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FLYNN, C. J., dissenting. The majority opinion rests on the notion that where alternative ways of transgressing a statute are possible, a charge that takes away from the jury one of the factual findings necessary for a finding of guilt on one of those alternatives is not harmful where there remains evidence of other alternatives not tainted by error in the charge. I conclude that such an instruction cannot reasonably be considered harmless and, therefore, respectfully dissent.

I agree with the majority that whether the defendant, John B. Sitaras, used physical force in his interaction with the police officer "was central to the state's theory of the case and was contested by the defendant at trial." I also would conclude that because that was a jury issue, the court's instruction to the jury was improper. Specifically, the court instructed the jury that any subjective view that the defendant had that the arresting officer might have been acting unlawfully "[was] no defense to the defendant's use of force, *which was unjustified*." (Emphasis added.) The use of force, whether justified or unjustified, however, was purely a jury issue. Yet, this instruction improperly removed that issue from the jury's consideration. I disagree with the majority that the effect of this error was harmless.

This is not a case dealing with evidentiary insufficiency as to one of the alternative ways of violating a particular criminal statute as occurred in *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994) (en banc), which recognized that "a factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another, factually supported basis, is not a federal due process violation." Id., 539. For *Chapman* to be on similar footing with the present case, the *Chapman* court would have had to instruct the jury that the defendant *did use force* on the victim, thus removing that disputed element from the jury's consideration. Such was not the case, however. In *Chapman*, the court instructed the jury on two different ways to meet an element of the crime charged, but one of the ways was not factually supported by the evidence. The court did not tell the jury that one of the factual ways to meet that element, in fact, had been established by the state, thus removing it completely from the jury's consideration, as happened in the present case.

Here, the court's instruction did not concern a factually insufficient manner of meeting an essential element of the crime charged. Rather, the court's instruction eliminated the state's burden of proof on an essential element of the crime charged (as with a mandatory presumption). I would conclude that this amounted to a due process violation; see *Sandstrom* v. *Montana*,

442 U.S. 510, 517–24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); *State* v. *Cerilli*, 222 Conn. 556, 583–84, 610 A.2d 1130 (1992); *State* v. *Moore*, 23 Conn. App. 479, 481, 581 A.2d 1071, cert. denied, 217 Conn. 802, 583 A.2d 132 (1990); subject to harmless error analysis because the instruction was not the subject of a proper objection during trial. See *State* v. *Faust*, 237 Conn. 454, 469, 678 A.2d 910 (1996); *State* v. *Cerilli*, supra, 584.

Where there is more than one way to violate a statute, and the jury is told by the court that one of those alternate ways has been established, it is very unlikely that the jury would move on to consider whether any other alternate way also had been established. Having been instructed that the element had been met, there would be no reason for the jury to consider another manner in which the statute could have been violated. Accordingly, the improper instruction could not reasonably be considered harmless, as it took that issue away from the jury's consideration.

Because of the importance of the court's improper instruction on this essential element of the crime, which specifically told the jury that the defendant *had used unjustified force* against the police officer, I would conclude that the error was not harmless in the conviction of the defendant, and, in the interests of justice, I would reverse the judgment and order a new trial.

Accordingly, I respectfully dissent.