STATE OF CONNECTICUT *v.* JOHN G.[1]
(AC 25504)

Flynn, Bishop and McDonald, Js.*

Argued October 19, 2005—officially released April 10, 2007

(Appeal from Superior Court, judicial district of New Britain, Espinosa, J.)

Kenneth A. Leary, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Kevin J. Murphy*, assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, John G., appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), five counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A) and (C) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The defendant claims that the trial court improperly (1) admitted into evidence a recorded telephone conversation between him and his son, and (2) permitted the state to introduce evidence of certain prior, uncharged misconduct.[2] We disagree and affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On September 12, 2002, while en route to Leesburg, Florida, the defendant stopped to visit the home of his son, D, in New Britain. When the defendant arrived, D; D's wife, G; two of the defendant's granddaughters, C and H; and his grandson, N, were present. Another of the defendant's granddaughters, K, was at school. During the defendant's visit, he played with his grandchildren and spent some time using a computer with H, who was four years old, and N, who was five years old. While N was using the computer, H sat on the defendant's lap. The defendant also watched television with C, who was twenty-two months old, placing her on his lap. Sometime after the defendant arrived, D left the residence.

Later in the day, the defendant decided to take a nap, and H brought him a blanket. When H returned, she whispered to her mother that the defendant had "kissed her . . . on the lips" and "touched her on her peeper." When G confronted the defendant, he denied initiating the kiss but admitted to accidentally touching H's private part. He explained that his hand accidentally slipped down and touched H's private part while she sat on his lap. G recounted that after she told the defendant that his behavior was unacceptable, he was very "humble and apologetic." The defendant then left the residence and returned to his home in Florida.

When D arrived home from work, G told him about the incident, and he telephoned the defendant. D recalled that when he spoke to the defendant, the defendant was very apologetic. D then asked the defendant if he had ever touched the older daughter, K, in a similar manner. When the defendant replied, "yes," D hung up the telephone. After the conversation, D decided to watch a videotape from the security camera installed in his home to observe the defendant's interaction with H. After his second time viewing the videotape, D noticed the defendant putting his hands down C's diaper. On the videotape, D noticed that when the defendant's hands were in C's diaper, she struggled, moved

his hand, screamed and seemed to be in pain. D testified that there was "no doubt in [his] mind" that C "was sexually penetrated" at that moment.

One month later, after having viewed the videotape and after discussing his concerns with family and friends, D took the videotape to the police. On October 28, 2002, with D's consent, Detective Tracy Baden of the New Britain police department set up a recorded telephone conversation with the defendant and D. During the conversation, the defendant admitted to having touched K, H and C, although he denied digital penetration of their private parts. He admitted to touching K when she was between the ages of four and six but claimed there had been no penetration. As to H, he stated that when he was touching H, his "hands were all over her, [and] it didn't seem to matter where, as long as [he] was touching her." The defendant also admitted to touching his other grandchildren in similar ways, as early as 1989. He recounted that he did not put his hand down the pants of one of his granddaughters, but he "touched her stomach" and "chest area . . . ." He also stated that he never touched his own children in the way that he touched his grandchildren but was tempted to touch some of the other children in his family.

On December 1, 2002, the defendant was charged with sexually assaulting his three granddaughters, C, H and K.[3] At trial, members of the defendant's family testified that they had witnessed the defendant inappropriately touching several grandchildren and had warned him that his behavior was unacceptable. The defendant's granddaughter, K, and another granddaughter, B, who is a cousin of the victims, testified that the defendant had touched them when they were younger. K testified that she did not remember the defendant touching her in her private area. B testified, however, that she recalled that when she was eight years old, the defendant digitally penetrated her private part when she was sitting on his lap watching television. At trial, the defendant also admitted that he had touched his grandchildren but insisted that it was just a show of affection, that the touching was innocent and that he had never intentionally touched the children in their groin area.[4] Following his conviction and sentencing, the defendant filed this appeal. On appeal, the defendant claims that the court improperly (1) admitted into evidence a recorded telephone conversation between him and D and (2) permitted the state to introduce evidence of certain prior, uncharged misconduct.

I

The defendant first claims that the court improperly denied his motion to suppress a recorded telephone conversation between him and D. Specifically, the defendant claims that the telephone conversation was inadmissible because it constituted an illegal search

under the fourth amendment to the United States constitution.[5] We disagree.

As a preliminary matter, we set forth the standard of review. Because the claims raised by the defendant are claims of law, our review is plenary. See, e.g., *State* v. *Gibson*, 270 Conn. 55, 66, 850 A.2d 1040 (2004). To inform our discussion of the defendant's specific claim, we begin by enumerating some fundamental tenets of federal fourth amendment jurisprudence. "Although the fourth amendment to the United States constitution protects conversations from illegal seizure . . . the United States Supreme Court has explicitly held that this protection does not extend to wiretaps conducted with the consent of one of the parties to the conversation. Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants. . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks. . . . Consistent with this constitutional analysis, consensual recording is specifically excluded from wiretaps protected by federal law." (Citations omitted; internal quotation marks omitted.) *State* v. *Grullon*, 212 Conn. 195, 207–208, 562 A.2d 481 (1989).

In the present case, the defendant concedes that his son, D, a party to the conversation, consented to the recording of the conversation. The recording, therefore, did not constitute an unreasonable search for purposes of the fourth amendment, and the court properly denied the defendant's motion to suppress.[6]

II

Next, the defendant claims that the court improperly permitted the state to introduce evidence of certain prior, uncharged misconduct. Specifically, the defendant claims that the state improperly permitted B to testify because the probative value of her testimony outweighed its prejudicial effect.

The following additional facts are relevant to our disposition of the defendant's claim. The defendant filed a motion in limine, seeking to preclude B's testimony. The court declined to address the issue until it was raised at trial. During the trial, outside of the presence of the jury, the state indicated its intent to call B as a witness to establish a common scheme and plan, intent and absence of mistake.

During the parties' voir dire, outside the presence of the jury, B testified that when she was between the

ages of three and eight, the defendant touched her private part while she was sitting on his lap watching television. She also testified that the touching occurred frequently while she was sitting on the defendant's lap when she was between the ages of three and eight.

The defendant objected to the admission of B's testimony on the grounds that the incident, having occurred ten years prior to trial, or eight years before the incident in question, was remote, and, therefore, it was not probative of the issue of common scheme and plan. The court denied the defendant's motion in limine. When the jury was recalled, but before B testified in its presence, the court gave the jury a limiting instruction.[7]

When B took the witness stand, she again testified that the defendant had touched her "in her vagina area" while she sat on his lap watching television in his basement. She testified that she was approximately eight years old at the time of the alleged incident. When asked by the state to "describe exactly . . . what [the defendant] was doing," B responded that the defendant digitally penetrated her private part. B also testified that the defendant touched her when she was between the ages of three and eight, although she could not recall the details of the previous incidents. On cross-examination, the court gave the defendant "some latitude" to impeach B's testimony.[8] After B's testimony and in its final instruction to the jury, the court reminded the jury of the limited purpose for which B's testimony was admitted.

We begin our review of the trial court's action by noting that "[a]s a general rule, evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . Evidence of prior misconduct may be admitted, however, when the evidence is offered for a purpose other than to prove the defendant's bad character or criminal tendencies. . . . Exceptions to the general rule precluding the use of prior misconduct evidence have been recognized in cases in which the evidence is offered to prove, among other things, intent, identity, motive, malice or a common plan or scheme. . . .

"In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption

should be given in favor of the trial court's ruling. . . . The first prong of the test requires the trial court to determine if an exception applies to the evidence sought to be admitted." (Citations omitted; internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 659–61, 835 A.2d 895 (2003).

In the present case, the court permitted the introduction of evidence of the defendant's alleged sexual assault of B to prove (1) a common scheme or plan on the part of the defendant to sexually abuse his granddaughters, (2) intent and (3) absence of mistake. Although it is unclear from his brief, the defendant appears to argue that the court abused its discretion in admitting the evidence under one of those exceptions and further claims that the court improperly allowed the admission of this evidence under any exception because the prejudicial effect outweighed the probative value. Specifically, the defendant claims that B's testimony that he touched and digitally penetrated her private part was unduly prejudicial.

"As we have indicated, [t]he primary responsibility for conducting the balancing test to determine whether the evidence is more probative than prejudicial rests with the trial court, and its conclusion will be disturbed only for a manifest abuse of discretion." (Internal quotation marks omitted.) Id., 664. "Prejudicial evidence is evidence that tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence . . . but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . The problem is thus one of balancing the actual relevancy of the other crimes evidence in light of the issues and the other evidence available to the prosecution against the degree to which the jury will probably be roused by the evidence. . . .

"In sexual assault cases, because of the nature of the evidence and its potential impact on the jury, the use of prior sexual misconduct evidence is usually prejudicial to the defendant, as well as probative of whether the defendant committed the charged crime. The balancing of probity against prejudice, therefore, to determine which trumps the other, in crimes involving sexual assaults and prior sexual misconduct, is a difficult process. . . .

"[T]he probative value of the evidence is increased, and the prejudicial effect decreased, by a number of factors. First, as in most other sexual assault cases, because they usually occur in private, the balance of the case hinge[s] on the [victim's] testimony versus the defendant's testimony." (Citation omitted; internal quotation marks omitted.) *State* v. *Aaron L.*, 79 Conn.

App. 397, 413–14, 830 A.2d 776 (2003), aff'd, 272 Conn. 798, 865 A.2d 1135 (2005). Furthermore, striking similarities between the charged and uncharged misconduct, such as the nature of the crimes and the identity of the victims, make the evidence of prior misconduct highly probative. Id., 414.

In this instance, the evidence was especially probative of intent and absence of mistake[9] because all of the victims were the defendant's granddaughters, allegedly molested while sitting on his lap watching television, and they were all prepubescent at the time of the alleged misconduct.[10] In light of the marked similarities between the uncharged and charged misconduct, the evidence had significant probative value. Moreover, because the jury already had heard, and was in the process of hearing, evidence of the charged sexual offenses, the uncharged sexual misconduct evidence was not as shocking and the prejudicial impact was lessened.

"[W]e are mindful that we are to give every reasonable presumption to the validity of the call by the trial court and that we accord more liberality in the admission of such evidence in cases involving sex related crimes than in cases involving other crimes." (Internal quotation marks omitted.) Id. Finally, as noted by the state, the court was aware of the prejudicial nature of the prior misconduct evidence and on three occasions gave the jury a limiting instruction.

We also note that the issue of intent was a significant factor at trial. Although the defendant would have had the jury believe that he was simply an affectionate grandfather who enjoyed cuddling with his grandchildren, the state's claim was that he sexually assaulted his grandchildren and placed them at risk of injury. The issue of intent, therefore, was central to the charges against the defendant, and, on the issue of intent, the evidence of prior sexual misconduct was especially relevant. Accordingly, we conclude that the court properly admitted the evidence of prior uncharged misconduct.

The judgment is affirmed.

In this opinion, FLYNN, J., concurred.

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

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

[2] The defendant pursues several avenues in his appeal that we decline to review because they are briefed inadequately.

First, the defendant attempts to assert a violation of his rights under the fifth and fourteenth amendments to the United States constitution and article first, § 8, of the constitution of Connecticut. We decline to review these claims because they were not briefed. Indeed, except for their cursory reference in the defendant's statement of issues, these claims receive no attention in his brief and, thus, are deemed to be abandoned.

Next, the defendant claims that the court improperly limited the testimony of his expert witness. The defendant has neither cited any decisional law to support his proposition, nor has he supplied analysis to support his claim.

"[W]e are not required to review issues that have been improperly pre-

sented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly." (Internal quotation marks omitted.) *Turner* v. *American Car Rental, Inc.*, 92 Conn. App. 123, 130, 884 A.2d 7 (2005). "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *Russell* v. *Russell*, 91 Conn. App. 619, 634–35, 882 A.2d 98, cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005). Because the defendant has failed to provide analysis in pursuit of his claim, we decline to afford them review.

[3] The defendant was charged with nine counts related to his sexual assault of C and H on September 12, 2002, and his sexual assault of K between October, 1994, and October, 1996.

[4] Additional facts will be referred to where they are pertinent to a discussion of a specific claim of error.

[5] The defendant makes no claim that the state violated Connecticut's wiretapping statutes, General Statutes § 54-41a et seq.

[6] We note that although the court denied the defendant's motion to suppress on the basis of *State* v. *Tomasko*, 238 Conn. 253, 681 A.2d 922 (1996), we affirm the court's ruling on the fourth amendment grounds raised by the defendant on appeal.

[7] The instruction was as follows: "All right. Ladies and gentlemen, you are about to hear testimony from this witness, who is identified as B. She is the defendant's granddaughter. And she will testify about certain sexual acts committed on her by the defendant.

"This offer, this evidence is offered by the state, of prior acts of misconduct of the defendant. And it will be admitted to prove not the defendant's bad character or his tendency to commit criminal acts. It is being admitted for a limited purpose for certain issues in this case. And those issues are the commission on the part of the defendant of a common scheme or plan, to show intent, which is a necessary element of these [offenses], and to show an absence of mistake. Those are the issues for which it is being offered.

"It cannot be used by you to show or determine that the defendant has a propensity to commit a crime or to do those acts that are alleged in the information because, simply because he committed these crimes—all right, I'm sorry—that he committed these acts.

"So, the admission of this testimony is for that limited purpose. The defendant is not charged with committing criminal acts upon this witness. All right. She is testifying here to prior acts of misconduct of the defendant to show those limited issues to which I have just referred.

"Let me just take a moment here. Again, I emphasize that you are not to take this evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. All right."

[8] Specifically, the court allowed the defendant to question B about her marijuana use in the previous twenty-four hour period, an allegation of sexual abuse made against another individual when she was seven, previous allegations she made that the defendant had sexually abused her and her sister, inconsistencies in testimony that she had given in 1994 and 1996 and her testimony at trial, her lack of veracity and drug use. The defense also called B's father to impeach B's testimony.

[9] As we hold that the evidence was probative of intent and absence of mistake, we need not decide whether the evidence was also admissible to prove common scheme or plan. Accordingly, we do not decide whether the incident was too remote to retain its probative value because remoteness is relevant in assessing prior misconduct evidence offered only under the common plan or scheme exception. See, e.g., *State* v. *James G.*, 268 Conn. 382, 390, 844 A.2d 810 (2004).

[10] C was twenty-two months old at the time of the sexual abuse and was between the ages of three and four at the time of trial. H was four at the time of the incident and six at the time of the trial.