STATE OF CONNECTICUT *v.* KENDALL O. SMITH, SR.
(AC 32803)

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

Argued October 16, 2014—officially released April 14, 2015

(Appeal from Superior Court, judicial district of Tolland, Fuger, J.)

Pamela S. Nagy, assigned counsel, for the appellant (defendant).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, was *Matthew C. Gedansky*, state's attorney, for the appellee (state).

Paul S. Bailin and *John T. Walkley* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Glenn W. Falk and *Hanni M. Fakhoury*, pro hac vice, filed a brief for the Electronic Frontier Foundation as amicus curiae.

Opinion

SHELDON, J. The defendant, Kendall O. Smith, Sr., appeals from the judgment of conviction, rendered against him after a jury trial, on charges of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4), as enhanced by General Statutes § 53-202k for having committed a class A, B or C felony with a firearm, and his posttrial plea of nolo contendere to the charge of being a persistent serious felony offender in violation of General Statutes § 53a-40 (c). The defendant was sentenced on those charges to a total effective term of fifty-five years in prison. On appeal, the defendant claims that the trial court erred by (1) denying his pretrial motion to suppress historical cell site location information (CSLI) from his cell phone records, which police obtained without a warrant from his cellular service provider, in alleged violation of his state and federal constitutional rights against unreasonable searches and seizures; (2) failing to instruct the jury, as he had requested, as to how it should consider and evaluate the testimony of expert witnesses; (3) instructing the jury, prior to a midtrial recess, that it could discuss its impressions of the trial during that recess; (4) admitting for substantive purposes, 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 signed, written statement of a material witness, Henry Lanier; and (5) acting as an advocate for the state by so questioning Lanier in the presence of the jury as to suggest that it did not believe Lanier's partial recantation of his written statement that was admitted under *Whelan*. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 23, 2008, at approximately 11:45 a.m., two men entered the front door of the Workers' Federal Credit Union in Stafford Springs wearing ski masks, gloves and dark clothing. The first man to enter, while carrying a gun in his left hand, jumped over the counter into the teller area, where three tellers were then working. He ordered the tellers to put up their hands and asked them where the money was. After taking the money from the tellers' cash drawers and putting it in a bag, the man jumped back over the counter into the lobby area of the bank.

While the first man was taking money from the tellers' cash drawers, the second man, who also was carrying a gun, ran toward the back of the bank to the desk of Stacey Fisher, another bank employee. On reaching Fisher's desk, the second man forced her at gunpoint to lead him into the vault area behind her so he could access the bank's safes. As the first man jumped back over the counter into the lobby area, the second man

emerged from the vault area carrying four or five cash drawers[1] from one of the bank's two safes. Upon meeting near the front door of the bank, the two men exited and got into a small or medium sized, silver or light colored car that had been parked in front of the building. The second man, who had been carrying the cash drawers, threw them into the backseat of the car and got into the passenger seat while the first man got into the driver's seat. The men then drove the car away, turning immediately into the driveway of Bravo's restaurant, next door to the bank. Although the tellers quickly lost sight of the car, two of them saw it long enough to see and write down its license plate number. Although none of the bank employees could identify the robbers because their skin was fully concealed by their clothing, they believed, based upon their speech and the sounds of their voices, that the men were African-American. After the robbers left the bank, Fisher locked the doors and called 911. The assistant manager of the bank later determined that the robbers had stolen a total of $150,714.94 from the bank.

State police Sergeant Thomas Duncan and Stafford police Officer James Desso arrived at the bank within five to ten minutes of Fisher's 911 call. Upon their arrival, they were told by one of the bank employees that the robbers had driven into the parking lot behind Bravo's. Duncan thus went outside to look for the robbers while Desso remained in the bank. Duncan and state police Trooper Colleen Anazewski found an unoccupied silver Volkswagen in the parking lot behind Bravo's, parked diagonally across the lines marking the parking spaces, with its driver's door open and its engine running. It was later learned that the Volkswagen had been reported stolen from a Hartford residence on January 5, 2008. Because there was snow on the ground but there were no footprints in it to suggest that the robbers had fled on foot, the responding officers concluded that they had probably left the area in a second getaway vehicle. Duncan so notified his dispatcher, and called in the state police helicopter, Trooper One, to assist in searching for the robbers.

State police Trooper Bruce Taylor was in the resident trooper's office in Somers when he first heard a report about the bank robbery over the radio. Upon hearing the report, he got into his vehicle and began to drive eastbound toward Stafford on Route 190. While en route, Taylor heard additional radio broadcasts reporting that the robbers, then described only as two black males, had abandoned their initial getaway vehicle and were probably fleeing the area in another vehicle. Based upon that report, Taylor continued to drive toward Stafford, looking for anything that might appear suspicious, and particularly for two black males. At some point he observed two black males in a black pickup truck heading westbound on Route 190. Taylor did not turn around immediately or try to stop the

pickup truck, but radioed his observations to the other troopers who were coming along behind him so they could stop the truck and investigate.

State police Sergeant Jose Claudio was also in the resident trooper's office in Somers when he heard the initial radio transmission about the bank robbery in Stafford. Claudio did not know what type of vehicle the robbers were using to make their getaway, but he, too, had learned from the radio transmissions that they were two black males. Because Claudio thought it likely that the robbers would try to reach an interstate highway to flee the area, he presumed that they would be travelling westbound from Stafford toward Interstate 91. He thus drove eastbound toward Stafford on Route 190, at a very slow speed, approximately ten miles per hour, so he could look closely at the occupants of all westbound vehicles. He, too, was looking for a vehicle occupied by two black males who might appear to be suspicious.

As Claudio approached the Stafford town line, he noticed a newer looking black pickup truck coming toward him. Because Claudio was driving so slowly, the operators of most oncoming vehicles regarded him closely, with evident curiosity. He noticed, however, that the black male operator of the pickup truck was acting very differently, staring rigidly straight ahead of him, seemingly in an effort to avoid Claudio's gaze. Claudio also noticed that the black male passenger in the pickup truck had ducked down low in his seat and was peering up over the dashboard. Upon making these observations, Claudio decided to follow the truck so he could see and run its license plate number, and get a closer look at its oddly behaving occupants. Accordingly, after waiting for several westbound cars to pass by him, Claudio made a U-turn so he could follow the truck. Once he did so, however, he discovered that the truck was no longer in sight, so he activated his cruiser's emergency lights and accelerated in an effort to overtake it. When, eventually, he caught sight of the truck ahead of him, he could see that it was being driven erratically, passing cars in a no passing zone. Claudio thus turned on his siren, increased his speed to catch up to the truck and tried repeatedly to stop it, but it further accelerated at each of his attempts, maneuvering through busy traffic and going through a red traffic signal. At that point, Claudio was confident that he was in pursuit of the robbers, and he relayed that information to his dispatcher.

Claudio continued to follow the truck through Enfield, first heading south on Route 191, then west on Route 140. As he did so, he saw the passenger of the truck start to duck up and down and then, while the two vehicles were travelling at approximately 100 miles per hour, saw him hang out the passenger's side window and start to throw things at his cruiser. First, the passen-

ger threw out several rolls of coins. Shortly thereafter, he threw out the cash drawers. Claudio reported the thrown objects to his dispatcher so that other troopers could find and retrieve them. Meanwhile, the chase continued.

State police Trooper Richard Cournoyer had been issuing a ticket to a motorist when he heard a report about the robbery and the ensuing chase over his radio. Because he was in the area through which the suspects were expected to pass, he rushed to the intersection of Route 140 and Route 5 with the intention of deploying stop sticks to disable their truck. Upon arriving at that intersection, Cournoyer positioned himself in the parking lot of a nearby business. Almost immediately, however, before he could deploy the stop sticks, the truck and Claudio's pursuing cruiser sped by him. Cournoyer had a good opportunity to view the truck as it passed him. He observed no damage to its body or its windshield. Cournoyer saw that there were two occupants in the truck, but was unable to identify their race or gender. Unable to stop the truck with the stop sticks, Cournoyer activated his cruiser's lights and siren and joined in the pursuit, falling in behind Claudio.

After following the truck onto the southbound lanes of Interstate 91, Claudio noticed that another trooper was behind him. At that point as well, he noticed that Trooper One, piloted by state police Sergeant Ben Liberatore and Trooper Stephen Samson, was in the air, approximately 500 feet above him, following and monitoring the pursuit.

Meanwhile, state police Trooper Chris Tanner, who had been in Hartford when he heard the radio report about the robbery and the chase, initially headed north on Interstate 91. Upon learning, however, that the fleeing truck had begun to head southbound on Interstate 91, he turned around at exit thirty-eight and also headed southbound, at a moderate speed of between forty and fifty miles per hour so that the truck would catch up to him and he could box it in. Just south of exit thirty-eight, Tanner caught sight of the truck and two pursuing state police cruisers, with their lights and sirens activated, in his rearview mirror. Activating his own cruiser's lights and siren, Tanner accelerated to a speed of between eighty and 100 miles per hour in order to stay ahead of the speeding truck, which closed the gap to within twenty-five to fifty feet of his cruiser. Although the truck then attempted to pass Tanner's cruiser, Tanner maneuvered the cruiser to prevent that from happening. In observing the truck in his rearview mirror, Tanner did not notice any damage to it at all.

The truck abruptly exited the highway at exit thirty-six in Bloomfield and continued to travel at approximately 100 miles per hour, still being pursued by state troopers. Due to the truck's abrupt maneuver, Tanner had to cut across the lawn to exit the highway, which

left him behind the truck and the other pursuing officers, Claudio and Cournoyer. From there, the chase continued south on Blue Hills Avenue into Hartford, with the truck swerving in and out of heavy traffic, then east on Tower Avenue. When Claudio followed the truck onto Tower Avenue, he attempted to pass it on the driver's side, but the truck swerved again, causing the two vehicles to collide. Again, however, the chase continued until, at approximately 12:20 p.m., Claudio was ordered to terminate the pursuit for safety reasons. Claudio complied with that order, pulling his cruiser over to the side of the road and turning off its lights and siren. From there, however, although he had lost sight of the fleeing truck, he noticed the state police helicopter still above him, pursuing the truck from the air, and so he began to follow it. As he did so, he heard a radio broadcast reporting that the truck had crashed and the suspects were fleeing from it on foot.

Because Trooper One remained in pursuit of the suspects, its crew witnessed the crash of their truck into a utility pole. As Trooper One hovered over the site of the crash, its crew radioed to all ground units in the area to inform them what they had seen. After the truck crashed into the utility pole, which appeared to be swaying and close to snapping or collapsing because of the impact, Liberatore observed the two suspects exit the truck, one from the driver's side and the other from the passenger's side. Liberatore observed that both suspects were dark skinned males. Samson also opined that both suspects were male and that they were not Caucasian. When the passenger emerged from the truck, he had a bag in his hand. Samson testified that he observed one of the suspects holding a bag and the other suspect holding what looked like a gun. The two suspects initially began to walk down the street together, but soon parted ways, causing the pilots to lose sight of the driver.

After driving two blocks, Claudio, followed closely by Tanner, arrived at the crash site, at the intersection of Martin Street and Nelson Street. There he observed the truck, unoccupied but with both of its doors open, up against a utility pole, while several bystanders were picking up money off the street around it.. Although Claudio saw that many people were walking toward the truck, he noticed that only one person was walking away from it. Recognizing that person as the passenger of the truck he had just been pursuing, Claudio exited his cruiser, retrieved his shotgun from the trunk and followed the passenger down Martin Street. Tanner also retrieved a shotgun from the trunk of his cruiser and, walking parallel to Claudio down the other side of Martin Street, began searching for the fleeing suspects. Because the fleeing passenger was ducking in and out of driveways and sidewalks of various residential properties, Claudio did not always have him in his sight. When Claudio did catch sight of the passenger on Gar-

den Street, he could see a Hartford police cruiser approaching him. The cruiser hit the passenger, who fell to the ground and was subdued by four or five Hartford officers. When he was apprehended, the passenger had a bag in his possession that contained $128,634 in cash. He also had a Connecticut identification card that identified him as Antwan Byrd. Byrd had some minor bruising and scrapes on his face. State police Sergeant Christopher Guari later counted the cash from the bag recovered from Byrd and, based upon the serial numbers on the money, was able to verify that it was the money that had been stolen from the bank that morning.[2]

After Byrd was taken into custody, Claudio returned to his cruiser, which he had parked close to the crash site. There, Claudio observed damage to the windshield of the truck, which had not been there before the crash. He and several other officers then searched the area for the driver of the truck. Tanner also doubled back to his cruiser, where he observed the truck he had been pursuing and several, "tens or twenty," law enforcement officers. Tanner assisted in establishing a perimeter around the crash site, then remained for two or three hours at one post along the perimeter while other officers searched for the driver of the truck. Police were unable to find the driver that day.

The police thereafter learned that the truck was registered to Dawn Smith (Smith), the defendant's wife. At approximately 12:13 p.m. on January 23, 2008, while the chase was ongoing, Smith had called the Manchester Police Department to report that the truck had been stolen while she was shopping at the Stop & Shop store near her home in Manchester at approximately 9 a.m. that morning. Because he was aware that the truck in question was involved in a police chase at the time it was reported stolen, Manchester police Officer James Moore and one of his colleagues went to Smith's residence to investigate her report. While talking to the officers, Smith was agitated, confrontational and defensive. She told the officers that she had driven the truck to Stop & Shop earlier that morning, when The Dr. Phil Show was on television. She stated that she had left the truck running and unlocked in the parking lot while she went inside and bought milk and cigarettes. When she came out of the store, she said, the truck was gone, so she walked two and one-half miles to her home, then called the police. To verify Smith's claim, the officers first asked her to show them the items she had bought at Stop & Shop. She told them that she did not have the milk, but showed them a pack of cigarettes. Smith told the officers that she had left the milk on the sidewalk in front of Stop & Shop when she realized that the truck was gone. The officers went to Stop & Shop but did not find any milk on the sidewalk. Because The Dr. Phil Show was on at 9 a.m. that morning, the officers viewed the surveillance video from Stop & Shop, partic-

ularly from the camera located over the customer service counter, which is the only place in the store where cigarettes are sold. They watched the video for the hours between 9 a.m. and 11 a.m., but did not see Smith in the video. When the officers then returned to Smith's residence to confront her with their findings, she responded by insisting that "she was there and she was not changing her story and . . . wasn't covering for anyone." At a later date, the officers again returned to Smith's residence and asked to see her cell phone. She refused. The officers thereafter applied for a court order to check Smith's cell phone records, and discovered records of several communications between her cell phone and the defendant's cell phone at the time of the chase after the bank robbery on January 23, 2008.

Upon examining the robbers' truck in the wake of the crash, police found a latent fingerprint on the passenger's side belonging to Harold Lanier of Hartford. The discovery of this fingerprint led the police to seek out Lanier in order to determine what he knew about the robbery and what involvement, if any, he had had in it. On May 8, 2008, state police Detectives Daniel Cargill and Priscilla Vining spoke to Lanier, who gave them a signed written statement concerning the events of January 23, 2008. Lanier explained that he had run into the defendant and another man on the morning of the robbery, just after breakfast, but the defendant did not mention the robbery to him. At that time, the defendant was driving his black pickup truck. Although Lanier did not know the man who was with the defendant at that time, he later learned that the man was "the one who [the defendant] did the robbery with that got caught." After Lanier talked to the defendant and his companion for a short time, three or four black men pulled up in a "small grayish, maybe two door car," and the defendant motioned to those men that he was going to follow them, which he then did. Lanier also told police that he was in Hartford when the defendant's truck crashed. His girlfriend had seen the truck after the crash and told him that it looked like the defendant's truck. When he saw the helicopter hovering overhead, he ran a few blocks to the scene of the crash. Lanier told the police that his fingerprints were on the truck because, when he saw it at the crash site and recognized it as the defendant's, he went up to it to look inside and, when he did so, he touched the door. Lanier had known the defendant for about twenty years. He was aware that the defendant was the only person who drove the truck other than his wife, and perhaps his stepson. After seeing the truck at the crash site, Lanier attempted to call the defendant on his cell phone. After a few unsuccessful attempts, he was finally able to reach him. Lanier asked the defendant "if he was all right and if they got him under arrest." The defendant responded: "No, they got me all fucked up, they got my money."

Lanier told the police that he met up with the defendant and a couple of other men later that afternoon. Lanier described the defendant as "all worried about who had his money," and stated that the defendant "started calling people [and] asking them where his money was. He wanted people to go down to find his bag of money for him." Lanier described the defendant as nervous. When Lanier saw the defendant that afternoon, the defendant was wearing a white T-shirt, black or blue jeans and black sneakers. The defendant told Lanier that he had some money in his jacket but he had left it. He told Lanier that "they got all of his money." Lanier said that the defendant told him that he hoped that his partner wouldn't "flip on" him and that he had been "driving his ass off" trying to get away from the police. Lanier stated that the defendant told him that he had called Smith during the pursuit and instructed her to report the truck stolen. Lanier said that the defendant told him that after he told Smith to report the truck stolen, he had called his "shorty" to tell her that the police were chasing him and that he needed her to meet him. As a result, the defendant told Lanier, she was "right there after they crashed and she took him away."

Lanier also told the police that the defendant called him between 8:30 and 9 a.m. on the morning after the robbery. Lanier picked the defendant up "off Windsor Street" that morning and drove him to the Denny's Restaurant in Newington. When they were together, Lanier gave the defendant a copy of that day's Hartford Courant, saying, "Here, read about yourself." Lanier told the defendant that committing the robbery was the "stupidest thing ever . . . they're going to be all over you." The defendant responded by telling Lanier that he did not think the police saw him, and, in any event, that the truck was not registered in his name. Lanier also told the police that, later on the night after the robbery, the defendant called him again to give him his new cell phone number. The defendant told Lanier in that call that he had gotten the new phone number because the police would probably trace his old one. When Lanier spoke to the police, he explained that up until two or three weeks earlier, the defendant had been hiding out, but that he was no longer in hiding and had recently begun to stay at his wife's house in Manchester.

On January 29, 2008, pursuant to General Statutes § 54-47aa, the police sought and obtained the cell phone records for Byrd's cell phone and two cell phones registered to the defendant, from their respective cellular service providers. The two phones registered to the defendant included one generally used by him and one generally used by his wife. The historical CSLI for the phones used by the defendant and Byrd revealed that numerous calls had been made from those phones during the course of the police chase, which connected through cell towers along the path of the pursuit.

The truck sustained significant damage from its crash into the utility pole at the end of the chase. The troopers who had seen the truck during the chase had not observed any damage to its windshield. After the crash, however, the front end of the truck was damaged and its windshield had a spider web like crack in it, which appeared to have been caused by a hard blow from the inside of the truck. In examining the truck after it was towed from the crash site, police determined that the damage to the inside of the windshield was consistent with the operator's head having struck it after the impact of a front end collision. Skin like material recovered from the crack on the inside of the windshield was forwarded to the state forensic laboratory for DNA testing.

On May 22, 2008, Cargill obtained an arrest warrant for the defendant and a search warrant to obtain a DNA sample from him. On that date, the defendant was in Massachusetts, where Cargill saw him but was unable to serve him with either warrant. Cargill made the following observation of the defendant on that day: "On his forehead there was a mark that appeared to be a healing wound, a pinkish . . . just below the hairline on the forehead, a pinkish area." Although the defendant had other scars on his face, Cargill opined that they appeared older than the scar just below his hairline. Cargill also testified that the defendant had numerous prior addresses in the north end of Hartford. Cargill testified, based upon his research and his past interactions with the defendant and Byrd, that the defendant was approximately five feet, eleven inches tall and weighed approximately 225 pounds, while Byrd was approximately five feet, eight inches tall and weighed between 180 and 190 pounds. These descriptions were consistent with the bank tellers' descriptions of the two men who had robbed them at gunpoint on January 23, 2008. The defendant, moreover, is left-handed, as was the first robber, who had jumped over the counter inside the bank. The DNA extracted from the skin like material swabbed from the crack inside the truck's windshield was later determined to be from a single source whose DNA profile was fully consistent with the defendant's DNA profile. The DNA testing revealed that the "expected frequency of individuals who could be the source of the DNA profile . . . is less than one in seven billion in the African-American, Caucasian and Hispanic population."[3]

By way of a substitute information dated June 7, 2010, the defendant was charged with robbery in the first degree in violation of § 53a-134 (a) (4), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (4). The jury found the defendant guilty of those charges and thereafter made a finding that he had committed a class A, B or C felony with a firearm in violation of § 53-202k. He was also

charged, by way of a part B information, with being a persistent serious felony offender in violation of General Statutes § 53a-40 (c), on the basis of two prior convictions—a 1993 conviction of robbery in the first degree in violation of § 53a-134 (a) (4) and a 1991 conviction of robbery in the second degree in violation of General Statutes § 53a-135. He pleaded nolo contendere to the part B information, and on that basis was found guilty by the court. The court denied the defendant's motion to set aside the verdict and for a new trial, and sentenced the defendant to a total effective term of fifty-five years incarceration, of which five years was the mandatory minimum. This appeal followed.

I

The defendant first claims that the court abused its discretion in denying his motion to suppress the historical CSLI for his cell phone, which was obtained by the police from his cellular service provider, Sprint Nextel, by way of a court order issued pursuant to § 54-47aa. The defendant argues that because the subject records showed not only the phone calls made from and received by his cell phone, but also tracked his movements over a period of time based upon the location of the cellular towers that picked up the signal from the cell phone, data referred to as historical CSLI,[4] he had a reasonable expectation of privacy in that information and, thus, that a warrant was required for the seizure of those records. Because those records were obtained from the cellular service provider pursuant to an ex parte order instead of a warrant, his state and federal constitutional rights to privacy were violated. The defendant argues that the statute pursuant to which the ex parte order was procured, § 54-47aa, is unconstitutional in that it provides for the disclosure of information, to which an individual has a reasonable expectation of privacy, without the due process safeguard of a warrant. The state argues that the defendant cannot prevail on this claim because he does not have a reasonable expectation of privacy in the business records maintained by his cellular service provider. In the alternative, the state argues that any error in denying the motion to suppress was harmless beyond a reasonable doubt because the jury had before it ample evidence aside from the CSLI upon which to base its guilty verdict. We agree with the state that any error in admitting the defendant's CSLI into evidence was harmless beyond a reasonable doubt.

The following additional facts are relevant to this claim. On June 16, 2010, the defendant filed a motion to suppress his cell phone records that the state had obtained from his cellular service provider, Sprint Nextel.[5] He argued therein that the records were illegally obtained in violation of the fourth and fourteenth amendments to the United States constitution and article first, §§ 7 and 8, of the Connecticut constitution. He

argued that a cell phone is a tracking device and thus that the signals emanating from a cell phone are not within the purview of the Stored Communications Act, 18 U.S.C. § 2701 et seq., or § 54-47aa, and cannot be disclosed on the basis of reasonable and articulable suspicion. He argued that the information transmitted by a cell phone falls within the ambit of the federal pen register statute; 18 U.S.C. § 3121; which prohibits the disclosure of the physical location of the subscriber absent a warrant based upon probable cause. In the alternative, the defendant argued that if the information transmitted by a cell phone does fall within the purview of the federal act or § 54-47aa, those statutes are unconstitutional as they violate his constitutional rights to privacy.

Following a hearing on the defendant's motion, the court denied it as follows: "I'm going to deny the motion to suppress the cell site location information, and I'm using the following basis: First of all, I think, [defense counsel], you've done a really good job in researching the issue, but I think you missed a key point, the key point being that the federal statute contemplates a prospective use of a cellular phone device as a tracking device.

"In other words, while I don't have facts in front of me to necessarily support that, the statute—the case law that's been cited makes reference to the fact that a cellular telephone can be tracked on a real time basis.

"The federal statute speaks in terms of a pen register or a—let's see, what's the exact word it uses—or a trap and trace device. If one of those apparently is placed on the circuitry and key to a particular cell phone, then a record of the movements of that cellular telephone can be recorded.

"I'm particularly struck by the verbiage in the federal statute being all prospective and all looking toward the future, so it's clear that were the order that were sought to be, we want to essentially follow where [the defendant's] telephone will be going from this date forward, that the federal statute would have governed and it would have required a federal warrant, and that required probable cause.

"What is key, however, is, if you look at the state statute under which the ex parte court order was sought and obtained, apparently, the verbiage in § 54-47aa all speaks in the past tense; in other words, § 54-47aa looks for the historical information and, as historical information, it seeks records and not communications.

"Consequently, the statute—I mean, the standard authorized by the legislature of reasonable and articulable suspicion is satisfactory for locating the past location of the record under the statute that has been enacted in the state of Connecticut.

"Were it to be prospective rather than retrospective,

then I agree the federal statute would apply. Consequently, on that basis, I'm going to find that the appropriate statute that governs this is § 54-47aa.

"Now, I don't have information in front of me, but from the tone and comments of the motions that were made, I'm presuming that a valid ex parte—I mean an ex parte order under § 54-47aa was in fact obtained for these records.

"[Defense Counsel]: It was, Your Honor.

"The Court: You're not challenging that these were seized without—I mean, outside of the authority of § 54-47aa.

"[Defense Counsel]: I'm not.

"The Court: You're challenging the fact that § 54-47aa should be—should yield to the greater requirements of the federal statute, correct?

"[Defense Counsel]: Correct.

"The Court: All right. So, on the basis of that I find the federal statute doesn't apply because the federal statute looks prospectively, the state statute, § 54-47aa, is retrospective and, on that basis, I see the distinction and will overrule your—I will deny your motion."

The defendant moved for reconsideration of the court's ruling, which it denied summarily. The records were presented to the jury through the testimony of Eric Tyrell, supervisor of legal compliance at Sprint Nextel, who described the general types of information found in the subject phone records, including calls made, the times and durations of those calls, and the cell phone tower sites used during those calls. He explained that the cell phones are designed to find the strongest signal possible and that as long as the cell phone is turned on, it searches for a strong signal whether on a call or not. The records submitted here, however, reflect only the CSLI for calls made or received. Although proximity to a tower is a significant factor in determining the strength of a signal, the strongest signal may not always come from the tower closest to the handset. Tyrell testified that the records reflect only which tower is used for a call, not the proximity of the phone to tower. In other words, the historical CSLI in this case did not reveal the exact location of the phone, only the location of the tower from which the phone was receiving signal to make or receive calls.

"As a general matter, the standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings

is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Boyd*, 295 Conn. 707, 717, 992 A.2d 1071 (2010), cert. denied, U.S. , 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011). Here, because the trial court's legal conclusion has been challenged, our review is plenary.

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 touchstone to determining whether a person has standing to contest an allegedly illegal search is whether that person has a reasonable expectation of privacy in the invaded place. . . . Absent such an expectation, the subsequent police action has no constitutional ramifications. . . . In order to meet this rule of standing . . . a two-part subjective/objective test must be satisfied: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . Whether a defendant's actual expectation of privacy . . . is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances. . . . The burden of proving the existence of a reasonable expectation of privacy rests on the defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Boyd*, supra, 295 Conn. 718.

There is no Connecticut appellate authority on the issue herein presented; nor has the United States Supreme Court squarely addressed it. Although it is tempting to wade into the depths of the fourth amendment and its state counterpart, we ultimately conclude that the present case does not require us to weigh in on this debate. Even if we assume, without deciding, that the facts and the law should have led the trial court to suppress the defendant's historical CSLI, we are fully convinced that any improper admission of the evidence was harmless beyond a reasonable doubt in light of the other evidence admitted at trial.

"It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error

analysis. . . . Accordingly, we often have declined to decide fourth amendment issues attendant to the legality of a search or seizure when it is clear that any erroneous admission into evidence of the fruits of the search was harmless beyond a reasonable doubt. . . . The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt . . . [but] the state bears the burden of proving that the error was harmless . . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citations omitted; internal quotation marks omitted.) *State* v. *Jordan*, 314 Conn. 89, 101–102, 101 A.3d 179 (2014).

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 780–81, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

To be sure, the CSLI presented at trial was persuasive evidence of the defendant's involvement in the robbery. It clearly suggested that the defendant was in the getaway truck with Byrd during the prolonged chase from Stafford to the crash site in Hartford. As the defendant argued at trial, however, the CSLI did not definitively prove his guilt. Instead, it showed only that his *cell phone*, *not the defendant himself*, had travelled along the route of the chase at the time it was taking place. There was no evidence apart from Lanier's statement that the defendant was carrying his cell phone on his person at the time of the robbery and the subsequent

chase. If, then, the jury found the defendant's version of events sufficiently credible to raise reasonable doubt, as to the theft of his truck in Manchester on the morning of the robbery, it might also have inferred that the cell phone was stolen along with it, thus undermining the significance of the CSLI evidence as evidence of his guilt.

Even, however, if the jury put no credence in the defendant's stolen truck theory of innocence, there was overwhelming evidence, apart from the CSLI evidence, in support of the jury's guilty verdict. It was undisputed at trial that the defendant's wife's truck was used by the suspects to flee the scene of the bank robbery. The evidence confirmed that the truck involved in the high speed pursuit and the crash was registered to the defendant's wife. The pickup truck was chased from Stafford all the way to the crash site in Hartford, observed virtually the entire way by the troopers who pursued it on the ground and in the air. Although it was not followed directly from the bank, the location of the robbery, the evidence of the cash drawers that were thrown from the pickup truck conclusively proved that the truck was involved in the robbery. The only disputed question before the jury was whether the defendant was one of the individuals who had robbed the bank and fled in that truck. The state also presented the testimony of Joseph Altimari, who was familiar with the defendant and had seen the defendant drive a black pickup truck with a distinctive front grille and a license plate number that matched that of the truck used in the robbery. Altimari testified that he had seen the defendant drive that truck in the north end of Hartford, in the area where the truck crashed after the robbery, and that he had never seen anyone other than the defendant operating that vehicle. Lanier, who had known the defendant for twenty years, also testified that the defendant was the only one who drove his truck, with the infrequent exceptions of his wife and perhaps his stepson.

The state also presented evidence of the physical description of the perpetrators of the robbery, one of which matched the description of the defendant. The bank tellers inferred, on the basis of the robbers' size and the way they acted, that they were men. Although their clothing, which included ski masks and gloves, concealed the robbers' skin, the tellers testified, on the basis of their voices and choice of words,[6] that they believed the robbers to be black. Claudio also identified the driver of the truck as a black male, based upon his observation of the truck and its occupants when it came toward him as he drove slowly eastbound on Route 190 after the robbery. Taylor also observed two black males in the black pickup truck when he observed it while driving eastbound from Somers after hearing the radio report of the robbery.

One of the tellers described the man who went to the vault as approximately five feet, nine or ten inches tall. They described the suspect who had jumped over the counter as slightly taller than the other man, probably six feet tall, and "husky," but not overweight. Those descriptions, particularly the comparison of the two perpetrators, were consistent with the physical characteristics of Byrd and the defendant. The defendant matched the general height and weight description given by the tellers. Alison Keleher, a credit union employee at the time of the robbery, had testified that the suspect held the gun with his left hand, and the defendant is left-handed. Additionally, Lanier told police that when he saw the defendant on the afternoon of January 23, 2008, following the robbery, he was wearing all dark clothing and dark shoes, aside from a white T-shirt, but that the defendant had been wearing a jacket. This, too, was consistent with the attire worn by the perpetrator.

The jury was also presented with Lanier's statement and testimony regarding his knowledge of the defendant's role in the robbery. Lanier told police in his May 8, 2008 written statement, and testified at trial, that he had seen the defendant in Hartford in his truck with Byrd on the morning of the robbery, at about 8:30 to 9 a.m., and that their conversation had ended when the defendant drove away in the truck to follow his associates, who were driving a "small grayish, maybe two door car," which could have been the Volkswagen that the defendant and Byrd used initially to drive away from the bank. Although Lanier testified at trial that he did not remember giving a written statement to the police and even recanted portions of it, that statement was admitted into evidence for substantive purposes pursuant to *Whelan*. Lanier's written statement revealed certain facts about the defendant's role in the robbery that were not available to the public, but were corroborated by evidence obtained from other sources. In his May 8, 2008 statement to the police, Lanier stated that the defendant told him that he had called his wife while he was being chased by the police and instructed her to report that his truck had been stolen. This statement is supported not only by Smith's phone records showing that she did, in fact, receive an incoming call from the defendant at the time that the police chase was occurring, and that she had spoken to the defendant immediately before and immediately after reporting the truck stolen, but also by the actual report made by Smith to that effect. Lanier's statement that he had seen the defendant in his truck in Hartford on the morning of the robbery also undermines Smith's claim that the same truck had been stolen in Manchester at 9 that morning.

Lanier also had told police that the defendant obtained a new cell phone after the robbery because

he was concerned that his other one would be traced. The defendant's phone records, the records simply showing calls made and received, the admission of which was not challenged, are consistent with Lanier's account in this regard because the use of the defendant's cell phone ceased after the robbery.

Byrd's cell phone records, which were also admitted into evidence without objection, showed that he was in repeated contact with the defendant on the morning of January 23, 2008. Between 6:40 a.m. and just before 9 a.m., Byrd called the defendant five times, and the defendant called Byrd another three times. Based upon the frequency and the timing of these calls, the jury could have inferred that the two men were trying to make plans to meet or get together that day. The cessation of these phone calls just before 9 a.m. was also consistent with Lanier's report that he saw the two men together at approximately that time.

Additionally, the defendant's DNA was retrieved from the crack in the windshield of the truck, thereby corroborating the defendant's presence in the truck at the time of the crash. At trial, the defendant did not meaningfully challenge the DNA identification, which essentially reported that he was the only individual in the world who could have deposited the material swabbed from the crack in the windshield. The defendant instead suggested that the recovered DNA could have been deposited in the crack in the windshield at any time prior to January 23, 2008, and thus that its presence there did not support the state's contention that he was the driver of the vehicle on that date, and thus a participant in the bank robbery. The defendant offered no evidence, however, in support of his suggestion that the crack in the windshield existed before the truck crashed into the utility pole on the day of the robbery. That argument is further belied by the testimony that there was no damage to the windshield prior to the subject crash. Claudio had the best view of the truck prior to the crash when, while travelling eastbound on Route 190, he first saw the truck. Because Claudio was specifically attempting to identify the robbery suspects, he was looking directly at the truck's occupants, right through the windshield, when he observed the driver of the vehicle rigidly looking rigidly straight ahead of him. Because he was looking directly at the driver, he certainly would have noticed a spider web crack in the windshield that may even have obstructed his view of that driver. Troopers Tanner and Cournoyer, who also observed the truck before the crash, echoed Claudio's observation that the windshield was in good condition, with no crack in it, until it crashed into the utility pole. Based on the evidence presented, the jury reasonably could have found that the crack in the windshield did not exist until the truck crashed into the utility pole on January 23, 2008, and thus that the defendant's DNA could not have been deposited into the crack before

the collision.

When the defendant was arrested four months later, Cargill saw that he had a healing wound, which appeared to be consistent with an injury sustained by hitting the windshield of the truck after it struck the telephone pole.

In closing argument to the jury, the state argued that the defendant had purposefully attempted to get back to the north end of Hartford after the robbery because he used to live there and knew the neighborhood. The state also explained that all of the facts in Lanier's *Whelan* statement had been corroborated. The state argued that the police were canvassing the Hartford area for months after the robbery, speaking to the defendant's associates and relatives.

On the basis of the foregoing, we conclude that the CSLI, which was circumstantial in nature, was merely cumulative of the mountain of additional evidence adduced at trial to establish the defendant's guilt. Although clearly persuasive, the CSLI did nothing more than track the movements of the defendant's cell phone in the aftermath of the robbery.[7] It is the strength of the additional evidence—the fact that the defendant's truck was involved in the robbery; that the defendant was the principal driver of that truck and was, in fact, seen driving his truck on the morning of the robbery with Byrd as his passenger; that the defendant matched the physical descriptions of the first robber given by several of the witnesses; that Lanier's statement conveyed details of the defendant's actions on the day of the robbery that he could have learned only from the defendant and those details are consistent with other evidence obtained by the police; that the defendant's DNA was recovered from the crack in the windshield of his truck and that the crack did not exist prior to the truck's collision at the conclusion of the pursuit from Stafford; the healing wound on the defendant's head that was consistent with an operator's impact with the windshield; and that the defendant knew that his truck had been involved in a serious crime and that the police were looking for him, but that he did not contact the authorities—was overwhelming, and thus rendered the admission of the CSLI unnecessary to establish the defendant's guilt. The heft of that evidence proved beyond a reasonable doubt that the defendant committed the subject robbery such that no rational juror could have reached a different conclusion. We are thus satisfied beyond a reasonable doubt that the result of the defendant's trial would have been the same without the admission of the CSLI into evidence. Accordingly, we conclude that the admission of the CSLI, if erroneous, was harmless beyond a reasonable doubt.

II

The defendant next claims that the jury was misled

by the trial court's failure to give an instruction on expert testimony, which was relevant to the two state's witnesses who testified as to the presence of the defendant's DNA in the crack of the windshield of the truck. He claims that, in the absence of such an instruction, the jury could not know that it was free to give whatever weight it deemed appropriate to that testimony or that it could reject it altogether, and thus that the jury was likely misled. The state argues that the defendant has failed to prove that he was prejudiced by the absence of such an instruction. We agree with the state.

On July 7, 2010, the defendant filed a request to charge wherein he requested, inter alia, an instruction on expert witness testimony as follows: "In this case, certain witnesses have taken the stand, given their qualifications and testified as an expert witness. A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which the testimony relates. An expert is permitted not only to testify to facts personally observed, but also to state an opinion about certain circumstances. This is allowed because an expert is, from his experience, research and study, supposed to have a particular knowledge of the subject of the inquiry and be more capable than a layperson of drawing conclusions from facts and basing his opinion upon them. Such testimony is presented to you to assist you in your deliberations. No such testimony is binding upon you, however, and you may disregard such testimony either in whole or in part. It is for you to consider the testimony with the other circumstances in the case, and, using your best judgment, determine whether you will give any weight to this testimony, and, if so, what weight you will give to it. The testimony is entitled to such weight as you find the expert's qualifications in his field entitle it to receive. An expert witness' testimony must be considered by you, but that testimony is not controlling upon your judgment." The state did not challenge the defendant's requested instruction.

On July 8, 2010, the court provided the prosecutor and counsel for the defendant with a written copy of its proposed instructions to the jury and took a brief recess to afford counsel the opportunity to quickly review them. After that recess, the court ordered that the instructions it had provided to counsel be marked as a court exhibit and told defense counsel that they "basically [encompass] what it is that you've requested, although the language may be slightly different." The court asked both attorneys whether they had any objections to the written instructions it had provided to them, and they both stated that they had none. Neither the defendant nor the state objected to any portion of the court's instructions after they were given to the jury.

The state does not dispute that an instruction on

expert testimony would have been appropriate. It appears from the record that the trial court did not deny the defendant's request to charge on expert testimony, but rather omitted such an instruction from its final charge inadvertently. Because the defendant filed a request to charge, his claim is preserved for our review.

"[A]n [impropriety] in instructions in a criminal case is reversible [impropriety] when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Cutler*, 293 Conn. 303, 317, 977 A.2d 209 (2009). "[C]laimed instructional errors regarding general principles of credibility of witnesses are not constitutional in nature." *State* v. *LaBrec*, 270 Conn. 548, 557, 854 A.2d 1 (2004); see also *State* v. *Antwon W.*, 118 Conn. App. 180, 202, 982 A.2d 1112 (2009) (claim that court failed to instruct jury on how to evaluate expert testimony not of constitutional magnitude), cert. denied, 295 Conn. 922, 991 A.2d 568 (2010). Because the defendant's claim is nonconstitutional in nature, we must determine whether it is reasonably probable that the jury was misled. In making that determination, we note that there is nothing in the instructions, as given, that the defendant claims to have misled the jury. The defendant's claim is limited to whether the jury could have been misled by the absence of the expert witness instruction.

Here, although the court did not instruct the jury as to how expert testimony should be evaluated, it did instruct the jury as to its prerogative to accept or reject all or part of the testimony of *any* witness. It told the jury: "You may believe all, none or any part of any witness' testimony." Although the state elicited from its experts their respective qualifications and experience, at no time were they acknowledged as expert witnesses before the jury. The state similarly elicited the qualifications and experience of each law enforcement officer who testified at trial. The court instructed the jury that their testimony was entitled to no greater weight than that of any other witness simply because the witness was a police official. The court told the jury that it should "weigh and balance [that testimony] just as carefully as you would the testimony of any other witness." There was nothing in the way that the expert testimony was presented to the jury from which it could be presumed that they were bound to accept such testimony as true. Thus, when examined in the context of the entire charge, the jury likely evaluated the testimony of the DNA witnesses in the same manner that it was instructed to evaluate the testimony of the other witnesses, which is essentially consistent with the instruction requested by the defendant.

Moreover, the defendant did not mount any meaningful challenge to the DNA testimony presented by the

state. The defendant did not contest the presence of his DNA on the windshield. Rather, his defense at trial was that his DNA could have been deposited on the windshield at any time, not necessarily at the time of the subject crash. The DNA witnesses did not dispute that contention, and in fact acknowledged that they were unable to ascertain when the defendant's DNA was deposited on the truck's windshield.

On the basis of the foregoing, we conclude that the defendant has not sustained his burden of proving that it was reasonably probable that the jury was misled by the absence of a jury instruction on expert testimony.

III

The defendant next claims that the court violated his constitutional right to an unbiased jury when it instructed the members of the jury, prior to a recess in the proceedings, that they could discuss their impressions of the trial while it was ongoing. We are unpersuaded.

Beginning on the first day of jury selection, June 9, 2010, the court instructed the members of the jury repeatedly that they were not free to discuss the case with anybody. On June 24, 2010, the first day of evidence, the statutory oath was administered to the jurors, requiring them to swear or affirm that they "will not speak to anyone else, or allow anyone else to speak to you, about this case"; General Statutes § 1-25; until they have been discharged by the court. Then, just before the start of evidence, the court again admonished the members of the jury not to "talk to anyone else about this case nor about anyone who has anything to do with it until the trial has ended and you've been discharged as jurors." The court further instructed: "Now, you certainly can tell people that you're a juror in a criminal case, you certainly can tell them about the generalities of what the courthouse is like, the hours we keep, et cetera, but don't discuss any of the evidence or any of the merits of this case with anybody else." That same day, after hearing the testimony of five witnesses, the court reminded the members of the jury: "remember, don't discuss what you've heard here today with anybody else, and we'll see you tomorrow morning."

The next day, June 25, 2010, at the close of evidence, the trial court reminded the jurors: "[A]lthough I'm sure you're all well aware of it, don't discuss the evidence amongst yourselves, certainly don't discuss it with anybody else, you can talk about your impressions of how the trial has been, your experience of being a juror but not the evidence per se. I don't want you to get into any details of what's been talked about. You're free to talk about how you were tortured all morning by the smell of whatever they were cooking over there and things like that but meanwhile, have a very good week-

end everybody." The defendant did not object to the court's instruction.

On appeal, the defendant takes issue with that portion of the court's instruction on June 25, 2010, in which it told the jurors "you can talk about your impressions of how the trial has been . . . ." Because the defendant did not raise this claim at trial, it is unpreserved. The defendant thus seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or the plain error doctrine. See Practice Book § 60-5.

Under *Golding*, "[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 clearly exists and clearly 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 in original; footnote omitted.) Id.

The state acknowledges, and we agree, that it is error of constitutional magnitude for a trial court to instruct jurors that they may discuss the case among themselves prior to its submission to them or to discuss it with anyone else during the pendency of the trial. *State* v. *Castonguay*, 194 Conn. 416, 481 A.2d 56 (1984); *State* v. *Washington*, 182 Conn. 419, 438 A.2d 1144 (1980). The defendant's claim thus satisfies the second prong of *Golding*. Because the record is adequate for review, it also meets the first prong.[8] The state contends, however, that the defendant has failed to prove a constitutional violation, and thus that his claim fails under the third prong of *Golding*. "[U]nder the third prong of *Golding*, [a] defendant may prevail . . . on a claim of [unpreserved] instructional error only if . . . it is reasonably possible that the jury was misled . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Schiappa*, 248 Conn. 132, 176–77, 728 A.2d 466 (en banc), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). In this inquiry, "we consider the alleged violation in the context of the entire charge and the entire trial, rather than as individual sentences or phrases viewed in isolation." (Internal quotation marks omitted.) *State* v. *Romero*, 269 Conn. 481, 506, 849 A.2d 760 (2004).

Here, the defendant invites us to examine a single phrase in a single sentence, which, viewed in isolation, is undoubtedly problematic. Such an examination, however, can only be the beginning of our analysis. When read together with the rest of the sentence in which the challenged phrase appears, and against the background of the court's other instructions on the issue of predeliberation jury discussion, that phrase cannot

reasonably be construed to suggest to the members of the jury that they could talk about the case with anyone, including each other, during the upcoming recess or at any time before the end of trial. We thus conclude that it was not remotely possible that the jury was misled by the phrase now challenged by the defendant. Because the defendant has failed to prove a constitutional violation, his claim fails under the third prong of *Golding*.

The foregoing reasoning also leads us to the conclusion that the court's instruction in this regard did not constitute error that is "so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." *State* v. *Roger B.*, 297 Conn. 607, 618, 999 A.2d 752 (2010). Accordingly, we conclude that the court did not commit plain error as alleged by the defendant.

IV

The defendant next claims that the court erred in admitting Lanier's written statement into evidence pursuant to *State* v. *Whelan*, supra, 200 Conn. 753. The defendant argues that the statement was inherently unreliable because it was made under unduly coercive circumstances.[9] We disagree.

On June 29, 2010, the state called Lanier to testify. He testified on direct examination that, on May 8, 2008, he was visited by two state police detectives, one male and one female, at his mother's house in Bloomfield. For the first twenty minutes of the ensuing interview, the police told Lanier only that his fingerprints had been discovered on a truck they were investigating. When they told Lanier that they were referring to the defendant's truck, he explained that his fingerprints got onto the truck when he saw it at the crash scene on January 23, 2008. He testified that the interview lasted three hours, at the end of which he signed a written statement that one of the detectives wrote out for him. He also consented to the swabbing of his mouth for DNA because he was confident that it would exclude him from being involved in the January 23, 2008 robbery. Lanier's testimony at trial initially was consistent with his written statement. When the state asked Lanier whether he had tried to contact the defendant on the afternoon of the robbery, Lanier stated that he didn't recall. As the state progressed with its direct examination, Lanier's testimony became increasingly inconsistent with his written statement. When the state showed Lanier his May 8, 2008 statement, Lanier first testified that he had never seen it before. He then acknowledged that the document did have his signature on it and that he did sign a written statement, but he indicated, "I don't know if they're these statements." When the state asked Lanier about various statements attributed to him in his written statement, Lanier either denied making those statements or stated that he did not recall saying any of those things. He denied that the defendant had

made any comments to him regarding his involvement in the robbery as set forth in the written statement.

On cross-examination, Lanier testified that he did not remember reading his written statement. He admitted that he had signed the statement, but claimed that the words in it were not his. He stated that the detectives had made a "small threat" against him. He explained that the detectives did not say that he could be arrested, but that he could be taken to the police barracks and questioned if he did not cooperate with them, and that made him nervous. Lanier testified that he felt pressure to sign the statement and that he believed that he had no choice but to do so. He explained that he believed that something bad was going to happen to him if he did not sign the statement.

After Lanier testified, Cargill testified about the circumstances of his interview with Lanier and the taking of his written statement on May 8, 2008. Cargill explained that Lanier was nervous when the interview began, but became calm when the detectives explained to him that they were investigating the January 23, 2008 robbery. Cargill testified that Lanier agreed to talk to them, that they did not threaten him in any way, either with arrest or with bringing him to the state police barracks for questioning. The detectives interviewed Lanier on his back patio, from which he was free to leave at any time he wanted to do so. Both detectives were in plain clothes; neither had a gun out. After the detectives told Lanier that they were investigating the pickup truck that crashed in Hartford on January 23, 2008, Lanier became "relieved and very calm" and "just began telling [them] what he knew about it." Cargill told Lanier that they needed to know why Lanier was at the crash site and what had happened that day and, in response, Lanier "began to tell a story." As Lanier told his story, Cargill wrote it down. When Lanier finished telling his story, Cargill read it aloud to him and gave Lanier an opportunity to read each page before signing it. After reading the statement himself, Lanier signed the statement. Lanier also signed a consent to search and examine evidence form to authorize the taking and testing of a sample of his DNA.[10]

The state moved for the admission of Lanier's May 8, 2008 written statement into evidence pursuant to *Whelan*. The defendant initially objected to the admission of the statement, but then conceded that it was admissible under *Whelan*. The statement was thus marked as a full exhibit.[11] The court then took a brief recess, immediately after which the defendant sought to reconsider the admissibility of the written statement into evidence. The court agreed to reconsider its ruling and permitted the defendant to present argument in support of his objection. The defendant argued that the statement was not admissible under *Whelan* because Lanier lacked personal knowledge of its content, that

he had merely heard the information contained in the statement on the street, and that its admission would violate *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The court rejected the defendant's arguments, finding that "the statements attributed to [the defendant] are based on the personal knowledge of . . . Lanier in the statement where he reports these statements were made to him, so he does have personal knowledge of the statements." The court thus concluded that the statement was admissible under *Whelan*, admitted it into evidence for substantive purposes, and Cargill read it aloud to the jury.

Several days later, on July 7, 2010, the defendant filed a motion seeking, inter alia, reconsideration of the admission of Lanier's written statement. In that motion, the defendant reiterated the same arguments he had previously presented to the court, and asserted the additional argument that Lanier's written statement should have been suppressed as a "product of fear of his being arrested by police." The court, he argued, "erred in its failure" to act as a gatekeeper to ensure the reliability and trustworthiness of the statement before it admitted it as substantive evidence against the defendant in that the linchpin of admissibility of a statement under the *Whelan* rule is its reliability and trustworthiness." In support of this claim, the defendant cited Lanier's testimony that he was "afraid and apprehensive that bad things, including arrest, would happen if he did not tell the police what they wanted to hear." The defendant suggested that Lanier's fear was likely heightened by the fact that the detectives showed up at his home and told him that his fingerprints had been found on a vehicle used in the robbery. The court summarily denied the defendant's motion.

On July 28, 2010, after the jury returned its verdict, the defendant filed a motion to set aside the verdict and for a new trial, wherein he again challenged the admission of Lanier's written statement on the same grounds that he had already presented to the court.[12] The court denied the defendant's motion.

On appeal, the defendant claims that Lanier's May 8, 2008 written statement was made under circumstances that rendered it unreliable.[13] The defendant claims that the circumstances under which the interview with Lanier was conducted—the detectives showing up at his parents' house and telling him that his fingerprint was found on a truck that had been involved in a robbery that they were investigating—caused him to fear the consequences that he might face if he did not tell the detectives what they wanted to hear. Under those circumstances, the defendant argues, Lanier had "every motivation to point the finger at another person in order to get the police off of his back," and thus that the written statement was inherently unreliable and should not have been admitted into evidence. We disagree.

"It is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies. . . . In *State* v. *Whelan*, supra, 200 Conn. 753, however, we adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination. This rule has also been codified in § 8-5 (1) of the Connecticut Code of Evidence, which incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided. . . .

"[The] *Whelan* . . . hearsay exception [applies to] a relatively narrow category of prior inconsistent statements . . . [and is] carefully limited . . . to those prior statements that carry such substantial indicia of reliability as to warrant their substantive admissibility. As with any statement that is admitted into evidence under a hearsay exception, a statement that satisfies the *Whelan* criteria may or may not be true in fact. But, as with any other statement that qualifies under a hearsay exception, it nevertheless is admissible to establish the truth of the matter asserted because it falls within a class of hearsay evidence that has been deemed sufficiently trustworthy to merit such treatment. Thus, as with all other admissible nonhearsay evidence, we allow the fact finder to determine whether the hearsay statement is credible upon consideration of all the relevant circumstances. Consequently, once the proponent of a prior inconsistent statement has established that the statement satisfies the requirements of *Whelan*, that statement, like statements satisfying the requirements of other hearsay exceptions, is presumptively admissible. . . .

"A party seeking to exclude a *Whelan* statement, however, may make a preliminary showing of facts demonstrating that the statement was made under circumstances so unduly coercive or extreme as to grievously undermine the reliability generally inherent in such a statement, so as to render it, in effect, not that of the witness. . . . If a party makes such a showing, the court should hold a hearing to determine whether, in light of the circumstances under which the statement was made . . . the statement is so untrustworthy that its admission into evidence would subvert the fairness of the fact-finding process. . . . Because this is a demanding standard, it will be the highly unusual case in which a statement that meets the *Whelan* requirements nevertheless must be kept from the jury. . . .

"[T]he trial court's decision [on the admissibility of a *Whelan* statement] will be reversed only [when] abuse of discretion is manifest or [when] an injustice appears to have been done. . . . On review by this court, there-

fore, every reasonable presumption should be given in favor of the trial court's ruling. . . . Of course, the trial court's factual findings on this issue will not be disturbed on appeal unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837–38, 100 A.3d 361 (2014).

Here, the record does not reveal any coercion by the detectives in inducing Lanier's statement. Although Cargill and Vining initially did not disclose the focus of their investigation to Lanier, and thus he first feared that they were accusing him of being involved in a crime, he testified that they kept the specifics of their investigation from him for only the first twenty minutes of the meeting, until the detectives revealed that they were interested in the defendant's truck. Although Lanier may have been nervous at the beginning of the meeting, the detectives both testified that he calmed down upon learning that they were investigating the defendant's truck. He told them precisely how his fingerprints came to be on the door of the defendant's truck and provided additional information in cooperation with the inquiry. In fact, Lanier testified that he consented to and was happy and anxious to provide the detectives with a DNA sample because it would exclude him from having been involved in the robbery. Lanier acknowledged that the detectives never threatened him with arrest, but said that they threatened to bring him to the police barracks for questioning if he did not cooperate. Both detectives denied this allegation. Even if the detectives did suggest to Lanier that he might be taken to the police barracks for questioning, we cannot conclude that such a suggestion would create a situation so unduly coercive or extreme as to undermine the inherent reliability of Lanier's written statement. This is not one of those " 'highly unusual' "; id., 838; cases in which a statement that otherwise satisfies the *Whelan* criteria nevertheless, in light of the circumstances under which it was made, rendered it so untrustworthy that its admission into evidence subverted the fairness of the fact-finding process. We therefore conclude that the court did not abuse its discretion in admitting the statement into evidence.

V

The defendant finally claims that the court improperly acted as an advocate for the state by questioning Lanier in such a manner as to suggest that it did not believe his testimony, thereby violating the defendant's constitutional rights to an impartial tribunal and a fair trial. Although the defendant did not raise this issue at trial, he properly raises it under *Golding* because the record is adequate to review it and his rights to an impartial tribunal and a fair trial are constitutional. The state agrees, as do we. We conclude, however, that no constitutional violation occurred, and thus that the

defendant's claim fails under the third prong of *Golding*.

Following the state's redirect examination of Lanier, and before the defendant's recross-examination of him, the following colloquy took place between the court and Lanier:

"The Court: Now, Mr. Lanier, aside from your signature and the initials on [the May 8, 2008 statement, which is] exhibit AR for identification, did you add any words to this document?

"[Lanier]: I don't recall. We're talking two and a half years; I don't even remember.

"The Court: There are some corrections that are made to this document.

"[Lanier]: Hm-mm.

"The Court: And your testimony was that you didn't read this document.

"[Lanier]: No.

"The Court: But you've initialed corrections.

"[Lanier]: Hm-mm.

"The Court: How is it you initialed corrections if you hadn't read the document?

"[Lanier]: I just—as far as I remember, I remember him reading it back to me and anything that he said that I didn't agree with I just initialed. That's as far as I remember.

"The Court: So, when you say read, you mean you didn't have the paper and silently read it to yourself?

"[Lanier]: No, sir.

"The Court: You're telling me the police officers read this statement to you?

"[Lanier]: Yeah.

"The Court: So, you knew what was in this document?

"[Lanier]: Yes.

"The Court: So, when you disagreed with something that was in that document, you told the police officers and corrections were made.

"[Lanier]: I don't know if corrections were made; I know I had to initial it.

"The Court: And then you acknowledged that you had had the statement read to you and it was true to the best of your knowledge and belief?

"[Lanier]: Yes.

"The Court: Several times you made the comment, I don't remember saying, and then you would say whatever.

"[Lanier]: Hm-mm.

"The Court: When you say that, do you mean, A, you never made such a statement or you cannot now recall making such a statement but it is possible you did? Which of those two options do you mean? A—

"[Lanier]: It depends which statement it is.

"The Court: Okay. So, there's some of those that you say you never made such a statement?

"[Lanier]: Yes.

"The Court: Others you don't recall making the statement, but you may have made such a statement?

"[Lanier]: Yes."

Neither side objected to the court's inquiry. The court then asked the parties if either had additional questions for the witness on the basis of its inquiry. The defendant asked a few questions, essentially confirming Lanier's earlier testimony that the statements in his written statement that he had attributed to the defendant had been heard from others on the street, not from the defendant himself. The state asked the witness several follow-up questions as well, eliciting from him, inter alia, the fact that he was not happy to be testifying in court because he had nothing to do with this case.

In its final instructions to the jury, the court reminded the jury: "My actions during the trial in ruling on any motions or objections by counsel or in comments to counsel or in any questions to witnesses that I may have posed or in setting forth the law in these instructions are not to be taken by you as any indication of my opinion as to how you should determine the issues of fact. Any perception you might have formed as to my opinion of the facts is totally immaterial because it is you the jury who are the sole arbiter of the facts in this case. Not me; you."

The defendant now argues that, through the aforementioned questioning of Lanier, the court ceased to be impartial and became an advocate for the state by suggesting that Lanier was not being truthful in his testimony. The defendant contends that the court, through its questioning of Lanier, expressed skepticism as to Lanier's testimony that he did not remember certain portions of his May 8, 2008 written statement. The defendant thus claims that the court's questioning of Lanier deprived him of his constitutional rights to an impartial tribunal and a fair trial. We are unpersuaded.

"Due process requires that a criminal defendant be given a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . . In a criminal trial, the judge is more than a mere moderator of the proceedings. It is [the judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . . However,

when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. . . . Whether or not the trial judge shall question a witness is within his sound discretion. The extent of the examination is likewise within his sound discretion. Its exercise will not be reviewed unless he has acted unreasonably, or, as it is more often expressed, has abused his discretion. . . . The trial judge can question witnesses both on direct and cross-examination. . . . [I]t may be necessary to do so to clarify testimony as [the judge] has a duty to comprehend what a witness says . . . [and] to see that the witness communicates with the jury in an intelligible manner. . . . While no precise theorem can be laid down, we have held that it is proper for a trial court to question a witness in endeavoring, without harm to the parties, to bring the facts out more clearly and to ascertain the truth . . . and [intervene] where the witness . . . may not understand a question. . . . The risk of constitutional judicial misconduct is greatest in cases where the trial court has interceded in the merits of the trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Velasco*, 253 Conn. 210, 237–38, 751 A.2d 800 (2000).

Here, the court's questioning of Lanier occurred in the context of the state's attempt to introduce Lanier's May 8, 2008 written statement into evidence. The state was attempting to lay the foundation for the admission of that statement and, through its questioning, it is apparent that the court was seeking to ascertain which portions of that statement Lanier was disavowing and which he simply did not remember, whether he read the statement himself or whether it was read to him, and whether he initialed the changes made to the statement. Because the court was required, when ruling on the admissibility of that statement, to consider whether the contents of the statement were based upon Lanier's personal knowledge under *Whelan*, it was important for the court to understand exactly what Lanier's testimony was regarding that statement. The court's inquiry did not pertain to the merits of the case or the substance of the statement or Lanier's testimony, but, rather, properly sought to clarify Lanier's testimony regarding his prior written statement. We thus cannot agree with the defendant's argument that the court ceased to be impartial and became an advocate for the state. See *State* v. *Fernandez*, 198 Conn. 1, 16, 501 A.2d 1195 (1985) (trial court's improper examination of witness conveyed to jury its " 'own notion' " of what inferences might be reasonable for it to draw). Moreover, the court instructed the jury that nothing in its comments throughout the trial should be construed as an indication of its opinions on the facts of the case, which the jury was solely responsible for finding. Accordingly, we conclude that the court's questioning of Lanier did not violate the defendant's rights to an impartial tribunal

and a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The drawers were approximately eighteen inches square.

[2] Additional money was also recovered from the side of the road where Byrd had thrown it out of the truck at Claudio's cruiser. The total amount of money recovered was $143,776.11.

[3] That figure was capped at seven billion because, at that time, it was the approximate population of the world.

[4] CSLI refers to location information generated when a cell phone call occurs. Historical CSLI (versus "real time" CSLI, which is used essentially as a tracking device while it is happening) identifies the location of the cell phone when calls were made at some time in the past based on records routinely kept by the cellular service provider. Cell service providers maintain a network of radio base stations called "cell sites" in different coverage areas. A cell site will detect a radio signal from a cell phone and connect it to the local network, the Internet, or another wireless network. The cell phones identify themselves by an automatic process called "registration," which occurs continuously while the cell phone is turned on regardless of whether a call is being placed. When a call is placed and the cell phone moves closer to a different cell tower, the cell phone service provider's switching system switches the call to the nearest cell tower. The location of the cell phone can be pinpointed with varying degrees of accuracy depending on the size of the geographic area served by each cell tower, and is determined by reference to data generated by cell sites pertaining to a specific cell phone. See B. Davis, "Prying Eyes: How Government Access to Third-Party Tracking Data May be Impacted by *United States v. Jones*," 46 New Eng. L. Rev. 843, 848–49 (2012). CSLI cannot be disabled by the user. J. Rothstein, "Track Me Maybe: The Fourth Amendment and the Use of Cell Phone Tracking to Facilitate Arrest," 81 Fordham L. Rev. 489, 494 (2012).

[5] In his motion, the defendant sought the suppression of the records corresponding with the cell phone number 860-881-6531. In his accompanying memorandum of law, he referred to the request for an order of disclosure regarding the cell phone number 860-881-6478. The evidence at trial showed that both numbers were registered to the defendant, but that the number ending in 6531 corresponded to the phone used by his wife, while the defendant himself used the number ending in 6478. The number ending in 6478 corresponds to the phone that was traced from the bank in Stafford to the crash site in Hartford on the date of the robbery.

[6] Fisher, the teller who led Byrd into the vault, explained that Byrd sounded "like an African-American" based upon the sound of his voice and the way he spoke to her. She explained that "he spoke . . . very street like," "a lot of slang" and "not proper English," such as, "you open dat safe . . . ."

[7] The only evidence that could be construed as definitely establishing that it was the defendant who was using that phone at the relevant time relates to the false report of the theft of the defendant's truck. The CSLI, however, was irrelevant to that issue.

[8] The state also contends that the record is inadequate to review the defendant's claim because the defendant failed to provide this court the transcripts for every day of voir dire. Because we conclude that the transcripts provided are sufficient to establish that the jury was properly and repeatedly admonished not to discuss the merits of the case during the trial, we disagree with the state that the additional transcripts are necessary for our review of the defendant's claim.

[9] The defendant also claims that the written statement should have been redacted to remove prejudicial remarks that he routinely committed robberies and was involved in dog fighting. The defendant did not ask for redaction at the time of the admission of the written statement, and when he did seek redaction of the statement in his July 7, 2010 motion for reconsideration, several days after the June 29, 2010 admission of the statement into evidence, he sought the redaction of certain unspecified uncharged misconduct. At no time prior to the jury's verdict did the defendant specify the specific portions of Lanier's statement that he sought to have redacted. The defendant argues that the trial court should have known which portions warranted redaction and should have ordered that the statement be so redacted sua sponte. Because the defendant failed to identify the portions of the statement he sought to have redacted, he did not adequately preserve this evidentiary claim.

[10] Vining's testimony regarding the circumstances of Lanier's interview

was consistent with Cargill's testimony.

[11] The consent form for Lanier's DNA also was admitted into evidence at that time, with no objection by the defendant.

[12] The defendant made additional arguments, but those arguments are not relevant to the issues he raises on appeal.

[13] Although the defendant made several arguments to the trial court in opposition to the admission of Lanier's statement, this is his only claim on appeal as to that statement.