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STATE OF CONNECTICUT *v.* MAURICE M.*
(SC 18454)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued March 23—officially released November 29, 2011

Kirstin B. Coffin, special public defender, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Nicole I. Christie*, assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Maurice M., appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming the trial court's judgment revoking his probation pursuant to General Statutes § 53a-32,[2] on the basis of the trial court's finding that the defendant had committed the crime of risk of injury to a child in violation of General Statutes § 53-21 (a) (1).[3] *State* v. *Maurice M.*, 116 Conn. App. 1, 3, 975 A.2d 90 (2009). On appeal, the defendant claims that the Appellate Court improperly concluded that there was sufficient evidence that he violated his probation by committing the crime of risk of injury to a child when he failed to supervise a two year old child who was in his care and able to exit the home. We agree with the defendant and, accordingly, reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant undisputed facts and procedural history. "On February 4, 2004, the defendant was convicted of assault in the third degree and sentenced to one year incarceration, execution suspended, and three years probation. The standard conditions of the defendant's probation included that he refrain from violating 'any criminal law of the United States, this state or any other state or territory.' On November 26, 2006, the defendant was arrested and charged with risk of injury to a child and, subsequently, with violation of probation.

"The record reveals that the following events led to the defendant's arrest on November 26, 2006. At approximately 11 a.m., Joseph Mortari was driving east on Main Street in East Windsor when he saw a pair of brown children's shoes in the roadway near the center divider line. In an attempt to avoid running over the shoes, Mortari maneuvered his vehicle slightly to the right. As he did, he caught a glimpse of something white near the curb and, turning his full attention to it, realized that it was a small child dressed in a diaper climbing from the street to the curb. He slammed on his brakes, stopping his vehicle about three feet from the child. As this transpired, another vehicle traveling in the opposite direction also stopped. Donna Caldon exited that vehicle, driven by her husband, Peter Caldon, and retrieved both shoes from the street and the child, who was then on the curb. Mortari left his vehicle in the street, and he and Donna Caldon conversed momentarily. Mortari retrieved his vehicle, doubled back and met the Caldons in a parking lot. The three attempted to persuade the child to tell them his name or where he lived. The child would not respond. The three then decided to call the police.

"Sergeant Michael Hannaford of the East Windsor police department arrived at the scene. After speaking with Mortari and the Caldons, Hannaford started going

from house to house on Main Street in an attempt to locate the child's home. Soon after, Hannaford was motioned back to the parking lot by Donna Caldon. Hannaford, after seeing the defendant walking toward Donna Caldon and the child, made his way back to the parking lot. It was ten to fifteen minutes after Hannaford arrived at the scene that the defendant emerged from his home and retrieved the child. After speaking briefly with the defendant, Hannaford directed him to take the child home, so the officer could interview Mortari and the Caldons. After conducting the interview, Hannaford went to the defendant's home. There, he questioned the defendant concerning how the child could have gotten from the home to the street.

"The defendant reported that the child was two years old. The defendant told Hannaford that he was the sole caretaker present in the home for the child and the child's eight year old brother.[4] The defendant told him that the child was playing with his eight year old brother in the house while the defendant was in the living room lying on the couch watching television. The living room was adjacent to the kitchen, where the back door was located, from which, the defendant concluded, the child had apparently exited the house. Hannaford observed that there were no child safety devices on the doorknobs on the back door. The defendant told Hannaford that at some point, the older child informed him that the two year old was missing. The defendant reported to Hannaford that he then searched the house for the missing child and eventually made his way outside where he and the child were reunited. During Hannaford's interview with the defendant, the children's grandparents arrived at the home. Soon after, Hannaford arrested the defendant on a charge of having violated § 53-21.

"On October 19, 2007, the court, *T. Sullivan, J.*, held a violation of probation hearing. Following the hearing, the court rendered judgment, finding that the defendant had violated his probation. The court further noted that the defendant was aware of the conditions of his probation, having acknowledged them in writing and reviewed them on three separate occasions with his probation officer. The court further found that the beneficial aspects of probation were no longer being served in the defendant's case. Accordingly, the court revoked the defendant's probation and committed him to the custody of the commissioner of correction for the unexecuted portion of his original one year sentence." Id., 3–6.

The defendant appealed from the judgment of revocation to the Appellate Court, claiming, inter alia,[5] that the trial court had improperly concluded that the state had shown by a preponderance of the evidence that the defendant had violated his probation. Id., 19. In a divided opinion, the Appellate Court concluded that the

trial court's conclusion was not clearly erroneous and affirmed the judgment of revocation. Id.; see id., 23 (*West, J.*, dissenting). The Appellate Court majority reasoned that the testimony presented at the revocation hearing sufficiently established that the defendant had acted with "reckless disregard for a situation that was inimical to the physical welfare of his child." Id., 18–19. Specifically, the Appellate Court concluded that "[t]he evidence was sufficient to show that the [defendant failed] to supervise his children adequately, despite his knowledge that the back door of his home was unsecured . . . ." Id.

In dissent, Judge West concluded that the evidence was insufficient to support the trial court's finding that the defendant had violated his probation. Id., 26–28. Judge West first observed that, "[e]ssentially, there are two main factual components supporting the [trial] court's ruling: (1) the 'accessibility' of the back door[6] and (2) the lack of supervision of the child." Id., 26. Judge West then concluded that the trial court's finding that the back door to the defendant's home was without a "lock" was clearly erroneous, given the complete lack of testimony by any witness at the revocation hearing relative to a lock on the back door. Id., 26–27. Judge West further concluded that there was no other evidence in the record to sustain the trial court's conclusion that the defendant had committed the crime of risk of injury to a child. Id., 27–28.

On appeal, the defendant argues only that the Appellate Court improperly concluded that there was sufficient evidence that he violated his probation by committing the crime of risk of injury to a child. Specifically, the defendant claims that he did not act with reckless disregard for the child's safety or physical welfare because, in the absence of any evidence of the back door's accessibility, and in light of testimony establishing that his child had never escaped the house in this manner before, it was not reasonably foreseeable that the child would exit the home. The state, in response, contends that the Appellate Court properly concluded that there was sufficient evidence that the defendant committed the offense of risk of injury to a child, and specifically argues, inter alia, that the lack of any past similar incident or evidence of a lock does not preclude the trial court's conclusion. We agree with the defendant and conclude that the Appellate Court improperly determined that, under the facts and circumstances of this case, there was sufficient evidence that the defendant had committed the crime of risk of injury to a child.

We begin with the applicable legal principles. First, we note "that revocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to

whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Citations omitted; internal quotation marks omitted.) *State* v. *Preston*, 286 Conn. 367, 375–76, 944 A.2d 276 (2008). "Since there are two distinct components of the revocation hearing, our standard of review differs depending on which part of the hearing we are reviewing." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004).

Because the present case concerns the evidentiary phase and the trial court's factual finding that the defendant violated his probation, we are guided by the standard of review applicable to that phase. "The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accordingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *State* v. *Benjamin*, 299 Conn. 223, 235–36, 9 A.3d 338 (2010). "In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Hill*, 256 Conn. 412, 425–26, 773 A.2d 931 (2001).[7]

Further, we note that the state charged the defendant with violating the " 'situation' " prong of § 53-21. "In order to establish the crime of risk of injury to a child under the situation prong of § 53-21 (a) (1), the state must prove that the defendant wilfully or unlawfully caused or permitted a child under the age of sixteen years to be placed in a situation where the life or limb of the child was endangered, the health of the child was likely to be injured, or the morals of the child

were likely to be impaired. Conduct is wilful when done purposefully and with knowledge of [its] likely consequences. . . . A defendant's failure to act when under a duty to do so, which causes a dangerous situation to exist or continue, may be sufficient to support a conviction under § 53-21 (a) (1)." (Citation omitted; internal quotation marks omitted.) *State* v. *Na'im B.*, 288 Conn. 290, 297, 952 A.2d 755 (2008). Moreover, "[s]pecific intent is not a necessary requirement of the statute. Rather, the intent to do some act coupled with a reckless disregard of the consequences . . . of that act is sufficient to [establish] a violation of the statute." (Internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 173, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006).

Furthermore, as this court has recognized, "§ 53-21 (a) (1) is broadly drafted and was intended to apply to any conduct, illegal or not, that *foreseeably* could result in injury to the health of a child." (Emphasis added.) *State* v. *Scruggs*, 279 Conn. 698, 724–25, 905 A.2d 24 (2006). Although no Connecticut appellate court has directly addressed a sufficiency challenge to a finding of risk of injury to a child under these facts—namely, inadequate supervision by a parent *in* the home as a basis for finding a probation violation—the determination of the foreseeability of the dangerous result necessarily must be fact specific. In *Barnes* v. *Commonwealth*, 47 Va. App. 105, 622 S.E.2d 278 (2005), the Court of Appeals of Virginia, in affirming the defendant's conviction of criminal negligence for leaving her two young children home alone unsupervised; id., 109; noted that "the sufficiency analysis on appeal depends entirely on the specific circumstances of each case: the gravity and character of the possible risks of harm; the degree of accessibility of the parent; the length of time of the abandonment; the age and maturity of the children; the protective measures, if any, taken by the parent; and any other circumstance that would inform the factfinder on the question whether the defendant's conduct was criminally negligent." Id., 113. This fact specific approach, and the attendant requirement to consider the totality of the circumstances of each case, is consistent with the foreseeability element of § 53-21 (a) (1), and provides the necessary guidance to determine whether a given defendant has committed the crime of risk of injury to a child by failing to supervise that child adequately. Accordingly, we adopt this nonexclusive list of factors to be considered in risk of injury cases where the primary charge is inadequate supervision by a parent in the home.

Against this legal backdrop, we turn to the defendant's challenge to the sufficiency of the evidence adduced at the revocation hearing. At the outset, we note that it is undisputed that the defendant was not supervising the child inside the home, and the trial court so found. Evidence of the defendant's wilful failure to

supervise his child inside the home, however, does not, on its own, establish the defendant's commission of the crime of risk of injury to a child; the totality of the circumstances surrounding the defendant's actions must color the character of the defendant's conduct. "To convict a defendant of risk of injury to a child, a court must find that the defendant acted wilfully and that he either intended the resulting injury to the victim, or he knew that the injury would occur, *or that his conduct was of such a character that it demonstrated a reckless disregard of the consequences*." (Emphasis added; internal quotation marks omitted.) *State* v. *Guitard*, 61 Conn. App. 531, 543, 765 A.2d 30, cert. denied, 255 Conn. 952, 770 A.2d 32 (2001); see also *State* v. *Cutro*, 37 Conn. App. 534, 539–40, 657 A.2d 239 (1995); *State* v. *Torrice*, 20 Conn. App. 75, 81, 564 A.2d 330, cert. denied, 213 Conn. 809, 568 A.2d 794 (1989).

Thus, because the state did not allege that the defendant intended to injure the child or knew that injury would occur, we are left with the question of whether there was sufficient evidence that the defendant's "conduct was of such a character that it demonstrated a reckless disregard of the consequences." *State* v. *Cutro*, supra, 37 Conn. App. 540. "Recklessness involves a subjective realization of [a] risk and a conscious decision to ignore it. . . . It does not involve intentional conduct because one who acts recklessly does not have a conscious objective to cause a particular result." (Internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 756, 961 A.2d 322 (2008). Accordingly, we review the trial court's findings with respect to the foreseeability factors for clear error, drawing every reasonable presumption in favor of that court's rulings. *State* v. *Hill*, supra, 256 Conn. 425–26.

The trial court could have found the following facts relevant to the "gravity and character of the possible risks of harm," and "the length of time of the abandonment . . . ." *Barnes* v. *Commonwealth*, supra, 47 Va. App. 113. The defendant lived 100 feet from a narrow, small town road that, at times, was heavily traveled. On November 26, 2006, the defendant's two year old son exited the defendant's home through the back door, which was not equipped with a child safety device, wearing only a diaper, and maybe a shirt. Between twenty and twenty-five minutes may have passed from the time that witnesses first saw the child outside the home to the time that the defendant appeared to retrieve his child, and the eight year old child, with whom the two year old child had been playing, spent at least a few minutes searching for the child before alerting the defendant that the two year old was missing. From this information, the trial court could have concluded that the defendant's two year old son was without adult supervision for at least twenty-five to thirty minutes, and that the proximity of the defendant's home to a busy street presented a dangerous condition.

Although we acknowledge that serious harm or death could have befallen the young child, the mere existence of a dangerous outcome does not necessarily dictate that there was an unsafe condition that caused it. Nor can the foreseeability of an event be presumed simply from the actual occurrence of that event; instead, the severity of the risk is but one factor to consider in the foreseeability inquiry. See *State* v. *Scruggs*, supra, 279 Conn. 722 ("[a]s we have suggested, actual effects are not necessarily foreseeable effects"). Moreover, there is no evidence in the record indicating the amount of time that the child was without adult supervision *inside the home before exiting*. The testimony at the revocation hearing addressed only the length of time between the time that the child was determined to be missing and the time that the defendant emerged from his home. Nor is there any evidence as to the length of time between when the defendant became aware of the child's absence and when he arrived outside where the child was located. Indeed, the state did not establish how long the defendant looked for the child inside the house before looking outside, or the lapse of time between the child's exit from the house and the commencement of the defendant's search for the child. Accordingly, the trial court's conclusions relative to the dangerous condition and the length of time during which the child was without adult supervision were derived from the *result* of the child's escape and, alone, could not have established that the child's escape was foreseeable.[8]

With respect to "the age and maturity of the [child]"; *Barnes* v. *Commonwealth*, supra, 47 Va. App. 113; we also acknowledge that the alleged victim in the present case was only two years old. We note, however, that although younger children, like the child in the present case, require heightened supervision, given their proclivity for exploration, any deficit in that supervision can be mitigated by other factors that would tend to reduce the potential risk to which the child may be exposed, including the existence of protective measures, the accessibility of a parent, the presence of an older child, and the history of the child's behavior. As discussed later, these factors effectively mitigated the two year old child's young age.

With respect to the "protective measures . . . taken by the [defendant]"; id.; although the trial court expressly concluded that the back door was accessible, facts pertinent to the risk of the child exiting through the back door were not established by the record. This evidentiary gap, acknowledged by both parties, is underscored by the trial court's repeated references to the absence of a lock on the back door, a finding that, as Judge West noted in his dissenting opinion in the Appellate Court, has no factual support in the record.[9] The only evidence offered relative to the back door or

doors of the defendant's home, however, was Hannaford's testimony "that there [were] *no safety devices* on the doorknobs or such that, you know, one would normally do with young children to *prevent them from opening the doors*, etcetera." (Emphasis added.) Indeed, there is no indication as to what exactly the missing "safety device" was; i.e., whether Hannaford was referring to a circular plastic device that covers metallic doorknobs, a hook and eye mechanism to keep an exterior screen door from opening, or some other device.[10] On the basis of the lack of evidence supporting the trial court's finding that the back door lacked a lock, we conclude that the finding was clearly erroneous.[11]

Moreover, we further conclude that the conclusion drawn from that erroneous finding—that is, that the back door was accessible to a two year old child—cannot be sustained by the evidence in the record. With the exception of Hannaford's testimony that the back door did not have any "safety devices," the record is devoid of any other evidence relative to the nature of the back door, which undoubtedly is material to the ease with which a two year old child could have accessed the exterior of the home. For example, there is no clear indication in the record as to how many doors separated the interior of the home from the exterior, i.e., whether there was both an interior door and an exterior screen or glass door, or only one door.[12] There is also no indication as to whether the back door or doors were ajar or shut at the time the child exited the home.[13] Moreover, there is no indication as to the method by which one would open the back door or doors, i.e., whether one must turn a doorknob and pull open the door; whether one must grasp a handle, depress a thumb lever and pull open the door; or whether one must press a small push latch and push open the door to exit (as is common with screen doors). Any of these factors could be relevant to determining whether the defendant reasonably would not have thought that his two year old child possessed the strength and manual dexterity to manipulate the door or doors open. Indeed, there is no indication whether the two year old child left on his own or whether the eight year old child opened the door for him. These unanswered questions demonstrate the lack of evidence before the trial court relative to the ease with which a young toddler may have exited the home. We thus conclude that the state failed to establish with sufficient evidence the accessibility of the back door.

Finally, with respect to "other circumstance[s] that would inform the factfinder on the question [of] whether the defendant's conduct was [reckless]"; *Barnes* v. *Commonwealth*, supra, 47 Va. App. 113; we also conclude that it was improper for the trial court to fail to give proper weight to the accessibility of the defendant, the age of the child with whom the two year old was playing, and the lack of any prior similar

incident. Hannaford testified that the defendant should have heard the back door close because of his proximity to the kitchen where, presumably, the back door was located. The defendant's proximity and accessibility to the child mitigates the child's young age and reduces the foreseeability of the child's escape. Hannaford also testified that the two year old child was playing with an eight year old child. Although we recognize that an eight year old child lacks the maturity and responsibility of an adult, we note that his presence alone carries some weight; the two year old child was not wandering around the home completely unattended. Moreover, we also note that the eight year old child demonstrated at least some minimal level of responsibility by notifying the defendant that the child was missing. Further, Hannaford's testimony established that the child had never left the house before under these circumstances. Though we certainly recognize that the state need not wait for "catastrophic harm" to occur first before prosecuting an individual for violating § 53-21; *State* v. *Scruggs*, supra, 279 Conn. 722 n.10; as a general proposition, the history, or lack thereof, of past occurrences provides evidence of the foreseeability of a given harm. See, e.g., *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 115–16, 869 A.2d 179 (2005) (reasonably foreseeable that assault would occur on premises given history of criminal activity in area). Finally, there is no evidence regarding the temperament or attitude of the two year old child that might suggest that he often misbehaved, was less prone to follow instructions, or otherwise would have been more at risk for escaping from the home. Thus, we conclude that the evidence was insufficient to establish that the child's escape to the exterior of the house was a reasonably foreseeable result.

Accordingly, we likewise conclude that the evidence was insufficient to establish that the defendant's failure to supervise the child while at home evinced a reckless disregard for the consequences of that conduct in violation of § 53-21 (a) (1).[14] Moreover, notwithstanding the evidence relative to the severity of the possible harm, the length of time during which the child was outside, the age of the child and the absence of a safety device on the doorknob, on the basis of the mitigating factors detailed previously, we are "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *State* v. *Benjamin*, supra, 299 Conn. 236; cf. *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 544, 557, 893 A.2d 389 (2006) (judgment of trial court reversed on basis of court's "definite and firm conviction that a mistake was committed"); *Socci* v. *Pasiak*, 116 Conn. App. 685, 689, 978 A.2d 96 (2009) (same).[15]

Further, the state's reliance on *State* v. *Branham*, 56 Conn. App. 395, 743 A.2d 635, cert. denied, 252 Conn. 937, 747 A.2d 3 (2000), is misplaced. In *Branham*, the

defendant was convicted of risk of injury to a child in violation of § 53-21 for leaving his three children, all under the age of four, alone and unattended in an apartment. Id., 396–97. The mother of the children testified that the children had been left home alone for up to one hour. Id., 398. Additional testimony established that the children had, on previous occasions, left the apartment to look for their mother when she left to use the downstairs telephone, and that drug dealers were in the hallway of the apartment building. Id., 399 n.2. The Appellate Court rejected the defendant's sufficiency claim and affirmed the conviction, concluding that: (1) the jury was entitled to credit the mother's testimony relative to the amount of time that the children were left home alone; and (2) the jury could reasonably infer that leaving three young children home alone placed them in "a dangerous situation . . . thereby exposing them to injury." Id., 398–99.

Branham is readily distinguishable from this case. Most notably, the defendant in *Branham* left the three young children at home, *alone and unsupervised*, for up to one hour; id., 398; whereas in the present case, the defendant was present in the home throughout the period in question. In addition, the oldest of the three children in *Branham* was three and one-half years old, and the other two children were ages two and one. Id. In contrast, the two year old child in the present case was playing with an eight year old child, who in fact demonstrated at least a minimal level of responsibility by notifying the defendant that the two year old was missing, after which the defendant proceeded to search for the child. Finally, we note that evidence presented in *Branham* establishing foreseeability, namely, the testimony that the children had previously left the apartment when left alone, further distinguishes it from the present case wherein, as we have noted, the testimony indicated that the two year old had never left the home before under these circumstances.[16]

We note that several other Connecticut cases, cited by both parties, finding sufficient evidence to affirm the conviction under the "situation" prong of § 53-21 (a) (1), are all distinguishable from the present case in terms of the plainly and obviously dangerous situation that the defendant had actively created or helped to create. See *State* v. *Na'im B.*, supra, 288 Conn. 292–94 (defendant did not take child with third degree burns to hospital); *State* v. *Sorabella*, supra, 277 Conn. 163–67 (defendant attempted to engage fictitious thirteen year old girl in sexual activities); *State* v. *Padua*, 273 Conn. 138, 158–59, 869 A.2d 192 (2005) (defendant allowed children to have access to marijuana); *State* v. *Davila*, 75 Conn. App. 432, 435, 816 A.2d 673 (defendant fired gun into home wherein children were located), cert. denied, 264 Conn. 909, 826 A.2d 180 (2003), cert. denied, 543 U.S. 897, 125 S. Ct. 92, 160 L. Ed. 2d 166 (2004); see also *State* v. *Cutro*, supra, 37 Conn. App. 536–37

(defendant masturbated in car in mall parking lot). Here, in contrast, the lone claim against the defendant, in the absence of sufficient evidence showing the ready accessibility of the back door, is his lack of supervision of the child who was present in the house with him. Given the dearth of evidence relative to any other potentially dangerous situation that the defendant helped to create or failed to remedy, we decline to conclude that the defendant's failure to supervise the child inside the home, by itself, represents a reckless disregard of the consequences, sufficient to substantiate a conviction under § 53-21 (a) (1).[17]

Although the defendant here does not challenge § 53-21 (a) (1) as unconstitutionally vague, we also find helpful our analysis in *State* v. *Scruggs*, supra, 279 Conn. 698. In *Scruggs*, we reversed the conviction of a defendant who had been convicted of risk of injury to a child, in relation to the death of her twelve year old son who had committed suicide in their home. Id., 700–701. The defendant had been convicted on the charge that she had maintained an " 'unhealthy and unsafe' " home, which harmed the health of the child. Id., 702–703. Although the defendant had challenged on appeal both the constitutionality of § 53-21 (a) (1) and the sufficiency of the evidence under which she was convicted, we determined that "these claims [were] inextricably intertwined"; id., 708; and ultimately concluded that as applied to the defendant, § 53-21 (a) (1) was unconstitutionally vague. Id., 719. Although we do not engage in the constitutional vagueness analysis in this case; see footnote 5 of this opinion; we do note that here, as in *Scruggs*, the defendant must be afforded some leeway in the maintenance of his home and supervision of his child. "Not *all* conduct that poses a risk to the mental or physical health of a child is unlawful. Rather, there is an acceptable range of risk." (Emphasis in original.) *State* v. *Scruggs*, supra, 720; cf. *State* v. *George*, 37 Conn. App. 388, 389–92, 656 A.2d 232 (1995) (rejecting vagueness challenge and upholding conviction of defendant who left seventeen month old child home alone while at bar, after police warned him earlier that same day after child was previously found unattended in defendant's car).

Under the facts of the present case, we cannot conclude that the defendant's decision to leave his two year old child unsupervised in another room with an eight year old child falls outside the acceptable range of risk. To conclude otherwise would be to hold a parent, who is home alone and solely responsible for the care and supervision of one or more young children, criminally responsible under what would essentially be a theory of strict liability for leaving his or her children unsupervised *inside* the home for a short period of time, an illogical and impracticable result.[18] In this case, the record merely establishes that the defendant exhibited less than ideal parenting, and, as the Court of

Appeals of Ohio aptly stated in reversing a defendant's conviction for child endangerment, "[t]he failure to realize an ideal level of supervisory attention to a child does not equate to acting with heedless indifference to the consequences . . . ." (Internal quotation marks omitted.) *State* v. *McLeod*, 165 Ohio App. 3d 434, 438, 846 N.E.2d 915 (2006). Accordingly, we conclude that the evidence does not sufficiently establish that the defendant violated his probation by committing the crime of risk of injury to a child, and we have the requisite confidence that the trial court's finding to the contrary was a mistake.[19]

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

In this opinion ZARELLA, McLACHLAN, EVELEIGH and HARPER, Js., concurred.

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

[1] We granted the defendant's petition for certification limited to the following issue: "Did the Appellate Court properly hold that there was sufficient evidence that the defendant violated his probation by committing the offense of risk of injury to a child in violation of General Statutes § 53-21 (a) (1)?" *State* v. *Maurice M.*, 293 Conn. 926, 980 A.2d 913 (2009).

[2] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. Any such warrant shall authorize all officers named therein to return the defendant to the custody of the court or to any suitable detention facility designated by the court. . . .

"(d) If such violation is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

Although § 53a-32 was amended since the time of the defendant's probation revocation proceedings; see Public Acts 2008, No. 08-102, § 7; Public Acts 2010, No. 10-43, § 20; the changes, including the redesignation of certain subsections, are not relevant to this appeal. For purposes of clarity, we refer herein to the current revision of the statute.

[3] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony . . . ."

Although § 53-21 was amended by No. 07-143, § 4, of the 2007 Public Acts, those amendments have no bearing on this appeal. For convenience, we refer herein to the current version of the statute.

[4] As the state notes, although both the trial court and the Appellate Court referred to the older child as the two year old child's brother, the record does not establish the relationship between the two children.

[5] On appeal to the Appellate Court, the defendant also claimed that: (1) § 53-21 (a) (1) is unconstitutionally vague; *State* v. *Maurice M.*, supra, 116 Conn. App. 6; (2) the trial court applied the incorrect mens rea standard to § 53-21; id., 12; and (3) the trial court abused its discretion in revoking his probation. Id., 19. He does not pursue those claims in this certified appeal.

[6] The trial court specifically stated: "[T]hat's not [the eight year old child's] responsibility to take care of the two year old child and to make sure that the two year old child doesn't get hurt or doesn't leave the house or eat something that he's not supposed to eat. It's the adult's responsibility. And by not fulfilling that responsibility, in this particular instance, a risk of harm to the child existed. *That is, a back door was accessible. He wasn't being watched by the adult.* The adult was doing something totally different." (Emphasis added.)

Although both the trial court and Judge West in the Appellate Court dissent both referred to the " 'accessibility of the back door' "; *State* v. *Maurice M.*, supra, 116 Conn. App. 26; we note that the real concern is not so much the accessibility of the back door itself as it is the accessibility of the exterior of the home *through* the back door. Because the basic claim is that the young child was able to access the exterior of the home through a back door that was somehow not secured in a manner that would prevent him from exiting, we will continue to refer to this factual component as the accessibility of the back door, which properly focuses our analysis on the condition of the back door.

[7] The dissent spends much time focused on what it perceives to be our consideration of the evidence in light of a more rigorous standard of proof than that called for in probation revocation hearings. Specifically, the dissent states that we "actually [employ] the far more demanding criminal standard of proof beyond a reasonable doubt." The dissent's argument, however, conflates two separate and distinct concepts: the quantum of proof that the state is required to present to establish the existence of any given fact, and the existence of the predicate facts necessary to prove the commission of the underlying crime as a matter of law. As previously stated, it is well established "that a trial court may not find a violation of probation unless it finds that *the predicate facts underlying the violation* have been established by a preponderance of the evidence at the hearing . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Benjamin*, supra, 299 Conn. 236. Put differently, those predicate facts proved by the state in this case are insufficient, either individually or in the aggregate, to establish a violation of § 53-21 (a) (1), which, in this case, served as the foundation for the trial court's finding of a violation of probation. In other words, even assuming that the facts in this case have been proven beyond a reasonable doubt, they still do not support the trial court's finding because, as a matter of law, we decline to hold that a parent or guardian has violated § 53-21 solely based on evidence showing his or her failure to supervise his young child inside the home. See also footnote 18 of this opinion.

[8] Although not ideal, it is by no means unusual for a parent to leave his or her young child unsupervised for a short period of time, often in front of a television. See, e.g., The Henry J. Kaiser Family Foundation, "The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents," (2006) p. 4 ("[p]arents use TV or DVDs as a 'safe' activity their kids can enjoy while the grownups get dressed for work, make a meal, or do the household chores"); id., p. 14 ("[m]any parents speak of the numerous demands on their time and of their strong need to keep their kids occupied while they get their chores done"); id., p. 38 (32 percent of parents of six month to six year old children surveyed reported that parent was in room watching television, DVD or videos with child about one half of time or less that child was watching); F. Zimmerman, "Television and DVD/Video Viewing in Children Younger than 2 Years," 161 Archives of Pediatrics & Adolescent Med. 473, 475, 476–78 (2007) (20.5 percent of parents surveyed reporting need to "get things done" as "most important reason" for children watching television). Indeed, it is hard to imagine how a single parent might otherwise shower and prepare for work in the morning, cook dinner, or do laundry, without leaving his young child or children unsupervised for a short period of time.

[9] In its oral decision, the trial court stated, in the context of describing the risks to young children in a house, that, in the present case, "there was no lock on that back door or screen. There was no lock. There was nothing to prevent [the child] from going out. . . . There was no lock on the door." In response to the defendant's motion for articulation, the trial court expanded this finding to include the absence of a child safety device, but

reiterated its finding that there was no lock on the back door: "neither the back door nor the back screen door of his house had a lock or child safety device thus permitting the child to be able to exit the house."

[10] We recognize that the trial court's statement in its articulation that the back door did not have a "child safety device" is consistent with Hannaford's testimony "that there [were] no safety devices on the doorknobs or such that, you know, one would normally do with young children to prevent them from opening the doors . . . ." Nevertheless, we conclude that Hannaford's testimony is too vague and ambiguous in its bare reference of a lack of safety devices to sustain the trial court's conclusion that the back door was accessible to the young child .

[11] Although the trial court and the Appellate Court may have, in part, based their conclusions that the back door was accessible by virtue of the young child's actual exit from the home; see *State* v. *Maurice M.*, supra, 116 Conn. App. 16 n.4 (noting "child's unimpeded access to the street"); a point that the state advances, as previously stated, the ease with which the child exited the home cannot be presumed by the child's actual presence outside the home.

[12] We note that Hannaford referred to both the "back door," in the singular, and to the "doorknobs" and "doors," in the plural. Moreover, the trial court referenced both a "back door" and "screen" or "back screen door" in both its oral memorandum of decision and its articulation. The Appellate Court also noted that "[i]t is unclear from the record whether the defendant's back door had locks or a screen door." *State* v. *Maurice M.*, supra, 116 Conn. App. 16 n.4.

[13] Although there was no direct evidence stating that the back door or doors were closed, the defendant's statement to Hannaford, as described in Hannaford's testimony, that that the two year old child "must have opened the back door" suggests that the back door or doors were closed. Hannaford also later testified that the defendant "should [have heard] the door close . . . ."

[14] The state nevertheless contends that the trial court properly relied on additional "undisputed facts" to support its conclusion that the defendant violated § 53-21, including: (1) "the defendant was responsible for the child's safety at the time"; (2) "the defendant was the only adult in the house"; (3) "the older child was not responsible for the younger child"; (4) "the defendant was lying on the couch watching television"; (5) "the defendant was doing something totally different than watching the child"; (6) "the defendant had no idea that the child had left the house"; (7) "the defendant had no idea where the child was"; and (8) "the defendant learned of the child's absence because the older child told him . . . ." Each of these "undisputed facts," however, goes to the defendant's lack of supervision over the child inside the home, a factual predicate that is both uncontested and insufficient, by itself, to sustain the trial court's conclusion. We also note that there was no evidence presented relative to the eight year old child and his relationship to the parties in this case. See footnote 4 of this opinion.

The state also claims that the facts that "the back door was accessible and unsecured" and "the child was in the middle of the highway" support the trial court's conclusion. We disagree. As discussed earlier, the evidence is insufficient to sustain the conclusion that the back door was accessible, and the mere fact that the child was in a dangerous situation does not mean that an unsafe condition caused it.

Finally, we conclude that additional facts cited by the state, which were not specifically found by the trial court—including the defendant's knowledge "that he lived on a busy main street, that the yard was not fenced . . . that the house had no baby-gates or other barriers to prevent roaming, that the defendant did not take any care whatsoever for the welfare of the child . . . did not pay any attention to the fact that the older child spent several minutes looking for the younger child, would not have known of the child's absence but for the older child, and upon retrieving the child, evidenced unnatural annoyance at the child and lack of concern for his condition or return of his desire for affection"—are either reinterpretations of previously mentioned facts, inferences without evidence in the record, or evidence that does not support a finding that the defendant acted with reckless disregard for the consequences. Accordingly, we conclude that these facts do not support the trial court's decision.

[15] We disagree with the dissent's claim that we have engaged in fact finding, and note that, in contrast, it is the dissent that has embraced that role. In particular, we disagree with the dissent's emphasis on the trial court's observations as to the apparent lack of any fence surrounding the defendant's home. At no point during the evidentiary phase of the proceeding did the state ever establish that the defendant's home did not have a fence around

the yard. Although the trial court apparently concluded, *during the dispositional phase*, that the defendant "knew that there was no fence around [the back door], as evidenced by the fact that there is now a fence around the back door," the dispositional phase is a distinct phase of the revocation hearing during which the trial court determines "whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Preston*, supra, 286 Conn. 376. It is during the evidentiary phase, however, that the trial court determines whether the defendant has violated a condition of his probation. Id., 375. Accordingly, because this appeal only challenges the trial court's findings during the evidentiary phase, any consideration in this appeal of evidence presented during the dispositional phase is improper.

Moreover, we note that the dissent's conclusions that the defendant "placed himself in a position from which he personally was unable to react to an emergency or some other problem in a timely fashion"; and the defendant "made no effort to . . . otherwise . . . child proof the house," lack support in the record. Indeed, contrary to the dissent's assertion that the defendant "placed himself in a position from which he personally was unable to react to an emergency or some other problem in a timely fashion," it is undisputed that, upon learning from the eight year old boy that the two year old son was missing, the defendant reacted by searching the home for the child.

Finally, we note that, to the extent that the dissent relies on the demeanor of the defendant when he came outside to retrieve his child, such reliance is misplaced. Putting aside the subjective matter that one person's nonchalance may well be another's stoicism, what occurred after the defendant emerged from the home and, indeed, after the child found his way outside, is irrelevant to the factual predicates necessary to prove a violation of § 53-21 (a) (1). Put differently, although it may well have looked better for the defendant to have approached Hannaford appearing frantic and despondent, his failure to do so does not make the manner in which he had supervised his son any more or less dangerous.

[16] The dissent also cites *State* v. *Fields*, 302 Conn. 236, 24 A.3d 1243 (2011), and *State* v. *George*, 37 Conn. App. 388, 390, 656 A.2d 232 (1995), for the proposition "that leaving young children at home alone for *any* appreciable period of time will support a *conviction* under § 53-21 (a) (1)." (Emphasis in original.) These two cases are likewise distinguishable from this case. In *Fields*, we rejected the defendant's vagueness challenge to § 53-21 (a) (1), where the defendant had forcibly removed *at gunpoint from her home* the babysitter of a one year old child, thereby leaving the child unattended in the crib and *alone in the home* for twenty-five minutes. *State* v. *Fields*, supra, 242–43. Similarly, in *George*, we rejected the defendant's vagueness challenge to § 53-21 (a) (1), where the defendant had left a seventeen month old child home alone while at a bar, after the police, earlier that very same day after the child was previously found unattended in his car, had warned him that such actions could subject him to arrest. *State* v. *George*, supra, 389–90. Thus, these two cases are inapposite to this case, where the defendant was present in the home.

[17] The defendant cites several out-of-state cases in support of the proposition that a parent who is "accessible" to the child or in the home with the child is less culpable for injuries sustained by an unsupervised child. Compare *State* v. *Bennett*, Court of Appeals, Docket No. 68039, 1995 WL 415193, *1–2 (Ohio App. July 13, 1995) (defendant, who was in upstairs bathroom when unsupervised four year old child burned herself using defendant's lighter, did not "recklessly [create] a substantial risk of harm"; court also noted protective measures defendant took and lack of any similar prior incident), and *Ellis* v. *Commonwealth*, 29 Va. App. 548, 551–52, 556–57, 513 S.E.2d 453 (1999) (defendant, who left two year old and four year old home alone while she went to building next door, not criminally negligent when gas stove, which was accidentally left on, caused fire that injured both children), with *State* v. *Fretas*, Court of Appeals, Docket No. 07AP-1046, 2008 WL 4233928, *1, *4 (Ohio App. September 16, 2008) (defendant, who left three year old son at home alone while he went to rent movie, "created a substantial risk of harm for his son"), and *Barnes* v. *Commonwealth*, supra, 47 Va. App. 109, 113 (defendant, who left two year old and four year old home alone while she went shopping, found criminally negligent).

In response, the state relies on *State* v. *Schaffer*, 127 Ohio App. 3d 501, 713 N.E.2d 450 (1998), *In re D.J.*, Court of Appeals, Docket No. 49A05-0803-JV-180, 2008 WL 4149822 (Ind. App. September 10, 2008), *People* v. *Delapaz*, Court of Appeals, Docket No. C045971, 2005 WL 1324850 (Cal. App. June 6, 2005), and *Reyes* v. *State*, 242 Ga. App. 170, 529 S.E.2d 192 (2000), for the proposition that a parent can be liable for reckless endangerment of the child even when the parent is home and available to the child. In *Reyes*,

although the defendant mother was home, the child was outside, playing in the street and with dogs; additionally, the mother had previously been known to let her children play outside alone. *Reyes* v. *State*, supra, 171–72. *In re D.J.* was a parental termination case, wherein the parents had demonstrated a "continued pattern of neglect," including an incident where the two young children were left in the living room with the "front door wide open . . . ." *In re D.J.*, supra, *6. In *Delapaz*, a one year old child escaped from a home where both the front and back doors were open. *People* v. *Delapaz*, supra, *1. These three cases are thus each distinguishable from the present case, where the two year old was playing inside the home, and there was no evidence that this had ever happened before or that the doors were left open.

In *Schaffer*, a police officer discovered the two year old son of the defendant on a street curb approximately 100 yards from the defendant's home. *State* v. *Schaffer*, supra, 127 Ohio App. 3d 502. The defendant testified that she had lost sight of her child for five to ten minutes, during which the defendant apparently believed that another six year old girl was watching her child upstairs. Id. The defendant's home was located near "two frequently traveled streets" and a pond. Id., 503. The Court of Appeals of Ohio concluded that "such circumstances manifest that [the defendant], in a manner that is not right or good, disregarded the risk that her son could have left the home and walked into the street. Therefore, [the defendant] recklessly created a substantial risk to her son's health by violating her duty of care and/or protection to the child." Id. One judge dissented, concluding that the evidence was not sufficient to sustain the verdict, and stating, "[i]f the facts in the record before us amounted to child endangering, then all parents, including myself, have been guilty of this criminal offense at one time or another." Id., 504 (Christley, J., dissenting). We agree with the dissent's well taken observations and, to the extent that the facts of *Schaffer* mirror the facts in this case, we decline to adopt the majority's reasoning in that case.

Moreover, although we agree with the defendant that a parent's availability is a factor, we note that there are several other factors to consider, as discussed earlier in this opinion. See *Barnes* v. *Commonwealth*, supra, 47 Va. App. 113.

[18] The dissent, criticizing us for apparently utilizing the reasonable doubt standard to assess the evidence in this case while "purport[ing]" to utilize the applicable preponderance of the evidence standard, contends that "our resolution of this appeal simply has no bearing on how we would resolve the defendant's insufficiency claim if this had been a criminal case." We disagree. The state in this case sought to establish that the defendant had violated his probation based on his *commission of a crime*, and the trial court expressly found that the state had proven "by a fair preponderance of the evidence that [the defendant] did, in fact, *commit a crime of placing the child at risk under* [*§ 53-21*]." (Emphasis added.) Clearly, the trial court's conclusion that the defendant violated his probation was based on its determination that the defendant had committed a crime, a wholly permissible basis, in theory, for finding a defendant guilty of violating his probation. See *State* v. *Benjamin*, supra, 299 Conn. 235 ("revocation may be based upon criminal conduct"). Thus, our disposition of this appeal necessarily carries with it an evaluation of the trial court's interpretation of what, as a matter of law, constitutes a violation of § 53-21, regardless of the standard of proof required to establish the factual predicate for such a violation. It is quite obvious, then, that our resolution of this appeal would indeed have at least some precedential value for future cases, both in probation revocation hearings and criminal trials, involving facts similar to those in this case. See also footnote 7 of this opinion.

[19] We stress that we do not conclude in the present case that a parent or guardian who fails to supervise his or her child inside the home is immunized from liability solely by virtue of his or her presence in the home. Indeed, there may be any number of factual circumstances, established though adequate evidence, which, when considered in conjunction with an individual's failure to supervise a young child in the home, would subject him or her to criminal liability. See, e.g., *Reyes* v. *State*, 242 Ga. App. 170, 171–72, 529 S.E. 2d 192 (2000) (evidence presented that mother previously let child play outside alone); *People* v. *Delapaz*, Court of Appeals, Docket No. C045971, 2005 WL 1324850 (Cal. App. June 6, 2005), *1 (child escaped from home where evidence showed front and back doors were open). The record in the present case, however, is devoid of any such evidence.