STATE OF CONNECTICUT *v.* DOUGLAS SAWYER
(SC 16972)

Sullivan, C. J., and Borden, Norcott, Katz,
Palmer, Vertefeuille and Zarella, Js.[1]

Argued November 21, 2005—officially released August 8, 2006

Norman A. Pattis, with whom, on the brief, was *David B. Bachman*, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Vernon Oliver*, former assistant state's attorney, for the appellee (state).

Michael Fitzpatrick and *Richard Emanuel* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Gerard A. Smyth, chief public defender, *Martin Zeldis*, chief of legal services, and *Kent Drager* and *Lauren Weisfeld*, senior assistant public defenders, filed a brief for the office of the chief public defender as amicus curiae.

Opinion

ZARELLA, J. The defendant, Douglas Sawyer, appeals, following our grant of certification,[2] from the judgment of the Appellate Court affirming his conviction, rendered after a jury trial, of one count each of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (A), sexual assault in the third degree in violation of § 53a-72a (a) (1) (B), threatening in violation of General Statutes (Rev. to 1997) § 53a-62 (a) (1) and reckless endangerment in the first degree in violation of General Statutes § 53a-63 (a). On appeal, the defendant claims that the Appellate Court improperly concluded that (1) the trial court did not abuse

its discretion in permitting the state to introduce into evidence certain uncharged misconduct evidence, and (2) even if the trial court improperly permitted the state to introduce the uncharged misconduct evidence, the evidentiary error was harmless. We agree with the defendant and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "On July 15, 1998, the victim, D,[3] lived with her boyfriend, her children and another couple in the town of Plymouth. After D's boyfriend and the other couple left to go shopping, D remained at home to watch her children. Also present in D's residence were [the] children of the defendant.[4] The defendant, who lived across the street from D, observed the children playing in a canoe that was in the backyard. He became upset, began to yell at the children and ordered them to stop playing in the canoe. The defendant went over and then entered D's home, and started to berate her for allowing the children to play [in] the canoe.

"D went upstairs to watch television, and the defendant, uninvited, subsequently followed her into the living room. D was sitting in a rocking chair, and the defendant stood behind her. He then proceeded to reach under her shirt and grope her breasts. D repeatedly asked him to stop and to leave her alone. She also informed the defendant that she would tell her boyfriend what he had done.

"The defendant then proceeded to unbutton D's jeans and inserted his finger into her vagina. D told him to stop. She attempted to push him off, but was unable to do so due to the defendant's size and superior strength. The defendant took a folding knife out of a sheath that he carried on his belt and opened it, exposing the blade. The defendant told her that he would kill her if she told anyone what had occurred. He then placed the knife blade on D's chest, causing her pain, but did not use enough force to break the skin.

"The defendant and D heard a motor vehicle arrive at the house. It was D's boyfriend and the other couple who lived with D returning from grocery shopping. The defendant folded the knife blade, placed it back in the sheath and left [D's] home.

"D exhibited noticeable changes in her behavior after the July 15, 1998 assault. She became depressed, scared and withdrawn. On August 20, 1998, approximately five weeks after the defendant had assaulted her, D told her boyfriend and others about the sexual assault perpetrated by the defendant. D filed a complaint with the police department, and the defendant subsequently was arrested and charged." *State* v. *Sawyer*, 74 Conn. App. 743, 745–46, 813 A.2d 1073 (2003).

Prior to the start of the trial, the defendant filed a

motion in limine to preclude testimony by his former wife, C, who also was D's sister, pertaining to allegations of uncharged misconduct.[5] During the hearing on the motion, the state argued that C should be allowed to testify under the common plan or scheme and identity exceptions to the evidentiary rule precluding the admission of uncharged misconduct evidence. The state also argued that testimony regarding an incident that had occurred in 1997 in which the defendant, in a fit of anger, used a knife to puncture the tire of his brother-in-law's car should be admitted because it was relevant to prove the defendant's motive and use of weapons to intimidate, to harass and to compel others to comply with his demands. Defense counsel objected to the admission of the uncharged misconduct evidence on the grounds of relevance and its tendency to present the defendant's character and reputation in a negative light. After considering the arguments of the parties, the trial court deferred a ruling on the motion until after the state had made an offer of proof as to the relevancy of the proffered evidence.

In the state's subsequent offer of proof, C testified outside the presence of the jury that, on April 22, 2001, a few months prior to commencement of trial, she and the defendant had a telephone conversation in which the defendant said that he wanted to have sex with her one more time.[6] C further testified that she had told the defendant that she was not interested because they were no longer married and that she did not want anything more to do with him. The defendant responded by threatening that, if she refused to agree, he would make her life miserable.

The trial court overruled the defendant's objection and determined that the proposed testimony was admissible because D and C were similarly situated. The court noted that both women were (1) unmarried when they were threatened by the defendant, (2) of diminished mental capacity, (3) inferior in strength and intellect to the defendant, (4) accessible to the defendant because he lived in close proximity, and (5) propositioned by the defendant and threatened with harm if they did not submit to his demands.[7]

After the jury returned to the courtroom, C testified that, approximately three months before the start of the trial, she notified the police that the defendant had been harassing her on the telephone and that in one of their conversations he had threatened that if she did not agree to have sex with him he would make her life miserable. Upon her refusal, he further threatened that, if she did not do as he wished, he would tell the person she was dating at the time that she and the defendant were having sex, even though they, in fact, were not. C also testified that the defendant's threats frightened her because he had threatened her in the past and that she had reason to believe that his threats "might

come true."

On cross-examination, the defendant admitted that he had told C that he would make her life miserable if she did not agree to have sex with him but denied that she was afraid of him or that his request constituted a threat. Following similar testimony on recross-examination, the state queried the defendant regarding his uncontrollable temper and threats he had made to others.

The state also queried the defendant on cross-examination regarding his collection of knives. The defendant indicated that he had possessed a knife similar to the one that was used to threaten D but that it had been confiscated by the police. Over defense counsel's objection, the court permitted the state to ask the defendant why the knife had been confiscated. The defendant then described an incident in which he had slashed a tire on his brother-in-law's automobile after his brother-in-law failed to comply with the defendant's command to remove the vehicle from the defendant's property. Following this testimony, the state elicited further information from the defendant regarding his threat to slash a second tire if the vehicle was not removed immediately and his subsequent arrest and plea of guilty to the offense.

The defendant's testimony about the tire slashing incident was followed by a series of questions regarding his intimidating persona, the efficacy of his threats, his mordacious temper, his history of medication to control emotional instability, his participation in anger management counseling for more than ten years, his counselor's observation that he was "a ticking time bomb," his fear of losing his temper in court and other threats that he had made to C during their marriage. Defense counsel objected to this line of questioning as irrelevant. On recross-examination, however, the state continued to elicit information from the defendant regarding the threatening telephone call and the tire slashing incident.

During closing arguments, the state asserted that the defendant was attempting to intimidate D when he placed the knife against her chest and ordered her to remain silent about the incident. The state argued that D believed that the defendant would kill her if she reported the incident because she had been present during the tire slashing incident and understood that the defendant had followed through on his threats in the past. Defense counsel responded that evidence regarding the defendant's emotional instability and the tire slashing incident was not relevant to the issue of the defendant's guilt because the defendant was not in D's home when the crime was committed, D's testimony was not credible and the testimony of the other state's witnesses was conflicting.[8]

When the uncharged misconduct evidence was admit-

ted, defense counsel did not request, and the court did not give, a cautionary instruction to the jury as to the limited purpose for which the evidence should be considered. In its final charge to the jury, however, the court repeatedly instructed that testimony regarding the threatening telephone call and the tire slashing incident was being admitted solely to establish the existence of intent to commit the charged crimes, the identity[9] of the person who committed the crimes and "the means that might have been useful or necessary for the commission of the crime[s] . . . ."[10]

Thereafter, the jury found the defendant guilty on all counts, and the court rendered judgment sentencing him to a total effective term of twenty years incarceration, suspended after twelve years, and ten years probation. On appeal to the Appellate Court, the defendant claimed that the trial court had abused its discretion in admitting the uncharged misconduct evidence. *State* v. *Sawyer*, supra, 74 Conn. App. 744–45.

The Appellate Court rejected the defendant's claims and concluded that the trial court had not abused its discretion in admitting the uncharged misconduct evidence. Id., 755. The Appellate Court determined that substantial similarities existed between the charged crimes and the uncharged misconduct evidence that were relevant to the identity of D's assailant. Id., 752. The Appellate Court further concluded that, even if the uncharged misconduct evidence had been admitted improperly, the evidentiary error was harmless.[11] Id., 759–60. This appeal followed.

I

The defendant first challenges the Appellate Court's conclusion that the trial court did not abuse its discretion in permitting the state to introduce evidence of the threatening telephone call to establish the identity of D's assailant. He claims that the trial court should have excluded this testimony because it bore little or no similarity to the charged crimes. We agree.

"The rules governing the admissibility of evidence of a criminal defendant's prior misconduct are well established.[12] Although evidence of prior unconnected crimes is inadmissible to demonstrate the defendant's bad character or to suggest that the defendant has a propensity for criminal behavior . . . such evidence may be admissible for other purposes, such as to prove knowledge, intent, motive, and common scheme or design, if the trial court determines, in the exercise of judicial discretion, that the probative value of the evidence outweighs its prejudicial tendency. . . . That evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material . . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the

correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *State* v. *Ellis*, 270 Conn. 337, 354–55, 852 A.2d 676 (2004).

"The first threshold for the use of evidence of other crimes or misconduct on the issue of identity is that the methods used be sufficiently unique to warrant a reasonable inference that the person who performed one misdeed also did the other. . . . [I]n proffering [prior misconduct] evidence [t]o prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused . . . much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature. . . . There should [be no] significant differences in the context and modus operandi of the crimes. . . . In order to determine if this threshold criterion for admissibility has been met, we must examine the proffered evidence and compare it to the charged offenses. . . .

"In comparing the proffered misconduct evidence and the crimes with which the defendant was charged, [t]he fact that some of the similarities between the offenses were legal or relatively common occurrences when standing alone does not . . . negate the uniqueness of the offenses when viewed as a whole. It is the distinctive combination of actions which forms the signature or modus operandi of the crime . . . and it is this criminal logo which justifies the inference that the individual who committed the first offense also committed the second. . . . In other words, [t]he process of construing an inference of [i]dentity . . . usually [consists of] adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together make it more probable that they coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the general principle of relevancy." (Citations omitted; internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 665–66, 826 A.2d 1021 (2003).

In *State* v. *Figueroa*, 235 Conn. 145, 665 A.2d 63 (1995), this court determined that the trial court did not abuse its discretion when it permitted the state to introduce uncharged misconduct evidence to prove the identity of the victim's assailant because "the characteristics of the two assaults were sufficiently distinctive and unique to be 'like a signature' . . . ." Id., 164. A comparison of the two offenses revealed that: "(1) both offenses occurred at night, to lone women; (2) in each instance, the assailant kidnapped the victim and held a knife to her throat; (3) both victims were forced into

the passenger seat of their own cars and were warned not to look at the assailant; (4) the assailant drove both of the victims' cars for a considerable period of time; (5) both assaults occurred near a particular barn [in a certain] tobacco field, where the [assailant] had previously worked; (6) in each instance, the assailant attempted to remove the victim's clothes; (7) both assaults involved a demand for oral sex; (8) in each instance, the assailant abandoned an attempt to perform or [a] request for a specific sex act when the victim resisted; (9) each victim described her assailant as [a] Hispanic male with similar features; and (10) both assaults occurred within weeks of each other." Id., 163–64.

The present case is distinguishable from *Figueroa* because there were few, if any, similarities between the charged crimes and the uncharged misconduct evidence. The charged crimes arose from the defendant's direct bodily assault of D followed by a threat at knifepoint to kill her if she revealed the incident to others. The uncharged misconduct evidence consisted of a telephone call in which the defendant threatened C, his former wife, that if she did not comply with his demand to resume a sexual relationship he would make her life miserable and tell the person she was dating that she and the defendant were having sex. Under the applicable principles of law, a comparison of the charged crimes and the uncharged misconduct evidence offered to prove the identity of the assailant must focus on "the distinctive *combination of actions* which forms the signature or modus operandi of the crime . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Merriam*, supra, 264 Conn. 665, quoting *State* v. *Figueroa*, supra, 235 Conn. 164. Accordingly, because there were no significant and compelling similarities between the charged and uncharged offenses and thus no evidence of a distinctive "criminal logo"; (internal quotation marks omitted) *State* v. *Merriam*, supra, 665; we conclude that the trial court abused its discretion in permitting the state to introduce the evidence of the threatening telephone call to establish the identity of D's assailant. See *State* v. *Sierra*, 213 Conn. 422, 431–33, 568 A.2d 448 (1990) (uncharged misconduct evidence inadmissible to establish defendant's identity because incidents not so unusual or distinctive as to be like signature); *State* v. *Ibraimov*, 187 Conn. 348, 352–54, 446 A.2d 382 (1982) (uncharged misconduct evidence inadmissible to establish defendant's identity because shared characteristics of charged and uncharged misconduct insufficiently distinctive to support reasonable belief that same person committed both).

We do not agree with the Appellate Court that "the number of substantial similarities between D and [C] resulted in a distinctive combination that was relevant to the identity of the individual who assaulted D."[13] *State* v. *Sawyer*, supra, 74 Conn. App. 751. Although

similarities between the victims may contribute to a finding that the characteristics of the charged crime and the uncharged offenses are sufficiently unique to be like a signature; see *State* v. *Figueroa*, supra, 235 Conn. 163 (acts of charged and uncharged misconduct involved lone women); our case law does not support the view that similarities between the victims are the only, or even the most important, factor to be considered. Rather, it is the "distinctive *combination* of factors" that justifies the inference that the individual who committed the first offense also committed the second. (Emphasis added; internal quotation marks omitted.) Id., 164. In the present case, the similarities between D and C, standing alone, were insufficient to satisfy this requirement.

The Appellate Court cited only two similarities between the charged crimes and the uncharged misconduct evidence relating to the manner in which the crimes were committed, namely, the defendant's use of threats to impose his will and his failure to conceal his identity.[14] These similarities, however, are far from unique or distinctive. Criminal defendants typically use threats in the course of committing their misdeeds; see *State* v. *Sierra*, supra, 213 Conn. 431 (use of threats common to crime of armed robbery); and often are known to the victim, particularly in cases of sexual assault. See, e.g., *State* v. *Merriam*, supra, 264 Conn. 658 (defendant had familial or familial-like relationship with victims of charged and uncharged offenses). Moreover, in threatening D, the defendant held her at knifepoint while expressing a willingness to kill her if she did not remain silent. In contrast, the defendant's threat to C involved the far more ambiguous warning that the defendant would make C's life "miserable" if she did not comply with his demand for sex and was issued over the telephone for the purpose of obtaining sexual gratification in the future. Consequently, the defendant's use of threats and his failure to conceal his identity, in combination with the similarities between D and C, did not constitute a "signature" or a "criminal logo" on which to base an inference that the defendant committed both offenses.

The state alternatively argues that a lesser degree of proof was sufficient to allow the state to introduce evidence regarding the threatening telephone call because a more liberal standard is employed when admitting evidence of other criminal acts to show a common plan or scheme in cases of sexual assault.[15] The state argues that the more liberal standard is applicable in the present circumstances because the distinctive characteristics shared by D and C show a "pattern of victim selection" on the part of the defendant that indicates the existence of a common plan or scheme. (Internal quotation marks omitted.) We are not persuaded.

It is well established that "[t]here is a greater liberality . . . in admitting evidence of other criminal acts to show a common scheme, pattern or design in sex-related crimes. . . . Evidence of another sex offense is admissible to show a common scheme or plan if the offense is proximate in time, similar to the offense charged, and committed with persons similar to the prosecuting witness." (Internal quotation marks omitted.) *State* v. *Ellis*, supra, 270 Conn. 355. This principle does not apply when uncharged misconduct evidence is admitted to prove identity because the degree of similarity between the charged crime and the uncharged misconduct in *unrelated* incidents is the key consideration in establishing that the same individual committed both offenses. See *State* v. *Shindell*, 195 Conn. 128, 134–35, 486 A.2d 637 (1985).

In the present case, we conclude that the evidence regarding the threatening telephone call should not have been admitted under the standard applied when prior misconduct evidence is introduced to show a common plan or scheme because it failed to satisfy all three prongs of that standard. Although D and C were similar in several notable respects, there were no other significant similarities between the charged and uncharged offenses. Moreover, the defendant made the threatening telephone call almost three years after he sexually assaulted D. We previously have considered a period of three or more years between charged and uncharged offenses as not too remote in time when the offenses bore "striking similarities"; *State* v. *Morowitz*, 200 Conn. 440, 442–47, 512 A.2d 175 (1986) (defendant podiatrist sexually assaulted victims after asking that they take off outer garments, put on surgical gowns, sit in reclining chair and accept injections of valium that put them to sleep for surgical procedures in his office); or "distinct parallels." *State* v. *Romero*, 269 Conn. 481, 498–500, 849 A.2d 760 (2004) (defendant engaged in pattern of sexual abuse that began with anal intercourse, took place within defendant's home, generally occurred within defendant's locked bedroom when no one else was at home, involved emotional manipulation of victim regarding consequences if abuse was revealed and consisted of separate acts of abuse over period of time). As we previously discussed, there are no "striking similarities" or "distinct parallels" between the charged and uncharged offenses in the present case. Accordingly, a lapse of three years between the charged and uncharged offenses cannot be considered proximate in time. We therefore conclude that the trial court abused its discretion in permitting the state to introduce evidence of the threatening telephone call.

II

The defendant next challenges the Appellate Court's conclusion that the evidence relating to the tire slashing incident was admissible to prove the identity of D's

assailant. The defendant claims that evidence of the tire slashing incident should not have been admitted because there were no similarities between that uncharged misconduct evidence and the charged crimes. We agree.

Applying the principles set forth in part I of this opinion, we conclude that the tire slashing incident bore no similarity to the charged crimes, and, consequently, the incident is not relevant to the issue of the identity of D's assailant. The charged crime involved a sexual assault. The tire slashing incident involved the destruction of property in the course of an angry confrontation. There simply is nothing about these two entirely different acts that would permit an inference that the person who committed one necessarily committed the other because of a "distinctive combination of actions" so unique as to form a "criminal logo . . . ." (Internal quotation marks omitted.) *State* v. *Merriam*, supra, 264 Conn. 665.

We disagree with the Appellate Court's conclusion that the tire slashing incident and the charged crimes shared several significant characteristics indicative of a criminal logo, including the following: (1) the defendant was related to his brother-in-law and to D as a result of his marriage to C; (2) the defendant made no effort to conceal his identity from either person; (3) the defendant used a knife to ensure compliance and to impose his will over his brother-in-law and D; and (4) both incidents occurred near the defendant's residence. *State* v. *Sawyer*, supra, 74 Conn. App. 757–58. Almost none of these characteristics relates to the actual misdeeds of the defendant. The only similarity of any consequence is that the defendant used a knife to threaten and intimidate both D and his brother-in-law. The manner in which he used the knife, however, was entirely different. During the sexual assault, the defendant held the knife to D's chest and threatened that he would kill her if she disclosed the incident to others but did not harm her. During the tire slashing incident, the defendant used the knife to puncture the tire on his brother-in-law's vehicle after the brother-in-law failed to comply with the defendant's command that he remove the vehicle from the defendant's property. We thus conclude that the charged and uncharged misconduct did not share a "criminal logo" from which an inference could be drawn that the defendant committed both offenses. (Internal quotation marks omitted.) *State* v. *Merriam*, supra, 264 Conn. 665.

III

The defendant finally claims that improper admission of the uncharged misconduct evidence resulted in harmful error. We agree.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of dem-

onstrating that the error was harmful. As we recently have noted, we have not been fully consistent in our articulation of the standard for establishing harm. . . . One line of cases states that the defendant must establish that it is more probable than not that the erroneous action of the court affected the result. . . . A second line of cases indicates that the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Young*, 258 Conn. 79, 94–95, 779 A.2d 112 (2001). This inconsistency requires resolution.

It is well established that a defendant must demonstrate harmful error by showing that "it is more probable than not" that the erroneous evidentiary ruling affected the result; (internal quotation marks omitted) *State* v. *Wilkes*, 236 Conn. 176, 188, 671 A.2d 1296 (1996); accord *State* v. *Chapman*, 229 Conn. 529, 544, 643 A.2d 1213 (1994); *State* v. *Payne*, 219 Conn. 93, 103, 591 A.2d 1246 (1991); *State* v. *Sierra*, supra, 213 Conn. 436; *State* v. *Vilalastra*, 207 Conn. 35, 47, 540 A.2d 42 (1988); *State* v. *Artieri*, 206 Conn. 81, 88, 536 A.2d 567 (1988); or that the erroneous evidentiary ruling "would have been likely" to affect the result. (Internal quotation marks omitted.) *State* v. *Ruth*, 181 Conn. 187, 196, 435 A.2d 3 (1980); accord *State* v. *McClain*, 171 Conn. 293, 300, 370 A.2d 928 (1976); *Obermeier* v. *Nielsen*, 158 Conn. 8, 13, 255 A.2d 819 (1969); *Guerrieri* v. *Merrick*, 145 Conn. 432, 435, 143 A.2d 644 (1958).

This court also has declared that erroneous evidentiary rulings will be overturned on appeal only upon a showing by the defendant of substantial prejudice or injustice. E.g., *State* v. *Hines*, 243 Conn. 796, 801, 709 A.2d 522 (1998); *State* v. *Beliveau*, 237 Conn. 576, 592, 678 A.2d 924 (1996); *State* v. *Alvarez*, 216 Conn. 301, 306, 579 A.2d 515 (1990); *State* v. *Hernandez*, 204 Conn. 377, 390, 528 A.2d 794 (1987). In the context of erroneous evidentiary rulings, we have likened "substantial prejudice" to error "so prejudicial as to undermine confidence in the fairness of the verdict." *State* v. *Askew*, 245 Conn. 351, 372, 716 A.2d 36 (1998).

Following *Askew*, we acknowledged both articulations of the standard for establishing harm but made no attempt to address or reconcile their differences. See, e.g., *State* v. *Gonzalez*, 272 Conn. 515, 527, 864 A.2d 847 (2005); *State* v. *Swinton*, 268 Conn. 781, 837 n.54, 847 A.2d 921 (2004); *State* v. *William C.*, 267 Conn. 686, 706 n.20, 841 A.2d 1144 (2004); *State* v. *Kirsch*, 263 Conn. 390, 412 n.16, 820 A.2d 236 (2003); *State* v. *Meehan*, 260 Conn. 372, 397 n.13, 796 A.2d 1191 (2002); *State* v. *Young*, supra, 258 Conn. 95; *State* v. *Grenier*, 257 Conn. 797, 807, 778 A.2d 159 (2001); *State* v. *Malave*, 250 Conn. 722, 741, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000);

State v. *Marshall*, 246 Conn. 799, 812, 717 A.2d 1224 (1998); *State* v. *Shabazz*, 246 Conn. 746, 759, 719 A.2d 440 (1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999). Nevertheless, each time we recognized the two lines of cases, we determined that the defendant either had failed; e.g., *State* v. *Gonzalez*, supra, 528 n.9; *State* v. *Swinton*, supra, 837 n.54; *State* v. *Kirsch*, supra, 412 n.16; *State* v. *Young*, supra, 95; *State* v. *Malave*, supra, 741; *State* v. *Shabazz*, supra, 759; or had succeeded; see, e.g., *State* v. *William C.*, supra, 706 n.20; *State* v. *Meehan*, supra, 397 n.13; *State* v. *Grenier*, supra, 807; *State* v. *Marshall*, supra, 812; in satisfying his burden of demonstrating harmful error under *both* articulations of the standard.

We conclude that there is no reason to perpetuate two competing formulations of the standard. Accordingly, we now establish a single workable standard for harmless error review of erroneous evidentiary rulings in the context of criminal cases.

We begin by noting that "[t]he appellate harmless error doctrine is rooted in [the] 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, *United States* v. *Nobles*, 422 U.S. 225, 230 [95 S. Ct. 2160, 45 L. Ed. 2d 141] (1975), 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." (Internal quotation marks omitted.) *State* v. *Chapman*, supra, 229 Conn. 544–45.

Historically, harmless error review of nonconstitutional errors in criminal cases required the reviewing court to ask "whether the error had produced a miscarriage of justice as measured by its likely impact upon the outcome of the proceeding." 5 W. LaFave, J. Israel & N. King, Criminal Procedure (2d Ed. 1999) § 27.6 (b), p. 935. Nevertheless, "[f]ew areas of doctrinal development have been marked by greater twisting and turning than the development of standards for *applying* the harmless error rule." (Emphasis added.) Id., pp. 938–39.

In considering the proper standard to be followed by Connecticut courts, it is helpful to examine the standards employed in other jurisdictions. In *Kotteakos* v. *United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), the United States Supreme Court determined that "[i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the

judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (Citation omitted.) Id., 764–65.

Several federal circuit courts, including the Second Circuit, have adopted the *Kotteakos* standard. See, e.g., *United States* v. *Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004), cert. denied, U.S. , 125 S. Ct. 2951, 162 L. Ed. 2d 877 (2005); *United States* v. *Grinage*, 390 F.3d 746, 751 (2d Cir. 2004); *United States* v. *LaHue*, 261 F.3d 993, 1009 (10th Cir. 2001), cert. denied, 534 U.S. 1083, 1084, 122 S. Ct. 819, 151 L. Ed. 2d 701 (2002), and cert. denied sub nom. *Anderson* v. *United States*, 534 U.S. 1083, 122 S. Ct. 818, 151 L. Ed. 2d 701 (2002); *United States* v. *Heater*, 63 F.3d 311, 325 (4th Cir. 1995), cert. denied, 516 U.S. 1083, 116 S. Ct. 796, 133 L. Ed. 2d 744 (1996). Other federal circuit courts have adopted a different formulation of the standard. See, e.g., *United State*s v. *Fernandez*, 388 F.3d 1199, 1256 (9th Cir. 2004) (error is harmful "unless it is more probable than not that the error did not materially affect the verdict" [internal quotation marks omitted]); *United States* v. *Clark*, 385 F.3d 609, 619 (6th Cir. 2004) (error is harmless "unless it is more probable than not that the error materially affected the verdict" [internal quotation marks omitted]); *United States* v. *Crenshaw*, 359 F.3d 977, 1004 (8th Cir. 2004) (error is harmless if "the substantial rights of the defendant were unaffected, and . . . the error did not influence or had only a slight influence on the verdict" [internal quotation marks omitted]); *United States* v. *Sutton*, 337 F.3d 792, 797 (7th Cir.) (error is harmful if it had "a substantial and injurious effect or influence on the jury's verdict" [internal quotation marks omitted]), cert. denied, 540 U.S. 1050, 124 S. Ct. 845, 157 L. Ed. 2d 700 (2003), and cert. denied sub nom. *Fleming* v. *United States*, 540 U.S. 1050, 124 S. Ct. 847, 157 L. Ed. 2d 700 (2003), and cert. denied sub nom. *Brown* v. *United States*, 540 U.S. 1051, 124 S. Ct. 846, 157 L. Ed. 2d 700 (2003); *United States* v. *Torres-Galindo*, 206 F.3d 136, 141 (1st Cir. 2000) (error is harmless unless "the improperly admitted evidence likely affected the outcome of [the] trial").

State courts display a similar lack of uniformity. See, e.g., *People* v. *Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956) (error harmful if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"), cert. denied sub nom. *Watson* v. *Teets*, 355 U.S. 846, 78 S. Ct. 70, 2 L. Ed. 2d 55 (1957); *Goodwin* v. *State*, 751 So. 2d 537, 541 (Fla. 1999) (error harmful if "court cannot say beyond a reasonable doubt that the error did not affect the verdict"); *People* v. *Cornell*, 466 Mich. 335,

364, 646 N.W.2d 127 (2002) (error harmful if "it is more probable than not that the error was outcome determinative" [internal quotation marks omitted]); *People* v. *Crimmins*, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975) (error harmful if "there is a significant probability, rather than only a rational possibility . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred").

Our review of these alternative approaches to harmless error review persuades us that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. This is consistent with the outcome determinative approach followed by the overwhelming majority of state and federal courts because it expressly requires the reviewing court to consider the effect of the erroneous ruling on the jury's decision. See *Kotteakos* v. *United States*, supra, 328 U.S. 764.

We also adopt the standard expressed in *Kotteakos* and followed by the Second Circuit, namely, "fair assurance"; id., 765; see *United State*s v. *Grinage*, supra, 390 F.3d 751; as the appropriate level of confidence for assessing whether the erroneous ruling substantially affected the verdict. Accordingly, we conclude that a nonconstitutional error is harmless when "an appellate court has a fair assurance that the error did not substantially affect the verdict." *United States* v. *Grinage*, supra, 751, citing *Kotteakos* v. *United States*, supra, 328 U.S. 765.

We now turn to the issue of whether the defendant in the present case has satisfied his burden of proving that the admission of the uncharged misconduct evidence constituted harmful error. "[W]hether [the improper admission of a witness' testimony] 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 [improperly admitted] evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 272 Conn. 527; see also *State* v. *Peeler*, 271 Conn. 338, 385, 857 A.2d 808 (2004), cert. denied, U.S. , 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); *State* v. *Rolon*, 257 Conn. 156, 174, 777 A.2d 604 (2001). Because the present case involves the improper admission of uncharged misconduct evidence, the most relevant factors to be considered are the strength of the state's case and the impact of the improperly admitted evidence on the trier of fact.

We first consider the overall strength of the state's case. The defendant claimed that he had not been present during the commission of the crime. The case thus turned on the jurors' assessment of the respective credibility of the defendant and D. See *State* v. *Sierra*, supra, 213 Conn. 437 (conflicting versions of events requires assessment of parties' credibility). In *State* v. *Ceballos*, 266 Conn. 364, 832 A.2d 14 (2003), we observed that "the absence of conclusive physical evidence of sexual abuse does not automatically render [the state's] case weak" when the case involves a credibility contest between the victim and the defendant. Id., 416. We also noted, however, that a sexual abuse case lacking physical evidence "is not particularly strong," especially when the victim is a child. (Internal quotation marks omitted.) Id.; see also *State* v. *Alexander*, 254 Conn. 290, 308, 755 A.2d 868 (2000).

In the present case, the state characterized D as mentally challenged. Her timid demeanor on the stand and her inability to comprehend and respond to many of the prosecutor's relatively simple questions without repetition and prompting gave her testimony an unmistakable childlike quality. Accordingly, in the absence of any physical evidence of the defendant's sexual assault of D and in light of the defendant's denial that he had assaulted the victim or even had been present in D's home on the day of the alleged assault, the state did not have a very strong case against the defendant. See *State* v. *Ceballos*, supra, 266 Conn. 416.

The state argued that the defendant could not be believed because D's boyfriend and the other couple living with D testified that, on the afternoon of the alleged assault, they observed the defendant leaving the house when they returned from a trip to go shopping. Defense counsel nonetheless pointed out numerous inconsistencies and weaknesses in the testimony of D, her boyfriend and the other couple living with D to show that they were not credible witnesses. See footnote 8 of this opinion. Furthermore, there was no evidence other than D's testimony that the alleged assault took place, and all of the corroborating witnesses were D's friends.

In view of the fact that the state's case was not particularly strong, we conclude that the admission of the uncharged misconduct evidence was harmful because it suggested that the defendant had a bad character and a propensity for criminal behavior and thus improperly influenced the deliberations of the jurors. C's testimony regarding the threatening telephone call revealed that the defendant had harassed her on the telephone, had threatened her in the past, had specifically threatened during one telephone call that if she did not have sex with him he would make her life miserable, had frightened and upset her when he made the threat, was a lot bigger and stronger than she was and made her feel "a

little nervous" about testifying as a witness against him. Testimony regarding the tire slashing incident also revealed that the defendant had been arrested and pleaded guilty to another offense involving the use of a knife similar to the one allegedly used in the charged crimes, was considered by others to be intimidating, believed that C was "somewhat afraid" of him, did not hesitate to follow through on his threats, had a "very bad" temper, had been attending anger management classes for at least ten years, took medication to control his emotional instability, would "fly off the handle at a heartbeat" if he did not take his medication, had been described by his anger management counselor as a "time bomb ready to go off" and had taken a double dose of medication on the day of his testimony so that he would remain calm on the witness stand.

Furthermore, during closing arguments to the jury, the state repeatedly referred to the defendant's threatening behavior and the tire slashing incident, and suggested that the defendant had intimidated D when he threatened her with the knife. The state further suggested that D was convinced that the defendant would kill her if she did not comply with his demand to remain silent because she had been present during the tire slashing incident and knew that the defendant had followed through on his threats in the past. Accordingly, uncharged misconduct evidence that portrayed the defendant as intimidating, hot-tempered, inclined to threaten other people and capable of using a knife to back up his threats was unduly prejudicial because it impermissibly suggested that the defendant had a bad character and a propensity for criminal behavior. See *State* v. *Ellis*, supra, 270 Conn. 354. We therefore conclude that the improperly admitted evidence very likely caused the jurors to believe that the defendant was predisposed to commit the offenses for which he was being tried. See *State* v. *Sierra*, supra, 213 Conn. 437 ("[a]ny improper evidence that may have a tendency to excite the passions, awaken the sympathy or influence the judgment of the jury, cannot be considered as harmless" [internal quotation marks omitted]).

We disagree with the Appellate Court's conclusion that admission of the uncharged misconduct evidence did not result in harmful error because the jury heard credible testimony from D regarding the details of the assault, three other witnesses testified that the defendant was at D's home around the time that the sexual assault allegedly occurred, numerous witnesses testified that the defendant regularly carried a knife in a sheath on his belt, the court gave a limiting instruction in its final charge to the jury and the uncharged misconduct evidence paled in comparison to the charged crimes. *State* v. *Sawyer*, supra, 74 Conn. App. 759. These considerations overlook the lack of physical evidence that the assault took place, inconsistencies in the testimony of the state's witnesses, most of whom were D's

friends, the defendant's vivid portrayal of the tire slashing incident, the state's extensive cross-examination and recross-examination of the defendant regarding his unstable temperament, which directly followed and was intertwined with testimony regarding both acts of uncharged misconduct, and the fact that the state repeatedly referred to the tire slashing incident during closing arguments, when discussing the defendant's intimidating personality. We therefore conclude that the defendant has satisfied his burden of proving that the error was not harmless because it cannot be said, with fair assurance, that the error did not substantially affect the verdict. Accordingly, the defendant is entitled to a new trial.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion SULLIVAN, C. J., and NORCOTT, PALMER and VERTEFEUILLE, Js., concurred.

[1] The listing of justices reflects their seniority status as of the date of oral argument.

This case first was argued on January 10, 2005, before five justices of this court. Subsequent to oral argument, however, the court, sua sponte, ordered supplemental briefing and argument before an en banc court on the following additional issues:

(1) "Should this court determine that, in sexual assault cases, prior misconduct evidence admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim? See, e.g., *State* v. *Murrell*, 7 Conn. App. 75, 507 A.2d 1033 (1986); *State* v. *Kulmac*, 230 Conn. 43, 644 A.2d 887 (1994); *State* v. *Merriam*, 264 Conn. 617, 835 A.2d 895 (2003)."

(2) "Should this court reconsider its holdings that, in sexual assault cases, prior sexual misconduct is viewed more liberally than other types of prior misconduct?"

(3) "To what extent, if any, is this court constrained by the Code of Evidence from answering either question 1 or 2 by changing our existing law?"

(4) "What standards should this court adopt for 'harmless error' review of erroneous evidentiary rulings? See, e.g., *State* v. *Hines*, 243 Conn. 796, 709 A.2d 522 (1998); *State* v *Askew*, 245 Conn. 351, 716 A.2d 36 (1998); *State* v. *Gonzalez*, 272 Conn. 515, 864 A.2d 847 (2005); *Kotteakos* v. *United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)." Reargument was conducted on November 21, 2005.

With respect to the first two issues, we conclude that prior misconduct evidence admitted under the common plan or scheme exception in sexual assault cases should not be admissible to prove the identity of the defendant as the perpetrator of the assault, and that our holdings in sexual assault cases that prior sexual misconduct is viewed more liberally than other types of prior misconduct should not be disturbed. It is therefore unnecessary to address the third issue. Nevertheless, we acknowledge that, since 2000, the year in which the Connecticut Code of Evidence was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function. Of course, prior to that date, changes to substantive evidentiary rules were accomplished by our courts in the exercise of their common-law authority. To the extent that our evidentiary rules may be deemed to implicate substantive rights, we believe that it is unclear whether those rules properly are the subject of judicial rule making rather than the subject of common-law adjudication. Because that question raises an issue on which we did not request briefing by the parties, however, we leave it for another day. We address the fourth issue in part III of this opinion.

[2] We granted the defendant's petition for certification to appeal limited to the following issues: "1. Did the Appellate Court properly conclude that

the trial court properly admitted the uncharged misconduct evidence?

"2. If the answer to question one is 'no,' was the introduction of the evidence harmful?" *State* v. *Sawyer*, 263 Conn. 908, 819 A.2d 842 (2003).

[3] In accordance with the policy of protecting the privacy interests of victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[4] D's sister, C, who was married to the defendant at the time of the assault, testified that she had separated from the defendant on June 9, 2000, and that they had divorced on December 7, 2000. C also testified that during July, 1998, she and the defendant attended weekly counseling sessions to address certain problems in their marriage.

[5] In his memorandum in support of the motion, the defendant suggested that the proposed testimony would relate to his character and reputation, his collection of knives, two incidents of spousal rape and a statement that he allegedly had made to D's boyfriend that he had sexually assaulted another woman.

[6] Although the alleged telephone call took place nearly three years following the charged offenses, when "evidence is relevant to show a common plan or an unusual technique used to commit a crime, we see no reason to exclude it simply because the acts of the defendant involved occurred subsequent to the crime being tried." (Internal quotation marks omitted.) *State* v. *Ellis*, 270 Conn. 337, 358 n.14, 852 A.2d 676 (2004).

[7] There is no evidence in the record, however, that the defendant had a prior sexual relationship with D as he did with C.

[8] Defense counsel pointed out numerous inconsistencies and alleged weaknesses in the testimony of D to show that she was not a credible witness. These included D's (1) inability to recall whether the defendant had entered her apartment once or twice on the afternoon of the assault, (2) testimony that she did not know how long the defendant had held a knife to her chest despite her earlier statement to the police that he had threatened her with the knife for five to ten minutes, (3) testimony describing the tattoo on the defendant's left hand, which he used to touch her under her jeans, without mention of the hand's obvious deformity, and (4) report to the police that the assault ended when the defendant heard the sound of D's boyfriend's car, which conflicted with her report to her boyfriend that the assault ended when the defendant heard children approaching from another part of the house.

Defense counsel also noted inconsistencies in the testimony of other witnesses for the state. For example, D's boyfriend testified that he initially believed that the assault took place on July 17 or 18, 1998, even though the police later concluded that the assault took place on July 15, 1998, on the basis of D's report that she was assaulted after her housemates had left to go shopping. D also testified that, following the assault, the defendant exited through the front door of the house whereas the couple living with D testified that they observed the defendant exit through the back door of the house upon their return from shopping. Finally, one of the members of that couple testified that he had learned about the assault on the day that it happened but subsequently testified that he had heard about the assault five weeks later, when D reported the incident to the police, and ultimately acknowledged that he did not know when he first learned about the incident.

[9] In their briefs filed with this court, both the defendant and the state assert that the central issue in the case is whether the assault had occurred and that there was no issue relating to the identity of the perpetrator. The trial court nonetheless advised the jury to consider the uncharged misconduct evidence to establish the identity of D's assailant. "In the absence of any indication to the contrary, we presume that the jury followed the court's instruction[s]." (Internal quotation marks omitted.) *State* v. *Alston*, 272 Conn. 432, 446, 862 A.2d 817 (2005).

[10] The court instructed the jury: "Evidence of prior misconduct of the defendant. In this case, the state offered evidence through [C] . . . that . . . after the defendant and she were divorced, the defendant telephoned her and asked her to come . . . have sex with him. When she refused, the defendant allegedly told [C] that, if she did not do what he wanted, he would make her life miserable. Additionally, the state, on cross-examination, elicited testimony from the defendant that, in 1997, he slashed the tires of [his brother-in-law's] car because he would not move it from the defendant's parking spot when the defendant told him to do so.

"The evidence offered by the state of prior acts of misconduct of the defendant is not being admitted to prove the bad character of the defendant or his propensity to commit criminal acts. Such evidence is being admitted

solely to show or establish the existence of the intent which is a necessary element of the crime charged, the identity of the person who committed the crime and the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged. . . .

"You may consider such evidence if you believe it and further find [that] it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it bears . . . on the issues of the existence of the intent which is a necessary element of the crime charged, the identity of the person who committed the crime and the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged.

"On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issues for which it is being offered by the state, namely, the existence of the intent which is a necessary element of the crime charged, the identity of the person who committed the crime, and the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged, then you may not consider that testimony for any purpose.

"You may not consider evidence of prior misconduct even for the limited purpose of attempting to prove the crimes charged in the information because it may predispose your mind uncritically to believe that the defendant may be guilty of the offenses . . . charged merely because of the alleged prior misconduct. For this reason, you may consider this evidence only on the issues of the existence of the intent which is a necessary element of the crime charged, the identity of the person who committed the crime and the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged, and for no other purpose."

[11] We note that, although the defendant claimed in his Appellate Court brief that the trial court improperly had admitted the uncharged misconduct evidence to prove intent, identity or knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged, the only ground for admission that the state contested in its reply to the defendant's brief was that pertaining to identity. It is well established that "[c]laims on appeal that are inadequately briefed are deemed abandoned." (Internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 281 n.30, 764 A.2d 1251 (2001). We therefore conclude that the state's failure to raise an issue in its Appellate Court brief regarding the defendant's claims relating to the improper admission of the uncharged misconduct evidence to prove intent, knowledge and possession of the means useful or necessary for the commission of the charged crimes constitutes a waiver of those claims on appeal.

[12] Subsection (a) of § 4-5 of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person."

Subsection (b) of § 4-5 provides: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

[13] According to the Appellate Court, these included the following: (1) "D and [C] were unmarried at the time they were threatened by the defendant; (2) both women previously had been related to the defendant by a marital relationship—[C] was the defendant's former wife . . . and D was his former sister-in-law; (3) both women lived near the defendant; (4) the defendant was superior in strength to D and [C]; (5) the defendant knew that both of the women were mentally handicapped and were supported by supplemental security income as a result of their disabilit[ies]; (6) both women were similar in age; (7) the defendant used threats to impose his will and domination over the women to achieve his goal of sexual gratification; and (8) the defendant made no effort to conceal his identity from the women." *State* v. *Sawyer*, supra, 74 Conn. App. 750.

[14] We note that the trial court did not single out the defendant's failure to conceal his identity as one of the similarities between the charged and uncharged offenses when it decided to allow the state to elicit testimony regarding the threatening telephone call.

[15] Practice Book § 84-11 provides in relevant part: "(a) Upon the granting of certification, the appellee may present for review alternative grounds upon which the judgment may be affirmed provided those grounds were raised and briefed in the appellate court. . . . If such alternative grounds

for affirmation . . . were not raised in the appellate court, the party seeking to raise them in the supreme court must move for special permission to do so prior to the filing of that party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require. . . ."

The state did not claim in the Appellate Court that the defendant's misconduct was relevant to prove the existence of a common plan or scheme on the part of the defendant. In its brief to that court, the state claimed that "the defendant's conduct formed a common scheme that was *probative of his identity* as the assailant." (Emphasis added.) Thereafter, the state consistently argued that the trial court properly had admitted common plan or scheme evidence to prove the *identity* of the perpetrator on the basis of his pattern of committing misconduct against individuals to whom he was related by marriage and his failure to conceal his identity from the victims. In the course of its argument, the state cited case law for the proposition that "evidence of a common scheme has been employed to establish *identity*." (Emphasis added.) E.g., *State* v. *Murrell*, 7 Conn. App. 75, 88, 507 A.2d 1033 (1986); cf. *State* v. *Shindell*, 195 Conn. 128, 134–36, 486 A.2d 637 (1985) (defendant's claim that uncharged misconduct evidence did not establish identity of perpetrator must fail because evidence was not admitted to prove identity but to establish broader scheme of criminal activity). In arguing that the probative value of the common scheme evidence outweighed its prejudicial effect, the state further noted that the trial court had concluded that the defendant was presenting a defense of mistaken identity and that, when identity is contested and an alibi defense is presented, "evidence that the assailant in each incident . . . acted in a manner and under circumstances having marked similarities [is] especially probative . . . ." *State* v. *Pollitt*, 205 Conn. 61, 71, 530 A.2d 155 (1987). At no time did the state refer to the more liberal standard for admissibility of uncharged misconduct evidence to prove the existence of a common plan or scheme, nor did it cite the legal standard of review for the admission of uncharged misconduct evidence to prove a common plan or scheme. We thus construe the state's use of the term "common scheme evidence" in its Appellate Court brief to mean prior uncharged misconduct evidence rather than, as the dissenting and concurring justice suggests, evidence used to prove a common plan or scheme.

Although we do not condone the state's failure to request this court's permission, pursuant to Practice Book § 84-11, to raise the alternative ground for affirmance that it now raises on appeal, we nonetheless consider the state's claim because the defendant did not file a reply brief to contest the newly raised claim as prejudicial, and we do not find that the defendant would be prejudiced by our consideration of the issue. See *State* v. *Sinval*, 270 Conn. 516, 529–30 n.11, 853 A.2d 105 (2004).