LAVINE, J., concurring in part and dissenting in part. I agree with the majority that the trial court properly denied the motion for a judgment of acquittal, postverdict, filed by the defendant, Troy Artis, as to the charge of accessory to assault in the first degree by means of a dangerous instrument and, therefore, join in part I of the majority opinion. Because I believe that the trial court did not abuse its discretion in admitting the victim's identification of the defendant and that, even if it did, such error was harmless beyond a reasonable doubt, I respectfully dissent from the remainder of the majority opinion.

I

RELIABILITY OF THE VICTIM'S IDENTIFICATIONS

I do not believe that the trial court abused its discretion in admitting the victim's out-of-court and in-court identifications as reliable, even though the identification procedure was unnecessarily suggestive. The record adequately supports the subordinate facts found by the court in its meticulous and nuanced oral decision. Additionally, in accordance with the reliability factors set forth in *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and the totality of the circumstances, the defendant has not met his burden of showing that the court's ultimate conclusion was unreasonable.

The standard of review governing the admissibility of an out-of-court identification is well settled. "[B]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . [T]he required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances. . . . To prevail on his claim, *the defendant has the burden of showing that the trial court's determinations of suggestiveness and reliability both were incorrect.* . . .

"Furthermore, [w]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of factbound determi-

nations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 547–48, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). "The exclusion of evidence from the jury is . . . a drastic sanction, one that is limited to identification testimony which is manifestly suspect. . . . Absent a very substantial likelihood of irreparable misidentification, [w]e are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (Internal quotation marks omitted.) *State* v. *Figueroa*, 235 Conn. 145, 159–60, 665 A.2d 63 (1995); see also *Manson* v. *Brathwaite*, supra, 432 U.S. 116; *State* v. *Outing*, 298 Conn. 34, 60–61, 3 A.3d 1 (2010) ("At a suppression hearing, a court is required only to determine the due process question of whether the eyewitness identifications are so lacking in reliability as to be inadmissible. . . . Thus, the trial court serves a constitutional gatekeeping function rather than as finder of fact making a credibility assessment of the eyewitness." [Citations omitted; internal quotation marks omitted.]), cert. denied, U.S. , 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

The majority largely ignores the findings of the trial court and substitutes its judgment in place of the court's findings. Contrary to the majority's conclusion that many of the court's findings were clearly erroneous, I believe that they are adequately supported by the record. See *State* v. *Wheat*, 52 Conn. App. 115, 116, 725 A.2d 993 ("[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses" [internal quotation marks omitted]), cert. denied, 249 Conn. 901, 732 A.2d 777 (1999); see also *State* v. *Sanchez*, 128 Conn. App. 1, 9 n.4, 15 A.3d 1182 ("[w]e must defer to the [finder] of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]), cert. granted on other grounds, 301 Conn. 919, 21 A.3d 465 (2011). Although appellate courts reviewing the reliability of identification evidence "defer less than [they] normally do to the . . . fact finding of the trial court"; (internal quotation marks omitted) *State* v. *Marquez*, 291 Conn. 122, 136 n.13, 967 A.2d 56, cert. denied, U.S. , 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009); this court cannot "disturb the findings of the trial court as to subordinate facts unless the record reveals clear and

manifest error." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 548. In my view, such clear and manifest error did not occur in this case.[1]

"[R]eliability is the linchpin in determining the admission of identification testimony . . . . To determine whether an identification that resulted from an unnecessarily suggestive procedure is reliable, the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [victim] to view the criminal at the time of the crime, the [victim's] degree of attention, the accuracy of [the victim's] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification]." (Internal quotation marks omitted.) Id., 553. Our Supreme Court recently held that this standard, originally derived from *Neil* v. *Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and reaffirmed in *Manson* v. *Brathwaite*, supra, 432 U.S. 114, applies under both the federal and state constitutions. *State* v. *Ledbetter*, supra, 275 Conn. 559–60, 568–69.

A

The Victim's Opportunity to Observe the Assailant

Regarding the first reliability factor, the victim's opportunity to observe the assailant at the time of the crime, the court found that there was sufficient lighting for the victim to observe the defendant's face. As noted by the majority, Jose Rivera, a Hartford police officer, testified that, in his experience, the area where the incident occurred is well lit. Hector Robles, another Hartford police officer, testified that he saw a scuffle, which included two women in red minidresses, from approximately 150 feet away and that, after breaking up the fight, three people entered a newer model gray Infiniti automobile and drove away. Later in the evening, Robles discovered a trail of blood splatter, which he followed "down to the northeast corner of High and Allyn" Streets in Hartford near the site of the altercation at issue. Robles' ability to observe both the scuffle from 150 feet away and the trail of blood supports the court's finding that the area was sufficiently well lit for the victim to see the defendant's face. Additionally, as explained by the trial court, the victim's ability to observe the make and color of the car and his ability to describe the assailant's face as freckled "is also indicative of sufficient opportunity and illumination to observe from a slight distance of at most a few feet." Therefore, there is clearly adequate support for the court's finding that there was sufficient lighting for the victim to observe the defendant's face.

The court also found, as to the first factor, that the victim "had a couple of beers" over the period of an hour and one-half and that there was no evidence that the victim's "capacity to observe was in any way

impaired or diminished during the incident due to alcohol." Although the first portion of this finding, which was that the victim only "had a couple of beers," may well be clearly erroneous, the second portion, regarding the victim's capacity to observe, is not. The majority accurately points out that, contrary to the court's finding, the victim testified that he had "[a]t least four" beers on the night in question.[2] The trial court was correct, however, that there was no evidence that the victim's alcohol consumption impaired his capacity to observe. Jeff Rousseau, a Hartford police sergeant, testified that when he visited the victim at Hartford Hospital shortly after the incident, he could not detect the odor of alcohol on the victim's breath. Additionally, the victim testified that he weighed approximately 250 pounds at the time of the incident. Therefore, despite the likely error in finding that the victim consumed only "a couple of beers" that night, the court's finding that the alcohol did not impair his ability to observe is supported adequately by the record. See *State* v. *Ledbetter*, supra, 275 Conn. 556 (trial court found "evidence did not indicate that [victim] was inebriated or that his ability to observe was impaired in any way"). In any event, the difference between two beers and four beers is almost certainly of limited significance given the circumstances of this case.

B

The Victim's Degree of Attention

Regarding the second factor, the victim's degree of attention, the court found that the victim "got a good hard look at his assailant." The court cited the evidence that the victim provided a description of the assailant's freckles, which "confirms that his concentration was on the perpetrator's face . . . ." The court also cited the evidence that "the victim and the other person were face to face at a very slight distance from one another [in] a fistfight, arm's length apart." Therefore, according to the court, the evidence "clearly establishes that the victim's concentration was on and directed toward the face of the person with whom he was fighting."

The majority, however, asserts that the court "made no explicit determination of the length of time [the victim] and his assailant were face-to-face" and "substantially compressed the time period in which a victim may be found to have a 'good hard look.' " I disagree. I believe that the court found that the victim and his assailant were face to face for a period of five to ten seconds.[3] I also believe that this time period was not too brief to render the court's finding that the victim had a "good hard look" at the defendant clearly erroneous. In fact, many of the witnesses in reported "fleeting glance" cases actually have had a worse opportunity to view the assailants than did the victim in this case. See, e.g., *State* v. *Piskorski*, 177 Conn. 677, 739, 742–43, 419 A.2d 866 (witness observed, from inside moving

car on opposite side of street, assailant inside lighted building "for a matter of seconds"), cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979), superseded by statute on other grounds as stated in *State* v. *Canady*, 187 Conn. 281, 283–84, 445 A.2d 895 (1982); *State* v. *Cubano*, 9 Conn. App. 548, 553, 520 A.2d 250 (1987) (witness "had the opportunity to observe [assailant] from five to ten seconds from a distance of about ten feet");[4] *State* v. *Tate*, 9 Conn. App. 141, 146, 516 A.2d 1375 (1986) (witness viewed assailant from twenty-five feet away for "a few seconds" but could not describe his face). In contrast, and as noted by the trial court, the victim in this case was no more than arm's length away from the defendant and was looking directly at his face.

The majority further asserts that the incident lasted only "a few seconds . . . in the context of a heated verbal exchange during which [the victim] was struck twice by his assailant, in the shoulder and facial area, and during which [the victim] struck the assailant two times," and that, in light of the stress of the incident, the accuracy of the victim's observation and recall was compromised. This court, however, is not permitted to engage in speculation or fact-finding. Because "a trial court is far better equipped than this court to make" factual determinations; (internal quotation marks omitted) *State* v. *Ledbetter*, supra, 275 Conn. 548; I do not believe that the circumstances cited by the majority warrant the conclusion that the trial court's finding that the victim had a good, hard look at the assailant's face was clear error.[5]

C

Accuracy of the Victim's Prior Description of the Assailant

As to the third factor, the accuracy of the victim's prior description of the assailant, the court found that the description given to Rousseau "was entirely accurate with reference to race, gender, height . . . and weight." The court also stated: "Based on my observation of the defendant in the course [of] trial . . . the description, 'a stocky build,' was entirely accurate." Moreover, the court explained, "most importantly, the victim did describe the one salient, distinguishing facial feature, a freckled face."[6]

The majority states that the victim's description "includes no indicia of uniqueness" because "[t]he record is devoid of any information as to whether [having freckles] is unique or common in the subject population . . . ." The majority's assertion is accurate but beside the point. "[Triers of fact] are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life, but, on the contrary, to apply them

to the facts in hand . . . .” (Internal quotation marks omitted.) *State* v. *Rosario*, 113 Conn. App. 79, 88–89, 966 A.2d 249, cert. denied, 291 Conn. 912, 969 A.2d 176 (2009). It was well within the trial court's discretion to take note of the freckles as a distinguishing characteristic. Therefore, in my view, the record provides adequate support for the court's finding that the victim's description was accurate and that the victim described “the one salient, distinguishing facial feature . . . .”

D

Level of Certainty Demonstrated at the Identification

Regarding the fourth factor, the level of certainty,[7] the court found that the victim's level of certainty of the “identification of the accused was exceedingly high.” Although Hartford police Detective Jeremy Bilbo testified that the victim could not identify the individual in the photograph, the victim testified that *he stated*, after viewing the photograph, that the individual in the photograph “was the one that I had the altercation with.” The victim also testified that he recognized instantly the individual in the photograph as the assailant. As explained by the court, the victim “testified repeatedly that he was face to face with the defendant at close proximity. When asked why he was able to identify [the defendant], he replied . . . ‘cause we were face to face’ . . . . [The victim] testified [that] he identified [the defendant] not . . . ‘because he was the person who came up on the screen, but’ . . . ‘cause he's the person that assaulted me.’ ” The court found the victim credible as to his motivation to identify the actual assailant rather than simply having “ ‘just anyone arrested’ . . . .”[8]

The majority states that this factor “warrants little discussion because, at the time of the confrontation, [the victim] was told, and not asked, by Bilbo that the photograph he was being shown was that of the defendant and that the defendant was a suspect in the case whose arrest Bilbo was seeking.” The corruptive influence of the suggestive procedure, although undoubtedly relevant to the ultimate determination of reliability, does not, under present law, negate the court's finding that the victim had a high level of certainty as to the identification. The trial court was in a better position to determine the credibility of the victim's testimony regarding his certainty; see *State* v. *Garcia*, 299 Conn. 39, 52–53, 7 A.3d 355 (2010); and this determination was not clearly erroneous.

E

Time between the Crime and the Identification

Regarding the last factor, the time between the incident and the identification, it is unclear what the court found as to the date of the identification. The victim and Bilbo gave contradictory testimony regarding when the identification procedure occurred. The victim stated

that the identification occurred on May 28, 2008, whereas Bilbo stated that it occurred six or seven months after June 5, 2008, in the late fall or early winter of 2008. In its findings, the court recounted this contradictory testimony but never explicitly stated which date it found more credible.[9] Even assuming that the victim identified the defendant ten months after the incident, this fact would not change my conclusion that the victim's out-of-court identification was reliable.

F

Ultimate Determination of Reliability

Certainly, there are valid reasons to question the reliability of the victim's identification, namely, the highly suggestive identification procedure, the nine year age discrepancy in the victim's description,[10] and, assuming that the court believed Bilbo's testimony, the approximately ten month gap between the incident and the identification. But see *State* v. *Mitchell*, 127 Conn. App. 526, 531, 537, 16 A.3d 730 (despite unnecessarily suggestive one-on-one show-up at crime scene, victim's identification was reliable), cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); *State* v. *Sanchez*, supra, 128 Conn. App. 10–11 (even though victim described assailant as "young" but defendant was forty-two years old and identification occurred sixteen months after crime, victim's identification was reliable). As explained in *Ledbetter*, however, "[a]lthough some factors may have weighed against the reliability of the identification, the trial court gave adequate consideration to those factors in making its determination, and the defendant fails to satisfy his burden of establishing that the trial court abused its discretion in reaching that determination." *State* v. *Ledbetter*, supra, 275 Conn. 556. In light of the trial court's detailed and thoughtful findings, which are adequately supported by the record, I would uphold the court's ultimate determination of reliability because its conclusion was reasonable. Most importantly, as explained by the trial court, the victim's "observation of his assailant, while only for a few seconds, was from a distance of no more than a couple of feet, possibly just inches, while positioned face to face with the assailant, looking directly at his face, and there is no indication that the victim's eyesight was other than fully normal."

A comparison of the facts of this case to other Connecticut cases in which this court and our Supreme Court have concluded that the identification was sufficiently reliable supports the trial court's conclusion that the identification was reliable. In *State* v. *Ledbetter*, supra, 275 Conn. 534, which the trial court relied on in making its reliability determination, the facts are somewhat similar to this case. The attack at issue in *Ledbetter* occurred at night, but the area was well lit. Id., 553. The victim "had an opportunity to observe his assailants' faces . . . from a very close range," and, "although the struggle occurred over a matter of sec-

onds, [the victim] looked at and focused on [the assailants'] faces." Id. Our Supreme Court explained that "a good hard look will pass muster even if it occurs during a fleeting glance"; (internal quotation marks omitted) id.; and, "the trial court specifically found that [the victim] got a good, hard look . . . at each of his two assailants . . . ." (Internal quotation marks omitted.) Id., 554. The victim had a high degree of attention on the assailants' faces. Id. "Although the description was general, [the victim] provided gender, race, approximate height, approximate weight, body type and that one of the assailants wore a hat. He also provided a description of the vehicle and the weapon used by the assailants." Id. Additionally, as argued by the defendant in *Ledbetter*, the victim "had been awake for approximately eighteen hours at the time of the incident and imbibed three to four and one-half ounces of alcohol earlier in the evening." Id., 555. The trial court found, however, "that the evidence did not indicate that [the victim] was inebriated or that his ability to observe was impaired in any way." Id., 556.[11]

Applying the *Manson* reliability factors and indulging "in every reasonable presumption in favor of the trial court's ruling"; (internal quotation marks omitted) id., 548; I do not believe that the trial court abused its discretion in admitting the victim's out-of-court identification. I therefore also would uphold the court's conclusion regarding the admissibility of his in-court identification. See *State* v. *Wooten*, 227 Conn. 677, 698, 631 A.2d 271 (1993) ("[g]enerally . . . conclusion that the victim's out-of-court identification of the defendant was constitutional would foreclose the defendant's argument that any subsequent in-court identification was inadmissible").

II

HARMLESS ERROR ANALYSIS

Even assuming that the trial court improperly admitted the victim's out-of-court and in-court identifications, I believe that harmless error analysis is available and that the court's error was harmless beyond a reasonable doubt because of Christina Miano's identification testimony.[12]

The majority relies on *State* v. *Gordon*, 185 Conn. 402, 420, 441 A.2d 119 (1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), for the proposition that our Supreme Court has "emphatically rejected the notion that the doctrine of harmless error is available to uphold a conviction in which the trial court admitted unnecessarily suggestive and unreliable witness identification testimony." The majority's conclusion that *Gordon* has any vitality is tenuous in light of subsequent case law.

As a preliminary matter, *Gordon* is clearly distinguishable on its facts because it was a case in which

the victim was the *only* person who identified the *anonymous* assailant. *State* v. *Gordon*, supra, 185 Conn. 421. Here, there was another eyewitness, Miano, who knew the defendant and clearly identified him not only as the individual engaged in the one-on-one altercation with the victim but also as one of the individuals engaged in the subsequent three-on-one altercation.[13] See *State* v. *Monteeth*, 208 Conn. 202, 217 n.1, 544 A.2d 1199 (1988) (*Healey*, *J.*, concurring) ("I am aware that *State* v. *Gordon* [supra, 420] . . . holds that harmless error analysis is not used 'whenever the erroneous admission of an unnecessarily suggestive and unreliable identification has violated a defendant's constitutional rights.' That case, however, concerned an unreliable identification by the victim, who was the *sole* source of identification evidence. Here, the unreliable identification is to be considered in the light of the untainted and reliable information by . . . another eyewitness who had a better opportunity to view the defendant during the robbery and made the initial identification." [Emphasis in original.]).

On a more fundamental level, since it was decided, *Gordon* has *never once* been applied to reverse a conviction, much less a conviction involving an assailant known by one of the witnesses. Just six years and seven months after *Gordon* was decided, our Supreme Court in *State* v. *Milner*, 206 Conn. 512, 536 n.11, 539 A.2d 80 (1988), apparently recognizing that *Gordon* was an outlier, effectively overruled *Gordon* without explicitly stating so: "Even if we assume, arguendo, that the [witness] identification resulted from unnecessarily suggestive procedures and the defendant was able to demonstrate the identification was also unreliable, *we would*, *nevertheless*, *find the erroneous admission of* [*the witness'*] *identification testimony to constitute harmless error beyond a reasonable doubt in light of the extensive identification evidence otherwise presented that we have previously outlined in detail.* See *Rose* v. *Clark*, 478 U.S. 570, 578–79, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *Moore* v. *Illinois*, 434 U.S. 220, 232, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977), on remand, 577 F.2d 411 (7th Cir. 1978), cert. denied, 440 U.S. 919, 99 S. Ct. 1242, 59 L. Ed. 2d 471 (1979); *Gilbert* v. *California*, 388 U.S. 263, 273–74, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967); *State* v. *Gordon*, [supra, 185 Conn. 420–21]; *State* v. *Packard*, 184 Conn. 258, 269 n.5, 439 A.2d 983 (1981); *State* v. *Oliver*, 161 Conn. 348, 357, 288 A.2d 81 (1971)." (Emphasis added.) *State* v. *Milner*, supra, 536 n.11;[14] see also *Manson* v. *Brathwaite*, supra, 432 U.S. 118 n.* (Stevens, J., concurring) ("[p]roperly analyzed, however, [other evidence of guilt] would be relevant to a question whether error, if any, in admitting identification testimony was harmless"). Although the court did not explicitly state that it was overruling *Gordon*, that was the clear import of the case.[15]

Interestingly, *Gordon* is one of the cases cited by the

court in *Milner* in the previous quotation. See *State* v. *Milner*, supra, 206 Conn. 536 n.11. The court in *Milner* cited the pages on which the *Gordon* court applied the harmless error rule despite its holding, earlier in that decision, that harmless error analysis is never available when an unnecessarily suggestive and unreliable identification has been admitted. Id., citing *State* v. *Gordon*, supra, 185 Conn. 420–21. The court in *Gordon* explained that the erroneous admission of the identifications would not have been harmless in any event because they came from "the only eyewitness to the crime . . . ." *State* v. *Gordon*, supra, 421. Therefore, the court in *Milner* appears to have been distinguishing the facts of that case from those in *Gordon*, concluding in effect that the broad rule in *Gordon* is not applicable when other identification evidence has been presented. See *State* v. *Milner*, supra, 536 n.11.

The majority notes that *Gordon* was cited approvingly in *State* v. *Perez*, 198 Conn. 68, 72 n.3, 502 A.2d 368 (1985), but fails to note that *Perez* was decided three years prior to *Milner*. The majority also notes, correctly, that *Gordon* was cited in *State* v. *Patterson*, 31 Conn. App. 278, 300, 624 A.2d 1146 (1993), rev'd, 230 Conn. 385, 645 A.2d 535 (1994). In that case, *Gordon* was cited as an example of a case in which "some constitutional rights [were held to be] so basic and so fundamental that their breach can never be deemed harmless." Id. In *Patterson*, however, this court did not address identification evidence and, thus, did not *apply Gordon*'s holding.

Moreover, the legal landscape supporting the premise of the *Gordon* holding—that, when a defendant's constitutional rights have been violated, harmless error analysis is the exception to the general rule, only to be used "sparingly, in a few, discrete circumstances"; *State* v. *Gordon*, supra, 185 Conn. 419—has changed substantially since *Gordon* was decided. As our Supreme Court explained in *State* v. *Jenkins*, 271 Conn. 165, 856 A.2d 383 (2004): "It is well settled that most improprieties, even those of constitutional magnitude, can be harmless and, therefore, do not require the reversal of a defendant's conviction. . . . [T]he appellate harmless error doctrine is rooted in that fundamental purpose of our criminal justice system—to convict the guilty and acquit the innocent. The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. . . . Accordingly, we forgo harmless error analysis *only in rare instances involving a structural defect* of constitutional magnitude. . . . Structural defect cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected . . . . *Ari-*

zona v. *Fulminante*, [499 U.S. 279, 309–10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)]. These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. [Id., 310]. Such errors infect the entire trial process, *Brecht* v. *Abrahamson*, [507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)], and necessarily render a trial fundamentally unfair, [*Rose* v. *Clark*, supra, 478 U.S. 577]. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for [the] determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair. . . . *Neder* v. *United States*, [527 U.S. 1, 8–9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)]." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Jenkins*, supra, 186–87.

As explained in *State* v. *Lopez*, 271 Conn. 724, 733, 859 A.2d 898 (2004): "[T]he [United States] Supreme Court has noted that there is a 'very limited class of cases' involving error that is 'structural,' that is to say, error that transcends the criminal process. *Johnson* v. *United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), citing *Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (defective reasonable doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of self-representation at trial); *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (biased trial judge)."

Therefore, the statement in *Gordon*, supra, 185 Conn. 419, that Connecticut appellate courts "sometimes apply the 'harmless error' exception, but only sparingly, in a few, discrete circumstances," lacks viability. Instead, in deciding whether harmless error analysis applies, Connecticut appellate courts determine whether the constitutional violation constitutes the rare case in which "[a] structural error creates a defect in the trial mechanism such that . . . it remains abundantly clear that the trial process was flawed significantly." *State* v. *Lopez*, supra, 271 Conn. 739; see also *State* v. *Morales*, 121 Conn. App. 767, 772, 996 A.2d 1206, cert. denied, 298 Conn. 909, 4 A.3d 835 (2010); *State* v. *Zapata*, 119 Conn. App. 660, 684–85, 989 A.2d 626, cert. denied, 296 Conn. 906, 992 A.2d 1136 (2010); *State* v. *Stuart*, 113 Conn. App. 541, 550–52, 967 A.2d 532, cert. denied, 293 Conn. 922, 980 A.2d 914 (2009). The admission of the victim's identifications of the defendant, which the majority finds to have been error, was not a "structural defect affecting the framework within which the trial proceeds"; *Arizona* v. *Fulmi-*

nante, supra, 499 U.S. 310; but, rather, was an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id., 307–308. In light of *Milner*, and because the premise underlying the rationale in *Gordon* has been vitiated,[16] I conclude that harmless error analysis is available in this case.

Applying the harmless error doctrine to this case, and conceding that the state's burden is a heavy one, I conclude nonetheless that any error in admitting the victim's identification was harmless beyond a reasonable doubt. The following standard of review governs this issue. "The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 306–307, 25 A.3d 648 (2011). "[T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 252, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). "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. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Ramirez*, 79 Conn. App. 572, 587, 830 A.2d 1165, cert. denied, 267 Conn. 902, 838 A.2d 211, 212 (2003).

My conclusion that the admission of the victim's identification was harmless is grounded in the fact that the jury heard testimony from Miano, an eyewitness who knew all of the parties involved in the incident and spent a significant amount of time with the defendant on the night in question. Miano provided the following relevant testimony. On the night in question, she traveled with her then boyfriend, Robert Acevedo; Robert's sister, Anna Acevedo; and the defendant, who was Anna Acevedo's boyfriend at the time. The four rode in Robert Acevedo's silver Infiniti automobile to Club NV. While inside Club NV, Miano briefly visited with the victim,

who was good friends with the father of Miano's children. After Robert Acevedo attempted to hit the victim with his automobile in retaliation for speaking with Miano, the defendant exited the automobile[17] and began pushing the victim. Soon thereafter, Anna Acevedo and Robert Acevedo exited the automobile, and the victim was on the ground. Miano saw Anna Acevedo, Robert Acevedo, and the defendant fighting with the victim while the victim was on the ground.[18] Miano eventually exited the automobile and attempted to help the victim by pulling Anna Acevedo off of him. The defendant was "right there" when Miano did this. As two police officers arrived to break up the fight, "they all got off [the victim at] the same time."

Although, as the majority points out, Miano's testimony is less than clear as to exactly what occurred during the attack, she unhesitatingly identified the defendant as the individual engaged in the one-on-one altercation with the victim, testifying that she did not have any doubts that the defendant was the first person out of the automobile confronting the victim. She also clearly identified the defendant as one of the three individuals "around" the defendant when he was on the ground.

The defendant was *not* convicted of stabbing the victim, as the court granted the defendant's motion for a judgment of acquittal as to the charge of assault in the first degree while aided by two or more persons. The defendant was convicted only of *accessory to assault in the first degree by means of a dangerous instrument*.[19] As explained in part I of the majority opinion, to obtain a conviction for this crime, "the state was not required to prove that the defendant intended to cause serious physical injury *by means of a dangerous instrument*, or to prove that the defendant was even aware that another participant had a dangerous instrument or knife." (Emphasis in original.) Rather, it was sufficient for the state to prove that the defendant intended to aid the principal in causing the victim serious physical injury and that the principal used a dangerous instrument.

Thus, at the least, the jury could have inferred on the basis of the testimony of the victim and Miano that the defendant struck the victim while he was on the ground, that the defendant intended to aid Robert Acevedo or Anna Acevedo in causing serious physical injury to the victim, and that Robert Acevedo or Anna Acevedo used a dangerous instrument to cause the serious physical injury. The victim testified, however, that he had no idea who stabbed him or who was hitting him after he was on the ground.[20] He merely testified that, because he was hit from different angles at the same time, he believed that three or four people assaulted him while he was on the ground and shielding his head. Therefore, even if the victim's identification of the defendant had

not been admitted, it seems clear that the jury still would have reached the same conclusion—that the defendant struck the victim with the requisite intent while he was on the ground—on the basis of Miano's testimony and the victim's untainted testimony. Because the defendant was convicted for his participation in the three-on-one altercation, and the victim could not identify any of the individuals involved in *that* altercation, the jury must have believed Miano's testimony. Simply put, in light of the other evidence, the victim's identification of the defendant as the assailant in the one-on-one altercation provided only incidental support for the defendant's conviction. See *State* v. *Dupigney*, 78 Conn. App. 111, 121, 826 A.2d 241 (witness identification "added little to the evidence before the jury"), cert. denied, 266 Conn. 919, 837 A.2d 801 (2003).

Finally, I underscore that this is not a case in which the victim was the only witness to identify an unknown assailant. It also is not a case in which a witness obtained a fleeting glance of an anonymous bank robber. See *State* v. *Ledbetter*, supra, 275 Conn. 553 ("[w]e have said of identification that a good hard look will pass muster even if it occurs during a fleeting glance" [internal quotation marks omitted]). Miano was not merely a member of the public who witnessed the assault. She was a social acquaintance of the defendant,[21] she arrived at the crime scene with the defendant, and she left the crime scene with him after the attack. As the finder of fact, the jury is the arbiter of credibility; *State* v. *Fleming*, 111 Conn. App. 337, 345, 958 A.2d 1271 (2008), cert. denied, 290 Conn. 903, 962 A.2d 794 (2009); and, apparently, the jury found Miano credible in light of the victim's testimony that he could not identify any of the individuals who struck him while he was on the ground.[22] The defendant had the full opportunity to explore any weaknesses in Miano's testimony at trial. "Any uncertainty on the witness' part goes toward the weight of the evidence rather than the admissibility." *State* v. *Figueroa*, supra, 235 Conn. 159. Notwithstanding legitimate concerns about eyewitness identification procedures generally and the nettlesome aspects of this case, the reality is that many of these concerns dissipate in cases in which a witness identifies a perpetrator known to him or her.

In light of the likely impact of the victim's identification and the result of the trial, I believe that any error did not contribute to the verdict. Accordingly, even assuming the identification was unreliable and should not have been admitted, I would find such error harmless.

I would affirm the judgment of the trial court.

[1] It is important to remember that the trial court's findings only were for the purpose of ruling on the defendant's *motion to suppress* the victim's identifications. After a trial court makes the threshold determination of reliability, it is ultimately up to the jury to make credibility assessments, weigh the evidence and decide, on its own, whether the identification was sufficiently reliable. See *State* v. *Outing*, supra, 298 Conn. 60–61; *State* v.

Morgan, 274 Conn. 790, 802, 877 A.2d 739 (2005). Indeed, in this case, the trial court provided extensive jury instructions on the factors to consider, including the *Manson* reliability factors, in determining the reliability of identification evidence. The court then explained: "You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crimes charged or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the identifications, you must find the defendant not guilty." It is well established that "[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 485, 832 A.2d 626 (2003).

[2] The victim initially testified that he only had "[a] couple beers." In light of his subsequent clarification, however, it seems probable that he had at least four beers.

[3] The court stated: "*It is recognized* that the defendant's viewing of his opposing combatant was very brief, according to [the victim]—a duration of five or ten seconds." (Emphasis added.) The court also stated, earlier in its oral findings, that "[p]unching continued for approximately ten seconds."

[4] *State* v. *Cubano*, supra, 9 Conn. App. 548, should not be confused with *State* v. *Cubano*, 203 Conn. 81, 523 A.2d 495 (1987). Both cases involved the same defendant and similar factual circumstances but separate incidents.

[5] The majority also cites "the conflicting testimony regarding the location of the assailant immediately before the incident" as "erod[ing] confidence in the accuracy of [the victim's] observations at the moment." I do not agree. Trial courts often are tasked with sorting through conflicting testimony to reach factual conclusions. See *State* v. *Jimenez*, 73 Conn. App. 664, 668, 808 A.2d 1190 ("[i]t is the trier's exclusive province to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" [internal quotation marks omitted]), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002). Therefore, the conflicting testimony regarding the location of the defendant prior to the assault, in my view, is not sufficient to render the court's finding that the victim had a good, hard look at the defendant clearly erroneous.

[6] The court noted that "there was no evidence that the defendant had any other conspicuous features, facial or otherwise, that would or should have been noticed in these circumstances: tattoos, scars—dental abnormalities, et cetera. And similarly, there was no evidence [that the defendant] customarily [wore] any distinctive attire or jewelry, scarf, bandana, gold chain, earring, et cetera."

[7] I recognize that our Supreme Court and the high courts of our sister states have considered the growing body of scientific knowledge regarding the ability of an eyewitness to recall events and that the area of eyewitness identification is undergoing some long overdue and much-needed reevaluation. See Eyewitness Identification Task Force, state of Connecticut, Report Pursuant to Public Act 11-252, § 2 (February 8, 2012) available at http://www.cga.ct.gov/jud/eyewitness/docs/Final%20Report.pdf (last visited February 21, 2012) (recommending mandatory sequential rather than simultaneous presentation of photographic arrays using double-blind procedure or, if not practicable, blind procedure); Substitute House Bill No. 5501, February Sess. 2012 (adopting recommendations of eyewitness identification task force); Report on Bills Favorably Reported by Committee, Judiciary, House Bill No. 5501 (April 5, 2012). These courts have noted that a victim's degree of certainty may not be a valid predictor of reliability. See *State* v. *Ledbetter*, supra, 275 Conn. 566–69; see also *State* v. *Outing*, supra, 298 Conn. 102–107 (*Palmer*, *J.*, concurring); *State* v. *Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). In *Outing*, the issue was whether defendants may present *expert testimony* regarding the reliability of identifications. Additionally, in *Henderson*, the New Jersey Supreme Court modified that state's framework for evaluating eyewitness identification evidence under the New Jersey constitution. *State* v. *Henderson*, supra, 287 n.10 ("We have no authority, of course, to modify *Manson*. The expanded protections stem from the due process rights guaranteed under the State Constitution."). In *State* v. *Ledbetter*, supra, 569, however, our Supreme Court concluded that the scientific studies demonstrating a weak correlation between a victim's certainty and the accuracy of the identification were "insufficient to tilt the balance of the [*State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992)] analysis in favor of the defendant" and, thus, declined to abandon the *Manson* factors under the state constitution. Therefore, at the present time, this court is still bound to employ the *Manson* factors, one of which is the witness' certainty.

[8] The victim was asked during cross-examination: "You wanted someone

arrested for this. Right?" The victim responded: "Not just anyone, just justice." The court's credibility determination is also supported by the fact that the victim freely admitted when he could not identify individuals. The victim explained that during the investigation, also conducted by Bilbo, into an unrelated incident in which the victim was shot, he could not identify any individuals because he focused on the gun rather than the assailant's face. Additionally, after examining a photographic array containing Robert Acevedo's photograph, the victim told Bilbo that he could not identify anyone but that two photographs, one of which was Robert Acevedo's, looked most like an individual involved in the incident.

[9] The court did, however, find the victim's testimony more credible than Bilbo's as to whether the victim actually identified the defendant.

[10] The court also noted that the victim's description did not include any clothing description. It explained, however, that prior to being hit from behind, the victim was focused directly on the assailant's face rather than on his clothing.

[11] Other cases with arguably weaker indicia of reliability include *State* v. *St. John*, 282 Conn. 260, 919 A.2d 452 (2007), and *State* v. *Liptak*, 21 Conn. App. 248, 573 A.2d 323, cert. denied, 215 Conn. 809, 576 A.2d 540 (1990). In *State* v. *St. John*, supra, 263, the witness was "walking her dog across the street when she suddenly heard loud voices coming from the direction of the gas station" between 9 and 9:30 p.m. She "looked over at the brightly lit station and saw a man come out of the convenience store, cross the island between the pumps and head in her direction before angling off to the right. . . . As he crossed the island, the man removed the mask, revealing the side of his face." Id. The trial court found that the witness "had a good opportunity to view the robber. The gas station was well lit, she was wearing her glasses and it was a clear day. Although she was about 100 feet away and initially had only a side view of the perpetrator, she was able to see him for a substantial enough period of time to obtain a good look." Id., 279–80. Additionally, "[a]lthough she was not 100 percent certain that the defendant was the robber, she indicated that the defendant and the robber were similar in appearance." Id. Our Supreme Court first concluded that the identification procedure was not unnecessarily suggestive but then concluded that, even assuming the procedure was unnecessarily suggestive, the identification was reliable. Id., 279, 280–81.

In *State* v. *Liptak*, supra, 21 Conn. App. 250, the witness initially observed, for six seconds, in his car's rear view mirror, an elderly woman being mugged in the parking lot of a bank. He only "saw the profile of the perpetrator, a man with a beard wearing very large, rounded, dark tinted sunglasses and a gray sweatshirt with the hood up." Id. After the perpetrator ran away and was out of sight, the witness drove around, looking "for someone running or walking away and saw no one, but noted a maroon car travelling ahead of him at the speed limit . . . . The car stopped at two stop signs. Both times, the driver of the car turned his head from side to side, enabling [the witness] to view his profile"; id.; which matched the profile he saw at the bank. Id., 251. The trial court suppressed the witness' out-of-court identification because he saw the back profile of a long haired, bearded man at the police station and was asked prior to the identification if he saw anyone who looked familiar. Id. The trial court, however, admitted the witness' in-court identification as nonetheless reliable. Id., 252. This court upheld the trial court's determination, explaining that the witness "had a good opportunity to view the crime," he was sure the vehicle he was following was driven by the defendant, he had a high degree of attention, and his description was accurate. Id., 253. This court also noted that "the in-court identification was not impermissibly distant in time from the incident itself. The trial took place approximately eight months after the crime. Our Supreme Court has held identifications made ten months after the crime to be reliable." Id.

[12] Although I recognize that I need not address the issue of harmlessness in light of my conclusion that the victim's identifications properly were admitted, I nonetheless choose to express my view on this topic because it presents an alternate ground for affirming the judgment of the trial court.

[13] The trial court found that the police built their case on the information furnished by Miano. I also note, as discussed herein, that while Miano unambiguously identified the defendant as one of the individuals engaged in the three-on-one altercation while the victim was on the ground, the victim admitted that he could not identify any of the individuals who struck him when he was on the ground.

[14] I respectfully disagree with the majority's contention that this quotation from *Milner* is mere dicta. See *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6,

31 A.3d 363 (2011) ("[Dicta] includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding of the case. . . . [I]t is not [dicta] [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] [we] will thereafter recognize as a binding decision." [Internal quotation marks omitted.]).

[15] *Gordon*, well-intentioned though it may have been, essentially has been ignored from the start. Research has failed to locate a single other jurisdiction that follows the rule that harmless error analysis is unavailable when an identification is found to be both unnecessarily suggestive and unreliable. Moreover, application of this rule would lead to absurd results in some cases. For example, imagine a bank robbery case in which the out-of-court identification made by a teller is unnecessarily suggestive and unreliable but is admitted at trial. The bank robber is clearly depicted on videotape; he is found outside the bank in possession of marked bills; his mother testifies that he admitted to her that he robbed the bank; five independent witnesses who were inside the bank identify him and he confesses on television. Under *Gordon*, harmless error analysis would not be available following a conviction of the bank robber, and this court would be required to reverse the conviction.

[16] The majority dismisses the fact that Connecticut appellate courts "forgo harmless error analysis only in rare instances involving a structural defect of constitutional magnitude"; *State* v. *Jenkins*, supra, 271 Conn. 187; on the ground that "*Gordon* does not rest on constitutional principles, but, rather, it is based on policy." Whether *Gordon*'s holding is viewed as resting on a constitutional principle or on judicial policy, one of the premises underlying its rationale—the availability of harmless error analysis to constitutional violations "only sparingly, in a few, discrete circumstances"; *State* v. *Gordon*, supra, 185 Conn. 419—is no longer an accurate statement of the law, thus calling *Gordon*'s holding into doubt, especially in light of *State* v. *Milner*, supra, 206 Conn. 536 n.11.

[17] The majority states that Miano "was unsure whether the defendant had gotten into the motor vehicle before the altercation." Miano testified that she thought the defendant, who, up until that point was missing, opened the automobile door, never fully sat down, and then exited the automobile.

[18] Miano did pull back from this statement at various times, testifying that while the victim was on the ground, Anna Acevedo, Robert Acevedo, and the defendant were "around him" but that she did not know exactly what they were doing. Later in her testimony, however, Miano testified that she did not have any doubts that Anna Acevedo and Robert Acevedo joined the altercation.

[19] The jury found the defendant not guilty of conspiracy to commit assault in the first degree while aided by two or more persons and conspiracy to commit assault in the first degree with a dangerous instrument.

[20] The defendant's counsel conducted the following cross-examination of the victim:

"Q. And you testified the other day that after this unknown party interjected themselves in, now, a second altercation, you never saw the passenger hit you again, did you?

"A. No.

"Q. You don't—in fact, you don't know what the passenger did after this unknown person interjected themselves in the altercation, do you?

"A. Correct.

"Q. For all you know, that person could have left the scene.

"A. Yes, sir."

[21] Miano testified that she had known the defendant for at least one month prior to the incident and that she "hung out with" him along with Robert Acevedo and Anna Acevedo.

[22] The majority asserts that Miano's "familiarity with [the victim] together with her relationship with Robert Acevedo reasonably could have put her objectivity in doubt for the fact finders." Contrary to this speculation that Miano may have been biased in favor of the victim, the jury, in fact, heard evidence indicating that Miano may have been motivated to minimize the inculpatory nature of her testimony. Miano testified that she did not want to be involved in the case because she feared her family would face retaliation in response to her cooperation. The majority also emphasizes Miano's testimony that she was "tipsy" on the night of the incident. Miano explained, however, that she had no trouble walking, could see clearly, and could

hear fine.