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PALMER, J., dissenting. I disagree with the majority's conclusion that, contrary to the determination of the Appellate Court, the defendant, Ricardo Collins, is not entitled to a new trial due to the improper admission of highly prejudicial evidence. Specifically, I believe that the Appellate Court properly determined that the trial court committed harmful error when it permitted the state to introduce testimony establishing that the defendant had shot Stephen Rose in an incident that occurred three months prior to the shooting of the victim in the present case, namely, Calvin Hopkins.<sup>1</sup> Although it is undisputed that the state was entitled to prove the defendant's possession of the gun that had been used in the Rose shooting, under the circumstances presented, the state had no legitimate reason to adduce evidence that the defendant actually had used that gun to shoot Rose. Furthermore, evidence of the Rose shooting was not relevant for any other purpose. Because I also agree with the Appellate Court that the trial court's improper admission of the evidence concerning the Rose shooting deprived the defendant of a fair trial, I respectfully dissent.<sup>2</sup>

I begin with a brief summary of the relevant facts and procedural history. Following a verbal dispute with Rose on August 28, 2002, the defendant removed a nine millimeter handgun from his waistband and fired four shots into the pavement near where Rose was standing. The altercation became physical and, during the ensuing scuffle, the defendant fired a fifth shot that struck Rose and lodged in his upper arm. Five shell casings from the defendant's gun were recovered at the scene. Thereafter, on December 2, 2002, in the city of Bridgeport, Hopkins was fatally shot in the head by a person wielding a nine millimeter handgun. The police retrieved a shell casing from that shooting that had lodged on Hopkins' collar, but the police were unable to solve that murder in the weeks immediately following the shooting.

In January, 2003, the defendant contacted the Bridgeport police and confessed to the shooting involving Rose but claimed that he had acted in self-defense. The defendant also told the police that he had sold the gun shortly after that shooting to an unknown person for \$300. During the course of his interview with the police, the defendant also was questioned about the Hopkins murder. The defendant admitted that he had been with Hopkins in Hopkins' car on the night of December 2, 2002, for the purpose of purchasing drugs but denied any involvement in the Hopkins murder. Thereafter, ballistics testing on the shell casing recovered from Hopkins' collar and similar testing on shell casings recovered from the scene of the Rose shooting estab-

lished that the bullets used in each of those incidents had been fired from the same nine millimeter handgun.

The defendant ultimately was convicted of offenses arising out of the Rose shooting and also was arrested and tried for the murder of Hopkins. At the defendant's first trial in the Hopkins case, the state introduced evidence establishing that the defendant had shot Rose for the purpose of demonstrating that the defendant had used the same gun in connection with the Hopkins murder. In that initial trial, however, the jury ultimately reported that it was hopelessly deadlocked, and the trial court declared a mistrial. Thereafter, the defendant was tried a second time for the Hopkins murder.<sup>3</sup> At that trial, the state again sought to introduce evidence of the defendant's involvement in the Rose shooting. The defendant, who at the time was representing himself, objected to that evidence, claiming that any testimony concerning the fact that he had shot Rose would be "highly prejudicial" and that such prejudice "clearly outweigh[ed]" any possible probative value. The defendant further maintained that the state had no need to present that evidence for the purpose of linking him to the gun that had been used in the Rose shooting because the defendant already had acknowledged possessing that gun when he confessed to shooting Rose.<sup>4</sup>

The trial court overruled the defendant's objection, concluding that the evidence was relevant under § 4-5 of the Connecticut Code of Evidence<sup>5</sup> to prove intent, an element of a crime, and opportunity. The court also concluded that the probative value of the evidence outweighed any danger of unfair prejudice under § 4-3 of the Connecticut Code of Evidence.<sup>6</sup> The trial court, however, gave the jury a limiting instruction with respect to the proper use of the evidence.<sup>7</sup> Although Rose did not testify, the state adduced evidence concerning the Rose shooting through several other witnesses, including an expert firearms examiner who testified that the same gun was used to fire the bullets in both the Rose shooting and the Hopkins murder. After the state adduced evidence that the defendant had shot Rose, the defendant consented to the state's introduction of the statement that he had given to the police in which he acknowledged that he had shot Rose but claimed that he did so in self-defense. In that statement, the defendant also claimed that he had sold the gun used in the Rose shooting shortly after that incident.

Following the court's instructions, the jury commenced its deliberations, during which the jury twice communicated to the court that it could not reach a unanimous verdict as to one of the counts of the information. On both such occasions, the court instructed the jury to continue deliberating, and, on the second occasion, the court gave the jury a Chip Smith instruction.<sup>8</sup> The jury subsequently found the defendant guilty as charged.

On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court improperly had allowed the state to introduce evidence establishing that he had shot Rose and that the state's use of that evidence had deprived him of a fair trial. *State v. Collins*, 111 Conn. App. 730, 737, 961 A.2d 986 (2008). He asserted, specifically, "that the probative value of evidence that he had shot and injured Rose did not overcome the risk of prejudice to his defense, even with the limiting instruction given by the court. He further assert[ed] that although it may have been probative that he once owned a gun that produced shell casings that match the one found on Hopkins' collar, the fact that he shot Rose with that gun was irrelevant to proving anything for which such evidence would be admissible." *Id.* The state maintained that the entirety of the Rose evidence, including the fact that the defendant had shot Rose, was relevant to prove identity and motive.<sup>9</sup>

After setting forth the principles of §§ 4-3 and 4-5 of the Connecticut Code of Evidence, the Appellate Court expressed its agreement with the defendant, explaining: "The testimony relating to the Rose [shooting] clearly fits into the category of evidence that would have unduly aroused the [jurors'] emotions and hostilit[ies]. It painted the defendant as a gun toting criminal with a proclivity for shooting people. The evidence was not admissible for that purpose. See [Conn. Code Evid. § 4-5]. . . .

"The testimony of several individuals was introduced at trial regarding the Rose shooting. The portion of the testimony relevant to the crimes for which the defendant was on trial was simply that which would prove that he had at some time owned a gun that produces shell casings that match the one found on Hopkins' collar. It would have been sufficient for the state simply to introduce evidence to that effect without going into the details of the defendant's involvement with the [shooting of] Rose." (Citation omitted.) *State v. Collins*, supra, 111 Conn. App. 743. After concluding that "the danger of unfair prejudice resulting from the admission of that evidence far outweighed its probative value"; *id.*, 732; the Appellate Court also concluded that the defendant had satisfied his burden of demonstrating that the impropriety was harmful and that he therefore was entitled to a new trial.<sup>10</sup> *Id.*, 744.

On appeal to this court following our granting of certification, the state claims that the Appellate Court improperly concluded that the evidence that proved that the defendant had shot Rose was inadmissible. In particular, the state contends that the evidence was relevant to establish identity and motive and, in addition, to corroborate the testimony of Kimberly Finney, an inmate whom the defendant allegedly had confided in about his involvement in the Rose shooting and the Hopkins murder while the two men were incarcerated

together at the Bridgeport correctional center. The state further maintains that, contrary to the conclusion of the Appellate Court, the trial court reasonably determined that the probative value of the evidence establishing that the defendant had shot Rose outweighed its potential for unfair prejudice. The defendant contends that the Appellate Court correctly concluded that the prejudicial effect of the evidence outweighed its minimal probative value. Alternatively, the defendant asserts that evidence of the Rose shooting was irrelevant and, therefore, inadmissible. In either case, the defendant claims that the trial court's admission of the evidence was harmful and that a new trial therefore is required.

In resolving the issue presented by this appeal, the majority states as follows: "The Appellate Court's decision did not address the first prong of the uncharged misconduct inquiry [under § 4-5 (b) of the Connecticut Code of Evidence], appearing to assume, but without specifically indicating, that the trial court properly had determined that evidence that the defendant had shot Rose with the same [gun] that was used to murder Hopkins was relevant under either the corroboration or identity exceptions set forth in § 4-5 (b) . . . ."<sup>11</sup> Rather, the Appellate Court's analysis focused on the second prong of the test [under § 4-3 of the Connecticut Code of Evidence], and the defendant's claim 'that the probative value of evidence of the Rose shooting did not overcome the risk of prejudice, even with the limiting instruction given by the court. He further asserts that although it may have been probative that he once owned a gun that produced shell casings that match the shell casing found on Hopkins' collar, the fact that he shot Rose with that gun was not necessary to prove any element of the state's case.' *State v. Collins*, supra, 111 Conn. App. 742." The majority then proceeds to explain why, in its view, "the Appellate Court improperly determined that the trial court had abused its discretion in determining that the prejudicial effect of the evidence that the defendant had shot Rose with the same gun used in Hopkins' murder did not unduly exceed its probative value." In doing so, the majority rejects the defendant's threshold contention that the evidence was irrelevant and therefore inadmissible, concluding that the evidence "was relevant to prove the defendant's identity as the shooter in this case, as well as to corroborate Finney's testimony to that effect." Footnote 19 of the majority opinion.

As I explain more fully hereinafter, the trial court improperly permitted the state to present evidence of the Rose shooting because that evidence was not relevant to prove any fact at issue in the case. Even if that evidence may be deemed relevant, however, it was inadmissible because, as the Appellate Court explained, any minimal probative value that it may have had was far outweighed by its potential for unfair prejudice.

Furthermore, whether the evidence is viewed as irrelevant or minimally relevant, the state's use of that evidence entitles the defendant to a new trial because it was so prejudicial as to violate the defendant's due process right to a fair trial.

Before addressing the majority's conclusion that the trial court properly permitted the state to present evidence of the Rose shooting, I first note the firmly established principles of relevance and materiality that govern a review of that conclusion. Except as provided by the state and federal constitutions, state statute or the Connecticut Code of Evidence, "[a]ll relevant evidence is admissible . . . . Evidence that is not relevant is inadmissible." Conn. Code Evid. § 4-2. "Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *State v. Hedge*, 297 Conn. 621, 635, 1 A.3d 1051 (2010). Thus, "[e]vidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State v. Bonner*, 290 Conn. 468, 497, 964 A.2d 73 (2009). As this court previously has noted, "[e]vidence is admissible only to prove material facts, that is to say, those facts directly in issue or those probative of matters in issue; evidence offered to prove other facts is immaterial." (Internal quotation marks omitted.) *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 265 Conn. 79, 106, 828 A.2d 31 (2003). With respect to the issue of materiality, "[e]vidence is immaterial if the objector is tempted to respond 'so what,' 'who cares,' or 'that is not in issue.'" C. Tait & E. Prescott, *Connecticut Evidence* (4th Ed. 2008) § 4.1.3, p. 136.

Furthermore, "[e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . Since the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a

trial court's decision only when it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State v. Cutler*, 293 Conn. 303, 311–12, 977 A.2d 209 (2009).

As I have indicated, the defendant does not dispute the fact that his possession of the gun used in the Rose shooting is relevant to the issue of whether he shot and murdered Hopkins. Indeed, in light of the state's evidence indicating that the same gun was used in both shootings, it is inarguable that the state had a legitimate interest in linking the defendant to the gun used in the Rose shooting because proof of that connection also implicates the defendant in the Hopkins murder.<sup>12</sup> The issue presented by this appeal, however, is not whether the trial court properly permitted the state to adduce evidence concerning the defendant's prior possession of the gun at the time of the Rose shooting but, rather, whether the court properly overruled the defendant's objection to evidence establishing that the defendant actually shot Rose. Ordinarily, when, as in the present case, the state's case against the defendant includes evidence that the defendant used a weapon in the commission of the crime, and the state can place that weapon in the hands of the defendant during his commission of a prior crime, the defendant will not acknowledge having committed the prior crime. In such circumstances, the only way for the state to prove that the defendant possessed the gun on the earlier occasion is to present evidence establishing the defendant's commission of that prior crime. Because that prior crime evidence generally is a vital element of the state's proof that the accused, as distinguished from anyone else, is guilty of the crime charged, the court is likely to conclude that the risk of any unfair prejudice arising from the state's use of that evidence is outweighed by its probative value. Indeed, the cases on which the majority relies in support of its conclusion that the probative value of the evidence concerning the Rose shooting outweighs its prejudicial effect fall squarely into this category, that is, in each such case, evidence of the defendant's prior possession of the weapon was critical to the state's case, and, because the defendant had not acknowledged possessing the weapon in the commission of a prior crime, the state was entitled to adduce evidence of the commission of that prior crime to prove the defendant's prior possession of the weapon. See, e.g., *United States v. Higgs*, 353 F.3d 281, 290–93, 311–12 (4th Cir. 2003), cert. denied, 543 U.S. 999, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *State v. Williams*, 992 So. 2d 330, 332–34 (Fla. App. 2008); *People v. Brown*, 13 App. Div. 3d 145, 146, 786 N.Y.S.2d 55 (2004), appeal denied, 4 N.Y.3d 828, 829 N.E.2d 676, 796 N.Y.S.2d 583 (2005); *State v. Stokes*, 381 S.C. 390, 404–406, 673 S.E.2d 434 (2009); cf. *State v. Lemons*, 348 N.C. 335, 351–53, 501 S.E.2d 309 (1998) (although defendant admitted prior possession of weapon, evidence of prior crime

admissible to prove identity), vacated on other grounds, 527 U.S. 1018, 119 S. Ct. 2363, 144 L. Ed. 2d 768 (1999).

Thus, contrary to the assertion of the majority, those cases provide no support for the majority's conclusion because, in the present case, the defendant confessed to the police that he had shot Rose, and he has never challenged the validity or accuracy of that confession. In other words, he never has disputed the fact that he shot Rose. Because the defendant's acknowledgment that he shot Rose necessarily also constitutes an acknowledgment that he possessed the gun that was used in that shooting, there simply was no basis for the court to permit the state to present evidence of the shooting itself. For that reason, evidence of that shooting was irrelevant to any disputed issue in the case. Because irrelevant evidence is inadmissible; see Conn. Code Evid. § 4-2; there is no reason to subject such evidence to the balancing standard prescribed by § 4-3 of the Connecticut Code of Evidence for determining whether *probative* evidence should be excluded due to its overriding prejudicial effect. See, e.g., *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980) (to be admissible, evidence of prior misconduct "must be relevant to some disputed issue in the trial").

Alternatively, it may be argued that, although evidence that the defendant shot Rose was relevant to prove the defendant's possession of the gun used in that shooting, the probative value of that evidence was minimal because other uncontested evidence, namely, the defendant's confession to the Rose shooting, established that fact definitively. Indeed, as the majority notes, the Appellate Court appears to assume the relevance of the Rose shooting, concluding, however, that its minimal probative value was far outweighed by its potential for undue prejudice. See *State v. Collins*, supra, 111 Conn. App. 732, 743. When the issue is viewed from the perspective that the evidence was relevant but, under the circumstances presented, only marginally so, the Appellate Court correctly concluded, contrary to the determination of the trial court, that the risk of unfair prejudice that the evidence posed substantially outweighed its slight probative value.

The majority nevertheless concludes that the trial court properly determined that the evidence was relevant and that its probative value outweighed its potential for unfair prejudice. The majority's conclusion is unsupported.

With respect to the issue of relevance, the majority reasons that, "[w]ithin the law of evidence, relevance is a very broad concept. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it not prejudicial or merely cumulative. . . . Given this broad definition, we view the distinction drawn by the defendant and the dissent—namely, that between simple prior possession of



the murder weapon, and its actual use in the Rose shooting—as one of degree rather than kind. Thus . . . the analytical key to this particular evidentiary decision lies under the second prong of the uncharged misconduct test, namely, the degree to which the prejudicial effect of the otherwise relevant evidence outweighs its probative value.” (Citations omitted; emphasis in original; internal quotation marks omitted.) Footnote 19 of the majority opinion.

In asserting that the evidence of the Rose shooting was relevant, albeit only to a “slight degree”; (internal quotation marks omitted) footnote 19 of the majority opinion; the majority does not address the defendant’s claim that the evidence was merely cumulative—and therefore inadmissible—in light of the fact that the state’s proof, which was *uncontested by the defendant*, established that the defendant confessed to having possessed the gun at the time of the Rose shooting. Specifically, the majority never explains why, in light of the undisputed evidence linking the defendant to the gun used in the Rose shooting, the Appellate Court improperly concluded that the state had no legitimate reason to present evidence of the Rose shooting itself. Instead of explaining why the Appellate Court improperly relied on that reasoning in concluding that the trial court had abused its discretion in permitting the state to prove that the defendant shot Rose, the majority ignores the critical distinction between the state’s use of evidence proving *that* fact, on the one hand, and the state’s use of evidence establishing that the defendant possessed the gun used in that shooting, on the other. Indeed, the majority states that, “[h]aving reviewed the record in this case, we conclude that the Appellate Court improperly determined that the trial court had abused its discretion in determining that the prejudicial effect of the evidence that the defendant *had shot Rose with the same gun used in [the Hopkins] murder* did not unduly exceed its probative value.” (Emphasis added.) The majority simply cannot justify reversing the judgment of the Appellate Court without considering and resolving that issue, which provides the primary basis for the Appellate Court’s decision and for the defendant’s opposition to the state’s appeal.

Despite its failure to explain why evidence of the Rose shooting was not needlessly cumulative, the majority nevertheless concludes that the trial court properly determined that the probative value of the evidence, however slight, exceeded its potential for unfair prejudice. Although conceding that “the evidence of the Rose shooting . . . certainly had some prejudicial effect”; footnote 21 of the majority opinion; the majority gives four reasons for its conclusion that the evidence was not unduly prejudicial. None of these reasons is persuasive in light of the fact that the evidence was both inflammatory and served no legitimate purpose.

The majority's first reason in support of its determination is the fact that the state did not present detailed evidence of the Rose shooting and that that incident was less serious than the Hopkins murder. Although it is true that the state could have presented more extensive evidence about the Rose shooting, which, of course, would have been even more prejudicial if Rose had not survived the shooting, as the Appellate Court observed, "[t]he testimony relating to the Rose [shooting] clearly fits into the category of evidence that would have unduly aroused the [jurors'] emotions and hostilit[ies] [because] . . . [i]t painted the defendant as a gun toting criminal with a proclivity for shooting people." *State v. Collins*, supra, 111 Conn. App. 743. Even though the state did not adduce details of the Rose shooting, and the shooting did not result in Rose's death, it is unreasonable to suggest that evidence of the shooting, which occurred just three months prior to the Hopkins murder, did not give rise to a significant risk of prejudice. The mere fact that the evidence could have been *more* prejudicial does not support the contention that it was only *minimally* prejudicial.

The majority next "find[s] significant the trial court's efforts to have the prosecution admonish its witnesses that any testimony about the Rose shooting was to be limited only to the fact that there was a shooting, with no other details regarding the events of that day." For purposes of performing the balancing required under § 4-3 of the Connecticut Code of Evidence, this contention has no significance independent of the first reason that the majority advances in support of its conclusion.

The third basis for the majority's conclusion is the limiting instruction that the trial court gave to the jury concerning the restricted purpose for which the Rose shooting evidence had been admitted. The court's instruction is a factor that supports the majority's conclusion because such instructions generally serve to minimize the prejudicial effect of prior misconduct evidence. See, e.g., *State v. James G.*, 268 Conn. 382, 397–98, 844 A.2d 810 (2004). As this court has acknowledged, however, the prejudice that invariably flows from the admission of such evidence is high; see, e.g., *State v. DeJesus*, 288 Conn. 418, 473, 953 A.2d 45 (2008); *State v. Jones*, 234 Conn. 324, 345, 662 A.2d 1199 (1995); and, although the court must give a limiting instruction when requested to do so; Conn. Code Evid. § 1-4; there are circumstances in which a limiting instruction is insufficient to protect the rights of the defendant. E.g., *State v. Wright*, 198 Conn. 273, 278–79, 502 A.2d 911 (1986) (limiting instructions given by trial court could not have eliminated likelihood that jurors would infer that defendant was guilty of crime charged because he previously had engaged in similar misconduct); see also Conn. Code Evid. § 1-4, commentary (contemplating possibil-

ity that limiting instruction “will not adequately protect the rights of the parties”). This court also has recognized that “the probability of a jury inferring a predisposition to commit the crime with which the defendant stands charged is logically increased when the evidence [of prior misconduct] pertains to misconduct similar to that involved in the case on trial because such evidence creates inevitable pressure on lay jurors to believe that if [the defendant] did it before he probably did so this time.” (Internal quotation marks omitted.) *State v. Jones*, supra, 345. Thus, “when prior crimes are quite similar to the offense being tried, a high degree of prejudice is created and a strong showing of probative value would be necessary to warrant admissibility.” (Internal quotation marks omitted.) *State v. Griggs*, 288 Conn. 116, 141, 951 A.2d 531 (2008). In the present case, the alleged prior misconduct, a shooting involving a gun, was very similar to the conduct for which the defendant was on trial. These considerations, along with the violent nature of the defendant’s alleged prior misconduct, undermine whatever effectiveness the court’s limiting instruction otherwise might have had.<sup>13</sup>

Finally, the majority relies on “decisions from numerous other federal and state courts that have rejected challenges, founded on undue prejudice, to the use of uncharged misconduct evidence in cases [in which] the charged offenses were committed using the same gun that the defendant had utilized in prior shootings.”<sup>14</sup> In fact, as I have explained previously, those decisions provide no support for the majority’s conclusion. In each of those cases, as in the present case, the prosecuting authority had sought to prove that the defendant had committed another crime with the same gun that was used in the offense for which the defendant was on trial. Moreover, in each of those cases, as in the present case, the state had a strong and legitimate interest in demonstrating that the same person who had committed the other crime also committed the crime for which the defendant was on trial. In contrast to the present case, however, in all but one of those cases, the defendant had not acknowledged responsibility for the prior shooting, and, in the only case in which the defendant did admit involvement in the other crime, evidence of that crime was admitted under an altogether different theory. See *State v. Lemons*, supra, 348 N.C. 351–53 (evidence of prior misconduct properly admitted as signature crime evidence). Thus, in those cases, in contrast to the present case, the prosecution’s use of the prior misconduct evidence was necessary to link the defendant to the gun that had been used in the other crime, proof of which was necessary to link the defendant to the gun used in the case being tried.<sup>15</sup> Those cases, therefore, are completely inapposite to the present case, in which evidence of the prior shooting is wholly unnecessary to link the defendant to the gun that he used on that prior occasion.<sup>16</sup>

In sum, because the state had absolutely no need to adduce evidence of the Rose shooting for the purpose of linking the defendant to the gun used in that shooting, the evidence is properly characterized as either irrelevant or needlessly cumulative. The majority, however, *fails completely to address that fact* in concluding that the trial court properly determined that the probative value of the challenged evidence outweighed its prejudicial effect. Indeed, the majority simply ignores that aspect of the balancing test despite having acknowledged the slight probative value of the evidence in rejecting the defendant's claim that the evidence was irrelevant and, therefore, inadmissible. Moreover, as the Appellate Court explained, evidence that the defendant had shot Rose just three months prior to the Hopkins murder was highly prejudicial to the defendant because of the likelihood that the jury would view the defendant as a person with violent propensities, including a propensity for shooting people. See *State v. Collins*, supra, 111 Conn. App. 743. In such circumstances, that is, when evidence is devoid of probative value and its potential for unfair prejudice is great, the evidence necessarily is inadmissible in accordance with § 4-3 of the Connecticut Code of Evidence. Indeed, even if the evidence may be deemed to have some slight relevance, as the majority maintains, its minimal probative value clearly is outweighed by its prejudicial effect.<sup>17</sup>

Moreover, contrary to the state's contention on appeal, evidence of the Rose shooting was not admissible either to prove motive or to corroborate Finney's testimony.<sup>18</sup> With respect to motive, the state argues that, because of his involvement in the Rose shooting, the defendant was trying to evade the police, and he could not do so successfully while maintaining a steady job; consequently, the defendant was unemployed, and, to support himself, he resorted to robbing people, among them, Hopkins. Although it may be possible to trace the defendant's unemployment to the Rose shooting, the fact that the defendant was not employed was undisputed, and it was his unemployed status that allegedly caused him to turn to robberies as a means of support. Thus, the state would have had no difficulty in establishing the defendant's need for money, and thus his motive for robbing and shooting Hopkins, without evidence of the Rose shooting. Indeed, even if it is assumed that proof of motive required evidence that the defendant was on the run from the police when Hopkins was murdered, there is no reason why the state could not have established that fact without use of the highly prejudicial evidence relating to the Rose shooting. Thus, evidence of the Rose shooting was not necessary to prove motive and, therefore, not admissible for that purpose.

The state's claim and the majority's unsupported assertion that the evidence was admissible to corrobo-

rate the prosecution testimony of Finney in accordance with § 4-5 (b) of the Connecticut Code of Evidence also lacks merit.<sup>19</sup> “Other crimes evidence . . . is only admissible for corroborative purposes . . . if the corroboration is direct and the matter corroborated is significant.” (Internal quotation marks omitted.) *State v. Mooney*, 218 Conn. 85, 129, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991); see also *United States v. Mohel*, 604 F.2d 748, 754 (2d Cir. 1979) (applying identical standard). Thus, otherwise inadmissible prior misconduct evidence that directly corroborates only those portions of a witness’ testimony that are themselves irrelevant and inadmissible is neither direct nor significant for purposes of the corroboration exception. See, e.g., *State v. Llera*, 114 Conn. App. 337, 343–44, 969 A.2d 225 (2009).

In the present case, evidence that the defendant shot Rose, including Finney’s testimony to that effect, was itself inadmissible. Thus, evidence that the defendant shot Rose “is not rendered admissible merely because it corroborates another equally inadmissible statement on the same subject.” *United States v. Mohel*, supra, 604 F.2d 754. Furthermore, the corroboration was not direct because the evidence corroborated only that aspect of Finney’s testimony relating to the Rose shooting, which was irrelevant to the issue of whether the defendant murdered Hopkins. See *State v. Llera*, supra, 114 Conn. App. 344 (rule that “[o]ther crimes evidence . . . is . . . admissible for corroborative purposes . . . [only] if the corroboration is direct and the matter corroborated is significant . . . would be meaningless if it was satisfied merely because evidence of another crime had a general tendency to corroborate the testimony of a witness who coincidentally testified about [that unrelated crime]” [citation omitted; internal quotation marks omitted]). Finally, proof that Finney might have been truthful on the witness stand concerning a matter wholly unrelated to the crimes at issue “is hardly ‘significant’ within the meaning of [our jurisprudence].” *United States v. Mohel*, supra, 755. Thus, evidence that the defendant shot Rose could not have been used by the state to corroborate Finney’s inadmissible testimony to that same effect.<sup>20</sup>

Finally, I agree with the Appellate Court that the trial court’s improper admission of the highly prejudicial evidence concerning the Rose shooting was not harmless. See *State v. Collins*, supra, 111 Conn. App. 744. “[T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury’s verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.” (Citation omitted; internal quotation marks omitted.) *State v. Beavers*, 290 Conn. 386, 419, 963 A.2d 956 (2009). As the Appellate Court succinctly explained, “[t]he

defendant's first trial resulted in a hung jury and a mistrial. Similarly, in the trial that resulted in [his conviction] . . . the jury twice indicated that it was deadlocked . . . . There was no eyewitness to the crime, and the only tangible evidence linking the defendant to the crime was the shell casing and a fingerprint. Given the overall strength of the state's case, we cannot say that we have a fair assurance that the error did not substantially affect the verdict." *State v. Collins*, supra, 744. Because the impropriety was not harmless, the defendant is entitled to a new trial.

Therefore, I respectfully dissent.

<sup>1</sup> The Appellate Court concluded that evidence of the Rose shooting was inadmissible because the minimal probative value of that evidence was far outweighed by the danger of unfair prejudice. See *State v. Collins*, 111 Conn. App. 730, 732, 743, 961 A.2d 986 (2008). As I explain more fully hereinafter, that evidence also may be viewed as lacking any probative value because it was wholly irrelevant to any contested issue in the case. In either event, however, the evidence was inadmissible.

<sup>2</sup> Because I would affirm the judgment of the Appellate Court, I need not address the defendant's alternative grounds for affirmance.

<sup>3</sup> At the second trial, the defendant faced charges of murder, felony murder and robbery in the first degree.

<sup>4</sup> During the same colloquy in which the defendant himself raised an objection to the state's use of any evidence that he had shot Rose, the defendant's standby counsel also spoke in support of that objection. In those remarks, standby counsel indicated that the state properly could introduce evidence identifying the defendant as the person who fired those shots but that it would be improper for the state also to present evidence establishing that one of those shots had struck and injured Rose.

<sup>5</sup> 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. . . ."

<sup>6</sup> Section 4-3 of the Connecticut Code of Evidence provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

<sup>7</sup> I note that the limiting instruction that the trial court actually gave to the jury does not mirror precisely the reasons that the court initially offered in support of its conclusion that the evidence was relevant. In particular, the court instructed the jury that "[t]he limited purposes [for which the jury could consider the evidence were] on the issues of intent, element of a crime or opportunity." The court also expressly instructed the jury that it could not consider the evidence that the defendant had shot Rose as "evidence of any bad character of the defendant" or as "evidence [of] a tendency on his part to commit criminal acts."

<sup>8</sup> "The purpose of the [Chip Smith] instruction is to prevent a hung jury by urging the jurors to attempt to reach agreement. It is a settled part of Connecticut jurisprudence . . . . Better than any other statement . . . it makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors . . . ." (Citation omitted; internal quotation marks omitted.) *State v. O'Neil*, 261 Conn. 49, 60, 801 A.2d 730 (2002).

<sup>9</sup> On appeal to the Appellate Court, the state contended that the defendant's responsibility for the Rose shooting was relevant to establish a motive for the Hopkins murder, namely, that the defendant had been on the run and unemployed since the Rose shooting, and had resorted to robberies, including the robbery of Hopkins, to support himself. The state raised this claimed

ground of admissibility for the first time on appeal to the Appellate Court.

<sup>10</sup> In explaining that “[t]he portion of the testimony relevant to the crimes for which the defendant was on trial was simply that which would prove that he had at some time owned a gun that produces shell casings that match the one found on Hopkins’ collar”; *State v. Collins*, supra, 111 Conn. App. 743; the Appellate Court seemed to be suggesting that evidence of the shooting itself was irrelevant. The Appellate Court, however, repeatedly stated that the prejudicial effect of that evidence outweighed its probative value. See id., 732 (“the danger of unfair prejudice resulting from the admission of [the] evidence [of the Rose shooting] far outweighed its probative value”); id., 743 (“the testimony [concerning the Rose shooting] would have unduly prejudiced the jury, while its probative value was minimal”). These statements by the Appellate Court concerning the minimal probative value of the evidence concerning the Rose shooting, coupled with the court’s reliance on the balancing standard of § 4-3 of the Connecticut Code of Evidence, reflect the court’s view that the evidence, although minimally probative, was inadmissible because of the danger of unfair prejudice that it posed to the defendant.

<sup>11</sup> I note that, although the trial court expressly instructed the jury that evidence of the Rose shooting was relevant only for the purpose of proving intent, an element of a crime, and opportunity, the majority asserts that the Appellate Court “appear[s] to [have] assume[d]” that the evidence “was relevant under either of the corroboration or identity exceptions” of § 4-5 (b) of the Connecticut Code of Evidence. It is true that, in a colloquy with counsel concerning the admissibility of the evidence, the trial court did state that the evidence was relevant to prove identity and to corroborate testimony, as well as for other purposes. Thereafter, however, in its instructions to the jury, the court expressly limited the jury’s consideration of the evidence “to the issues of intent, element of a crime or opportunity.” In view of the fact that the trial court informed the jury that the evidence was relevant as to those issues and those issues only, I see no reason to presume, as the majority does, that the Appellate Court assumed that the evidence was relevant for other purposes, such as corroboration or to prove identity.

<sup>12</sup> In essence, evidence demonstrating the defendant’s prior possession of the murder weapon is relevant to establish identity insofar as that evidence tends to identify the defendant as the perpetrator. In other words, evidence that, on a prior occasion, the defendant possessed the gun that was used in the Hopkins murder implicates *him* in that murder because it demonstrates his access to the murder weapon.

<sup>13</sup> I also note that the trial court’s limiting instructions were hardly a model of clarity, and, in fact, the instruction likely was more confusing than helpful to the jury. In particular, the court told the jury, without further elaboration, that it could consider the evidence of the Rose shooting for purposes of determining “intent” or “opportunity” or as proof of an “element of a crime . . . .” At least in the absence of some additional explanatory comments by the court, I do not see how the court’s limiting instruction would have provided guidance to the jury with respect to its proper use of the evidence demonstrating that the defendant had shot Rose.

<sup>14</sup> The cases that the majority cites are: *United States v. Higgs*, supra, 353 F.3d 312, *State v. Williams*, supra, 992 So. 2d 330, *People v. Brown*, supra, 13 App. Div. 3d 145, *State v. Lemons*, supra, 348 N.C. 335, and *State v. Stokes*, supra, 381 S.C. 390.

<sup>15</sup> In fact, the one case that bears the most similarity to the present case, namely, *Thompson v. State*, 690 N.E.2d 224 (Ind. 1997), supports the conclusion of the Appellate Court that the trial court improperly permitted the state to present evidence of the Rose shooting. In *Thompson*, the defendant, Jerry K. Thompson, was charged with two counts of murder. See id., 227–28. To prove its case against Thompson, the state sought to introduce evidence that he had stolen the murder weapon, a handgun, in the course of committing a different murder approximately one month earlier. Id. The trial court allowed the state to adduce evidence of the circumstances surrounding Thompson’s theft of the handgun, including evidence of his involvement in and conviction of the earlier murder. See id., 231–32. Following Thompson’s conviction, he appealed, claiming, inter alia, that the evidence of the prior murder was both unnecessary and unduly prejudicial. See id., 233–37. In reversing Thompson’s conviction, the Supreme Court of Indiana concluded that, although the state was entitled to establish generally how and when Thompson had obtained the murder weapon, it was unnecessary, and therefore improper, for the state to have elicited the highly prejudicial testimony about the prior murder. Id., 236–37. As in *Thompson*, the state in the present

case had every right to prove that the defendant had possessed the gun that was used in the Rose shooting, but, because proof of the Rose shooting was completely unnecessary to establish the defendant's prior possession of the gun, the state's use of that prejudicial evidence was improper.

<sup>16</sup> The majority also asserts that the prejudicial effect of the evidence was not "undue or unreasonable" in light of the alternative suggested at trial by the defendant's standby counsel, namely, that the state's proof be limited to a showing that the defendant had discharged the gun on a prior occasion. Footnote 21 of the majority opinion. The majority reaches this conclusion on the basis of its contention that there is no appreciable difference in the prejudicial effect of evidence demonstrating that the defendant once had discharged the gun as opposed to evidence demonstrating that the defendant actually had shot another person, namely, Rose. In my view, the majority blinks at reality in equating the nature and extent of the prejudice attendant to the innocent discharge of a gun and the intentional shooting of another. Indeed, the significance of this distinction is self-evident: many, if not most, gun owners have discharged a gun, whereas exceedingly few gun owners ever have shot another person for any reason, let alone intentionally. Moreover, any possible prejudice arising out of the evidence establishing that the defendant merely had discharged the gun would have been minimal because the court would have instructed the jury that it could not consider that evidence for any purpose other than to demonstrate the defendant's possession of the gun. In essence, the jury would have been required to presume that the discharge of the gun was entirely innocent or innocuous, an instruction that the jury would have had no difficulty following in view of the fact that there would have been no evidence adduced at trial even to suggest a contrary conclusion. No such instruction could have ameliorated the prejudice associated with evidence demonstrating that the defendant had fired at and struck Rose.

<sup>17</sup> The majority maintains that I have not afforded proper deference to the trial court's evidentiary ruling concerning the admissibility of the Rose shooting. Of course, rulings pertaining to the admissibility of evidence are entitled to substantial deference. Because evidence of the Rose shooting was so lacking in probative value, however, and because its potential for unfair prejudice was so great, the trial court reasonably could not have permitted the state to adduce evidence of that shooting. In such circumstances, proper deference to the trial court's ruling cannot save it because such deference does not relieve this court of its obligation to reject evidentiary rulings that are unreasonable.

<sup>18</sup> Although evidence of the Rose shooting ordinarily would be relevant to establish the identity of the defendant in the sense that such evidence tends to identify him as the perpetrator; see footnote 12 of this opinion; I disagree with the majority's suggestion that the evidence was admissible as a signature crime to prove identity. See footnote 17 of the majority opinion and accompanying text. "To be admissible for that purpose, the factual characteristics shared by the charged and uncharged crimes must be sufficiently distinctive and unique as to be like a signature [so that] it logically could be inferred that if the defendant is guilty of one [crime] he must be guilty of the other." (Internal quotation marks omitted.) *State v. Snelgrove*, 288 Conn. 742, 765, 954 A.2d 165 (2008). Thus, "[m]uch more is required than the fact that the offenses fall into the same class. The device used must be so unusual and distinctive as to be like a signature." (Internal quotation marks omitted.) *State v. Ibrahimov*, 187 Conn. 348, 354, 446 A.2d 382 (1982). Aside from the fact that Rose and Hopkins were shot with the same gun, there is nothing unusual or unique about those two shootings. In fact, certain important dissimilarities are apparent; for example, according to the state's proof, the reason for the Rose shooting and the motive for the Hopkins murder were completely different. Consequently, it is absolutely clear that evidence of the Rose shooting was not admissible as a signature crime for the purpose of proving identity.

<sup>19</sup> The majority merely asserts, in conclusory fashion, that evidence of the Rose shooting was admissible to corroborate Finney's testimony. The majority, however, provides no explanation to support its assertion.

<sup>20</sup> The state also contends that evidence of the Rose shooting "was highly probative because it helped the jury understand how the defendant became a suspect in [the Hopkins] murder." Although the state frequently will be permitted to demonstrate how an accused came to the attention of the police, there is nothing in our law that affords the state a right to do so. Indeed, such evidence generally is unimportant to the state's case. In the present case, there was absolutely no need for the state to get into that



aspect of the investigation, and, to whatever limited extent such evidence might have appealed to one or more jurors' curiosity, any interest that the state may have had in using the evidence for that purpose was vastly outweighed by its high potential for unfair prejudice.

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