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PALMER, J., concurring. I agree with the conclusion of the majority and with most of its reasoning. I concur separately only because I disagree with that portion of the majority's opinion in which the majority concludes that the improper remarks of the state's attorney were invited by defense counsel's comments during closing arguments. As the Appellate Court observed, "[t]he prosecutor's [improper] remarks that he was 'burnt out' during the trial and 'having a hard time focusing' were made in response to defense counsel's argument that 'if there was some sort of ruckus going on in the bedroom when the kids were sleeping in the other room, I think the kids would wake up in the middle of the night.' In essence, defense counsel was arguing that the fact that [the victim] did not scream upon finding the defendant in her bed with her supported an inference that the encounter was consensual. . . . [Defense counsel thus] was arguing one possible permissible inference *from the evidence*. This was proper argument and . . . it did not invite a response in rebuttal which referred to irrelevant matters *not in evidence*." (Emphasis in original.) *State v. Sinvil*, 76 Conn. App. 761, 771–72, 821 A.2d 813 (2003). Although defense counsel's comments *did* invite the state's attorney's *proper* rebuttal argument that there had been no screaming or, alternatively, that the victim's children might not have heard any such screaming because they frequently slept with the television on, defense counsel's comments cannot fairly be characterized as inviting the state's attorney's *improper* rebuttal argument that, during trial, he was "burnt out," "having a hard time focusing," and that he "should have asked [the victim] why she didn't scream."

In my view, even though the improper comments of the state's attorney about his physical condition and his failure to ask the victim why she did not scream were not invited, I nevertheless do not believe that, under all the circumstances, those comments rise to the level of a due process violation. I therefore agree with the conclusion of the majority that, contrary to the determination of the Appellate Court, the improper remarks of the state's attorney do not warrant a new trial. Accordingly, I concur in the judgment.

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