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D'AURIA, J., with whom PALMER and McDONALD, Js., join, dissenting. I agree with the Appellate Court's conclusion that the trial court improperly admitted certain testimony as lay opinions over the objections of the defendant, Kenny Holley. *State* v. *Holley*, 160 Conn. App. 578, 619–22, 631–37, 127 A.3d 221 (2015). Specifically, I agree that the trial court improperly admitted Sergeant Donald Olson's testimony that the wounds on the wrist of Donele Taylor, the defendant's alleged accomplice, were the result of a bite. I also agree with the Appellate Court that the trial court improperly allowed Detective Jason Smola to give his opinion that an object depicted in the surveillance video from the bus was a "sneaker box," even though Smola had not personally observed either the object or the events the video depicted. Because I conclude that the admission of this testimony was both improper and harmful, I would affirm the Appellate Court's judgment reversing the defendant's conviction and remanding the case to the trial court for a new trial. I therefore respectfully dissent from the majority's decision to the contrary.

I

I begin with Olson's testimony that Taylor had a bite on his wrist. Olson had interviewed Taylor in the weeks after the murder. During the interview, Taylor told Olson that the victim had bitten him while they struggled inside the victim's apartment, shortly before the victim was shot. At trial, the state asked Olson about the nature of wounds that Taylor had on him at the time of the interview, and Olson responded that Taylor had a "bite on his wrist . . . ." The trial court allowed the testimony on the ground that it was based on what Olson "observed."

The testimony concerning the cause of the marks on Taylor's wrist was critical evidence for the state. The state had strong evidence linking Taylor to the victim's murder, but lacked similarly strong evidence against the defendant. To implicate the defendant in the victim's murder, the state relied on testimony about a conversation between Taylor and someone else, apparently the defendant, while they rode on a bus just after the crime occurred. A fellow passenger on the bus testified that she overheard Taylor telling his companion, "I can't believe I got bit by the dog—by a dog," to which the companion, allegedly the defendant, responded, "that was a big dog; it was a big dog." The state suggested in its closing argument that the victim was the "big dog" that had bitten Taylor during a struggle and that the defendant's reply indicated he was aware of the size of the "big dog" that had inflicted the bite and he had witnessed the bite occur, helping to place him inside the apartment when Taylor and victim struggled.

Olson's testimony helped to establish that the wounds on Taylor's wrists were, in fact, caused by a bite and, thus, bolstered the credibility and accuracy of the passenger's testimony about the statements she heard on the bus.

The Appellate Court concluded, however, that Olson's testimony was not a proper lay opinion because a lay witness generally may not testify about the cause of a wound. See *State* v. *Holley*, supra, 160 Conn. App. 621–22. Regardless of whether I would agree with this general proposition, I am persuaded that Olson's testimony should not have been admitted as a lay opinion. No foundation was laid to show that his testimony was based on his personal observations rather than on inadmissible hearsay from Taylor, and his testimony was not helpful to the jury.

A

Taylor told Olson that his wounds were the result of a bite. But Olson could not testify as to what Taylor had told him because admitting Taylor's hearsay statements into evidence would have violated the defendant's constitutional right to confront his accusers. The confrontation clause of the Sixth Amendment to the United States constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend VI. This "bedrock" guarantee requires that the defendant have the opportunity to cross-examine any witness who gives testimony against him, and this applies to certain out-of-court statements that the state might seek to introduce into evidence. *Crawford* v. *Washington*, 541 U.S. 36, 42, 50–52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause bars the state from admitting into evidence, as proof of guilt, any out-of-court statement that is "testimonial" in nature unless the defendant has had the opportunity to cross-examine the speaker. Id., 55–56, 68. "[T]estimonial" statements include confessions given to police officers and statements made in response to police interrogation. Id., 51–52, 68; accord *State* v. *Pierre*, 277 Conn. 42, 77–78, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

Taylor's statements to Olson concerning his wound being a bite mark were unquestionably testimonial in nature, as he made the statements when he confessed to Olson of having participated in the victim's murder, and, thus, were barred from admission unless they comported with *Crawford*. The state intended to use them as evidence of the defendant's guilt, but Taylor was unavailable for cross-examination. When called to the stand outside the presence of the jury, Taylor refused to answer any questions and was held in contempt. The defendant, thus, could not cross-examine him concerning his statements, and, consequently, they could not be admitted into evidence against the defendant. See

Crawford v. *Washington*, supra, 541 U.S. 68. It follows that Olson could not testify as to what Taylor had told him about his wounds.

B

To avoid this confrontation clause problem, the state argues that the trial court properly admitted Olson's testimony as a lay opinion based on his *observations* of Taylor's injuries, not on what Taylor had *told* him. I am not persuaded.

At the time the evidence was admitted, no foundation whatsoever had been laid to establish that Olson's testimony was an opinion formed on the basis of his personal observations, rather than a parroting of what Taylor had told him. Indeed, all of the information put before the trial court up to the point it admitted Olson's testimony established only that Olson had learned that Taylor's wounds were caused by a bite because Taylor had *told* him so.

Before trial, the defendant filed a motion in limine to exclude any of Taylor's statements to police from being admitted into evidence. As recounted by defense counsel during argument on the motion, Taylor gave two separate confessions to police. In the first, Taylor implicated himself as the shooter and said that someone else had been inside the apartment, but he did not know who that person was or what they were doing there. In the second, Taylor said that he had been in the apartment when the victim was murdered, but that the defendant had shot the victim. While giving these confessions to Olson, Taylor indicated that he still had bite marks and scratches from the struggle with the victim, and he said that the victim had bit him on his wrist. During argument on the motion, the state explained that it did not intend to offer into evidence Taylor's statement implicating the defendant, but would offer his statement that he had a bite on his wrist and that it came from the victim. The state argued that Taylor's statement was admissible because, although hearsay, it was against the speaker's penal interest, rendering it admissible. See *State* v. *Smith*, 289 Conn. 598, 630–31, 960 A.2d 993 (2008). The defendant responded that the state's position was mistaken under *Crawford*, requiring the exclusion of Taylor's statement because of his unavailability for cross-examination. The court took the motion under advisement, explaining that it wanted to further consider whether the statement was against Taylor's penal interest. The defendant reiterated that, even if it was otherwise admissible as a statement against penal interest, Taylor's statement would be barred by *Crawford*.

The admissibility of Taylor's statement, which had significant inconsistencies, came up again early in the trial. During the first day of trial, the state called as a witness Officer Woodrow Tinsley, who had photo-

graphed Taylor's injuries. When the state asked Tinsley whether he had been asked to take photographs of Taylor, the defendant's counsel objected and asked to be heard outside the presence of the jury. The defendant apparently was concerned that the state would attempt to elicit Taylor's statements about having a bite mark from the victim, but the state responded that it intended to ask Tinsley only whether he had photographed Taylor's injuries, not about their nature or how he received them. The state further offered, however, that it intended to have Olson testify "that in talking to . . . Taylor . . . Taylor at some point indicated that [he had] injuries on his hands [that] came from being bit by [the victim] during the course of the altercation that resulted in [the victim's] death." The defendant renewed his arguments that any such testimony would be barred under *Crawford*. After further argument, the state represented that the court had already ruled Taylor's statements admissible, stating: "I thought Your Honor had agreed with me that the statements about the bite marks were nontestimonial in nature . . . ." Even though the record contains no indication that the trial court had previously ruled on the matter but indeed indicates it had reserved ruling, the court agreed with the state, responding: "I had; I remember that. Everything else was barred; that was allowed in." Defense counsel protested, stating that "I did not believe that you had ruled on that specific part," and the court replied, "Well, if it wasn't clear, I'm ruling now: it's allowed in." The defendant continued to argue the effect of *Crawford* and asked permission to further brief the issue, but the trial court denied the request.

Two days later, on the third day of trial, the trial court changed its mind about admitting Taylor's statement concerning the bite mark. The court explained: "Now, I did some research on my own on the statements and right now, based on what the evidence is, because the defense hasn't challenged anything concerning that statement, I'm going to disallow the statement concerning the bite. I understand that it is a statement against penal interest; the entire confession was a statement against penal interest. But if there's even a hint anywhere that that bite was anything other than where it came from, that statement does come in, and that includes during closing argument as well. I will reopen this case if there's a hint during closing argument that the bite was anything other than what it is. So, remember, I'll stop the trial and allow it in at that point."[1] The state responded: "I will intend to have—based on Your Honor's ruling, I will still intend to have [Olson] come back today and testify that he interviewed [Taylor] and during the course of that interview they took the photographs . . . ." The court responded: "That's fine. But that doesn't indicate any statement."

When Olson testified, however, the state asked him whether Taylor had any injuries on him and the nature

of those injuries. The following colloquy took place:

"[The Prosecutor]: Continuing on with the investigation into the . . . homicide, did you have occasion to meet with [Taylor] on July 16, [2009]?

"[Olson]: Yes.

"[The Prosecutor]: And did you speak to [Taylor], yes or no?

"[Olson]: Yes.

"[The Prosecutor]: And, as a result of your conversations with [Taylor] and what you knew to date in the investigation, did you ask [Tinsley] to take any photographs of injuries to [Taylor]?

"[Olson]: Yes.

"[The Prosecutor]: What was the nature of the injuries?

"[Olson]: He had a bite on his wrist and—"

"[Defense Counsel]: Objection, Your Honor.

"[The Court]: I'm going to allow the testimony. That's what he observed. Thank you. You can cross-examine him about that."

The state argues that, contrary to the Appellate Court's conclusion, the trial court properly admitted Olson's testimony as a lay opinion about what had caused Taylor's injuries based on his observations of Taylor's wounds. I disagree.

Without any foundation that Olson's testimony was an opinion based on his own perceptions, rather than on the inadmissible information he learned from Taylor, it could not properly be admitted as a lay opinion. Lay witnesses generally must testify only to facts within their personal knowledge, not their opinions, and the jury may draw its own conclusions from those facts. See *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 406, 880 A.2d 151 (2005). Nevertheless, opinions from lay witnesses sometimes may better convey an idea to the jury, rather than having the witness recount each individual perception leading to that opinion, for example, an opinion that a person was intoxicated. See, e.g., *State* v. *McNally*, 39 Conn. App. 419, 424, 665 A.2d 137, cert. denied, 235 Conn. 931, 667 A.2d 1269 (1995). A party seeking to admit a lay opinion must first establish that it is based on the witness' own perceptions before it may properly be admitted. See Conn. Code Evid. § 7-1 (lay witness may not testify to opinion "unless the opinion is rationally based on the perception of the witness"); see also *Jacobs* v. *General Electric Co.*, supra, 406–407 (lay witness opinions must be based on personal knowledge of witness). Hearsay does not constitute a proper foundation for a lay opinion. See, e.g., *United States* v. *Lloyd*, 807 F.3d 1128, 1154 (9th Cir. 2015) ("a lay opinion witness may not testify based on

speculation [or] rely on hearsay" [internal quotation marks omitted]); *United States* v. *Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014) (lay opinion that relies on hearsay is inadmissible because it is not based on witness' own perceptions), cert. denied, U.S. , 135 S. Ct. 2350, 192 L. Ed. 2d 149 (2015); *United States* v. *Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (lay opinion must be based on personal perceptions and cannot be based on information learned from others).[2]

No proper foundation was laid in the present case. Up to the point when Olson testified that Taylor's wounds were from a bite, Olson had said exactly nothing about forming an opinion of the cause of Taylor's wounds on the basis of his own observations. The only basis given in the record for his testimony was that Taylor had *told* Olson that the victim had bit him. In fact, the questions leading up to Olson's testimony about the bite were directed at Olson's *conversation* with Taylor, not his observations. The state had asked Olson "did you *speak* to [Taylor]" and whether, as a result of his "*conversations*" with Taylor, he had asked another officer to photograph Taylor's injuries.[3] (Emphasis added.) Consequently, at the time the trial court admitted the testimony, it had no basis for concluding that Olson's testimony was based on his observations rather than what Taylor had told him. Its decision to admit this lay opinion evidence was without an adequate foundation.

After the evidence was admitted—and after the trial court's unfounded conclusion that the testimony was based on the witness' observations—Olson clarified that Taylor "*appeared* to have a bite mark on his wrist . . . ." (Emphasis added.) In my view, this was too little and too late to cure the trial court's error. This comment was too late to serve as a foundation for Olson's testimony because it came after the trial court had ruled the testimony admissible and, therefore, it could not possibly have served as a valid basis for the court's exercise of its discretion in admitting the testimony. Even if this after the fact remark could have somehow cured the trial court's error, it was too little because it did not establish whether Olson had reached an independent opinion based solely on the appearance of the wound, or whether his observations were simply consistent with what he had already heard from Taylor. In fact, shortly after this testimony, Olson specifically acknowledged that he had learned that the wound was a bite from talking to Taylor, as evidenced by the following exchange:

"[The Prosecutor]: After talking to [Taylor], yes or no, did you learn what that injury was on his wrist?

"[Olson]: Yes.

"[The Prosecutor]: And what was it?

"[Olson]: A bite."

The defendant's counsel then objected, and the trial

court sustained the objection, but the import of the testimony is clear—Olson learned that Taylor's wounds were caused by a bite on the basis of what Taylor had told him.[4] With nothing in the record to establish that Olson had reached an opinion independently based on his own perceptions—an opinion derived from admissible evidence—I conclude that the state failed to lay a proper foundation for the admission of this testimony.

I acknowledge that the trial court has broad discretion when ruling on evidentiary matters, but, in the present case, that discretion was constrained by the confrontation clause and the limitations on admitting a lay opinion. Ordinarily, the trial court might be permitted to infer from the circumstances that a witness' testimony was likely based on that witness' own perceptions, but, due to the constitutional implications of the evidence at issue in the present case, the trial court had a responsibility to act with greater care when considering whether to admit this evidence. The trial court's ruling to exclude evidence barred from admission pursuant to the federal constitution was critical to ensuring that the defendant received a fair trial. The court knew from the state's representations that Olson likely derived his knowledge of the bite from what Taylor had told him. It was the responsibility of the trial court to ensure that Olson's supposed opinion was not based on this hearsay, which was constitutionally inadmissible pursuant to *Crawford*. The state failed to lay a proper foundation for Olson's testimony, and the trial court did not insist that it do so. On this record, I am persuaded that the admission of Olson's testimony was not a proper exercise of the court's discretion.

C

Besides the lack of a proper foundation, the trial court's admission of Olson's testimony runs afoul of another requirement for admitting lay opinion testimony. A lay opinion must not only be based on the witness's perceptions, but also must be "helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Conn. Code Evid. § 7-1. Olson's supposed opinion on the origin of Taylor's wound was unhelpful and unnecessary because the police had taken photographs depicting how the wounds looked when Olson interviewed Taylor. Olson testified that those photographs were a fair and accurate representation of the marks on Taylor as he saw them. The helpfulness of a lay opinion describing a wound is diminished, if not extinguished, when the jury has a photograph that fairly and accurately depicts the wound as the witness saw it. Of course, photographs sometimes fail to capture precisely how something appeared and some additional description or an opinion may be called for to facilitate a complete understanding of what the witness saw. The state, however, laid no foundation to suggest that the photograph had not fully

captured the appearance of the wound, such that Olson's opinion testimony would be of help. Indeed, the state acknowledged in its brief to this court that "Olson's testimony was cumulative of the photographs in evidence." The state was free to use the picture of Taylor's wound alone to argue that the jury should conclude that it was caused by a bite, but, given the confrontation clause problems associated with Olson's opinion testimony and the lack of any demonstrated need to present that opinion as evidence when the photograph was available, I agree with the Appellate Court that the trial court exceeded the bounds of its discretion when admitting Olson's testimony.

II

I also agree with the Appellate Court that the trial court improperly allowed Smola to testify as to his belief that the defendant was carrying a shoebox in a backpack shortly after the crime occurred. According to the information put before the trial court, the state had a video recording from a bus depicting Taylor and another person, apparently the defendant, getting onto the bus near the location of the murder shortly after it occurred. The defendant is seen carrying a backpack, which he opened to retrieve money to pay the bus fare. Through the small opening in the backpack, there appears to be an object of some sort inside. At an earlier probable cause hearing, Smola testified that he had no personal knowledge of what was in the backpack—he had not personally witnessed the events depicted in the video, and the backpack and the object inside were not recovered by police. Instead, the state proffered that Smola had a belief about what was in the backpack based on what he saw in the video. In addition, the state proffered that Taylor had told officers during his confessions that he had looked in the defendant's backpack while on the bus and saw a shoebox inside.

The defendant moved to preclude Smola from identifying the object in the backpack because he lacked personal knowledge of what it was, but the trial court allowed him to testify as to his opinion about what the object looked like. While the video was playing before the jury at trial, the prosecutor noted that there appeared to be a backpack depicted in the video and asked Smola, "[w]ere you able to determine *through your investigation* what you believe is contained within that backpack?" (Emphasis added.) After the trial court overruled the defendant's objection, Smola answered: "It's my belief *through investigation* it was a sneaker box." (Emphasis added.) The testimony was significant for the state because the victim was known to sell shoes, and the defendant's possession of a shoebox shortly after the crime could implicate him in the robbery and murder.

In my view, however, Smola's testimony was not properly admitted as a lay opinion. The majority does

not directly address the propriety of admitting his testimony, but, before concluding that any error was harmless, cites to mixed authority about whether witnesses generally may narrate events depicted in a video that the witness did not personally observe. Compare *United States* v. *Begay*, 42 F.3d 486, 502–503 (9th Cir. 1994) with *People* v. *Sykes*, 972 N.E.2d 1272, 1278 (Ill. App. 2012). Perhaps, in some circumstances, our rules of evidence should permit a lay witness to narrate or opine about what they see depicted in a video, even without personal knowledge of what is depicted. As the majority points out, courts are divided on whether such narration is appropriate. But that is not what Smola was asked to do in the present case. The state's question instead asked Smola whether he had determined *through his investigation*, what he believed was in the backpack. The question was not limited to asking what Smola had seen in the video, but explicitly asked him to draw more broadly upon other knowledge from his investigation when answering. This would, presumably, include the information he had learned from Taylor's statements to police—hearsay evidence that was inadmissible under *Crawford*. See part I A of this dissenting opinion. By the time the state posed the question, it had previously alerted the trial court to the inadmissible hearsay evidence that Taylor told police that the defendant had a shoebox in his backpack. As a result, the court should have acted with greater care to ensure that Smola's testimony was founded solely on his own impressions and did not improperly rely on hearsay evidence barred from admission by the confrontation clause. The state's question, however, explicitly invited Smola to rely on this inadmissible hearsay evidence. Moreover, because the jurors could view the video for themselves and draw their own conclusions about what it depicted, Smola's opinion about what the backpack contained would be unhelpful and unnecessary to the members of the jury. The state certainly could point to the video during its closing argument and claim to the jury that the object shown in the backpack could be a shoebox, but I am persuaded that Smola's testimony, impermissibly bolstering the state's theory in response to the state's question, should have been excluded.

III

Although the Appellate Court concluded that Olson's and Smola's challenged testimony could not properly be admitted as lay opinions, it did not conduct a harmful error analysis because it had separately concluded that the defendant was entitled to a new trial based on a violation of his right to present a defense. *State* v. *Holley*, supra, 160 Conn. App. 619 n.15. Even though constitutional concerns are present, upon conducting my own analysis under the standard of review for a nonconstitutional error, I "do not have the requisite fair assurance that the error did not substantially affect the verdict," leading me to conclude that the defendant has estab-

lished that a new trial is warranted. (Internal quotation marks omitted.) *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012). In my view, the improperly admitted evidence helped to significantly strengthen the state's evidence tying the defendant to the murder, which was otherwise rather thin.

The state had strong evidence implicating Taylor in the victim's murder, including DNA evidence placing him inside the victim's apartment and Taylor's confessions, but the state's case against the defendant was not nearly as strong. With Taylor's statements inadmissible against the defendant, the state's case turned on its ability to present other evidence to show that the defendant had actually participated in the robbery and/or the murder. The state had no forensic evidence to accomplish this—investigators did not find either the defendant's fingerprints or DNA in the apartment. Other than Taylor's inadmissible statements, the state had no eyewitness testimony to directly implicate the defendant. Unlike Taylor, the defendant did not give any self-incriminating statements to police.

Without the challenged testimony from Olson and Smola, the state's evidence linking the defendant to the murder was limited. The state had video recordings that put Taylor together with the defendant as they ran to a bus stop and boarded a bus near the crime scene around the time the crime occurred. Those recordings, however, did not show whether the defendant had been inside the apartment with Taylor when the victim was murdered, leaving open the possibility that he had met up with Taylor after Taylor had left the apartment, or that the defendant had waited outside the apartment while Taylor went in, without any knowledge of what Taylor might have been doing inside.

The only other evidence that arguably could have placed the defendant inside the apartment was the testimony from another passenger on the bus, who had overheard the defendant make the "big dog" comment. The passenger testified, however, that she did not see any injuries or blood on the person who said he had been bitten. The state also called the bus driver to testify that, after boarding the bus, Taylor had asked for a tissue, presumably for his wounds, but the driver testified that he did not see anything about Taylor that would have required use of a tissue.

To connect the defendant to the murder with this evidence, the jury was required to draw a chain of inferences. The jury would first have to conclude that the defendant was the person with Taylor and then infer from their comments on the bus that Taylor had recently been bitten, that the "big dog" that bit Taylor was actually the victim, and that the defendant's knowledge of the victim's size suggested that the defendant had seen the victim and knew that he had bitten Taylor. From these inferences, the jury would have to be satis-

fied, beyond a reasonable doubt, that the defendant had participated in the crime. Without the challenged testimony from Olson and Smola, any conviction would thus turn solely on the credibility and accuracy of the testimony from the passenger and the bus driver.

Olson's and Smola's challenged testimony thus significantly filled in holes in the state's case. Olson's testimony that Taylor, in fact, had a bite wound on his wrist in the days after the murder corroborated the passenger's testimony and helped mitigate the impact of the evidence that neither the passenger nor the bus driver had noticed any wounds on Taylor while he was on the bus. In addition, Smola's testimony that the defendant had a shoebox with him on the bus just after the crime provided an alternative basis for inferring that the defendant had been inside the victim's apartment and had participated in the crime by suggesting that he may have taken the shoebox from the victim's apartment, implicating him in the robbery and murder. I am not sufficiently confident that the jury would have found the defendant guilty of the crimes charged without this additional evidence. I thus cannot conclude that the trial court's evidentiary errors were harmless.

The state nevertheless asserts that the admission of Olson's and Smola's challenged testimony, even if improper, was harmless. I disagree.

The state first asserts that Olson's testimony about Taylor having been bitten on his wrist was harmless because the jury could have viewed the photographs and likely would have concluded for itself that the marks were from a bite, even in the absence of Olson's testimony. I have viewed those same photographs, and, like the Appellate Court, I am not persuaded. The marks on Taylor's wrist, as depicted in the photographs, appear to be a series of small, parallel scratches, rather than a small arc of impressions that one might normally associate with a bite wound.

Moreover, the lack of clarity about what the photographs depict is demonstrated by the state's arguments to this court, which express some confusion about which of Taylor's marks were the result of a bite. Olson testified that the marks from what he believed to be a bite were on Taylor's wrist and that Taylor also had other lacerations on his hand. But, in its brief and at oral argument, the state directed this court's attention to the photographs and argued that the bite might have been on Taylor's hand, not his wrist, and that Olson was possibly mistaken in his testimony about where Taylor had been bitten. The state's lack of certainty, a product of the lack of foundation for Olson's testimony to begin with, demonstrates just how unclear it is from the photographs that the marks on Taylor's wrist (or hand) were caused by a bite. As a result, I disagree that Olson's confirmatory testimony concerning the nature of the marks was inconsequential.

That the marks on Taylor's wrist do not obviously resemble bite marks, along with the state's supposition that Olson might have testified incorrectly about where the bite marks were located, also undercuts, in my view, a conclusion that Olson was testifying from his own observation when he identified the marks on Taylor's wrist as being caused by a bite. The state did not seek to qualify Olson as an expert in recognizing whether marks on a person's skin were caused by a bite. Because it is not at all clear what the marks depicted in the photograph are, or what caused them, admitting Olson's testimony created a danger that the jury might infer that he knew they were bite marks from some source other than his observation, such as from Taylor. This would have been a fair inference for the jury given that Olson soon after stated exactly that in response to a question that plainly violated the trial court's ruling excluding Taylor's statements from evidence, which forced the trial court to strike the testimony.

As for Smola's testimony identifying the shoebox, the state asserts that the trial court's instructions to the jury mitigated any harm it might have caused. The state notes that the trial court instructed that it was up to the jury members to determine for themselves what was depicted in the video from the bus. The state argues that we must presume the jury followed this instruction and reached its own conclusions about what the video depicted, without placing added weight on Smola's testimony. Of course, this argument further establishes why it was unnecessary and unhelpful to admit any opinion from Smola about what the video depicted. In any event, the court's instruction did not address the state's question and Smola's response concerning the defendant's possession of a shoebox. Specifically, as discussed previously, the state's question did not limit the basis for Smola's testimony about the defendant having a shoebox in his backpack to only what Smola had seen in the video. He was instead asked whether, *as a result of his investigation* generally, he had formed a belief about what was in the backpack. This question allowed Smola to draw upon a broader range of information beyond what the video depicted. The jury, thus, could have accepted the trial court's instruction to draw its own conclusion about what the video depicted, but, nevertheless, placed added weight on Smola's testimony on the basis of their belief that he had somehow confirmed—using information other than the video—that the defendant did, in fact, have a shoebox with him on the bus shortly after the crime occurred.

Lastly, I do not believe that subsequent testimony from Smola during cross-examination eliminated any harm from the improper admission of Smola's testimony regarding the shoebox. During cross-examination, the defendant's counsel asked a question presumably aimed at having Smola agree that he had

no personal knowledge of what was contained in the backpack. In the course of responding, however, Smola stated that Taylor had told the police that the defendant had a shoebox with him. The defendant's counsel asked, "[i]sn't it true that you cannot testify that that item, that thing in the backpack," at which point Smola interrupted and responded, "[s]omeone told me that that was . . . Taylor said that." The defendant moved to strike the answer, but the trial court allowed it because it was responsive to the question. Because the defendant elicited this testimony, its admission would not be precluded by *Crawford* if otherwise admissible. In my view, however, this exchange did not overcome any harm from the trial court's earlier improper admission of Smola's testimony about the defendant having a shoebox in the backpack because the defendant should not have been placed in the position of having to cross-examine Smola about the shoebox in the first place. If the trial court had properly excluded Smola's challenged testimony, the defendant would have had no reason to question Smola about it, and Smola's response about what Taylor had told police, which the state could not cross examine Taylor about because he was unavailable, would never have been put before the jury.

Because I am persuaded that these evidentiary errors require reversal of the defendant's conviction, I would affirm the Appellate Court decision on these grounds, without considering the first certified question of whether the trial court violated the defendant's constitutional right to present a defense or the defendant's alternative grounds for affirmance. I therefore take no position on how those remaining questions should be decided, and I respectfully dissent from the majority's decision to reverse the Appellate Court's judgment.

[1] The defendant challenged this ruling on appeal to the Appellate Court, which concluded that this conditional *Crawford* ruling violated the defendant's right to present a defense. *State* v. *Holley*, supra, 160 Conn. App. 611–14. The majority does not directly address the propriety of the trial court's conditional ruling, but, rather, concludes that the defendant cannot establish a violation to his constitutional right to present a defense because he did not demonstrate what admissible evidence or argument, if any, that the court's conditional ruling prevented him from offering. My conclusion that the trial court improperly admitted certain evidence as lay testimony renders it unnecessary for me to reach that issue, although I note my concern that, irrespective of whether the trial court's ruling violated the defendant's right to present a defense, such a conditional ruling does not appear to have been proper under *Crawford*.

[2] Because the federal rule of evidence governing opinion testimony by a lay witness is sufficiently similar to § 7-1 of the Connecticut Code of Evidence, federal case law may assist our analysis. *Jacobs* v. *General Electric Co.*, supra, 275 Conn. 407.

[3] Because Olson had not taken the photographs, the trial court could not infer from the existence of the photographs alone that Olson might have observed the marks closely enough when photographing them to form an opinion about their cause.

[4] As a result of this exchange, the defendant's counsel immediately moved for a mistrial, arguing that the state had violated the trial court's *Crawford* ruling, and counsel asked to heard outside of the jury's presence. The trial court denied the motion and the request. Like the Appellate Court, I do not reach the defendant's alternative claim on appeal that the trial court should have granted the motion for a mistrial. Nevertheless, it is impossible to overlook that excluding the evidence barred by *Crawford* (i.e., Taylor's

hearsay statements) was fundamental to a fair trial. As evidenced by the Appellate Court's decision, and the majority's decision not to address its merits head on, the trial court's conditional *Crawford* ruling was highly questionable—another issue I do not reach. See footnote 1 of this opinion. Whatever the merits of the trial court's conditional *Crawford* ruling, however, the state almost immediately violated it, eliciting testimony the trial court had expressly barred. Under those circumstances, granting the motion for a mistrial would have been defensible.