony for a violation of subdivision (1) . . . of this subsection and a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.”

[4] General Statutes § 53a-196b (a) provides: “A person is guilty of promoting a minor in an obscene performance when he knowingly promotes any material or performance in which a minor is employed, whether or not such minor receives any consideration, and such material or performance is obscene as to minors notwithstanding that such material or performance is intended for an adult audience.”

[5] The United States Supreme Court has described “crush videos” as “videos [that] feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. . . . Crush videos often depict women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes,’ sometimes while ‘talking to the animals in a kind of dominatrix patter’ over ‘[t]he cries and squeals of the animals, obviously in great pain.’ . . . Apparently these depictions ‘appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.’ . . . The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all [fifty] [s]tates and the District of Columbia.” (Citations omitted.) *United States* v. *Stevens*, 559 U.S. 640, 130 S. Ct. 1577, 1583, 176 L. Ed. 2d 435 (2010), quoting H.R. Rep. No. 106–397, pp. 2–3 (1999).

[6] General Statutes § 53a-193 provides in relevant part: “(2) Material or a performance is ‘obscene as to minors’ if it depicts a prohibited sexual act and, taken as a whole, it is harmful to minors. For purposes of this subdivision: (A) ‘Minor’ means any person less than seventeen years old as used in section 53a-196 and less than sixteen years old as used in sections 53a-196a and 53a-196b, and (B) ‘harmful to minors’ means that quality of any description or representation, in whatever form, of a prohibited sexual act, when (i) it predominantly appeals to the prurient, shameful or morbid interest of minors, (ii) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value for minors.

“(3) ‘Prohibited sexual act’ means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse.

“(4) ‘Nude performance’ means the showing of the human male or female

genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state in any play, motion picture, dance or other exhibition performed before an audience.

"(5) 'Erotic fondling' means touching a person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast.

"(6) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(7) 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"(8) 'Masturbation' means the real or simulated touching, rubbing or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breast, either by manual manipulation or with an artificial instrument.

"(9) 'Sexual intercourse' means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

"(10) 'Material' means anything tangible which is capable of being used or adapted to arouse prurient, shameful or morbid interest, whether through the medium of reading, observation, sound or in any other manner. Undeveloped photographs, molds, printing plates, and the like, may be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

"(11) 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

"(12) 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, advertise, produce, direct or participate in. . . ."

[7] The defendant was a martial arts instructor who taught a form of martial arts known as jeet kune do. Several students visited the defendant for lessons in this technique at the condominium in Southington.

[8] The defendant testified that he had learned how to suture cuts from a cousin who had been an emergency medical technician before becoming a postal worker, and that, in his cousin's view, anesthetic was not necessary because of the existing pain and inflammation in the wounded area that is being sutured. The defendant also claimed, and the trial court rejected, that the victim had asked him to suture her cut himself rather than visit a hospital or physician.

[9] The trial court also imposed a standing criminal restraining order and lifetime sex offender registration on the defendant.

[10] The crush video featuring E was admitted into evidence as state's exhibit 13 as uncharged misconduct evidence. See part III B of this opinion.

[11] At oral argument before this court, the defendant claimed, for the first time, that the "audience" aspect with respect to the "performance" element of § 53a-196b was not satisfied. See General Statutes § 53a-193 (11) (defining " '[p]erformance' " as "any play, motion picture, dance or other exhibition performed before an audience"). We ordinarily would decline to reach an unbriefed claim raised for the first time at oral argument before this court. See, e.g., *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 586 n.17, 22 A.3d 518 (2011). Nevertheless, we determine that, viewing the victim's testimony to support the finding of the trial court, the defendant's claim is foreclosed by our decision in *State* v. *Ehlers*, 252 Conn. 579, 595–96, 750 A.2d 1079 (2000), which held that "an audience, for the purposes of [first degree possession of child pornography in violation of General Statutes] § 53a-196d, could consist of a single photographer of the live performance, whether . . . he or she actually was present at the performance or ever viewed the photographs, or a single person viewing photographs of the performance, whether . . . any spectator was present at the live performance or depicted in the photographs. This commonsense interpretation of the statute advances the legislative purpose of protecting children by targeting the market for child pornography." See also *State* v. *Ernesto P.*, 135 Conn. App. 215, 231, 41 A.3d 1115 ("the term audience, as used in [General Statutes] § 53a-196a [employing a minor in an obscene performance], may consist of a single photographer of the live performance or a single person viewing photographs of the performance"), cert. denied, 305 Conn. 912, 45 A.3d 98 (2012).

[12] We note that exhibit 6 is approximately one minute long and depicts the victim crushing a mouse to death with her bare foot with a man's voice

audible, but muffled, in the background. Exhibit 7 is approximately three minutes long and depicts the victim crushing numerous mice to death with her bare feet in and around a bathtub; similarly, a man's voice is audible, but muffled, in the background.

[13] Specifically, the victim testified as follows on direct examination:

"Q. And now I'd like to ask you in terms of the balloon things, what ages were you when that happened? Was that, again, between [ten] and [twelve]?

"A. Yes.

"Q. And how many times did that happen?

"A. It happened a few times. I can't remember the number.

"Q. Okay. And did all of those incidents take place in your [condominium] in Southington?

"A. Yes.

"Q. And the things with the mice, did all those things take place in your [condominium] in Southington?

"A. Yes.

"Q. And would [the defendant] film these things?

"A. Yes.

"Q. And did he film your activities with the mice?

"A. Yes.

"Q. And did he film your activities with the balloons?

"A. Yes.

"Q. And all that took place between the ages [ten] and [twelve] in Southington?

"A. Yes."

[14] We note that the trial court apparently misspoke in its oral memorandum of decision, crediting the victim's testimony to sustain the defendant's conviction under § 53a-196b (a), and stating that state's exhibit 13, a video, "depicts erotic fondling, nudity, masturbation and sexual intercourse." Although state's exhibit 13 contains graphic sexual content, the subject of exhibit 13 is E, an adult, rather than the victim. See footnote 26 of this opinion. Inasmuch as the memorandum of decision indicates that the trial court relied on the video exhibits merely to corroborate the victim's testimony, we do not view this misstatement as any basis for disturbing the defendant's conviction.

[15] Although the defendant objected during Livingston's testimony, that objection was limited to the admission of her report on the ground that it was an improper hearsay document, and also that certain statements contained therein were inadmissible double hearsay. The trial court overruled this objection and admitted Livingston's report subject to certain redactions not at issue in this appeal. As the defendant acknowledges, this hearsay objection was insufficient to preserve his opinion based claim on appeal. See, e.g., *State* v. *Devalda*, 306 Conn. 494, 517, 50 A.3d 882 (2012).

[16] Indeed, in electing a court rather than a jury trial, the defendant repeatedly stated that he valued the experience and professional detachment of a trial judge rather than a lay jury that he feared might be swayed by emotion, given what he acknowledged were "allegations that . . . have a certain amount of shock value . . . ."

[17] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1996).

[18] *Doyle* v. *Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[19] It is well settled that, in a case with a properly preserved claim involving an "improper evidentiary ruling [that] is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 306 Conn. 808–809, quoting *State* v. *Sawyer*, 279 Conn. 331, 357–58, 904 A.2d 101 (2006), overruled on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 454 n.4, 953 A.2d 45 (2008).

[20] We disagree with the defendant's rather optimistic characterization of the state's case as "not particularly strong" because "[n]one of the physical evidence offered by the state conclusively established that any abuse actually occurred," given his alternate explanations for the victim's bruising, namely, her participation in martial arts training with him, the fact that the crush videos depicting the victim do not actually depict sexual conduct and could have been made by the victim to support her fabrications, and that K's prior misconduct testimony may also have been fabricated. Although these explanations may well have provided something for the fact finder to consider, for purposes of assessing the harmfulness of evidentiary impropriety, they do not render this case indistinguishable from cases with no physical or other evidence to support the victim's narrative of the abuse that she suffered.

[21] We note that § 4-5 of the Connecticut Code of Evidence was subsequently amended to conform with this court's decision in *State* v. *DeJesus*, supra, 288 Conn. 474. This rule, as amended, provides: "(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

"(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

"(d) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct." Conn. Code Evid. § 4-5 (effective January 1, 2012), 73 Conn. L.J. No. 1, pp. 211PB–212PB (July 5, 2011).

[22] We note that this evidentiary issue was argued before the trial court under the common scheme or plan exception as the state's claimed basis for the admission of the uncharged misconduct evidence. See footnotes 23 and 25 of this opinion. On appeal, however, both parties brief this claim in light of the propensity standard for the admission of uncharged misconduct evidence in sex crimes cases adopted in *State* v. *DeJesus*, supra, 288 Conn. 470–74. In accordance with now established practice, we review this issue pursuant to the propensity exception articulated in *DeJesus* because the factors that guide the relevance inquiry remain the same. See id., 476–77 ("[i]n assessing the relevancy of such evidence, and in balancing its probative value against its prejudicial effect, the trial court should be guided by this court's prior precedent construing the scope and contours of the liberal standard pursuant to which evidence of uncharged misconduct previously was admitted under the common scheme or plan exception"); see also, e.g., *State* v. *Gupta*, supra, 297 Conn. 225 n.7 ("[T]he underlying decisions in the present case rested on the cross admissibility of the evidence under the liberal common plan or scheme exception, not the propensity exception. As *DeJesus* makes clear, however, although we changed the label of the exception, we did not change the parameters that such evidence must satisfy to be admissible."); *State* v. *Antonaras*, 137 Conn. App. 703, 715 n.10, 49 A.3d 783 ("Although the uncharged misconduct evidence was admitted under the common scheme or plan exception, the defendant argues on appeal that the evidence was inadmissible under the propensity exception delineated in *DeJesus*. As the defendant concedes, if the evidence was admissible for propensity purposes, any error in admitting the testimony under the common scheme or plan exception was harmless."), cert. denied, 307 Conn. 936, 56 A.3d 716 (2012).

[23] In objecting, the defendant argued that K's testimony was irrelevant, and that its "prejudicial effect substantially outweighs the probative value."

The trial court overruled the defendant's relevance based objection to K's testimony, agreeing with the state's argument that, under *State* v. *Kulmac*, 230 Conn. 43, 62–63, 644 A.2d 887 (1994), and *State* v. *Sawyer*, 279 Conn. 331, 357–58, 904 A.2d 101 (2006), the uncharged misconduct evidence was admissible because the defendant's conduct was not remote in time and K was a similar age to the victim when she was assaulted, and as evidence of a common plan or scheme, or as a signature because "this issue with the mice and the rodents . . . qualifies as sufficient and unique to constitute that." The trial court further found "that the probative value outweighs any prejudice."

[24] The defendant's argument that the mice crushing activities with K were not adequately similar because "sexual gratification of the defendant was an integral component of the misconduct with K, but not with the crimes charged with [the victim]," based on the fact that he masturbated himself with K, but not with the victim, defies credulity. It is well established that the victim and the conduct at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence. See, e.g., *State* v. *Romero*, supra, 269 Conn. 500–501 (holding requisite similarity when act at issue was anal intercourse with prepubescent child in locked bedroom accompanied by viewing of pornography, despite difference in genders between uncharged misconduct witness and victim). It requires no citation to authority to establish that his own sexual gratification was the purpose for which the jury reasonably could have found that the defendant had made the victim rub mice on, and insert them in, to her private parts, while he watched. Further, although the defendant's crushing fetish apparently is sufficiently common to have generated a market for video depictions thereof; see *United States* v. *Stevens*, 559 U.S. 640, 130 S. Ct. 1577, 1591–92, 176 L. Ed. 2d 435 (2010) (invalidating 18 U.S.C. § 48, which Congress enacted to outlaw crush video industry, as facially overbroad); *People* v. *Thomason*, 84 Cal. App. 4th 1064, 1065–66, 101 Cal. Rptr. 2d 247 (2000) (upholding felony animal cruelty conviction for production of crush videos), review denied, 2001 Cal. LEXIS 841 (2001); our independent research into the legions of federal and state sexual assault cases reveals *no other reported decision* wherein a defendant has forced a victim to engage in crushing or other rodent related activities. That lacuna creates, ipso facto, the similarity requisite to sustaining the trial court's exercise of its discretion.

[25] The defendant objected to the admission of this video, contending that, because he was not charged with committing any crimes against E, it was "not relevant and more prejudicial than it is probative." The trial court overruled the objection, concluding that the probative value of the DVD outweighed its prejudicial effect and agreeing with the state's argument that it was relevant to the "signature issue . . . that the defendant has this interest in mice."

[26] Exhibit 13 is an approximately fifteen minute long video of E manipulating numerous mice or other rodents into and around her vaginal area. What appears to be man's hand appears at several points during the video to guide E's hand, and a man's voice is audible during several points of the video directing E's activities therein. In the last few minutes of the video, E then crushes the mice to death using her hands and feet, with the man's voice audibly directing those activities as well.

[27] We note that E testified as follows:

"Q. Okay. And you described [the defendant's] fetish with rats, and, I guess, mice and things like that. Did you engage in that conduct with [the defendant]?

"A. I was forced to.

"Q. Okay. And [the defendant], would he record that activity?

"A. Sometimes.

"Q. And would he direct you what to do with the rats and the mice and things?

"A. Yes.

"Q. And it was sexual in nature?

"A. Yes, it was."