BEACH, J., concurring in part and dissenting in part. I agree with the analysis and conclusion reached by the majority in parts II and III and, accordingly, would affirm the judgment with respect to the conviction of the defendant, Brushaun Thompson, of failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). I respectfully disagree, however, with the majority's analysis and conclusion in part I of its opinion and would reverse the judgment as to the defendant's conviction of two counts of larceny in the first degree by false pretenses in violation of General Statutes §§ 53a-122 (a) (2) and 53a-119 (2), and would remand the case for a new trial as to those counts only.

With respect to part I of the majority opinion, I agree that the failure of the trial court to instruct the jury on the issue of aggregation was reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). I also agree that the defendant has satisfied the third prong of *Golding* in that there was clear constitutional error. Unlike the majority, I do not believe that the state has demonstrated that the error was harmless beyond a reasonable doubt.

The jury was never instructed to consider whether the amounts stolen in the individual transactions were to be aggregated pursuant to General Statutes § 53a-121 (b), which states that "[a]mounts included in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense." Thus, the jury was never instructed on an essential element of the alleged crime, which, in the circumstances presented, is whether the individual transactions were committed "pursuant to one scheme or course of conduct . . . ." General Statutes § 53a-121 (b). Because the jury never considered, so far as we know, whether the transactions were committed pursuant to one scheme or course of conduct, the instructional error can be harmless only if we "[conclude] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *State* v. *Gainey*, 116 Conn. App. 710, 716, 977 A.2d 257 (2009).

The majority points out that the existence of one scheme or common plan was not a hotly contested issue at trial, and I agree.[1] The defendant claimed he was not the perpetrator and did not claim, perhaps wisely, that he really committed a series of discrete thefts. In the circumstances of this case, however, I do not believe that the existence of one scheme or common plan is supported by such overwhelming evidence that

the jury verdict necessarily would have been the same had the mandated instruction been given.

When arguing in its brief that the error was harmless, the state noted the following. The credit card numbers used, for the most part, were taken from customers of Advantage Waste Services. Arena Johnson, an employee of Advantage Waste Services who had access to customers' credit card information, admitted knowing the defendant for fifteen years. All items were purchased using a telephone. When purchasing items from the Coach store in Westport, the defendant identified himself three times as Larry Rosenblatt. The merchandise from Coach and the Lowe's store in Newington was picked up and delivered by John Spalding, the owner of ABC Moving, who delivered the items to the defendant at a supermarket parking lot in Bridgeport or at a garage in Bridgeport underneath the defendant's apartment. The defendant paid Spalding $100 for the Coach deliveries and $400 for the Lowe's deliveries. Spalding identified the defendant as the person who took and paid for the delivery of the merchandise from Coach and Lowe's. The state further argued that the evidence established that the defendant was the mastermind behind the plan.

An analysis of case law suggests that the evidence in this case does not so overwhelmingly support the existence of one scheme or course of conduct that a failure to instruct on that issue is harmless. Our Supreme Court's leading case in this area of the law is *State* v. *Desimone*, 241 Conn. 439, 696 A.2d 1235 (1997). In that case, the defendant, a maintenance mechanic, was employed by Pfizer, Inc. Id., 443. He offered for sale several computers that had been taken from Pfizer, Inc. Id. The defendant was charged with larceny by receiving various items of stolen property in the first and third degrees. Id., 449. The value of the items was aggregated for the purpose of charging him with the particular degree of that offense. The trial court, overruling an objection by the defendant as to its jury instructions, concluded that § 53a-121 (b) was not applicable to the offense of larceny by receiving stolen property. Id., 450. Thus, the court did not instruct the jury in accordance with that statutory subsection that it may aggregate the value of the allegedly stolen property only if the state has established that the defendant received the property pursuant to one scheme or course of conduct, and the defendant challenged this omission on appeal. Id., 449–50. The Supreme Court disagreed with the state's contention on appeal that the items *necessarily* were received pursuant to one scheme or course of conduct. Id., 463–64. The Supreme Court noted that the evidence revealed that several days interceded between the times that the defendant offered the computers for sale. Id., 464. It continued: "Moreover, the evidence did not establish exactly when the defendant received the two computers or whether he received or possessed

them at the same time. Thus, we cannot say that the evidence *necessarily compelled* the conclusion that the defendant's unlawful receipt of the two computers was part of a single scheme or course of conduct."[2] (Emphasis in original.) Id.

In contrast, in *State* v. *Browne*, 84 Conn. App. 351, 367, 854 A.2d 13, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004), this court held that the trial court's failure to instruct the jury that it could aggregate the value of the items of stolen property only if it first concluded that the offenses were committed pursuant to one scheme or course of conduct did not require reversal. Id., 389–94. In that case, the defendant was not charged with committing a series of thefts, but, rather, he simultaneously stole and simultaneously attempted to steal two distinct sets of personalty belonging to the same family. Id., 393–94. Each aggregated charge alleged that the crime was committed at a discrete time and place.[3] Id., 394.

In this case, for the jury to find the defendant guilty of larceny in the first degree, it had to aggregate transactions that occurred at different times. There is no doubt that the values of the goods ordered in each telephone transaction should be aggregated, and the defendant does not assert otherwise. Additionally, the evidence of one scheme or course of conduct may well have been sufficient to support the aggregation of the value of goods ordered in different telephone calls and received in different transactions had the court properly instructed the jury regarding aggregation. The transactions, however, occurred on different days and were accomplished by different calls and different deliveries. Although there was evidence that Spalding was to be generally available and the methods of the crimes were quite similar, a jury reasonably could have failed to reach the conclusion that the transactions were but steps effecting a single scheme, had it been so instructed. For example, the jury may not have believed the entirety of Spalding's testimony; similarly, a reasonable doubt could have arisen from a hypothesis that the defendant's intent to commit a subsequent transaction was not fully formed until just prior to its commission. There may have been other hypotheses consistent with the evidence. Consistent with *State* v. *Desimone*, supra, 241 Conn. 439, the transactions were not *necessarily* part of one scheme or course of conduct.[4] I therefore agree with the defendant that the state did not prove that the court's failure to instruct the jury in accordance with § 53a-121 (b) was harmless beyond a reasonable doubt. Accordingly, I believe that the defendant's claim satisfies the fourth prong of *Golding* because the state has failed to demonstrate the harmlessness of the alleged constitutional violation beyond a reasonable doubt, and the error may have resulted in the defendant's convictions of larceny in the first degree.

For the foregoing reasons, I respectfully concur in part and dissent in part.[5]

[1] There does not appear to have been a formal concession that there was a common scheme; rather, the issue does not seem to have been addressed specifically. The majority aptly summarizes the positions of the parties at trial. Though the majority's arguments fully support the notion that the element was not contested, they do not amount to a waiver or formal concession.

[2] The majority suggests that I would rely on *State* v. *Desimone*, supra, 241 Conn. 439, for the "conclu[sion] that there was not one scheme or course of conduct." Neither the *Desimone* court nor I reach such a conclusion. To the contrary, there was sufficient evidence on which a properly instructed jury could have concluded that the transactions were undertaken pursuant to one scheme or course of conduct.

[3] In *State* v. *Brown*, 235 Conn. 502, 514–19, 668 A.2d 1288 (1995), the Supreme Court held that the values of checks attempted to be cashed within moments of each other could be aggregated under § 53a-121 (b) The court did not decide whether the values necessarily had to be aggregated. Id.

[4] I have found no precise definition of the phrase "one scheme or course of conduct." Cases such as *State* v. *Desimone*, supra, 241 Conn. 439; *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995); and *State* v. *Browne*, supra, 84 Conn. App. 351; suggest by example that the theoretical linchpin is intent: if the accused intentionally sets out to engage in a more or less continuous course of conduct that contemplates a series of thefts, then the value of goods taken in the thefts may be aggregated for the purposes of determining the degree of the larceny. If, on the other hand, the accused decides to commit one larceny and later decides to commit another, the values of the goods taken may not be aggregated even if the methods of committing the crimes are very similar. In extreme situations, the failure to instruct the jury pursuant to § 53a-121 (b) may be harmless, but ordinarily the determination of intent is a factual question for the finder of fact. See generally 3 C. Torcia, Wharton's Criminal Law (15th Ed. 1995) §§ 345 and 346, pp. 361–69.

The scenario is further complicated by the axiom that a jury may believe some, all or none of any witness' testimony. Some of Spalding's testimony, for example, regarding the defendant's statements to him, may have been self-serving and to some degree disbelieved by the jury. As a reviewing court, we should not be left to speculate.

[5] The majority suggests that a thief could take advantage of the reasoning of the concurring and dissenting opinion and avoid harsh punishment by serializing crimes. I would suggest that even such a well-read and erudite felon runs a great risk of being convicted of the greater degree of larceny by a properly instructed jury. The issue is not whether the evidence presented in this case is sufficient to convict.