LAVERY, C. J., dissenting. The majority's opinion is clearly contrary to the United States Supreme Court's holding in *Davis* v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), when the majority upholds the trial court's charge that the jury could not consider the effect of marijuana use on the state's key witness, the only witness who identified the defendant as being at the scene with a gun. By so doing, the majority denies the jury, as the sole trier of fact and credibility, the right to consider facts from which they could draw inferences about the reliability and credibility of the witness. Thus, while I agree with the majority's conclusions as to the other issues raised in this appeal, I respectfully dissent from its conclusion that the trial court's instruction[1] that the jury could not consider the effect on the state's key witness of the witness' smoking of five marijuana joints shortly before the shooting constituted harmless error.

As an initial matter, the majority addresses the claim here as a ''nonconstitutional evidentiary'' claim. I disagree with this characterization of the defendant's claim since the jury instruction at issue violated his right to confront and to impeach a witness against him, a right guaranteed both by the sixth amendment to the United

States constitution and by article first, § 8, of the Connecticut constitution.[2] The majority reasons that not all claims of instructional error are constitutional in nature and cites *State* v. *Dash*, 242 Conn. 143, 152, 698 A.2d 297 (1997), for the proposition that ''claimed instructional errors regarding *general principles of credibility* of witnesses are not constitutional in nature.'' (Emphasis added; internal quotation marks omitted.)

While these two propositions put forth by the majority as its basis for dismissing this claim as nonconstitutional are true, they do not prove the point. First, the error claimed here is not about general principles of credibility of witnesses. The error claimed here concerns *one* instruction about the credibility of *one* witness. Second, the fact that not all instructional errors are constitutional in nature does not mean that *this* claim of instructional error is not constitutional in nature.

As the United States Supreme Court stated in *Davis*: ''[I]t seems clear . . . that to make any [effort to impeach a witness] effective, defense counsel should [be] permitted to expose to the jury the facts from which jurors, *as the sole triers of fact and credibility*, could appropriately draw inferences relating to the reliability of the witness.'' (Emphasis added.) *Davis* v. *Alaska*, supra, 415 U.S. 318; see also *State* v. *Santiago*, 224 Conn. 325, 331, 618 A.2d 32 (1992); *State* v. *Lubesky*, 195 Conn. 475, 482, 488 A.2d 1239 (1985).

This court previously has stated that ''a criminal defendant's right to impeach the witnesses against him implicates his constitutional right to confrontation. *State* v. *Rodriguez*, 180 Conn. 382, 393, 429 A.2d 919 (1980). The confrontation clause gives the defendant the right to confront the witnesses against him.'' *State* v. *Menzies*, 26 Conn. App. 674, 684, 603 A.2d 419, cert. denied, 221 Conn. 924, 608 A.2d 690 (1992).

This court also has stated: ''The denial or undue restriction of the right to confrontation constitutes *constitutional error*. *Davis* v. *Alaska*, [supra, 415 U.S. 318]; *State* v. *Ouellette*, 190 Conn. 84, 101, 459 A.2d 1005 (1983).'' (Emphasis added.) *State* v. *Streater*, 36 Conn. App. 345, 352, 650 A.2d 632 (1994), cert. denied, 232 Conn. 908, 653 A.2d 195 (1995); see also *State* v. *Lee*, 229 Conn. 60, 70, 640 A.2d 553 (1994).

Because the defendant elected a jury trial, he had a right to have all questions of fact decided by the jury, which courts have often referred to as ''the sole triers of fact and credibility . . . .'' *Davis* v. *Alaska*, supra, 415 U.S. 318; *State* v. *Santiago*, supra, 224 Conn. 331; *State* v. *Jones*, 60 Conn. App. 866, 869, 761 A.2d 789 (2000). In its capacity as the trier of fact, the jury ''is the judge of the credibility of all the witnesses and the weight to be given their testimony and, therefore, has the right to accept part or disregard part of a witness'

testimony." (Internal quotation marks omitted.) *In re Deana E.*, 61 Conn. App. 197, 208, 763 A.2d 45 (2000).

This court previously has stated that the effect of alcohol consumption on a witness' ability accurately to observe and later to recall what he observed "is an effect which is common knowledge and is an inference which is clearly within the ability of the jurors, as laypersons, to draw based on their own common knowledge and experience. The jury may, without the aid of expert testimony, use the consumption of alcohol as a basis on which to *infer* impairment of ability to observe and recall accurately." (Emphasis added.) *State* v. *Heinz*, 3 Conn. App. 80, 86, 485 A.2d 1321 (1984), citing *D'Amato* v. *Johnston*, 140 Conn. 54, 58, 97 A.2d 893 (1953) (intoxication and its accompaniments are a matter of common knowledge).

In addition, the state, on prior occasions, has successfully impeached a witness by inviting the jury to draw inferences from the witness' use of marijuana, a practice our Supreme Court has endorsed. In *State* v. *Person*, 215 Conn. 653, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991), the state's attorney asked questions of a defense witness, Mercier, about his use of marijuana. Justifying this line of questioning, the state's attorney stated: "It's highly relevant. I claim that as highly relevant. He has testified as far as *perceptions of what he observed, what he heard, what he saw, his observations*. And, my point here is that he was not in complete control of his faculties . . . ." (Emphasis added; internal quotation marks omitted.) Id., 661 n.4. The Supreme Court noted that the state "sought to raise doubt as to Mercier's ability to observe and perceive events, an entirely permissible subject . . . ." Id., 661. In addition, the Supreme Court noted in *Person* that "[t]he *prosecutor* may not express his own opinion, either directly or indirectly, as to the credibility of witnesses." (Emphasis added; internal quotation marks omitted.) Id., 666 n.8.

Prior to the Supreme Court's decision in *Person*, this court considered the use of testimony about drug use for impeachment purposes in *State* v. *Person*, 20 Conn. App. 115, 564 A.2d 626 (1989), aff'd, 215 Conn. 653, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991). We stated: "The prosecutor's initial purpose in questioning Mercier regarding his use of marijuana was to impeach his credibility by casting doubt on his ability to perceive and recall the events that were the subject of his testimony. The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. . . . *Consumption of alcohol or drugs obviously can impair an individual's ability to perceive and recall accurately* . . . ." (Citations omitted; emphasis added.) Id. 121–22.

In no case in which the issue of impeaching a witness'

credibility by his drug or alcohol use has arisen has either this court or our Supreme Court required, as a predicate, that the jury be instructed by an expert witness on the effects of the alcohol or drug use on the witness' ability to perceive and recall events. This has been true whether the "drug" in question was alcohol, marijuana or cocaine.

There have been a number of cases in which both this court and our Supreme Court have held that ordinary people, namely, jurors, can judge for themselves whether a witness' admitted use of drugs would, in their opinion, affect the witness' credibility. "The trier of fact *need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters*." (Emphasis added.) *Way* v. *Pavent*, 179 Conn. 377, 380, 426 A.2d 780 (1979). In *Way*, the plaintiff had consumed ten glasses of beer and, without any expert testimony, the Supreme Court approved of permitting the jury to draw its own inferences on the effects of that quantity of alcohol, finding it to be a "[matter] of common knowledge . . . ." Id.

If, in 1979, the effects of ten one-ounce glasses of beer were common knowledge, then it is fair to say that in 2000, the effects of several marijuana cigarettes are common knowledge. In fact, in 1993, this court approved of a statement by a trial court to a jury that "the effect of alcohol on a person and also the effect of marijuana on a person . . . [are] probably within your common knowledge, but [defense counsel] has asked me to allow this to be presented as an exhibit so that he could argue from this what he feels the [marijuana] and alcohol, what role they played in this case. So . . . it's offered solely for the purpose of explaining to you *something you already know, the effect of marijuana* . . . on a person." (Emphasis added.) *State* v. *Charlton*, 30 Conn. App. 359, 368–69 n.9, 620 A.2d 1297, cert. denied, 225 Conn. 922, 625 A.2d 824 (1993).

I would therefore conclude that it was improper for the trial court to instruct the jury not to draw any conclusions in the absence of testimony, expert or otherwise, as to the probable effects of the witness' smoking of five joints of marijuana on the night of the shooting on his ability to perceive and to recall the events accurately. Because the instruction precluded the jury from considering important facts bearing on the credibility of the only witness[3] who had placed the defendant at the scene and with a gun, I would find that the instruction was not harmless and reverse and remand the case for a new trial.

[1] The relevant portion of the court's instruction is as follows: "Also, you have heard testimony that [Leroy] Townsend smoked marijuana the night of the shooting. There is no evidence as to what effect it had on him. Because there is no such evidence, you must not speculate that he was or was not affected by it or how he was affected by it." It is undisputed that counsel for the defendant timely objected to this portion of the charge, and the court declined to reinstruct the jury.

[2] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . ."

[3] The witness' credibility was the key factor in the trial. He was impeached with prior felonies and inconsistent statements. He came forward as a witness three weeks after the incident, when he was incarcerated. Further, the witness' own cousin testified that he was a pathological liar.