BANK OF AMERICA, N.A., TRUSTEE *v.* STEVEN CHAINANI ET AL.
(AC 38252)

Keller, Mullins and Harper, Js.

Syllabus

Pursuant to the rule of practice (§ 23-18 [a]), "[i]n any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness . . . ."

The plaintiff sought to foreclose a mortgage on certain of the defendant's real property after the defendant had defaulted on a promissory note. In the defendant's answer, he denied the debt was in default and averred insufficient knowledge to admit or deny the alleged amount of the debt and left the plaintiff to its proof. At trial, pursuant to § 23-18 (a), the plaintiff submitted two affidavits of debt to establish the amount of the debt owed. The defendant objected that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. The trial court considered one of the affidavits to establish the amount of the debt, determined the debt to be $3,268,499.34, and rendered a judgment of strict foreclosure, from which the defendant appealed to this court. On appeal, the defendant claimed that the trial court erred in admitting the affidavit of debt into evidence under § 23-18 (a) because he disputed the amount of the debt via his answer that contained responses that were sufficient to bar the affidavit's admission, and thus the affidavit was inadmissible hearsay evidence that deprived the defendant of his right to cross-examine witnesses on the amount of the debt. *Held*:

1. Contrary to the parties' claims that the abuse of discretion standard of review applied to this case, this court clarified that in claims involving an affidavit of debt admitted under § 23-18 (a), the appropriate standard is plenary review; the defendant's claim that the trial court erred in determining that § 23-18 (a) applied is properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies, and whether an exception to the hearsay rule applies is a question of law over which this court's review is plenary.
2. The trial court did not err in admitting the affidavit into evidence and determining that § 23-18 (a) applied, as the defendant never raised any defense to the amount of the debt sufficient to prohibit the admission of affidavits of debt under that rule of practice; a defense challenging the amount of a debt must be actively made, and the defense must be squarely focused on the amount of the debt rather than other ancillary matters, such as whether the loan is in default, and the defendant's proffered challenges here that he had insufficient knowledge to admit or deny the amount of the debt and that the debt was not in default did not amount to defenses as to the amount of the debt.

Argued January 11—officially released July 11, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants JP Morgan Chase Bank, N.A., et al., were defaulted for failure to appear; thereafter, the defendant Webster Bank was defaulted for

failure to plead; subsequently, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (named defendant).

Stephen I. Hansen, for the appellee (plaintiff).

Opinion

HARPER, J. In this appeal from a judgment of strict foreclosure after a trial, the defendant, Steven Chainani,[1] challenges the applicability of Practice Book § 23-18 (a),[2] under which the plaintiff, Bank of America, N.A.,[3] was permitted to establish the amount of the debt at issue via an affidavit of debt, rather than through the presentation of live testimony from witnesses. The defendant's arguments implicate two affidavits that were admitted at separate hearings; however, his claims attack only the use of these affidavits to the extent they were used to establish the amount of the debt, for which the court used only the second affidavit.[4] The relevant

[1] The complaint also named as defendants JP Morgan Chase Bank, N.A., Levco Tech, Inc., Webster Bank, and Patriot National Bank. Each of these defendants was alleged to hold a subsequent encumbrance on the subject property. Of these defendants, only Webster Bank filed an appearance. None of these additional defendants are participating in the appeal, and all references to the defendant are references to Steven Chainani.

[2] Practice Book § 23-18 (a) provides that "[i]n any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto."

[3] The plaintiff in this action is the successor to LaSalle Bank N.A., and is acting as trustee on behalf of the holders of the "Thornburg Mortgage Securities Trust 2007-4 Mortgage Home Loan Pass-Through Certificates, Series 2007-4."

[4] Because the court used only the second affidavit to establish the amount of the debt, we need not consider the defendant's claims regarding the first affidavit. We note that the same legal analysis applies to both affidavits

affidavit was admitted at a hearing to determine the form of the judgment and was used to determine the amount of the debt pursuant to § 23-18 (a). The defendant argues that the trial court erred because § 23-18 (a) was not applicable to this case. He asserts that this was not harmless error because the affidavit was the only evidence offered to establish the amount of the debt. For the reasons that follow, we conclude that the affidavit was admitted properly under § 23-18 (a) and, accordingly, we affirm the judgment of the trial court.

The following procedural history and facts are relevant to our consideration. On July 6, 2007, the defendant executed a promissory note in favor of the Bank of New Canaan in exchange for a loan in the amount of $2,316,000, which was secured by a mortgage on the defendant's real property located at 215 Springwater Lane in the town of New Canaan. Thereafter, on July 13, 2007, the Bank of New Canaan assigned the note to Thornburg Mortgage Home Loans, Inc. (Thornburg), and it was recorded on April 9, 2009. Thornburg, in turn, assigned the note to the plaintiff, as trustee,[5] on February 9, 2011, and it was recorded on February 17, 2011. By virtue of the latter assignment, the plaintiff is now the holder of the note and mortgage. The defendant defaulted on the note, and the plaintiff elected to declare the unpaid balance under the note to be due in full and to foreclose the mortgage securing the note.

On March 5, 2012, the plaintiff commenced this action to foreclose by service of process on the defendant. The defendant filed an answer and special defense. The answer denied that the debt was in default and averred insufficient knowledge to admit or deny the alleged

under Practice Book § 23-18 (a) and that were we to consider the defendant's arguments concerning the first affidavit, we would nevertheless reach the same conclusion, for the same reasons, as we do regarding the second affidavit.

[5] See footnote 3 of this opinion.

amount of the debt and left the plaintiff to its proof.[6] Prior to trial, a joint trial management report was submitted by the parties in which they stated the sole factual and legal issue in dispute was "[w]hether or not [the] [p]laintiff . . . has standing to commence this foreclosure action." The matter was tried to the court on December 17, 2014.

Although we will not consider the defendant's arguments concerning the first affidavit as previously noted; see footnote 4 of this opinion; it is necessary at this point to provide some background on the first affidavit because the defendant's objection to the second affidavit incorporated his arguments as to the first affidavit. At trial, pursuant to Practice Book § 23-18 (a), the plaintiff offered the first affidavit, signed by the plaintiff's vice president, Michelle Simon (Simon affidavit), along with the original note and mortgage.[7] The court admitted the Simon affidavit into evidence over the defendant's objection that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. At the conclusion of this proceeding, the court reserved judgment in order to consider motions made during trial.[8]

After concluding that the plaintiff had standing to foreclose, the court held a hearing on May 27, 2015, to determine the amount of the debt and the form of the judgment to be rendered. In advance of that hearing, the plaintiff submitted the second affidavit of debt executed by one of the plaintiff's agents, KaJay Williams

[6] The defendant also raised a special defense, which is not at issue in this appeal. The defendant's special defense was that "[the] [p]laintiff failed to comply with preacceleration and preforeclosure notice requirements set forth in the alleged mortgage."

[7] The Simon affidavit averred a debt totaling $3,070,761.34.

[8] The defendant made an oral motion to dismiss the case, and the court provided the defendant with three weeks to file a brief in support of the motion. After the defendant failed to file the brief, the motion was denied on March 19, 2015.

(Williams affidavit), in support of the plaintiff's motion for strict foreclosure. The plaintiff sought to use the Williams affidavit to establish, pursuant to Practice Book § 23-18 (a), that the updated debt, taking into account additional costs, fees, and interest accrued since the Simon affidavit was submitted, was now $3,268,499.34. When the plaintiff offered the Williams affidavit at the hearing, the defendant objected to its admission, stating that his objection was the same as it was to the Simon affidavit, namely, that § 23-18 (a) did not apply because he had put forth a defense implicating the amount of the debt. The defendant did not inform the court of any new legal arguments, evidence, or witnesses that he anticipated presenting to dispute the amount of the debt contained in the Williams affidavit. The trial court overruled the objection on the ground that the Williams affidavit, like the Simon affidavit, was admissible under § 23-18 (a). Thereafter, on July 8, 2015, the court found in favor of the plaintiff, determined the debt to be $3,268,499.34, and rendered a judgment of strict foreclosure. This appeal followed.

The defendant argues that the trial court erred in admitting the Williams affidavit under Practice Book § 23-18 (a) because he had disputed the amount of the debt. He argues that his answer contained responses to the allegations of the plaintiff's complaint that were sufficient to bar admission of the affidavits under § 23-18 (a). Because § 23-18 (a) did not apply, he argued that the affidavit was inadmissible hearsay and its admission deprived the defendant of his right to cross-examine the witness on this issue. The plaintiff counters that nothing in the defendant's answer to the complaint was sufficient to render § 23-18 (a) inapplicable.

The parties have asserted that the abuse of discretion standard of review applies in this case.[9] After carefully

[9] The defendant's brief recites both the plenary and abuse of discretion standards, however, he applies only the abuse of discretion standard in his analysis. The plaintiff's brief acknowledges the defendant's reference to the

reviewing the limited appellate decisions involving Practice Book § 23-18 (a), we cannot agree. There is ambiguity in the case law involving § 23-18 (a) claims, with many decisions not articulating or clearly applying a standard of review.[10] Some decisions apply, as the parties in the present case urge, the abuse of discretion standard.[11] One notable outlier applies the clearly erro-

plenary review standard and states that such standard is not applicable to claims involving Practice Book § 23-18 (a) affidavits. This dispute reveals the necessity for this court to clarify the appropriate standard of review to be applied.

[10] The following cases do not clearly state or apply a particular standard of review in analyzing claims involving Practice Book § 23-18 (a): *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374–75, 439 A.2d 396 (1981) (§ 23-18 [a] inapplicable where defaulted defendant objected to proffered affidavit on ground that amounts claimed were inaccurate and offered his own testimony regarding calculation of debt); *Saunders* v. *Stigers*, 62 Conn. App. 138, 144, 773 A.2d 971 (2001) (counterclaim under Fair Debt Collection Practices Act was separate claim and not defense to amount of debt such that § 23-18 [a] was inapplicable); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability for debt is not defense to amount of debt and is insufficient to render § 23-18 [a] inapplicable), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996); *Suffield Bank* v. *Berman*, 25 Conn. App. 369, 372–74, 594 A.2d 493 (challenge to amount of debt need not be disclosed prior to judgment hearing but defense to liability must be disclosed; defense to liability insufficient to prevent application of § 23-18 [a]), cert. dismissed, 220 Conn. 913, 597 A.2d 339, cert. denied, 220 Conn. 914, 597 A.2d 340 (1991); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 473, 578 A.2d 655 (1990) (claim of insufficient knowledge to admit or deny amount of debt is not defense to amount sufficient to render § 23-18 [a] inapplicable). Additionally, this court's decision in *Patriot National Bank* v. *Braverman*, 134 Conn. App. 327, 38 A.3d 267 (2012), did not state the applicable standard of review, but *Patriot National Bank* perhaps is distinguishable from the others in this list on the fact that, although the court mentioned the issue, it ultimately did not analyze or decide the issue because it determined the defendant was not aggrieved. See id., 331–32.

[11] The following cases apply the abuse of discretion standard in analyzing claims involving Practice Book § 23-18 (a): *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 403–405, 89 A.3d 392 (unsupported challenge to affiant's credentials and qualifications to aver amount of debt and challenge to veracity of affiant's signature are not challenges to amount of debt such that § 23-18 [a] is inapplicable), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 186–87, 73 A.3d 742

neous standard.[12] Therefore, we take this opportunity to clarify the appropriate standard of review to be applied in claims involving an affidavit of debt admitted under § 23-18 (a). As will be explained herein, "[t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court." (Internal quotation marks omitted.) *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014).

In this appeal, the proper characterization of the trial court's ruling is clarified by examining the nature of an affidavit of debt and the function of Practice Book § 23-18 (a) in foreclosures. Without question, an affidavit of debt is hearsay evidence because it is an out-of-court statement, by an absent witness, that is offered to prove the truth of the amount of the debt averred in the affidavit. See *Midland Funding*, *LLC* v. *Mitchell-James*, 163

(2013) (objection to affidavit of debt seeking to cross-examine affiant does not state challenge to amount of debt sufficient to defeat applicability of § 23-18 [a]); *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 797–99, 888 A.2d 95 (defendant made sufficient challenge to amount of debt to prohibit application of § 23-18 [a] where multiple objections to proffered affidavit of debt sought to cross-examine representative of plaintiff specifically to ascertain what taxes and assessments plaintiff claimed to incur, including when they were paid, by whom, and why), cert. denied, 277 Conn. 925, 895 A.2d 799 (2006); *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 736–37 and 748–50, 725 A.2d 975 (1999) (affidavit of debt not admissible under § 23-18 [a] may nevertheless be admissible under business record exception to hearsay rule). Additionally, the court in *TD Banknorth*, *N.A.* v. *White Water Mountain Resorts of Connecticut*, *Inc.*, 133 Conn. App. 536, 540 n.6, 37 A.3d 766 (2012), did not reach the issue involving § 23-18 (a) because the claim was not properly raised, but the court described the matter as an evidentiary ruling and presumably, therefore, would have applied the abuse of discretion standard.

[12] In *Bank of America*, *FSB* v. *Franco*, 57 Conn. App. 688, 694–95, 751 A.2d 394 (2000), the defendant, claiming plenary review, argued that there was not sufficient evidence in the record to support the court's findings regarding the amount of debt because the only evidence of the amount had been an affidavit of debt that the defendant claimed was improperly admitted under Practice Book § 23-18 (a). The court characterized this claim as one regarding the adequacy of the evidence in record and employed the clearly erroneous standard of review.

Conn. App. 648, 655, 137 A.3d 1 (2016) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible." [Citation omitted.]); *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 798–99, 888 A.2d 95 (2006) (when § 23-18 [a] does not apply, proffered affidavit of debt is subject to hearsay rules). As is relevant here, the purpose of § 23-18 (a) is to serve as an exception to the general prohibition of hearsay evidence when appropriate circumstances arise, namely, that the amount of the debt is not in dispute. *National City Mortgage Co.* v. *Stoecker*, supra, 798–99. Therefore, the defendant's claim that the trial court erred in determining that § 23-18 (a) applies is most properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies to the affidavit of debt.

"A trial court's decision to admit evidence, *if premised on a correct view of the law* . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made the *legal determination* that a particular statement . . . is subject to a hearsay exception, is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 653.[13] Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary.[14] See *Weaver* v.

[13] We note there are situations where a claim that involves Practice Book § 23-18 (a) could require the application of the clearly erroneous standard of review. See footnote 12 of this opinion. The present appeal does not present such a case.

[14] Once the initial legal determination that Practice Book § 23-18 (a) applies is made, the trial court is then faced with the discretionary decision of whether to admit or bar the affidavit based on an appropriate legal ground,

McKnight, 313 Conn. 393, 426, 97 A.3d 920 (2014) (whether hearsay exception applies is legal question demanding plenary review).

The defendant argues that Practice Book § 23-18 (a) does not apply here because he challenged the amount of the debt claimed by the plaintiff. He identifies his answer to the complaint as sufficiently denying the amount of the debt to render § 23-18 (a) inapplicable. Specifically, he asserts that this was achieved by denying that the debt was in default and claiming insufficient knowledge to admit or deny the amount of the debt. He argues that the trial court should have understood these responses to be a challenge to the amount of the debt such that § 23-18 (a) would not apply. The plaintiff rejects these claims and argues that the defendant failed to articulate a defense to the amount of the debt prior to trial.[15]

such as an apparent defect in the affiant's source of knowledge or a defect in the execution of the affidavit that renders it unreliable. *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 655–56; see also, e.g., *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 748–49, 725 A.2d 975 (1999) (discussing fact affidavit is witnessed by notary public is one characteristic suggesting reliability). The defendant has not raised any challenges to the discretionary aspect of the trial court's decision to admit the affidavit under § 23-18 (a).

[15] The plaintiff seems to argue that any challenge to the amount of the debt that was not raised prior to trial is not cognizable for the purposes of determining the applicability of Practice Book § 23-18 (a). This position is not supported by the case law. The case law is clear that "defenses relating to the mathematical calculation of the debt need not be disclosed but defenses that go to the issue of the defendant's liability for the debt must be disclosed." *Suffield Bank* v. *Berman*, supra, 25 Conn. App. 374; see also *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374–75, 439 A.2d 396 (1981) (objection to admission of affidavit sufficient where defendant disputed amounts averred regarding principal of loan and charges for interest, taxes, and late payment penalties); *Patriot National Bank* v. *Braverman*, 134 Conn. App. 327, 331–32, 38 A.3d 267 (2012) (motion to open judgment challenging amount of debt was sufficient to impact applicability of § 23-18 [a] and plaintiff consented to reduction of debt by amount claimed by defendant); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (challenges to amount of debt sufficient for § 23-18 [a] may be raised through presentation of evidence or arguments), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996). Moreover, even where a

Practice Book § 23-18 (a) provides that in any foreclosure action "where no defense as to the amount of the mortgage debt is interposed," the amount of the debt may be proved by submission of an affidavit executed by an affiant familiar with the details of the debt. "A defense is that which is offered and alleged by a party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks. . . . In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact." (Citation omitted; internal quotation marks omitted.) *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 472–73, 578 A.2d 655 (1990). The case law is clear that a defense challenging the amount of the debt must be actively made in order to prevent the application of § 23-18 (a). "[A] mere claim of insufficient knowledge as to the correctness of the amount stated in the affidavit of debt is not a defense for purposes of [§ 23-18 (a)]." Id., 473.

It is axiomatic that such a defense may be raised by pleading a special defense attacking the amount of the debt claimed, but it may also be raised by objection, supported with evidence and arguments challenging the amount of the debt, upon the attempted introduction of the affidavit in court. See, e.g., *Suffield Bank* v. *Berman*, 25 Conn. App. 369, 372–74, 594 A.2d 493 (challenge to amount of debt, unlike defense to liability, need not be disclosed prior to judgment hearing), cert. dismissed, 220 Conn. 913, 597 A.2d 339, cert. denied, 220 Conn.

defendant has been defaulted for failure to disclose a defense, that defendant has not waived the opportunity to contest the amount of the debt and the plaintiff is not relieved of the obligation to prove its claimed debt. *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 545–46, 37 A.3d 766 (2012); see id., 546 ("the effect of a default [for failure to disclose defenses] is to preclude the defendant from making any further defense in the case so far as *liability* is concerned" [emphasis added]).

914, 597 A.2d 340 (1991). A defense, however raised, must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of liability, or challenges that attack the credibility of the affiant or defects in the execution of the affidavit itself. See *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 403–405, 89 A.3d 392 (challenge to affiant's credentials and qualifications are not challenges to amount of debt), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability does not implicate the amount of the debt), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996). Similarly, where a counterclaim is made by a defendant in a mortgage foreclosure action, that counterclaim does not affect the applicability of Practice Book § 23-18 (a) unless it actually challenges in some manner the amount of the debt alleged by the plaintiff. See *Saunders* v. *Stigers*, 62 Conn. App. 138, 144, 773 A.2d 971 (2001) (counterclaim under Fair Debt Collection Practices Act was separate claim and not defense to amount of debt).

The pleadings that the defendant characterizes as challenges to the amount of the debt simply are not defenses to the amount of the debt. Regarding his claim of insufficient knowledge to admit or deny the amount of the debt, the case law is clear that this is not a defense to the debt sufficient to bar application of Practice Book § 23-18 (a). *Connecticut National Bank* v. *N. E. Owen II, Inc.*, supra, 22 Conn. App. 473. Turning to the defendant's denial that the debt was in default, this is similarly not a defense that negates the applicability of § 23-18 (a). To deny that the debt is in default is a defense that goes to liability, not the amount of the debt, because whether a debt is owed—liability—is a separate matter from whether the amount that is claimed to be owed is accurate. See *Busconi* v. *Dighello*, supra, 39 Conn.

App. 771–72 (defense to liability for debt is not defense to amount).

Additionally, on both occasions when the trial court admitted an affidavit of debt over the defendant's objection, he failed to make further argument or explanation that would have supported a challenge to the debt. The defendant could have responded to the court's questions regarding his objections by informing the court that he had new legal arguments, evidence, or witnesses to present that would support his contention that the debt figure averred to in the affidavit was inaccurate. The defendant, however, made no such attempt.

It is clear that the defendant never raised any defense to the amount of the debt sufficient to prohibit the admission of affidavits of debt under Practice Book § 23-18 (a). Accordingly, we conclude that the trial court did not err in its legal determination that § 23-18 (a) applies in this case.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EVER LEE HOLLEY (AC 38115)

Alvord, Sheldon and Mullins, Js.

Syllabus

Convicted of the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, the defendant appealed to this court, claiming that the trial court improperly instructed the jury on reasonable doubt. Specifically, he claimed that the court improperly instructed the jury that reasonable doubt "is such a doubt as, in serious affairs that concern you, you will heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance." He also claimed that the trial court improperly denied his motion to suppress certain evidence that had been seized by police during a warrantless search of his residence. The defendant, who was on parole, claimed that a warrantless search of a parolee's residence that fails

to comply with certain administrative directives of the Department of Correction is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. The trial court rejected that argument and also denied the motion to suppress on the ground that the defendant had orally consented to the search. *Held*:

1. The defendant's claim that the phrase "upon it" in the court's instruction concerning reasonable doubt effectively diluted the state's burden of proof was unavailing; our Supreme Court repeatedly has upheld the use of instructions employing the very language challenged by the defendant, and this court, as an intermediate appellate court, was bound by that controlling precedent.
2. The defendant could not prevail on his claim that the jury was misled by the trial court's instructions regarding proof beyond a reasonable doubt, which was based on his claim that the trial court improperly orally instructed the jury that reasonable doubt is such doubt as "you will heed," rather than "you would heed," as was stated in the court's written instructions; the defendant having failed to object to the discrepancy between the written and oral instructions, his claim was unpreserved, and he failed to demonstrate the existence of a constitutional violation that deprived him of a fair trial pursuant to the third prong of the test set forth in *State* v. *Golding* (231 Conn. 233), as there was no reasonable possibility that the jury was confused by the court's use of "will" instead of "would" when the jury had before it the written instructions, and both sets of charges adequately explained the principles governing burden of proof, the presumption of innocence and reasonable doubt.
3. This court dismissed as moot the defendant's claim that the trial court improperly denied his motion to suppress evidence that was seized in a warrantless search of his residence; there was no practical relief that could be afforded to the defendant with respect to his claim that his constitutional rights were violated when the police did not follow certain administrative regulations concerning searches of a parolee's residence, as the trial court also determined that the defendant had orally consented to the search of his residence, which was an independent basis that supported the trial court's decision to deny the motion to suppress that was not challenged by the defendant on appeal.

Argued February 6—officially released July 11, 2017

Procedural History

Two part information charging the defendant, in the first part, with the crime of possession of narcotics with intent to sell, and, in the second part, with being a subsequent offender, brought to the Superior Court in the judicial district of Middlesex, where the court,

Diana, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the first part of the information was tried to the jury; verdict of guilty; subsequently, the second part of the information was tried to the jury; verdict of guilty; thereafter, the court granted the defendant's motion for a judgment of acquittal on the second part of the information and rendered judgment in accordance with the verdict as to the first part of the information, and the defendant appealed to this court. *Appeal dismissed in part; affirmed.*

Jeremiah Donovan, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, was *Peter A. McShane*, state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Ever Lee[1] Holley, appeals from the judgment of conviction, rendered after a jury trial, of possession of a narcotic substance with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b). On appeal, the

[1] It appears that there was some confusion in the trial court proceedings regarding the defendant's first name. The state's substituted long form information charged him as "James E. Holley, a.k.a., Ever Lee Holley," but the proceedings in the trial court were captioned as *State* v. *Ever Lee Holley*. In its appellate brief, the state now refers to the defendant as "Ever Lee Holley, also known as James Holley." Conversely, the defendant asserts in his appellate brief that his birth name is actually "James Holley." Specifically, he notes that "[a]t sentencing it was determined that the name on [the defendant's] birth certificate is 'James.' " A review of the sentencing transcript reveals that the defendant appears to assert the opposite of what the presentence investigation report discovered with respect to his first name. The trial court stated at the sentencing hearing: "Several discrepancies have arisen regarding Mr. Holley's name, he's been using his dead brother's name of James as an alias for decades, *but his birth name is Ever Lee Holley*." (Emphasis added.) In any event, because the case was docketed in the trial court and in this court as *State of Connecticut* v. *Ever Lee Holley*, and neither party has filed a motion to correct the defendant's name, the case retains its original caption.

defendant claims that the trial court improperly (1) instructed the jury on reasonable doubt and (2) denied his motion to suppress evidence. We reject both of these claims and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On December 11, 2012, the narcotics unit of the Middletown Police Department executed a search and seizure warrant on the residence of Rachel Sweeney at 165 South Main Street in Middletown. Sweeney was arrested on drug possession charges as a result of the search.

At the time the warrant was executed, the defendant and another person were sitting in a car parked in the area behind 165 South Main Street. One officer detained the defendant while others searched Sweeney's residence. After police completed the search, David Skarzynski, a parole officer who had assisted the Middletown officers in executing the warrant, was alerted to the defendant's presence outside the residence. Skarzynski recognized the defendant as a parolee who previously had been under his supervision. Skarzynski asked the defendant for permission to search his residence at 29 Avon Court in Middletown. The defendant consented.

Skarzynski and officers with the narcotics unit traveled to the defendant's residence. Upon conducting a search of the defendant's bedroom, the officers recovered, among other items, 16.529 grams of crack cocaine from a locked safe located underneath the defendant's bed.

The defendant was arrested and charged with possession of a narcotic substance with the intent to sell in violation of § 21a-278 (b). After a jury found the defendant guilty of that offense,[2] the court sentenced him

[2] In a part B information, the state also had charged the defendant with possession of a narcotic substance with the intent to sell as a subsequent

to ten years incarceration, five years of which were mandatory, followed by eight years of special parole. This appeal followed.

I

REASONABLE DOUBT INSTRUCTION

The defendant's first claim is that part of the court's instruction on reasonable doubt was improper. Specifically, he argues that the court erred in describing reasonable doubt as follows: "[Reasonable doubt] is such a doubt as, in serious affairs that concern you, you will heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance." The defendant asserts that the language used in this part of the court's charge was defective in two respects. We address both of his linguistic challenges herein.

A

The gravamen of the defendant's first challenge is that the "insertion . . . of the prepositional phrase 'upon it' render[ed] the instruction nonsensical," causing it to "mean the opposite of what it should." He argues that reversal is required because this part of the instruction effectively diluted the state's burden of proof by "muddl[ing] the description of what a reasonable doubt is" and by failing to "impress . . . upon the [jury] the need to reach a subjective state of *near certitude* of [the defendant's] guilt." (Emphasis altered; internal quotation marks omitted.)

The state responds that the defendant concedes that our appellate courts have upheld instructions

offender. Although the jury found the defendant guilty of being a subsequent offender, the court granted the defendant's motion for acquittal with respect to this part of the jury's verdict.

employing the "upon it" language. Therefore, it contends that this court, as an intermediate court, is constrained to following that controlling precedent. We agree with the state.

We begin by identifying our standard of review and outlining the relevant legal principles. "It is fundamental that proof of guilt in a criminal case must be beyond a reasonable doubt. . . . The [reasonable doubt concept] provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . . At the same time, by impressing upon the [fact finder] the need to reach a subjective state of near certitude of the guilt of the accused, the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. . . . [Consequently, the defendant] in a criminal case [is] entitled to a clear and unequivocal charge by the court that the guilt of the [defendant] must be proved beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 283 Conn. 111, 116–17, 925 A.2d 1060 (2007).

"Because our system entrusts the jury with the primary responsibility of implementing the substantive protections promised by the reasonable doubt standard, reasonable doubt jury instructions which appropriately convey [the reasonable doubt concept] are critical to the constitutionality of a conviction." *United States* v. *Doyle*, 130 F.3d 523, 535 (2d Cir. 1997). Accordingly, "[a] claim that the court's reasonable doubt instruction diluted the state's burden of proof and impermissibly burdened the defendant is of constitutional magnitude." *State* v. *Alberto M.*, 120 Conn. App. 104, 115, 991 A.2d 578 (2010).

"A challenge to the validity of jury instructions presents a question of law over which this court has plenary

review. . . . It is well settled that jury instructions are to be reviewed in their entirety. . . . When the challenge to a jury instruction is of constitutional magnitude, the standard of review is whether it is reasonably possible that the jury [was] misled. . . . In determining whether it was . . . reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement . . . . Individual instructions also are not to be judged in artificial isolation. . . . Instead, [t]he test to be applied . . . is whether the charge . . . as a whole, presents the case to the jury so that no injustice will result." (Citation omitted; internal quotation marks omitted.) *State* v. *Brown*, 118 Conn. App. 418, 428–29, 984 A.2d 86 (2009), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010).

As acknowledged by both parties, our Supreme Court repeatedly has upheld the use of instructions that utilized the very language the defendant challenges. See, e.g., *State* v. *Winfrey*, 302 Conn. 195, 218, 24 A.3d 1218 (2011) (instruction explaining that reasonable doubt is " 'such doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance' " not constitutionally infirm); *State* v. *Mark R.*, 300 Conn. 590, 616–17, 17 A.3d 1 (2011) ("this court has rejected virtually identical claims on multiple occasions"); *State* v. *Johnson*, 288 Conn. 236, 288–90, 951 A.2d 1257 (2008) (rejecting challenge to instruction describing reasonable doubt as " 'such a doubt as would cause reasonable [people] to hesitate to act upon it in matters of importance' "); *State* v. *Delvalle*, 250 Conn. 466, 474 n.11, 473–75, 736 A.2d 125 (1999) (same);[3] see

[3] Additionally, the United States Supreme Court has endorsed a description of reasonable doubt that virtually is identical to the one challenged by the defendant in this case. See *Holland* v. *United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954) (citing with approval instruction given in *Bishop* v. *United States*, 107 F.2d 297, 303 [D.C. Cir. 1939], which defined

also *State* v. *Vazquez*, 119 Conn. App. 249, 258, 259–61, 987 A.2d 1063 (2010) (not improper to instruct jury that reasonable doubt is " 'doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance' "); *State* v. *Hernandez*, 91 Conn. App. 169, 178–79, 883 A.2d 1 (same), cert. denied, 276 Conn. 912, 886 A.2d 426 (2005); *State* v. *Otero*, 49 Conn. App. 459, 470–74, 715 A.2d 782 (same), cert. denied, 247 Conn. 910, 719 A.2d 905 (1998).

"[A]s an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor." (Internal quotation marks omitted.) *State* v. *Brantley*, 164 Conn. App. 459, 468, 138 A.3d 347, cert. denied, 321 Conn. 918, 136 A.3d 1276 (2016).

Accordingly, since our Supreme Court already has determined that the challenged description of reasonable doubt is not improper, we cannot conclude to the contrary.

B

The defendant's second challenge to the court's reasonable doubt instruction concerns the language used in describing reasonable doubt as "a doubt as, in serious affairs that concern you, you *will* heed." (Emphasis added.) His specific contention is that the court erred in using the word *will* instead of "the subjunctive '*would*' "; (emphasis in original); and that this error impermissibly diluted the state's burden of proof. Although we review this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d

reasonable doubt as "doubt [that] would cause reasonable men to hesitate to act upon it in matters of importance to themselves").

823 (1989), we conclude that there is no reasonable possibility that the challenged language misled the jury.

The following additional procedural history is relevant to our resolution of the defendant's claim. At the time it instructed the jury, the court provided the jurors and counsel with typewritten copies of its instructions. The court informed the jury that it would deliver its instructions by reading the typewritten version aloud: "As you see, I'm reading these instructions. I do that because they were prepared in advance, and I want to make sure that I say exactly what I intend to say. Do not single out any sentence or individual point or instruction in my charge and ignore the others. You are to consider all the instructions as a whole, and consider each, in light of all the others." The jurors had copies of the written instructions during their deliberations.

In the typewritten version of the instructions, reasonable doubt was described, in relevant part, as a "doubt, as in serious affairs that concern you, you *would* heed." (Emphasis added.) However, the transcript of the trial court proceedings indicates that the court's oral instruction described reasonable doubt as "a doubt, as in serious affairs that concern you, you *will* heed." The defendant never took an exception to the court's use of the word "will" in its oral instructions.[4] Also, there is no indication in the record that the jury, the court, or counsel noticed the discrepancy between the oral and written instructions. Moreover, the jury did not request clarification as to that discrepancy or on any of the court's instructions pertaining to reasonable doubt and the burden of proof.

[4] Although in closing argument defense counsel described reasonable doubt as a "doubt that, in your own serious affairs, you *would* heed," he did not take an exception or request clarification when the court subsequently used *will* instead of would in its instructions. We also note that the state did not make an argument with respect to either word during its closing argument.

We next set forth our standard of review and the relevant legal principles. "[U]nder *Golding* review, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), 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 . . . exists and . . . 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." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 572, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016). It is an error of constitutional magnitude to instruct the jury on reasonable doubt in such a manner as to dilute the state's burden of proof. *State* v. *Alberto M.*, supra, 120 Conn. App. 115.

"[I]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge *as a whole* to determine whether it is reasonably possible that the instruction misled the jury. . . . The test is whether the charge *as a whole* presents the case to the jury so that no injustice will result." (Emphasis added; internal quotation marks omitted.) *State* v. *Frasier*, 169 Conn. App. 500, 509, 150 A.3d 1176 (2016), cert. denied, 324 Conn. 912, 153 A.3d 653 (2017).

Reviewing courts are especially hesitant in reversing a conviction on the basis of an inaccuracy in a trial court's oral instruction if the jury was provided with accurate written instructions. See, e.g., *State* v. *Warren*, 118 Conn. App. 456, 464, 984 A.2d 81 (2009) (no constitutional violation where trial court's oral charge suggested written instructions should be used "only . . . as a guide" because "the [*written*] *copy of the charge itself*

correctly guided the jury by stating . . . that the jury was obligated to accept the law as provided by the court" [emphasis added]), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010); *United States* v. *Rodriguez*, 651 Fed. Appx. 44, 48 (2d Cir. 2016) ("In this case, there is no indication that the jurors were confused by the court's misreading of the instruction. The jury was able to follow along from the correct written instructions during the oral charge, and it had access to those written instructions during its deliberations. . . . [This] mitigated any risk of confusion . . . ."); *United States* v. *Colman*, 520 Fed. Appx. 514, 517 (9th Cir.) ("a [trial] court's misstatement while reading instructions aloud does not constitute reversible error if it provides proper written jury instructions to the jury members"), cert. denied, U.S. , 133 S. Ct. 2817, 186 L. Ed. 2d 876 (2013); *United States* v. *Ancheta*, 38 F.3d 1114, 1117 (9th Cir. 1994) ("The judge provided the jury with proper written instructions. We do not suggest that written instructions necessarily repair an error in oral instructions, since often oral instructions are used to cure typographical and other errors in written instructions. Nevertheless, here there is no reason to suppose that any juror was confused by the judge's slip of the tongue, and probably they understood him to say orally what he meant to say and did say in the written instructions."); *People* v. *Rodriguez*, 77 Cal. App. 4th 1101, 1113, 92 Cal. Rptr. 2d 236 (2000) ("It is generally presumed that the jury was guided by the written instructions. . . . The written version of jury instructions governs any conflict with oral instructions. . . . Consequently, as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions." [Citations omitted; internal quotation marks omitted.]).

Additionally, reviewing courts are less willing to conclude that a discrepancy between written and oral

instructions constitutes reversible error where: (1) defense counsel fails to object to the discrepancy; *United States* v. *Ancheta*, supra, 38 F.3d 1117 ("It was incumbent upon defense counsel to object if the judge erroneously instructed the jury . . . because the slip of the tongue could easily have been corrected before the jury retired to deliberate. The absence of objection suggests that the mistake was not noticeable or confusing."); and (2) counsel, the parties, the court, and the jury all fail to notice the discrepancy; *United States* v. *Jones*, supra, 468 F.3d 710 ("The fact that defense counsel as well as the experienced [trial] judge were unperturbed by the error, if they noticed it at all, weighs heavily. . . . If there had been an indication that anyone in the courtroom—counsel, parties, or jurors—was confused, we might find this a more difficult question." [Citations omitted.]).

Here, because the defendant did not object to the discrepancy between the written and oral instructions, his claim is unpreserved. However, his claim is reviewable because the first two *Golding* prongs are satisfied. The record is adequate for review, and the defendant's claim that the instruction diluted the state's burden of proof is of constitutional magnitude. We conclude, however, that the defendant has failed to satisfy *Golding*'s third prong because he has not demonstrated the existence of a constitutional violation that deprived him of a fair trial. When viewed as a whole, the court's oral instruction reasonably would not have misled the jury.

Our review of the record convinces us that there is no reasonable possibility that the jury was confused by the court's use of "will" instead of "would." The court informed the jury that it would be reading its instructions from a written version of the instructions. Copies of those written instructions, which accurately used "would" instead of "will" in describing reasonable doubt, were given to the jury to use during deliberations.

After the court had read its oral instructions, defense counsel did not object to its use of "will." Indeed, there is no indication that defense counsel, the state, or the court itself noticed the errant use of the word "will."

Moreover, after the case was submitted to the jury, the jury did not request any clarification as to the discrepancy relating to "will" and "would," and it did not ask any questions regarding reasonable doubt and the burden of proof. Finally, in reviewing the entirety of the court's oral and written instructions, we conclude that both sets of charges adequately explained the principles governing burden of proof, the presumption of innocence, and reasonable doubt by using several accurate descriptions of those concepts.[5] Accordingly, in the circumstances in this case, we conclude that it was not reasonably possible that the jury was misled by a single word in the court's jury instructions.

II

MOTION TO SUPPRESS EVIDENCE

The defendant's second claim is that the trial court improperly denied his motion to suppress evidence that was seized in a warrantless search of his residence. The defendant contends that such evidence was obtained in violation of the fourth and fourteenth amendments to the United States Constitution[6] and article first, § 7, of

[5] We also note that the United States Court of Appeals for the Second Circuit recently held that an arguably more problematic discrepancy between written and oral instructions did not confuse the jury. *United States* v. *Rodriguez*, supra, 651 Fed. Appx. 47–48 (no constitutional violation where oral charge instructed jury to find defendant not guilty if "*defendant* ha[d] failed to prove [his self-defense claim] beyond a reasonable doubt" because written charge correctly instructed jury that *government* had burden of disproving defendant's claim of self-defense [emphasis in original]).

[6] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the Connecticut Constitution.[7] Specifically, he contends that a warrantless search of a parolee's residence that fails to comply with administrative directives promulgated by the Department of Correction (department) is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. The state's principal response is that we should not review the defendant's federal and state constitutional claims because they are moot. Specifically, it argues that on appeal the defendant fails to challenge an independent basis supporting the trial court's denial of his motion to suppress, namely, the trial court's finding that the defendant verbally consented to the search. We agree with the state.[8]

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant filed a motion to suppress evidence that was seized in a warrantless search of his residence, including 16.529 grams of crack cocaine. In that motion, the defendant's principal argument was that the search was unconstitutional because it was made without a warrant and did not comply with administrative directives promulgated by the department. He also asserted that he had not consented, verbally or in writing, to the search. After a two day evidentiary hearing, the trial court made the following factual findings.

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[7] Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[8] The state also argues that the defendant failed to preserve his state constitutional claims by not presenting an analysis pursuant to *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), to the trial court. Because we conclude that the defendant's state and federal constitutional claims both are moot, we need not address this preservation argument.

"On December 11, 2012, [in the course of executing a search and seizure warrant for the residence of . . . Sweeney, members of the Middletown police force] encountered a vehicle being operated by [the defendant]. . . . Parole Officer Skarzynski, who assisted in the execution of the search and seizure warrant, knew [the defendant,] as [the defendant] was previously on his caseload. . . . [Skarzynski also] was aware that [the defendant] was on lifetime parole. . . . Skarzynski spoke with [the defendant] and obtained his verbal consent to . . . conduct a search of his residence. . . .

"Middletown police officers transported [the defendant] to his residence and room within his boarding house. . . . Skarzynski made a phone call to his . . . supervisor, [the defendant's] current parole officer, and [the supervisor of the defendant's current parole officer,] requesting their authorization to search [the defendant's] room. . . . [A]ll [three] gave their verbal consent. When inside the residence . . . Skarzynski . . . [and] Middletown police detectives . . . conducted a search of [the defendant's] bedroom. [U]nder the bed a safe was located . . . where a large amount of crack cocaine was found."

In a written memorandum of decision, the court denied the defendant's motion to suppress the seized evidence. The court articulated two grounds in support of its ruling. First, it rejected the defendant's argument that a warrantless search of a parolee's residence that fails to comply with the department's administrative directives is unconstitutional, even if the parolee had previously executed an agreement authorizing such searches as a condition of his parole. Beginning with a review of the relevant case law, the court noted that "[a]s a parolee, a defendant has a reduced expectation of privacy which allows a warrantless search of his person and residence by his parole officer." The court then found that the defendant gave written consent to

the search by executing an agreement called "Conditions of Parole," which was submitted by the state as an exhibit. That agreement, which was signed by the defendant on February 25, 2010, provided in relevant part: "You shall be required to submit to a search of your person, possessions, vehicle, business, residence, or any area under your control at any time, announced or unannounced, with or without cause by parole or its agent to verify your compliance with the conditions of your parole."[9]

The court's second ground for denying the defendant's motion to suppress was its finding that the defendant verbally consented to the search: "[The defendant] not only consented in writing to the warrantless search of his residence as a condition of his parole on February 25, 2010, he also gave his verbal consent to . . . Skarzynski on December 11, 2012."

On appeal, the defendant challenges only the first of the trial court's two grounds for denying the motion to suppress. That is, he again presents the argument that a warrantless search of a parolee's residence that fails to comply with the department's administrative directives is unconstitutional, even if the parolee previously had executed an agreement authorizing such searches as a condition of his parole.[10] The defendant does not challenge, however, the court's finding that he verbally consented to the search. Because the finding regarding the defendant's verbal consent constitutes an unchallenged independent basis for the court's ruling, we are compelled conclude that the defendant's claim on

[9] The court also made a finding that the search had in fact "substantially complied with parole regulations" because Skarzynski "obtain[ed] authorization" from "his parole manager and the parole manager of [the defendant's] probation officer" before conducting the search.

[10] The defendant also argues that the court erroneously found that the search was conducted in "substantial" compliance with the department's administrative directives. See footnote 9 of this opinion.

appeal is moot. Accordingly, we decline to review the defendant's claim.

We set forth the relevant legal principles regarding mootness. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction. . . . The fundamental principles underpinning the mootness doctrine are well settled. We begin with the four part test for justiciability established in *State* v. *Nardini*, 187 Conn. 109, 445 A.2d 304 (1982). . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from *the determination of which no practical relief can follow*. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . .

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations

omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

In *State* v. *Lester*, our Supreme Court held that the defendant's appeal from his conviction on the basis of an adverse evidentiary ruling was moot because he did not challenge all of the independent bases supporting the ruling. Id., 528. In that case, the state filed a motion in limine to preclude the defendant from introducing evidence of a supposedly false prior allegation of sexual abuse that the eight year old victim made against another person when she was five years old. Id., 521, 523. "[T]he trial court granted the state's motion . . . to exclude evidence of the victim's prior allegation . . . on the grounds that: it was not admissible under the rape shield statute because the defendant had not provided credible evidence that it was false; it was remote in time; it was dissimilar from the victim's allegation against the defendant; and it was a collateral issue that would confuse the jury." Id., 527.

On appeal, the defendant in *Lester* challenged only one of the four grounds on which the trial court relied in its evidentiary ruling, namely, that evidence of the allegation was inadmissible under the rape shield statute. Id., 524–25. Our Supreme Court reasoned that the other three grounds were independent bases supporting the court's ruling because they were responses to the state's separate and distinct evidentiary objections pertaining to relevancy and probative value. Id., 527–28. Thus, the court concluded that the defendant's failure to challenge those three grounds precluded appellate review of his claim that the trial court incorrectly applied the rape shield statute: "Because there are independent bases for the trial court's exclusion of the evidence of the prior allegation . . . that the defendant has not challenged in this appeal, even if this court were to find that the trial court improperly applied the

rape shield statute, we could grant no practical relief to the defendant." Id., 528; see also *State* v. *A.M.*, 156 Conn. App. 138, 141 n.2, 111 A.3d 974 (2015) (unchallenged independent basis rendered claim on appeal moot where trial court admitted forensic interview of victim under three separate exceptions to hearsay rule but defendant challenged trial court's ruling on two exceptions), aff'd on other grounds, 324 Conn. 190, 152 A.3d 49 (2016).

In the present case, the trial court denied the defendant's motion to suppress on the following two grounds: (1) by executing an agreement authorizing searches of his residence as a condition of his parole, the defendant gave written consent to the warrantless search at issue; and (2) the defendant gave verbal consent to Skarzynski immediately before the warrantless search at issue occurred. Although not challenged by the defendant in this appeal, the second of those grounds, his verbal consent, is an independent basis supporting the trial court's denial of the defendant's motion to suppress. See *State* v. *Nowell*, 262 Conn. 686, 699, 817 A.2d 76 (2003) ("[i]t is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search [or seizure] that is conducted pursuant to consent" [internal quotation marks omitted]); *State* v. *Vaught*, 157 Conn. App. 101, 121, 115 A.3d 64 (2015) (warrantless search of residence constitutional where trial court found that homeowner gave valid verbal consent).

The trial court's finding that the defendant verbally consented to the search is wholly dispositive of the defendant's motion to suppress, regardless of whether it erred in ruling on the defendant's other arguments that the search was unconstitutional. That is, once the defendant verbally consented to the search, the need for law enforcement to obtain a warrant or comply with

the department's administrative directives was obviated. See, e.g., *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("a search authorized by consent is *wholly* valid" [emphasis added]). The defendant does not challenge the court's finding that he verbally consented to the search in this appeal. Consequently, because the defendant has failed to challenge that independent basis supporting the trial court's denial of his motion to suppress, even if this court were to rule in his favor on the claim he presents on appeal, we could grant him no practical relief. Accordingly, the defendant's claim is moot.

The appeal is dismissed as moot with respect to the defendant's claim that the trial court improperly denied his motion to suppress evidence; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JOHN AVERY ET AL. *v.* LUIS MEDINA ET AL. (AC 38689)

Lavine, Alvord and Beach, Js.

Syllabus

The plaintiff landowners brought this action seeking, inter alia, a temporary and permanent injunction requiring the defendant landowners, A and L, to cease construction of a pole barn and a stone wall on certain of their real property. The trial court subsequently rendered judgment denying in part the plaintiffs' request for injunctive relief. The plaintiffs appealed to this court, claiming, in part, that the trial court improperly found that the stone wall was not a prohibited permanent structure pursuant to a restrictive covenant in the defendants' deed. This court agreed with the plaintiffs and reversed the judgment only as to the trial court's finding that the defendants' construction of the stone wall did not violate the restrictive covenant prohibiting the erection of permanent structures within a 100 foot setback area. Subsequently, the trial court, pursuant to direction from this court, rendered judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that were within the 100 foot setback area. In 2014, the plaintiffs filed a motion for contempt, which

the trial court granted, finding that the defendants had failed to comply with its prior orders by failing to remove all portions of the stone wall within the setback. Although the defendants did subsequently remove the stone wall, the plaintiffs filed another motion for contempt in 2015, claiming, in part, that the defendants had erected another stone wall in the setback area. The trial court granted in part the plaintiffs' motion for contempt, finding, in relevant part, that L was in contempt as to the stone wall, and ordering L to remove the stone wall and to pay $1500 in attorney's fees to the plaintiffs. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that, in granting the plaintiffs' 2015 motion for contempt, the trial court impermissibly modified the substantive terms of its judgment by converting a mandatory injunction into a prohibitive injunction that forbade any structure from being constructed in the setback, not just a permanent structure, which is prohibited by the language of the restrictive covenant; the trial court did not impermissibly alter the terms or the nature of the injunction, but merely ordered the defendants to remove stones that they had placed in the setback area after they had removed the stone wall, which the court did to effectuate its original judgment, and although the stones were not permanently affixed to the land and were lower in height than the original stone wall, they nevertheless formed a prohibited permanent structure because they were intended to remain permanently in their present location to keep trespassers out.
2. The defendants' claim to the contrary notwithstanding, this court's judgment in the prior appeal and the subsequent order of the trial court requiring the defendants to remove all portions of the stone wall within the 100 foot setback, which was prohibited by the clear language of the restrictive covenant in the deed, were clear and unambiguous, and, thus, sufficient to support the contempt finding, and the stones within the setback constituted a permanent structure that violated the restrictive covenant in the defendants' deed.
3. The defendants' claim that the trial court's contempt finding deprived them of a fundamental property right was unavailing; that court did not deprive the defendants of their entire interest in their real property, as the court did not convey the defendants' interest in their land, but merely sanctioned the defendants for disobeying the judgment to remove the stone wall in the setback, and the court granted the plaintiffs' 2015 motion for contempt in order to vindicate its prior judgment ordering the defendants to remove the stone wall within the setback, which was rendered pursuant to the restrictive covenant in the deed that the defendants had voluntarily signed.

The defendants' claim that the trial court abused its discretion by awarding the plaintiffs $1500 in attorney's fees was not reviewable, the defendants having failed to preserve the claim at the contempt hearing by failing to object to the plaintiffs' request for an additional $1500 in attorney's

fees, or to seek to have the plaintiffs present evidence in support of their request for attorney's fees.

Argued February 14—officially released July 11, 2017

Procedural History

Action for, inter alia, a temporary and permanent injunction requiring the defendants to cease construction of a stone wall on certain of their real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Pickard, J.*; judgment denying in part the plaintiffs' request for injunctive relief; thereafter, the plaintiffs appealed to this court, which reversed in part the judgment of the trial court, and remanded the case with direction to render judgment in part for the plaintiffs; subsequently, the court, *Pickard, J.*, granted the plaintiffs' motion for contempt; thereafter, the court, *Pickard, J.*, granted in part the plaintiffs' motion for contempt, and the defendants appealed to this court. *Affirmed.*

Luis A. Medina, self-represented, with whom was *Richard R. Lavieri*, for the appellants (defendants).

Shelley E. Harms, with whom was *David Torrey*, for the appellees (plaintiffs).

Opinion

LAVINE, J. This dispute between the parties, which returns to this court for the third time, concerns the enforcement of a restrictive covenant in the deed to real property in Norfolk that is owned by the defendants, Luis Medina and Amanda Medina. The defendants appeal from the judgment of the trial court finding Luis Medina in contempt of the judgment rendered pursuant to *Avery* v. *Medina*, 151 Conn. App. 433, 94 A.3d 1241 (2014) (*Avery I*). On appeal, the defendants claim that the court improperly (1) modified the *Avery I* judgment by transforming a mandatory injunction into a

prohibitive injunction, (2) exceeded its equitable powers, (3) denied them a fundamental right, and (4) awarded the plaintiffs attorney's fees for which there was no evidence. We affirm the judgment of the trial court.

The relationship among the parties and the underlying history of their ongoing dispute is set forth in detail in *Avery I*. Id., 435–40. The following facts are relevant to the present appeal. In April, 2003, David Torrey, the defendants, and the plaintiffs, John Avery, Elisabeth Avery, and Shelley Harms (collectively, co-owners), purchased 55.72 acres of land in Norfolk.[1] Id., 435–36. The co-owners agreed in writing to subdivide the 55.72 acres into two four acre building lots and one approximately 47 acre lot, which was to be conveyed to the Norfolk Land Trust, Inc. Id., 436–37. John Avery and Elisabeth Avery received one of the four acre lots (Avery lot) and the defendants received the other four acre lot (Medina lot). Id., 437.

Harms, acting on behalf of the co-owners, engaged Michael Sconyers, a lawyer, to draft the deeds to the Avery and Medina lots. Id. Sconyers advised that the language in the deeds should differ in two respects from the language in the co-ownership agreement. "The co-ownership agreement stated that the Avery lot and the Medina lot will contain deed restrictions providing that the lot shall not be further divided, will contain only one single-family dwelling, and not more than two additional outbuildings with a reasonable setback from the road for any structures and will be subject to a right of first refusal for each of the other co-owners . . . . The co-ownership [agreement] was silent as to enforcement of these deed restrictions." (Internal quotation

[1] The co-owners are three married couples. Torrey is married to Harms, but he is not a plaintiff in this action. When the co-owners purchased the 55.72 acres, each couple received a one-third undivided interest in it. *Avery* v. *Medina*, supra, 151 Conn. App. 436.

marks omitted.) Id. Sconyers advised that the "reasonable setback" language "should be made more specific and that there should be persons named to enforce the restrictions." (Internal quotation marks omitted.) Id.

Pursuant to Sconyers' advice, the language in the deeds to the Avery and Medina lots states in relevant part that "any permanent structure erected on the property shall be located at least 100 feet distant from the westerly line of Winchester Road." (Internal quotation marks omitted.) Id. The deed for the Medina lot also states that the restrictions in the deed "shall be enforceable by [the] Grantors, their heirs and assigns *in perpetuity*, as an appurtenance to the property of the Grantors." (Emphasis added; internal quotation marks omitted.) Id., 437–38. The grantors are the co-owners.

The plaintiffs and Torrey signed the deeds on August 8, 2004, and the defendants, who also are lawyers, signed them on August 10, 2004. Id., 438. Subsequently, the defendants constructed a house, a carriage house, and a shed on the Medina lot. Id. In November, 2011, Luis Medina informed Torrey that the defendants were going to build a "pole barn" near the carriage house. (Internal quotation marks omitted.) Id., 439. Torrey advised Luis Medina that the pole barn would be a "third outbuilding" on the lot and a violation of the restrictive covenant in the deed. (Internal quotation marks omitted.) Id. The defendants nonetheless began to construct the pole barn.[2] Id.

The plaintiffs commenced the underlying action to enforce the restrictive covenant in the Medina deed and sought "an injunction prohibiting further construction of the pole barn and an order that it be removed." (Internal quotation marks omitted.) Id. While the action

[2] The defendants failed to secure a building permit for the pole barn, and the town of Norfolk issued them a cease and desist order. *Avery* v. *Medina*, supra, 151 Conn. App. 439.

was pending, the defendants built a stone wall along the southern and eastern borders of the Medina lot, a portion of which was twenty feet from Winchester Road.[3] Id. Consequently, the plaintiffs amended their complaint to allege that the wall was "a new permanent structure in violation of the restrictive covenant in the defendants' deed [that] prohibits new permanent structures within 100 feet of the road." (Internal quotation marks omitted.) Id. The plaintiffs sought injunctive relief and requested costs and punitive damages. Id.

The case was tried to the court, which issued its memorandum of decision on November 12, 2013. The court found that the pole barn violated the restrictive covenant that "limits development on [the defendants'] property to one single-family dwelling and no more than two additional outbuildings . . . ." Id., 440. The court found, however, that the stone wall was not permanent in nature and, therefore, did not violate the restrictive covenant prohibiting permanent structures within 100 feet of Winchester Road. Id. The court ordered the defendants to remove the pole barn in thirty days. Id. The court did not find that the defendants' conduct was wanton or malicious and did not award the plaintiffs punitive damages. Id. The plaintiffs appealed to this court.

On appeal, in *Avery I*, the plaintiffs claimed, among other things, that the court improperly found that the wall was not a permanent structure pursuant to the Medina deed. Id. This court agreed; id., 447; and reversed the judgment "only as to the [trial] court's finding that the defendants' construction of the stone wall did not violate the restrictive covenant prohibiting

[3] "The wall [was] approximately three feet high, with two large, six feet high stone pillars. There [was] a large wooden gate attached to one of the pillars, and a 1.5 foot fence that . . . attached to the top of the wall. The [trial] court found that the wall was large, heavy and immobile." *Avery* v. *Medina*, supra, 151 Conn. App. 447.

the erection of permanent structures within 100 feet of the westerly line of Winchester Road . . . .'' Id., 451. This court remanded the case to the trial court ''with direction to render judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road.'' Id.

Pursuant to this court's remand order, on August 20, 2014, the trial court rendered judgment for the plaintiffs ''on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road.''[4]

On December 3, 2014, the plaintiffs filed a motion for contempt asking the court to find the defendants in contempt for failing to comply with the court's orders

[4] During the course of the plaintiffs' appeal, the conflict between the parties continued. On December 11, 2013, the defendants filed a motion to open the judgment and modify its order to state, ''[w]ithin the next [thirty] days the defendant shall remove from their property one of the outbuildings identified in the [court's] memorandum, leaving two outbuildings on [the defendants'] land.'' The defendants wished to remove the utility shed, which would cost them significantly less than it would cost to remove the pole barn. The plaintiffs objected, arguing in part that the pole barn was an illegal structure in that it was constructed without a building permit, and that the defendants had the opportunity to present evidence as to the cost of removing structures on the Medina lot at trial, but failed to do so.

On February 26, 2014, the court denied the defendants' motion to open, stating, ''[t]he evidence in this case concerned the pole barn, not a shed. The defendant had the option of removing the shed before the pole barn was constructed so as to avoid this problem. It would not be proper for the court to permit the defendant to change the facts under which the case was tried.'' The defendants filed a motion asking the court to reconsider its order denying their motion to open and modify the corrected memorandum of decision on or about March 18, 2014, and the plaintiffs filed an objection to it. On May 19, 2014, the court sustained the plaintiffs' objection to the motion to open and modify. The defendants appealed from the judgment denying their motion to open. This court affirmed the judgment of the trial court in a memorandum decision. See *Avery* v. *Medina*, 153 Conn. App. 909, 100 A.3d 476 (2014) (*Avery II*).

dated November 20, 2013,[5] and August 20, 2014. The plaintiffs stated that although more than thirty days had passed since the court had ordered the defendants to remove the pole barn, the pole barn was still standing on the Medina lot. Moreover, the plaintiffs represented that the defendants failed to remove all portions of the stone wall within the 100 foot setback. The plaintiffs asked the court to find the defendants in contempt for every day they remained in violation of the court's order, and for costs and attorney's fees pursuant to General Statutes § 52-256b. The defendants objected to the motion for contempt, arguing that they were not in wilful noncompliance with the judgment and that they did not have the financial wherewithal to remove the pole barn. On December 19, 2014, the court found Luis Medina to be in contempt of its orders. The court continued the matter to January 5, 2015, "during which period of time the defendant is ordered to fully comply with the court's orders. If the contempt has not been full[y] remedied a fine will be imposed for every day there is noncompliance."

On January 6, 2015, the court ruled on the plaintiffs' motion for contempt, ordering: "The defendants, Luis Medina and Amanda Medina, are found to be in contempt of the orders of the court. The defendants are ordered to remove all the stones from the wall on or before February 1, 2015. Commencing [January 5, 2015], the defendants shall pay the plaintiffs the sum of $100 per day until the stones are removed. The plaintiffs are awarded attorney's fees in the amount of $1,500."

On July 8, 2015, Harms filed an affidavit of noncompliance, attesting that Luis Medina had not fully complied with the court's order because he failed to pay the

[5] Subsequent to issuing its November 12, 2013 memorandum of decision, the trial court issued a corrected memorandum of decision on November 20, 2013.

plaintiffs $100 per day until the stone wall was completely removed. Luis Medina needed six days from, and including, January 5, 2015, to remove the wall, and had paid the plaintiffs only $400, not $600. In addition, Harms attested that Luis Medina had failed to remove the pole barn completely, as one of the pole supports remained standing. Luis Medina filed a counteraffidavit in which he attested that the stone wall was removed within four days of January 5, 2015, and that other stones, not part of the stone wall, were removed two days later. He further attested that he had paid the attorney's fees of $1500.

The plaintiffs filed another motion for contempt against the defendants on September 24, 2015. In that motion, the plaintiffs represented that the defendants had failed to fully remove the pole barn, failed to pay the $200 balance of the fine, and have "reerected a stone wall in the exact area where they were ordered to remove it." The defendants objected, asking the court to deny the plaintiffs' motion for contempt because they had removed the stone wall that the plaintiffs claimed was a permanent structure. The defendants argued that they had removed the stone wall that the plaintiffs alleged was a permanent structure, and that the court's order did not prohibit them from having stones on their property.

The parties appeared for oral argument on the motion for contempt on November 23, 2015. At the hearing, Luis Medina argued that the stone wall to which the plaintiffs were then objecting merely consisted of loose stones along the southern boundary of the defendants' property. A photograph of what Luis Medina termed "loose stones" was placed into evidence. The court rejected the defendants' argument, stating: "If that's not a stone wall, I don't know what it is. . . . There is no question in my mind that the law as laid down by the Appellate Court includes what's shown in that picture

as a stone wall."[6] The court issued its ruling on November 25, 2015, ordering, "[a]s to previously imposed fines, the court does not make a finding of contempt, but does find that Mr. Medina owes $200 to the plaintiffs, which is ordered to be paid by December 11, 2015. As to the remaining pole from the pole barn, the court finds it to be a negligible item that need not be removed, and the court does not make a finding of contempt. As to the stone wall, the court does make a finding of contempt against Mr. Medina. The stones [shown in the photograph that was placed into evidence] are ordered removed on or before [December 11, 2015]. The court orders Mr. Medina to pay $1500 in attorney's fees to the plaintiffs on or before December 11, 2015." The defendants appealed.

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, 154 Conn. App. 780, 788–89, 107 A.3d 1004 (2015).

I

On appeal, the defendants claim that in granting the plaintiffs' 2015 motion for contempt, the court impermissibly modified the substantive terms of its judgment

[6] We have reviewed the photograph in the record and conclude that the court's finding is not clearly erroneous. During oral argument before this court, Luis Medina argued that the wall is necessary to keep trespassers

by converting a mandatory injunction into a prohibitive injunction that forbade any structure, not just a permanent structure, from being constructed in the setback. We disagree.

The defendants' claim requires us to examine the judgment rendered pursuant to this court's decision in *Avery I* to determine whether it was clear and unambiguous. "In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order. [T]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as whole." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 484–85, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

On the basis of our review of the injunction judgment and the underlying circumstances, we conclude that the court did not impermissibly alter the terms or the nature of the injunction. The facts found at trial reveal that the co-owners purchased the 55.72 acres of land to prevent it from becoming heavily developed and made the majority of the land available to the Norfolk Land Trust. The co-ownership agreement, which the

and hikers on the land conservancy's property from walking on the defendants' land.

defendants signed, provided that there was to be a reasonable setback from the road for any permanent structures. The deed to the Medina lot provided that "any permanent structure erected on the property shall be located at least 100 feet distant from the westerly line of Winchester Road." The defendants signed the deeds on August 10, 2004.

In *Avery I*, this court determined that the wall in question was a permanent structure. After reviewing the trial court's factual findings regarding the size, structure, height, and appearance of the stone wall, and examining the photographic evidence in the record, this court found that "there can be no doubt that the defendants intend for the wall to remain firmly in the same place where it was erected and [not be] moved or relocated on a seasonal basis." (Internal quotation marks omitted.) *Avery* v. *Medina*, supra, 151 Conn. App. 447. For that reason, this court concluded that the wall was a "permanent structure that is *prohibited by the clear language of the restrictive covenant contained in the defendants' deed*." (Emphasis added.) Id. On remand, the court rendered "judgment for the plaintiffs on their request for injunctive relief requiring the defendants to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road," and ordered the defendants to remove the stone wall, which they did. Thereafter, they placed stones lower in height in a similar position within the setback area. The plaintiffs filed a motion for contempt claiming, in part, that the defendants reerected a stone wall in the setback area and therefore failed to comply with the court's orders. The defendants objected to the motion for contempt arguing, in part, that the court did not prohibit any stones on their property. At the hearing on the motion for contempt, Luis Medina argued that there were just loose stones along the southern boundary of the defendants' property. The court rejected that

representation stating: "If that's not a stone wall, I don't know what it is. . . . There is no question in my mind that the law as laid down by the Appellate Court includes what's shown in that picture as a stone wall."

On appeal, the defendants claim that the court modified the judgment whereby they were ordered to remove the stone wall. "A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, supra, 165 Conn. App. 484.

The substance of the defendants' claim is that the stone wall that replaced the wall they were ordered to remove is not permanently affixed to the land. This is a distinction without a difference. At oral argument before us, the defendants stated that the stones were necessary to denote the boundary of their land to keep hikers and other trespassers out. Regardless of the height of the stones now in place within the setback, given their purpose to keep trespassers out, they are intended to remain permanently in their present location.

"Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Gong* v. *Huang*, 129 Conn. App. 141, 154, 21 A.3d 474, cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011). "This is so because [i]n a contempt proceeding, even in the absence of a finding

of contempt, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order." (Emphasis omitted; internal quotation marks omitted.) *Fuller* v. *Fuller*, 119 Conn. App. 105, 115, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992 A.2d 329 (2010). For the foregoing reasons, we conclude that the court did not modify the injunction judgment, but merely ordered the defendants to remove the stones in the setback to effectuate its original judgment.

II

The defendants claim that the injunction ordered on remand from *Avery I* was vague and precluded a finding of contempt. We do not agree.

As we set forth previously, an appellate court's analysis of a judgment of contempt consists of two parts, the first of which is to determine whether the underlying order constituted an order that was sufficiently clear and unambiguous to support the contempt judgment. See *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 788–89. In *Avery I*, this court determined that the stone wall was "prohibited by the clear language of the restrictive covenant in the defendants' deed§ because there was no doubt that the defendants intended for it to remain in place where it was erected and not moved on a seasonal basis. *Avery* v. *Medina*, supra, 151 Conn. App. 447. On remand, the trial court ordered the defendants "to remove all portions of the stone wall that are within 100 feet of the westerly line of Winchester Road."

We employ the plenary standard of review when construing a judgment or order of the court. *Lawrence* v. *Cords*, supra, 165 Conn. App. 484. "The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment." (Internal quotation

marks omitted.) Id., 485. On the basis of our examination of this court's judgment in *Avery I* and the subsequent order of the trial court, we conclude that the judgment and order to remove the stone wall were clear and unambiguous. The stones within the setback constitute a permanent structure that violates the restrictive covenant in the Medina deed. The defendants' claim therefore fails.

III

The defendants claim that the court's contempt finding stripped them of a fundamental property right. We disagree.

On appeal, the defendants argue that the court's contempt finding deprives them of the use of 25 percent of their property because it exceeds the "permanent structure" restriction in the deed to the Medina lot by prohibiting stones within the setback area. At the hearing on the plaintiff's motion for contempt, Luis Medina made the same argument to which the court responded: "No, no, no. I'm saying that you cannot put permanent structures within 100 feet of the road. And we went through this one time and it's been found by the Appellate Court that a stone wall, regardless of whether it's cemented or not cemented, is a permanent structure."[7]

[7] The following colloquy also transpired between the court and Luis Medina during the hearing on the plaintiffs' motion for contempt.

"Luis Medina: [Y]ou've made your ruling. I need to clarify it for the record because I have to be able to discern what it is that I'm not able to do on my property.

"The Court: You can't have a permanent structure within 100 feet of the road, you know that.

"Luis Medina: That I understand.

"The Court: The Appellate Court [has] determined that a stone wall is a permanent structure. What you just had your contractor construct in Plaintiffs' Exhibit 2 is in my finding a stone wall.

"Luis Medina: Right.

"The Court: Remove it.

* * *

The defendants rely on *Edmond* v. *Foisey*, 111 Conn. App. 760, 961 A.2d 441 (2008), to support their claim. *Edmond*, however, is not on point with the facts of the present case. In *Edmond*, the trial court conveyed the defendant's entire interest in real property to the plaintiff. Id., 766–67. This court reversed the judgment of contempt, concluding that the trial court abused its discretion by depriving the defendant of her entire interest in her real property. Id., 775–76. In the present case, the court sanctioned the defendants for disobeying the judgment rendered in *Avery I* to remove the stone wall in the setback. It did not convey the defendants' interest in their land.

"Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 794.

The deed to the Medina lot contains a restrictive covenant that provides in relevant part: "[a]ny permanent structure erected on the Property shall be located at least 100 feet distant from the westerly line of Winchester Road." In *Avery I*, this court concluded that a stone wall within the 100 foot setback constituted a violation of the restrictive covenant. *Avery* v. *Medina*, supra, 151 Conn. App. 447. The court granted the plaintiffs' 2015 motion for contempt to vindicate its prior judgment, which was rendered pursuant to the restrictive covenant in the deed to the Medina lot. The defendants voluntarily signed the deed and, therefore, they cannot prevail on a claim that they were deprived of a

"The Court: I'm not asking you to do anything other than [not to] violate the restriction in your deed."

fundamental right when the court vindicated its prior judgment by finding Luis Medina in contempt.

IV

The defendants also claim that the court abused its discretion by awarding the plaintiffs $1500 in attorney's fees because there was no evidence to support the award. The defendants failed to preserve this claim at the hearing on the motion for contempt, and we, therefore, decline to review it.

On September 24, 2015, the plaintiffs filed a motion for contempt in which they alleged that the defendants failed to completely remove the pole barn, failed to pay the remaining $200 fine owed to them, and placed a line of stones in the exact place where they were ordered to remove the stone wall. The plaintiffs argued that the defendants had flouted the court's orders and had twice been found in contempt. The plaintiffs asked that the defendants again be found in contempt, and ordered to comply with the court's judgment and to pay costs and attorney's fees pursuant to General Statutes § 52-256b.[8] The defendants filed an objection to the motion for contempt but did not object to the plaintiffs' request for attorney's fees. At the contempt hearing, the plaintiffs asked for "attorney's fees of $1500, the same as [the trial court] ordered on January 6."[9] The defendants

[8] General Statutes § 52-256b (a) provides in relevant part: "When any person is found in contempt of any order or judgment of the Superior Court, the court may award to the petitioner a reasonable attorney's fee . . . such sums to be paid by the person found in contempt."

[9] A hearing on the plaintiffs' December 2014 motion for contempt was held on January 6, 2015. The record reflects the following colloquy.

"Torrey: And, Your Honor, lastly, our motion to request reasonable legal fees for: the appearances, both preparing the motion, appearing the first time, appearing yesterday and appearing today. Right. I spent an hour and a half preparing the motion. I spent two hours on the first hearing. I spent two hours yesterday and whatever time we're spending today. So that's a total of five and a half hours, plus whatever it is today, which is now going on at least an hour and a half. So that's seven hours' worth of legal time. My normal hourly rate is $300 an hour, but . . . I would have no objection to you finding a reasonable hourly rate for that.

did not object or request that the plaintiffs present evidence in support of their request for attorney's fees. The court ordered "another $1500 of attorney's fees."

"It is fundamental that claims of error must be distinctly raised and decided in the trial court." *State* v. *Faison*, 112 Conn. App. 373, 379, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009). See Practice Book § 5-2 (party intending to raise question of law subject to appeal must state question directly to judicial authority); Practice Book § 60-5 (court not bound to consider claim unless distinctly raised at trial or arose subsequent to trial).

"Although the proponent bears the burden of furnishing evidence of attorney's fees at the appropriate time, once the plaintiffs . . . make such a request, the defendants should [object] or at least [respond] to that request." *Smith* v. *Snyder*, 267 Conn. 456, 480–81, 839 A.2d 589 (2004). An appellate court will not reverse an award of attorney's fees if the defendants fail to object to a bare request for attorney's fees. Id., 481. "In other words, the defendants, in failing to object to the plaintiffs' request for attorney's fees, effectively acquiesced in that request, and, consequently, they now will not be heard to complain about that request." Id.

The judgment is affirmed.

In this opinion the other judges concurred.

"The Court: Anything further?

"Luis Medina: I leave it to the court's decision. I . . . said what I had to say. There was no wilful desire on my part not to comply with the court's order."

STATE OF CONNECTICUT *v.* HEATHER GANSEL (AC 39427)

DiPentima, C. J., and Lavine and Flynn, Js.

Syllabus

Convicted of the crime of larceny in the first degree by embezzlement, the defendant appealed to this court. The defendant, who owned two businesses, helped her grandparents, L and M, to manage their household finances and personal needs. After L died, M gave the defendant power of attorney to be her agent. After M sold her house and moved in with her son, the defendant's uncle, she deposited the proceeds from the sale of her house in a bank account that she jointly owned with the defendant for the purpose of allowing the defendant to have access to the funds to fulfill her duties as M's agent and to use the funds for M's benefit. Thereafter, the defendant transferred approximately $412,400 from the joint bank account into her personal and business accounts, and she used more than $20,000 of M's funds to pay for her own personal and business expenses. After M learned that a significant amount of her funds were missing, the defendant's uncle convened a family meeting at which the defendant admitted to having taken a portion of the missing funds and that she was willing to create a repayment plan to reimburse M. Shortly thereafter, the defendant sent two e-mails to her uncle in which she again admitted to having taken M's funds and reconfirmed her commitment to devising a repayment plan. The defendant also wrote a letter to M in which she promised to repay her the missing funds. On appeal, the defendant claimed that the trial court improperly admitted the inculpatory e-mails into evidence because they were not properly authenticated. *Held* that the defendant failed to show that the admission into evidence of the e-mails was harmful; even if the trial court abused its discretion by admitting the inculpatory e-mails into evidence, any error was harmless, as the e-mails were cumulative of other properly admitted evidence that independently provided a basis for the defendant's conviction, including the testimony of the defendant's uncle at trial that the defendant unequivocally admitted at the family meeting that she unlawfully had taken M's money, and the letter that the defendant wrote to M in which she had promised to repay her the missing funds.

Argued April 17—officially released July 11, 2017

Procedural History

Substitute information charging the defendant with the crime of larceny in the first degree, brought to

the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *White*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

John R. Williams, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were, *David Cohen*, former state's attorney, *James Bernardi*, supervisory assistant state's attorney, and *Joseph C. Valdes*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Heather Gansel, appeals from the judgment of conviction, following a trial to the court, of larceny in the first degree by embezzlement in an amount more than $20,000 in violation of General Statutes §§ 53a-119 (1), 53a-121 (b), and 53a-122 (a) (2). The defendant claims that the court abused its discretion by admitting into evidence certain inculpatory e-mails because they were not properly authenticated. Because we conclude that an evidentiary error, if any, was harmless, we affirm the judgment of the trial court.

The following facts, which were found by the court in its oral memorandum of decision,[1] and procedural history are relevant to our resolution of the defendant's appeal. The defendant, who was a chiropractor and, for two years, the sole owner of two businesses, lived

[1] The defendant has failed to provide this court with a record that contains a signed transcript of the trial court's oral decision, in accordance with Practice Book § 64-1. The record does, however, contain the unsigned transcript of the October 29, 2015 hearing. On the basis of our review of the unsigned transcript, we are able to locate the portions of the record that constitute the court's orders. Thus, despite the defendant's failure to abide by the rules of practice, we will review her claim. See *Stechel* v. *Foster*, 125 Conn. App. 441, 445–46, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011).

with her grandparents, Lou Sabini and Marietta Sabini, in her grandparents' house located in Stamford. Her grandparents had two children: the defendant's mother, Marilyn Gansel, and the defendant's uncle, Louis Sabini. The defendant helped her grandparents manage their household accounts and personal needs. On May 13, 2010, after Lou Sabini had died, Marietta Sabini gave the defendant written power of attorney to act as her agent. Marietta Sabini then sold the Stamford house and moved in with Louis Sabini. The defendant lived elsewhere but continued to manage Marietta Sabini's finances and personal needs.

On June 22, 2010, Marietta Sabini received approximately $592,539 in proceeds from the sale of her house. She deposited the money in a bank account she jointly held with the defendant (Wachovia account). All of the money deposited in the Wachovia account belonged solely to Marietta Sabini, and she only deposited the money in the Wachovia account so that the defendant could access the funds to fulfil her duties as Marietta Sabini's agent and to use the funds for Marietta Sabini's benefit. The two also jointly held a second bank account (ING Direct account). In addition, the defendant had her own personal account and two separate accounts for each of her businesses.

On June 24, 2010, the defendant withdrew $262,720 from the Wachovia account and deposited it into the ING Direct account. Between June 22, 2010 and October 17, 2012, the date of Marietta Sabini's death, the defendant transferred approximately $412,400 from the Wachovia account and the ING Direct account into her personal and business accounts. In addition, she used more than $20,000 of Marietta Sabini's money to pay for her own personal and business expenses, such as catering, family matters, real estate, groceries, gasoline, and student debt.

In August, 2012, Marietta Sabini tried to use her Wachovia debit card at a nail salon, but her card was declined because it had been cancelled. Louis Sabini and Marietta Sabini subsequently went to Wachovia bank and learned that a significant amount of Marietta Sabini's money was missing. On August 22, 2012, Louis Sabini held a family meeting to determine what had happened to the missing money. Six people—Louis Sabini, Louis Sabini's wife, the defendant, Marietta Sabini, Marilyn Gansel, and Marilyn Gansel's husband—attended the meeting. During the meeting, Louis Sabini accused the defendant of stealing $110,000 from Marietta Sabini. She responded: "yes," and "I realize that Louis [Sabini]," but then stated that she had only taken $109,000 and that she was willing to create a repayment plan to reimburse Marietta Sabini.

Shortly thereafter, the defendant sent Louis Sabini two e-mails from her business e-mail address, both of which contained incriminating information against her, including that she regretted "removing" Marietta Sabini's money from her accounts and that she was working with an attorney to devise an affordable repayment plan. The defendant claims that these e-mails were improperly admitted into evidence. On September 21, 2012, the defendant wrote a letter to Marietta Sabini, promising to repay her $283,000. She also wrote, "[i]n this correspondence to you I want to make you aware of my efforts to make things right," "[p]lease be aware that I want to make every effort possible to return all funds to you in an organized, efficient, and consistent manner," and, "I am terribly sorry for my actions and for the pain all of this has caused you. I hope one day you might be able to forgive me."

The defendant was arrested on November 29, 2012. She waived her right to a jury trial, and on October 29, 2015, the court found the defendant guilty of larceny in the first degree by embezzlement in an amount more

than $20,000. The court found that the state had proved all of the elements of larceny in the first degree by embezzlement and stated, "[the defendant] had the specific intent to appropriate [Marietta Sabini's property] to herself or her businesses . . . ." The court sentenced the defendant to ten years incarceration, execution suspended after three years, and five years of probation. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court abused its discretion by admitting into evidence the inculpatory e-mails she had sent to Louis Sabini. She argues that the state failed to properly authenticate the e-mails as being written and sent her because it relied solely on Louis Sabini's testimony to prove their authenticity. She contends that because the court expressly relied on the defendant's admissions in the e-mails to support its judgment, their admission was not harmless. We disagree that the defendant established harm and, therefore, need not decide whether the court abused its discretion.

"[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the [court's judgment] was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *LeBlanc*, 148 Conn. App. 503, 508–509, 84 A.3d 1242, cert. denied, 311 Conn. 945, 90 A.3d 975 (2014).

Assuming, without deciding, that the court abused its discretion in admitting the inculpatory e-mails into evidence, we conclude that the defendant has failed to show that the error was harmful because the state presented ample other evidence, apart from the e-mails, that the defendant unequivocally admitted that she

unlawfully took Marietta Sabini's money. As noted, Louis Sabini testified that at the family meeting, which six family members attended, when he accused the defendant of stealing $110,000 from Marietta Sabini, the defendant responded, "yes," and "I realize that Louis [Sabini]." She also admitted that she "had stolen" "only $109,000" and that she "would come up with some sort of a plan within the next few days" to reimburse Marietta Sabini. Marilyn Gansel, who testified for the defendant, confirmed that this meeting took place. She also testified that the defendant "did borrow some money" and that she "promised to pay all of this money back . . . ."

In addition, the defendant wrote to Marietta Sabini in the September 21, 2012 letter that she "returned a total of $30,500 to the [Wachovia] account," and "[t]o honor my commitment, I will begin to make monthly installments of $500 starting October 15, 2012. My attorney and I have discussed how these funds will be allocated." She indicated that she would transfer $283,000 into two separate trust funds, one of which "will hold your 'living' money ($106,000) and the other trust fund will hold your 'home healthcare' money ($177,000)."

Louis Sabini's testimony and the letter the defendant sent to Marietta Sabini were sufficient evidence to support her conviction. Because the defendant's admissions in the e-mails were cumulative of other evidence that properly had been admitted, and which independently provided the basis for conviction, we conclude that the defendant failed to show the admission of the e-mails was harmful.

The judgment is affirmed.

ANTHONY SANTOS *v.* ZONING BOARD OF APPEALS OF THE TOWN OF STRATFORD ET AL.
(AC 37281)

Sheldon, Mullins and Beach, Js.

Syllabus

The plaintiff landowner brought this action against the defendant town and its zoning board of appeals alleging that, by denying certain requested variances that would have allowed him to construct a home on certain of his real property, the defendants had taken his property through inverse condemnation and had been unjustly enriched thereby. The trial court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held* that the trial court properly determined that the plaintiff had failed to prove his claim for inverse condemnation: the plaintiff's claim that he had a reasonable investment-backed expectation of use of the property that was thwarted by the defendants' regulations was unavailing, as he conceded that the difficulty occasioned by the deficient width of the building lot could be remedied with little expense by adjusting the building line and inserting a certain limitation in his deed and, accordingly, the application of the zoning regulations did not amount to a practical confiscation of the property or infringe on the plaintiff's reasonable investment-backed expectations of use and enjoyment of the property; moreover, there was no merit to the plaintiff's claim that the defendants had been unjustly enriched by preventing him from developing his property, which abutted certain open space owned by the town, this court having determined that the application of the town's regulations did not result in a taking of the plaintiff's property.

Argued February 2—officially released July 11, 2017

Procedural History

Action to recover damages for, inter alia, the alleged taking by inverse condemnation of certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Radcliffe, J.*; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Ian Angus Cole, for the appellant (plaintiff).

Sean R. Plumb, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Anthony Santos, appeals from the judgment of the trial court in favor of the defendants, the town of Stratford (town) and its Zoning Board of Appeals (board). On appeal, the plaintiff contends that the court improperly held that the plaintiff had failed to prove his claims for (1) inverse condemnation and (2) unjust enrichment. We affirm the judgment of the trial court.

The following facts, as found by the court or not contested, are relevant to this appeal. The plaintiff purchased an unimproved parcel of land in Stratford at a tax sale conducted by the town in May, 2002. The prior owner had owned the property for approximately seventeen years, but had never attempted to develop the property. The town had never formally approved the property as a building lot. In noticing the sale of the property, the town included a warning that the property had not been guaranteed to be buildable under the town's current zoning regulations. The property was sold to the plaintiff for approximately one half of its assessed value, and the prior owner made no attempt to exercise his right to redeem the property in the six months following the sale.

After the sale was complete, the plaintiff attempted to develop the property as a residential building lot. Because the property contained wetlands, the plaintiff applied for a permit from the town's Inland Wetlands and Watercourses Commission. He then learned that two variances were required in order to build a home on the lot. One variance was required in order to construct a building near wetlands, and another was required because the lot, by application of the zoning regulations,[1] did not meet the lot width requirement

[1] The property was situated in an RS-3 zone, which, according to § 4.2 of the Stratford Zoning Regulations, required "minimum lot width" of 100 feet. The "line of measurement" of the width was to touch the building line, pursuant to § 1.32 of the regulations. The building line was defined as a

set forth in those regulations. The board denied the requested variances, noting that because the plaintiff's predecessor in title had created the plaintiff's lot in a way that did not conform to the town's zoning regulations, the board lacked the power to grant a variance. The plaintiff appealed, and the trial court affirmed the board's decision, reasoning that the plaintiff had failed to establish that the denial of the variance would cause him an unusual hardship. The plaintiff appealed to this court, and this court affirmed. See *Santos* v. *Zoning Board of Appeals*, 100 Conn. App. 644, 918 A.2d 303, cert. denied, 282 Conn. 930, 926 A.2d 669 (2007).

In 2004, while his appeal from the board's decision was pending, the plaintiff commenced the present action against the defendants alleging that the act of denying the requested variances by the board (1) constituted a taking of his property through inverse condemnation; and (2) resulted in the town's unjust enrichment. The trial court rendered judgment[2] for the defendants, holding that (1) the plaintiff failed to establish his claim for inverse condemnation, in large part because he had failed to demonstrate that he had a reasonable investment-backed expectation in the property; and (2) the plaintiff's claim for unjust enrichment had no basis in the evidence. This appeal followed.

The plaintiff first argues that the court improperly determined that he failed to prove his claim for inverse condemnation. He claims that the court erred in relying on facts irrelevant to an inverse condemnation analysis

"line parallel to the street at a distance equal to the required front yard . . . ." Id., § 1.10. By this standard, the building line was drawn across the property's "panhandle," which abutted the street. By this figuring, the width of the property at that point was approximately fifty feet.

[2] The case was tried twice. The first judgment was vacated because of the trial court's failure to comply with the requirements of General Statutes § 51-183b. See *Santos* v. *Zoning Board of Appeals*, 144 Conn. App. 62, 67, 71 A.3d 1263, cert. denied, 310 Conn. 914, 76 A.3d 630 (2013). The judgment from which the plaintiff appeals was rendered in 2014.

as set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), and in failing to consider facts that were relevant to that analysis. We agree with the court's determination that the plaintiff has failed to prove his claim for inverse condemnation.

As a preliminary matter, we state the standard of review applicable to the resolution of the plaintiff's appeal. In considering a claim for inverse condemnation, "we review the trial court's factual findings under a clearly erroneous standard and its conclusions of law de novo." *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008).

"[A]n inverse condemnation occurs when either: (1) application of the regulation amounted to a practical confiscation because the property cannot be used for any reasonable purpose; or (2) under a balancing test, the regulation's application impermissibly has infringed upon the owner's reasonable investment-backed expectations of use and enjoyment of the property so as to constitute a taking." Id., 299.

The plaintiff argues that he had a reasonable investment-backed expectation that he would be able to build a residential home on the property. He claims that the board's denial of the requested variances has foiled this expectation, and, therefore, that the defendants have effected a taking of his property. The plaintiff has conceded, however, that he may still be able to build a home on the property. If the plaintiff adjusts the building line by inserting a limitation in his deed such that the lot width deficiency is remedied, and if the board approves a building plan consistent with that adjustment, he will be able to build a home on his property.[3] Both parties

[3] As the plaintiff stated in his reply brief, "the minimum lot width was 100 feet and that lot width is measured at the building line and . . . the regulations allowed him to set, by limitation in his deed, the location of the building line at a distance of 125 feet from the street thus eliminating a potential problem with inadequate lot width and obviating any need to apply for a variance."

conceded this point in their briefs and at oral argument before this court. It is undisputed, then, that the problem could be solved with relatively little expense.[4] In light of the agreement that the difficulty is readily correctible,[5] a conclusion that application of any regulation amounted to confiscation, or that a *reasonable* investment-backed expectation had been thwarted, is obviously untenable.[6]

The application of the zoning regulations to the plaintiff's property did not "infringe upon the owner's reasonable investment-backed expectations of use and enjoyment of the property *so as to constitute a taking*"; (emphasis added) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 299; because the plaintiff has not been deprived of any reasonable investment-backed

Section 1.10 of the Stratford Zoning Regulations provides an exception for the place to measure minimum width; although ordinarily it is to be measured at the distance from the required front yard—in this case, twenty-five feet—it may be measured at a greater distance "by limitation in a deed." A width of approximately 200 feet could be found, if the line were farther from the street.

[4] The plaintiff's attorney conceded at oral argument before this court that altering the building line on the deed is "not very complicated" and would take him about half a day's work.

[5] See also *Santos* v. *Zoning Board of Appeals*, supra, 100 Conn. App. 650 n.4 ("The plaintiff contends, however, that the location of the building line under the regulations is not fixed but rather can be set arbitrarily, at any greater distance by the board or the property owner, by limitation in the deed. According to the plaintiff, by inserting a provision in his deed setting the building line at 125 feet from the street, the lot width issue evaporates and no variance is required. Inasmuch as the building line has not been otherwise established by limitation in the deed, we decline to consider this hypothetical scenario.")

[6] The trial court held that no *reasonable* expectation was foiled by regulatory action, because the regulatory situation was ascertainable throughout the relevant period of time, the town had disclaimed any representations as to use of property, the plaintiff's predecessors had created the nonconformity, and the purchase price reflected the speculative nature of the transaction. The court held as well that, in any event, the property was not without value. We do not disagree with the conclusions of the court.

expectation.[7] See id., 302 ("[b]ecause the plaintiff failed to establish either that it had been deprived of all beneficial use of the property or that it had been deprived of a reasonable investment-backed expectation, the trial court properly dismissed the plaintiff's inverse condemnation claim"). We agree with the court's conclusion that there has been no inverse condemnation.

The plaintiff also claims that the court improperly concluded that he failed to prove his claim of unjust enrichment. He argues that because the town has prevented him from developing his property, "[t]he town has essentially added 2.3 acres of [the plaintiff's] land to the ten acres of open space that the town already owns immediately to the east . . . and equity requires that the town compensate [the plaintiff] for the benefit it has derived from preventing [the plaintiff] from developing his property."

As we previously held, the application of the town's regulations did not result in a taking of the plaintiff's property. We have carefully reviewed the record and the arguments of both parties on the unjust enrichment issue, and we find the claim to be without merit.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* JERMAINE E. REDDICK
(AC 38446)

Sheldon, Keller and Prescott, Js.

Syllabus

The defendant, who had been convicted of several offenses that arose from a shooting incident, appealed to this court, claiming that he was deprived

[7] The trial court did not expressly decide the "limitation in the deed" issue, nor did the parties directly assert this ground. The factual issue had been suggested in *Santos* v. *Zoning Board of Appeals*, supra, 100 Conn. App. 650–51, however, and both sides have recognized the available reconciliation.

of his constitutional right to a fair trial as a result of certain allegedly improper comments that the prosecutor made during closing argument to the jury. The defendant asserted, inter alia, that the prosecutor improperly used the defendant's exercise of his right to remain silent as evidence of his guilt, expressed his opinion about a witness' credibility and appealed to the jurors' emotions. The defendant and his girlfriend, G, had argued on their way to G's home after leaving a party that they had attended. When they arrived, G called her mother to ask that she come and pick up G's minor child. G's mother then woke up her brother, the victim, and G's mother and the victim thereafter drove to G's house, where they observed the defendant in the passenger seat of a vehicle that was leaving the premises. The victim approached the vehicle in which the defendant was sitting, and the defendant eventually got out of the vehicle and shot the victim with a handgun. The defendant then got back into the vehicle, which left the premises. A police officer thereafter stopped the defendant's vehicle and arrested him. During a police search of the vehicle, a handgun was found, which the defendant stated belonged to him. During the encounter with the officer, the defendant did not inform him that he shot the victim in self-defense. At trial, the defendant, who previously had been convicted of a felony, claimed that he had shot the victim in self-defense. G, who sustained injuries on the evening of the shooting, gave conflicting accounts through testimony and statements given to the police as to how she sustained those injuries. Although both parties questioned the arresting officer as to the sequence of events pertaining to his stop of the defendant's vehicle, neither the state nor the defendant established when in that sequence the defendant was arrested or if and when the officer informed the defendant his constitutional rights. *Held*:

1. The defendant could not prevail on his claim that his constitutional right to a fair trial was violated when the prosecutor stated during closing argument to the jury that the defendant did not inform the police officer who arrested him that he acted in self-defense when he shot the victim, thereby using his postarrest silence as circumstantial evidence of his guilt: there was no basis on which to conclude that the prosecutor used the defendant's exercise of his right to remain silent as evidence of his guilt, as the record did not establish when the defendant was arrested, whether the arrest preceded or followed the questioning of him by the police officer who stopped the defendant's vehicle, and if and when the officer informed the defendant of his constitutional rights, and there was no evidence that the defendant expressly invoked his right to remain silent during his encounter with the officer.
2. This court found unavailing the defendant's claim that he was deprived of his due process rights to a fair trial when the prosecutor allegedly expressed his opinion during closing argument as to the credibility of G, and appealed to the jurors' emotions by referencing a trend in gun violence and referring to the defendant as a convicted felon and a

predator: contrary to the defendant's claim that the prosecutor expressed his belief that G lied about her injuries, the prosecutor argued that G was biased in favor of the defendant and had a motive to testify favorably for him, and asked the jury to draw reasonable inferences from G's testimony, in which she presented different accounts as to how she was injured on the evening of the shooting; furthermore, although the prosecutor's reference to broader issues of gun violence and certain comments he made about the defendant's prior felony conviction were improper, the court's jury instructions were sufficient to cure any prejudice resulting from the gun violence comment, the prosecutor did not refer to the defendant as a predator, and the defendant failed to demonstrate that, in the context of the entire trial, the challenged comments that were deemed improper were so egregious as to render the trial unfair, as the state's case was strong, the comments were infrequent and the defendant failed to object to the comments at issue.

Argued February 3—officially released July 11, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, criminal possession of a firearm and assault in the third degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Robert E. Byron, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Michael Dearington*, former state's attorney, and *Gary W. Nicholson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Jermaine E. Reddick, appeals from the judgment of conviction, rendered against him after a jury trial in the judicial district of New Haven, on charges of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), criminal

possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and assault in the third degree in violation of General Statutes § 53a-61 (a) (1). On appeal, the defendant claims that his conviction should be reversed on grounds that the prosecutor, in his closing argument to the jury, violated his right to a fair trial by (1) improperly commenting on the defendant's failure to inform police officers at the time of his arrest that he had shot the victim in self-defense; (2) offering his personal opinion as to the credibility of a state's witness; and (3) appealing to the emotions of the jurors by injecting extraneous issues into the trial and commenting on the defendant's prior felony conviction. We affirm the judgment of the trial court.

The jury was presented with the following evidence upon which to base its verdict. In the early morning hours of April 29, 2013, the defendant, along with his girlfriend, Myesha Gainey, and their three year old daughter, J,[1] got a ride home from a party they had attended earlier in the evening. Both the defendant and Gainey had been drinking before the ride. At the start of the ride, the defendant was seated in the front passenger seat, while Gainey sat in the backseat with J. At some point during the ride, however, the defendant reached into the backseat, unbuckled J's seat belt, and lifted her into the front seat, where she remained unbuckled for the remainder of the ride. Upon seeing that J was unbuckled in the front seat of the car, Gainey began to argue with the defendant. The argument continued until the couple reached Gainey's home at 38 Peck Street, New Haven, where the defendant stayed several nights a week.

Upon arriving at 38 Peck Street, Gainey took J up to the second floor of the home. There, she told the

[1] In view of this court's policy of protecting the privacy interests of juveniles, we refer to the child involved in this matter as J. See, e.g., *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396 n.1, 94 A.3d 588 (2014).

defendant that she was going to call her mother, Marjorie Tillery, to come over and pick up J.[2] The defendant and Gainey then started to argue again. Shortly before 1 a.m., Marjorie Tillery received a phone call from J, who was crying and sounded distraught. During this phone call, Tillery also spoke with Gainey, who sounded emotional and upset. Although Gainey provided few details to her mother about what was happening, Tillery became concerned for Gainey's and J's safety, and agreed to drive over to Peck Street from her home in West Haven.

Thereafter, Tillery woke up the victim, her brother, Mickey Tillery, who was asleep in another room. She told her brother that the defendant had been hitting Gainey, and thus that she wanted him to accompany her to retrieve Gainey and J from New Haven.[3] The Tillerys then drove together from West Haven to Lombard Street, New Haven, where Gainey had instructed Marjorie Tillery to meet her.[4] After waiting several minutes at that location, the Tillerys left Lombard Street and drove over to Peck Street.[5] When they arrived,

[2] At trial, Gainey claimed that she intended to call her mother because she was too drunk to care for J. Tillery and the victim, her brother, Mickey Tillery, however, stated that Gainey called her mother that evening because the defendant had struck her in front of J.

[3] Marjorie Tillery also testified that she wanted her brother to accompany her "in case [the defendant] wanted to disrespect me in a sense . . . [to make] sure everything would be all right once [we] got there."

[4] At trial, Gainey testified inconsistently regarding the plan to meet at Lombard Street that evening. Gainey first testified that, after she had called her mother, she traveled to Lombard Street and waited with J on the front porch of a friend's house before returning to Peck Street. Upon further questioning, Gainey testified that she never made it to her friend's house, but instead had walked approximately halfway to Lombard Street before she returned to Peck Street. Thereafter, she stated that she had gone to her neighbor's home following her argument with the defendant, and was inside that neighbor's home when her mother arrived at Peck Street.

[5] Although Marjorie Tillery testified that she first traveled to Lombard Street before heading to Peck Street, Mickey Tillery testified that they traveled directly from West Haven to Peck Street, New Haven.

however, they were unable to find parking in the lot behind Gainey's home, and Marjorie Tillery parked her Chevy Tahoe truck in the middle of the parking lot, blocking several occupied parking spaces. At that time, Marjorie Tillery attempted to call Gainey to inform her that they had arrived at Peck Street. Within minutes of the Tillerys' arrival, a grey station wagon began to back out of a parking spot that was partially blocked by Marjorie Tillery's Tahoe. As she was about to move the Tahoe, Marjorie Tillery observed the defendant in the front passenger seat of the station wagon. She then stated to Mickey Tillery, "there go Jermaine right there."

Upon seeing the defendant in the passenger seat of the station wagon, both Tillerys exited the Tahoe and began to approach the station wagon. Although Marjorie Tillery recalled that she "came in peace,"[6] Mickey Tillery admittedly came with the intent to fight the defendant. He testified at trial that, upon seeing the defendant, "I kind of, like, lost it. I jumped out of the truck. I ran over to where he was sitting in the car . . . ." During this initial encounter, the station wagon remained stationary in its parking space, with its doors unlocked and its passenger window partially down.

As he approached the station wagon, Mickey Tillery began to argue with the defendant, saying "something about [how] I'm tired of this with my niece and then . . . like I said, I pushed him, and I just put my hands inside the car and tried to snatch him out and he yanked back." Mickey Tillery also recounted, "I put my hand inside the car so I could snatch him out the car a minute and . . . that's why I opened the [passenger] door, but they locked it and then they [rolled] their windows up, and [so] I stepped away from the car and I was just

[6] At trial, Marjorie Tillery testified that she "just wanted to talk to [the defendant] and ask him, you know, why [the defendant continued] to keep on doing what he [was] doing to my daughter knowing my granddaughter, which is his daughter, is there to see all that."

looking because I couldn't get in now that they [had] hatched the windows up and lock[ed] the door."

After the defendant locked the car's doors and rolled up its windows, Mickey Tillery took several steps away from the station wagon in an effort to lure the defendant out of the car. Several seconds later, Mickey Tillery heard the doors of the station wagon unlock, and, believing that he and the defendant were about to fight, Mickey Tillery backed away from the car to allow the defendant to exit the station wagon. The defendant then opened the front passenger side door, exited the vehicle, produced a nine millimeter semiautomatic handgun and shot Mickey Tillery, who, at the time, was stepping away from the vehicle with his hands up in the air. Mickey Tillery immediately collapsed on the pavement. Fearing that the defendant might shoot her as well, Marjorie Tillery got back into the Tahoe. The defendant then returned to the passenger side of the station wagon and got in, after which the station wagon backed out of the parking space, drove around the Tahoe, and exited the parking lot. Immediately after the station wagon left the area, Marjorie Tillery saw Gainey exiting her neighbor's home. Although Gainey had not witnessed the shooting, Marjorie Tillery told her that the defendant had shot Mickey Tillery, who, by then, was lying unconscious near the passenger side of the Tahoe. Marjorie Tillery also dialed 911 and reported the incident to the police.

Officer Reginald E. McGlotten of the New Haven Police Department arrived first on the scene. After speaking with Marjorie Tillery, McGlotten broadcasted a description of the shooter and the station wagon over his police radio. At the time of that broadcast, Officer Gene Trotman, Jr., who was responding to the initial report of a gunshot fired on Peck Street, observed a station wagon matching the broadcast description of the shooter's vehicle traveling near the intersection of

Chapel and Church Streets in New Haven. Trotman first called for backup units, then initiated a traffic stop of the station wagon. Once backup units arrived, Trotman approached the station wagon with his weapon drawn. The driver of the station wagon was identified as Akeem Whitely, and his passenger was identified as Jermaine Reddick, the defendant. Trotman asked the defendant where he was then coming from. The defendant responded that he was coming from 38 Peck Street. Trotman asked if there were any weapons in the vehicle, and the defendant stated that there were. The defendant and Whitely were then placed under arrest. A subsequent search of the station wagon revealed a nine millimeter semiautomatic handgun between the front passenger seat and the center console. Upon further questioning, the defendant stated that the gun was his and that Whitely was simply giving him a ride.[7]

Contemporaneously with this traffic stop, Officer Keron Bryce arrived at Peck Street to secure the scene with McGlotten. While securing the scene, Bryce found one nine millimeter shell casing on the pavement near Marjorie Tillery's Tahoe.[8] Bryce then interviewed Marjorie Tillery and Gainey about the events preceding the shooting. During these interviews, Bryce saw a laceration on Gainey's face and noticed that she had a swollen lip. Upon further questioning by the officer, Gainey indicated that the defendant had caused her injuries.

[7] As we will discuss more fully, the parties agree that the record does not clearly establish the chronology of Trotman's traffic stop or his questioning of the defendant. Notably, there is no indication of whether the defendant was arrested prior to or after answering Trotman's questions or when, if at all, the defendant received his warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), during this encounter.

[8] On the second day of trial, Jill Therriault, a firearms and toolmark examiner with the state Department of Emergency Services and Public Protection's division of scientific services, testified that forensic testing confirmed that the shell casing discovered at Peck Street was fired from the nine millimeter handgun later recovered in the defendant's possession.

Thereafter, Bryce was notified that Trotman had pulled over a vehicle matching the description given by Marjorie Tillery. Bryce then transported Marjorie Tillery to the intersection of Chapel and Church Streets to conduct a one-on-one showup identification of the suspect.

Once Bryce and Tillery had arrived at Trotman's location, Bryce shined a spotlight on the defendant, who was then sitting in the backseat of a police cruiser. Upon seeing the defendant, Marjorie Tillery positively identified him as the person who had shot her brother. The defendant was then transported to the New Haven Police Department's detention facility for processing. A subsequent background check revealed that the defendant had previously been convicted of a felony.[9]

A few miles away, Mickey Tillery arrived by ambulance at Yale-New Haven Hospital. There, it was determined that the bullet had struck the femoral artery in his right leg and that he was rapidly losing blood. Doctors first performed cardiopulmonary resuscitation on Mickey Tillery, then gave him a "massive [blood] transfusion . . . ." Thereafter, doctors performed reconstructive surgery on his femoral artery to halt the loss of blood. Although the surgery proved successful, Mickey Tillery had to remain in the hospital for the next two weeks. On May 9, 2013, while still recovering in the hospital, Mickey Tillery spoke with members of the

[9] During the state's direct examination of Bryce, the following colloquy occurred:

"Q. Finally, sir, as part of your duties or responsibilities in this case, did you have occasion to do a background check for the defendant, Mr. Jermaine Reddick . . . to determine whether or not he had been previously convicted of a felony? Did you do such a check? . . .

"A. Yes.

"Q. All right. And after doing that check, did you confirm that Mr. Reddick, in fact, had been previously convicted of a felony before that date?

"A. Yes."

The defendant did not object to this line of questioning or request a limiting instruction as to the permissible use of such prior conviction evidence.

New Haven Police Department and agreed to view a photographic array of eight individuals. Upon reviewing the array, Mickey Tillery positively identified a photograph of the defendant as that of the man who had shot him.

Thereafter, by way of a long form information, the state charged the defendant with assault in the first degree in connection with the shooting of Mickey Tillery, assault in the third degree in connection with the assault of Gainey, and criminal possession of a firearm. The defendant elected a trial by jury, which took place from April 21 through April 23, 2015. At trial, the defendant argued that Mickey Tillery had been the initial aggressor in the incident between them and that he had shot Mickey Tillery in self-defense. After several hours of deliberations, the jury found the defendant guilty of all three charges. On July 10, 2015, the defendant was sentenced to a total effective term of twenty-three years in prison followed by three years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendant first claims that the state violated his due process right to a fair trial because the prosecutor, during closing argument, impermissibly commented on the defendant's failure to inform Trotman when he was first interviewed that he had shot Mickey Tillery in self-defense. In support of his claim, the defendant argues that the prosecutor failed to distinguish between the defendant's prearrest and postarrest silence, the latter of which is constitutionally protected. The defendant thus argues that, by commenting on his failure to tell the police when he first spoke with them that he had acted in self-defense, the prosecutor used his postarrest silence as circumstantial evidence of his

guilt, in violation of his privilege against self-incrimination, as applied in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).[10] The defendant claims that the challenged comments were "so egregious, so deliberate, and so calculated to defeat the constitutional right of the defendant and to abuse the authority of the office of the prosecutor that it merits . . . the reversal of the verdict, even though no objection was made at trial."[11]

The state disagrees, arguing that "the defendant's claim fails on both the law and the facts [of this case]." In support of its position, the state argues that the defendant's pre-*Miranda*[12] silence, unlike his post-*Miranda* silence, is not constitutionally protected, and thus a prosecutor is not prohibited from commenting on a defendant's pre-*Miranda* silence during closing argument. The state further argues that the trial court record does not establish when Trotman read the defendant his *Miranda* rights, and thus there is no basis for concluding that the prosecutor violated the defendant's fifth and fourteenth amendment rights under the rule of *Doyle* v. *Ohio*, supra, 426 U.S. 610. Finally, the state argues that even if the challenged comments were improper, any error based upon them was harmless and

[10] The defendant also claims that the prosecutor's comments violated General Statutes § 54-84 (a), which provides in relevant part: "Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official . . . ."

A review of the record, however, demonstrates that the prosecutor never commented on the defendant's decision not to testify during trial. We thus reject this alternative argument.

[11] It is well settled that a defendant may raise a claim of prosecutorial impropriety on appeal even though he failed to object to the alleged impropriety at trial. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 573–74, 849 A.2d 626 (2004).

[12] See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

does not warrant reversal of the defendant's conviction. We agree with the state that the record does not establish when the defendant received his *Miranda* warning, and thus there is no basis upon which to conclude that the prosecutor's comments violated *Doyle*.

The following additional facts are necessary for our resolution of this claim. As discussed in the preceding paragraphs, the defendant advanced a claim of self-defense throughout the trial. In support of his claim, he attempted to establish, through his cross-examination of the state's witnesses, that Mickey Tillery was approximately six inches taller than he was and outweighed him by as much as seventy pounds.[13] On cross-examination of Mickey Tillery, the defendant elicited admissions as to his anger toward the defendant and his desire to fight him on the evening of the shooting. Mickey Tillery, in fact, agreed with defense counsel's statement that he "would have . . . beat the crap out of [the defendant]," that he would not have let anyone break up the fight, and that he did not intend to stop fighting with the defendant until he "got tired of hitting him." Defense counsel also sought to emphasize that the defendant had "tried to get away" from Mickey Tillery before the shooting occurred.

As part of its case-in-chief, the state presented the testimony of Trotman, the officer who had stopped the station wagon at the intersection of Church and Chapel Streets. Although both parties inquired of Trotman as

[13] At several points during the trial, the defendant claimed that Mickey Tillery was six feet tall and weighed 240 pounds. On direct examination of Dirk Johnson, a physician at Yale-New Haven Hospital, the state entered into evidence exhibit 25, a medical report dated May 7, 2013, which listed Mickey Tillery's height at five feet, eleven inches and his weight at 219 pounds. On cross-examination, Gainey agreed with defense counsel that the defendant was approximately five feet, six inches tall and weighed 170 pounds.

to the sequence of events during that traffic stop, neither the state[14] nor the defendant[15] established when in that sequence the defendant was arrested, whether the

[14] During the state's direct examination of Trotman, the following colloquy occurred:

"Q. Okay. Now . . . after you stopped the vehicle . . . did you ask Mr. Reddick any questions, sir?

"A. Yes, I asked him where he was coming from.

"Q. Okay. And do you remember what, if anything, he told you about that?

"A. Yes, he said he was coming from 38 Peck.

"Q. Okay. Now, after you discovered the handgun . . . did Mr. Reddick indicate who that gun belonged to?

"A. Yes, he said it was his.

"Q. And concerning Mr. Whitely's involvement in this incident, what did he say, if anything, about Mr. Whitely?

"A. He said Mr. Whitely was just giving him a ride and that the gun belonged to him.

"Q. So, at this point, were both Mr. Whitely and Mr. Reddick . . . were they both detained and placed under arrest, sir?

"A. Yes."

[15] On cross-examination of Trotman, the following colloquy occurred:

"Q. When you spoke to Mr. Reddick, you asked him where he was coming from. Correct?

"A. Yes.

"Q. And he told you 38 Peck Street.

"A. Yes.

"Q. And that's, in fact, where he was coming from. Correct?

"A. Yes.

"Q. And . . . did you ask him whose gun is that?

"A. I don't recall . . . I think it was more . . . that he didn't want the driver to get in trouble for what he did. I don't recall how it came about, but he did say that . . . it was his gun.

"Q. And were you the one that stopped him?

"A. Yes.

"Q. All right. . . . [Did] you have your weapon drawn when you . . . stopped him?

"A. Yes.

"Q. All right.

"A. Yes.

"Q. Did you ask him if he had any weapons in the car?

"A. Yes.

"Q. And did he say yes?

"A. I don't recall.

"Q. Okay. At some point he said yes. Correct?

"A. Yes.

arrest preceded or followed Trotman's questioning of the defendant, whether the defendant was ever given his *Miranda* warnings, and, if so, when those warnings were given in relation to Trotman's questions.

After two days of evidence, the state rested its case-in-chief. The defendant thereafter elected to not testify in his own defense and, after being canvassed by the court as to that decision, rested his case without presenting any defense witnesses. Closing arguments were made the following day.

During closing argument, the prosecutor recounted the events leading up to the shooting, emphasizing, inter alia, that during the initial encounter, the defendant had rolled up the car's windows and locked its doors. The prosecutor then recalled for the jury that Mickey Tillery, who was unarmed, had backed away from the defendant's vehicle after its windows were rolled up. "Suddenly," the prosecutor argued, "he hears the door on the passenger's side unlock and what happens? The defendant comes out, pulls out a gun, aims it at Mickey Tillery, and fires at him, striking him in his upper right leg. . . . I mean, ask yourself, when you shoot somebody who's doing that, is that self-defense? It's not self-defense, ladies and gentlemen."

"Q. He . . . indicated . . . that it was his weapon.

"A. Yes.

"Q. All right. And do you know the person who was shot in this case? Do you know his name? . . .

"A. No, it's not in my notes. I had nothing to do with that part of the investigation.

"Q. Okay. So, all you did was stop him, arrest him, and bring him to . . . Union Station. Correct?

"A. No, I . . . stopped and I waited until the primary officer that was at the scene of the crime—until he came and then he did what he had to do. . . .

"Q. And then . . . you left.

"A. Yes.

"Q. Went on with other things.

"A. Yup."

The prosecutor also discussed, without objection, the defendant's conversation with Trotman following the shooting. More specifically, the prosecutor stated: "[W]hat's said by Mr. Reddick at that time? Well, he tells Officer Trotman that he had been over at 38 Peck Street. He also tells . . . Officer Trotman that the gun was his and that Mr. Whitely was a friend of his and was just giving him a ride. That's what he told Officer Trotman. What didn't he say to Officer Trotman? You know, this is somebody who is going to now claim that he was acting in self-defense. I mean, did he say anything to Officer Trotman, you know, geez, you know . . . I was just accosted by this [madman] and I had to shoot him. Did he mention the shooting at all? He didn't mention the shooting at all. I . . . don't know how he thought he was going to get away this. But he, for whatever reason, was willing to admit that he had been over to Peck Street and that the gun was his, but he never admitted to doing any shooting or . . . that he had to shoot anybody in self-defense, never made . . . any mention of that, whatsoever." Thereafter, the prosecutor concluded his opening closing argument.

At the outset of his closing argument, defense counsel commented that "99 percent of the facts of this case are not disputed. You know what happened; it's just your interpretation of it with a couple of minor twists." Counsel then argued that Marjorie Tillery "was going [to Peck Street] for vengeance. She was going to be a vigilante. She was taking things into her own hands." Thereafter, counsel claimed that Marjorie Tillery "let [Mickey Tillery] loose" on the defendant. Counsel argued that, at that moment, it was the middle of the night, the defendant did not recognize Mickey Tillery,[16] he was being confronted by a larger man who was

[16] Although the defendant's argument suggested that he did not recognize Mickey Tillery, both Tillerys testified that the two men had met each other prior to April 29, 2013.

attempting to pull him out of the car window and that, fearing for his safety, he shot Mickey Tillery in self-defense.

Thereafter, defense counsel argued that the state had failed to carry its burden of proof that the defendant had not acted in self-defense that night. In support of his argument, counsel reminded the jury that it could infer that (1) the defendant reasonably believed that he faced serious physical injury because Mickey Tillery admitted that he intended to seriously injure the defendant; (2) the defendant reasonably believed that Mickey Tillery may have had a weapon in the car; (3) the defendant tried to avoid the fight and "stayed in the car for as long as he could"; and (4) the defendant had not used deadly force because he had shot Mickey Tillery in the leg and fired only once before fleeing the area. Counsel then concluded his argument without addressing the state's characterization of the defendant's interaction with Trotman.

In its rebuttal argument, the state reiterated that the jury should not credit the defendant's claim of self-defense because the defendant had not told officers at the time of his arrest either that he had shot Mickey Tillery or that he had done so in self-defense. More specifically, the prosecutor argued that, "when the defendant was stopped by Officer Trotman, shortly after the shooting, you know, he didn't say, hey, geez, you know, I'm glad . . . you can't believe what just happened to me. This madman was coming at me and I had to shoot him. I thought he was going to kill me. He doesn't even mention to Officer Trotman that he shot anybody. So, this wasn't self-defense. If it was self-defense, he would have told the police right then and there what had happened. He didn't."

Before reaching the merits of the defendant's claims, we first set forth the relevant portions of our law of

self-defense. "Under our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. . . . That is, [the defendant] merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . . As these principles indicate, therefore, only the state has a burden of persuasion regarding a self-defense claim: it must disprove the claim beyond a reasonable doubt.

"It is well settled that under § 53a-19 (a), a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . [Our Supreme Court] repeatedly [has] indicated that the test a jury must apply in analyzing the second requirement . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *Abney*, 88 Conn. App. 495, 502–503, 869 A.2d 1263, cert. denied, 274 Conn. 906, 876 A.2d 1199 (2005). Under subsection (b) of § 53a-19, however, "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . ." Moreover, under subsection (c) of § 53a-19, "a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under

such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . .''

Against this backdrop, ''[w]e set forth the legal principles that guide our analysis [of the defendant's claims] and our standard of review. In *Doyle* [v. *Ohio*, supra, 426 U.S. 610] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. . . . Likewise, our Supreme Court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt . . . . *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . Because it is the *Miranda* warning itself that carries with it the promise of protection . . . the prosecution's use of [a defendant's] silence *prior* to the receipt of *Miranda* warnings does not violate due process. . . . Therefore, as a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury. . . . The defendant's claim raises a question of law over which our review is plenary.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Lee-Riveras*, 130 Conn. App. 607, 612–13, 23 A.3d 1269, cert. denied, 302 Conn. 937, 28 A.3d 992 (2011); see also *State* v. *Bereis*, 117 Conn. App. 360, 373, 978 A.2d 1122 (2009).

In the present case, the defendant claims that the prosecutor's remarks during his opening and rebuttal closing arguments violated his constitutional rights under the fifth and fourteenth amendments, as applied

in *Doyle* v. *Ohio*, supra, 426 U.S. 610, not to have the exercise of his right to remain silent used against him in a later criminal proceeding. In support of his position, the defendant argues that, although "[p]ostarrest silence is treated differently from prearrest silence," the facts of this case demonstrate that "there was a period under anyone's definition of arrest during which the defendant was silent as to his exculpatory explanation . . . ." The defendant further asserts that the prosecutor failed to distinguish between the defendant's prearrest and postarrest silence, and thus the prosecutor's comments, which "encompassed the entirety of the time the defendant was under the custody of Trotman," violated the defendant's fifth and fourteenth amendment rights to remain silent. Furthermore, although the defendant concedes that Trotman did not testify as to when, if at all, the defendant received his *Miranda* warnings in the course of the traffic stop, he maintains that the right to remain silent is not contingent upon the receipt of *Miranda* warnings, but instead "inheres automatically under the fifth amendment." We are not persuaded.

At the outset, we address two fundamental flaws in the defendant's argument. We first note that, although the defendant is correct in his assertion that the right to remain silent is not contingent upon the receipt of *Miranda* warnings, "[i]t has long been settled that the privilege [against self-incrimination] generally is not self-executing and that a witness who desires its protection must claim it." (Citation omitted; internal quotation marks omitted.) *Salinas* v. *Texas*, U.S. , 133 S. Ct. 2174, 2178, 186 L. Ed. 2d 376 (2013). In the present case, however, there is no evidence to support the notion that the defendant, in the absence of any *Miranda* warning, expressly invoked his constitutional right to remain silent at any time during his encounter with Trotman.

We further note that, in support of his claim that the prosecutor violated the constitutional protections described in *Doyle*, the defendant relies upon the fact that he was either in police custody or under formal arrest when he spoke with Trotman.[17] A review of relevant federal and state case law demonstrates that the defendant's reliance on these facts is misplaced. In *Fletcher* v. *Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the United States Supreme Court summarized its evolving jurisprudence under *Doyle* by explaining that the "use of silence for impeachment was fundamentally unfair in *Doyle* because *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . [Thus] *Doyle* bars the use against a criminal defendant of silence maintained *after receipt of governmental assurances*." (Emphasis added; internal quotation marks omitted.) Id., 606. In *State* v. *Leecan*, 198 Conn. 517, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986), our Supreme Court adopted the rationale of *Fletcher*, holding that "the absence of any indication in the record that the silence of a defendant had been preceded by a *Miranda* warning rendered *Doyle* inapplicable, even though the inquiry of the prosecutor pertained to the time of arrest." Id., 524–25; see also *State* v. *Berube*, 256 Conn. 742, 751–52, 775 A.2d 966 (2001); *State* v. *Plourde*, 208 Conn. 455, 467, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989).

Accordingly, our courts have recognized that the giving of *Miranda* warnings, even in the absence of a

[17] Although "[e]vidence of a defendant's postarrest silence is inadmissible under the principles of the law of evidence . . . a defendant must seasonably object and take exception to an adverse ruling in order to obtain appellate review of his claim of error in this respect." (Internal quotation marks omitted.) *State* v. *Lee-Riveras*, supra, 130 Conn. App. 613 n.7. As the state correctly notes, the defendant has not raised an evidentiary claim regarding the state's use of the defendant's postarrest silence.

formal arrest, entitles the defendant to the *Doyle* protections because such warnings provide governmental assurance, at least implicitly, that the defendant's silence will not be used against him. See *State* v. *Montgomery*, 254 Conn. 694, 715, 759 A.2d 995 (2000). We have, however, distinguished the former cases from cases where no *Miranda* warnings were given. In so doing, we have held that the act of being placed under arrest does not, by itself, provide governmental assurance that the defendant's silence will not be used against him at a later date. E.g., *State* v. *Plourde*, supra, 208 Conn. 466–67. Thus, it is the giving of *Miranda* warnings, not the act of being placed under arrest, that cloaks a defendant with the protections of *Doyle* v. *Ohio*, supra, 462 U.S. 610. See B. Gershman, Prosecutorial Misconduct (2d Ed. 2011–2012) § 10:17, p. 416 ("[c]learly, the operative fact in *Jenkins* [v. *Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)], as in *Doyle*, is the giving of *Miranda* warnings, not the arrest").

As we have long held, if a defendant alleges a constitutional violation, he bears the initial burden of establishing that the alleged violation occurred; it is only then that the state assumes the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Jones*, 65 Conn. App. 649, 654, 783 A.2d 511 (2001); see also *State* v. *Nasheed*, 121 Conn. App. 672, 678–79, 997 A.2d 623, cert. denied, 298 Conn. 902, 3 A.3d 73 (2010). Moreover, when analyzing a defendant's claim that a prosecutor violated the protection set forth in *Doyle*, we have held that "[i]t is essential to know the timing of these conversations because the use at trial of silence *prior* to the receipt of *Miranda* warnings does not violate due process." (Emphasis in original; internal quotation marks omitted.) *State* v. *Berube*, supra, 256 Conn. 751. In the present case, the record is unclear as to when, if at

all, Trotman gave *Miranda* warnings to the defendant. Accordingly, under the present facts, "we are unable to determine whether a *Doyle* violation occurred." *State* v. *Gonzalez*, 167 Conn. App. 298, 302 n.2, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016). In light of the foregoing, we conclude that there is no basis upon which to conclude that the prosecutor's comments during closing argument violated the defendant's due process rights pursuant to *Doyle* v. *Ohio*, supra, 426 U.S. 610. In so concluding, we need not address the subsequent question of whether such violation, if established, was harmless beyond a reasonable doubt. Cf. *State* v. *Montgomery*, supra, 254 Conn. 717–18.

II

The defendant's final claim on appeal is that the prosecutor committed several improprieties in closing argument that combined to deprive him of his due process right to a fair trial. More specifically, the defendant argues that the prosecutor impermissibly (1) voiced his personal opinion as to Gainey's credibility; and (2) appealed to the emotions of the jury by referencing the recent trend of increasing gun violence in New Haven and repeatedly referring to the defendant as a "convicted felon" and a "predator . . . ." The defendant claims, on the basis of such alleged improprieties, that he is entitled to the reversal of his conviction on all charges and a new trial.

In response, the state first argues that the defendant misquotes the record and misrepresents the context in which the prosecutor's challenged comments were allegedly made. It thus argues, as a threshold matter, that the prosecutor's comments, when properly understood, were not improper because (1) the comments as to Gainey's credibility were "based in the evidence and the reasonable inferences drawn therefrom"; (2) the comments about gun violence in New Haven only

referred to facts about which the jurors had common knowledge, and the prosecutor never suggested that by finding the defendant guilty, the jury could somehow lessen the problem of gun violence; and (3) the prosecutor's comments regarding the defendant's felony conviction were true in fact, supported by the record, and relevant to a substantive issue in the case. Finally, the state argues that, "to the extent that this court finds any impropriety, the defendant has failed to demonstrate a violation of his right to a fair trial."

Before addressing the defendant's individual claims of impropriety, we set forth our standard of review and governing legal principles. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . In analyzing whether the prosecutor's comments deprived the defendant of a fair trial, we generally determine, first, whether the [prosecutor] committed any impropriety and, second, whether the impropriety or improprieties deprived the defendant of a fair trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 8–9, 124 A.3d 871 (2015). Put differently, "[impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question . . . ." (Internal quotation marks omitted.) Id., 9, quoting *State* v. *Warholic*, 278 Conn. 354, 361–62, 897 A.2d 569 (2006); see also *State* v. *Ciullo*, 314 Conn. 28, 35, 100 A.3d 779 (2014). "[T]he burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they

amounted to a denial of due process." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 620, 65 A.3d 503 (2013). "As we have indicated, our determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)]."[18] (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 362.

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Internal quotation marks

[18] See part II B of this opinion.

omitted.) *State* v. *Medrano*, supra, 308 Conn. 611–13. With these general principles in mind, we address each of the defendant's arguments.

A

Gainey's Credibility

The defendant first argues that the prosecutor usurped the jury's role in assessing Gainey's credibility, instead "[making] that determination for the jury" by offering his personal belief that she had lied under oath regarding her injuries. The following additional facts are necessary for our resolution of this claim.

From the outset of her direct examination, Gainey admitted, inter alia, that she was still in love with the defendant, she did not wish to testify, and she was testifying only because she had been served with a subpoena. Throughout the course of her examination, she vehemently denied that the defendant had hit her on the evening of the shooting or that he was, in any way, responsible for the bruises and cuts she sustained that evening. Rather, she maintained that, although she could not recall what she had had to drink that evening, she was heavily intoxicated, as a result of which she had fallen down her stairs. Gainey stated that, despite informing the police after the shooting that she had fallen down the stairs, she had been pressured into giving a statement implicating the defendant, and thus had lied in her statements to police.[19] She also denied telling either her neighbor or the police that the defendant had hit her that evening.

After Gainey became increasingly unresponsive to the state's questions during the trial, the court permitted

[19] As we have discussed, the state also called Officer Bryce during its case-in-chief. During his examination, Bryce testified that, while interviewing Gainey that evening, he became interested in locating the defendant in connection with her bruises. Bryce also stated that Gainey never mentioned that she had fallen down the stairs.

the prosecutor to examine her as a hostile witness. Thereafter, the prosecutor introduced into evidence a redacted video[20] of Gainey's April 29, 2013 interview with the New Haven police. In that interview, Gainey told the police, inter alia, that the defendant had struck her several times in the face, and that she had attempted to fight back and, thereafter, had run over to her neighbor's house and told her neighbor about the defendant's physical abuse.

During his initial closing argument to the jury, the prosecutor argued, inter alia, that Gainey had violated her oath to testify truthfully as to the source of her injuries that night. In support of that argument, the prosecutor reminded the jury that Gainey had told the police that the defendant had struck her several times in the face that evening, but she had never mentioned falling down the stairs. The prosecutor then asked the jury to recall Gainey's demeanor while testifying and her admission that she was testifying only because the state had subpoenaed her. In an attempt to explain why Gainey had offered two drastically different accounts as to the source of her injuries, the prosecutor stated, "[w]ell, people don't come into court and lie just for the heck of it. I mean, I guess there . . . are pathological liars that might do that; I'm not claiming that Ms. Gainey is that type of person. You know, she came in here. She admitted that she's in love with the defendant. She has a young daughter by him. The state would submit, use your common sense on that issue. Her motivation for fabricating here in court about how she got hurt was because she was trying to help Mr. Reddick. But, again . . . for you to make that decision, you'd had an opportunity to review and see her actual interview at the New Haven Police Department the night of

[20] Pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), the court admitted only those portions of the taped interview that concerned the cause of Gainey's injuries on the evening of the shooting.

that incident. She was coherent. She answered questions in a manner that was appropriate. She did not have slurred speech. She never asked to use the bathroom. There was absolutely no evidence whatsoever that during that interview that she was intoxicated or drunk, nothing. So, she came in here and there were some things that had a kernel of truth to it, but for the most part, as far as how she got injured that night, she did not want to blame that on Mr. Reddick because she was trying to protect him and that's what she did. You know, she's a victim of domestic abuse. She'll take a beating and not report it to the police. She's blinded by her love for the defendant and . . . [her] feelings for him. She's unable to protect herself from this abuse. She's . . . unable to prevent her daughter from seeing it happen. But, you know, unfortunately, she's blinded by her feelings for the defendant."

It is well established that, although "[a] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses . . . [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 40–41. Moreover, we have held that "[i]t is permissible for a prosecutor to explain that a witness either has or does not have a motive to lie." *State* v. *Ancona*, 270 Conn. 568, 607, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005). In the present case, the prosecutor's comments did not amount to statements of personal opinion as to whether Gainey was, in fact, lying. Rather, the prosecutor argued that Gainey had presented two drastically different accounts as to how she was injured on the evening of the shooting, that she was biased by her feelings for the defendant, and that she had a motive to testify favorably for the defense. From those facts,

the prosecutor asked the jury to "use [its] common sense on that issue" and to reject Gainey's claim that she had fallen down the stairs that night. Such argument does not amount to prosecutorial impropriety; "instead, the prosecutor's statements, when placed in the context in which they were made, are reasonable inferences the jury could have drawn from the evidence adduced at trial." *State* v. *Ciullo*, supra, 42. Because we conclude that the defendant's first claim does not amount to prosecutorial impropriety, we need not consider whether it "caused or contributed to a due process violation . . . ." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 362.

B

Appealing to Jurors' Emotions

The defendant's final argument on appeal is that the prosecutor improperly appealed to the jurors' emotions (1) by arguing that the defendant's conduct was "another example of the unnecessary and senseless gun violence that's become all too common [in] the city of New Haven"; and (2) by engaging in character assassination of the defendant by referring to him as "a predator" and "a convicted felon . . . [who] doesn't care about the law." The state responds that the prosecutor's comments about gun violence in New Haven were not improper or, alternatively, that they did not violate the defendant's right to a fair trial. As to the defendant's remaining claim, the state first argues that the word "predator" was never used to describe the defendant, but instead was used to describe the kind of person, unlike Mickey Tillery, against whom the defendant might have needed to use deadly force in self-defense. The state further argues that the prosecutor's comments about the defendant being a convicted felon properly referred to the evidence presented and the reasonable

inferences that could be drawn therefrom. We address each argument in turn.

We first address the prosecutor's comment regarding general patterns of gun violence in New Haven. At the close of the prosecutor's initial remarks to the jury, the prosecutor summarized the events surrounding the shooting and the defendant's ability, but unwillingness, to leave the area safely before he shot Mickey Tillery. In that regard, the prosecutor stated that "what this case is, *it's another example of the unnecessary and senseless gun violence that's become all too common in the city of New Haven.* That's what this is. This defendant was not justified in using deadly physical force against Mickey Tillery. This was not self-defense, ladies and gentlemen. The defendant didn't shoot Mickey Tillery to protect himself. He was angry at Mickey Tillery for intervening in this domestic abuse situation he had going on with Myesha [Gainey]. He became angry. He was going to teach him a lesson. Mind your own business, stay out of the relationship. He taught him a lesson, all right." (Emphasis added.)

As discussed in the preceding paragraphs, "a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Medrano*, supra, 308 Conn. 613. Accordingly, "the prosecutor should refrain from injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict . . . ." (Internal quotation marks omitted.) A. Spinella, Connecticut Criminal Procedure (1985) p. 713, quoting *State* v. *Gold*, 180 Conn. 619, 659, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320,

66 L. Ed. 2d 148 (1980). Here, we agree with the defendant that the prosecutor's reference to broader issues of gun violence in New Haven was improper because it was extraneous and irrelevant to the issues before the jury.

We turn next to the defendant's argument that the prosecutor engaged in character assassination. We first dispose of the defendant's subsidiary claim that the prosecutor violated his right to a fair trial by referring to the defendant as a "predator" in closing argument. Simply stated, he did not. Instead, as the state has argued, the prosecutor used that word only when he argued as follows: "[T]his is not a typical self-defense claim. You know, typically we think of self-defense, you know, someone minding their own business, doing nothing they shouldn't be doing and *being accosted by some predator* who sets upon them and . . . they have this confrontation with the predator, they're forced to protect themselves. That's not what happened here." (Emphasis added.) It is thus readily apparent that, when using the term "predator" in his closing argument, the prosecutor was not referring to the defendant. Accordingly, we conclude that this comment was not improper.

Finally, we address the prosecutor's references to the defendant's prior felony conviction during his opening and rebuttal closing arguments to the jury. In his opening argument, the prosecutor recalled for the jury that Officer Bryce had testified that he had performed a background check on the defendant and learned "that the defendant had been previously convicted of a felony." When summarizing the evidence supporting count two, criminal possession of a firearm, he argued that the defendant had admitted that it was his gun, the gun was found in an operable condition, and that "Mr. Reddick, who is a convicted felon, had no right to have that weapon that evening." The defendant did not object to these remarks.

In his rebuttal argument, however, the prosecutor made two additional references to the defendant's felony conviction for very different purposes. On the first occasion, he argued that the defendant's claim of self-defense should be rejected because the defendant "created this situation" by assaulting Gainey and then remaining at Peck Street, knowing that Gainey's family "wasn't going to stand for that." "Right after the beating," the prosecutor remarked, "what did [the defendant] do? . . . He arms himself with a nine millimeter semiautomatic pistol, which, originally, had seventeen live rounds. You know, he was ready for trouble. He was locked and loaded.

"He was a convicted felon. He knew he couldn't have that gun. He doesn't care about the law. You think [he] cared about the law when his fists were smashed into his girlfriend's face? He didn't care. He doesn't care. He knew that there was going to be consequences for his actions. . . . [I]f he thought that the family or Myesha [Gainey] were going to call the New Haven police, do you think he would have been sitting with a nine millimeter fully loaded pistol waiting for the New Haven police to show up? I don't think so."

On the second occasion, the prosecutor referenced the defendant's felony conviction while discussing the circumstances immediately preceding the shooting. Specifically, he remarked that the defendant was able to lock the doors and windows to the station wagon, after which "[h]e could have had his buddy drive away" or, alternatively, he could have displayed the pistol and told Mickey Tillery, "look, stay the hell away from me." Had he pursued either of those alternative courses, the prosecutor argued, "[h]e could have went up to his apartment at 38 Peck Street, locked the door, and called the police. Did he do that? No. Well, he's not going to do that because he's a convicted felon in the possession of a pistol." Thereafter, the prosecutor concluded his

closing argument by stating, inter alia: "So I want . . . you to consider all of those things that he could have done. . . . [T]his was not a necessary shooting because this shooting was not self-defense. That's not what the shooting was about. It was motivated by the defendant wanting to teach the Tillery family a lesson." The defendant voiced no objection to any of these comments.

The parties do not dispute that "[e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove . . . an element of the crime. . . ." Conn. Code Evid. § 4-5 (c); see also, e.g., *State* v. *James*, 69 Conn. App. 130, 135, 793 A.2d 1200, cert. denied, 260 Conn. 936, 802 A.2d 89 (2002); *State* v. *Hanks*, 39 Conn. App. 333, 344, 665 A.2d 102, cert. denied, 235 Conn. 926, 666 A.2d 1187 (1995). In this case, the prosecutor's comments during his opening closing argument merely summarized Bryce's unobjected-to testimony that the defendant had, in fact, been convicted of a felony, which was an essential element of the charge of criminal possession of a firearm.[21] We conclude, therefore, that this remark was wholly proper, and obviously did not constitute prosecutorial impropriety.

We conclude, however, that the prosecutor's further commentary regarding the defendant's prior felony conviction was improper. It is well established that "[a] prosecutor may not appeal to the emotions of the jurors by engaging in character assassination and personal attacks against . . . the defendant . . . ." *State* v. *Warholic*, supra, 278 Conn. 389. As discussed in the

[21] Pursuant to General Statutes § 53a-217 (a): "A person is guilty of criminal possession of a firearm . . . or . . . electronic defense weapon when such person possesses a firearm . . . or . . . electronic defense weapon and . . . has been convicted of a felony . . . ."

We note that although § 53a-217 has been amended since the events at issue here, those amendments are not relevant to this appeal. We therefore refer to the current revision of § 53a-217.

preceding paragraphs, "[The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment." (Internal quotation marks omitted.) *State* v. *Medrano*, supra, 308 Conn. 612. Thus, "[a]lthough a state's attorney may argue that the evidence proves the defendant guilty, he may not stigmatize the defendant by the use of epithets which characterize him as guilty before an adjudication of guilt." (Internal quotation marks omitted.) Id., 615.

In its brief to this court, the state attempts to walk a fine line by arguing that the prosecutor's comments did not suggest that the defendant did not care about the law *merely because he was a convicted felon* but, instead, suggested that the defendant did not care about the law because, despite the fact that he had previously been convicted of a felony, he assaulted his girlfriend, illegally armed himself with a nine millimeter pistol, and waited for the eventual confrontation with Mickey Tillery. We are unpersuaded.

As previously discussed, the defendant did not testify in this case, and thus his prior felony conviction could not be used to challenge the veracity of his testimony. See Conn. Code Evid. § 6-7 (b). Accordingly, the prosecutor could only use evidence of the defendant's prior conviction to establish an essential element of a crime or by utilizing another recognized exception under § 4-5 of the Connecticut Code of Evidence. His comments, however, suggested that the defendant, a convicted felon, was not a law-abiding citizen, and thus had a propensity to engage in the type of criminal conduct

for which he had been charged. Our Code of Evidence unequivocally prohibits the use of prior convictions to establish a defendant's propensity for criminal behavior. Conn. Code Evid. § 4-5 (a); see, e.g., *State* v. *Ellis*, 270 Conn. 337, 354, 852 A.2d 676 (2004). We thus agree with the defendant that these comments were also improper.

"Having determined that several of the prosecutor's statements were improper, we now turn to whether the defendant has proven that the improprieties, cumulatively, 'so infected the trial with unfairness as to make the [conviction] a denial of due process.' " *State* v. *Medrano*, supra, 308 Conn. 620. "To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This inquiry is guided by an examination of the following *Williams* factors: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396.

With respect to the first *Williams* factor, there is nothing in the record before us to suggest that the prosecutor's comments about gun violence in New Haven or the defendant's felony conviction were invited

by the defendant's conduct or argument.[22] Next, with respect to the second *Williams* factor, the severity of the improprieties, we agree with the state that the prosecutor's remarks regarding gun violence in New Haven did not go so far as to "imp[ly] that convicting the defendant would alleviate the gun violence in New Haven." Moreover, although we conclude that the prosecutor's comments regarding the defendant's felony conviction were improper, we are cognizant that the defendant failed to object, at any point, to the remarks now at issue. As we have repeatedly held, "the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 361.

With respect to the third *Williams* factor, the frequency of the alleged improprieties, we note that the prosecutor's comment regarding gun violence in New Haven was an isolated remark and was not part of a larger pattern or theme in the state's case. Cf. *State* v. *Ceballos*, 266 Conn. 364, 411, 832 A.2d 14 (2003). As for the frequency of his comments regarding the defendant's felony conviction, these questionable comments occurred only twice, and thus we conclude that the frequency of these comments does not rise to the level

[22] During closing argument, defense counsel argued, "[the prosecutor] may be right. You may feel the same way. You're sick of the gun violence . . . in New Haven. This case is not a referendum on gun violence. It's not. This case is about Mr. Reddick defending himself against someone who was going to cause him serious physical injury." We are cognizant, however, that these comments occurred after, and in response to, the prosecutor's comments in closing argument.

of the frequency of impropriety that was identified and admonished by our Supreme Court in *State* v. *Williams*, supra, 204 Conn. 547.

As to the fourth *Williams* factor, whether the challenged comments touched upon the central issues before the jury, we agree with the state that, with respect to the defendant's claim of self-defense, the central issue was whether the jury credited the Tillerys' account of what transpired on the evening of the shooting. Against that background, we conclude that the prosecutor's comment regarding gun violence in New Haven had little, if any, relation to that issue, and thus did not strike at the central issues of this case. As for his comments regarding the defendant's felony conviction, however, we believe that such comments did touch upon the central issue of self-defense, and thus we resolve the fourth *Williams* factor in the defendant's favor.

As for the fifth *Williams* factor, the strength of the curative measures adopted, we note that the defendant did not request, and the court did not give, any curative instruction to the jury that it should disregard any of the prosecutor's improper comments. Although the court instructed the jury, with respect to the elements of criminal possession of a firearm, that "the state must prove beyond a reasonable doubt, number one, that the defendant possessed a firearm and, number two, that he was prohibited from possessing a firearm at the time because he was convicted of a felony," the court did not provide any limiting instruction concerning the prosecutor's improper remarks about the defendant's felony conviction. With respect to his comments on gun violence in New Haven, the court instructed the jury only generally, that "[y]ou may not go outside the evidence introduced in court to find the facts. This means you may not [resort] to guesswork, conjuncture, or

suspicion, and you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. . . . Arguments by counsel are not evidence. . . . What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence." We conclude that these instructions were sufficient to cure any prejudice resulting from the prosecutor's improper comment regarding gun violence in New Haven. See, e.g., *State* v. *Williams*, supra, 204 Conn. 534 ("Absent a fair indication to the contrary, the jury is presumed to follow the court's instructions. . . . There is nothing in this record to suggest that it did not do so." [Citation omitted.]).

Finally, we emphasize that, with respect to the sixth *Williams* factor, the strength of the state's case, the state's case against the defendant was strong. During its case-in-chief, the state presented, inter alia: (1) testimony of two eyewitnesses to the shooting, who testified consistently that Mickey Tillery had his hands raised and was moving away from the defendant and his vehicle when the defendant emerged from the station wagon and shot him; (2) photographic and testimonial evidence demonstrating that the location of Marjorie Tillery's Tahoe did not prevent the station wagon from leaving the parking lot had the defendant attempted to do so; (3) testimony that the defendant made inculpatory statements to the police officers shortly after the shooting; and (4) forensic evidence linking the gun found in the defendant's possession to the shell casing recovered at the scene. As such, the remaining issue to be decided was whether the defendant acted in self-defense. As more fully explained throughout this opinion, however, the facts elicited throughout the state's case-in-chief substantially undercut the defendant's claim that he shot Mickey Tillery in self-defense.[23]

[23] Such facts included, inter alia, the lapse of time between the initial confrontation and the second confrontation between the defendant and Mickey Tillery; Whitely's ability to drive the station wagon around Marjorie

As previously stated, "when a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012). Considering the strength of the state's case, the infrequency with which the improper comments were made, and the defendant's failure to object to any of the comments with which he now takes issue, we conclude that the defendant has not demonstrated that, "in the context of the entire trial"; *State* v. *Williams*, supra, 204 Conn. 538; the prosecutor's improper comments "rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 396; see also *State* v. *Stevenson*, 269 Conn. 563, 571, 849 A.2d 626 (2004).

The judgment is affirmed.

In this opinion the other judges concurred.

Tillery's truck and exit the parking lot; the fact that Mickey Tillery was unarmed; and the fact that Mickey Tillery was backing away from the vehicle with his hands raised when the defendant voluntarily emerged from the station wagon and shot him.