STATE OF CONNECTICUT *v.* PAOLINO SANSEVERINO
(SC 17786)
(SC 17787)

Rogers, C. J., and Norcott, Katz, Palmer and Zarella, Js.

Argued October 16, 2007—officially released July 1, 2008

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Paul Rotiroti*, assistant state's attorney, for the appellant in Docket No. 17786, appellee in Docket No. 17787 (state).

Jon L. Schoenhorn, for the appellant in Docket No. 17787, appellee in Docket No. 17786 (defendant).

Opinion

KATZ, J. In these certified appeals involving criminal offenses against two victims, the defendant, Paolino Sanseverino, and the state both appeal from the judgment of the Appellate Court, which reversed the judgment of conviction, rendered after a jury trial, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A)[1] and sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1)[2] for acts committed against the victim G,[3] and of sexual assault in the first degree in violation of § 53a-70 (a) (1) and attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2)[4] and 53a-70 (a) (1) for acts committed against another victim, C. *State* v. *Sanseverino*, 98 Conn. App. 198, 205–13, 907 A.2d 1248 (2006). The Appellate Court concluded that the trial court improperly had denied the defendant's motion to sever the cases relating to the two victims in violation of the defendant's due process right to a fair trial, but it rejected the defendant's claim that the first degree kidnapping statute, § 53a-92 (a) (2) (A), was unconstitutionally vague as applied to the facts of his case. In his certified appeal, the defendant claims that the Appellate Court improperly determined that § 53a-92 (a) (2) (A) was not void for vagueness as applied to the facts of his case because he was not on notice that the minimal restraint that was incidental to the underlying conduct was criminalized under the statute. In its certified appeal, the state claims that the Appellate Court improperly reversed the judgment of the trial court and remanded the case for separate trials because evidence of both assaults would have been cross admissible, and, therefore, the defendant had suffered no substantial prejudice because of the denial of severance. The defendant claims, as an alternate ground to affirm the Appellate Court's judgment, that the trial court committed harmful error in admitting evidence as to specific incidents of sexual abuse by the defendant during his prior marriage. We conclude that this court's decision today in *State* v. *Salamon*, 287 Conn. 509, A.2d (2008), compels the conclusion that the defendant's conviction of kidnapping in the first degree cannot stand. We also conclude that severance of the offenses for separate trials relating to the two victims was not required in this case, and we reject the defendant's alternate ground for affirmance of the Appellate Court's judgment. Accordingly, we reverse the Appellate Court's judgment as to the severance issue, and we reverse the defendant's conviction of kidnapping in the first degree.

The Appellate Court's opinion sets forth the following facts that the jury reasonably could have found. "In June or July, 1998, the defendant, the owner of Uncle's Bakery in Newington, hired C to work in the bakery. . . . One day, toward the end of her shift, while she

was alone with the defendant, the defendant asked C to take a box into the back room. The defendant followed C into the back room, grabbed her by her shoulders and pushed her against a wall and a metal shelving unit. She could not move because the defendant had one arm and his upper body pressed against her. The defendant pulled her shirt out of her pants, put his hand under her shirt and touched her breasts. She tried to push him away and told him three or four times to stop, but he told her that 'he could do whatever he wanted to [her] because he had friends in the Newington police department, and it would be [her] word against his. Nobody would believe [her].' He then unbuttoned her jeans, pulled them down and digitally penetrated her vagina. He unbuttoned his pants and pulled out his penis. He turned C around and held her down by the back of the neck, pinning her with her head between the shelving unit and the wall. He tried to insert his penis into her vagina, but because she kept moving around, he did not successfully penetrate her, although she did feel the pressure of him trying to insert himself.

"At that point, the buzzer rang at the front door, indicating that a customer had entered the store. The defendant turned C around, put his hand over her mouth, pushed her against the wall and told her to stay there and to be quiet. When the defendant left to assist the customer, C ran out of the bakery and went home. She never returned to the bakery. At home, C went into the bathroom, took off her clothes and showered. She later burned her clothing. She testified that her initial intention was to call the police but that when she got home, her boyfriend had three other people with him, and she did not want them to know, so she did not tell anyone or call the police at that time. She did not tell anyone what had happened to her until 'a couple of months later.' C testified that after what happened, she was angry always, and if she was not working, she was sleeping. She said that she would not talk to anybody or let anybody touch her, and she would not let anybody be around her. Her boyfriend's mother, with whom C was residing, eventually asked her about her behavior and mood, and C 'finally broke down and told her what had happened at the bakery.'

"On November 8, 1998, C contacted Peter Lavery, an officer with the Newington police department, to report that she had been sexually assaulted sometime in June or July, 1998, by the defendant at Uncle's Bakery. She gave a sworn statement of what had occurred. Later that same day, she contacted Lavery and said that she did not want to press charges against the defendant and did not want to go through any further investigation of the case because it would be too stressful for her to go to court and go through the court proceedings. In August, 1999, however, after being informed that a second rape victim, G, had come forward, C agreed to reinstate her case against the defendant. C and G did

not know each other.

"In the fall of 1998, G became a regular customer at Uncle's Bakery. In the spring of 1999, she approached the defendant about working at the bakery and was hired to work from 5 a.m. to 7:30 a.m. In May, 1999, as G started her shift at 5 a.m., she went into the back room of the bakery to get her apron. The defendant followed her in and grabbed her. She told him to 'get away and stop,' to which the defendant replied, '[you] know you want it, so stop.' The defendant grabbed G's arms, pushed her against the wall, pinned her arms over her head with his arm, and pressed his body against hers so she could not move. She twice yelled at him to stop, but he did not. She testified that she became afraid and that she froze. While still keeping her pinned [with one hand], he pulled her pants down, then pulled his pants down. He inserted his penis inside her vagina and then, prior to climaxing, pulled out and ejaculated on the floor. The defendant let G go, and she went into the bathroom, locked herself in and did not come out again until she heard another person enter the bakery. G then came out of the bathroom, waited until her shift was over and went home. She threw away her clothes. She did not talk to anybody about what had happened because, she testified, she felt ashamed, dirty, cheap and scared because the defendant had threatened her. She testified that he had told her [on numerous occasions] that 'he was with the family, the mob, and that if [she] ever said anything . . . he would take care of [her] and [her] family.' G continued to work at the bakery for about one week because she was afraid of the defendant. After one week, she . . . quit because she 'could [not] stand to see [the defendant] anymore.' At some point, G told her former husband and her sister what had happened. She was advised not to say or do anything 'because it would cause a scandal' and because her sister and her sister's husband 'were in the process of buying the business from the defendant.' She testified that if she had said anything, 'they might have lost the business.' In July, 1999, however, G reported the sexual assault when she found out that the defendant was 'smearing [her] name, saying that [she] was doing sexual favors for other men.' This made her angry and determined that 'he's not going to get away with this.' . . . The defendant subsequently was charged in connection with both incidents." *State* v. *Sanseverino*, supra, 98 Conn. App. 200–203.

The record reveals the following additional undisputed facts and procedural history. The state separately had charged the defendant with kidnapping in the first degree with respect to C and G. Prior to trial, upon agreement of the state, the trial court dismissed the charge of kidnapping in the first degree as to C, which the defendant claimed had been brought beyond the statute of limitations.[5] The trial court denied the defendant's motion to have the charges relating to C and G

tried separately pursuant to Practice Book § 41-18.[6] At the close of the state's case-in-chief, the defendant moved for a judgment of acquittal, which the trial court also denied. During the presentation of his case, the defendant claimed that he had dated both C and G for a period of time and that any sex with the victims was consensual.[7] The jury subsequently returned a verdict of guilty on all four counts of the substitute information: sexual assault in the first degree and attempt to commit sexual assault in the first degree as to C, and kidnapping in the first degree and sexual assault in the first degree as to G. The trial court sentenced the defendant to a total term of forty years imprisonment. The defendant appealed from the judgment of conviction to the Appellate Court.

The Appellate Court determined that the trial court improperly had denied the defendant's motion to sever the charges relating to C and G, concluding that the defendant had been prejudiced substantially by the consolidation of the two cases, because—viewed through the lens of our holding in *State* v. *Ellis*, 270 Conn. 337, 377, 852 A.2d 676 (2004), that the crime of sexual assault is inherently violent in nature, regardless of whether there is physical violence—the two cases did not involve discrete and easily distinguishable factual scenarios. *State* v. *Sanseverino*, supra, 98 Conn. App. 205. That court further concluded that this prejudice had not been cured by the trial court's instructions to the jury. Id., 206–208. It therefore reversed the defendant's conviction and remanded the case for new separate trials. Id., 208. The Appellate Court rejected, however, the defendant's contention that the kidnapping statute was void for vagueness as applied to the facts of his case. Id., 213. The Appellate Court determined that the amount of restraint applied to G was "not minuscule" and that all that is required under the kidnapping statute is a "restriction of movement . . . with the intent to prevent the victim's liberation." Id.

We thereafter granted the defendant's petition for certification to appeal to this court on the following question: "Did the Appellate Court properly conclude that . . . § 53a-92 (a) (2) (A), kidnapping in the first degree, is not unconstitutionally vague as applied to the defendant's conduct?"; *State* v. *Sanseverino*, 280 Conn. 945, 946, 912 A.2d 481 (2006); and granted the state's petition for certification to appeal on the following issue: "Whether the Appellate Court properly held that the trial court improperly denied the defendant's motion to sever the two cases charged against him?" *State* v. *Sanseverino*, 280 Conn. 946, 912 A.2d 481 (2006).

I

The defendant first claims that § 53a-92 (a) (2) (A) is unconstitutionally vague as applied to the facts of his case. Specifically, the defendant contends that, because

the conduct at issue here predated our decision in *State* v. *Luurtsema*, 262 Conn. 179, 201–204, 811 A.2d 223 (2002),[8] in which we rejected an insufficiency of the evidence challenge on a materially similar set of facts and concluded that the kidnapping statute requires no minimum duration of restraint or distance of movement, he was not on notice that such a minuscule and incidental restraint would be criminalized by the statute, rendering it void for vagueness as applied to the facts of his case. Thus, as part of his vagueness claim, the defendant contends that the kidnapping charge was "based upon a minuscule duration of confinement" and that "the restraint imposed was wholly incidental to the commission of the sexual assault." The defendant points to dictum in our case law relating to the availability of a void for vagueness claim based in part, according to the defendant, on the merger doctrine; see *State* v. *Jones*, 215 Conn. 173, 180, 575 A.2d 216 (1990);[9] which prohibits a kidnapping charge under circumstances wherein "the restraint was so much [a] part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility cannot fairly be attributed to them." (Internal quotation marks omitted.) *People* v. *Gonzalez*, 80 N.Y.2d 146, 152–53, 589 N.Y.S.2d 833, 603 N.E.2d 938 (1992). We conclude that our decision in *State* v. *Salamon*, supra, 287 Conn. 509, requires reversal of the defendant's kidnapping conviction.

Although the defendant broadly phrases his claim in constitutional terms, upon review of his specific contentions, it is clear that he is in effect addressing the same considerations with respect to the kidnapping statute—i.e., the incidental and necessary nature of the restraint to the underlying criminal offense[10]—that we recently reconsidered in *Salamon*. Therefore, because our case law advises us to eschew unnecessarily deciding a constitutional question; see, e.g., *Tarro* v. *Commissioner of Motor Vehicles*, 279 Conn. 280, 286, 901 A.2d 1186 (2006); *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002); we resolve the defendant's claim that the confinement of G in the present case was merely incidental to and necessary for the sexual assault and, therefore, not separately chargeable under § 53a-92 (a) (2) (A) in accordance with the statutory principles adopted in *Salamon*.[11]

In *State* v. *Salamon*, supra, 287 Conn. 528–41, we reconsidered our long-standing interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a. *Salamon* involved a female victim who had been assaulted by the defendant at a train station in Stamford late at night. Id., 515. The defendant had approached the victim from behind as she was ascending a flight of stairs, grabbed her by the back of the neck, causing her to fall, and held her down by her hair. Id. When the victim began to scream, the defendant punched her in the mouth and attempted to insert his

fingers into her throat. Id. After a few minutes, the victim freed herself, and the defendant fled. Id. The defendant ultimately was charged with kidnapping in the second degree in violation of General Statutes § 53a-94, unlawful restraint in the first degree, and risk of injury to a child. Id., 516. At trial, the defendant requested a jury instruction that, if the jury found that the restraint had been incidental to the assault, then the jury must acquit the defendant of the charge of kidnapping. Id. The trial court declined to give that instruction. Id.

In response to the defendant's claim on appeal to this court in *Salamon*, we reexamined our long-standing interpretation of the kidnapping statutes to encompass even restraints that merely were incidental to and necessary for the commission of another substantive offense, such as robbery or sexual assault. Id., 522–28. We concluded that neither considerations related to the doctrine of stare decisis nor legislative acquiescence as to our prior, literal interpretation justified adherence to that interpretation; id., 520–22; particularly when it was bound, in some instances, to produce "unconscionable, anomalous, or bizarre results." Id., 524. Moreover, we noted that, since 1977, when this court first had interpreted the kidnapping statutes, courts of many other states had adopted a contrary interpretation, barring convictions on the basis of incidental restraint or movement. Id., 526–27. Thus, in *Salamon*, we engaged, for the first time, in a more searching inquiry as to whether the kidnapping statutes "warrant[ed] the broad construction that we had given them." Id., 524.

Our case law dating back to 1977 had concluded that the kidnapping statutes required only an element of intent, and not any time or distance elements. Id., 531–32. In this regard, the hallmark of a kidnapping is an "abduction,"[12] which requires "restraint,"[13] the latter also being an element of the lesser crime of unlawful restraint. Id., 530. Each of these terms, which are statutorily defined, requires a separate intent element. The differing intents required for abduction and restraint presented us with an ambiguity not previously explored under our case law. Id., 534. In other words, we had not "explored the parameters of that intent, in particular, how the intent to prevent [a victim's] liberation . . . that is, the intent necessary to establish an abduction, differs from the intent to interfere substantially with [a victim's] liberty . . . necessary to establish a restraint. Certainly, when an individual intends to interfere substantially with another person's liberty, he also intends to keep that person from escaping . . . [but] the point at which an intended interference with liberty crosses the line to become an intended prevention of liberation is not entirely clear." (Citations omitted; internal quotation marks omitted.) Id. We concluded in *Salamon* that this "point" is significant because, "[a]t least in a case not involving the secreting of a victim in a place he or

she is unlikely to be found," it is the intent that separates an abduction, and thus a kidnapping, from a mere unlawful restraint, which imposes "relatively minor penalties . . . ." Id.

To resolve this ambiguity, we examined the "common law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, [and] we conclude[d] the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim." Id., 542. Although we reaffirmed our long-standing rule that no minimum period of restraint or degree of movement is necessary,[14] "[t]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . ." (Internal quotation marks omitted.) Id., 546.

"Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 547–48. Applying this standard to the facts in *Salamon*, we concluded that, although the defendant had not been charged with assault, the judgment of conviction of kidnapping in the second degree had to be reversed and the case remanded for a new trial because the defendant was entitled to a jury instruction explaining that a kidnapping conviction could not lie if the restraint was merely incidental to the assault.[15] Id., 550.

Applying our holding in *Salamon* to our review of the Appellate Court's determination regarding the trial

court's denial of the defendant's motion for a judgment of acquittal in the present case, we conclude that, although the question of whether kidnapping may stand as a separate offense is one for the jury; id.; under the facts of the present case, no reasonable jury could have found the defendant guilty of kidnapping in the first degree on the basis of the evidence that the state proffered at trial. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004).

In the present case, the evidence clearly establishes that the defendant restrained G solely for the purpose of sexually assaulting her. Although we have carefully scrutinized the record, transcript, exhibits and briefs, we have found no evidence that the defendant restrained G to any greater degree than that *necessary* to commit the sexual assault. G walked into the back room of the bakery to get an apron. The restraint occurred thereafter when the defendant grabbed G from behind and pushed her against the wall, pinning her arms over her head with his arm and pressing his body against hers to keep her from moving. These actions were clearly undertaken solely for the purpose of allowing the defendant to initiate, and to keep G from moving away from, his sexual advances. None of the restraint that the defendant applied to G was for the purpose of preventing her from summoning assistance nor did it significantly increase the risk of harm to G outside of that created by the assault itself. The defendant released G immediately after he had ejaculated. For these reasons, we conclude that no reasonable jury could have convicted the defendant of a kidnapping in light of our holding in *Salamon*.[16] Cf. *State* v. *Salamon*, supra, 287 Conn. 549 (concluding, in direct contrast to facts of present case, that defendant was not entitled to judgment of acquittal because reasonable jury could have concluded that defendant "pulled the victim to the ground *primarily* for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape" [emphasis added]). Accordingly, the defendant's kidnapping conviction cannot stand.

II

We next turn to the issue raised in the state's certified appeal. The state submits, inter alia, that the Appellate

Court improperly determined that the defendant had been prejudiced substantially by the trial court's denial of his motion to sever the charges concerning the two victims, C and G. The state specifically contends that the evidence in both cases would have been cross admissible at separate trials to show a common scheme or plan on the part of the defendant, and, therefore, the defendant could have suffered no substantial prejudice as a result of the consolidation. In the alternative, the state claims that the trial court properly consolidated the charges according to the considerations that this court set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–25, 529 A.2d 1260 (1987). We agree with the state's first contention, and therefore, we need not consider whether the consolidation otherwise would have been proper under *Boscarino*.

The following additional procedural history is relevant to our resolution of this issue. Prior to trial, the defendant made a motion, pursuant to Practice Book § 41-18, to sever the charges against him and to order separate trials for the charges relating to each victim. The defendant argued that, because the crimes were so similar, he would be prejudiced by the consolidation because the jury could use evidence of guilt of a crime against one victim to convict him of another offense against the other victim. The trial court, applying *State* v. *Boscarino*, supra, 204 Conn. 722–25, concluded that: (1) the two incidents involved discrete, easily distinguishable factual scenarios; (2) the trial would not be unusually long or complex so as to confuse the jurors; (3) the crimes were not unusually brutal or shocking, above and beyond the typical sexual assault case; and (4) the evidence of misconduct in one case likely would be admissible to prove intent or a common scheme or plan in the other. Thus, the trial court concluded that the evidence was more probative than prejudicial and denied the defendant's motion to sever.

The Appellate Court concluded that consolidation of the offenses was improper because the factual scenarios as to each victim were so similar that consolidation "would impair the defendant's right to the jury's fair and independent consideration of the evidence in each case." (Internal quotation marks omitted.) *State* v. *Sanseverino*, supra, 98 Conn. App. 205–206. It further concluded that any prejudice caused by the consolidation of the cases was not cured by the trial court's jury instructions to consider each of the counts individually because the court did not instruct the jury that it could not consider the evidence of one victim's case in determining whether to convict the defendant on charges relating to the other victim. Id., 207–208.

General Statutes § 54-57[17] and Practice Book § 41-19[18] permit a trial court to join similar charges in pending cases against a common defendant. Our prior decisions have made clear that the trial court enjoys broad discre-

tion in this respect and that its decision to consolidate will not be disturbed in the absence of manifest abuse of that discretion. *State* v. *McKenzie-Adams*, 281 Conn. 486, 519–20, 915 A.2d 822, cert. denied, U.S. , 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). "[T]his court consistently has recognized a clear presumption in favor of joinder and against severance . . . and, therefore, absent an abuse of discretion . . . will not second guess the considered judgment of the trial court as to the joinder or severance of two or more charges." (Internal quotation marks omitted.) Id., 521. On appeal, "[t]he defendant bears a heavy burden of showing that the denial of severance resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Internal quotation marks omitted.) Id., 520.

"Where evidence of one incident can be admitted at the trial of the other, separate trials would provide the defendant no significant benefit. It is clear that, under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial." *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987). We consistently have found joinder to be proper if we have concluded that the evidence of other crimes or uncharged misconduct would have been cross admissible at separate trials. *State* v. *McKenzie-Adams*, supra, 281 Conn. 520 (citing cases); see also *State* v. *Atkinson*, 235 Conn. 748, 765, 670 A.2d 276 (1996) (concluding that consolidation was proper, in part, because evidence of escape offense would have been admissible at trial to prove consciousness of guilt of other factually unrelated offenses); *State* v. *Greene*, 209 Conn. 458, 464, 551 A.2d 1231 (1988) ("[t]he trial court properly joined the two cases for trial because, in the event of separate trials, evidence relating to each of the cases would have been admissible in the other"); *State* v. *Pollitt*, supra, 72. Even if the evidence was not cross admissible, however, we have affirmed the trial court's judgment permitting joinder, provided that the defendant was not substantially prejudiced. *State* v. *McKenzie-Adams*, supra, 520–21. To make that determination, we have examined: "(1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *Ellis*, supra, 270 Conn. 375.

Accordingly, we first must determine whether the trial court abused its discretion when it determined that the evidence of either assault would have been cross admissible at separate trials to prove a common plan or scheme. *State* v. *Jacobson*, 283 Conn. 618, 626, 930

A.2d 628 (2007). "As a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, is admissible." (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, supra 281 Conn. 521–22; *State* v. *Morowitz*, 200 Conn. 440, 442, 512 A.2d 175 (1986) ("evidence of prior unconnected crimes . . . may be admissible . . . to prove knowledge, intent, motive, and common scheme or design" [citations omitted; internal quotation marks omitted]); see also Conn. Code Evid. § 4-5 (b).[19] Such evidence properly may be admitted if it is (1) "relevant and material to at least one of the circumstances encompassed by the exceptions," and (2) more probative than prejudicial. *State* v. *McKenzie-Adams*, supra, 522.

There are "two separate and distinct categories of cases in which we have applied the common scheme or plan exception. In the first category, which consists of what most accurately may be described as 'true' common scheme or plan cases, the nature of the charged and uncharged crimes combined with connecting evidence, if any, gives rise to a permissive inference that an overall scheme or plan existed in the defendant's mind, and that the crimes were executed in furtherance of that plan. In the second category of cases, which consists of what most accurately may be described as 'signature' cases, the charged and uncharged crimes appear to be separate and discrete criminal acts, but the method of commission exhibits the existence of a 'modus operandi,' 'logo,' or 'signature,' which, when considered in combination with other factors, such as the proximity of time and place of commission, gives rise to a permissive inference that the crimes were executed in furtherance of an overall common scheme or plan." *State* v. *Randolph*, 284 Conn. 328, 343, 933 A.2d 1158 (2007).

Thus, to establish a common scheme, "[i]t is not enough that the two offenses are similar. . . . [Rather], the characteristics of the two offenses must be sufficiently distinctive and unique as to be like a signature." (Internal quotation marks omitted.) *State* v. *Morowitz*, supra, 200 Conn. 443. We repeatedly have applied, however, a more liberal approach to admitting evidence of misconduct to prove a common plan or scheme in sex crime cases than in other types of cases.[20] *State* v. *Randolph*, supra, 284 Conn. 340–42; *State* v. *McKenzie-Adams*, supra, 281 Conn. 522; *State* v. *Aaron L.*, 272 Conn. 798, 820–21, 865 A.2d 1135 (2005); *State* v. *Romero*, 269 Conn. 481, 497–98, 849 A.2d 760 (2004);

State v. *Kulmac*, 230 Conn. 43, 62, 644 A.2d 887 (1994); *State* v. *Hauck*, 172 Conn. 140, 145, 374 A.2d 150 (1976). We generally have determined that such evidence is relevant to a common scheme or plan of sex crimes provided that three conditions are met: "[T]he prior offenses (1) are not too remote in time; (2) are similar to the offense charged; and (3) are committed upon persons similar to the prosecuting witness." (Internal quotation marks omitted.) *State* v. *Jacobson*, supra, 283 Conn. 631; see also *State* v. *McKenzie-Adams*, supra, 522.

With regard to the first factor, we have acknowledged that "increased remoteness in time does reduce the probative value of prior misconduct evidence . . . [but], [e]ven a relatively long hiatus between . . . misconduct . . . is not, by itself, determinative of the admissibility of common plan or scheme evidence . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Jacobson*, supra, 283 Conn. 633. When there are "striking similarities" between the incidents at issue, we have found longer intervals to be acceptable. See *State* v. *Sawyer*, 279 Conn. 331, 350–51, 904 A.2d 101 (2006) (citing cases). In the present case, the period between occurrences—approximately one year—falls within the range of time we have accepted as "not too remote." See, e.g., *State* v. *Jacobson*, supra, 632–33 (six to ten years between incidents was not "insignificant" period of time but still not too remote); *State* v. *Romero*, supra, 269 Conn. 498–500 (nine years between incidents of sexual abuse not too remote); *State* v. *Kulmac*, supra, 230 Conn. 62 (seven years between incidents not too remote).

With regard to the second and third factors, in the present case, the events were not merely similar; rather, the type of victim and the method of attack were substantially identical in both cases. First, both C and G are women whom the defendant had hired to work in his bakery. Second, the place where the assault occurred (the bakery's back room), the method of restraint (pushing the victims up against an object and pinning them down), the method of sexual attack (vaginal intercourse or attempted vaginal intercourse), and the use of threats to dissuade the victim from reporting the assault (assertions of police or Mafia contacts) were all substantially the same in the cases of both victims. The similarities between the two attacks are, indeed, so striking that we have little trouble concluding, particularly under our more liberal sex crime admissibility rules, that the attacks were relevant to prove a common plan or scheme on the part of the defendant to sexually assault his female employees. See *State* v. *Sawyer*, supra, 279 Conn. 344 ("[i]t 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" [inter-

nal quotation marks omitted]).

We next must determine whether the prejudicial effect of the evidence outweighed its probative value. In so doing, "every reasonable presumption should be given in favor of the trial court's ruling. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates *undue* prejudice so that it threatens an injustice were it to be admitted. . . . [Accordingly] [t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the jur[ors]." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jacobson*, supra, 283 Conn. 639.

Under these circumstances, it is difficult to imagine that G's testimony unduly aroused the emotions of jurors anymore than C's testimony and vice-versa—particularly given the strong similarities in the details of the incidents. Any trial at which a sexual assault victim has to relate intimate details of the assault is an emotional affair; we cannot conclude in the present case, without more, that evidence of such a common plan or scheme was unduly prejudicial.

The defendant contends that he was unduly prejudiced because, in consolidating the cases, the trial court permitted the jury to hear and consider more details than were necessary to prove a common plan or scheme. Specifically, the defendant points to the admission of the evidence regarding the victims' hesitation in coming forward and their general emotional reaction to the assault. Although the details concerning the state of mind and conduct of both victims after the assault were not relevant to a common plan or scheme, we disagree that the details of what happened to the victims after their assaults—such as, C's emotional state—subjected the defendant to any undue prejudice. We cannot find, and the defendant has not directed us to, anything shocking or unusual about the victims' emotional or psychological reactions to the assaults that would have so inflamed the passions and prejudices of the jury that separate trials would have afforded the defendant any substantial benefit. For the foregoing reasons, we conclude that the trial court did not abuse its discretion in determining that the evidence of each assault would have been cross admissible to prove a common plan or scheme. Thus, separate trials would have afforded the defendant no substantial benefit. Accordingly, the Appellate Court improperly concluded that the defendant was entitled to new trials.

III

Pursuant to the Practice Book § 84-11 (a),[21] the defendant offers an alternate ground to affirm the Appellate Court's judgment reversing his convictions: the trial

court's decision to permit his former wife to testify as a rebuttal character witness constituted harmful error. We are not persuaded.

The following additional procedural history is relevant to our consideration of this issue. At trial, the defendant called various friends and acquaintances to testify that he was a person of good character and that he was not the kind of person who would commit a crime like sexual assault.[22] At the close of the defendant's case, the state sought to call Robin Sanseverino, the defendant's former wife, to testify to incidents of sexual assault against her by the defendant during their thirteen year marriage. The defendant objected to this evidence on the basis that: (1) he was not given sufficient time to prepare to rebut it; and (2) the testimony itself would be more prejudicial than probative. The state contended that this testimony was admissible as rebuttal evidence of the character traits that the defendant had opened the door to during his presentation of evidence. The trial court agreed with the state and permitted Robin Sanseverino to testify as a rebuttal witness.

Thereafter, she testified that she had been sexually abused by the defendant on nearly a daily basis during their marriage. She testified as to specific incidents of this sexual abuse, such as when the defendant had forced her to have sex with him while she was sick with influenza, during which assault the victim swallowed her own vomit. She also testified as to prior incidents of domestic abuse that were nonsexual, such as when the defendant threw a child's high chair at her for not having dinner ready on time. In surrebuttal of this evidence, the defendant called members of his family and his divorce attorney to testify that they had no knowledge of the alleged sexual abuse of Robin Sanseverino by the defendant during the marriage.

The prosecutor did not mention Robin Sanseverino's testimony in his summation to the jury. In its jury charge, the trial court instructed the jury that it could consider her testimony only as evidence of a common scheme or plan to commit sexual abuse, not as evidence of the defendant's bad character or propensity to commit criminal acts.[23] The court did not give a charge on character evidence in this regard, and defense counsel stated on the record that he had no objection to the charge as given.

The defendant submits that the trial court improperly admitted Robin Sanseverino's testimony as evidence of a common scheme or plan under the test set forth previously and that the impropriety was harmful. The state admits that it improperly had inquired into specific instances of sexual abuse during its direct examination of Robin Sanseverino,[24] but contends that the defendant's claim on appeal must be limited to the objection he raised at trial that the evidence was unduly prejudi-

cial. The state maintains that the trial court did not abuse its discretion in admitting the testimony because it was not more prejudicial than probative, and that, in any event, any error was harmless.

Even if we were to assume, without deciding, that the trial court improperly admitted the evidence as evidence of a common scheme or plan, we conclude that the defendant failed to meet his burden of providing that such impropriety was harmful. When an evidentiary error is nonconstitutional in nature, as in the present case, the defendant bears the burden of showing it was harmful. *State* v. *Sawyer*, supra, 279 Conn. 352. "[A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id., 357.

"[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.) Id., 358.

The state's evidence independent of Robin Sanseverino's testimony provided a strong case against the defendant. The fact that C and G gave nearly identical accounts of the sexual assaults by the defendant within one year of each other significantly enhanced the inference of guilt and strengthened the state's case. Both victims were adults and had a good memory of the key details of the assaults. Moreover, the fact that Robin Sanseverino's testimony was offered by the state in rebuttal to earlier character evidence that the defendant had presented conveyed to the jury its limited importance to the state's case. Thus, we conclude that the state's case was strong and that it reasonably could have supported a guilty verdict independent of the contested testimony. See id. (strength of state's case was key factor in determining harmfulness of error in admission of uncharged misconduct in sex crimes case).

Three other factors influence our determination that the error was not harmful. First, the defendant had, and took full advantage of, the opportunity to present evidence in surrebuttal of his former wife's testimony. Specifically the defendant's brother, Joseph Sanseverino, his nephew, Pasquale Serino, and his sister, Angela Sanseverino testified that they had never observed any signs of abuse between the defendant and his former wife while they were married. The defendant's divorce

attorney, Marcus Bordiere, also testified that no allegations of sexual abuse had surfaced during the course of the dissolution proceedings. Moreover, the defendant had, prior to Robin Sanseverino's testimony, called four witnesses to testify to his good character in relation to his treatment of women. Second, any prejudice the defendant suffered was mitigated in part by the fact that he was the party who opened the door to the character evidence and thus it would have been entirely proper for the state to have called Robin Sanseverino to give her opinion as to the defendant's violent character in rebuttal to the defendant's evidence of his good character. Third, the state's attorney did not rely on or mention Robin Sanseverino's testimony during his summation to the jury, thus confining its effect to the rebuttal portion of his case.

The defendant claims, however, that we should find harmful error for the same reason that we did in *State* v. *Ellis*, supra, 270 Conn. 352. In *Ellis*, we addressed a defendant's claim that the trial court improperly had admitted testimony as evidence of a common plan or scheme from three young girls alleging prior sexual misconduct by the defendant in a case involving a fourth victim, Sarah S. Id. We concluded that the allegations of abuse by Sarah S. and those by the other girls were materially different because the abuse of Sarah S. was "far more frequent and severe." Id., 359. This and other differences in the relationship between the defendant and Sarah S. led us to determine that the admission of the evidence relating to the other girls was improper. Id., 358–65. In determining that the impropriety was harmful, we concluded that "[t]he sheer quantity of testimony concerning the defendant's abuse of the other girls was likely to have been harmful in its cumulative effect on the jury's deliberations." Id., 368. We further concluded that the trial court improperly had consolidated the trials of charges relating to the incidents involving Sarah S. with charged sexual misconduct involving two of the other girls, whose testimony was admitted to prove a common scheme or plan, because the evidence of Sarah S.'s abuse was "substantially more egregious . . . ." Id., 378.

In the present case, we previously have determined that allegations of sexual assault against C and G would have been cross admissible at separate trials. Thus, in contrast to the facts in *Ellis*, wherein the allegations of *three* additional victims improperly had been admitted, we do not conclude that the jury would have been overwhelmed by the testimony of the defendant's former wife in the same way as it would have been had multiple additional victims come forward.

The defendant contends that, although Robin Sanseverino was the only witness who testified as to prior uncharged conduct, the magnitude of the abuse that she described was so much greater than that described

by C and G that the effect was the same as in *Ellis*. We have trouble with this comparison, however, because Robin Sanseverino's testimony did not bear on guilt in the same way. As we have stated, C and G's allegations, in combination, fit a common pattern and modus operandi of sexual abuse of employees and thereby enhanced the inference of guilt. *State* v. *McKenzie-Adams*, supra, 281 Conn. 525 (evidence of sexual misconduct against two victims offered to prove common scheme or plan "sufficiently similar to permit the jury to infer that, if [the defendant] was guilty of the offense involving one victim, then he was also guilty of the offenses involving the other"). In stark contrast, Robin Sanseverino's allegations of sexual abuse did not tend to prove a common scheme or plan on the part of the defendant to sexually abuse his female employees. Accordingly, we reject the defendant's alternate ground for affirmance.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction: (1) to reverse the judgment of the trial court with respect to the conviction of kidnapping in the first degree and to remand the case to the trial court with direction to render judgment of not guilty on that charge; and (2) to affirm the judgment of the trial court in all other respects.

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

[1] General Statutes § 53a-92 (a) provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually . . . ."

[2] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person . . . which reasonably causes such person to fear physical injury to such person or a third person . . . ."

We note that § 53a-70 (a) was amended in 2000, however, the changes made are not relevant to this appeal. See Public Acts 2000, No. 00-161, § 1. For purposes of convenience, we refer to the current revision of the statute.

[3] In accordance with the policy of protecting the privacy interests of victims of sexual abuse, we do not identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[4] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[5] The defendant originally was charged with unlawful restraint in the first degree as to C. On or about April 5, 2004, the state filed a substitute long form information charging the defendant with kidnapping in the first degree as to C. The defendant filed a motion to dismiss the kidnapping count on the ground that the kidnapping charge "broaden[ed] or substantially amend[ed] the charge of [u]nlawful [r]estraint in the [f]irst [d]egree made in the first information, such that the defendant has been called upon to address factual allegations by the [s]tate beyond those already charged in the first information" and, therefore, was a new charge brought beyond the five year statute of limitations. In response to the defendant's motion, the state withdrew the kidnapping charge prior to trial and, on or about April 21, 2004, the state filed another substitute long form information charging the defendant with sexual assault in the first degree and attempt to commit sexual assault in the first degree as to C; and kidnapping in the first degree

and sexual assault in the first degree as to G.

[6] Practice Book § 41-18 provides: "If it appears that a defendant is prejudiced by a joinder of offenses, the judicial authority may, upon its own motion or the motion of the defendant, order separate trials of the counts or provide whatever other relief justice may require."

[7] In this respect, we note the following points. The defendant asserted at trial that he had dated C, but that she ultimately was fired for giving away pastries and for stealing money. The defendant adduced testimony from one of his employees that C had returned to the bakery on occasion after the alleged assault to ask the defendant for bus fare. With respect to G, the defendant asserted that they had dated for a short period of time, and that she did not quit within one week after the alleged incident, but continued to work at the bakery until sometime later when the defendant sold the bakery to G's brother-in-law. The defendant also asserted that G and her brother-in-law had offered to drop the charges in exchange for money. G testified that her brother-in-law had approached her about taking money from the defendant to drop the charges, but that she had refused to do so.

[8] In *State* v. *Luurtsema*, supra, 262 Conn. 201–204, we rejected the defendant's claim that the evidence was insufficient to support a kidnapping conviction under § 53a-92 (a) (2) (A) because he only had moved the victim from the couch to the floor, where he had choked and attempted to sexually assault her. We concluded that the kidnapping statute does not impose time or distance requirements, and that "any argument that attempts to reject the propriety of a kidnapping charge on the basis of the fact that the underlying conduct was integral or incidental to the crime of sexual assault also must fail." (Internal quotation marks omitted.) Id., 202. We also noted that, because the defendant did not raise a void for vagueness challenge, we could "neither acknowledge nor reject the merits of such a constitutional claim." Id., 204.

[9] In *State* v. *Jones*, supra, 215 Conn. 180, although the court rejected the defendant's claims that § 53a-92 (a) (2) (A) was void for vagueness as applied and that there was insufficient evidence to support his kidnapping conviction, the court acknowledged that it could conceive of a successful void for vagueness challenge in a "factual situation in which charging a defendant with kidnapping based upon the most minuscule movement would result in an absurd and unconscionable result." (Internal quotation marks omitted.) In so doing, the court cited to *People* v. *Adams*, 389 Mich. 222, 232, 205 N.W.2d 415 (1973), representing a line of cases from other jurisdictions applying the "merger doctrine." *State* v. *Jones*, supra, 180. In *People* v. *Adams*, supra, 227–28, a prison inmate took a prison guard hostage at knifepoint and moved him from the cell block to the prison yard and ultimately to the prison hospital. He took several other hostages along the way. Id. The Michigan Supreme Court concluded—on the basis of a review of the development of case law from other jurisdictions—that the state's kidnapping statute required some asportation that was independent of an underlying lesser offense. Id., 230–38. The defendant contends that this court's citation to *Adams* in *Jones* represents an endorsement of the merger doctrine reasoning in the void for vagueness context pre-*Luurtsema*.

[10] Although at oral argument before this court, the defendant stated that he was not asking us to reconsider our position on the merger doctrine, we note that under either the merger doctrine or the void for vagueness framework we are required to consider the relationship between the sexual assault and the restraint and to determine whether, under the specific facts of the case, one was so incidental and necessary to the other that kidnapping may not lie as a separate offense. The defendant addresses this aspect in his void for vagueness claim, and the state has responded. For these reasons, we conclude it is appropriate to examine the defendant's contentions within the *Salamon* framework.

[11] We may apply the rule announced in *Salamon* to the present case because this court long has stated that a rule enunciated in a case presumptively applies retroactively to pending cases. *Marone* v. *Waterbury*, 244 Conn. 1, 10–11 and n.10, 707 A.2d 725 (1998) (citing cases). Because the present case was pending at the time we articulated a new construction of the kidnapping statutes in *Salamon*, that construction applies here.

[12] "Abduct" is defined under General Statutes § 53a-91 (2) as "to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation."

[13] "Restrain" is defined under General Statutes § 53a-91 (1) as "to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to

another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . ."

[14] In *State* v. *Salamon*, supra, 287 Conn. 532 n.21, we also had noted that "[a] challenge to a kidnapping conviction predicated on such miniscule movement or duration of confinement remains viable on constitutional grounds under the void for vagueness doctrine." See also id., 527–28 n.17. Although we recognize that a minuscule degree of restraint and its incidentalness to the more substantive offense often will go hand in hand, we emphasize that our more recent decisions do not foreclose the success of a void for vagueness challenge in a situation wherein the restraint is independent of the substantive offense but still so minuscule that the application of the kidnapping statute would produce absurd and unconscionable results.

[15] The dissent suggests that our holding in the present case, and in *Salamon*, merely have replaced the issues created by our previous interpretation of the kidnapping statute with a host of new ones. For all of the reasons set forth in *Salamon*, we believe that our interpretation of the kidnapping statute is sound. Additionally, although we recognize that other issues may arise as a result of the decisions in *Salamon* and the present case, we leave those issues for another day when they are appropriately before us.

[16] Contrary to the dissent's assertion that the state "*could have proffered*" additional evidence in the present case to support the kidnapping charges had it had knowledge of the rule announced in *Salamon*, we have found nothing in the record to indicate that there was any such evidence. (Emphasis in original.) In the absence of any such evidence, it strains the imagination to conceive of a situation in which the state would decline to proffer relevant and material evidence in a criminal prosecution wherein it bears the burden of proving every element of the crimes charged beyond a reasonable doubt. See *State* v. *Perkins*, 271 Conn. 218, 235, 856 A.2d 917 (2004). We note that the state has not requested that we order the trial court to enter a judgment of conviction of unlawful restraint in the second degree; General Statutes § 53a-96; as a lesser included offense of kidnapping. Therefore, we currently express no opinion on whether the state might be entitled to such relief and we reserve judgment on whether to consider that issue should the state raise it in a postappeal motion.

[17] General Statutes § 54-57 provides: "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise."

[18] Practice Book § 41-19 provides: "The judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together."

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

"(b) When evidence of other crimes, wrongs or acts is admissible. 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. . . ."

[20] "That rationale rests, in part at least, on the notion that, when human conduct involves sexual misconduct, people tend to act in generally consistent patterns of behavior, and that it is unlikely (although, of course, not impossible) that the same person will be falsely accused by a number of different victims." *State* v. *Sawyer*, 279 Conn. 331, 383, 904 A.2d 101 (2006) (*Borden*, *J.*, concurring and dissenting); see also *State* v. *Merriam*, 264 Conn. 617, 670–71, 835 A.2d 895 (2003).

[21] Practice Book § 84-11 (a) provides in relevant part: "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. . . ." The defendant did raise and brief his alternate ground for affirmance before the Appellate Court, but the court did not reach the issue in rendering its decision.

[22] Specifically, Barbara Pleasent, the defendant's friend, employer and former girlfriend, testified that the defendant had a reputation in the community for truthfulness and that she believed he never would force himself on anyone sexually. Grace Cillo, a friend who had helped out in the defendant's

bakery, and her husband, Geraldo Cillo, also a close friend of the defendant, testified that they believed that the defendant had a reputation in the community for truthfulness and that he never would force himself on anyone. Both of the Cillos testified, however, that they might change their opinion of the defendant if they knew that he had sexually assaulted someone. Finally, the defendant's current girlfriend, Elizabeth Solak, testified that she did not believe that the defendant would sexually assault anyone.

[23] The trial court specifically had stated: "In this case, the defendant's [former wife], Robin Sanseverino, testified that the defendant compelled her to have sexual intercourse against her will and that he abused her sexually and mentally during the pendency of their marriage. This evidence offered by the state of prior acts of misconduct by the defendant is not being admitted to prove the bad character of the defendant or the defendant's tendency to commit criminal acts. Such evidence is being admitted solely to show or establish a common scheme in the commission of criminal acts or the existence of the intent which is a necessary element of the crime charged.

"You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence, if you believe it and further, find it logically, rationally, and conclusively supports the issues for which it is being offered by the state but only as it may bear here on the issues of establishing a common scheme in the commission of criminal acts or the existence of the intent which is a necessary element of the crime charged."

[24] Specifically, the state admits that it "more properly should have simply . . . had [the defendant's former wife] offer her opinion regarding whether, based on her knowledge of the defendant's character, she believed he would force someone to engage in sexual intercourse, and . . . asked the defendant's four character witnesses if their opinion, that based on their knowledge of the defendant they did not believe he would forcibly restrain or compel another to engage in sex, would have been altered if they were aware that the defendant, during his marriage to his [former wife], repeatedly forced her against her will to engage in sex." Without passing judgment on these specific contentions, we note that it long has been our rule that evidence of prior specific acts may not be used as rebuttal evidence when a defendant has put his character at issue. *State* v. *Martin*, 170 Conn. 161, 163–65, 365 A.2d 104 (1976) ("Whether or not the accused produces testimony of reputation or opinion to prove a trait, the prosecution may not use specific acts of misconduct to disprove the trait. . . . There is a distinction between the prosecution's use of specific acts in rebuttal to disprove the trait in question and the prosecution's use of specific acts in the cross-examination of a character witness. When a character witness has given his opinion as to a particular trait, the state may cross-examine that witness concerning specific acts, not to prove the truth of such facts, but to test the credibility of the character witness by ascertaining his good faith, his source and amount of information and his accuracy." [Citations omitted.]); see also Conn. Code Evid. § 4-4 (c) and commentary.